No. 24-30399

In the
United States Court of Appeals for the Fifth Circuit

State of Louisiana, by and through its Attorney General, Elizabeth B. Murrill; Louisiana Department of Education; State of Mississippi, by and through its Attorney General, Lynn Fitch; State of Montana, by and through its Attorney General, Austin Knudsen; State of Idaho, by and through its Attorney General, Raul Labrador; School Board of Webster Parish; School Board of Red River Parish; School Board of Bossier Parish; School Board Sabine Parish; School Board of Grant Parish; School Board of West Carroll Parish; School Board of Caddo Parish; School Board of Natchitoches Parish; School Board of Caldwell Parish; School Board of Allen Parish; School Board LaSalle Parish; School Board Jefferson Davis Parish; School Board of Ouachita Parish; School Board of Franklin Parish; School Board of Acadia Parish; School Board of Desoto Parish; School Board of St. Tammany Parish; All Plaintiffs,

Plaintiffs-Appellees,

v.

United States Department of Education; Miguel Cardona, in his official capacity as Secretary of Education; Office for Civil Rights, United States Department of Education; Catherine Lhamon, in her official capacity as the Assistant Secretary for Civil Rights; United States Department of Justice; Merrick B. Garland, in his official capacity as the Attorney General of the United States; Kristen Clarke, in her official capacity as Assistant Attorney General for the Civil Rights Division of United States Department of Justice,

Defendants-Appellants.

School Board Rapides Parish,

Plaintiff-Appellee,

v.

United States Department of Education; Miguel Cardona, in his official capacity as Secretary of Education; Catherine Lhamon, in her official capacity as the Assistant Secretary for Civil Rights; United States Department of Justice; Merrick B. Garland, in his official capacity as the Attorney General of the United States; Kristen Clarke, in her official capacity as Assistant Attorney General for the Civil Rights Division of United States Department of Justice,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Louisiana

Brief of *Amici Curiae* America's Future, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, Fitzgerald Griffin Foundation, LONANG Institute, Restoring Liberty Action Committee, and Conservative Legal Defense and Education Fund in Support of Plaintiffs-Appellees and Affirmance

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September 26, 2024

Case No. 24-30399

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF LOUISIANA, *et al.*,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,

Defendants-Appellants,

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

State of Louisiana, Louisiana Department of Education, State of Mississippi, State of Montana, State of Idaho, School Board of Webster Parish, School Board of Red River Parish, School Board of Bossier Parish, School Board

Sabine Parish, School Board of Grant Parish, School Board of West Carroll Parish, School Board of Caddo Parish, School Board of Natchitoches Parish, School Board of Caldwell Parish, School Board of Allen Parish, School Board of LaSalle Parish, School Board of Jefferson Davis Parish, School Board of Ouachita Parish, School Board of Franklin Parish, School Board of Acadia Parish, School Board of Desoto Parish, School Board of St. Tammany Parish, School Board of Rapides Parish, Plaintiffs-Appellees.

U.S. Department of Education, *et al.*, Defendants-Appellants.

America's Future, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, Fitzgerald Griffin Foundation, LONANG Institute, Restoring Liberty Action Committee, and Conservative Legal Defense and Education Fund, *Amici Curiae*.

William J. Olson, Jeremiah L. Morgan, J. Mark Brewer, Kerry L. Morgan, James N. Clymer, Joseph W. Miller, Patrick M. McSweeney, and Rick Boyer are counsel for *Amici Curiae*.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that *Amici Curiae* America's Future, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense

Fund, Fitzgerald Griffin Foundation, LONANG Institute, and Conservative Legal Defense and Education Fund are non-stock, nonprofit corporations, have no parent companies, and no person or entity owns them or any part of them, except for Restoring Liberty Action Committee, which is an educational organization.

/s/ William J. Olson
William J. Olson
Attorney of Record for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

America's Future, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, Fitzgerald Griffin Foundation, LONANG Institute, Restoring Liberty Action Committee, and Conservative Legal Defense and Education Fund are nonprofit organizations which work to defend constitutional rights and protect liberties. These *amici* filed an *amicus* brief in the Sixth Circuit involving a challenge to the same Title IX Rule at issue in this appeal.[2]

STATEMENT OF THE CASE

On his first day in office, President Biden issued an executive order instructing each federal agency to implement regulations to change the definition of "sex discrimination" to include the terms "sexual orientation" and "gender identity."[3] On April 29, 2024, the U.S. Department of Education ("the DOE")

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[1] All parties have consented to the filing of this *amici curiae* brief. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting the brief. No person other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting this brief.

[2] *Tennessee v. Cardona*, No. 24-5588, 6th Cir., Brief *Amicus Curiae* of America's Future, *et al.* (Sept. 3, 2024).

[3] The White House, "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation" (Jan. 20,

issued a Final Rule which declared that "'[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation or gender identity.'" *Louisiana v. United States Dep't of Educ.*, 2024 U.S. Dist. LEXIS 105645, *5 (W.D. La. 2024) ("*Louisiana*"). The rule, *inter alia*, "requires students to be allowed to access bathrooms and locker rooms based on their gender identity [and] … requires schools to use whatever pronouns the student requires…." *Id.* at *4. The rule was to take effect on August 1, 2024. *Id.* at *6.

The states of Louisiana, Mississippi, Montana, and Idaho as well as a group of Louisiana parish school boards sued the DOE. They alleged that Title IX, which bans discrimination on the basis of sex in federal education funding, was intended to remedy discrimination against biological women, and that the DOE's Final Rule constituted a legislative determination the DOE had no authority to make. *Id.* at *25. Plaintiffs also argued that requiring teachers and state education officials to use the preferred pronouns of students violated the First Amendment's prohibition on compelled speech. *Id.* at *32.

2021).

The district court for the Western District of Louisiana agreed that the text of the statute covered discrimination on the basis of biological sex, and did not stretch to cover such categories as "sexual orientation" or "gender identity." *Id.* at *31. The court found that the Plaintiffs had demonstrated likelihood of success that the pronoun rule would violate the First Amendment. *Id.* at *34. Finally, the court found that the DOE had gone beyond its authority granted legislatively in Title IX to extend the statute's reach to cover sexual orientation and gender identity. *Id.* at *7. The court entered an injunction against enforcing the rule in the Plaintiff States. *Id.* at *56-57.

The DOE sought a stay of the district court's order in the Fifth Circuit Court of Appeals, which was denied. *Louisiana v. United States Dep't of Educ.*, 2024 U.S. App. LEXIS 17886 (5th Cir. 2024). The Supreme Court likewise denied an application to stay the injunction. *Dep't of Educ. v. Louisiana,* 2024 U.S. LEXIS 2983 (Aug. 16, 2024).

ARGUMENT

I. THE DOE RULE IS *ULTRA VIRES*, AS IT DOES NOT IMPLEMENT, BUT RATHER UNDERMINES, TITLE IX.

Purporting to implement Title IX, the Rule actually undermines it, imposing radical new requirements on educational institutions receiving federal

funding in pursuit of an extremist "transgender" ideology. Although the Rule claims to amend the definition of sex discrimination, it actually twists the words beyond all recognition, to cover "'discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity.'" *Louisiana* at *5. The Rule provides not a shred of evidence that this new interpretation is consistent with the text, context, or purpose of Title IX. The Rule's agenda is without statutory support:

- The term "gender identity" now "describe[s] an individual's sense of their gender, which may or may not be different from their sex assigned at birth." 89 *Fed. Reg.* at 33809.
- "The validity of the Final Rule will ultimately determine whether biological males that identify as female are allowed in female **bathrooms and locker rooms** and vice versa." *Louisiana* at *35 (emphasis added).
- The Rule "would literally allow biological males to circumvent the purpose of allowing biological females to participate in sports that they were unable to participate in prior to 1975." *Louisiana* at *29.
- The Rule "[c]reates a new standard for '**hostile environment harassment**' that could include views critical of gender identity occurring outside the

recipient's educational programs or even outside the United States." *Id.* at *6 (emphasis added).

- A student's preferred pronoun must be used by teachers and fellow students. *Id.*

Each of these provisions shamelessly undermines the protections for actual women and girls that Title IX was intended to protect.

A. The Rule Destroys Personal Privacy for Women and Girls.

Rather than an effort to "clarify" the meaning of the term "sex discrimination" (89 *Fed. Reg.* at 33476), the Rule imposes and institutionalizes discrimination against biological females. One critical casualty of the Rule is the personal privacy afforded women and girls by use of their own bathrooms and locker rooms, as well as their safety.

To compel schools to allow biological boys to fulfill their teenage dream — to shower with teenage girls — DOE expands on a deeply flawed decision of the Fourth Circuit case which allowed a biological girl to use the boys' restroom. *See* 89 *Fed. Reg.* at 33805. *Gavin Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020). In no way does that decision support the Rule. Although Justices Thomas and Alito would have granted certiorari in that early

"gender identity" case, the Supreme Court declined. *Gloucester Cty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878 (2021). That Fourth Circuit decision was seriously flawed, as detailed in four *amicus* briefs filed in that case by most of these *amici*.[4]

With respect to compelling girls to compete in school sports against biological boys, the DOE's faulty analysis is similar to that engaged in by the Fourth Circuit in *B.P.J. v. West Virginia*, 98 F.4th 542 (4th Cir. 2024). That case too is deeply problematic and is now pending on a petition for certiorari,[5] of which most of these *amici* have filed a brief in support.[6] The plaintiff in that case, B.P.J., is a biological male who "identifies" as a "transgender girl" and demands the right to play on high school girls' teams.

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[4] *G.G. v. Gloucester County School Board*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, Fourth Circuit (May 10, 2016); *Gloucester County School Board v. G. G.*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court (Jan. 10, 2017); *G.G. v. Gloucester County School Board*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, Fourth Circuit (May 15, 2017); *Gloucester County School Board v. Gavin Grimm,* Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court (Mar. 26, 2021).

[5] *West Virginia v. B.P.J.*, U.S. Supreme Court, Case No. 24-43.

[6] *Id.* Brief of *Amicus Curiae* America's Future, *et al.*

One of the intervenor-plaintiffs in a parallel challenge to the Rule, A.C., is a biological female who described the emotional and mental harms to her caused by the invasion of her locker room by a biological boy. *See Tennessee v. Cardona*, 2024 U.S. Dist. LEXIS 106559 at *20 (E.D. Ky. 2024). A.C.'s reaction is perfectly natural and proper. Although such matters are of little import to the current DOE, children have a natural sense of modesty which this Rule seeks to strip away from them. This aspect of the Rule not only violates deeply held religious principles of multiple religions, but it also should be seen for what it is — a deeply immoral Rule. No government should have the power to harm children in this manner, and no court should permit it.[7]

In response to DOE's Notice of Proposed Rulemaking ("NPRM"), some of these *amici* submitted comments, highlighting these privacy issues and illustrating the invasion of males into female locker rooms. These *amici* noted

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[7] *See* "When Do Children Feel Modesty?" *You Are Mom* (Mar. 15, 2019). Ripping away modesty is an attribute of "grooming" of children to become sexually available to adults. *See, e.g.*, E. Kao and A. Jones, "We Must Fight the Sexualization of Children by Adults," *Heritage Foundation* (Oct. 5, 2019); H. Salem, "25 Signs of Child Grooming and Abuse Parents Should Recognize," *Family Education* (Aug. 2, 2023). Reports of sexual abuse of children by both male and female teachers occurs regularly. "Teacher Accused of Sexually Abusing Child," *KPRC2Click2H* (Apr. 18, 2021).

the case of Riley Gaines, a University of Kentucky student and swimmer, who explained:

> she had felt "extreme discomfort" being forced to change in the same locker room as the male Thomas. "That's not something we were forewarned about, which I don't think is right in any means, changing in a locker room with someone who has different parts," Gaines said.[8]

Seven years ago, civil rights group Liberty Counsel compiled a list of more than 50 news stories of incidents across the country of men committing sexual assaults and taking indecent photographs in women's restrooms.[9] While most of the men were not transgender, all were biological males. In practice, opening women's bathrooms to men identifying as women simply opens women's bathrooms to men generally — for any assertion of a different "gender identity" is treated as an irrefutable fact. As the court below noted, "Defendants did not consider the effect the Final Rule would have on biological females by requiring them to share their bathrooms and locker rooms with biological males." *Louisiana* at *50. Men's and women's rooms have always been separate:

> Sex-specific bathrooms were originally established not only because of men and women's **distinct hygienic needs**, but also because

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[8] Comments of America's Future, *et al.*, to DOE at 9 (May 15, 2023).

[9] Liberty Counsel, "Predators in Women's Facilities."

> **women are far more vulnerable to sexual assault** than men, and creating protected areas where only women strip naked prevents sexual violence. While some left-leaning publications have decried this idea as "paternalistic" and "antiquated," the estimated 1 in 6 women who will experience sexual assault (or the 17.7 million existing victims) might disagree.[10]

The "transgender" denial of reality encapsulated in the Rule creates a harsh, cold new reality for America's women and girls, which elevates those suffering from the mental illness of "gender dysphoria" and related conditions over the rights of all others.

B. The Rule Destroys Women's and Girls' Sports.

State schools have rules, and more recently state legislation, which seeks to promote women's sports and protect women. Federal regulations now seek to undermine women's sports and remove that protection. An Idaho law banning biological males from competing on girls' and women's teams designed specifically to deliver on Title IX's promise of equal access to sports for females is now pending on a petition for certiorari, which was supported by most of these

[10] A. Hall, "Transgender Bathrooms Are An Assault On Reality And Freedom," *The Federalist* (July 11, 2016) (emphasis added).

amici.[11] DOE believes that its Rule would override Idaho law and similar laws in fully half the states,[12] for any school receiving federal funding.

Further, the Rule could introduce untenable disruption in school athletics, as the "gender identity" of a school's athletes would be utterly mutable and may change at any time. According to transgender ideology, "gender fluidity" is just as real as "gender identity": "[f]or some people, gender identity and expression isn't fixed – rather, it can change daily."[13] According to "gender-fluid" psychologist Liz Powell, "gender fluidity enables people to take their identity and expression one day at [a] time, instead of feeling tied to a single, overarching gender label." *Id.* According to Powell, gender "'is not a fixed point' … but rather flexible and able to shift depending on various factors, both within a person's internal self as well as their external surroundings." *Id.*

As some of these *amici* pointed out in Comments filed with DOE, "The scars inflicted by radical 'gender ideology' are not just physical. They are

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[11] *Little v. Hecox*, U.S. Supreme Court, Case No. 24-38, Brief of *Amicus Curiae* America's Future, *et al.* at 5.

[12] N. Modan, "Half of states now restrict trans student athletes," K12Dive.com (Feb. 13, 2024).

[13] J. Klein, "'Gender fluidity': The ever-shifting shape of identity," *BBC* (Sept. 14, 2022).

mental too, and have left deep wounds in the lives of girls denied a fair chance at sporting events because of schools adopting cruel and misguided policies like the NPRM."[14]

In 2019, Connecticut high school sprinter Selina Soule missed her chance to compete in the New England 55-meter regionals — because two biological boys ran faster than she did.[15] "It wasn't long before I discovered that athletic associations have the power to make rules that directly impacted my ability to win races. No matter how hard I trained, enduring long hours of practice, I just couldn't beat a boy."[16]

In 2018, a man named Will Thomas was listed on the roster of the Penn State men's swim team.[17] The following season, Thomas "transitioned," identified as "Lia Thomas," and began swimming on the women's team. On the men's team, Thomas was mediocre, but competing against women, Thomas dominated. "During the last season Thomas competed as a member of the Penn

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[14] Comments of America's Future, *supra*, at 9.

[15] R. del Giudice, "High School Girl Who Lost Race to Transgender Athletes Files Federal Complaint," *Daily Signal* (June 18, 2019).

[16] S. Soule, "I Am a Women's Track and Field Champion. Here's Why I Continue to Fight for the Future of Women's Sports," *Fox News* (Oct. 4, 2022).

[17] Will Thomas, 2018-19 Men's Swimming and Diving, *Penn Athletics*.

men's team, which was 2018-19, [Thomas] ranked 554th in the 200 freestyle, 65th in the 500 freestyle and 32nd in the 1650 freestyle. As [Thomas'] career at Penn wrapped, [Thomas] moved to fifth, first and eighth in those respective events on the women's deck."[18] In March 2022, Thomas snatched the NCAA women's championship in the 500-meters.[19]

In March 2023, ESPN lauded Thomas in its "Women's History Month" segment.[20] Riley Gaines, the former University of Kentucky swimmer who was edged out by Thomas for a fifth-place title in another 2022 NCAA women's event, responded. "Lia Thomas is not a brave, courageous woman who EARNED a national title," Gaines stated on Twitter. "He is an arrogant, cheat who STOLE a national title from a hardworking, deserving woman. The @ncaa is responsible…. If I was a woman working at ESPN, I would walk out. You're spineless @espn." *Id*.

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[18] J. Lohn, "A Look At the Numbers and Times: No Denying the Advantages of Lia Thomas," *Swimming World* (Apr. 5, 2022).

[19] R. Gaydos, "Ex-NCAA swimmer still upset over Lia Thomas making it to 500 finals in 2022 championships," *Fox News* (Mar. 23, 2023).

[20] R. Gaydos, "Swimmer Riley Gaines slams ESPN for Lia Thomas Women's History Month segment," *Fox News* (Mar. 26, 2023).

After Thomas spoke out in support of the Rule at the NPRM stage, Riley Gaines again responded. "Under the guise of competitive fairness? Are you really trying to say you would have won a national title against the men? Does it not break your heart to see women lose out on these opportunities? The Biden Admins proposed bill denies science, truth, and common sense."[21] "This take is selfish and shows an utter disregard for women." *Id*.

DOE promulgated its rule because efforts to impose the desired transgender policy have failed in Congress. In 2015, Congress refused to enact the Student Non-Discrimination Act of 2015 ("SNDA"), S. 439 114th Cong. (2015), which would have expanded Title IX to include gender identity, and similar to the Rule, the SNDA would have prohibited discrimination based on actual or perceived sexual orientation or gender identity. That bill failed in the Senate, while last year, **the House passed a ban on males in women's sports to reverse the Rule**, though it failed in the Senate and would have faced a certain

[21] Riley Gaines post https://x.com/Riley_Gaines_/status/1648141754640613379 (Apr. 17, 2023).

veto from President Biden.[22] But the Department's argument that it is simply "clarifying" the law fails in the face of the evidence that it is revolutionizing it.

C. The Rule Censors the Free Speech Rights of Teachers and Students.

In addition, the court below accepted plaintiffs' arguments that the Rule's new harassment standard "chills and punishes protected speech under the First Amendment because it would compel staff and students to use whatever pronouns a person demands, even when those are contrary to grammar rules, reality, or political ideologies, and it further prohibits staff and students from expressing their own views on certain topics." *Louisiana* at *32.

The court below also cited the Supreme Court pronouncements regarding compelled speech: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The Rule is not only *ultra vires* in contravention of the clear text of Title IX, but also blatantly unconstitutional.

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[22] M. Ginsberg, "House Passes Ban On Men Participating In Women's Sports," *Daily Caller* (Apr. 20, 2023).

The court below was correct: "The 'harassment standard' created by the Final Rule is obviously contrary to Title IX, and Plaintiffs have made compelling arguments for how it can violate the free speech right of the First Amendment." *Louisiana* at *34. It also will undermine girls' school sports programs. The Rule destroys Title IX in an act of obliteration, not interpretation.

II. THE *BOSTOCK* DECISION NEITHER CONTROLS NOR INFORMS A DECISION IN THIS CASE.

The Department grounds its Final Rule in the Supreme Court's decision in *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020). *See* 89 *Fed. Reg*. at 33806-08. Regardless, as multiple Courts of Appeals — including this Court — have concluded, *Bostock* does not apply in any way to Title IX.

Bostock interpreted Title VII, which prohibits employers from making employment decisions "because of … sex." 42 U.S.C. § 2000e-2. *Bostock* determined that making an adverse employment decision against a homosexual or transgender-identifying person that would not be made against a person of the opposite sex discriminates "because of sex," because the person's sex would be a "but-for" cause of the employment action. *Bostock* at 657. Accordingly, for purposes of Title VII, the Court stated, "[a]n individual's homosexuality or transgender status is not relevant to employment decisions." *Id.* at 660. As the

court below noted, there is "no support in either the ordinary meaning or the 1975 regulations that *Bostock*'s interpretation of 'sex' should apply to Title IX." *Louisiana* at *29.

Bostock expressly made clear that its reasoning was not to be used outside the context of Title VII, and that even in that context, the Court was only addressing adverse employment actions, not single-sex accommodations for privacy purposes. "Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind." *Bostock* at 681. The Biden DOE disregarded the cautionary language and relied on *Bostock* as if it had decided the issue here, but the district court properly recognized the Supreme Court's limiting language. *See Louisiana* at *26.

The court below correctly distinguished between Title VII and Title IX. Title IX deals with an entirely different regulated field — education rather than employment: "*Bostock* does not apply because the purpose of Title VII to prohibit discrimination in hiring is different than Title IX's purpose to protect biological women from discrimination in education." *Louisiana* at *30. The court below looked at "the language, exemptions, legislative history, and prior

regulations" to find that "Title IX was intended to prevent biological women from discrimination." *Id.*

The court below rejected the DOE's arguments that the Rule does not violate the Spending Clause because *Bostock* put plaintiffs-appellees on notice that the Title IX rule was going to be amended. However, the court below properly rejected this argument, pointing out that "under the Spending Clause, the regulatory scheme must provide funding recipients with notice that they may be liable for their failure to abide by the terms…. [A]s discussed, Title VII, which was at issue in *Bostock*, is much different than Title IX…. [P]roper notice was not given by Defendants to Plaintiffs." *Id.* at *41-42.

Most importantly, there is a massive structural difference between Title VII and Title IX, in that Title IX explicitly carves out areas where specific federally funded programs are textually entitled to make distinctions on the basis of the biological realities of sex. Title VII does not. The district court recognized that:

> the Final Rule would render meaningless all of the Exemptions set forth in Title IX, such as traditionally one-sex colleges, social fraternities and sororities, voluntary youth organizations, one-sex youth service organizations, beauty pageants, and the exemption that allows educational facilities to maintain separate living facilities. Allowing this would allow decades of triumphs for women and men

> alike to go down the drain, and this Court finds that Defendants' argument is meritless. [*Louisiana* at *29-30.]

Bostock conceded that "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to" covering classes such as homosexual and transgender when the drafters were thinking of biological sex. *Bostock* at 653. Still, "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another," Title VII must be applied as *Bostock* applied it. *Id*. The text and history of Title VII not only did not compel *Bostock*'s result, but it also did not permit it. In any event, the plain text of Title IX flatly forbids a similar result here.

Title VII makes no textual "carveouts" for when sex differences may be considered in the employment context, but Title IX does so, and those carveouts are based on the inherent biological differences between males and females. The legislative history of Title IX explains why biological differences between males and females, men and women, are relevant, indeed central, in the Title IX context. Title IX Senate sponsor Birch Bayh (D-IN) introduced the legislation, stating that its object was to ensure that females have the same educational opportunities available to males. Senator Bayh attacked "corrosive and

unjustified discrimination against women."[23] He stressed that the bill was designed to address preferential treatment for biological males over females. *Id.* He denounced stereotypes of females as "pretty things who go to college to find a husband … and finally marry, have children and never work again."[24] Senator Bayh repeatedly lamented disparate opportunities in education and employment between "males" and "females." *Id.* "I am concerned that in 1970 the percentage of the female population enrolled in college was markedly lower than the percentage of the male population…." *Id.* He further added, "[i]t is of little comfort for women to know that they are encouraged to further their schooling but that … they will be earning far less than male colleagues for the rest of their lives."[25]

Senator Bayh noted that Title IX's language dealt expressly with differentiations on the basis of "sex." "Central to my amendment are sections 1001-1005 which would prohibit discrimination **on the basis of sex** in federally-funded education programs." *Id.* at 5807 (emphasis added). Section 1007 of Title IX required the Commissioner of Education to "investigate **sex**

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[23] 118 *Cong. Rec.* 5803.

[24] 118 *Cong. Rec.* 5804.

[25] 118 *Cong. Rec.* 5807.

discrimination at all levels of education … and report … recommendations for action to guarantee equality of opportunity in education **between the sexes**." *Id*. at 5808 (emphasis added). There was no concept of "gender identity" involved in either the statute's intent or its text. As the district court noted:

> Title IX lists several exemptions which use the language "one sex" or "both sexes" showing that the statute was referring to biological men and biological women, not gender identity, sexual orientation, sex stereotypes, or sex characteristics. [*Louisiana* at *8.]

One of these carveouts is that Title IX expressly allows schools to maintain "separate living facilities" by biological sex. "Notwithstanding anything to the contrary contained in this title, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686.

The Final Rule, juxtaposed against the statutory text, produces a schizophrenic result that cannot be squared with Title IX's text. The district court properly cited the canon against surplusage to know that "the Final Rule would render meaningless all of the Exemptions set forth in Title IX…. *Louisiana* at *29. It is incomprehensible that the text of Title IX permits sex-segregated college cafeterias or laundry areas, but not bathrooms or locker rooms.

The Eleventh Circuit is in accord, noting that the implementing regulations for Title IX expressly allow for "'separate toilet, locker room, and shower facilities on the basis of sex,' so long as the facilities 'provided for students of one sex [are] comparable to such facilities provided for students of **the other sex**.'" *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022) (quoting 34 C.F.R. § 106.33) (emphasis added). Notably, the regulations themselves envision the actual binary world of two biological sexes.

The way the DOE Office of Civil Rights ("OCR") interpreted Title IX at the time of its passage is also instructive. OCR promulgated regulations in 1975 to initially implement Title IX. The implementing regulations clearly envisioned two — and only two — distinct sexes, and were intended to close the gap between biological males and females in school athletics:

> The Department's intent … is to require institutions to take the interests of **both sexes** into account in determining what sports to offer. As long as there is no discrimination against members of **either sex**, the institution may offer whatever sports it desires…. In so doing, an institution should consider by a reasonable method it deems appropriate, the interests of **both sexes**. [40 *Fed. Reg.* 24134 (1975) (emphasis added).]

The regulations, in these earliest days of Title IX, also "permit[ted] separate teams for members of each sex where selection for the team is based on

competitive skill or the activity involved is a contact sport." *Id*. Clearly, the text recognizes and accounts for inherent biological differences between men and women.

In his remarks, Senator Bayh made clear that Title IX would allow "differential treatment by sex" "in sports facilities or other instances where **personal privacy must be preserved**."[26] Nothing in the language of Title IX even contemplates allowing biological males to penetrate the locker rooms, bathrooms, and sports competitions of biological female students.

Dr. Bernice Sandler, a pioneer instrumental in the enactment of Title IX, recognized the salient fact that advocates of transgender ideology and too many courts fail to recognize. That is, in sports, "some sex segregation is necessary. **If all teams were integrated by sex, few women would have access to sports**." B. Sandler, "Title IX: How We Got It and What a Difference It Made," 55 CLEV. ST. L. REV. 473, 482 (2007) (emphasis added). That is precisely the evil Title IX sought to remedy.

Now the Department attempts to stretch the 1972-1975 term "sex discrimination" to encompass the 2024 term "gender identity." It is a blatant

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[26] 118 *Cong. Rec.* 5807 (emphasis added).

departure from the intent and text of Title IX to socially construct gender contrary to simple biology. In the intervening half-century, Congress has never redefined the word "sex" relative to Title IX in a manner so patently contrary to the legislation's text or intent. The Department has no such authority and no deference is accorded to the Rule. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

As the court below correctly put it, "[A]llowing this would allow decades of triumphs for women and men alike to go down the drain…." *Louisiana* at *30. The court added, "Title IX was written and intended to protect biological women from discrimination…. Enacting the changes in the Final Rule would subvert the original purpose of Title IX: protecting biological females from discrimination." *Id.* at *30-31.

The court below was correct. *Bostock* is irrelevant to Title IX, and the Department's purported "rulemaking" is impermissible lawmaking by fiat, contrary to the clear textual command of Title IX.

III. THE DOE RULE PRESUPPOSES THAT BIOLOGICAL SEX IS NOT AN IMMUTABLE AND UNIVERSAL REALITY, BUT RATHER A SOCIAL CONSTRUCT, CHANGEABLE AT WILL.

Putting aside what could fairly be described as the absurdities that the federal government seeks to impose on schools under the DOE Rule, discussed *supra*, the question remains, what is the Biden Administration attempting to accomplish? Should this Court be tempted to reverse direction and sanction the DOE Rule on the assumption it was somehow mandated by the Equal Protection Clause, it would repudiate any pretense of examining the "historical core" of the Clause to adopt what Professor Donald L. Drakeman has termed "the hollow core of constitutional theory."[27]

The Rule mandates students and faculty speak and think in accordance with the progressive value of transgenderism. We know from natural law that biological sex is a fixed reality, but progressive doctrine tells us that biological sex is irrelevant, as explained by one of its earliest spokespersons:

> [T]ransgenderism developed during the 1980s. The guiding principle … is that people should be free to **change**, either **temporarily or permanently**, the sex type to which they were

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[27] *See* D.L. Drakeman, The Hollow Core of Constitutional Theory (Cambridge Univ. Press: 2020) at 3 ("For constitutional theory to return to its historical core … it needs to refocus on … the will of the lawmaker, the Framers' intentions….").

> assigned since infancy … even if a sex type was real at birth, it **can now be changed at will**…. [M. Rothblatt, The Apartheid of Sex: A Manifesto on the Freedom of Gender (Crown Pub.: 1995) at 16 (emphasis added).]

We are told that we must not just respect, but embrace, the psychological pathology inherent in a person believing he was born in the wrong body. The Rule demands faculty and students use the government's language to express the government's thoughts. The modesty of girls must be sacrificed. Women's sports must be sacrificed. Girls must be put in danger. No price is too high to advance the progressive agenda of transgenderism. And, under the Rule, faculty and students must speak about transgenderism in a politically correct manner, forsaking truth and reality, according to this rubric:

> "Comrade, your statement is factually incorrect."
> "Yes, it is. But it is politically correct."[28]

When our nation's school systems are required to treat a lie as though it were the truth, there must be a powerful underlying agenda, which Professor Angelo M. Codevilla explained as follows:

> Because all progressives, Communists included, claim to be about creating **new human realities**, they are perpetually **at war against nature's laws** and limits. But since reality does not yield,

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[28] A.M. Codevilla, "The Rise of Political Correctness: From Marx to Gramsci to Trump," *Claremont Review of Books* (Fall 2016).

> progressives end up **pretending** that they themselves *embody* those new realities. Hence, any progressive movement's **nominal goal** eventually ends up being subordinated to the urgent, all-important question of the movement's own **power**. [*Id*. (emphasis added).]

We might ask, where do Progressives come up with this never-ending series of demands on our society? Codevilla explained why the vicious attacks on those brave souls who are slow to embrace the Progressives' newest cause will never cease.

> Why does the American Left demand ever-new P.C. obeisances? In 2012 no one would have thought that defining **marriage between one man and one woman**, as enshrined in U.S. law, would brand those who do so as motivated by a **culpable psychopathology** called **"homophobia," subject to fines and near-outlaw status**. Not until 2015-16 did it occur to anyone that requiring persons with male personal plumbing to use public bathrooms reserved for men was a sign of the same pathology. Why had not these become part of the P.C. demands previously? **Why is there no canon of P.C. that, once filled, would require no further additions?**
>
> Because ***the point of P.C. is not and has never been merely about any of the items that it imposes, but about the imposition itself***. [*Id*. (emphasis added).]

No one should think that accepting the illogic of transgenderism will satisfy the beast of Progressivism. Rather, feeding the beast ensures that tomorrow there will be more demands that Americans yield to some other favored cause. Polygamy? Minor Attracted Persons? Why not, once we have

undermined the constraint of biology and religion? And today's cause *du jour* not only demands that we suspend disbelief and embrace transgenderism — it also requires us to abandon Free Speech, to silence, or at least marginalize, all voices in opposition:

> **[T]hat power is insecure as long as others are able to question the truth of what the progressives say** about themselves and the world, progressive movements end up struggling not so much to create the promised new realities as to **force people to speak and act** as if these were real: **as if what is correct politically — i.e., what thoughts serve the party's interest — were correct factually**. [*Id*. (emphasis added).]

The nation's school system presents perhaps the best area to mold the minds of the next generation to subordinate themselves to the escalating dictates of Progressivism. Accordingly, the DOE Rule requires both teachers and students to say what all know is false, in service to the collective. Eight years ago, Codevilla anticipated such rules would be imposed on schools: "Progressive parties everywhere have sought to **monopolize educational and cultural institutions** in order to **force those under their thumbs to sing their tunes or to shut up."** *Id*. (emphasis added). Writing during earlier days of transgenderism, Codevilla stated:

> Consider **our ruling class's** very latest demand: Americans must agree that someone with a penis can be a woman, while

> someone else with a vagina can be a man. **Complying with such arbitrariness is beyond human capacity**. In Orwell's *1984*, as noted, Big Brother's agent demanded that Winston acknowledge seeing five fingers while he was holding up four. But that is small stuff next to what the U.S. ruling class is demanding of a free people. [*Id*. (emphasis added).]

Our progressive rulers are disrupters in our society — condemning both the past and the present, tearing down monuments, ridiculing our history, demeaning our institutions, always criticizing, never content, always demanding change. Not believing in God, the Bible, or eternal life, they work to destroy what exists in the hope of creating the new man — a utopia in the here and now as a type of Heaven on Earth. Meanwhile, while under constant attack, the rest of society labors to keep functioning the institutions on which our nation relies — most especially the family and the church.

To be sure, judges who challenge the transgender orthodoxy will pay a price even though they are part of our nation's ruling class. Fortunately, under our constitutional scheme, this will not include termination from employment, but there are other costs that are imposed on dissident voices. As physicist Eric Weinstein described forces at work in a different context:

> Whatever it is is not really trying to fool you, it's trying to instruct you…. Think about [the establishment media] as a set of instructions for how to keep your job…. But if you say what you

> understand to be true, you can know what the consequences are…. In essence, this is a lot like Caligula installing his horse as a Senator. No one's fooled that the horse is an ordinary human senator. The choice is, do you wish to say something.[29]

This latest progressive cause of transgenderism seeks to destroy what exists in pursuit of the creation of a new human reality. This progressive program is sometimes described as "imagining what can be, unburdened by what has been." To Progressives, reality is only a social construct.[30] The Progressives at DOE seek to control the entire government school environment, operating under no limiting principle, and if a victory is achieved here today, they will seek to build upon it tomorrow.

If courts do not ground the law in reality — in fixed and universal truths — then every right we enjoy is put at risk. To approve DOE's effort to compel schools to bow to transgenderism, this Court would need to be unburdened not only **by what has been**, but also **by what actually is**. The district court courageously refused to be politically correct at the cost of being factually and legally incorrect. This court should do no less.

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[29] *See* Eric Weinstein, Are we on the Brink of Revolution? *Chris Williamson podcast* (Sept. 2, 2024) (14:00-15:33).

[30] *See generally* P. Berger & T. Luckmann, The Social Construction of Reality: A Treatise in the Sociology of Knowledge (Knopf Doubleday: 1967).

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of America's Future, *et al*. in Support of Plaintiffs-Appellees and Affirmance, was made, this 26th day of September, 2024, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of America's Future, *et al*. in Support of Plaintiffs-Appellees and Affirmance complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,276 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief 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), as well as Circuit Rule 32.1, because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 21.0.0.194 in 14-point CG Times.

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Dated: September 26, 2024