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ATTORNEY GENERAL

May 15, 2023

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (Apr. 13, 2023)

Dear Secretary Cardona:

The Attorneys General of Mississippi, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia submit these comments opposing the Department of Education's proposed rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (Apr. 13, 2023).

For more than 50 years, Title IX of the Education Amendments of 1972 has safeguarded equal opportunity by prohibiting schools from discriminating against students "on the basis of sex," including in school athletics. 20 U.S.C. § 1681(a). Because providing equal opportunity at times requires recognizing inherent differences between the sexes, Title IX allows—and has long been understood to allow—schools to "operate or sponsor separate teams for members of each sex" in certain circumstances. 34 C.F.R. § 106.41(b). That framework has been critical to promoting equal opportunity for women and girls in athletics.

The proposed rule would depart from those foundational principles—and undermine the equal opportunity that Title IX has long secured—by redefining *sex*

to embrace undefined conceptions of gender identity. The proposed rule defies Title IX's text, history, and purpose. It disregards five decades of evidence showing the benefits of applying the traditional definition of biological sex in sports. It ignores basic considerations of privacy and dignity. And it fails to meet the Department's duty to analyze costs and benefits. Rather than "providing clarity," 88 Fed. Reg. at 22879, the proposed rule would inject uncertainty into school athletics and threaten the progress that Title IX has ushered in for women and girls over the past 50 years. The Department should withdraw the proposed rule.

## I. Background

### A. Title IX's Text, History, And Purpose

Title IX of the Education Amendments of 1972 prohibits schools from discriminating against students in "any education program or activity receiving Federal financial assistance" "on the basis of sex." 20 U.S.C. § 1681(a). Enacted in 1972, Title IX is the culmination of years of effort to equalize opportunities for male and female students.

In April 1970, an influential report by President Nixon's Task Force on Women's Rights and Responsibilities detailed "widespread and pervasive ... discriminatory practices against women," including "gross discrimination against women in education." A Matter of Simple Justice, The Report of the President's Task Force on Women's Rights and Responsibilities iii, 6 (Apr. 1970). The task force recommended "a national commitment to basic changes that will bring women into the mainstream of American life." *Id.* at iii. It advocated reforms to bring about equality between the sexes. These reforms included "guarantee[ing] women and girls admission to publicly supported educational institutions under the same standards as men and boys." *Id.* at 5.

Soon after this, Senator Birch Evans Bayh Jr. introduced the Education Amendments of 1972 in Congress. He explained that "one of the great failings of the American educational system" was "the continuation of corrosive and unjustified discrimination against women." 118 Cong. Rec. 5730, 5803 (1972). He stressed that the new law—now commonly referred to as Title IX—would be "a strong and comprehensive measure ... to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." *Id.* at 5804. Title IX passed the Senate and House with bipartisan majorities, reflecting broad societal consensus that men and women should be provided equal opportunities in schools.

### B. Title IX's Longstanding Application To School Athletics

Title IX applies to a vast range of educational programs and activities. These include (with some exceptions) "all of the operations of ... a college, university, or other postsecondary institution," "a public system of higher education," "a local educational agency," or "other school system," "any part of which is extended Federal financial assistance." 20 U.S.C. § 1687. Since 1975, Title IX regulations have required schools (from elementary schools to colleges) to provide equal opportunities for students in athletics.

Title IX recognizes that, at times, providing equal opportunity requires recognizing inherent differences between the sexes. *Cf. United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsburg, J.) ("Physical differences between men and women ... are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'") (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). For example, the statute expressly permits schools to maintain "separate living facilities for the different sexes." 20 U.S.C. § 1686. This approach followed careful consideration in Congress and carried over to school athletics. When introducing Title IX, Senator Bayh identified "sports facilities" as a case where "different treatment by sex" would be proper. 118 Cong. Rec. at 5807. He explained that just as Title IX would not "requir[e] integration of dormitories between the sexes," it would not "mandate[ ] the desegregation of football fields." 117 Cong. Rec. 30399, 30407 (1971). Congress followed Senator Bayh's lead and recognized that "a different approach to athletics was appropriate." 88 Fed. Reg. at 22863. It directed that for "intercollegiate athletic activities," Title IX's implementing regulations must include "reasonable provisions considering the nature of particular sports." Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484, 612 (1974).

Title IX's implementing regulations took effect in July 1975 after undergoing congressional review. The Title IX athletics regulation—which the proposed rule would amend—provides: "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics ... , and no [school] shall provide any such athletics separately on such basis." 34 C.F.R. § 106.41(a). But, consistent with the statute, the regulation is clear that schools "may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* § 106.41(b).

Title IX has ushered in amazing progress for women and girls, including female athletes. *See Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993) ("[A]lthough title IX and the [athletics] regulation apply equally to boys as well as girls, it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys'

athletic programs to the exclusion of girls' athletic programs."). When the law was enacted, about 294,000 girls participated in high-school sports each year—compared to over 3.6 million boys. Women's Sports Foundation, 50 Years of Title IX (2022), https://bit.ly/3V66cHW. By 2018, over 3.4 million girls were playing high-school sports. *Ibid.*; *see also* Nat'l Ctr. for Educ. Stat., Fast Facts for Title IX, https://bit.ly/3npc1DR ("The girls' high school participation rate is greater than 11 times what it was when Title IX was passed, an increase of more than 1,000 percent.").

### C. The Proposed Rule

On April 13, 2023, the Department published in the Federal Register the proposed rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams. The Department acknowledged that its "longstanding view" has been "that sex-separate teams can in some instances advance Title IX's goals." 88 Fed. Reg. at 22869 n.10; *see* U.S. Dep't of Educ., Fact Sheet: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams 5 (Apr. 6, 2023) (Fact Sheet), https://bit.ly/3NAzhtq ("The Department's regulations have ... long permitted schools to offer separate male and female teams in some circumstances."). But the proposed rule would reshape Title IX's application to school athletics and dramatically narrow that critical feature.

The rule would modify Title IX's athletics regulation to add this provision:

> If a [school] adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) Be substantially related to the achievement of an important educational objective; and (ii) Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

88 Fed. Reg. at 22891.

The rule would thus require schools to meet an extreme form of intermediate scrutiny whenever they adopt eligibility criteria for athletics based on the traditional definition of *sex*—which has been the norm for all of Title IX's existence. The proposed rule does not define *gender identity*. It does not explain what constitutes "harm[ ] to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied." *Ibid.* And it does not explain how such "harm[ ]" is to be balanced against the harm to students—particularly women and girls—who thrive under the longstanding Title

IX framework. *Ibid.* By all indications, the rule would make it very hard for schools to retain the central understanding of *sex* that has enabled Title IX to promote equal opportunity and spur the amazing athletic success of women and girls.

## II. The Proposed Rule Is Unlawful And Should Be Withdrawn

The proposed rule is profoundly flawed. If adopted, it would be unlawful on many fronts. The Department should withdraw it.

### A. The Proposed Rule Is Inconsistent With Title IX

The proposed rule defies Title IX. Agencies cannot make rules "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (internal quotation marks omitted). And when Congress has directly spoken on an issue, its clearly expressed intent controls. *Id.* at 132. The proposed rule is irreconcilable with those principles. Title IX and its implementing regulations (which took effect with Congress's approval) adopt and rest on the traditional definition of biological sex. The proposed rule would supplant Congress's clear, settled understanding with gender-identity ideology.

#### 1. Title IX Adopts The Traditional Definition Of Sex, Longstanding Regulations Do The Same, And That Settled Approach Is Central To Promoting Title IX's Core Purpose In Athletics

Title IX adopts the traditional view of *sex*—meaning biologically male and female. When Title IX was enacted, *sex* meant "[t]he condition or character of being male or female." The American Heritage Dictionary of the English Language 1187 (1969); *see ibid.* (also defining *sex* as "The property or quality by which organisms are classified according to the reproductive functions ... . Either of two divisions, designated *male* and *female*, of this classification."); Webster's Third New International Dictionary 2081 (1966) (defining *sex* as "one of the two divisions of organic esp. human beings respectively designated male or female"). In line with that enduring, binary understanding of *sex*, Title IX recognizes that schools have no "justifiable reason to discriminate against one sex or the other." 118 Cong. Rec. at 5807 (remarks of Senator Bayh).

Title IX generally bars—as presumptive discrimination—different treatment or separation based on sex. But the statute recognizes that in certain settings, providing equal opportunity requires recognizing inherent differences between the sexes. In doing so, the statute repeatedly embraces the traditional definition of *sex* as "male or female." It permits schools to maintain "separate living facilities for the different sexes." 20 U.S.C. § 1686. It contains express exceptions

for fraternities and sororities. *Id.* § 1681(6)(A). It makes exceptions for "the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and [other] voluntary youth service organizations" that "traditionally [have] been limited to persons of one sex." *Id.* § 1681(6)(B). It carves out "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." *Id.* § 1681(7)(A). And it permits "father-son or mother-daughter activities" provided that if they are offered "for students of one sex" they are offered "for students of the other sex" as well. *Id.* § 1681(8).

Longstanding Title IX regulations—in effect since 1975—follow the statute by incorporating the traditional understanding of *sex*. The regulations permit schools to "provide separate toilet, locker room, and shower facilities on the basis of sex" if the facilities "provided for students of one sex" are "comparable" to those "provided for students of the other sex." 34 C.F.R. § 106.33. The regulations similarly allow "separate housing on the basis of sex" if it is comparable from "one sex" to "the other sex." *Id.* § 106.32(b). The regulations repeatedly recognize that *sex* means male or female. *See id.* § 106.7 (duty to provide educational programs not alleviated where employment opportunities are "more limited for members of one sex than for members of the other sex"); *id.* § 106.31(c) (schools that administer foreign scholarship programs "restricted to members of one sex" must provide "reasonable opportunities for similar studies for members of the other sex"); *id.* § 106.37(c)(2) ("Separate athletic scholarships ... for members of each sex may be provided as part of separate athletic teams for members of each sex ... .").

This long-settled approach has promoted Title IX's core aim in athletics. Title IX aims to "provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved." 117 Cong. Rec. at 30406 (remarks of Senator Bayh). Title IX does "not requir[e]" (for example) "that intercollegiate football be desegregated, nor that the men's locker room be desegregated." *Ibid.* To the contrary, the statute recognizes that separating men's and women's sports teams is essential for promoting equal opportunity. As Bernice Resnick Sandler—a famed women's-rights activist known as "the godmother of Title IX," More Men's Teams Benched As Colleges Level the Field, N.Y. Times (May 9, 2002)—has emphasized: "some sex segregation is necessary" for athletics. Bernice Resnick Sandler, Title IX: How We Got It and What A Difference It Made, 55 Clev. St. L. Rev. 473, 482 (2007). "If all teams were integrated by sex, few women would have access to sports." *Ibid.* And because "some sports are preferred more by men or by women," "having *equal* and *identical* programs is often not possible nor desirable." *Ibid.* Thus, for decades, Congress, the Department, schools, and the public have recognized that applying the traditional definition of *sex* advances Title IX's core objectives. *See supra* Part I. Doing so protects the privacy, dignity, and safety of

women and girls. All those features are essential to providing equal opportunity. *See infra* Part II-B-2. In athletics, applying the traditional definition of *sex* also promotes fairness, competitive integrity, and physical safety. *See ibid.* Those views—which align with the approach cemented into Title IX and its regulations—have been echoed by world-class female athletes who have emphasized that having separate teams for boys and girls "is the only way to achieve equality for girls and women in competitive athletics." Doriane Coleman, Martina Navratilova, & Sanya Richards-Ross, Pass the Equality Act, But Don't Abandon Title IX, Wash. Post (Apr. 29, 2019), https://bit.ly/3L3CT4c ("Title IX not only permits but often requires educational institutions that receive federal money to provide separate programs and opportunities for females based on sex.").

### 2. The Proposed Rule Defies Title IX's Text, Settled Regulatory Understanding, And Purpose

The proposed rule would abandon the settled understanding of Title IX and its legacy of achieving equal opportunity by addressing "discriminat[ion] against one sex or the other." 118 Cong. Rec. at 5807 (remarks of Senator Bayh).

The Department admits that its "longstanding view" is "that sex-separate teams can in some instances advance Title IX's goals." 88 Fed. Reg. at 22869 n.10. It claims that the proposed rule "would not affect a [school's] discretion ... to offer separate male and female athletic teams when selection is based on competitive skill or the activity involved is a contact sport" and "would govern" only "a narrow category of athletic eligibility criteria" where "eligibility to participate on a male or female team" is not based on "gender identity." *Id.* at 22871.

That claim is specious. The proposed rule departs from Title IX's text, longstanding regulatory approach, and purpose by jettisoning the use of biological sex in athletics. The rule would make it dramatically more difficult (if not practically impossible) for schools to apply eligibility criteria based on the traditional definition of sex—that is, whenever they follow the Title IX framework that has been in place for more than 50 years. Under the proposed rule, schools applying traditional sex-related criteria to (for example) maintain girls' and boys' athletic teams would have to meet an extreme form of intermediate scrutiny that requires demonstrating both that such criteria are "substantially related to the achievement of an important educational objective" and "[m]inimize harms to students" who are unable to "participate on a male or female team consistent with their gender identity." 88 Fed. Reg. at 22891. Satisfying that level of scrutiny will be all the more challenging because the Department deliberately leaves undefined its conception of gender identity. It does not even attempt to explain when or how gender identity is to be determined. Nor does it explain how the "harm to students" who are unable participate "consistent with their gender identity" is to be balanced

against the harm to students who thrive under the existing Title IX framework (if it is to be balanced at all).

Indeed, the Department's statements show just how extreme its version of intermediate scrutiny would be. The Department has already announced that, if the rule were adopted, "elementary school students would generally be able to participate on school sports teams consistent with their gender identity," Fact Sheet 3, regardless of a school's preferred approach to athletics. The Department has also asserted that "it would be particularly difficult for a school to justify excluding students immediately following elementary school from participating consistent with their gender identity." *Ibid.* So the Department has already prejudged the results of its new approach.

As further evidence that the Department is abandoning Title IX's requirements, the Department has sweepingly condemned recent state laws that protect women- and girls-only sports teams and thus promote equal athletic opportunities for women and girls. *See* Fact Sheet 1 (criticizing "new [state] laws and policies on athletics participation that target transgender students"); 88 Fed. Reg. at 22866 (faulting laws in Idaho, Indiana, and West Virginia for "categorically limit[ing] transgender students' eligibility to participate on male or female athletic teams consistent with their gender identity"). The Department has said outright that "[u]nder the proposed regulation, schools would not be permitted to adopt or apply a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity." Fact Sheet 2. This just admits that the supposed "flexibility" the Department has promised for schools—"to develop their own participation policies" and "organize their athletic program as they wish" consistent with Title IX—is a red herring. *Id.* at 1, 5.

The Department attempts to justify the rule based on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *Bostock* held that an employer who fires an employee merely for being gay or transgender violates Title VII of the Civil Rights Act, which prohibits discrimination in employment "because of sex." *Id.* at 1740. *Bostock* does not support the Department's reimagining of Title IX. To begin, *Bostock* assumed (without deciding) that *sex* in Title VII—which was enacted just eight years before Title IX—means "biological distinctions between male and female." *Id.* at 1739; *see id.* at 1746-47 ("transgender status" is a "distinct concept[ ] from sex"). The proposed rule rejects that basic assumption, which makes *Bostock* an odd springboard for redefining *sex* to mean *gender identity*. And *Bostock* interpreted Title VII's bar on discrimination in employment "because of sex" to incorporate a "sweeping" "but-for causation standard," which is satisfied when an employer treats an employee differently "on account of" sex—even if "other factors besides ... sex contributed to the decision." *Id.* at 1739, 1740, 1741. Title IX does not use the "because of sex" language or adopt a but-for standard. It applies to discrimination "on the basis of sex." 20 U.S.C. § 1681(a); *cf. Jackson v. Birmingham*

*Bd. of Educ.*, 544 U.S. 167, 168 (2005) (Title VII "is a vastly different statute" than Title IX). And Title VII reflects Congress's "simple but momentous announcement that sex" is "not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion). By contrast, Title IX *permits* and at times *requires* schools to consider sex and to treat students of each sex differently when doing so advances the statute's aims, including in athletics. Last, in *Bostock* the Court limited its holding to the question whether firing an employee merely for being gay or transgender violates Title VII—and disclaimed any holding on the propriety of "sex-segregated bathrooms, locker rooms, and dress codes" under Title VII or on "other federal or state laws that prohibit sex discrimination." *Id.* at 1753. *Bostock* provides no cover for the Department's attempt to rewrite Title IX.

The Department alludes to "the interest of some stakeholders in preserving certain [schools'] current athletic-team policies and procedures regarding sex-related eligibility criteria." 88 Fed. Reg. at 22866. But that is not a mere *interest*. The traditional understanding of *sex* is a central feature of Title IX. The proposed rule would override that feature. The Department drives home its true aim when it declares its hostility to state laws limiting sports based on biological sex. *See ibid.* All told, the Department's proposed rule suggests that it is less concerned with honoring Title IX and its core aim in athletics—promoting equal opportunity for women and girls—than with promoting gender-identity ideology.

### B. The Proposed Rule Rests On A Failure To Soundly Assess Benefits, Costs, And Important Aspects Of The Problem

The proposed rule fails basic requirements of agency action. An agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). A rule is unlawful when the agency "entirely fail[s] to consider an important aspect of the problem" that Congress sought to address. *Ibid.* An agency must "take into account benefits and costs, both quantitative and qualitative" of significant regulatory action, and "select ... approaches that maximize net benefits." Improving Regulation and Regulatory Review, Exec. Order No. 13563, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011); *see* Regulatory Planning and Review, Exec. Order. No. 12866, 58 Fed. Reg. 51735, 51736 (Sept. 30, 1993). It must "propose or adopt a [significant] regulation only upon a reasoned determination that the benefits ... justify its costs." Exec. Order. No. 12866, 58 Fed. Reg. at 51736; *see* Exec. Order No. 13563, 76 Fed. Reg. at 3821 (same); Nina A. Mendelson & Jonathan B. Wiener, Responding to Agency Avoidance of OIRA, 37 Harv. J.L. & Pub. Pol'y 447, 456 (2014) (The cost-benefit requirement is a "key element[ ]" for oversight of the administrative state that "has been consistently maintained and reaffirmed ... by each President since Reagan.").

The proposed rule flunks these requirements.

### 1. The Department Has Failed To Seriously Assess The Proposed Rule's Claimed Benefits

The proposed rule fails to seriously account for and assess the rule's claimed benefits. The Department merely asserts that "the proposed regulation would provide numerous important benefits," but admits that "it is not able to quantify these benefits at this time." 88 Fed. Reg. at 22879; *see* Reginfo.gov, RIN 1870-AA19, Nondiscrimination on the Basis of Sex in Athletics Education Programs or Activities Receiving Federal Financial Assistance, https://bit.ly/3VRL48y ("We have limited information about the costs and benefits at this time.").

This is woefully inadequate. Of course, "*some* benefits and costs are difficult to quantify" in the regulatory context. Exec. Order No. 13563, 76 Fed. Reg. at 3821 (emphasis added); Exec. Order. No. 12866, 58 Fed. Reg. at 51735 (same). But the Department's "trust us" approach does not satisfy its duties to "base its decisions on the best reasonably obtainable ... information concerning the need for, and consequences of, the intended regulation," Exec. Order. No. 12866, 58 Fed. Reg. at 51735, and to "propose or adopt a regulation only upon a reasoned determination" of the benefits. *Id.* at 51736. Nor does it adequately arm the public with the information it needs to meaningfully participate in the notice-and-comment process. *Cf. infra* Part II-C.

And the benefits that the Department does vaguely claim lack a sound basis. The Department says that the rule would "provid[e] greater clarity" about the standards that apply to sex-related criteria in athletics. 88 Fed. Reg. at 22879; *see* Fact Sheet 6 ("The Department heard that students, parents, schools, athletic associations, and others need clarity about how schools can meet Title IX's nondiscrimination requirement if they limit students' eligibility to participate on male or female athletic teams consistent with their gender identity."). But the most reasonable assumption is that the rule would have the opposite effect. After all, the rule abandons the straightforward, decades-old view of Title IX by introducing the undefined concept of gender identity.

### 2. The Department Has Failed To Account For The Costs Of the Proposed Rule And To Consider Important Aspects Of The Problem

Most of the Department's cost-benefit analysis focuses on estimated monetary costs that schools may bear when "reviewing, adopting, and implementing policies" and "training staff" on the proposed rule. 88 Fed. Reg. at 22880. The Department fails to meaningfully engage with the proposed rule's truly important costs, which will be borne by women and girls denied the opportunity to

meaningfully participate in sports on an even playing field and in a manner that safeguards their privacy, dignity, and safety.

*First*, the Department ignores the benefits of Title IX's current, longstanding approach to athletics. The Department alludes to benefits provided by participating in sports, including lower rates of anxiety and depression, increased cognitive performance, improved fitness, improved life skills, and higher levels of academic achievement. *See* 88 Fed. Reg. at 22879. But the rule would deny those benefits to many female athletes whose positions on athletic teams would instead go to biological males. Indeed, the bitter irony is that the Department relies on Title IX's successes as the basis for fundamentally changing the framework that gave rise to those successes in the first place.

"[I]t is neither myth nor outdated stereotype that there are inherent differences between those born male and those born female and that those born male, including transgender women and girls, have physiological advantages in many sports." *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 819 (11th Cir. 2022) (Lagoa, J., concurring). Many studies show that, especially after puberty, marked differences emerge in the performance of male and female athletes with "an ever-widening gap starting at about age 10." Steve Magness, There's Good Reason for Sports to Be Separated by Sex, The Atlantic (Sept. 29, 2022), https://bit.ly/3NW3rHx. A recent study found that "the performance gap between males and females becomes significant at puberty and often amounts to 10–50% depending on sport." Emma N. Hilton & Tommy R. Lundberg, Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage, 51 Sports Med. 199, 199 (2021). In proposing to engraft notions of gender identity onto the Title IX framework, the proposed rule "insufficiently accounts for the sex-linked physiological advantages that drive male dominance and the performance gap." Doriane Coleman, Martina Navratilova, & Sanya Richards-Ross, Pass the Equality Act, But Don't Abandon Title IX, Wash. Post (Apr. 29, 2019), https://bit.ly/3L3CT4c. Refusing to recognize that "[s]port is an unusual if not unique institution ... where the relevance of sex is undeniable" would "cause the very harm Title IX was enacted to address." *Ibid.*

Studies also indicate that student athletes in general—and young women and girls in particular—benefit from sports and other athletic activities organized by biological sex. For example:

- A 2021 study revealed that teen girls were significantly more active in single-sex physical education classes. Crystal Vargos et al., The Effects of Single-sex Versus Coeducational Physical Education on American Junior High PE Students' Physical Activity Levels and Self-competence, 13 Biomedical Human Kinetics 170 (2021), https://bit.ly/3HiomAK. The data suggested that "it might be more ideal for females to participate in a single-sex setting to elicit more activity." *Ibid.*

- A 2019 survey indicated that a majority of girls preferred single-sex athletics classes and reported greater opportunities to develop skills and to experience lowered self-consciousness in classes separated by sex. Kelly Morgan et al., Formative Research to Develop a School-based, Community-linked Physical Activity Role Model Programme for Girls, BMC Public Health (2019), https://bit.ly/3n8tNeA.

- A 2011 study revealed that "[f]emale students in same-sex classes had notably higher scores in perceived physical competence, enjoyment and effort than females in coeducational classes, who had the lowest competence, enjoyment and effort perceptions." Minjeong Lyu and Diane L. Gill, Perceived Physical Competence, Enjoyment, and Effort in Same-sex and Coeducational Physical Education Classes, 31 Educ. Psych. 247, 258 (2011), https://bit.ly/3Npga5z.

Indeed, sources that the Department relies on refer to studies and reports that show the benefits of athletics organized by biological sex. For example:

- A September 2020 report from the President's Council on Sports, Fitness and Nutrition Science Board (cited in 88 Fed. Reg. at 22879) discusses reports describing the benefits of sex-conscious approaches to athletics. Benefits of Youth Sports, PCSFN Science Board (Sept. 17, 2020), https://bit.ly/3LwAi4n. One such report stresses that "the need for training and conditioning programs for male and female athletes in the same sport [may] be different." Women's Sports Foundation, Her Life Depends On It II: Sport, Physical Activity, and the Health and Well-Being of American Girls and Women 2, 73 (Dec. 2009), https://bit.ly/42tIk3S (cited in Benefits of Youth Sports at 3 n.11); *see id.* at 73 ("Differences between the sexes in anatomy and joint mechanics suggest that simply teaching women to move like men may be largely ineffective.") (internal quotation marks omitted). It also recounts that girls "had fewer opportunities to play single-sex sports" than their male counterparts, were forced to "play[ ] on a mixed-gender team in order to play a sport they liked," and, as a result, "reported that their high school popularity was contingent on emphasizing traditional femininity and downplaying their athleticism." *Id.* at 60-61. The proposed rule would exacerbate the lack of opportunity for women's and girl's teams. That is especially troubling given research showing that girls generally sustain more injuries than boys in several sports. *See* Jon Solomon, Safety Analysis Report, Aspen Institute Sports & Society Program (2018), https://bit.ly/3Latkk5 (noting, *e.g.*, that girls were 12.1% more likely to sustain a concussion and 2 to 10 more times as likely to injure their ACLs than boys in high-school sports).

- Another report notes that "sex differences in brain structure and function ... [are] likely to put women at greater risk of mood and anxiety disorders," and

stressed that "it is important to consider how the coupling of gender and sport type may affect risk for mental health issues." Emily Pluhar et al., Team Sport Athletes May Be Less Likely To Suffer Anxiety or Depression than Individual Sport Athletes, 18 J. of Sports Sci. & Med. 490, 493 (2019), https://bit.ly/3Me6qKj (cited in Benefits of Youth Sports 3 n.4).

- A recent study emphasized that further research is needed to understand the costs and benefits of mixed-sex sport environments, including the "unique challenges" for adolescent girls in "having to navigate tensions and problematic assumptions" when playing alongside members of the opposite sex. Melissa L. deJonge et al., One of These Is Not Like the Other: The Retrospective Experiences of Girl Athletes Playing on Boys' Sports Teams During Adolescence, Qualitative Research in Sport, Exercise and Health (Mar. 9, 2023).

The Department is silent on these important issues. It has thus failed to meaningfully account for costs and to consider important aspects of the problem.

*Second*, the Department ignores that competition and physical safety are not the only considerations for advancing Title IX's aims in athletics. As a result, it disregards the proposed rule's impact on privacy and dignity. Student athletes do not merely compete with one another on the field. They often share locker rooms, gyms, training rooms, dorms, bathrooms, and other facilities where privacy and dignity are essential concerns. Even in non-contact sports, athletes operate in close proximity and in intimate settings with opponents and teammates. These are reasons why Title IX and its longstanding regulations permit separate accommodations for men and women. As Senator Bayh explained, "differential treatment by sex" may be necessary "in sports facilities or other instances *where personal privacy must be preserved*." 118 Cong. Rec. at 5807 (emphasis added); *cf.* Ruth Bader Ginsburg, The Fear of the Equal Rights Amendment, Wash. Post (Apr. 7, 1975) ("Separate places to disrobe, sleep, [and] perform personal bodily functions are permitted, in some situations required, by regard for individual privacy.").

Indeed, when the Department held a public hearing in June 2021 on possibly incorporating gender identity into the Title IX framework, it received many comments from girls and women concerned about personal privacy. For example:

- One commentor attested to the "vulnerab[ility]" that women and girls experience when they lack "private female spaces in school," which promotes "harassment, exclusion, fear, and dehumanization on the basis of their sex." June 10, 2021 Comment on Title IX Hearing, https://bit.ly/3n7zYiT.

- Another observed that the Department's changes would, in addition to promoting "an unfair competitive balance," "creat[e] an environment that is

discriminating against" women's rights "to privacy." June 7, 2021 Comment on Title IX Hearing, https://bit.ly/3oMqpqj.

- Another commentor expressed concerns that eliminating "female-exclusive" spaces would "den[y] privacy and safety" and harm "the most vulnerable women in our society: victims of violence and young girls." June 10, 2021 Comment on Title IX Hearing, https://bit.ly/3Azz3uI.

- And hundreds of persons submitted comments emphasizing that the Department's actions would "harm privacy and steal opportunities for women and girls." May 2021 Comments on Title IX Hearing, https://bit.ly/3Ax6iyQ.

This just samples concerns expressed by the public, which has a strong interest in safeguarding opportunities for women and girls. Yet despite the obvious implications for privacy and dignity of women athletes, the proposed rule does not address the issue at all. It mentions privacy only when discussing the potential impact on transgender individuals in having to "verify" their sex to participate on single-sex teams. 88 Fed. Reg. at 22877.

These failures defy the demands of law and show that the proposed rule is not the product of reasoned decisionmaking.

### C. The Irregularity Of The Department's Approach Confirms That The Proposed Rule Is Poorly Considered

Agencies must "afford the public a meaningful opportunity to comment … on any proposed regulation, with a comment period that should generally be at least 60 days." Exec. Order No. 13563, 76 Fed. Reg. at 3821-22; *see* Exec. Order No. 12866, 58 Fed. Reg. at 51740 (same). As a coalition of States observed in a recent letter to the Department, "[t]he Department should not arbitrarily and capriciously rush this rule." Letter from Tennessee Attorney General Jonathan Skrmetti et al. to Secretary Cardona 2 (Apr. 21, 2023). Yet the Department has provided a mere 32 days for the public to comment on its proposed fundamental changes to Title IX regulations that have been on the books for nearly five decades. The Department summarily rejected a request to extend that period—even while it acknowledged the "considerable public interest" in the proposed rule. Letter from Assistant Secretary for Civil Rights Catherine E. Lhamon to Tennessee Attorney General Jonathan Skrmetti 1 (May 5, 2023).

The Department's haste is all the more troubling given its assumption that the proposed rule will affect tens of thousands of schools and tens of millions of students, *see* 88 Fed. Reg. at 22880-89, not to mention countless parents, teachers, coaches, and others with a vested interest in school athletics. When the Department hosted a virtual hearing on Title IX and gender-identity issues in June

2021, it received over 30,000 written comments, *id.* at 22865—many of which expressed significant concerns about girls' privacy and well-being. *Cf. supra* Part II-B-2. And when the Department published the precursor rulemaking to the proposed rule here, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022), it provided a more-typical 60-day comment period and received over 238,000 public comments. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Regulations.gov, https://bit.ly/3pu9AR8.

The Administrative Procedure Act's notice-and-comment requirements "are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). The Department's decision to plow ahead with the proposed rule on an artificially truncated timeline suggests that it is not interested in providing a meaningful opportunity for comment. *Cf. Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919, 954-56 (N.D. Cal. 2021) (finding insufficient a 30-day comment period for a regulation that received 1,284 public comments). The Department's approach is even more problematic given its abdication of its duty to conduct a federalism analysis, *see* 88 Fed. Reg. at 22890, placing greater burden on commentors—and particularly state governments—to pick up the slack.

* * *

Title IX passed Congress with bipartisan majorities, reflecting broad consensus that men and women, boys and girls, should have equal opportunities in schools. The issue of gender identity in sports, on the other hand, is incredibly divisive and unsettled. *See*, *e.g.*, House Passes Bill to Bar Transgender Athletes From Sports, Roll Call (Apr. 20, 2023), https://bit.ly/42BNF90 (detailing pending federal legislation that would bar transgender women from playing on teams based on gender identity). Title IX quite obviously did not embrace the deeply divisive gender-identity ideology that the Department now proposes to engraft onto it. Engrafting the deliberately vague, undefined, and malleable concept of gender identity onto Title IX—and subjecting schools to an extreme form of intermediate scrutiny if they try to continue to uphold Title IX's aims—will do a great disservice to our Nation's student athletes. Instead of advancing the mission that Title IX started more than 50 years ago, the proposed rule would take a large leap toward erasing many women and girls from competitive sports. The rule would undermine a crowning achievement of our Nation and "the source of a vast expansion of athletic opportunities for women in the nation's schools and universities." *Mansourian v. Regents of Univ. of California*, 602 F.3d 957, 961 (9th Cir. 2010).

The Department should abandon the proposed rule.

Sincerely,

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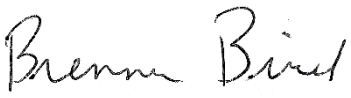

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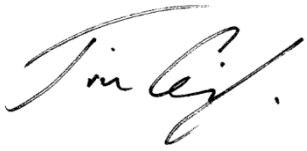

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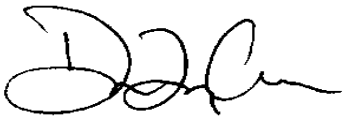

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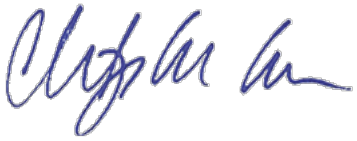

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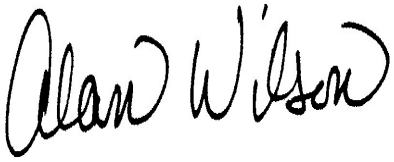

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