

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:24-cv-02185-CNS-SBP

JOHN AND JANE DOE,

Plaintiffs,

v.

PHILIP WEISER, in his official capacity as Attorney General of the State of Colorado;
SUSANA CORDOVA, in her official capacity as Commissioner of the Colorado
Department of Education; and
SCHOOL DISTRICT 27J a/k/a 27J SCHOOLS, in its official and personal capacities,

Defendants.

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO
DISMISS**

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Plaintiffs John and Jane Doe hereby file this consolidated Response in Opposition to the Motions to Dismiss of the Colorado Attorney General (the “Attorney General”), the Commissioner of the Colorado Department of Education (the “Commissioner”), and School District 27J a/k/a 27J Schools (the “District”). The Court should deny the Motions.

INTRODUCTION

This case concerns Colorado’s Name Change Law, the District’s Parental Exclusion Policy, and the District’s prior social transition of the Does’ oldest daughter, A.D. Under the Law and Policy, schools are required to socially transition children upon their request without regard to parental consent and without requiring parental notice. The Policy goes even further—it requires schools to conceal the transition from children’s parents if children say their parents are not “supportive” of it. Worse, the Policy requires schools to lie to “unsupportive” parents if they ask whether their children are being transitioned at school. The Law and Policy violate the Does’ fundamental parental rights.

Defendants argue the Does lack standing, but their arguments are without merit. As an initial matter, the Does plainly have standing to seek retrospective relief in the form of nominal damages against the District for its prior social transition of A.D.

The Does also have standing to seek prospective relief against the Law and Policy. First, the Law and Policy are currently injuring the Does. Parents have the right to obtain truthful information about their children, and the Policy’s requirement that District personnel lie to parents precludes the Does from knowing whether their children are being transitioned. Moreover, just by being on the books, the Law and Policy impermissibly alter the constitutionally mandated decisional framework under which parents make the important decisions in their children’s lives. Further, the Does must alter their behavior to combat the impact of the Law and Policy on their children. Second, the Does are subject

to future injury under the Law and Policy. There is a realistic danger the Does' children will struggle with their gender identity in the relatively near future and thus seek to be socially transitioned at school. In fact, A.D. is still struggling with her gender identity, a struggle caused, in part, by the District's prior acts in socially transitioning her.

Defendants also argue the Does have not alleged plausible claims, but these arguments fare no better. First, schools that socially transition children upon their request violate their parents' right to consent to healthcare treatment the state provides their children. Second, even if social transitioning were not healthcare treatment, schools that socially transition children upon their request violate their parents' right to consent when the state makes important decisions in their children's lives. Third, schools that socially transition children upon their request unduly interfere with their parents' right to family integrity. Fourth, the Law and Policy fail to provide parents the baseline procedural safeguards of notice and an opportunity to be heard before transitioning their children.

Because the parental right is fundamental, strict scrutiny applies, but the Law and Policy fail any level of review. Defendants argue the Law and Policy prevent discrimination against transgender-identifying children at school, but this argument ascribes far too much permanence to what, in children, is typically a temporary identity state. Moreover, it ignores the fact that a social transition itself can change gender outcomes, leading to a life of medicalization and the serious complications that follow, and it wrongly assumes that a social transition is appropriate for every child who asks for it. This "one-size-fits-all" approach is irrational. Indeed, not a single professional association recommends it.

To be sure, some children feel a transgender identification deeply, and some may persist. For these children, transition may be appropriate. But that's a decision for parents

to make. Absent exigent circumstances, Defendants have no authority to override parents' decision to say "no," and the District has no warrant to deceive and lie to parents about what it is doing to their children.

FACTUAL BACKGROUND

I. BACKGROUND ON GENDER DYSPHORIA AND ITS TREATMENT

A. Gender Dysphoria in Minors

"Gender dysphoria" is a psychiatric condition in which a person's transgender identity causes clinically significant psychological distress. First Am. Compl. ("FAC") ¶ 31. Not all transgender-identifying minors have gender dysphoria, but many do. *Id.* ¶ 32.

B. Social Transitioning is a Form of Psychological Treatment

There are four general approaches to treating gender dysphoria in minors—the "hands off" model, the "watchful waiting" model, the "psychotherapy" model, and the "affirmation" model. *Id.* ¶¶ 34–37. The "affirmation" model holds that a minor's expression of a transgender identity should be accepted as decisive and that the minor's psychological condition will improve with "affirmation" of that identity. *Id.* ¶¶ 38–39.

A primary pillar of the "affirmation" model is social transitioning. *Id.* ¶ 40. In the school setting, social transitioning generally refers to calling students by a new name and / or pronouns associated with their transgender identity. *Id.* ¶ 42. Social transitioning is a form of psychological treatment. *Id.* ¶ 43. Its purpose is to alleviate the psychological distress caused by the mismatch between a person's gender identity and sex, regardless of whether the distress rises to the level of gender dysphoria. *Id.* ¶ 44.

Social transitioning in minors is not a mere harmless exploration of gender identity. *Id.* ¶ 45. Absent social transitioning, a large majority of transgender-identifying minors will desist by adulthood; that is, they will lose their transgender identity. *Id.* ¶ 46. But when

social transitioning occurs, the rate of desistence plummets. *Id.* ¶ 47. Thus, social transitioning makes it more likely that a minor’s transgender identity will persist. *Id.* ¶ 48. Inducing persistence in minors who would otherwise desist is harmful to them. *Id.* ¶ 49.

In the vast majority of cases, minors who are socially transitioned go on to transition medically through puberty blockers and cross-sex hormones, and, for some, “affirming” surgeries, like mastectomies. *Id.* ¶ 50. Because of the close correlation between social and medical transitions, the risks associated with medical transitions must be considered before a child is socially transitioned. *Id.* ¶ 51. These risks are significant, and include bone weakness, depression, lack of sexual function, and sterility. *Id.* ¶ 52.

Socially transitioning every minor who asks for it is a “one-size-fits-all” approach that fails to account for the minor’s unique issues. *Id.* ¶ 53. Instead of transitioning, some minors simply need counseling to understand their feelings. *Id.* ¶ 54. Thus, before a social transition is undertaken, every minor should receive a professional evaluation. *Id.* ¶ 58.

C. Parental Consent is Necessary to Socially Transition Minors.

Due to the significance of social transitioning on the minor’s life course, parental involvement is necessary when minors are socially transitioned. *Id.* ¶ 57. Indeed, no medical or psychological association has endorsed school-facilitated social transitions of minors without parental consent. *Id.* ¶ 66. And from a treatment standpoint, it can be permissible for parents to say “no” to a social transition. *Id.* ¶ 55.

Moreover, schools that socially transition minors without even notifying their parents inflict unique harm on children. *Id.* ¶ 61. This practice keeps minors who may be experiencing serious psychological distress from receiving adequate treatment. *Id.* ¶ 62. This practice is inherently psychologically unhealthy to minors because it causes them to

inhabit a secret identity at school. *Id.* ¶ 64. And this practice treats parents as “the enemy,” driving a wedge in the family just when parents are needed most. *Id.* ¶ 65.

II. THE NAME CHANGE LAW AND PARENTAL EXCLUSION POLICY

Under the Name Change Law, all schools in the state must refer to students by any name they chose that “reflect[s their] gender identity.” Colo. Rev. Stat. Ann. § 22-1-145(2). Neither parental consent nor notice is required. FAC ¶ 69.

Under the Parental Exclusion Policy, if a child asks to go by a new name and / or pronouns associated with their transgender identity, District personnel and other students must honor the child’s wishes. *Id.* ¶ 77. Neither parental consent nor notice is required. *Id.* ¶ 74. Moreover, unless the child agrees to parental notification, the school will not inform the child’s parents if the child asserts his or her parents are “not supportive” of the transition.” *Id.* ¶¶ 80–81. Instead, District personnel must conceal the transition by “us[ing] the [child’s] legal name and [prior] pronoun[s]” in communications with parents. *Id.* ¶ 82. Further, if these parents ask the school whether their children are being socially transitioned, District personnel must lie to the parents. *Id.* ¶ 83.

III. THE DISTRICT SOCIALLY TRANSITIONS A.D.

A. A.D.’s middle school

In 2019, when A.D. was in the 6th grade, she began having mental health struggles. *Id.* ¶ 85. Around that time, she also began experiencing a transgender identity. *Id.* ¶ 84. Over the years, A.D. has been treated for various psychological conditions, including depressive disorder, mood disorder, and gender identity disorder. *Id.*¹

¹ “Gender identity disorder” is a psychiatric condition “characterized by a strong and persistent cross-gender identification . . . coupled with persistent discomfort with [one’s] sex.” See NCI Thesaurus, *Gender Identity Disorder*, available online at

B. A.D.’s freshman year of high school

In 2022, early in A.D.’s freshman year in high school, she began seeing a school counselor (the “Counselor”) regarding her mental health struggles. *Id.* ¶¶ 98–100. A.D. also informed the Counselor she had a transgender identity. *Id.* To help alleviate A.D.’s psychological distress, the Counselor encouraged A.D. to undergo a social transition. *Id.* ¶ 101. From that point forward, A.D. began using the male name “Z.D.” at school. *Id.* ¶ 105. A.D. asked the Counselor not to change her profile in the school’s computerized database—called Infinite Campus—so her parents would not find out about the transition. *Id.* ¶ 105. The Counselor agreed. *Id.* However, a secret “pronoun flag”—invisible to the Does—was placed on A.D.’s Infinite Campus account to alert District personnel that A.D. was going by non-female pronouns. *Id.* ¶¶ 93, 105–106.²

A.D.’s mental health struggles worsened during her freshman year, but District personnel did not inform the Does about the transition. *Id.* ¶¶ 107, 117–118. Instead, District personnel—including the Counselor—concealed the transition from the Does, referring to A.D. as “A.D.” and by female pronouns in conversations with the Does despite referring to her as “Z.D.” and by non-female pronouns at school. *Id.* ¶ 119.

https://ncit.nci.nih.gov/ncitbrowser/pages/concept_details.jsf?dictionary=NCI_Thesaurus&version=24.08d&code=C94362&ns=ncit&type=properties&key=null&b=1&n=0&vse=nu (last visited on Nov. 26, 2024) and attached as Ex. A. The Court should take judicial notice of this government website under FRE 201 without converting Defendants’ Motions into Motions for Summary Judgment. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009).

² The District has submitted evidence tending to show that A.D. first sought to go by non-female pronouns—though not a new name—in her 8th grade year. FAC ¶ 93. At this time, the Does do not dispute that evidence. The timing of when A.D. began going by non-female pronouns is not relevant to Defendants’ Motions.

In March 2023, the Does learned A.D. was experiencing a transgender identity. *Id.* ¶ 123. Mrs. Doe told the Counselor she did not want A.D. to be socially transitioned. *Id.* ¶ 127. The Counselor did not inform Mrs. Doe that A.D. was already being socially transitioned, and the school continued to refer to A.D. by “Z.D.” and non-female pronouns against Mrs. Doe’s express wishes. *Id.* ¶¶ 5, 128–29. During this time, A.D.’s relationship with her parents worsened because she wanted to start testosterone and have a mastectomy, but the Does would not consent. *Id.* ¶¶ 6, 134.

C. A.D.’s sophomore year of high school

In March 2024, the spring of A.D.’s sophomore year, she informed her parents she no longer identified as a boy. *Id.* ¶ 135. In May 2024, A.D. asked a school counselor to change her Infinite Campus profile back to female pronouns. *Id.* ¶ 136. A.D. did not ask her teachers to stop calling her “Z.D.” or referring to her with non-female pronouns, and her teachers continued to refer to her that way the rest of her sophomore year. *Id.* ¶ 137

D. A.D.’s junior year of high school

In August 2024, at the beginning of A.D.’s junior year, her new teachers started calling her “A.D.” and referring to her with female pronouns, consistent with her Infinite Campus profile. *Id.* ¶ 138. When A.D. encountered her prior teachers, some of them referred to her as “Z.D.” and with non-female pronouns. *Id.* ¶ 141. A.D. has told some of her prior teachers that she now goes by “A.D.” and uses female pronouns. *Id.* A.D. intends to inform the rest of her prior teachers of the change when she feels the time is right. *Id.*

A.D. now believes her mental health struggles and uncertainty regarding her sexual orientation caused her to have a transgender identity. *Id.* ¶¶ 6–7, 142–43. But it is too early to say that A.D.’s transgender identity has desisted. *Id.* ¶ 148. While A.D. feels

like a girl, she is still struggling with her gender identity and the same conditions she believes triggered her transgender identity. *Id.* ¶ 144. In addition, there is a part of A.D. that does not yet feel comfortable in a female body. *Id.* A.D. is trying to understand those feelings and get back to her prior self, but she has not yet figured out how to do that. *Id.*

ARGUMENT

Defendants argue (1) the Does lack standing, (2) the FAC does not state plausible claims, and (3) the Attorney General is not a proper party. Defendants are mistaken.

I. THE DOES HAVE ARTICLE III STANDING

The Does seek two forms of relief. First, they seek retrospective relief in the form of nominal damages against the District for its prior social transition of A.D. FAC Prayer for Relief ¶ 4. Second, they seek prospective relief against Defendants in the form of (1) a declaration that the Law and Policy are unconstitutional and (2) an injunction against application of the Law and Policy. *Id.* ¶¶ 1–3. The Does have standing to seek this relief.

A. Legal standard

To satisfy Article III, plaintiffs must allege (1) an injury-in-fact (2) traceable to the defendant's actions that (3) can be redressed through the requested relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). “[O]n a motion to dismiss [the Court must] presum[e] that general allegations embrace those specific facts that are necessary to support the claim.” *Id.* at 561 (cleaned up); see also *Hooper v. City of Tulsa*, 71 F.4th 1270, 1277 (10th Cir. 2023). When evaluating standing, the Court “must assume . . . that each claim is legally valid.” *Citizen Center v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014).³

³ In support of its standing argument, the District cites a declaration from one of A.D.’s counselors, but that declaration is consistent with the FAC. Accordingly, the Court should treat Defendants’ Motions as raising a facial challenge. Even assuming Defendants were making a factual challenge, the FAC—which is verified—establishes standing.

Here, Defendants' arguments center on the injury-in-fact requirement. To allege an injury-in-fact, the plaintiff's harm must be "real, and not abstract." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016) (cleaned up). The harm, however, need not be "tangible." Rather, "intangible harms," such as the loss of a constitutional right, can constitute injury. *Id.*; see also *J.B. v. Washington Cnty.*, 127 F.3d 919, 928 (10th Cir. 1997) (holding standing exists to challenge loss of parental right); *Lee v. Poudre Sch. Dist.*, No. 23-CV-01117-NYW-STV, 2023 WL 8780860, at *7 (D. Colo. Dec. 19, 2023) (same).

"The 'injury-in-fact' requirement is satisfied differently depending on whether the plaintiff seeks prospective or retrospective relief." *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004). For retrospective relief, the plaintiff must allege injury that is "concrete and particularized." *Id.* at 1284. To be particularized, the injury must "affect the plaintiff in a personal and individual way." *Lujan*, 504 at 560 n.1. "The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Spokeo*, 578 U.S. at 339 n.7.

For prospective relief, the plaintiff must either (1) be "suffering a continuing injury" that is ongoing or (2) be "under a real and immediate threat of being injured in the future." *Tandy*, 380 F.3d at 1283. Plaintiffs can establish continuing injury by alleging ongoing harm from the defendant's acts. *Does 1-11 v. Bd. of Regents of Univ. of Colorado*, 100 F.4th 1251, 1266 (10th Cir. 2024) (concluding plaintiff's continued unemployment was ongoing harm). Plaintiffs can establish future injury by alleging facts sufficient to show there is a "realistic danger" they will be injured "in the relatively near future." *California v. Texas*, 593 U.S. 659, 670 (2021) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 201 (1995); see also *Cache*

Valley Elec. Co. v. Utah Dep't of Transp., 149 F.3d 1119, 1122 (10th Cir. 1998); *Tandy*, 380 F.3d at 1285. While past wrongs do not establish future injury, “[p]ast wrongs are evidence [of] . . . [future] injury.” *Id.*; see also *Riggs v. City of Albuquerque*, 916 F.2d 582, 586 (10th Cir. 1990). And past wrongs establish future injury when accompanied by “continuing, present adverse effects.” *Ward v. Utah*, 321 F.3d 1263, 1269 (10th Cir. 2003).

B. The Does have standing.

The Does have standing to seek both retrospective and prospective relief.

1. The Does have standing to seek retrospective relief.

The Does plainly have standing to seek retrospective relief against the District for its prior social transition of A.D. Based on the Does’ view of the law, this act violated their parental rights because the District did not obtain their consent or provide them notice, causing them an injury-in-fact redressable by nominal damages. *J.B.*, 127 F.3d at 928.

While Defendants’ Motions are not crystal clear, they seem to suggest the Does lack standing to seek retrospective relief because the Law and current version of the Policy were “enacted . . . *after* [A.D.] disavowed” the name “Z.D.” Dist. Mot. (ECF 61) at 10 (emphases in original); Comm’r Mot. (ECF 62) at 4 (similar); Att’y Gen. Mot. (ECF 63) at 13 (similar). This argument is meritless. Whether the Law was in effect and what version of the Policy was in place during the time A.D. was being socially transitioned are irrelevant. The District’s actions, even if taken exclusively under the old version of the Policy, are sufficient to give the Does standing to seek retrospective relief.

In any event, Defendants’ argument misstates the facts. The effective date of the Law and current version of the Policy are April 29, 2024 and July 2024, respectively. FAC ¶¶ 67, 72, Ex. I. Yet A.D.’s teachers continued to refer to her as “Z.D.” through the end of

her sophomore year—*i.e.*, after April 29, 2024—and some of them continued to refer to her as “Z.D.” into her junior year, which began in August 2024. *Id.* ¶¶ 136–141. Accordingly, the District continued its unlawful social transition of A.D. after the effective dates of the Law and current version of the Policy.

2. The Does have standing to seek prospective relief.

The Does have standing to seek prospective relief because the Law and Policy are (1) currently injuring the Does and (2) likely to injure the Does in the future.

a. *The Law and Policy are currently injuring the Does.*

The Law and Policy are currently injuring the Does. First, parents have the right to obtain important information from schools about their children. *Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees*, 680 F. Supp. 3d 1250, 1277 (D. Wyo. 2023). Accordingly, parents have standing to challenge school policies that prevent them from obtaining such information. *Id.*; see also *FEC v. Akins*, 524 U.S. 11, 21 (1998) (holding standing exists where plaintiff alleges “inability to obtain information . . . that, on [plaintiff’s] view of the law” must be disclosed); *Citizen Ctr.*, 770 F.3d at 916 (similar). That is precisely what the Policy does here. The Policy requires District personnel to lie to parents in response to a direct question regarding whether their children are being transitioned. FAC ¶ 83. And the Does “intend to seek . . . information [from the District regarding whether their children are being socially transitioned].” Compl. ¶ 165. Yet despite trying, the Does are unable to get truthful information from the District. The Does thus have standing to seek prospective relief against the Policy. *Willey*, 680 F.Supp.3d at 1277.

Defendants cite *John & Jane Parents 1 v. Montgomery County Board of Education* in support of their standing argument, but in that case the parents’ claim was much narrower than the Does’ claims here. There, the parents specifically limited their claim to

seek access *only* to their children’s “gender support plan” and related information. 78 F.4th 622, 629 (4th Cir. 2023). But because the parents did not allege their children had such a plan, the court concluded the parents’ alleged injury was speculative. *Id.* at 631. Here, by contrast, the Does seek to ascertain whether their children are being transitioned, which is information that indisputably exists one way or the other.

Second, the Law and Policy have impermissibly altered the constitutionally required decisional framework under which parents have authority over their children. As the Supreme Court has held, the state may not “transfer the power” to make major decisions in children’s lives away “from . . . parents” without sufficient justification. *Parham v. J.R.*, 442 U.S. 584, 603 (1979). By the Law and Policy, Defendants have impermissibly created a regime under which children may decide—on their own—whether to undergo a social transition. This framework usurps parental authority even if the Does’ children never seek to be socially transitioned under it. *See Deanda v. Becerra*, 96 F.4th 750, 757 (5th Cir. 2024) (holding father had standing to challenge contraception distribution program that “over[rode his] parental rights” despite no allegation his children sought to obtain contraceptives); *Parents Un. For Better Schs., Inc. v. Sch. Dist. of Phila. Bd. of Educ.*, 148 F.3d 260, 275 (3d Cir. 1998) (allowing parents to challenge school condom distribution program despite no allegation children sought to obtain condoms); *Parents 1*, 78 F. 4th at 644 (Niemeyer, J., dissenting) (concluding parents have standing to challenge school policies that “invite[] minor children to develop and implement a gender transition plan without . . . participation of their parents”); *see also Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 800 (2015) (holding plaintiff had standing to challenge law that denied its “alleged prerogative” to make decision).

Third, the Law and Policy are currently injuring the Does because they are required to “curtail their [behavior]” in response. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000); *see also Clements v. Fashing*, 457 U.S. 957, 962 (1982) (holding standing exists where plaintiffs were required to change their behavior); *Sierra Club v. Franklin Cnty. Power of Illinois, LLC*, 546 F.3d 918, 926 (7th Cir. 2008) (similar); *Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078, 1081 (D.C. Cir. 1997) (similar). To counter the influence of the Law and Policy on their children, the Does are required to “speak with their children about gender-identity related issues they otherwise would not discuss,” “self-censor their speech” with B.D. to avoid giving her the impression they would not approve of a social transition (lest she seek to do so in secret), and “monitor their children’s activities at school more closely than they otherwise would.” FAC ¶¶ 168–71. Because the Does are required to alter their behavior to counter the influence of the Law and Policy on their children, the Does are suffering ongoing harm. *Laidlaw*, 528 U.S. at 184; *see also Parents 1*, 78 F.4th at 641 (Niemeyer, J, dissenting) (concluding parents had standing to challenge similar policy because it caused “the dynamics and dialogue between parent and child [to] change on an ongoing basis”).

The Commissioner argues that because A.D. first experienced a transgender identity before the effective date of the Law, the Does would have had to engage in these behavioral modifications regardless. Not so. The Does would not have been required to seek to convince A.D. not to undergo a social transition at school if she were not empowered by the Law and Policy to decide for herself whether to do so, nor would they have been required to monitor her activities to find out whether she was secretly undergoing a social transition at school. Moreover, the Commissioner’s argument utterly

ignores the impact the Law and Policy have on their relationship with B.D. Accordingly, the Law and Policy are currently injuring the Does.

b. The Law and Policy will injure the Does in the future.

The Does are also suffering the threat of future injury that their right to consent to—or notice of—their children’s social transition will be violated. While A.D. presently identifies as a girl and has taken steps toward de-transitioning, “it is too early to say that [A.D.’s] transgender identity has desisted.” FAC ¶ 148. Instead, A.D. is likely to continue to struggle with her gender identity for the foreseeable future:

- In youth, coming to have a gender identity can be a process, and A.D. only recently began feeling like a girl again after approximately five years of first feeling like a boy. *Id.* ¶ 150.
- There is a part of A.D. that does not yet feel comfortable in a female body, and she is still trying to understand those feelings and get back to her prior self. *Id.* ¶ 144.
- A.D. has gone through other periods—like this one—where she has not felt like a boy, yet that feeling returned. *Id.* ¶ 150.
- A.D. is still suffering from the conditions that likely triggered her transgender identity, a fact that makes the reappearance of that identity likely. *Id.* ¶ 151.
- A.D. was socially transitioned at school for two years, a fact that makes it likely her transgender identity will persist. *Id.* ¶ 152.
- The social pressures on A.D. to re-identify as a boy are high. *Id.* ¶¶ 153–55. A.D.’s friend group includes many children who identify as LGBTQ+, and District personnel create a uniquely supportive environment for LGBTQ+ students. *Id.*

On these facts, there is a “realistic danger” A.D. will seek to re-transition without the Does’ involvement “in the relatively near future.” *California*, 593 U.S. at 670; *Adarand Constructors*, 515 U.S. at 211; *see also Parents 1*, 78 F.4th at 626 (noting that case would have been different if parents had alleged their children were “struggling with issues of

gender identity”). Indeed, because the District previously socially transitioned A.D., which perpetuated her transgender identity, FAC ¶ 142, the Does are suffering “continuing, present adverse effects” from the District’s prior acts, *Ward*, 321 F.3d at 1269. These adverse effects put the Does’ parental rights at risk of future violation.

The same conclusion applies to B.D. The District is “encouraging” B.D. and other students in her class to “evaluate whether they feel like they might [have a transgender identity]” despite the fact B.D. is “too immature to process” that information. FAC ¶¶ 157–62. Moreover, B.D. faces pressure from both her friend group and District personnel to identify as a boy. *Id.* On these facts, there is a realistic danger that B.D. will seek to be socially transitioned without the Does’ involvement in the relatively near future.

The Attorney General argues the Court should disregard the Does’ allegations that their children are subject to peer and other pressures because the Law only protects social transitions that are based on a child’s transgender identity. Atty. Gen. Mot. at 15. But this argument misconstrues the FAC. The FAC does not allege children are subject to pressure *to change their name*. Rather, the FAC alleges peer and other pressures can contribute to a child *coming to have a transgender identity*. FAC ¶¶ 153–55, 158–60; see *also id.* ¶ 29 (noting that coming to have a transgender identity is a “complex interplay between biological, psychological, and social factors”).

The cases Defendants cite are all distinguishable. In *Parents 1*, as discussed, the parents limited their claim to the school’s failure to disclose a “gender support plan” that may or may not have existed. 78 F.4th at 630. In *Parents Protecting Our Children, UA v. Eau Claire Area School District*, the policy at issue had never been applied, and it was unclear how it would operate in practice. 95 F.4th 501, 505–06 (7th Cir. 2024) (“All we

have before us is a policy on paper without concrete facts about its implementation”). Here, by contrast, the Law and Policy have already been applied against A.D., and there is no ambiguity over how they work. In *Parents Defending Education v. Linn-Mar Community School District*, the children in question had not previously been socially transitioned, and the parents alleged only that the policy at issue “could potentially” implicate their children. 629 F. Supp. 3d 891, 901, 903 (N.D. Iowa 2022), *opinion vacated, appeal dismissed*, 83 F.4th 658 (8th Cir. 2023). Similarly, in *Doe v. Pine-Richland School District*, there was no allegation that the child in question had ever experienced a transgender identity or even struggled with her gender identity. No. 2:24-CV-51, 2024 WL 2058437, at *9 (W.D. Pa. May 7, 2024). Instead, the mother alleged only that her child had “looked at internet sites discussing gender issues” and had transgender-identifying friends. *Id.* The Does’ allegations supporting the inference of future injury are far more compelling here.

c. The Does have alleged causation and redressability.

The Law and Policy are also the cause of the Does’ injury, which may be redressed by awarding prospective relief to them.

The Commissioner argues causation is lacking because the Law “does not make students change their names.” Comm’r Mot. at 6. This argument badly misses the mark. The Law and Policy authorize the Does’ children to undergo a social transition without parental consent or notice, which is sufficient to establish causation. The Commissioner also claims causation is lacking because the Law is silent as to parental consent and notice. But the constitution *requires* parental consent and notice when schools socially transition children. Because the Law authorizes schools to socially transition children without parental consent or notice, it—no less than the Policy—is a cause of the Does’ injury. Indeed, it is black-letter law that the “existence of multiple causes of an injury does

not defeat [standing].” *WildEarth Guardians v. USDA*, 795 F.3d 1148, 1157 (9th Cir. 2015); see also *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1080 (D.C. Cir. 2017) (noting that causation “is met when a plaintiff demonstrates that the challenged [state] action authorizes the conduct that allegedly caused the plaintiff’s injuries”). If the rule were otherwise, defendants in cases with multiple potential causes would each point the finger at one another and plaintiffs would be unable to seek relief. That’s obviously not the law.

Defendants also argue causation and redressability are lacking because A.D.’s prior social transition started before the effective dates of the Law and current version of the Policy. But again, A.D.’s prior transition continued after these dates. Moreover, the effective dates of the Law and Policy have no bearing on whether the Does’ are currently being injured or are likely to be injured in the future. The Law and current version of the Policy are in effect now, and they must be enjoined to prevent further injury to the Does.

The Commissioner claims redressability is lacking because the Does have not challenged Title IX or the Colorado Ant-Discrimination Act (“CADA”). That’s wrong too. As set forth below, Title IX does not authorize schools to socially transition children without parental consent. *Infra* at 31–32. As for CADA, while the Does did not originally interpret CADA to require schools to socially transition students upon their request without regard to parental consent, they accept the Commissioner’s assertion that it does. Comm’r Mot. at 6 (citing 3 Code Colo. Regs. 708-1, Rule 81.6(A)(4)). This fact, however, does not defeat redressability. Under Rule 54(c), the Court “should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than an another plainly appropriate one.” *EEOC v. CollegeAmerica Denver, Inc.*, 869 F.3d 1171, 1175 (10th Cir. 2017) (quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65–66 (1978)).

Here, the FAC seeks declaratory and injunctive relief against the Law and Policy and asks for all “further relief that the Court deems just and proper.” *Id.* Prayer for Relief ¶¶ 1–3. To the extent CADA authorizes schools to socially transition children without parental consent, it violates the Does’ parental rights for all the same reasons the Law and Policy do. Accordingly, the Court should construe the FAC to seek prospective relief against CADA too. *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir. 1990) (“Fed. R. Civ. P. 54(c) requires courts to award the relief to which the prevailing party is entitled, even if that party did not request the relief or relied on the wrong statute.”); see also *Frazier v. Simmons*, 254 F.3d 1247, 1255 (10th Cir. 2001) (holding complaint should be construed to seek prospective relief where allegations give “any indication” such relief is sought). And even if the Court were to accept the Commissioner’s formalistic argument that the Does’ injury is not redressable because the FAC does not specifically challenge CADA, the appropriate remedy would be to allow the Does leave to amend so they may state an entitlement to this relief, which they can easily do.

Finally, the Attorney General argues the Does’ claim for prospective relief is unripe. Atty. Gen. Mot. at 16. But standing and ripeness “boil down to the same question.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 n.5 (2014); see also *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1175 (10th Cir. 2021), *rev’d on other grounds*, 600 U.S. 570 (2023). Because the Does are currently being injured and there is a realistic danger they will be injured in the relatively near future, their claim for prospective relief is ripe.

II. THE DOES STATE PLAUSIBLE CLAIMS

A. Legal standard

To survive a Rule 12(b)(6) motion, the complaint must only allege “sufficient factual matter . . . to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). “A claim has facial plausibility when the plaintiff pleads factual content that allows . . . the reasonable inference” of a legal violation. *Id.* The Court must “assume [the] veracity [of the allegations]” and “determine whether they plausibly give rise to an entitlement of relief.” *Id.* The FAC clears this hurdle.

B. The Does state plausible substantive due process and First Amendment claims.

1. The Does plausibly allege the Law and Policy infringe their parental rights.

Parents have a “fundamental right” to direct the “care, custody, and control” of their minor children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.); *Arrendondo v. Locklear*, 462 F.3d 1292, 1297 (10th Cir. 2006). This right arises under both the substantive component of the Due Process Clause, *Arredondo*, 462 F.3d at 1297, and the First Amendment’s concept of “intimate association,” *Bd. of Dir. of Rotary Intern. v. Rotary Club*, 481 U.S. 537, 545 (1987). The right rests on the presumptions that (1) “parents possess what a child lacks in maturity, experience, and capacity for judgment” and (2) the “natural bonds of affection lead parents to act in the best interests of their children.” *Parham*, 442 U.S. at 602. The Law and Policy plausibly infringe the Does’ parental rights.

a. *Parents have the right to consent when the state seeks to provide healthcare treatment to their children.*

Parents have the right to consent when the state seeks to provide healthcare treatment to their children. *Parham*, 442 U.S. at 602 (“Most children, even in adolescence,

simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment.”); *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010) (concluding the constitution protects “parents’ decisions regarding their children’s medical care”); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003) (noting parents’ “right to control the . . . medical care[] of a child”); ”); see also *Colon v. Collazo*, 729 F.2d 32, 34 (1st Cir. 1984) (holding parents have right to make mental healthcare decisions for minor children).

The FAC plausibly alleges social transitioning is a form of healthcare treatment subject to the parental right:

- Its purpose is to “alleviate the psychological distress” that can be “caused by the mismatch between one’s natal sex and gender identity.” FAC ¶ 44.
- It is a “primary pillar” of the “affirmation” model of treatment. *Id.* ¶¶ 39–40.
- Adherents of the “affirmation” model believe the child’s “psychological condition will improve with ‘affirmation’” through transition. *Id.* ¶ 39.
- A social transition is not without risks. It decreases the odds of desistence. *Id.* ¶¶ 46–48. And it almost invariably leads to future “affirmative care,” the risks of which are significant and can be irreversible. *Id.* ¶ 50.

Indeed, the Tenth Circuit has already concluded social transitioning is a form of healthcare treatment. *Lamb v. Norwood*, 899 F.3d 1159, 1161 (10th Cir. 2018) (noting “[t]reatment forms [for gender dysphoria] currently include . . . [c]hanges in gender expression and role (which may involve living . . . in another gender role, consistent with one’s gender identity)”). Courts throughout the country have arrived at the same result.⁴

⁴ *Kadel v. Folwell*, 100 F.4th 122, 136–37 (4th Cir. 2024); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 770 (9th Cir. 2019); *Tirrell v. Edelblut*, No. 24-CV-251-LM-TSM, 2024 WL 4132435, at *2 (D.N.H. Sept. 10, 2024); *Clark v. Quiros*, No. 3:19-CV-575 (VAB), 2024 WL 3552472, at *6 (D. Conn. July 26, 2024); *Koe v. Noggle*, No. 1:23-CV-2904-SEG, 2023 WL 5339281, at *6 (N.D. Ga. Aug. 20, 2023); *Doe v. Horne*, No. CV-23-00185-TUC-JGZ,

In addition, experts view social transitioning as a form of healthcare treatment. In April 2024, Dr. Hilary Cass released the final version of her evidence review assessing the safety and efficacy of the “affirmation” method of care in minors. See *The Cass Review: Independent review of gender identity services for children and young people*, Dr. Hilary Cass, United Kingdom National Health Service (April 10, 2024), FAC Ex. E. As Dr. Cass concluded, social transitioning is “an active intervention” in the lives of minors “because it may have significant effects on the [minor] in terms of their psychological functioning and longer-term [gender] outcomes.” *Id.* at 158t. Dr. Ken Zucker, a leading clinician in the field, has opined that social transitioning is a form of “psychosocial treatment that will increase the odds of long-term persistence.” Zucker, Ken J., *The myth of persistence: Response to “A Critical Commentary on Follow-Up Studies and Desistance Theories about Transgender and Gender Non-Conforming Children” by Temple Newhook et al.*, 19 International Journal of Transgenderism at 237, FAC Ex. F.

In addition, leading medical associations—including but not limited to the American Medical Association, the American Academy of Pediatrics, and the Endocrine Society—view social transitioning as “treatment.” Br. of Amici Curiae Medical, Nursing, Mental Health, and other Health Care Organizations in Support of Appellee in *Adams v. Sch. Bd. of St. Johns Cnty.*, No. 18-13592, at 17, FAC Ex. G. And the U.S. Department of Health and Human Services observes that a social transition can be the “clinically indicated next

2023 WL 4661831, at *3 (D. Ariz. July 20, 2023); *Monroe v. Meeks*, 584 F. Supp. 3d 643, 678 (S.D. Ill. 2022); *Pinson v. Hadaway*, No. 18-CV-3420-NEB-KMM, 2020 WL 6121357, at *1 (D. Minn. July 13, 2020); *Porter v. Allbaugh*, No. 18-CV-0472-JED-FHM, 2019 WL 2167415, at *2 n.3 (N.D. Okla. May 17, 2019).

step for [a gender non-conforming] child.” Nondiscrimination in Health Programs and Activities, Proposed Rule, 87 FR 47,824-01, *47,867 (August 4, 2022).

On these facts, the FAC plausibly alleges that social transitioning is a form of healthcare treatment. Accordingly, schools must obtain parental consent before socially transitioning their children at school. *T.F. v. Kettle Moraine School Dist.*, No. 2021CV1650, 2023 WL 6544917, at *5 (Wis. Cir. Oct. 03, 2023) (holding socially transitioning child without parental consent “directly implicates an infringement against the parental . . . right to direct the care for their child”).

To be sure, while the parental right “reside[s] first” in the parents, *Troxel*, 530 U.S. at 65 (plurality op.), the state may provide healthcare treatment to children without parental consent under its *parens patriae* authority “when a child’s life [or health] is under immediate threat.” *Jensen*, 603 F.3d at 1198. But neither the Law nor Policy require schools to find the child’s health is under “immediate threat” before socially transitioning them at school. Moreover, unlike an emergency situation, social transitioning is a slow, deliberative processes in which seeking parental consent is always feasible.

Defendants claim social transitioning merely “accords [children] the basic level of respect expected in a civilized society.” District Opp’n to Pls.’ PI Mot. (ECF 25) at 20. But this argument presupposes the correctness of the “affirmation model” of care in minors, which the FAC disputes. Moreover, every one of the decisions Defendants rely on in support of this argument is currently on appeal, has been vacated, or was a preliminary decision that is subject to further proceedings. *Doe v. Del. Valley Reg’l H.S. Bd. of Educ.*, No. 24-00107 (GC) (JBD), 2024 WL 706797, at *5-12 (D.N.J. Feb. 21, 2024) (temporary restraining order denied; case pending in district court); *Willey*, 680 F. Supp. 3d at 1274

(preliminary injunction partially granted/denied; case pending in district court); *Regino v. Staley*, No. 2:23-cv-00032-JAM-DMC, 2023 WL 4464845, at *2-5 (E.D. Cal. July 11, 2023), *appeal pending* (9th Cir.); *Foote v. Town of Ludlow*, No. CV 22-30041-MGM, 2022 WL 18356421, at *4 (D. Mass. Dec. 14, 2022), *appeal pending* (1st Cir.); *Littlejohn v. Sch. Bd. of Leon Cnty*, 647 F. Supp. 3d 1271, 1273 (N.D. Fla. 2022), *appeal pending* (11th Cir.); *John and Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 622 F. Supp. 3d 118, 128-30 (D. Md. 2022), *vacated by* 78 F.4th 622. Moreover, the complaints in those cases did not contain the type of detailed allegations set forth in the FAC explaining the role social transitioning plays in the “affirmation” model of care. And all those cases were decided before the *Cass Review* was released. As Dr. Cass advises, “parents should be actively involved [in the decision to socially transition their children] unless there are strong grounds to believe that this may put the [minor] at risk.” *Cass Review* at 158, 164. That is precisely the rule the Does advocate for here.

Defendants contend social transitioning is not healthcare treatment because the Law and Policy do not require children to be diagnosed with gender dysphoria before schools socially transition them. But this fact does not help Defendants. As for the Does’ claim for retrospective relief, A.D. was treated by a private counselor for various mental health conditions, including gender identity disorder. FAC ¶ 87. A.D. began seeing the Counselor because of her “feelings of depression, anxiety, and transgender identification.” *Id.* ¶ 100. The Counselor encouraged A.D. to undergo a social transition and assisted her in doing so to “help alleviate [her] psychological distress.” *Id.* ¶ 101. These actions constitute “treatment” on any reasonable understanding of the term.

As for the Does' claim for prospective relief, Defendants cannot claim plausible deniability simply by refraining from evaluating children for gender dysphoria before socially transitioning them. Neither the Law nor Policy *exclude* students who have gender dysphoria; thus, some subset of the children who are being socially transitioned under the Law and Policy will have gender dysphoria. Moreover, the very fact a child is asking to be socially transitioned indicates they have some measure of psychological distress, and socially transitioning a transgender-identifying child whose psychological distress is sub-threshold for gender dysphoria is no less healthcare treatment than if the child has full-blown gender dysphoria. FAC ¶ 44. Defendants' argument is like saying giving a child Tylenol loses its character as "treatment" if the child doesn't have a severe headache. That's plainly wrong. Tylenol has a similar physiological impact regardless of whether the child has a severe headache, just as social transitioning has a similar psychological impact regardless of whether the child has gender dysphoria. *Id.* ¶ 48.

Defendants claim they aren't providing psychological treatment because District personnel lack the subjective intent to provide treatment. But the very purpose of a social transition is to alleviate psychological distress; District personnel's subjective intent is immaterial. *Id.* ¶ 43. The treatment is the creation of the environment that affirms the child's transgender identity, enforced throughout school by policies that punish non-compliance, regardless of the subjective intent of District personnel. *Id.* For this reason, the Does agree with Defendants that a child's friends do not provide healthcare treatment when they call the child by their preferred name and pronouns. Like a group therapy session, the members of the group are not providing healthcare treatment to one another. Rather, it is the creation of the therapeutic environment by the therapist that constitutes

treatment. Here, the Law and Policy require schools to create the (putatively) therapeutic environment that constitutes the provision of healthcare treatment to the child.

Defendants try to downplay the impact of social transitioning in children's lives by analogizing it to a gym teacher overseeing an overweight child running around during gym class or a cafeteria worker ensuring the child eats healthy foods for lunch. The analogy fails. Exercise and eating a healthy diet are indisputably routine, beneficial activities for a child. Social transitioning, by contrast, is a "primary pillar" of a controversial psychological treatment paradigm with serious and potentially life-long consequences. *Id.* ¶¶ 40, 48–50. Unlike exercise and eating a healthy diet, which is beneficial for all children, socially transitioning every minor who ask for it is a "one-size-fits-all" approach that "fails to account for the unique issues the minor may be facing." *Id.* ¶ 53.

Finally, the District contends parents' rights are only violated when the state "compel[s]" their children to take some act. District Opp'n to PI Mot. at 18. But parents—not children—have the right to consent when the state seeks to provide healthcare treatment to their children. There is no reason to believe the rule announced in cases like *Parham*, *Jenson*, and *Dubbs* would have been different if the children there had voluntarily sought healthcare treatment from the state.

The cases the District cites—both of which involved state-run health clinics that distributed contraceptives to minors—are distinguishable. First, unlike social transitioning, children have a decisional privacy right to obtain contraceptives. *Anspach v. City of Phila.*, 503 F.3d 256, 262 (3d Cir. 2007) (citing *Carey v. Pop. Servs. Int'l*, 431 U.S. 678 (1977) (plurality op.)); *Doe v. Irwin*, 615 F.2d 1162, 1166 (6th Cir. 1980) (same). Second, unlike schools—where attendance is compulsory and where the state has plenary control over

the child during the school day, Colo. Rev. Stat. Ann. § 22-33-104—health clinics “have no authority” over children seeking contraceptives. *Anspach*, 503 F.3d at 268; see also *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (noting that public schools “exert[] great authority and coercive power” over children); *Alfonso v. Fernandez*, 195 A.D.2d 46 (N.Y. App. Div. 1993) (holding condom distribution program at school violated parental rights). Third, unlike health clinics, District schools have ongoing relationships with parents that require regular interactions in which consent can easily be obtained. And fourth, unlike health clinics, District schools are active participants with the child in parental concealment. These facts render *Anspach* and *Irwin* distinguishable.

Moreover, a holding that compulsion is a necessary element of a parental rights claim would give the state far too much leeway to interfere with the family. Schools could employ doctors to provide medication to willing children before class. Schools could hold a “Grandparent Visitation Day” for willing children. And school personnel could retain custody of a child who ran away from home. Yet precedent establishes each of these situations would violate the parental right. *Mario V. v. Armenta*, No. 18-CV-00041-BLF, 2021 WL 1907790 (N.D. Cal. May 12, 2021) (holding parents’ rights violated where teacher conducted blood-sugar tests on willing students); *Troxel*, 530 U.S. at 65–66 (plurality op.) (holding parents have right to determine child’s associates without mentioning wishes of child); *Gomes v. Wood*, 451 F.3d 1122, 1128 (10th Cir. 2006) (holding state may maintain temporary custody of child only “in an emergency situation”).

In sum, the Does have plausibly alleged social transitioning is a form of healthcare treatment and that the Law and Policy violate their right to consent when the state seeks to socially transition their children.

b. Parents have the right to consent when the state seeks to make important decisions in the lives of their children.

Even if social transitioning were not healthcare treatment, the Does have plausibly alleged the Law and Policy violate their right to consent when the state seeks to make “important decisions” in their children’s lives. *H.L. v. Matheson*, 450 U.S. 398, 411 (1981); *see also Gerson v. Logan River Acad.*, 20 F.4th 1263, 1280 (10th Cir. 2021) (noting that “[p]arents can and must make many decisions on behalf of their children” (cleaned up)). Parents have the “primary role” in raising their children, *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), and the Constitution protects those decisions that go to the “heart of parental decision-making,” *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005). Among the decisions protected are decisions about child visitation, *Troxel*, 530 U.S. 57, whether to send children to private school, *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925), the subjects children can be taught, *Meyer v. Nebraska*, 262 U.S. 390 (1923), whether children can go out in public at night, *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 952 (9th Cir. 1997), and whether children have access to birth control at school, *Alfonso*, 606 N.Y.S.2d at 265–66.

The decision whether to socially transition a child falls squarely within these precedents. That decision has significant consequences that are both immediate and that are likely to send reverberations throughout the child’s life course. FAC ¶¶ 45–50. Because of the consequential nature of this decision, and because children are too immature to make it on their own, *id.* ¶¶ 51–52, 57, the decision “reside[s] first” in the parents. *Troxel*, 530 U.S. at 65 (plurality op.); *see also Tennessee v. Cardona*, No. CV 2: 24-072-DCR, 2024 WL 3019146, at *30 (E.D. Ky. June 17, 2024) (holding “parents retain a constitutionally protected right to guide their own children on matters of identity,

including the decision to adopt or reject various gender norms and behaviors”), *stay pending appeal denied*, 24-5588, 2024 WL 3453880 (6th Cir. 2024), *stay pending appeal denied*, *DOE v. Louisiana*, 144 S. Ct. 2507 (2024); *Tatel v. Mt. Lebanon Sch. Dist.*, No. CV 22-837, 2024 WL 4362459, at *31 (W.D. Pa. Sept. 30, 2024) (“Who decides how to determine a young child’s gender identity goes to the heart of parental decision-making authority on a matter of greatest importance.”); *Mirabelli v. Olson*, No. 3:23-cv-00768-BEN-WVG, 2023 WL 5976992, at *9 (S.D. Cal. Sept. 14, 2023) (concluding school district’s “policy of elevating a child’s gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that . . . choice, is . . . foreign to federal constitutional . . . law”); *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 522CV04015HLTGE, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022) (parents “have [the right to] have a say in what [their] minor child[ren are] called” by their school).

Contrary to Defendants’ suggestion, socially transitioning students at school without parental consent does not fall within the scope of schools’ implied authority under the *in loco parentis* doctrine. Under that doctrine, schools have “inferred parental consent” that gives them “a degree of authority . . . commensurate with the task that the parents ask the school to perform”—namely, to educate their children. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2052 (2021) (Alito, J., concurring); *see also Vernonia Sch. Dist. 47 v. Acton*, 515 U.S. 646 (1995). And because parents have impliedly delegated this slice of their parental authority to schools, parents “do not have a constitutional right to control each and every aspect of their children’s education and oust the state’s authority over that subject.” *Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998) (holding parental right does not include authority to

send child to public school on a part-time basis). But socially transitioning students is not within the scope of that inferred delegation. Instead, parents retain the right to decide whether children are socially transitioned at school, just as parents retain the right to decide their children's religious upbringing. *Edwards*, 482 U.S. at 584 ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance [religion.]"). As the Supreme Court held almost 100 years ago, the state's authority to educate children does not turn them into "mere creature[s] of the state." *Pierce*, 268 U.S. at 535.

Resisting this conclusion, Defendants invoke the line of cases holding parents do not have a right to dictate what schools teach their children, *see, e.g., Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995), or how schools teach their children, including things like "the hours of the school day," "the timing and content of examinations," and "the individuals hired to teach," *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005). But these cases are not analogous to social transitioning. While schools' core purpose is to "educat[e]" students, Colo. Const. art. IX sec. 2, schools have no special role—much less competence—in deciding whether a child should be socially transitioned. Unlike decisions regarding the content of curriculum, the hours of the school day, or traditional anti-discrimination provisions regarding race, sex, sexual orientation, *etc.*, the impact of social transitioning on the child's life stretches far beyond the classroom. FAC ¶¶ 48–52; *see also Cass Review* at 158 (noting that "[t]he importance of what happens in school cannot be underestimated").

The Commissioner asserts the Court should "defer" to the state's judgment that every child who seeks to be socially transitioned should be, Comm'r Mot. at 10 (citing

New Jersey v. T.L.O., 469 U.S. 325, 340 (1985)), but this assertion ignores the FAC’s allegations that minors must “receive a careful professional evaluation . . . [b]efore social transitioning” and that “it can be permissible for parents to say ‘no.’” FAC ¶¶ 55, 58. Deference to schools is not warranted when, as here, the school’s actions “violate[a] substantive constitutional guarantee.” *T.L.O.*, 469 U.S. at 342 n.9.

Moreover, one of the primary rationales underlying the *Brown / Blau* line of cases is that giving parents the right to dictate what or how schools educate children would present intractable management problems because different sets of parents would invariably want their children to be taught conflicting things or subject to different rules. *Brown*, 68 F.3d at 534 (noting that “[i]f all parents had a . . . constitutional right to dictate . . . what the schools teach their children, the schools would be forced to cater a curriculum for each student”). But social transitioning does not present this concern. Schools can defer to parents regarding the transition of their own children without impacting other parents’ rights. Indeed, the District already requires parental permission for a host of school-based activities for their children, like field trips, the distribution of medication, and organized sports. See Field Trips and Excursions, FAC Ex. N; Administering Medication to Students, FAC as Ex. O; Constitution of the Colorado High School Activities Association § 1780, FAC as Ex. P. Accordingly, the logic of *Brown / Blau* does not apply here.

Related, the Commissioner also contends parents do not have the right to “override” a state’s nondiscrimination laws as applied in schools, Comm’r Opp’n at 9, but the case she cites—*Runyon v. McCrary*—is inapposite. *Runyon* held that parents do not have the right to send their children to racially segregated schools in violation of the Equal Protection Clause and 42 U.S.C. § 1981. 427 U.S. 160, 178 (1976). That is not remotely

analogous to the right the Does advance. The Does do not assert the right—nor do they want—to send their children to schools without *other* transgender-identifying students. Rather, they assert only the right to parent *their own* children.

Defendants contend the Law and Policy merely “honor [the child’s] decision” as to his or her gender identity. Comm’r Mot. at 12; District Mot. at 17. But as discussed, this contention presupposes children are capable of making that decision on their own. Moreover, Defendants may not so easily duck responsibility for their own actions. Under the Law and Policy, the District enforces children’s choices through coercive policies requiring affirmation of the child’s new identity. By this active participation, the District is impermissibly enabling children to make a major life choice on their own. Colorado may have “decided [children are sufficiently mature] to determine how they are addressed” at school, Comm’r Mot. at 10, but that decision violates the constitution, *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (noting children are “vulnerable . . . to negative influences and outside pressures” and often make “impetuous and ill-considered . . . decisions”).

Finally, the Commissioner contends schools are required to socially transition students upon their request under the Biden Administration’s new regulations interpreting Title IX. Comm’r Mot. at 6. But those regulations exceed the Executive Branch’s statutory authority. *Tennessee v. DOE*, 104 F.4th 577 (6th Cir. 2024); *see also Louisiana*, 144 S. Ct. 2507 (rejecting stay). More importantly, those regulations (like their predecessors) acknowledge “the right of parents to act on behalf of their minor child,” which includes the right to determine the child’s gender identity in the school setting. 34 C.F.R. 106.6(g); *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 2024 WL 1833438, 89 FR 33474-01, *33822 (Apr. 29,

2024) (“[N]othing in Title IX or the final regulations may be read in derogation of any legal right of a parent . . . to act on behalf of a minor child”). Indeed, the United States admits Title IX does not purport to override any parental right that may exist “to have school employees consult with them” before socially transitioning their children. Br. of United States in *Tennessee v. Cardona*, No. 24-5588 (6th Cir. 2024) at 43, attached as Ex. B.⁵ And even if Title IX required schools to socially transition students upon their request without regard to parental consent, it would be unconstitutional for the same reasons the Law and Policy are unconstitutional. *Tennessee*, 2024 WL 3019146, at *30.

In short, parents’ rights do not stop at “the threshold to the schoolhouse door.” *C.N.*, 430 F.3d at 185 n.6. And “[i]t is not educators, but parents who have primary rights in the upbringing of children.” *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000). Parents cannot play this crucial role in the lives of their children if schools are facilitating children’s social transition without parental consent.

c. Parents have the right to maintain the integrity of their family.

The Does have plausibly alleged the Law and Policy infringe their right to “family integrity.” *Griffin v. Strong*, 983 F.2d 1544, 1549 n.6 (10th Cir.1993); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality op.). This aspect of the parental right protects parents against state action that constitutes an “unwarranted intrusion” in the family. *Thomas v. Kaven*, 765 F.3d 1183, 1196 (10th Cir. 2014).

Socially transitioning children without obtaining parental consent or providing parental notice constitutes “unwarranted intrusion” in the family. FAC ¶ 62–65. It

⁵ The Court should take judicial notice of this document under FRE 201 without converting Defendants’ Motions into Motions for Summary Judgment. *Richardson*, 565 F.3d at 702 n.22.

fundamentally alters the nature of the “deep attachments” parents have with their children as sons or daughters. *Rotary Club*, 481 U.S. at 545. It “deprives . . . parents the opportunity to counter influences on” their children they disagree with. *Arnold v. Bd. of Educ. of Escambia Cnty.*, 880 F.2d 305, 312 (11th Cir. 1989). It creates “mistrust among the members of [plaintiff’s] family” by causing children to view their parents as enemies. *Patel v. Searles*, 305 F.3d 130, 134, 140 (2d Cir. 2002). And it impermissibly “obstructs the parental right to choose the proper method of resolution” of the question of whether the child should undergo a social transition. *Gruenke*, 225 F.3d at 306.

The District argues the Does’ family integrity claim fails because they did not allege an “intent” to interfere with protected family relationships. District Mot. 15 (quoting *Griffin*, 983 F.2d at 1548). As the Commissioner acknowledges, however, Comm’r Mot. at 14–15, because the Does are not challenging isolated actions of executive officials—but rather laws and policies and the actions District personnel took to implement them—the “fundamental rights approach” applies here. *Halley v. Huckaby*, 902 F.3d 1136, 1153 n.13 (10th Cir. 2018); see also *Abdi v. Wray*, 942 F.3d 1019, 1028 (10th Cir. 2019) (holding that challenges to the “implementation of . . . policies” are analyzed under the fundamental rights approach). And under the fundamental rights approach, the Does are not required to allege the state had an “intent to interfere” with their family relationships. *Halley*, 902 F.3d at 1153 n.13. Instead, the sole question is whether the Law and Policy—and the implementing actions of District personnel—constitute an unwarranted intrusion in the family. For the reasons stated, they do.

Even if the Does were required to allege intent, they have done so. As for the Does’ claim for retrospective relief against the District, the Does allege the Counselor (1)

intentionally assumed the role as decision maker regarding A.D.'s request to be socially transitioned despite knowing the Does did not approve and (2) intentionally deceived the Does regarding A.D.'s social transition despite knowing her mental health was deteriorating. FAC ¶¶ 102–104, 117–19, 126–29. These allegations give rise to a plausible inference the Counselor's actions "were directed at the parent-child relationship with knowledge that the conduct would adversely affect that relationship." *Id.* ¶ 183.

The same is true with respect to the Does' claim for prospective relief. Like the Counselor's actions, the Does allege the Law and Policy "are directed at the parent-child relationship with knowledge that schools' conduct will adversely affect that relationship." FAC ¶ 180. Moreover, that intent is manifest on the face of the Law and Policy. The Policy explicitly provides—and the Law impliedly contemplates—that parental consent is not required. *Id.* ¶¶ 67–69, 74. The fact the Law and Policy allow schools to bypass parental consent on their face plausibly establishes intent. *Adarand Constructors*, 515 U.S. at 2013 (noting that unconstitutional intent may be inferred on statute's face).

The Commissioner also argues the Law and Policy do not violate the right to family integrity because they do not constitute a "total prohibition" on the parental right, but that's wrong too. The right at issue is the Does' right to consent when the state seeks to socially transition their children. By authorizing the District to socially transition children without parental consent, the Law and Policy constitute a "total prohibition" of that right. Contrary to the Commissioner's suggestion, the state need not completely deprive parents of custody over their children to violate the right to family integrity. *See, e.g., Thomas*, 765 F.3d at 1196 (holding state violated right to family integrity through temporary hold on child's hospital discharge); *Gruenke*, 225 F.3d at 306 (same with respect to school coach's

interference with family crisis); *Arnold*, 880 F.2d at 312 (same with respect to school officials' coercion of child to obtain abortion).

In any event, the Law and Policy “directly and substantially” interfere with the Does’ parental rights. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). Under their plain text, the Law and Policy authorize schools to socially transition children without parental consent in direct contravention of the parental right. Accordingly, this case is unlike *Stewart v. City of Oklahoma City*, where the plaintiff claimed an interference with his right to family integrity where he “voluntarily declin[ed] to attend a handful of family . . . events” in response to the defendants’ actions. 47 F.4th 1125, 1139 (10th Cir. 2022). Here, the Law and Policy themselves authorize schools to infringe the Does’ parental rights.

2. The Does’ allegations satisfy *Glucksberg*.

Defendants contend the Does are asking the Court to extend their rights in contravention of *Washington v. Glucksberg*, 521 U.S. 702 (1997). This argument fails.

The Supreme Court first acknowledged the parental right over a century ago. *Meyer*, 262 U.S. at 402; see also *Yoder*, 406 U.S. at 232 (noting that parental right is “established beyond debate as an enduring American tradition”). Indeed, *Glucksberg* recognized parents’ fundamental right to “direct the education and upbringing of [their] children.” 521 U.S. at 720. Accordingly, parents are not required to demonstrate the existence of this right anew in every case. Instead, the question is whether the plaintiff’s asserted right “fall[s] within” the logic of the previously recognized right. *Dubbs*, 336 F.3d at 1203; see also *Troxel*, 530 U.S. at 65–66 (plurality op.) (concluding state violated parental right to determine child’s associates without conducting historical analysis); *id.* at 77–78 (same) (Souter, J., concurring); *id.* at 80 (same) (Thomas, J., concurring); *C.N.*, 430 F.3d at 184 (holding question is whether asserted right goes to the “heart of parental

decision-making”). *Accord Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (noting that question was not whether the Court should create a “new . . . right to same-sex marriage” but whether the right to same-sex marriage falls within “the right to marry in its comprehensive sense”). The parental rights the Does seeks to vindicate here fall squarely within the scope of that previously announced right.

Moreover, as noted, the parental right is protected by substantive due process *and* the First Amendment. Because *Glucksberg* does not apply to First Amendment claims, 521 U.S. at 720–21, Defendants’ *Glucksberg* argument has no force.

The Does acknowledge that old Tenth Circuit authority housed the parental right in substantive due process only. *See, e.g., Griffin*, 983 F.2d at 1547. But *Rotary Club* says otherwise, 481 U.S. at 545 (noting that the “First Amendment protects . . . family relationships”), and more recent Tenth Circuit authority has acknowledged the right also arises under the First Amendment, *Wirsching v. Colorado*, 360 F.3d 1191, 1198 (10th Cir. 2004) (evaluating First Amendment family integrity claim on its merits); *see also Reinhardt v. Kopcow*, 66 F. Supp. 3d 1348, 1359 (D. Colo. 2014) (noting that family integrity claim arises under “First and Fourteenth Amendment”). Moreover, the out-of-circuit precedent *Griffin* relied on has been abrogated. *See Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018) (holding parental right arises under both First and Fourteenth Amendments); *Easterling v. Thurmer*, 880 F.3d 319, 323 (7th Cir. 2018) (same).

Finally, even if the parental right were protected by substantive due process alone, and even if the Does were seeking an extension of that right, such an extension is warranted here. Under the common law, parents had the right “to speak and act on . . . behalf” of their minor children. *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990)

(Kennedy, J., concurring in part and dissenting in part); see also Blackstone, 1 COMMENTARIES at 447 (noting parental right to “sett[le one’s children] properly in life, by preventing the ill consequence of too early and precipitate [decisions]”). And this concept of the “authority of parents in the lives of their children persisted in the decades leading up to the ratification of the Fourteenth Amendment.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 835 (2011) (Thomas, J., concurring). Based on these “deeply rooted” common-law principles and traditions, *Glucksberg*, 521 U.S. at 721, it beggars belief to think the founding (or second founding) generation would have thought schools could deviate from parents’ wishes regarding their children’s gender identification.

* * *

In the alternative, even if the Does did not have the right to *consent* when the state socially transitions their children, they at least have the right to *notice*. *Hodgson*, 497 U.S. 483 (noting common-law right of parents to be “notified of their children’s actions”) (Kennedy, J., concurring in part and dissenting in part). And in the alternative to that, the Does at least have the right not to be lied to by their children’s school. *Willey*, 680 F. Supp. 3d at 1277. The Policy fails even that modest command.

3. The Law and Policy do not satisfy any standard of review.

a. *Strict scrutiny*

The parental right is “fundamental.” *Troxel*, 530 U.S. at 67 (plurality op.); *Glucksberg*, 521 U.S. at 720. As such, infringements of it must satisfy strict scrutiny. *Reno v. Flores*, 507 U.S. 292, 301–302 (1993). Thus, the Law and Policy—and District personnel’s actions implementing them—are subject to strict scrutiny. *Id.*; *Abdi*, 942 F.3d at 1028; see also *United States v. Bear*, 769 F.3d 1221, 1229 (10th Cir. 2014).

To satisfy strict scrutiny, Defendants must show the infringement is “narrowly tailored to serve a compelling government interest.” *Reno*, 507 U.S. at 302; *see also Kitchen v. Herbert*, 755 F.3d 1193, 1218 (10th Cir. 2014). Considering the fact-intensive nature of this inquiry, the Court should not decide the question now. *See Thomas*, 765 F.3d at 1196 (noting that “[w]hen the facts have not yet been fully brought out through discovery, it is difficult for the court to adequately conduct the relevant constitutional test”); *Willey* 2023 WL 9597101, at *8 (“It will be more appropriate to decide [whether the policy complies with strict scrutiny] later in litigation, aided by . . . a more developed record.”).

If the Court decides to resolve the question, Defendants have failed to satisfy their burden. Defendants articulate only one governmental interest—“prohibiting discrimination against gender-diverse students” at school. Comm’r Mot. at 18; District Opp’n to PI Mot. at 22–23 (similar). This interest does not satisfy strict scrutiny.⁶

- i. The state’s interest in anti-discrimination does not justify bypassing parental consent.

While the prevention of discrimination against transgender-identifying children may be compelling when the child’s parents consent to the child’s social transition, it is not compelling in the absence of parental consent. Absent social transitioning, most transgender-identifying children are likely to desist. FAC ¶¶ 29, 54. For this reason, a child’s request to undergo a social transition should *begin* an individualized evaluation process—involving the child’s parents—designed to determine whether a transition would benefit the child. *Id.* ¶ 58. Considering (1) the likely transitory nature of the transgender

⁶ To the extent Defendants invoke additional governmental interests, the Does incorporate their Memorandum and Reply in Support of their Motion for Preliminary Injunction (ECF 2-1 and 34) at 17–21 and 23–25, respectively, under Rule 10(c).

identity, *id.* ¶ 46, (2) the possibility that social transitioning will cause that identity to persist, *id.* ¶ 48, and (3) the serious ramifications of persistence on the child’s life course, *id.* ¶ 50, it is irrational for Defendants to rely solely on minors’ self-attestation of their gender identity. Instead, the child’s parents must be involved, and if parents say “no,” then—absent a finding of parental unfitness—that decision controls, and Defendants lack any anti-discriminatory interest with respect to that child.

Moreover, cutting parents out of the decision-making process violates the presumptions of parental fitness and affection. *Parham*, 442 U.S. at 603; *see also Troxel*, 530 U.S. at 65 (plurality op.); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (holding unconstitutional statute that presumed unwed fathers were unfit). While the state can overcome these presumptions by making specific findings that specific parents are unfit or will not act in the best interests of their children, the Law and Policy do not require such a finding before the District socially transitions children. This not only violates the constitution, but it also harms children, which is precisely what these presumptions were designed to guard against.

The Does’ case bears this out. The Does are fit parents who love their children. FAC ¶ 17. When the Counselor facilitated A.D.’s social transition, she had no reason to believe otherwise. *Id.* ¶ 104. Instead, the Counselor knew only that A.D. did not believe the Does would be “supportive” of the transition. *Id.* ¶ 103. But that decision—which was based on the Does’ conclusion that A.D.’s transgender identity was not a permanent identity state—was within the bounds of permissible parental decision making. *Id.* ¶ 89. And A.D. is now trying to return to living life as a girl, just as the Does expected would happen eventually, despite Defendants’ efforts to socially transition her. *Id.* ¶ 89, 135.

For the same reasons, socially transitioning every child who asks for it is not narrowly tailored to prevent discrimination. As noted, most children with a transgender identity will desist, and instead of transitioning, some children simply need counseling to understand the source of their feelings. *Id.* ¶¶ 46, 56. Further, “[s]ocially transitioning every [child] who asks for it is a ‘one-size-fits-all’ treatment approach that fails to account for the broader and unique issues the minor may be facing.” *Id.* ¶ 53. The categorical decision making required under the Law and Policy is the antithesis of narrow tailoring.

- ii. The state’s interest in anti-discrimination does not justify parental secrecy or lying to parents.

The Policy’s requirement that schools keep secrets from and lie to “unsupportive” parents also fails strict scrutiny. Indeed, the District utterly fails to explain how these features of the Policy could possibly prevent discrimination against transgender-identifying children, much less how doing so is narrowly tailored to that end. Under the Law and Policy, “unsupportive” parents have no power to halt a social transition their child wants. Accordingly, keeping “unsupportive” parents in the dark does not protect the child from discrimination at school in any way. *See Mirabelli*, 2023 WL 5976992, at *14 (“The reasons proffered by the defendants [for parental secrecy do not] pass . . . the rational basis test[.]”); *Ricard*, 2022 WL 1471372, at *8 n.12 (noting that “there are real questions” whether parental secrecy “would satisfy even the rational basis standard”); *see also Willey*, 680 F. Supp. 3d at 1277 (holding that “preclude[ing] . . . school district personnel . . . from answering . . . a parent’s or guardian’s inquiry as to whether their child is being called by other than their legally given name . . . creates a likely constitutional problem”).

The District points out the Policy “encourage[s]” children to involve their parents in the process, District Opp’n to PI Mot. at 24, but that’s not good enough. The *District* is

socially transitioning children. The *District* thus has the obligation to tell parents what it is doing, or at the very least not to lie about it.

b. Rational basis review

The Law and Policy—and District personnel’s actions implementing them here—also fail rational basis review. To satisfy rational basis review, laws must “bear a rational relationship to a legitimate government interest.” *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009). For the same reasons the prevention of discrimination is insufficient to satisfy strict scrutiny, it is also insufficient to satisfy rational basis review. Defendants have no valid anti-discriminatory interest in socially transitioning children without parental consent, and socially transitioning all children who ask for it irrespective of parental consent is irrationally overbroad. Moreover, the District has no valid anti-discriminatory interest in keeping secrets from and lying to parents, and doing so based on nothing more than children’s say-so is also irrationally overbroad. Accordingly, the Law and Policy—and District personnel’s actions implementing them here—fail rational basis review.

c. The “shocks the conscience” standard does not apply, and the Does have met it in any event.

The District argues the facts here do not “shock the conscience.” As discussed, however, because this case involves challenges to provisions of law—and government officials’ implementation thereof—the “fundamental rights approach” and not “shocks the conscience” review applies. *Halley*, 902 F.3d at 1153 n.13; *Abdi*, 942 F.3d at 1028.

Even if the “shocks the conscience” standard applied, the Counselor’s actions here shocked the conscience. When state officials have ample time and opportunity to engage in “actual deliberation” before taking some act, acts that are “deliberately indifferent” to a

“great risk of serious injury” shock the conscience. *Green v. Post*, 574 F.3d 1294, 1303 (10th Cir. 2009)). Here, the Counselor facilitated A.D.’s social transition, knowing that A.D. had mental-health struggles, while repeatedly deceiving the Does and contradicting their express wishes, despite the fact the Counselor knew her actions were contributing to setting A.D. down the road to likely having a mastectomy later in life. FAC ¶¶ 100–129. These actions were “deliberately indifferent” to a “great risk of serious injury.”

The District argues the Does’ claim is barred under *Doe v. Woodard*, but the state action in *Doe* did not create a risk of serious harm to the child. 912 F.3d 1278, 1301 (10th Cir. 2019). And even if the rule in *Doe* applied here, the Counselor’s actions ran “afoul of traditional ideas of fair play and decency.” *Id.* Accordingly, they shock the conscience.

C. The Does state a plausible procedural due process claim.

The Does plausibly allege a violation of their procedural due process rights. When deciding whether to socially transition children at school, District personnel must make the factual determinations that: (1) the child’s chosen name “reflect[s his or her] gender identity,” FAC ¶¶ 67, 73; and (2) the child’s parents are “unsupportive” of the transition, *id.* ¶ 80. Because these determinations involve case-by-case adjudications implicating parents’ substantive rights, the procedural requirements of the Due Process Clause apply. *J.B.*, 127 F.3d at 925 (concluding state action implicating parental right triggers procedural protections); *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997) (same). Indeed, the procedural protections required by the Due Process Clause apply even if the Law and Policy satisfied substantive review. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (“When government action depriving a person of life, liberty, or property survives substantive . . . scrutiny, it must still be implemented in a fair manner.”).

The Law and Policy do not provide the Does the baseline requirements of procedural due process—notice and opportunity to be heard—prior to (or even after) these determinations are made. *Mathews v. Eldridge*, 424 U.S. 319, 338 (1976) (“The essence of due process is the requirement that “a person . . . be given notice of the case against him and opportunity to meet it.” (cleaned up)); see also *Gomes*, 451 F.3d at 1128 (holding the state must always provide at least post-deprivation hearing when depriving parental rights). Accordingly, the Law and Policy violate the Due Process Clause.

The District claims *Lee* stands for the proposition that parents lack the right to be notified of their children’s actions at school, but *Lee* held only that parents have no right “to receive notice and information about . . . an after-school, voluntary extracurricular club.” 2024 WL 2212261, at *7 n.7. Here, by contrast, the Does seek important information about the way their children are being treated in the compulsory school environment itself. Accordingly, *Lee* is inapposite.

III. THE ATTORNEY GENERAL IS A PROPER DEFENDANT

Finally, the FAC alleges plausible claims for prospective relief against the Attorney General under both CADA and the Law. First, as discussed, because the Commissioner argues schools are required to socially transition students without regard to parental consent under CADA, the Court should construe the FAC to seek prospective relief against enforcement of CADA. *Supra* at 17–18. Under CADA, the Attorney General has both (1) the right to file charges on behalf of aggrieved students and (2) the obligation to prosecute charges that go to a formal hearing. 3 Code Colo. Regs. 708-1, Rules 10.4(A), 10.8(A)(3) (“The case in support of the complaint shall be presented at the hearing by the

attorney general's office"). Accordingly, the Attorney general has a particular duty to enforce CADA. *303 Creative*, 6 F.4th at 1174 (holding same).

Moreover, the FAC also plausibly alleges the Attorney General is willing to exercise these rights and obligations. The Attorney General has joined amicus briefs around the country touting the purported importance of school policies that require schools to socially transition children upon their request. FAC ¶ 19; *see also id.* Ex. A at 1 (noting the "compelling interest in providing public schools where [transgender-identifying] students . . . can thrive"). In addition, the Attorney General has instituted lawsuits seeking to enjoin perceived harm to youth. *Id.* ¶ 19. These facts raise the plausible inference the Attorney General is willing to exercise his powers to enforce CADA. *303 Creative*, 6 F.4th at 1174 (noting that "Colorado's strenuous assertion that it has a compelling interest . . . indicates that enforcement is anything but speculative"). This conclusion is particularly true considering the Attorney General has failed to disavow enforcement of CADA. *Id.*

Second, the same conclusion applies with respect to the Law. The Law provides, among other things, that school districts must enact policies implementing its "chosen name" requirements. Colo Rev. Stat. § 22-1-145(5). The Attorney General has authority to bring an enforcement action against "any government authority" for violating state law. Colo Rev. Stat. § 24-31-113. In addition, "at the request of the governor, secretary of state, state treasurer, . . . or commissioner of education," the Attorney General is required to "prosecute . . . all suits relating to matters connected with their departments." Colo. Rev. Stat. Ann. § 24-31-101(h). These provisions give the Attorney General the particular duty to enforce the Law. *See Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 758, 760 (10th Cir. 2010) (holding state attorney general had a particular duty to enforce statute

under similarly worded state law). And for the same reasons as discussed with respect to CADA, the FAC also plausibly alleges the Attorney General is willing to exercise this duty, a duty that he has not disavowed.

Accordingly, the FAC alleges plausible claims for prospective relief against the Attorney General under both CADA and the Law.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motions.

Respectfully submitted,

Dated: November 26, 2024.


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EXHIBIT A

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Gender Identity Disorder (Code C94362)

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Terms & Properties

Preferred Name: Gender Identity Disorder

Definition: A disorder characterized by a strong and persistent cross-gender identification (such as stating a desire to be the other sex or frequently passing as the other sex) coupled with persistent discomfort with his or her sex (manifested in adults, for example, as a preoccupation with altering primary and secondary sex characteristics through hormonal manipulation or surgery).

Label: Gender Identity Disorder

NCI Thesaurus Code: C94362 ([Search for linked caDSR metadata](#)) ([search value sets](#))

NCI Metathesaurus Link: C0017250 ([see NCI Metathesaurus info](#))

Synonyms & Abbreviations: ([see Synonym Details](#))
Gender Identity Disorder

External Source Codes:
UMLS CUI C0017250

Other Properties:

Name	Value (qualifiers indented underneath)
code	C94362
Semantic_Type	Mental or Behavioral Dysfunction

Additional Concept Data:
Defined Fully by Roles: No

URL:https://ncit.nci.nih.gov/ncitbrowser/ConceptReport.jsp?dictionary=NCI_Thesaurus&version=24.08d&ns=ncit&code=C94362

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EXHIBIT B

No. 24-5588

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

STATE OF TENNESSEE, et al.,
Plaintiffs-Appellees,

CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL;
A.C., by her next friend and mother Next Friend, Abigail Cross,
Intervenors-Plaintiffs-Appellees,

v.

MIGUEL CARDONA, in his official capacity as Secretary of Education, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Kentucky

BRIEF FOR APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

The federal government respectfully requests oral argument. The district court preliminarily enjoined the Department from enforcing, in six states, a regulation implementing Title IX's prohibition on discrimination on the basis of sex in education programs or activities receiving federal financial assistance. Oral argument would facilitate the Court's consideration of the case.

INTRODUCTION

Title IX prohibits sex discrimination in federally funded education programs and activities. As the Supreme Court has made clear, “Congress gave the statute a broad reach” to cover a “wide range of intentional unequal treatment.” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Congress also authorized the Department of Education to issue rules to effectuate the statute’s sweeping prohibition on sex-based discrimination.

In April 2024, the Department exercised that authority by issuing a rule that makes a variety of amendments to its Title IX regulations. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (Rule). The Rule does many things, ranging from revising recordkeeping requirements to guaranteeing access to lactation spaces for breastfeeding students. But plaintiffs have challenged only three provisions of the Rule—and in particular, how those provisions apply to discrimination on the basis of gender identity.

The first such provision (§ 106.10) clarifies that discrimination on the basis of gender identity is necessarily a form of discrimination on the basis of sex. The second (§ 106.31(a)(2)) provides that a school violates Title IX when it differentiates on the basis of sex in a way that causes a person more than de minimis harm that Congress has not permitted; as relevant here, it means that individuals must be permitted to use restrooms and locker rooms consistent with their gender identity. And the third (the

definition of hostile-environment harassment in § 106.2) recognizes that unwelcome sex-based conduct that is “subjectively and objectively offensive” and “so severe or pervasive that it limits or denies” a person’s ability to participate in or benefit from an educational program constitutes hostile-environment harassment. All three provisions effectuate Title IX’s “broad” prohibition on sex discrimination, *Jackson*, 544 U.S. at 175, and all three are consistent with precedent of this Court and the Supreme Court.

Plaintiffs’ challenges to these provisions are meritless. Section 106.10 flows directly from the reasoning of the Supreme Court’s decision in *Bostock v. Clayton County*, which recognizes that it is “impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” 590 U.S. 644, 660 (2020). Section 106.31(a)(2) likewise follows directly from the statutory text, providing that it violates the statute’s nondiscrimination mandate to treat a person differently on the basis of sex when (a) the statute does not otherwise permit such disparate treatment, and (b) the differential treatment causes more than de minimis harm. And § 106.2’s definition of hostile-environment harassment not only requires recipients to address conduct that denies students the right to an education free from sex discrimination, but also is consistent with the standards that courts—including this one—have long applied in both the Title IX and Title VII contexts.

The district court nevertheless entered a sweeping preliminary injunction barring the Department from enforcing the entirety of the Rule in Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia. In so doing, it wrongly characterized the Department as seeking to redefine sex as gender identity and refused to apply *Bostock*'s central teaching—discrimination on the basis of gender identity is necessarily discrimination on the basis of sex—to the materially indistinguishable language of Title IX. Beyond that, it erroneously found that the ordinary costs associated with implementing the Rule amounted to irreparable harm sufficient to warrant preliminary relief. And if that were not enough, it failed to justify an injunction against the entirety of the Rule when plaintiffs challenged only three provisions.

This Court should vacate the preliminary injunction.

STATEMENT OF JURISDICTION

Plaintiffs and plaintiff-intervenors asserted jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1361, as well as 5 U.S.C. §§ 553 and 701-706. Compl., RE1, PageID #11-12; Intervenors' Compl., RE72, PageID #1489. The district court entered a preliminary injunction on June 17, 2024. *See* Op., RE100, PageID #1996-2088. Defendants timely appealed on June 24, 2024. Notice of Appeal, RE103, PageID #2093-95. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

In April 2024, the Department of Education issued a rule making numerous changes to its regulations implementing Title IX of the Education Amendments of 1972. After finding that plaintiffs were likely to succeed on challenges to three of the new or changed provisions, the district court preliminarily enjoined the Department from enforcing the entire Rule within six states.

The question presented is whether the district court erred in entering a preliminary injunction barring the Department from enforcing the Rule, in its entirety, within those six states.

STATEMENT OF THE CASE

A. Title IX and the Final Rule

Title IX 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). “Congress gave the statute[’s]” prohibition on sex discrimination “a broad reach” subject only to a “list of narrow” statutory exceptions and exclusions. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173, 175 (2005); *see* 20 U.S.C. §§ 1681(a), 1686. Congress also authorized the Department to “issu[e] rules, regulations, or orders of general applicability ... consistent with achievement of the objectives of the statute.” 20 U.S.C. § 1682. And Congress established a detailed administrative scheme requiring the Department to first attempt to secure compliance

through voluntary means before the Department may suspend or terminate federal financial assistance. *See id.* §§ 1234g(a), 1682-1683; *see also* 34 C.F.R. §§ 100.7(a)-(d), 100.8(a).

Since Title IX’s enactment, the Department has promulgated regulations implementing the statute’s prohibition on sex discrimination, including in 2020. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (2020 Regulation). One month after publication of the 2020 rule, the Supreme Court held that the prohibition on discrimination “because of ... sex” in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), necessarily encompasses discrimination because of sexual orientation and gender identity. *See Bostock v. Clayton County*, 590 U.S. 644, 660 (2020). Following *Bostock*, the President directed the Department to review the 2020 regulation and existing guidance “for consistency with governing law.” Exec. Order No. 14,021, § 2(a), 86 Fed. Reg. 13,803, 13803 (Mar. 8, 2021).

Following an extensive public engagement process, the Department issued the Rule. Among other things, the Rule streamlines requirements related to Title IX Coordinators, 34 C.F.R. § 106.8(a); revises recipients’ notice of nondiscrimination and record-keeping requirements, *id.* § 106.8(c), (f); ensures access to lactation spaces for breastfeeding students and employees, *id.* §§ 106.40(b)(3)(v), 105.57(e)(2); addresses a recipient’s response to sex discrimination, *id.* § 106.44; and provides recipients

additional flexibility regarding procedures to respond to claims of sex discrimination, including sex-based harassment, *id.* §§ 106.45-106.46.

Plaintiffs’ challenges concern three other provisions of the Rule, and particularly those provisions’ application to discrimination on the basis of gender identity. Section 106.10 describes the scope of prohibited sex discrimination under Title IX. It provides that “[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.” 34 C.F.R. § 106.10. As the Department explained, “discrimination on each of those bases is sex discrimination because each necessarily involves consideration of a person’s sex, even if that term is understood to mean only physiological or ‘biological distinctions between male and female.’” 89 Fed. Reg. at 33,802 (quoting *Bostock*, 590 U.S. at 655).

Separately, § 106.31(a)(2) details when separation or differentiation on the basis of sex constitutes prohibited sex discrimination. It sets out the general principle that Title IX permits “different treatment or separation on the basis of sex” only to the extent that such differential treatment or separation does not “discriminate[] ... by subjecting a person to more than de minimis harm.” 34 C.F.R. § 106.31(a)(2). The final sentence of § 106.31(a)(2) provides that a policy or practice that “prevents a person from participating in an education program or activity consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex.” *Id.* This provision also recognizes, however, that Congress carved out

certain contexts in which a school may permissibly differentiate on the basis of sex even though greater than de minimis harm may result. *Id.*; *see, e.g.*, 20 U.S.C.

§ 1681(a)(6) (membership in fraternities or sororities); *id.* § 1686 (sex-separate living facilities). The Rule does not alter the existing athletics regulation, which is the subject of a separate rulemaking. *See* 89 Fed. Reg. at 33,817.

Finally, § 106.2 defines many terms, including “sex-based harassment.” One form of such harassment is “[h]ostile environment harassment,” defined as “[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity (*i.e.*, creates a hostile environment).” 34 C.F.R. § 106.2. Section 106.2 explains that “[w]hether a hostile environment has been created is a fact-specific inquiry that includes consideration” of several enumerated factors. *Id.*

B. Prior Proceedings

1. District Court Proceedings

Plaintiffs are Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia, as well as an association representing religious educators and a high-school student from West Virginia, both of which intervened. Compl., RE1, PageID #9-11; Intervenor’s Compl., RE72, PageID #1490. Plaintiffs challenge the Rule’s treatment of gender identity, claiming that the application of certain provisions to contexts such

as restrooms and pronouns will cause them irreparable harm. *See* States’ Mot., RE19-1, PageID #859-61; Intervenor’s Mot., RE63-1, PageID #1397-99.¹

The district court preliminarily enjoined the Department from enforcing the entire Rule within the plaintiff states. *Op.*, RE100, PageID #2088. The court held that § 106.10’s inclusion of gender-identity discrimination in the scope of prohibited sex discrimination was contrary to Title IX, reasoning the Rule “would turn Title IX on its head by redefining ‘sex’ to include ‘gender identity.’” *Id.*, PageID #2011-23, 2086. The court rejected the Department’s reliance on *Bostock*, believing that the Supreme Court’s “holding was limited to the narrow issue of” “hiring and firing in employment.” *Id.*, PageID #2017, 2019 (quotation marks omitted). For much the same reason, the court concluded that the Rule’s reliance on “*Bostock*’s reasoning” was arbitrary because the “text, structure, purpose, and history” of Titles VII and IX “vary

¹ Numerous other challenges are pending in cases around the country. *See Alabama v. Cardona*, --- F. Supp. 3d ---, 2024 WL 3607492 (N.D. Ala. July 30, 2024) (denying preliminary injunction), *mot. for inj. pending appeal pending*, No. 24-12444 (11th Cir.); *Louisiana v. U.S. Dep’t of Educ.*, --- F. Supp. 3d ---, 2024 WL 2978786 (W.D. La. June 13, 2024) (granting preliminary injunction), *stay denied*, No. 24-30399, 2024 WL 3452887 (5th Cir. July 17, 2024); *Kansas v. U.S. Dep’t of Educ.*, --- F. Supp. 3d ---, 2024 WL 3273285 (D. Kan. July 2, 2024) (granting preliminary injunction), *mot. for stay pending appeal pending*, No. 24-3097 (10th Cir.); *Carroll Indep. Sch. Dist. v. U.S. Dep’t of Educ.*, --- F. Supp. 3d ---, 2024 WL 3381901 (N.D. Tex. July 11, 2024) (granting preliminary injunction); *Texas v. United States*, No. 24-86, 2024 WL 3405342 (N.D. Tex. July 11, 2024) (granting preliminary injunction); *Arkansas v. U.S. Dep’t of Educ.*, No. 24-636, 2024 WL 3518588 (E.D. Mo. July 24, 2024) (granting preliminary injunction); *Oklahoma v. Cardona*, No. 24-461, 2024 WL 3609109 (W.D. Okla. July 31, 2024) (granting preliminary injunction).

considerably.” *Id.*, PageID #2063. And the court concluded that the major-questions doctrine and Spending Clause required clearer congressional authorization for the Rule. *Id.*, PageID #2023-27.

The court also concluded that § 106.31(a)(2)’s de minimis harm standard contravened Title IX and was arbitrary and capricious. *Op.*, RE100, PageID #2020-23, 2065-72. The court questioned the Rule’s application of that standard to certain contexts involving sex separation (*e.g.*, restrooms) but not others (*e.g.*, membership in fraternities). *Id.*, PageID #2065. The court further faulted the Department for not addressing “potential risks posed to student and faculty safety,” *id.*, PageID #2067, from permitting individuals to access “intimate spaces like bathrooms and locker rooms” consistent with their gender identity, *id.*, PageID #2068. And the court opined that the Department “failed to account for the impact [of the Rule] on the constitutional right of parents to influence their children’s education.” *Id.*, PageID #2058.²

The court held that § 106.2’s definition of hostile-environment harassment contravened the First Amendment. *Op.*, RE100, PageID #2036-51. The court concluded that the Rule would “compel[] affirmation of gender identity” by requiring students and teachers to use “preferred rather than accurate pronouns” and “compel[] silence of opposing viewpoints.” *Id.*, PageID #2037 (quotation marks omitted). The

² The court rejected plaintiffs’ arguments concerning athletics, explaining that “the current regulations on athletics continue to apply.” *Op.*, RE100, PageID #2074.

court also concluded that the standard was “overbroad” and “vague.” *Id.*, PageID #2046.

As to the remaining factors, the court concluded that the equities favored plaintiffs and that plaintiffs faced irreparable injuries in the form of compliance costs, threatened loss of federal funding, interference with the plaintiff states’ sovereign interests, and harm to the plaintiff states’ citizens. *Op.*, RE100, PageID #2074-83. Despite the court’s recognition that plaintiffs challenged only certain provisions of the Rule, *id.*, PageID #2085, the court did not limit the injunction to the challenged provisions or to the gender-identity-related applications of the Rule that the court deemed invalid. Instead, the court enjoined the Rule in its entirety within the six plaintiff states. *Id.*, PageID #2088.

2. Appellate and Supreme Court Proceedings

The Department filed an emergency motion seeking to partially stay the injunction. *See* Dkt. 19. The Department asked the Court to stay the injunction except as to the following 2024 Rule provisions: (i) 34 C.F.R. § 106.31(a)(2), and (ii) 34 C.F.R. § 106.2’s definition of hostile-environment harassment as applied to discrimination on the basis of gender identity.

A motions panel denied the stay request. *See* Dkt. 41 (Stay Order). The panel concluded that “the district court likely concluded correctly that the Rule’s definition of sex discrimination exceeds the Department’s authority,” *id.* at 4, as “Title VII’s definition of sex discrimination under *Bostock* simply does not mean the same thing

for other anti-discrimination mandates,” *id.* at 5. It therefore concluded that “the preliminary injunction properly extends to three central provisions of the Rule: §§ 106.10, 106.2’s definition of hostile environment harassment, and 106.31(a).” *Id.* at 6. The panel then concluded that these provisions “appear to touch every substantive provision of the Rule,” as they all “implicate[] the new definition of sex discrimination.” *Id.* The panel therefore declined to stay any portion of the injunction. Judge Mathis dissented, explaining that he would “limit the injunction to the provisions Plaintiffs challenge.” *Id.* at 11 (Mathis, J., dissenting).

The Solicitor General filed an application asking the Supreme Court to partially stay the injunction pending appeal. *See* Application for a Partial Stay of the Injunction Entered by the United States District Court for the Eastern District of Kentucky, *Cardona v. Tennessee*, No. 24A79 (U.S. July 22, 2024). As of the date of this filing, that application remains pending.

SUMMARY OF ARGUMENT

I. The district court erred in holding that the Rule’s provision addressing the scope of sex discrimination—§ 106.10—exceeds the Department’s statutory authority by stating that gender-identity discrimination is a form of sex discrimination. That conclusion follows directly from the statute’s plain text and from the reasoning of *Bostock v. Clayton County*, 590 U.S. 644 (2020), which interpreted materially identical language in Title VII and concluded that gender-identity discrimination necessarily involves sex discrimination. That is so, as *Bostock* made clear, even assuming that

“sex” is understood to refer only to physiological or “biological distinctions between male and female.” *Id.* at 655.

None of the district court’s reasons for distinguishing *Bostock* withstand scrutiny. As this Court and others have recognized, Title VII and Title IX set out identical but-for causation standards, and this Court has consistently looked to Title VII case law to interpret Title IX. The texts of the two provisions demonstrate that they serve the same purpose of eradicating sex discrimination, and Title IX’s various statutory exemptions do not suggest that Title IX’s core prohibition against discrimination “on the basis of sex” can be read differently. The district court ran afoul of basic rules of statutory interpretation by relying on nebulous, atextual considerations like the court’s sense of Title IX’s history and purposes to conclude that “sex discrimination” carries different meanings in materially identical statutes.

For largely the same reasons, the district court was wrong to conclude that the Rule likely violates the Spending Clause and the major-questions doctrine. Both holdings turned on the district court’s erroneous conclusion that the Rule rewrote Title IX’s definition of sex discrimination. But as the Supreme Court made clear in *Bostock*, the conclusion that gender-identity discrimination is a form of sex discrimination flows clearly from the statutory text.

II. The district court likewise erred in holding that the remaining challenged Rule provisions—and, in particular, their application to certain contexts involving gender-identity discrimination—were likely unlawful.

A. Section 106.31(a)(2) sets out the circumstances in which drawing sex-based distinctions constitutes prohibited discrimination. Title IX does not prohibit all sex-based distinctions; rather, it bars only those distinctions that cause cognizable—*i.e.*, more than de minimis—harm. At the same time, Congress identified certain contexts, such as fraternity membership and athletic teams, in which recipients may draw sex-based distinctions—even if they cause harm—notwithstanding Title IX’s prohibition on sex discrimination. Section 106.31(a)(2) thus effectuates Title IX’s text and structure in providing that unless a congressionally recognized exception applies, a recipient may not separate or differentiate on the basis of sex in a manner that subjects a person to more than de minimis harm.

The Rule also details how § 106.31(a)(2)’s standard applies to gender-identity discrimination. The Rule explains that preventing individuals from participating in sex-separate education programs or activities consistent with their gender identity subjects individuals to cognizable harm. Recipients thus must permit individuals to participate in sex-separate programs or access sex-separate facilities consistent with their gender identity, unless those programs or facilities fall within a congressionally recognized exception. In the context of restrooms, providing sex-separate facilities generally does not violate Title IX because a cisgender male suffers no sex-based harm from being excluded from a comparable women’s restroom, and vice versa. But because sex-separate restrooms are not exempt from Title IX’s nondiscrimination mandate and denying individuals the ability to access such restrooms consistent with

their gender identity causes cognizable harm, preventing transgender students from accessing restrooms that align with their gender identity would violate Title IX, as various courts have found.

The district court concluded that treating sex separation in contexts like social fraternities differently than contexts like restrooms contravened Title IX and was arbitrary and capricious. Section 106.31(a)(2), however, reflects the deliberate choices that Congress itself drew. Congress exempted certain contexts from Title IX's general nondiscrimination mandate, without including any such exemption for sex-separate restrooms. Section 106.31(a)(2) neither conflicts with Title IX nor is unreasonable for carefully adhering to the statutory language that Congress actually enacted.

The district court was also wrong in concluding that the Department failed to adequately account for privacy, safety, and compliance concerns. The Rule explained that nothing prevents recipients from ensuring the privacy and safety of all students in sex-separate facilities, including by enforcing existing prohibitions on harassment and other forms of misconduct. The Rule further explained that nothing indicates that transgender students pose a particular risk to their cisgender peers or that the mere presence of a transgender person in a single-sex space compromises anyone's legitimate privacy interests. And the Rule explained that recipients may take reasonable measures to verify individuals' gender identity for purposes of compliance with § 106.31(a)(2).

B. The district court also erred in holding that the Rule’s definition of hostile-environment harassment contravenes the First Amendment. The standard announced in § 106.2 closely tracks the Department’s longstanding interpretation of Title IX as well as the standard applied for evaluating hostile-environment harassment under Title VII. No court had previously found those standards in conflict with the First Amendment; to the contrary, various courts—including this one—have upheld those proscriptions on hostile-environment harassment without raising any First Amendment concerns. And if any doubt remained, the Rule makes clear that no provision requires or authorizes a recipient to violate anyone’s First Amendment rights.

The district court badly misapprehends the Rule’s operation in suggesting that it compels speech regarding gender identity. The hostile-environment standard neither compels any particular speech nor requires anyone to affirm any particular viewpoint. It merely requires *schools* to address conduct that creates a hostile environment in their education programs, which is wholly different from telling students and faculty what they must say. The Rule makes clear, moreover, that when addressing sex-based harassment, recipients must account for individuals’ First Amendment rights, which may constrain the manner in which recipients respond to harassing speech. In short, nothing in the Rule mandates that anyone use particular pronouns or compels silence of opposing viewpoints on questions of gender-identity discrimination.

Section 106.2's hostile-environment standard also is not overbroad or vague. The Rule defines the scope of prohibited harassment narrowly in terms of specific and required elements and in language with common usage in the antidiscrimination context. Even if the bar on offensive conduct occasionally sweeps in speech, any amount of prohibited protected speech is not so substantial, either in absolute or relative terms, as to raise overbreadth concerns. Nor is the standard so indeterminate as to fail to put the public on notice of what is prohibited. That courts—including this Court—have long applied analogous standards in both the Title VII and Title IX contexts without raising overbreadth or vagueness concerns demonstrates that § 106.2 comports with the First Amendment.

C. Lastly, the district court erred in accepting the states' argument that the Rule fails to adequately protect parental rights. The states plainly lack standing to advance such a claim on behalf of individual citizens. In any case, the Rule is explicit that it does not limit parental rights and that where a parent and minor disagree about the appropriate response to sex discrimination, schools should defer to parents.

III. The remaining preliminary-injunction factors favor the government. Most importantly, plaintiffs failed to establish irreparable harm. The ordinary costs of complying with a federal regulation do not amount to irreparable harm, particularly where (as here) the district court made no finding that the costs were sufficiently unusual or extensive to justify the extraordinary remedy of a preliminary injunction. Nor does the attenuated possibility that the Department could seek to terminate a

recipient's federal funding suffice; such a step is plainly not imminent, and plaintiffs cannot convert a hypothetical future harm into a present injury by complaining about the effects such uncertainty might have on their planning and budgeting process. The states' attempts to assert the constitutional rights of their citizens must fail given the Supreme Court's repeated reminders that states lack standing to do so. *See Haaland v. Brackeen*, 599 U.S. 255, 295 (2023). And all of the asserted harms upon which the plaintiff-intervenors relied rested entirely on speculation about hypothetical future events. In contrast, the equities plainly favor the implementation of a regulation intended to fight sex discrimination in education.

Finally, the preliminary injunction was at minimum overbroad. Plaintiffs' claims targeted three provisions of the Rule, and the Department's severability determinations made clear that the remaining provisions could and should take effect even if those three provisions were enjoined. The district court's sweeping injunction vastly exceeded what was necessary to redress "the plaintiff's particular injury." *Gill v. Whitford*, 585 U.S. 48, 73 (2018).

STANDARD OF REVIEW

A district court's "decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion," with its "legal conclusions" reviewed "de novo and its factual findings for clear error." *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 546 (6th Cir. 2021) (emphasis and quotation marks omitted).

ARGUMENT

I. Gender-Identity Discrimination Is Necessarily a Form of Discrimination on the Basis of Sex.

Title IX prohibits discrimination “on the basis of sex.” 20 U.S.C. § 1681. Section 106.10 describes the scope of that prohibition, explaining that “[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity,” 34 C.F.R. § 106.10, “because each necessarily involves consideration of a person’s sex, even if that term is understood to mean only physiological or ‘biological distinctions between male and female,’” 89 Fed. Reg. at 33,802 (quoting *Bostock v. Clayton County*, 590 U.S. 644, 655 (2020)). Section 106.10 thus makes clear that prohibited sex discrimination under Title IX includes actions like excluding a student from homecoming for being pregnant, giving a student detention for being gay, or barring a student from band for being transgender.

The district court’s decision—mirroring plaintiffs’ challenges—focused only on § 106.10’s inclusion of gender identity. *See Op.*, RE100, PageID #2015-17; *see also* States’ Mot., RE19-1, PageID #859-61; Intervenor’s Mot., RE63-1, PageID #1398. The court rejected the Rule’s recognition that the reasoning of *Bostock*, when applied to the text of Title IX, compels the conclusion that discrimination based on gender identity is necessarily a form of discrimination “on the basis of sex.” *See Op.*, RE100, PageID #2015-17. But the reasons the district court gave for that conclusion have no

foundation in the text of the statute and cannot be squared with the analysis in *Bostock*.

A. Section 106.10 reflects a straightforward application of *Bostock*'s reasoning. There, the Court confronted the provision of Title VII making it unlawful “for an employer ... to discriminate against any individual ... because of such individual’s ... sex.” *Bostock*, 590 U.S. at 655 (quoting 42 U.S.C. § 2000e-2(a)(1)). The Court explained that Title VII’s “because of” language “incorporates the ‘simple’ and ‘traditional’ standard of but-for causation.” *Id.* at 656 (quotation marks omitted). “[S]ex is necessarily a but-for cause” of discrimination on the basis of sexual orientation or gender identity, the Court explained, “because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.* at 660-61 (emphasis omitted). Such discrimination would, for example, “penalize[] a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.” *Id.* at 660. That is true even on the assumption that “sex” in Title VII “refer[s] only to biological distinctions between male and female,” *id.* at 655, and even without having to decide how the insight applies to sex differentiation in contexts such as “bathrooms, locker rooms, and dress codes,” *id.* at 681.

Bostock's reasoning applies with equal force to Title IX's prohibition against discrimination “on the basis of sex,” 20 U.S.C. § 1681(a). Title IX imposes a causation standard no more stringent than but-for causation under Title VII. *See*

Kollaritsch v. Michigan State Univ. Bd. of Trs., 944 F.3d 613, 622 (6th Cir. 2019) (applying “but for” causation to school’s liability for Title IX harassment claim). And as *Bostock* made clear, “sex is necessarily a but-for cause” of discrimination on the basis of sexual orientation or gender identity. 590 U.S. at 661 (emphasis omitted). A school, no less than an employer, engages in sex discrimination when it “penalizes a person ... for traits or actions that it tolerates” in persons identified as a different sex “at birth.” *Id.* at 660. That is why various courts have concluded that in light of *Bostock*, discrimination on the basis of sexual orientation and gender identity are necessarily forms of prohibited sex discrimination under Title IX. *See, e.g., Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020); *A.C. ex rel. M.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023); *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023). That conclusion does not depend, the Department explained, on viewing the term “sex” in Title IX to mean anything other than “physiological or ‘biological distinctions between male and female.’” 89 Fed. Reg. at 33,802 (quoting *Bostock*, 590 U.S. at 655).

B. None of the district court’s reasons for rejecting that conclusion are valid. The court believed that § 106.10 “contravenes the plain text of Title IX by redefining ‘sex’ to include gender identity.” Op., RE100, PageID #1996. But § 106.10 does not redefine sex—it simply applies the same analysis applied in *Bostock* to determine that discrimination on the basis of sexual orientation or gender identity is necessarily discrimination on the basis of sex even assuming a definition of sex tied

to biological distinctions. Indeed, much of the district court’s analysis appeared to be driven by the assumption that the Rule is somehow inconsistent with the view that “[t]here are two sexes: male and female.” *Id.* But as discussed, § 106.10, like *Bostock*, recognizes that discrimination based on gender identity is sex discrimination even under that understanding of sex. 89 Fed. Reg. at 33,802 (quoting *Bostock*, 590 U.S. at 655).

The district court alternatively sought to dismiss *Bostock* as “limited to Title VII.” Op., RE100, PageID #2018; *see* Stay Order 4 (similar). But *Bostock*’s core insight—that “it is impossible to discriminate against a person for being ... transgender without discriminating against that individual *based on sex*,” 590 U.S. at 660 (emphasis added)—applies equally to Title IX and Title VII. If an employer “fires a transgender person who was identified as a male at birth but who now identifies as a female” yet “retains an otherwise identical employee who was identified as female at birth,” the employer has engaged in discrimination based on sex assigned at birth because it has “intentionally penalize[d] a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.” *Id.* Exactly the same is true under Title IX: a school that excludes or punishes a transgender female student for being transgender has engaged in discrimination “on the basis of sex,” 20 U.S.C. § 1681(a), because it has penalized her for traits it would have tolerated in an otherwise identical student identified as female at birth.

The district court’s suggestion that *Bostock*’s reasoning cannot be applied to Title IX because the “text” of Title VII and Title IX “vary considerably,” Op., RE100, PageID #2063; *see* Stay Order 5 (similar), is also wrong. Indeed, this Court has repeatedly “looked to the Title VII landscape for guidance” when interpreting Title IX precisely because “both statutes prohibit discrimination on the basis of sex.” *Chisholm v. St. Marys City Sch. Dist. Bd. of Educ.*, 947 F.3d 342, 350 (6th Cir. 2020); *see also Kollaritsch*, 944 F.3d at 622 (similar). In *Bostock* itself, the Supreme Court substituted the phrase “on the basis of” for Title VII’s “because of” formulation at least eight times. *See, e.g.*, 590 U.S. at 650 (noting that “in Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin” (emphasis added)). And in other contexts, the Supreme Court has explained that the ordinary meaning of “the phrase ‘based on’ indicates a but-for causal relationship” and that the phrase has “the same meaning as the phrase, ‘because of.’” *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (quotation marks omitted).

The district court also suggested that the “structure, purpose, and history” of Title VII and Title IX differ. Op., RE100, PageID #2063. But the court did not explain how those extra-textual factors could undermine the straightforward textual analysis set out above. In any event, the relevant purpose of both statutes is the same: to root out sex discrimination, albeit in different settings. As for the fact that Title IX contains statutory provisions allowing sex separation in some contexts, *see id.*, PageID #2064-66, those provisions do not somehow compel a different understanding of

what constitutes sex discrimination. Title VII, too contains statutory exceptions, *see* 42 U.S.C. § 2000e-2(e) (bona fide qualifications), and has long been understood to allow certain forms of sex separation, like “sex-segregated bathrooms, locker rooms, and dress codes,” and yet the Supreme Court still held that gender-identity discrimination is necessarily a form of sex discrimination. *Bostock*, 590 U.S. at 681. In any event, the presence of statutory provisions that allow for sex separation in certain contexts only reinforces the Rule’s conclusion: the very existence of those provisions shows that Congress understood Title IX’s general prohibition against sex discrimination otherwise could have been applied to such separation or differentiation. *See Arnold, Constable & Co. v. United States*, 147 U.S. 494, 499 (1893) (“[T]he exception of a particular thing from general words proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made.” (quotation marks omitted)).

The district court also erred in suggesting that this Court has already rejected *Bostock*’s application to Title IX. *Op.*, RE100, PageID #2018-19; *see also* Stay Order 5. The cases the district court cited did not arise under Title IX or address its statutory language. *See L.W. ex rel. Williams v. Skermetti*, 83 F.4th 460, 484 (6th Cir. 2023) (equal-protection clause claim); *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 323 (6th Cir. 2021) (Age Discrimination in Employment Act claim); *Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021) (free speech claim where Title IX was “not implicated”). And the

motions panel's decision in this case is not precedential and does not bind the merits panel. *See Wallace v. FedEx Corp.*, 764 F.3d 571, 583 (6th Cir. 2014).

C. Finally, the district court erred in concluding that the Rule is suspect under the major-questions doctrine and the Spending Clause. Op., RE100, PageID #28-32; *see also* Stay Order 5. On both scores, the district court's holding stemmed from its erroneous conclusion that the Rule somehow redefined sex discrimination to mean something other than discrimination based on "biological differences" between men and women. *See* Op., RE100, PageID #28-32. As already explained, discrimination on the basis of gender identity is necessarily a form of sex discrimination covered by Title IX's unambiguous text even under that understanding of sex. *Supra* pp.18-24. Thus, Title IX places recipients of federal funds clearly on notice that they must comply with the prohibition on sex-based discrimination in all of its forms. *Cf. Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174-175 (2005) (holding that Title IX's private right of action encompasses retaliation claims even though the statute does not specifically mention retaliation). And just as the major-questions doctrine posed no obstacle to *Bostock*'s recognition that the Equal Employment Opportunity Commission had correctly interpreted Title VII to prohibit gender-identity discrimination, it poses no obstacle to recognizing that the Department has correctly interpreted the parallel text of Title IX.

II. The Rule’s Treatment of Sex-Separate Spaces and Pronouns Comports with Title IX and the Constitution.

A. Section 106.31(a)(2)’s De Minimis Harm Standard Effectuates Title IX’s Text.

Section 106.31(a)(2) is the provision detailing when otherwise permissible separation or differentiation on the basis of sex constitutes prohibited sex discrimination. It provides that subject to certain congressionally recognized exceptions, recipients may not differentiate on the basis of sex when doing so causes more than de minimis harm. 89 Fed. Reg. at 33,815. The district court concluded that § 106.31(a)(2) contravenes Title IX, Op., RE100, PageID #2020-23, and that its application to restrooms and locker rooms was arbitrary and capricious, *id.*, PageID #2065-72. Neither conclusion withstands scrutiny.

1. Section 106.31(a)(2) effectuates Title IX’s plain text, which prohibits “discrimination” on the basis of sex. 20 U.S.C. § 1681(a). As the Supreme Court has explained, “the term ‘discriminate against’ refers to distinctions or differences in treatment that injure protected individuals.” *Bostock*, 590 U.S. at 681 (quotation marks omitted); see *Muldrow v. City of St. Louis*, 144 S. Ct. 967, 974 (2024) (same). Because “the concept of discrimination includes an element of injury or harm,” 89 Fed. Reg. at 33,815, the Department “does not interpret Title IX to prohibit all sex-based distinctions or separation,” *id.* at 33,814. Rather, Title IX prohibits “only” those sex-based distinctions “that subject[] any person to legally cognizable injury—*i.e.*, more

than de minimis harm.” *Id.* The Rule thus explains that recipients generally may separate or differentiate on the basis of sex where doing so causes no harm.

At the same time, the Rule recognizes that in certain contexts Congress permitted recipients to separate or distinguish on the basis of sex, even if doing so causes cognizable harm. *See* 89 Fed. Reg. at 33,816. Those contexts are limited to recognized exceptions that, among other things, permit sex-separated fraternities and sororities, 20 U.S.C. § 1681(a)(6)(A); voluntary youth service organizations, *id.* § 1681(a)(6)(B); and “living facilities,” *id.* § 1686. The Rule effectuates Congress’s decision to treat those contexts differently by providing that § 106.31(a)(2)’s de minimis harm standard does not apply to the statutory exemptions and the regulations implementing them. 89 Fed. Reg. at 33,816.³

The Rule further specifies how § 106.31(a)(2) applies to gender-identity discrimination.⁴ The Rule explains that, except as provided in the recognized exceptions, recipients must permit individuals to access sex-separate facilities and programs consistent with their gender identity because “prevent[ing] a person from

³ Congress also legislated separately regarding Title IX’s application to athletics, *see* Education Amendments of 1974, Pub. L. No. 93-380, tit. VII, pt. D, § 844, 88 Stat. 484, 612. As the district court correctly recognized, this case does not implicate the regulation concerning sex-separate athletic teams, which is the subject of a different, ongoing rulemaking. *See* Op., RE100, PageID #2074; 89 Fed. Reg. at 33,817.

⁴ Section 106.31(a)(2)’s protections are not limited to that context, instead applying “with equal force to all students.” 89 Fed. Reg. at 33,818.

participating in an education program or activity consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex.” 34 C.F.R. § 106.31(a)(2).

As relevant here, the Department has long recognized that sex separation “in the context of bathrooms or locker rooms[] is not presumptively unlawful sex discrimination” because a cisgender male suffers no sex-based harm from being excluded from the women’s restroom or locker room, and vice versa. 89 Fed. Reg. at 33,818. That is why existing regulations permit sex-separate “toilet, locker room, and shower facilities,” so long as the facilities are “comparable.” 34 C.F.R. § 106.33. But it violates Title IX to bar transgender students from accessing restrooms that align with their gender identity because doing so *does* cause cognizable harm and because restrooms are not exempted from the statute’s general nondiscrimination mandate. 89 Fed. Reg. at 33,818. Consistent with that conclusion, various courts have held that school policies that prevent students from accessing the restrooms that correspond to their gender identity violate Title IX. *See, e.g., A.C.*, 75 F.4th at 769; *Grimm*, 972 F.3d at 616.

2. In holding § 106.31(a)(2) unlawful, Op., RE100, PageID #2020, the district court did not dispute that Title IX’s nondiscrimination mandate generally prohibits sex distinctions that cause more than de minimis harm. Nor did the court dispute the Department’s conclusion—supported by ample case law—that preventing

a person from participating in an education program or accessing a sex-separate facility consistent with their gender identity subjects the person to harm.

Instead, the court concluded that § 106.31(a)(2) produces “inconsistencies” that “Congress could not have intended” by permitting recipients to “separate students for purposes of fraternities and sororities, but not for purposes of utilizing bathrooms.” Op., RE100, PageID #2020-21. But § 106.31(a)(2) reflects the distinctions that Congress drew in enacting Title IX. Congress (not the Department) expressly excepted fraternities’ membership practices—amongst other things—from Title IX’s general nondiscrimination mandate. *See* 89 Fed. Reg. at 33,816. Congress included no such exemption for sex-separate restrooms and locker rooms. *Id.* at 33,819.

The Rule effectuates the distinctions Congress drew by recognizing that Title IX requires that “a recipient must not provide sex-separate facilities or activities in a manner that subjects any person to legally cognizable injury”—including by preventing individuals from participating in a sex-separate program or activity consistent with their gender identity—“*unless there is a statutory basis for allowing otherwise.*” 89 Fed. Reg. at 33,814 (emphasis added). That careful adherence to statutory text is not “throwaway reasoning.” Op., RE100, PageID #2021. The Supreme Court “has explained many times” that courts may not “disregard [a statute’s] plain terms based on some extratextual consideration,” *Bostock*, 590 U.S. at 673-74, such as the district court’s speculation about purported “inconsistencies” that Congress could or “could not have intended,” Op., RE100, PageID #2020-21.

The district court’s ruling also finds no support in *Adams ex. rel. Kasper v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (en banc). *Contra* Op., RE100, PageID #2021. There, the Eleventh Circuit reasoned that a school policy preventing transgender students from accessing sex-separate restrooms that aligned with their gender identity “fit[] squarely within” 34 C.F.R. § 106.33—the regulation allowing sex-separate restrooms—on the assumption that this regulation implements the “express carve-out with respect to living facilities.” 57 F.4th at 811 (citing 20 U.S.C. § 1686). But as the Department subsequently explained, although § 1686 “specifically carves out from Title IX’s general statutory prohibition on sex discrimination an allowance for recipients to maintain sex-separate living facilities,” that provision does not apply “to any other aspects of a recipient’s education program or activity ... such as bathrooms, locker rooms, or shower facilities.” 89 Fed. Reg. at 33,821. That is why the Department’s longstanding regulation regarding “toilet, locker room, and shower facilities” was promulgated pursuant to the statute’s general nondiscrimination mandate, 20 U.S.C. § 1681, not the living-facilities provision. 89 Fed. Reg. at 33,821.

3. The district court separately erred in holding that § 106.31(a)(2)’s application to sex-separate spaces like restrooms and locker rooms was arbitrary and capricious. Op., RE100, PageID #2065-72. The arbitrary and capricious standard is “deferential” and requires only “a reasoned explanation” for the agency’s actions. *Watson v. Solis*, 693 F.3d 620, 623-24 (6th Cir. 2012) (quotation marks omitted). The Rule’s extensive discussion of § 106.31(a)(2)’s applications to sex-separate spaces—

including issues related to safety, privacy, and compliance—easily satisfies this “least demanding form of judicial review.” *Id.* at 623 (quotation marks omitted).

Much of the district court’s reasoning merely collapses into its flawed conclusion that the Rule contravenes Title IX. *Op.*, RE100, PageID #2065. But as explained, *see supra* pp.25-29, the Rule reflects distinctions made by Congress, not the Department. Congress excluded sex-separate living facilities and other specific contexts from Title IX’s nondiscrimination mandate; it did not exempt restrooms or locker rooms. *See* 89 Fed. Reg. at 33,816. The Department “clearly articulated,” *Op.*, RE100, PageID #2067, how those congressional choices affect the Rule’s operation, explaining that “§ 106.31(a)(2) applies in contexts for which there is no statutory exception, such as sex-separate restrooms and locker rooms,” 89 Fed. Reg. at 33,819. The Department hardly acted “arbitrarily,” *Op.*, RE100, PageID #2065, in recognizing the distinctions drawn by Congress and effectuating Title IX’s nondiscrimination mandate accordingly.

The district court also believed that the Rule failed to “adequately account[] for” the “safety and privacy interests at stake” in restrooms and locker rooms. *Op.*, RE100, PageID #2067. The Rule, however, thoroughly addressed these concerns, explaining that the Department “agrees that recipients have a legitimate interest in protecting all students’ safety and privacy” and that such goals are not “inconsistent with § 106.31(a)(2).” 89 Fed. Reg. at 33,820. The Rule emphasized that nothing prevents recipients from taking steps “to ensure privacy and safety for all students in a

recipient's sex-separate facilities—steps that many recipients already take consistent with their general codes of conduct, including rules prohibiting harassment, assault, and other forms of misconduct.” *Id.* The Rule further explained that recipients may “offer[] single-occupancy facilities, among other accommodations, to any students who seek additional privacy for any reason.” *Id.*⁵

The court nonetheless insisted that “more [was] required” to address the purported “safety risk to other students” posed by “transgender students.” Op., RE100, PageID #2068. But the Department reasonably explained that, based on its “enforcement experience, listening sessions with stakeholders, and its review of Federal case law,” it disagreed that “transgender students pose a safety risk to cisgender students, or that the mere presence of a transgender person in a single-sex space compromises anyone’s legitimate privacy interest.” 89 Fed. Reg. at 33,820. The Department pointed to the experience of schools across the country who attested that, when “integrat[ing] transgender students into gender-specific facilities,” “hypothetical fears and concerns” regarding safety and privacy have been “wholly unfounded in practice.” Amici Brief of School Administrators, *Grimm v. Gloucester Cty. Sch. Bd.*, No. 19-1952 (4th Cir. Nov. 25, 2019), 2019 WL 6341095, at *18-19; *see* 89

⁵ The Rule explained that recipients are not required to provide “single-occupancy facilities” both “because such facilities are not the only way a recipient could provide nondiscriminatory access to its facilities” and because it “would likely carry significant cost implications.” 89 Fed. Reg. at 33,820. Contrary to the district court, then, the Department did consider the “cost implications” for recipients of providing such facilities. Op., RE100, PageID #2071.

Fed. Reg. at 33,820. It also noted various court decisions that have rejected “unsubstantiated” and “generalized” claims that “transgender persons’ access to sex-separate spaces infringes on other students’ privacy or safety.” 89 Fed. Reg. at 33,820 (citing examples). No more was required to justify the conclusion that a “recipient can make and enforce rules that protect all students’ safety and privacy without also excluding transgender students from accessing sex-separate facilities and activities consistent with their gender identity.” *Id.*

The district court similarly erred in suggesting that the Department “fail[ed] to address” whether a recipient “may require gender verifying documentation.” Op., RE100, PageID #2065. The Department explained that recipients may rely “on written confirmation of the student’s gender identity by the student or student’s parent, counselor, coach, or teacher.” 89 Fed. Reg. at 33,819 (noting also that recipients may rely on “a student’s *consistent* assertion” (emphasis added)). Recipients may also request documentation such as an amended birth certificate or evidence of medical treatment, except where “access to such documentation is prohibited by law in that jurisdiction.” *Id.* That hardly amounts to a “requirement of allowing any person unfettered, unverified access” to schools’ sex-separate facilities, as the court suggested, Op., RE100, PageID #2071.

B. The Rule’s Prohibition on Hostile-Environment Harassment Raises No First Amendment Concerns.

The district court also erred in holding that the Rule’s prohibition on harassment—particularly, the application of § 106.2’s definition of hostile-environment harassment to certain contexts involving transgender individuals—contravenes the First Amendment. Op., RE100, PageID #2027-51. The court’s conclusion rests on a basic misapprehension of how § 106.2 operates as well as a disregard for longstanding antidiscrimination practice and principles.

1. It is well established that prohibited sex discrimination under Title IX includes sex-based harassment. *See Jackson*, 544 U.S. at 174. One form of prohibited harassment is hostile-environment harassment, which § 106.2 defines as “[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity (*i.e.*, creates a hostile environment).” 34 C.F.R. § 106.2.

The Rule makes a handful of changes to the definition of hostile-environment harassment promulgated in 2020, but the standard announced in § 106.2 is hardly novel. *See* 89 Fed. Reg. at 33,497. It closely tracks the Department’s “longstanding interpretation of Title IX” and accompanying “enforcement practice” prior to the 2020 amendments. *Id.* at 33,508; *see Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5512 (Jan. 19,

2001).⁶ It also mirrors the standards applied in the context of “numerous civil rights laws, including Title VII.” 89 Fed. Reg at 33,508; *see Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (applying a severe “or” pervasive standard to conduct that “alter[ed] the conditions” of employment (quotation omitted)); *see also Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018) (explaining that “[a] Title IX hostile-environment claim is analogous to a Title VII hostile-environment claim”).

Prior to this litigation, no court had held that the standards for evaluating hostile-environment harassment long applied in the Title VII and Title IX contexts contravened the First Amendment. To the contrary, the Supreme Court upheld “similar proscriptions on hostile environment harassment” in both contexts “without raising any First Amendment concerns.” 89 Fed. Reg. at 33,505-06 (citing *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (Title IX);⁷ *Harris*, 510 U.S. at 23 (holding Title VII’s harassment standard applied to sex-based insults, despite

⁶ Whereas the 2020 standard prohibited unwelcome sex-based conduct “determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person” access to an education program or activity, 34 C.F.R. § 106.30(a)(2) (2020), § 106.2 prohibits unwelcome sex-based conduct that, “based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies” such access.

⁷ In *Davis*, the Court addressed the standard for a private damages claim premised on hostile-environment harassment brought under Title IX’s implied right of action. 526 U.S. at 650. Although the *Davis* standard differs from § 106.2 in certain respects, the standard for private damages actions need not control in the administrative enforcement context. *See* 89 Fed. Reg. at 33,497-501. The district court, moreover, nowhere suggested that the Rule was invalid for departing from *Davis*. *See* Op., RE100, PageID #2027-51.

First Amendments objections)). That makes sense: A recipient can safeguard the expression of “politically charged and contentious ideas” consistent with the First Amendment, Op., RE100, PageID #2030, while still protecting students from an “educational experience ... ‘permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive [so as] to alter the conditions of the victim’s’ educational environment.” *Doe*, 882 F.3d at 590 (second alteration in original) (quoting *Harris*, 510 U.S. at 21).

If any doubt remained, the Rule also makes clear that “nothing in the regulations”—including § 106.2—“requires or authorizes a recipient to violate anyone’s First Amendment rights.” 89 Fed. Reg. at 33,516; *see also* 34 C.F.R. § 106.6(d). Thus, while recipients must address hostile environments, the “First Amendment may in certain circumstances constrain the manner in which a recipient responds to sex-based harassment in the form of speech.” 89 Fed. Reg. at 33,503.

2. The district court nonetheless believed that the standard “compel[s] speakers to affirm the concept of gender identity” by requiring “students and teachers to use ‘preferred’ rather than accurate pronouns.” Op., RE100, PageID #2037, 2043 (quotation omitted). But § 106.2 neither compels any particular speech by students or staff, nor requires anyone to affirm “any particular view on any issue.” 89 Fed. Reg. at 33,505. The Rule merely requires that federal funding *recipients* address sex-based harassment that is “subjectively and objectively offensive” and so “severe or

pervasive” as to limit or deny a person’s ability to access their educational programs.

34 C.F.R. § 106.2.

Requiring schools to address sex-based harassment—even where it involves speech—is different in kind from “telling” individual students and staff “what they must say.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). The government can ensure that the classroom, no less than the workplace, is free from sex-based “intimidation, ridicule, and insult” without governing every “utterance,” *Harris*, 510 U.S. at 21 (quotation marks omitted), and while preserving the right of individuals to be free from compelled speech under the First Amendment. This Court recently recognized as much in upholding a school’s harassment policy that prohibited the “intentional use of non-preferred pronouns,” explaining that the prohibition did not “unconstitutionally compel[] speech” because students had “options” for complying with the policy—such as “us[ing] no pronouns at all”—that did “not violate their conscience.” *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, --- F.4th ---, 2024 WL 3565635, at *7-8 (6th Cir. July 29, 2024). Likewise, the Rule requires recipients to “formulate, interpret, and apply its rules in a manner that respects the legal rights of students and employees when taking action to end sex-based harassment that creates a hostile environment.” 89 Fed. Reg. at 33,503.

The district court thus badly misreads the Rule in suggesting that students and faculty must “abide by preferred pronouns” or else expose “a recipient of Federal funds to liability under Title IX.” Op., RE100, PageID #2041. The Department

explained that “whether verbal conduct constitutes sex-based harassment is necessarily [a] fact-specific” inquiry, but that “a stray remark, such as a misuse of language, would not constitute” harassment. 89 Fed. Reg. at 33,516. Even if there were circumstances in which the persistent or acute refusal to use pronouns consistent with a student’s gender identity contributed to a claim of hostile-environment harassment, nothing in the Rule would “require[] or authorize[]” the recipient to take remedial measures that would “violate anyone’s First Amendment rights.” *Id.* at 33,516; *see e.g., Parents Defending Educ.*, 2024 WL 3565635, at *7-8. Nor would anything in the Rule require or authorize the recipient to “compel[] silence of opposing viewpoints.” *Op.*, RE 100, PageID #2037.

The district court improperly dismissed the Rule’s express First Amendment protections “as little more than a paper tiger,” *Op.*, RE100, PageID #2041, based on an amicus brief the government filed years before the Rule’s publication, *see* Amicus Brief of the United States, *Kluge v. Brownsburg Cmty. Sch. Corp.*, No. 21-2475 (7th Cir. Nov. 8, 2021), 2021 WL 5405970 (U.S. Amicus). But as the court recognized, the “only claim[]” at issue there was “grounded in Title VII,” *Op.*, RE100, PageID #2039 n.13, and concerned whether a school permissibly declined to retain a particular accommodation for a teacher’s religious objection “to referring to transgender students by names and pronouns that match[ed] their gender identities.” U.S. Amicus 2-3. The brief argued that the school acted lawfully in the particular circumstances presented there, in part, because specific evidence showed that the teacher’s proposed

workaround “harmed students” in a way that “could potentially” have supported a Title IX claim and made school officials “reasonably concerned that if they took no action to address the situation,” they faced increased litigation risk. *Id.* at 29-30.

Nothing in the filing addressed the standard for hostile-environment harassment, much less undermines the Department’s commitment that “nothing in the [Rule] requires or authorizes a recipient to violate anyone’s First Amendment rights.” 89 Fed. Reg. at 33,516.

The district court’s ruling also finds no support in *Merivether*, 992 F.3d 492. *Contra* Op., RE100, PageID #2034-36. There, the Court reversed the dismissal of a college professor’s First Amendment compelled-speech claim based on allegations that he suffered disciplinary action for failing to comply with a policy that required faculty to “refer to students by their preferred pronoun[s]” and that applied despite the professor’s “religious objections.” *Merivether*, 992 F.3d at 498 (alteration in original) (quotation marks omitted). The Court nowhere suggested that a narrowly tailored harassment standard—like the one set out in § 106.2—conflicts with the First Amendment. To the contrary, the Court recognized that Title IX prohibits hostile-environment harassment, including “discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive so as to alter the conditions of the victim’s educational environment,” *id.* at 511 (quoting *Doe*, 882 F.3d at 590)—a standard materially indistinguishable from the one articulated in § 106.2. The Court simply concluded that Title IX’s prohibition on sex-based harassment was “not implicated”

because there was no indication “at this stage of the litigation” that the professor’s failure to comply with the policy “inhibited” any student’s “education or ability to succeed in the classroom.” *Id.*

3. The district court erred in concluding that § 106.2’s definition of hostile-environment harassment was so “vague” and “overbroad” as to “chill” protected speech. *Op.*, RE100, PageID #2044. Overbroad laws “prohibit[] a substantial amount of protected speech both in an absolute sense and relative to the statute’s plainly legitimate sweep,” while vague laws “fail to give ... a reasonable opportunity to know what is prohibited” and “create a danger of arbitrary and discriminatory enforcement.” *Entertainment Prods., Inc. v. Shelby Cty.*, 588 F.3d 372, 379 (6th Cir. 2009) (quotation marks omitted). This Court has “repeatedly” warned that “[f]acial invalidation” of an overbroad or vague regulatory scheme is “strong medicine” that should be “deployed sparingly and only as a last resort.” *Id.* (quotation marks omitted). Such extraordinary relief is not “unambiguously warranted” here. *Id.* at 380.

Section 106.2’s definition of hostile-environment harassment poses no overbreadth problems. It “covers only sex-based conduct that is unwelcome, both subjectively and objectively offensive, and so severe or pervasive that it limits or denies a person’s ability to participate in” an education program or activity. 89 Fed. Reg. at 33,503. The Rule “only prohibit[s] conduct that meets all the[se] elements” and requires an evaluation based on the “totality of the circumstances” to ensure that

no “required element[] ... is ignored.” *Id.* at 33,506. Even if the prohibition occasionally “sweeps in speech,” *id.* at 33,494, there is no indication that the standard prohibits a substantial amount of protected speech “in an absolute sense” or relative to the Rule’s “plainly legitimate sweep.” *Entertainment Prods.*, 588 F.3d at 379 (quotation marks omitted); *see also Parents Defending Educ.*, 2024 WL 3565635, at *11 (rejecting overbreadth challenge to harassment policy).

Courts and agencies have long applied analogous harassment standards in the Title VII and Title IX contexts. *See Harris*, 510 U.S. at 23; *Rowles v. Curators of the Univ. of Mo.*, 983 F.3d 345, 352, 355 (8th Cir. 2020) (rejecting overbreadth challenge to standard nearly identical to § 106.2). That includes this Court, which has articulated and applied similar standards in cases arising under both statutes. *See, e.g., Meriwether*, 992 F.3d at 511; *Doe*, 882 F.3d at 590; *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 815 (6th Cir. 2013) (concluding that being “repeatedly ... called derogatory and demeaning names” was “severe or pervasive harassment” under Title VII). The district court simply ignored this well-established precedent.

The court also failed to identify “a substantial number of instances ... in which” the hostile-environment standard “cannot be applied constitutionally.” *Entertainment Prods.*, 588 F.3d at 379 (quotation marks omitted). Instead, the court focused on the Rule’s application to a narrow set of contexts involving gender identity, such as pronoun usage. *Op.*, RE100, PageID #2048. As explained, *supra* pp. 35-38, the court misunderstands the Rule’s operation in those contexts. In any event,

the requirement that a provision’s “overbreadth be substantial” is “vigorously enforced,” *Entertainment Prods.*, 588 F.3d at 379 (quotation marks omitted), and “the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge,” *Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

The court was also wrong to suggest that the Rule is overbroad because § 106.2 may apply “outside of the classroom.” Op., RE100, PageID #2050. As the Department explained, a recipient’s obligation is to address a hostile environment occurring “under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside” the program or activity. 89 Fed. Reg. at 33,530. That is consistent with this Court’s precedent, which recognizes that schools may regulate “off-campus speech that materially disrupts classwork or involves substantial disorder or invasions of the rights of others,” such as social media posts that cause “serious or severe harassment” of teachers and students. *Kutchinski ex rel. H.K. v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 357-58 (6th Cir. 2023) (quotation marks omitted).

Section 106.2’s definition of hostile-environment harassment also is not vague. It offers “specific and required elements,” 89 Fed. Reg. at 33,506, “using language with common usage and understanding” in the antidiscrimination context, *Rowles*, 983 F.3d at 358. And it enumerates relevant considerations based on factors that “courts and agencies have used in evaluating a hostile environment” in both the Title VII and

Title IX contexts. 89 Fed. Reg. at 33,512. Indeed, the Department discussed at length questions the district court deemed unaddressed regarding the “objectively offensive,” “severe or pervasive,” and “limits or denies” elements. *Op.*, RE100, PageID #2046-49.⁸ The hostile-environment standard’s specificity and long lineage more than suffices to put the public on constitutionally adequate notice of its contours and demonstrates that it is neither unworkable nor prone to arbitrary enforcement.

The district court’s remaining grounds for deeming the hostile-environment standard vague fare no better. The court faulted the standard for being “entirely fact-dependent,” *Op.*, RE100, PageID #2046, but the Supreme Court has explained that “whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances,” *Harris*, 510 U.S. at 23. Likewise, the standard is not vague merely because it applies to discrimination based on “gender identity,” a term the Department declined to define. *Contra Op.*, RE100, PageID #2045. The Department explained that “a specific definition” was unnecessary because the “term is now well understood” and “used widely in laws and policies.” 89 Fed. Reg. at 33,809. Even so, the Rule did “offer[] ... guidance,” *Op.*, RE100, PageID #2045 (emphasis omitted), explaining that gender identity “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 33,809.

⁸ See 89 Fed. Reg. at 33,509 (addressing “Subjectively and Objectively Offensive”); *id.* at 33,508 (“Severe or Pervasive”); *id.* at 33,511 (“Limits or Denies”).

C. The Rule Protects Parental Rights.

The district court further erred in holding that the Rule interferes with parents' rights by requiring schools "to accommodate the stated gender identity of each student." Op., RE100, PageID #2058-59. This argument was advanced exclusively by the states, *see* States' Mot., RE19-1, PageID #870, which cannot invoke the rights of parents against the federal government, *see infra* pp.47-48 (discussing *Haaland v. Brackeen*, 599 U.S. 255, 295 (2023)), particularly where they failed to identify any parent whose rights would be threatened by the Rule.

In any case, "nothing in the final regulations disturbs parental rights." 89 Fed. Reg. at 33,821; *see also* 34 C.F.R. § 106.6(g). As the Department made clear, "[w]hen a parent and minor student disagree about how to address sex discrimination against that student, deference to the judgment of a parent, guardian, or other authorized legal representative with a legal right to act on behalf of that student is appropriate." 89 Fed. Reg. at 33,822. *Contra* Op., RE100, PageID #2060 (suggesting that the Rule does not clarify whether "schools must adopt their students' gender identity even over a parental objection"). At most, the district court gestured to situations where schools might treat students consistent with their gender identity even though "the student chooses not to involve his or her parents." *Id.*, PageID #2059. The district court cited no authority for the proposition that parents have a constitutional right to have school employees consult with them before using a particular pronoun to address their children—but if they do, the Rule makes clear that it must not "be read in

derogation of any legal right of a parent to act on behalf” of a minor child. 34 C.F.R. § 106.6(g). In any event, if a recipient wants to notify parents in such circumstances, it may do so—nothing in the Rule “prohibits a recipient from notifying a parent, guardian, or authorized legal representative of a minor student’s complaint alleging sex discrimination so they can exercise their rights to act on behalf of the minor student.” 89 Fed. Reg. at 33,540.

III. The Remaining Factors Weigh Against Preliminary Injunctive Relief.

The preliminary injunction should be vacated for the independent reason that plaintiffs have not made the requisite “clear showing” that the remaining preliminary injunction factors are satisfied. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). Plaintiffs have not established that they will suffer immediate and irreparable harm absent the injunction. Nor have they demonstrated that the balance of harms and public interest weigh in favor of preliminary relief.

A. Plaintiffs Failed to Establish Irreparable Harm.

“Irreparable harm is an indispensable requirement for a preliminary injunction.” *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020) (quotation marks omitted). The asserted injury “must be both certain and immediate, not speculative or theoretical.” *Id.* (quotation marks omitted). The district court erred in concluding that plaintiffs had made that showing.

1. The district court concluded that the costs of complying with the Rule amounted to irreparable harm. Op., RE100, PageID #2074-78. Because compliance costs “commonly result from new government regulation,” this Court looks to the “peculiarity and size” of those costs in evaluating whether they suffice. *Kentucky v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023). Plaintiffs, however, made no effort to quantify their costs or to tie those costs to the provisions they challenged.

Absent such a showing, courts routinely reject claims of irreparable harm. *See Pennsylvania v. DeVos*, 480 F. Supp. 3d 47, 68 (D.D.C. 2020) (rejecting claims of irreparable harm premised on undifferentiated costs in challenge to 2020 Title IX Rule); *New York v. U.S. Dep’t of Educ.*, 477 F. Supp. 3d 279, 304 (S.D.N.Y. 2020) (same). And while the district court believed that the “short timeframe” available to schools weighed in favor of irreparable harm, Op., RE100, PageID #2077, the 2020 rule gave schools a similar period to comply. *See* 2020 Regulation, 85 Fed. Reg. at 30,028 (published May 19, 2020; effective August 14, 2020). Moreover, the overwhelming majority of the costs about which plaintiffs have speculated relate to unchallenged provisions of the Rule. *See, e.g.*, Op., RE100, PageID #2076 (pointing to costs associated with Rule’s training requirements). Those costs represent the sort of garden-variety expenses that school districts incur every year. *See* Tr., RE109, PageID #2148 (Tennessee witness agreeing that it is part of a “school’s general routine practice” to provide Title IX training); *see also id.*, PageID #2184 (similar).

2. The district court’s suggestion that the states face irreparable harm in the form of potential loss of federal funding, Op., RE100, PageID #2077-81, is plainly wrong. The court made no finding that any recipient faced an imminent loss of federal funding. *See D.T. v. Sumner Cty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019) (requiring that injury be both “imminent and irreparable”). Nor is that surprising, for “Title IX clearly provides that an agency may not take administrative action to revoke a recipient’s funding until notice and opportunity to cure has been provided.” *New York*, 477 F. Supp. 3d at 304 n.12. In particular, funding cannot be terminated until (1) the Department has unsuccessfully endeavored to obtain voluntary compliance, (2) the recipient has had an opportunity to contest the Department’s allegations at an administrative hearing; (3) the Department has provided notification to Congress; and (4) 30 days have passed. *See* 20 U.S.C. § 1682.⁹

The district court instead observed that the mere possibility of such termination in the future would make “budget planning ... difficult” now. Op., RE100, PageID #2081. But a plaintiff may not demonstrate irreparable harm by recharacterizing a hypothetical future monetary injury as a present uncertainty injury. Indeed, in the Article III context, the Supreme Court has held that a plaintiff may not rely on an injury that is not “certainly impending” by focusing on its present effects,

⁹ After unsuccessfully seeking voluntary compliance, the Department also has the option of referring the matter to the Department of Justice to bring a civil action. *See* 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a)(1).

as “allowing respondents to bring [an] action based on costs they incurred in response to a speculative threat would be tantamount to accepting” as sufficient that speculative threat itself. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 316 (2013).¹⁰

3. The district court suggested that the Rule will prevent some plaintiff states from enforcing their laws. Yet the Rule does not actually prevent the states from enforcing their laws; in implementing Spending Clause legislation, it operates “in the nature of a contract: in return for federal funds, the States *agree* to comply with federally imposed conditions,” *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added). States have no right to demand the federal government’s money while rejecting the terms on which the federal government has elected to make that money available. To the extent that *Tennessee v. Department of Education*, 104 F.4th 577, 613 (6th. Cir. 2024), suggests states suffer irreparable harm whenever they are dissatisfied with conditions on federal funding, we respectfully preserve our disagreement—and even if such asserted harm “favors” plaintiffs, *id.*, it would not outweigh plaintiffs’ inability to satisfy the remaining equitable factors.

¹⁰ The district court’s suggestion that litigants need not “bet the farm by taking the violative action before testing the [validity of the] law,” Op., RE100, PageID #2081 (quoting *Tennessee v. Dep’t of Educ.*, 104 F.4th 577, 606 (4th Cir. 2024)), is not to the contrary. *Tennessee* rejects the proposition that pre-enforcement review of a Department guidance document was unavailable. See *Tennessee*, 104 F.4th at 603. The Department here is not contesting the availability of pre-enforcement review; it is suggesting that “there’s no need to grant relief now as opposed to at the end of the lawsuit.” *D.T.*, 942 F.3d at 327 (emphasis omitted).

4. The district court concluded that citizens of the plaintiff states, as well as the intervenor plaintiffs, would suffer injuries to their privacy, safety, and First Amendment rights. *See* Op., RE100, PageID #2082-83. Precedent makes clear, however, that a “State does not have standing as *parens patriae* to bring an action against the Federal Government.” *Haaland*, 599 U.S. at 295 (quotation omitted). Even if the court were correct that states may assert “quasi-sovereign interests” against the federal government, *see* Op., RE100, PageID #2082, that principle is irrelevant here, where the states are simply asserting their citizens’ individual rights.

As for the intervenor plaintiffs, the district court cited no evidence for its conclusion that “Christian Educators has sufficiently alleged such claims to establish irreparable injury.” Op., RE100, PageID #2082. To the contrary, the intervenors relied entirely on a handful of speculative declarations. *See, e.g.*, Campbell Decl., RE72-5, PageID #1684, ¶ 39 (“I am also afraid that the new Title IX rule will prevent me from discussing my views with other teachers or responding honestly if a student asks me my views on gender identity.”); Keaton Decl., RE72-6, PageID #1692, ¶ 31 (“I fear that ... I will be kept from speaking the truth about religious and controversial topics”); Taylor Decl., RE72-9, PageID #1717, ¶ 48 (“I fear I will be punished for violating the new rules.”). Such “speculative [and] theoretical” allegations of harm do not suffice. *Michigan Coal. of Radioactive Material Users v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991); *see also, e.g., Fischer v. Thomas*, 78 F.4th 864, 868 (6th Cir. 2023).

B. The Equities and Public Interest Weigh Against an Injunction.

The remaining factors tilt decisively towards the Department. Every time the federal government “is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quotation marks omitted). The harm is particularly pronounced here because the Rule effectuates Title IX’s goals of “avoid[ing] the use of federal resources to support discriminatory practices [and] provid[ing] individual citizens effective protection against those practices.” *Cannon v. University of Chi.*, 441 U.S. 677, 704 (1979). No one disputes that preventing discrimination serves a compelling public interest. See *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1359 (6th Cir. 1975). By contrast, plaintiffs would suffer no cognizable harm from litigating their claims on an ordinary schedule—and in any case any such harms would be dramatically outweighed by the government’s interest in stamping out sex discrimination and ensuring all students’ access to federally funded educational opportunities. Cf. *Winter*, 555 U.S. at 23 (public interest in naval training “outweighed” irreparable injury to wildlife).

IV. At a Minimum, the Injunction Is Overbroad.

Finally, at a minimum, the preliminary injunction was overbroad, for “injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs” on their valid claims. *Califano v. Yamasaki*,

442 U.S. 682, 702 (1979); *see also* *Union Home Mortg. Corp. v. Cromer*, 31 F.4th 356, 364 (6th Cir. 2022) (preliminary injunction is “overly broad when there is a risk that it restrains legal conduct”).

A. The district court erred in extending its injunction to provisions that plaintiffs have not even challenged. As set out above, plaintiffs challenged three provisions of the Rule: 34 C.F.R. § 106.10, 34 C.F.R. § 106.31(a)(2), and 34 C.F.R. § 106.2’s definition of hostile-environment harassment. But the Rule makes dozens of unrelated changes, most of which have nothing to do with gender identity. The district court did not find any of those provisions unlawful, and there was accordingly no basis to enjoin the Department from enforcing unrelated provisions that could easily have been issued as separate rules.

The district court also erred in enjoining § 106.10. Even putting aside plaintiffs’ failure to demonstrate a likelihood of success as to this provision, *see supra* pp.18-24, plaintiffs do not identify any harm they would suffer if they could not engage in discrimination on the basis of gender identity (let alone the other bases listed in § 106.10, such as pregnancy or sex stereotypes). They have never suggested that they wish to punish transgender students “simply for being ... transgender,” *Bostock*, 590 U.S. at 651, by, for example, barring them from participating in the science fair, the marching band, or student government.

Finally, the district court erred in enjoining § 106.2 other than the definition of hostile-environment harassment as applied to discrimination on the basis of gender

identity. Section 106.2 defines more than a dozen terms used throughout the Title IX regulations. Plaintiffs challenge only the definition of hostile-environment harassment, and they principally object to the application of this standard to discrimination on the basis of gender identity, focusing on pronouns and salutations. States’ Mot., RE19-1, PageID #867-68; Intervenor’s Mot., RE63-1, PageID #1411-12; *see also* Op., RE100, PageID #2037, 2044. There was no basis for enjoining any more of § 106.2 than the definition of hostile-environment harassment as applied to gender-identity discrimination.

B. The motions panel’s unpublished order—which as set out above does not bind the merits panel—does not counsel otherwise. The motions panel believed that § 106.10 implicates “every substantive provision of the Rule” because “there are ‘numerous’ references to sex discrimination throughout the Rule.” Stay Order 6. But the Rule’s unchallenged provisions would remain operative even if § 106.10 remained enjoined.

The motions panel appeared to assume that because many provisions of the Rule refer to sex discrimination, those provisions cannot function without § 106.10. But the Department’s pre-existing regulations (amended in 2020) repeatedly reference “sex discrimination” without defining that term or clarifying its scope. *See, e.g.*, 34 C.F.R. § 106.8(a) (2020) (Title IX coordinators); *id.* § 106.8(c) (2020) (grievance procedures); *id.* § 106.8(d) (2020) (extraterritoriality); *id.* § 106.71(a) (2020) (retaliation). Earlier regulations, too, have long referred to “discrimination on the basis of sex” and

“discrimination based on sex” without defining those terms. *E.g.*, 45 C.F.R. §§ 86.1, 86.3(a)-(b), 86.4, 86.6(a), 86.9(a), (c), 86.36(a)-(c), 86.37(a)(2), (b), 86.38(a), 86.39, 86.51(a)(4), 86.53, 86.56(b), 86.59 (1975). In short, the term “sex discrimination” or its variants has been ubiquitous in the Department’s Title IX regulations for decades, and both the Department and regulated entities have understood that term to simply incorporate Title IX’s prohibition on discrimination “on the basis of sex,” 20 U.S.C. § 1681(a), without further regulatory gloss. If § 106.10 remained enjoined, regulated entities would apply the rest of the updated Title IX regulations in the Rule in accordance with the text of Title IX, relevant precedent, and valid and unenjoined regulations.

The panel majority also faulted the Department for failing to consider whether other provisions of the Rule should remain in effect if § 106.10 were held invalid. Stay Order 8. In actuality, the Department specified that the provisions of the Rule are “intended to operate independently of each other” and confirmed that pre-existing severability clauses in the Title IX regulations apply to the Rule, such that “the potential invalidity of one provision should not affect the other provisions.” 89 Fed. Reg. at 33,848. Those clauses specify that “[i]f any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.” 34 C.F.R. §§ 106.16, 106.48. The Rule thus expressly instructs that “the potential invalidity of one provision should not affect the other provisions.” 89 Fed.

Reg. at 33,848. And the Rule explains how unchallenged provisions, such as the “specific grievance procedure requirements,” “operate separately from the clarification of the scope of sex discrimination under § 106.10.” *Id.* The legal disputes concerning Title IX’s application to gender-identity discrimination thus provide no justification for delaying or blocking the implementation of those important and unrelated reforms.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court’s preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,940 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

s/ Steven A. Myers

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Steven A. Myers

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	Description	PageID Range
RE1	States' Complaint	1-799
RE19	States' PI Motion	838-984
RE63	Intervenors' PI Motion	1383-1436
RE72	Intervenors' Complaint	1486-1718
RE73	Defendants' Response to States' PI Motion	1542-1575
RE91	Defendants' Response to Intervenors' PI Motion	1791-1819
RE92	States' PI Reply	1820-1860
RE99	Intervenors' PI Reply	1974-1995
RE100	Memorandum Opinion and Order	1996-2088
RE103	Notice of Appeal	2093-2095
RE109	Transcript of Preliminary Injunction Hearing	2121-2310

ADDENDUM

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20 U.S.C. § 1681

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and

continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals

of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

...

20 U.S.C. § 1682

§ 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.