IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF PENNSYLVANIA, et al.,
Plaintiffs,

v.

MITCHELL ZAIS, in his official capacity as Acting Secretary of Education et al.,
Defendants,

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, et al.,
Defendant-Intervenors.

No. 1:20-cv-1468-CJN

DEFENDANT-INTERVENORS' COMBINED MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Charles J. Cooper (D.C. Bar #248070)
Brian W. Barnes (pro hac vice)
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com
bbarnes@cooperkirk.com

Counsel for Foundation for Individual Rights in Education

William S. Consovoy (D.C. Bar #493423)
Cameron T. Norris
Alexa R. Baltes (pro hac vice)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com
cam@consovoymccarthy.com
lexi@consovoymccarthy.com

Counsel for Speech First, Inc. and Independent Women's Law Center

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INTRODUCTION

The First and Fourteenth Amendments constrain when and how public universities may punish speech, yet for many years Department of Education guidance documents encouraged schools to disregard those constraints when presented with allegations of sexual misconduct. Recognizing both the practical and constitutional problems with its former approach, the Department changed course last year in the Title IX Rule that is the subject of this lawsuit. Plaintiffs urge the Court to force the Department to return to the prior regime but doing so would expose both the Department and public universities to liability for violating the Constitution. However objectionable Plaintiffs may find certain speech, the First Amendment does not allow public universities to punish "sexual harassment" unless it is severe, pervasive, *and* objectively offensive. And before life-altering, career-ending sanctions are imposed on a public university student, the accused is constitutionally entitled to a hearing at which he has a meaningful opportunity to contest the credibility of the witnesses against him. Plaintiffs cannot mount a successful challenge to features of the Rule that require their public universities to do nothing more than comply with these constitutional mandates.

Moreover, wholly independent from those constitutional considerations, Plaintiffs' Administrative Procedure Act challenge to the Rule cannot succeed. The process the Department used in promulgating its rule represents the best of administrative decision making. Rather than using unreviewable guidance documents and the threat of lost federal funding as cudgels to force schools to conform to the Department's preconceived policy preferences, the Department instead opted to promulgate regulations after an exhaustive, multi-year effort to solicit and account for public comments reflecting a wide variety of perspectives. The Rule's preamble devotes hundreds of pages

to a reasoned discussion of the policy tradeoffs involved and the evidence and arguments offered in over 124,000 comments. Given the Rule's importance and controversial subject matter, it was inevitable that some would be dissatisfied with any approach the Department ultimately adopted. But to accept Plaintiffs' invitation to turn such disagreement into a basis for throwing out the Rule would send a troubling message to administrative agencies tasked with making rules that touch upon politically charged topics: don't bother. The Department deserves praise for opting to do the hard work that was involved in promulgating these important regulations, and Plaintiffs do not come close to making a persuasive argument for setting aside the Rule under the deferential standard afforded by the Administrative Procedure Act.

FACTUAL BACKGROUND

Title IX prohibits education programs that receive federal financial assistance from discriminating on the basis of sex. 20 U.S.C. § 1681. In 1997, the Department published its first guidance on funding recipients' obligations to address sexual harassment. Sexual Harassment Guidance, 62 Fed. Reg. 12,034, 12,035 (Mar. 13, 1997). The Department "did not request substantive comments" on this guidance, and the roughly 80 comments it received mostly focused on the document's "clarity and completeness" rather than its substance. 62 Fed. Reg. 12,034–35. The Department largely reiterated its position on sexual harassment and Title IX in a 2001 guidance document that it issued the day before President Clinton left office. *See* Sexual Harassment Guidance, 66 Fed. Reg. 5,512 (Jan. 19, 2001), *available at* https://bit.ly/3oVQaj6 ("2001 Guidance"). For the 2001 guidance document, the Department received a total of 11 comments from 15 organizations and individuals. 2001 Guidance at iii.

The Department reassessed its guidance a decade later in a 2011 Dear Colleague Letter on Sexual Violence and a 2014 Q&A document. Neither guidance document was subject to notice and comment. As relevant here, these two guidance documents expressed the Department's view that schools should be "strongly discourage[d] . . . from allowing the parties personally to question or cross-examine each other" during sexual harassment grievance proceedings. U.S. Dep't. of Educ. Office for Civ. Rights, Dear Colleague Letter, pg. 12 (Apr. 4, 2011), *available at* https://bit.ly/2M2lnlY ("2011 Dear Colleague Letter"). The 2011 Dear Colleague Letter stated that schools "must use a preponderance of the evidence standard" during such proceedings. *Id.* at 11. And the Letter warned funding recipients to ensure that "steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant." *Id.* at 12. The Department withdrew the 2011 and 2014 guidance documents in 2017.

Despite using guidance documents to shape the legal backdrop for funding recipients' efforts to comply with Title IX, the Department carefully drafted them in a (largely successful) effort to evade judicial review. For instance, the Department averred in its 2011 Dear Colleague Letter that it considered the letter to be a "'significant guidance document,' which 'does not add requirements to applicable law, but provides information and examples to inform recipients about how [the Department's Office of Civil Rights] evaluates whether covered entities are complying with their legal obligations.'" *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 205 (D. Mass. 2017). Thus, an upshot of the Department's decision to speak only through guidance documents was that the reasonableness of its interpretation of Title IX was not subjected to full notice and comment or tested in court. *See SurvJustice Inc. v. DeVos*, 18-CV-00535-JSC, 2019 WL 5684522, at *15 (N.D.

Cal. Nov. 1, 2019) (concluding that 2017 guidance document "is not final agency action because it does not produce legal consequences."); *cf. Perez v. Mortgage Bankers Ass'n,* 575 U.S. 92, 97 (2015) ("The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules.").

Despite the supposedly nonbinding nature of those guidance documents, "[m]any recipients changed their Title IX policies and procedures to conform to the 2001 Guidance, and then to the 2011 Dear Colleague Letter, in part based on [Department] enforcement actions that found recipients in violation for failing to comport with interpretations of Title IX found only in guidance." 85 Fed. Reg. 30,029 n.11. Thus, although the guidance was nominally nonbinding, "[t]he explicit threat" from the Department was that it would "terminate all federal funding—upon which virtually all institutions of higher education significantly rely—if schools did not change their policies and disciplinary procedures to comply." *Doe v. Univ. of Scis.*, 961 F.3d 203, 213 n.6 (3d Cir. 2020) (quoting Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 931–32 (2016)). These were potentially "ruinous" consequences, similar to what the Supreme Court described in another context as "economic dragooning" and a "gun to the head." *Id.* at 213 (quoting *NFIB v. Sebelius*, 567 U.S. 519, 581, 582 (2012)). The guidance, which was developed without the iterative and exhaustive demands of informal rulemaking and notice and comment, had significant consequences for both institutions and students alike. *See* 85 Fed. Reg. 30,029 n.11 (detailing numerous Department investigations into allegedly noncompliant recipients).

But the procedures endorsed by the Department's guidance documents, most notably the 2011 Dear Colleague Letter, were deeply flawed. This led to a "spate of cases" filed by students accused of sexual misconduct challenging the procedures and the resulting disciplinary actions

taken by funding recipients. *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 583 (E.D. Va. 2018). As one court explained, the 2011 Dear Colleague Letter's "goal of reducing sexual assault, and providing appropriate discipline for offenders, is certainly laudable. Whether the elimination of basic procedural protections—and the substantially increased risk that innocent students will be punished—is a fair price to achieve that goal is another question altogether." *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 572 (D. Mass. 2016).

Courts around the country answered by concluding that institutions' procedures did not strike the appropriate balance—the procedures often denied students basic tenets of due process and fundamental fairness. *See, e.g.*, *Doe v. Univ. of Scis.,* 961 F.3d 203, 215 (3d Cir. 2020); *Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019); *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399–402 (6th Cir. 2017); *see also Lee v. Univ. of New Mexico*, 449 F. Supp. 3d 1071, 1127 (D.N.M. 2020); *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 131–34 (Cal. Ct. App. 2019); *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 61 (Cal. Ct. App. 2018); *Doe v. Univ. of S. Cal.* 241 Cal. Rptr. 3d 146, 163 (Cal. Ct. App. 2018); *Doe v. Claremont McKenna Coll.*, 236 Cal. Rptr. 3d 655, 666 (Cal. Ct. App. 2018); *Doe v. Univ. of Michigan*, 325 F. Supp. 3d 821, 828 (E.D. Mich. 2018), *vacated on other grounds*, *Doe v. Bd. of Regents of Univ. of Mich.*, 2019 WL 3501814 (6th Cir. 2019); *Doe v. Univ. of Miss.*, 3:16-CV-63-DPJ-FKB, 2018 WL 3570229, at *11 (S.D. Miss. July 24, 2018); *Doe v. Pa. State Univ.*, 336 F. Supp. 3d 441, 450 (M.D. Pa. 2018); *Doe v. Alger*, 228 F. Supp. 3d 713, 730 (W.D. Va. 2016); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 603 (D. Mass. 2016); *cf. Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 70 (1st Cir. 2019) (upholding university's process in one student's expulsion proceeding only because the disciplinary panel "avoid[ed] the pitfalls created by" the university's "ill-

suited" training manual and instead conducted "reasonably adequate questioning"). Indeed, since 2011, no less than 151 state and federal courts have issued rulings favorable to students who objected to the procedures used in campus adjudications. Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 66 (2019).

After decades of allegedly "nonbinding" guidance that evaded judicial review, using that guidance to "dragoon" compliance by schools, and then witnessing litigation against schools on the basis of the flawed procedures that guidance "recommended," the Department at last pursued a different path. As it stated in the preamble to the final Rule at issue in this case, the Department issued the Rule "to better align the Department's Title IX regulations with the text and purpose of Title IX, the U.S. Constitution, Supreme Court precedent and other case law, and to address the practical challenges facing students, employees, and recipients with respect to sexual harassment allegations in education programs and activities." 85 Fed. Reg. 30,030.

On May 19, 2020, the Department of Education published its final Rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (the "Rule") to take effect on August 14, 2020. *See* 83 Fed. Reg. 30,026. This Rule reflected the culmination of a years-long process to "develop an approach to student sexual misconduct that responds to the concerns of stakeholders and that aligns with the purpose of Title IX to achieve fair access to educational benefits." U.S. Dep't. of Educ. Office for Civ. Rights, Dear Colleague Letter, at 2 (Sept. 22, 2017), https://bit.ly/3oVyrrS. Stakeholders had raised concerns that the practices endorsed by the Department's previous guidance "led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate

resolution of their complaints." *Id.* As then-Secretary DeVos said in 2017, "One rape is one too many. One assault is one too many. One aggressive act of harassment is one too many. One person denied due process is one too many." 85 Fed. Reg. 30,059 (quoting Betsy DeVos, U.S. Sec'y of Education, Prepared Remarks on Title IX Enforcement (Sept. 7, 2017), https://bit.ly/3qya4Rv). To that end, the Department began to regulate sexual harassment for the first time in its history through a process that would culminate in a rule binding on recipients of federal funding and with a resulting regulation that would fall within the Constitution's commands.

In November 2018, the Department issued its Proposed Rule in a Notice of Proposed Rulemaking, 83 Fed. Reg. 61,462, opening the way for a public comment period. The Department received over 124,000 comments in response to its proposed rule. The Department heard from those who had been victims of sexual assault and sexual harassment, "parents and grandparents of students who had been assaulted, classmates and friends of victims, teachers at all levels, professors, counselors, coaches, Title IX Coordinators, rape crisis advocates, graduate students and teaching assistants, resident advisors, social workers, and health care professionals." 85 Fed. Reg. 30,055. The Department heard from those who had been accused of sexual assault and sexual harassment, both male and female, "respondents of color, faculty-respondents, . . . graduate-student respondents," "individuals with disabilities such as autism," and those close to the accused, "friends and classmates, parents and family members," and "professors and teachers who had seen the system in action." 85 Fed. Reg. 30,057. These comments and personal stories were in addition to comments from schools, universities, nonprofit groups, concerned citizens, and thousands of others. In developing and revising its final Rule, "the Department considered the input of the over 124,000 comments [it] received," and these comments were "taken into account with respect to

each issue addressed" in the final Rule. 85 Fed. Reg. 30,505.

As the Rule's preamble makes clear, the Department's final Rule and its provisions reflect a reasoned analysis of the issues and concerns raised by the commenters. The Department's careful and iterative process in finalizing the Rule is best highlighted by a review of the Department's approach to a few of the Rule's key provisions.

1. Definition of Sexual Harassment

In § 106.30 of the Rule, the Department adopted a three-part definition of what constitutes sexual harassment for purposes of Title IX and federal funding recipients' resulting obligations. Sexual harassment includes quid pro quo harassment, sexual assault under the Clery Act, 20 U.S.C. § 1092(f)(6)(A)(v), dating violence, domestic violence, stalking in the Clery Act as amended by Violence Against Woman Act ("VAWA"), 34 U.S.C. § 12291(a)(8), (10), (30), and a catchall provision that tracks the definition of sexual harassment adopted by the Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 650 (1999). This catch-all prohibits "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." 34 C.F.R. § 106.30. The Department adopted this latter *Davis* provision in part to "help[ ] ensure that Title IX is enforced consistent with the First Amendment." 85 Fed. Reg. 30,033.

The Rule's preamble notes that "[m]any commenters expressed support for the § 106.30 definition of sexual harassment." *Id.* at 30,139. For instance, one commenter stated that the definition,

> makes clear that Title IX governs misconduct by colleges, not students, and addresses the real problem of sexual harassment while acknowledging that not all

> forms of unwanted sexual behavior—inappropriate and problematic as they may be—rise to the level of a Title IX violation on the part of colleges.

Id. Indeed, the unique position of colleges and universities proved to be of vital importance in the perspective of several commenters because "the § 106.30 definition . . . would protect free speech and academic freedom while still requiring recipients to respond to sexual harassment." *Id.* Further, since the Department's standard matched the Supreme Court's standard in *Davis*, universities noted that the consistency with the *Davis* standard would be administratively "helpful." American Council on Education Comment pg. 7, AR 128325; Purdue Univ. Comment pg. 1, AR 150910 ("[W]e welcomed the Department's principles-based approach—primarily the notion that 'administrative standards governing recipients responses to sexual harassment should be generally aligned with the standards developed by the Supreme Court in cases assessing liability under Title IX . . . .'").

The Department acknowledged and considered the concerns of other commenters who disagreed with the Department's three-part definition. For instance, "[m]any commenters asserted that the proposed definition fails to encompass the wide range of types of sexual harassment that students frequently face" or would give a "green light" to harassment and inappropriate behavior on campus. 85 Fed. Reg. 30,142. Yet the Department thoughtfully responded. It "acknowledge[d] that not every instance of subjectively unwelcome conduct is captured under the three-pronged definition of sexual harassment," but it also noted that the definition "constitutes precisely the sex-based conduct that the Supreme Court has indicated amounts to sex discrimination." *Id.* at 30,145. As one commenter submitted, school investigations can cause First Amendment liability because of their speech-chilling effects, so the Rule "need[ed] to define harassment narrowly to avoid free speech problems ex ante." *Id.* at 30,140 (citing *Rodriguez v. Maricopa Cmty. Coll. Dist.*, 605 F.3d

703 (9th Cir. 2010); *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000); *Lyle v. Warner Bros. Television Prods.*, 132 P.3d 211, 300 (Cal. 2006) (Chin, J., concurring), and *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351 (Or. 1995)). But the Department did not turn a blind eye to problems on campuses. As mentioned, the Department included non-expressive *conduct* in its sexual harassment definition that went beyond what the Supreme Court provided for in *Davis* so that "[n]o student or employee traumatized by sexual assault needs to wonder whether a rape or sexual assault was 'bad enough' or severe enough to report and expect a meaningful response from the survivor's school, college, or university." *Id.* at 30,144. The Department thus explained that its three-part definition of sexual harassment "captures categories of misconduct likely to impede educational access while avoiding a chill on free speech and academic freedom." 85 Fed. Reg. 30,142.

2. Live Hearing and Cross-Examination

The Department similarly received a wide range of perspectives on the Rule's new requirement for live hearings and cross-examination. Many commenters stated that this requirement "is an essential pillar of fair process," especially in cases that "turn exclusively or largely on witness testimony." 85 Fed. Reg. 30,311. At least one funding recipient had questions for the Department but noted that it already gave "[c]omplainants and respondents [an] equal opportunity to present witnesses and evidence, to have an advisor of choice present during all meetings and proceedings, to access and respond to evidence and to pose questions to the other party and witnesses prior to determination." Ohio State Comment pg. 3, AR 139579. At schools that had not embraced that approach, other commenters complained that pre-existing postsecondary education hearings had been "'Kafka-esque,' '1984-like,' 'McCarthy-esque,' and 'medieval star chamber.'" 85 Fed. Reg. 30,058; *see, e.g.,* Anonymous Parent of Respondent Comment pg. 1, AR 133136, Anonymous

Respondent with Autism Spectrum Disorder Comment pg. 1, AR 188639; Peltz-Steele Comment pg. 1–3. AR 187152–187154. These commenters explained how alternatives to cross-examination had proved grossly unfair. For instance, some universities left it to hearing panelists to ask all the questions in a Title IX adjudication. But as a law firm that "represented more than 100 students at more than 80 colleges, universities, and secondary schools nationwide" explained:

> In [their] experience, schools often fail to challenge an accuser's testimony in any meaningful way. They simply don't ask hard questions. We have seen far too many cases where, for example, a series of text messages provides strong evidence of the accused student's innocence—but the investigator or the panel never asks a single question about them.

Kaiser Dillon Comment pg. 4, AR 147687. The preamble further recounted how "in numerous instances, college and university administrators have refused to ask some or all of a party's submitted questions, reworded a party's questions in ways that undermined the question's effectiveness, [and] ignored follow-up questions." 85 Fed. Reg. 30,311.

The Department acknowledged that other commenters disagreed. "Commenters argued that cross-examination is an adversarial, contentious procedure that will revictimize, retraumatize, and scar survivors of sexual harassment." 85 Fed. Reg. 30314. The fear of trauma would "chill reporting of sexual harassment and cause more victims to stay in the shadows." *Id.* at Fed. Reg. 30,315. Among other objections, opponents of live cross-examination argued that it is not required by due process, that the Department should instead opt for the so-called "submitted questions" format where the decisionmaker decides which questions should be asked, and that cross-examination would, in fact, undermine the accuracy of adjudications because complainants would be subjected to "verbal attacks," "emotional beatings," and suffer from a "trauma response" that reduces complainants' ability to tell their stories.

After considering these competing perspectives, the Department embraced the cross-examination and live-hearing model because "in too many instances" alternative methods of adjudication fell short by "stifl[ing] the value of cross-examination." The Department concluded that a live-hearing with a fulsome "cross-examination serves the interests of complainants, respondents, and recipients, by giving the decision-maker the opportunity to observe parties and witnesses answer questions, including those challenging credibility, thus serving the truth-seeking purpose of an adjudication." *Id.* at 30,313.

The Department also concluded that the truth-seeking function of cross-examination can be achieved while mitigating the risk of re-traumatizing the victims of sexual misconduct. *Id.* The Department explained that it "understood commenters' concerns that survivors of sexual harassment may face trauma-related challenges to answering cross-examination questions about the underlying allegations." *Id.* at 30,323. But to address that problem, recipients could apply "trauma-informed approaches in the training provided to Title IX Coordinators, investigators, decision makers, and persons who facilitate informal resolutions," so long as this trauma-related training does not "rely on sex stereotypes" or violate other provisions of the Rule. To further address these concerns, the Department explained how it "revised § 106.45(b)(6)(i) in a manner that builds in a 'pause' to the cross-examination process; before a party or witness answers a cross examination question, the decision-maker must determine if the question is relevant." 85 Fed. Reg. 30,323. Such a practice ensures cross-examination without badgering. As other commenters emphasized, colleges and universities have a long history of treating advisors for students as "potted plants," Families Advocating for Campus Equality Comment pg. 32, AR 187713, so the Department explained there was no reason to think that colleges and universities could not ensure advisors did

not ask questions "in an abusive or intimidating manner." 85 Fed. Reg. 30,324; *see also id.* at 30,320 ("[P]ostsecondary institutions are capable of appropriately controlling party advisors even without the power to hold attorneys in contempt of court."). Thus, the Department concluded that requiring cross-examination in a live hearing was not akin to "throwing a party to the proverbial wolves," as funding recipients could exercise control over the decorum of the proceedings. *Id.* at 30,319.

With these accommodations to commenters' concerns, the Department concluded that cross-examination is a superior truth-seeking device and ensures students receive the protections of due process—protections that are essential to preserving the credibility of Title IX investigations.

3. Directly Related Evidence

The Rule also imposes two concurrent obligations on recipients with respect to evidence. First, a recipient's grievance process must "[r]equire an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness." 34 C.F.R. § 106.45(b)(1)(ii). Second, to ensure that those involved in the grievance process are able to argue over what evidence is relevant to the decision, the recipient's grievance process must:

> Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source . . .

34 C.F.R. § 106.45(b)(5)(vi).

Like other provisions of the Rule, commenters had differing views on this latter

requirement. For instance, commenters stated that the Rule "would restore fairness and provide full disclosure to both parties so that they can adequately prepare defenses and present additional facts and witnesses." 85 Fed. Reg. 30,301. In particular, the Rule was an improvement because "Title IX investigator[s] should not have unilateral authority to deem certain evidence 'irrelevant.'" *Id.* "A number of commenters shared stories of their personal experiences with recipients withholding information from parties in a Title IX proceeding." *Id.*

The Department acknowledged that other commenters disagreed. One argued that imposing a broad obligation to share evidence with the accused was a "blunt solution to a nuanced problem." *Id.* Others argued that information sharing would "deter reporting" and "create difficulties in maintaining student privacy." In particular, several institutional commenters expressed concerns that requiring the sharing of information would sweep in students' medical and counseling records, which was an unnecessary intrusion into student privacy. *See* University of Illinois System Comment pg. 12, AR 136043 ("During the course of an investigation, an investigator may obtain information that is very sensitive (e.g., medical information, mental health information, information about past conduct)"); 76 Student Body Presidents Comment pg. 2, AR 150569. There were other concerns that the release of information could lead to "retaliation and witness tampering," 85 Fed. Reg. at 30,301, or that electronic sharing of information would lead to screenshotting of evidence and improper distribution.

After considering these competing perspectives, the Department determined that equal information sharing was necessary to "ensur[e] that the parties have meaningful opportunities to participate in advancing each party's interests in these high-stakes cases." 85 Fed. Reg. at 30,304–05. After all, "complainants as much as respondents" benefit from being able to use all "directly

related" evidence to "make corrections" to any investigative report, "provide appropriate context" to evidence found to be relevant, and "prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility." *Id.* at 30,305. At bottom, "parties are entitled to constitutional due process from public institutions and a fair process from private institutions during Title IX grievance proceedings." *Id.* at 30,306. Equal access to evidence is a necessary element of any fair grievance procedure. *Cf.* FRANZ KAFKA, THE TRIAL, ch. 3 (1925) (" 'I see,' said K., and nodded, 'those books must be law books, and that's how this court does things, not only to try people who are innocent but even to try them without letting them know what's going on.' ").

Yet in its final Rule the Department still made several clarifications and modifications of this information-sharing requirement based on the concerns raised by commenters who opposed it. In response to worries about improper sharing of sensitive or confidential information, the Department clarified that Section 106.45(b) allows recipients to adopt additional rules and practices so long as these rules "apply equally to both parties" and do not conflict with funding recipients' other legal obligations. To that end, the Department explained that "[r]ecipients . . . may specify that the parties are not permitted to photograph the evidence or disseminate the evidence to the public" and can use a "file sharing platform that restricts the parties and advisors from downloading or copying the evidence." 85 Fed. Reg. 30,432. Moreover, the Department adopted an additional provision to govern retaliation claims, thereby reducing the risk that evidence would be wrongfully disseminated. *See* 34 C.F.R. § 106.71. Finally, in response to numerous concerns about the sharing of medical information, the Department barred the recipients from "access[ing], consider[ing], disclos[ing], or otherwise us[ing] a party's records that are made or maintained by a

physician, psychiatrist, psychologist, or other recognized professional or paraprofessional" unless "the recipient obtains that party's voluntary, written consent." 34 C.F.R. § 106.45(b)(5)(i). As the Department explained, "[t]his provision adequately addresses commenters' concerns about sensitive information that may be shared with the other party." 85 Fed. Reg. 30,304.

ARGUMENT

Defendants' brief, which Defendant-Intervenors adopt and incorporate by reference, explains why Defendants and Defendant-Intervenors are entitled to summary judgment on Plaintiffs' claims.[1] In addition to those reasons, Defendants and Defendant-Intervenors are entitled to summary judgment because many of the Rule's protections are already required by the First and Fourteenth Amendments and because the Department's exhaustive and reasoned rulemaking process indicates the Rule is neither arbitrary nor capricious. Indeed, the Department's process in promulgating the Rule and its reasoned analysis in its preamble represent the best of administrative decision making. Contrary to Plaintiffs' arguments, the Rule plainly effectuates Title IX by both addressing sexual harassment and establishing clear rules for funding recipients. Further, despite Plaintiffs' claims, the Department complied with the APA's notice requirement in the process it used to promulgate this long-anticipated Rule.

I. The Rule adopts protections for college students that the Constitution already requires.

[1] Defendant-Intervenors, however, do not incorporate two arguments in Defendants' Memorandum. First, as the Department acknowledged in its preamble to the Rule, the *Davis* definition of "severe, persistent, *and* pervasive" is meaningfully different than "severe, persistent, *or* pervasive." 85 Fed. Reg. at 30,036. That distinction—critical to the Rule—may not be elided. *But see* Defendants' Mem. at 45. Second, notwithstanding some references in Defendants' Memorandum, public universities do not have free reign to punish student speech outside of Title IX—they remain limited by the Constitution, as *Davis* itself recognized. *See Davis*, 526 U.S. at 649.

Though Plaintiffs ostensibly brought this case "to protect . . . students . . . in their States," Compl., Doc. 1 at ¶33 (June 4, 2020), they ask the Court to throw out the Rule's new safeguards for students' rights to free speech and due process. But Plaintiffs should have been providing those protections anyway. For public universities, the Constitution makes these protections mandatory.

It is essential for the Court to consider these constitutional issues because they call into serious question whether Plaintiffs' alleged injuries from key features of the Rule are redressable. A long line of cases shows that, if Defendant-Intervenors' constitutional arguments are correct, then many of Plaintiffs' claims must be dismissed for lack of redressability. In *Black v. LaHood*, 882 F. Supp. 2d 98, 106 (D.D.C. 2012), for example, this Court dismissed a challenge to a federal trail project that permanently closed a road to automobile traffic. The plaintiffs' injuries from the federal project were not redressable, this Court explained, because a separate D.C. Council ordinance also prohibited drivers from using the road. *Id.* Many other cases reach similar results. *See, e.g.*, *White v. United States*, 601 F.3d 545, 552 (6th Cir. 2010) (economic injuries caused by federal prohibition on cockfighting not redressable because cockfighting is also illegal under state law); *Fla. Family Policy Council v. Freeman*, 561 F.3d 1246, 1256–58 (11th Cir. 2009) (injuries caused by canon of judicial conduct requiring disqualification were not redressable because unchallenged state statute also required disqualification); *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 430 (4th Cir. 2007) (billboard company lacked redressable injury from local ordinance challenged under the First Amendment because it could not place sign at desired location under separate, unchallenged ordinance). As Judge Easterbrook has explained, a plaintiff cannot establish redressability where "winning the case will not alter [the] situation." *Harp Advert. Ill., Inc. v. Vill. of Chi. Ridge, Ill.*, 9 F.3d 1290, 1292 (7th Cir. 1993). Even if successful, Plaintiffs'

challenge to many important aspects of the Rule would not change the situation for public universities, which must comply with the First Amendment and the Due Process Clause.

A. Free Speech

The second prong of the Rule's definition of "sexual harassment" tracks the definition the Supreme Court adopted in *Davis*. 85 Fed. Reg. 30,026 at 30,155 n.680; *see id.* at 30,574. According to *Davis*, Title IX covers sexual harassment of students that "is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). That standard is high, for good reason: anything lower would violate the First Amendment.

Davis involved a highly disturbed fifth-grade boy. For five months, the boy sexually harassed and assaulted his classmate LaShonda. Three times the boy "attempted to touch LaShonda's breasts and genital area[s]" while making "vulgar statements such as 'I want to get in bed with you' and 'I want to feel your boobs.'" *Id*. at 633. One time he stuck a "door stop in his pants and proceeded to act in a sexually suggestive manner toward LaShonda." *Id*. at 634. The boy also "rubbed his body against LaShonda in the school hallway . . . in a sexually suggestive manner." *Id*. This campaign of abuse tanked LaShonda's grades and made her suicidal. *Id*. Meanwhile, the school did virtually nothing to punish the boy. *Id*. at 634–35.

The question in *Davis* was whether LaShonda could sue her school for violating Title IX, even though her harasser was another student (rather than a teacher or other school employee). In a 5-4 opinion, the Supreme Court held that schools could be liable for student-on-student harassment "in certain limited circumstances." *Id*. at 643. The school must be "deliberately indifferent"

to the harassment, which means it knew about the harassment and responded to it in a "clearly unreasonable" way. *Id*. at 648–49. And the harassment must be "sufficiently severe" that it rises to the level of "discrimination." *Id*. at 649–50.

Justice Kennedy dissented, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas. Justice Kennedy denied that Title IX makes schools "liable for peer sexual harassment." *Id*. at 658 (Kennedy, J., dissenting). He stressed that public schools' power to discipline their students is "circumscribed by the First Amendment." *Id*. at 667. "[U]niversity speech codes designed to deal with peer sexual and racial harassment," after all, are routinely invalidated in court. *Id*. But the majority's interpretation of Title IX would require universities to adopt speech-restrictive codes, Justice Kennedy predicted, and expose themselves to liability from students whose "speech, even if offensive, is protected by the First Amendment." *Id*. at 657–58, 682–83.

In her majority opinion, Justice O'Connor acknowledged and addressed this concern. The *Davis* majority did not deny that schools face "legal constraints on their disciplinary authority" and admitted that punishing sexual harassment could "expose [them] to constitutional or statutory claims." *Id.* at 649 (majority op.). The Court stressed the "very real limitations" in its definition of actionable sexual harassment. *Id.* at 652. The definition excludes mere "teas[ing]" and "offensive name[-calling]." *Id.* It "depends *equally* on the alleged persistence *and* severity of [the students'] actions" *Id.* (emphasis added). And because "the behavior [must] be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity," a "single instance of sufficiently severe one-on-one peer harassment" almost never counts. *Id.* The Court's stringent definition of sexual harassment, it explained, "reconcile[s] the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of

responding to student behavior, realities that Congress could not have meant to be ignored." *Id.* at 653. Those practical realities, of course, include First Amendment liability. *See id.* at 649.

All nine Justices were right to be concerned about the First Amendment in *Davis*. As Justice Alito explained when he served on the Third Circuit, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001). Broad bans on "sexual harassment" thus cover large swaths of protected speech. And they do so in a way that "imposes content-based, viewpoint-discriminatory restrictions on speech." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 597 (5th Cir. 1995). Under the First Amendment, content-based restrictions are "presumptively unconstitutional," *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015), and viewpoint-based restrictions are forbidden, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019). States have no legitimate interest in "preventing speech" because it is "hateful" or "demeans on the basis of … gender." *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017). The "very idea . . . grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995).

Unsurprisingly, then, federal courts routinely deem university "harassment" codes unconstitutional under the First and Fourteenth Amendments. *See, e.g.*, *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) ("racial harassment"); *Booher v. Bd. of Regents, N. Ky. Univ.*, 1998 WL 35867183 (E.D. Ky. July 22, 1998) ("sexual harassment"); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) ("harassment"); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) ("sexually harassing speech"); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008)

("sexual harassment"); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) ("discriminatory" speech).

Not all regulations of "harassment," of course, are inconsistent with the First Amendment. "[N]on-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause," *Saxe*, 240 F.3d at 206, even if regulations of that conduct "impos[e] incidental burdens on speech," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). "While drawing the line between speech and conduct can be difficult, [court] precedents have long drawn it, and the line is long familiar to the bar." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (cleaned up).

The *Davis* standard draws that line between speech and conduct for Title IX's regulation of sexual harassment. When a student engages in a sexist campaign of severe, pervasive, and targeted ridicule that effectively prevents another student from getting her education, his speech crosses over into conduct. If the university prohibits that kind of conduct, then it is regulating only the "secondary effects" of the speech (i.e., the victim's inability to attend school)—not the speech itself. *Booher*, 1998 WL 35867183, at *7; *accord R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984). Each element of the *Davis* standard is crafted to ensure schools maintain this distinction. It sets the bar high, requiring an "egregious" amount and degree of sexually harassing speech. *DeAngelis*, 51 F.3d at 593. If Title IX required schools to punish anything less than that, it would "steer[]" back into the First Amendment and regulate speech "on the basis of its expressive content." *Id*. at 596–97 & n.7.

Public universities, especially, cannot weaken any aspect of the *Davis* standard. *Davis* was a case about fifth graders. Unlike children in grade school, adults at public universities have full First Amendment rights. *DeJohn*, 537 F.3d at 315, 318. Because universities are "peculiarly the

marketplace of ideas," the "vigilant protection of constitutional freedoms is nowhere more vital." *Healy v. James*, 408 U.S. 169, 180 (1972) (quotation marks omitted). Public universities "'are granted less leeway in regulating student speech than are public elementary or high school[s]'" due to:

> the differing pedagogical goals of each institution, the *in loco parentis* role of public elementary and high school administrators, the special needs of school discipline in public elementary and high schools, the maturity of the students, and, finally, the fact that many university students reside on campus and thus are subject to university rules at almost all times.

McCauley v. Univ. of V.I., 618 F.3d 232, 242–43 (3d Cir. 2010). Accordingly, universities "must *at least*" satisfy "the limitations" from grade-school cases like *Davis*. *DeJohn*, 537 F.3d at 318. The Rule's definition of sexual harassment ensures that they do.

B. Due Process

Plaintiffs also ask the Court to throw out the provisions of the Rule that afford accused students basic procedural protections in the Title IX grievance process. Among the provisions that Plaintiffs would have the Court invalidate are the requirements that funding recipients conduct live hearings, 85 Fed. Reg. at 30,577, afford the accused a presumption of innocence, *id.* at 30,575, and resolve disputes through a neutral decisionmaker who considers all inculpatory and exculpatory evidence, *id.* at 30,575. One unfamiliar with university disciplinary proceedings might assume that these procedures are provided before schools expel a student and permanently brand him a sexual harasser or worse. But that assumption would be mistaken. Before the Rule went into effect, only a small fraction of universities afforded the accused a presumption of innocence. Foundation for Individual Rights in Education Comment pg. 24–25, AR 146427–146428. And, in practice, universities that use the so-called "single investigator" model—where the same person conducts the

investigation, presses the charges, and adjudicates the dispute—often resolve these cases based on the judgment of a single, partial individual. *See id.* at 34, AR 146437. The Rule's procedural provisions force public universities to correct these and other widespread violations of due process.

Courts tasked with deciding which procedures a public university must follow before expelling a student for sexual misconduct apply the balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). That test weighs the nature of the private interest at stake, the risk of erroneous deprivation under the procedures used, the value of any additional procedural safeguards, and the government's burden in providing additional procedures. *See Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017). Although the extent of the accused's interest depends on the severity of the potential sanction, it cannot be doubted that university sexual misconduct proceedings concern extremely weighty liberty and property interests. A finding of guilt can bring with it a permanent and life-altering stigma that irreparably harms a student's educational, professional, and social prospects, even if the finding is later reversed. Given these realities, accused students are constitutionally entitled to robust procedural protections. *See Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019); *Univ. of Cincinnati*, 872 F.3d at 400; *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988); *cf. Mathews*, 424 U.S. at 334.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner," *Mathews*, 424 U.S. at 333 (quotation marks omitted), and the Supreme Court has held that even a suspension from a secondary school of a few days requires that the disciplined student receive "an explanation of the evidence the authorities have and an opportunity to present his side of the story" at "some kind of hearing," *Goss v. Lopez*, 419 U.S. 565, 579, 581 (1975). Applying these principles at the post-secondary level, federal courts have

consistently concluded that before expelling a student for sexual misconduct a public university must hold a hearing and that the hearing must be "a real one, not a sham or pretense." *Purdue Univ.*, 928 F.3d at 663. And when "the credibility of an alleged victim is at issue"—as it almost always is in these cases—"the university must provide a way for the adjudicative body to evaluate the victim's credibility and to assess the demeanor of both the accused and his accuser." *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018) (quotation marks omitted).

"[T]o be fair in the due process sense," a hearing in this context must afford the accused "the opportunity to respond, explain, and defend," *Univ. of R.I.*, 837 F.2d at 13, and in a case that turns on witness credibility a live hearing is the only way to provide such an opportunity. When the entire dispute turns on a witness's credibility and demeanor, there is simply no way for the accused to effectively defend himself if he cannot hear the witness's testimony live and respond to it in person. Given the high stakes in these cases, both for the accused and the accuser, the benefits of live hearings overwhelmingly outweigh their costs.

Courts also consistently hold that university decisions in these cases must be made by "an impartial decision maker." *Winnick v. Manning*, 460 F.2d 545, 548 (2d Cir. 1972). And although some courts have declined to adopt a per se rule against allowing the same individual to initiate, investigate, prosecute, and judge a case, the Due Process Clause is violated when "a school official's involvement in an incident create[s] a bias such as to preclude his affording the student an impartial hearing." *Brewer ex rel. Dreyfus v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 264 (5th Cir. 1985). "The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious," *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 606 (D. Mass. 2016), and the Rule's requirement that these roles be separated is an

important prophylactic measure that will prevent biased adjudications that are all too common at public universities.

In the most serious cases that turn on witness credibility, the Due Process Clause also requires live cross-examination. Without live cross-examination, an accused party loses the chance to have his side of the story *meaningfully* heard, because cross-examination subjects an accusation to scrutiny in a way that nothing else can. Cross-examination is "essential to a fair hearing," *Brandeis Univ.*, 177 F. Supp. 3d at 605, "like no other procedural device" in its effectiveness, *Univ. of Cincinnati*, 872 F.3d at 401, and "the greatest legal engine ever invented for the discovery of truth," *California v. Green*, 399 U.S. 149, 158 (1970).

The importance of cross-examination is heightened in sexual misconduct cases, given the extremely frequent "he-said-she-said" nature of the inquiry. Overwhelmingly, courts affirm the due process right to cross-examination when the credibility of witnesses is at issue. *See, e.g.*, *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (a university student was entitled to cross-examine accuser in a sexual assault case because the case turned on the accuser's credibility); *Univ. of Cincinnati*, 872 F.3d at 401–02 (same); *Neal v. Colo. State Univ.-Pueblo*, 2017 WL 633045 (D. Colo. 2017) (same); *Brandeis Univ.*, 177 F. Supp. 3d at 605 (same). In the majority of cases affected by the Rule, adjudicators must sift through "plausible, competing narratives" to determine who is telling the truth. 85 Fed. Reg. at 30,328. This directly implicates witness credibility and therefore calls for cross-examination. Thus, Plaintiffs' proposed alternatives, such as written questions, are constitutionally insufficient. As the Sixth Circuit has explained, "cross-examination is essential in cases like [these] because it . . . takes aim at credibility like no other procedural device. Without the back-and-forth of adversarial questioning, the accused cannot

probe the witness's story to test her memory, intelligence, or potential ulterior motives." *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018) (internal citation omitted). Accordingly, the Rule's cross-examination provision allows for the procedural fairness demanded by due process in campus sexual misconduct cases.

II. The Department issued the final Rule through an exhaustive and reasoned rulemaking process that withstands APA scrutiny.

In arguing that the Rule and several of its provisions are "arbitrary [or] capricious," the Plaintiffs' challenge "carries a heavy burden." *Wisc. Valley Improvement v. FERC*, 236 F.3d 738, 745 (D.C. Cir. 2001). The Court must not "substitute [its] own judgment for that of the agency." *Id*. Instead, the Court may only set aside agency action if the agency,

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc., *v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). This analysis does not call for the Court to ask "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). So long as an agency "cogently explain[s] why it has exercised its discretion in a given manner" and that explanation is "sufficient" to show the agency's decision was "the product of reasoned decisionmaking," the agency's decision is not arbitrary or capricious. *State Farm*, 463 U.S. at 48, 52. As the Department's voluminous preamble makes abundantly clear, the Department cogently and carefully explained its reasoned decisions.

A. The Department's Definition of Sexual Harassment Is Not Arbitrary or Capricious.

Plaintiffs argue that the Rule's sexual harassment definition is arbitrary and capricious for

several reasons, but the Department considered and reasonably accounted for each of the factors that Plaintiffs claim the Department overlooked.

First, Plaintiffs argue that the Department "did not adequately address how schools can no longer use Title IX to remedy hostile environments caused by severe, persistent, *or* pervasive conduct." Plaintiffs' Mem. of Law in Supp. of Their Mot. for Summ. J., Doc. 108-1, at 50 (Dec. 18, 2020) ("Plaintiffs' Br."). But the Department thoroughly explained how, in crafting the second prong of the Rule's definition of sexual harassment, it was important to pursue Title IX's objectives "while avoiding a chill on free speech and academic freedom." 85 Fed. Reg. at 30,142. The administrative record demonstrates how broader and more amorphous definitions of sexual harassment that depart from *Davis* have stymied freedom of expression and the exchange of ideas at colleges and universities. *See, e.g.*, 85 Fed. Reg. 30,148 n. 649 (citing Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault (May 16, 2016), *available at* https://bit.ly/3bNpnlf). Whatever the requirements of the First Amendment in this context, it cannot be doubted that "students benefit from robust exchange of ideas, opinions, and beliefs." 85 Fed. Reg. 30,143. The Department acted reasonably in giving significant weight to that important educational objective, and the APA does not entitle Plaintiffs to force the Department to strike a different balance "according to [Plaintiffs'] own notions of what might be best." *Process Gas Consumers Grp. v. FERC*, 712 F.2d 483, 488 (D.C. Cir. 1983). Indeed, the fact that the Supreme Court struck the very same balance in *Davis* all but forecloses Plaintiffs' argument that the Department's approach is so unreasonable as to be arbitrary and capricious. *See New York v. United States Dep't of Educ.*, 20-CV-4260 (JGK), 2020 WL 4581595, at *8 (S.D.N.Y. Aug. 9, 2020) ("While the DOE acknowledged that it was not bound by the *Davis* formulation of sexual

harassment, turning to that Supreme Court authority could hardly be characterized as 'arbitrary or capricious'").

Plaintiffs also suggest that the Rule's definition of sexual harassment will lead to reduced investigations, "impair[ing] deterrence and increas[ing] harassment." Plaintiffs Br. at 50. But Plaintiffs point to nothing in the administrative record that required the Department to conclude that those harms will come to pass. *See* 85 Fed. Reg. at 30,143 (explaining that "the Department does not agree that this standard for verbal harassment . . . will discourage students or employees from reporting harassment"). The Department's predictions about the probable effects of its Rule are entitled to great deference. *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) (observing that "[t]he 'arbitrary and capricious' standard is particularly deferential in matters implicating predictive judgments"). By setting forth a clear standard for when speech and expressive conduct constitutes sexual harassment under Title IX, the Department reasonably concluded that the Rule will *improve* the quality and reliability of Title IX investigations—ultimately redounding to the benefit of victims of sexual misconduct. *See* Foundation for Individual Rights in Education Comment pg. 7–25, AR 146410–146414.

Moreover, Defendants' myopic focus on a single prong of the Rule's sexual harassment definition ignores other features of the Rule that address Plaintiffs' concerns. "As a whole, the definition of sexual harassment in § 106.30 is significantly broader than the *Davis* standard alone," 85 Fed. Reg. at 30,143, for it treats quid pro quo harassment and sex offenses under the Clery Act and VAWA as sexual harassment without regard to their severity, pervasiveness, or objective offensiveness. The Rule requires funding recipients to respond to sexual harassment "promptly in a manner that is not deliberately indifferent," and it mandates that funding recipients immediately

notify complainants of available supportive measures even before a Title IX investigation has begun in earnest. 34 C.F.R. § 106.44(a). The Rule also "leaves schools discretion to address misconduct that does not meet the Title IX definition," 85 Fed. Reg. at 30,371, thus giving funding recipients "flexibility to address other forms of misconduct to the degree, and in the manner, best suited to each recipient's unique educational environment." *Id.* at 30,143.

Plaintiffs also assert that the Department "failed to provide a reasoned basis for imposing novel and unique burdens on sexual harassment claims that diverge from racial harassment claims under Title VI." Plaintiffs' Br. at 50–51. But Plaintiffs are unable to cite *any* authority that requires the Department to promulgate identical regulations under the two statutes. *See New York*, 2020 WL 4581595, at *11. More fundamentally, the APA does not compel the Department to simultaneously address every problem that falls within its jurisdiction in a single rulemaking. The Rule's massive preamble, which exhaustively discusses the over 124,000 comments the Department received on Title IX, stands as a testament to the reasonableness of the Department's decision not to *also* tackle Title VI in this rulemaking. For all their parallels, discrimination on the basis of sex and race in educational programs present distinct issues, and the Department should not be faulted for leaving Title VI for another day.

Far from disputing the Department's evaluation of the unique circumstances and challenges presented by sexual harassment on campuses, Plaintiffs appear to simply demand consistency for consistency's sake. Concern over harmonizing Title IX and Title VI was notably absent from the Department's 2011 Dear Colleague Letter. In contrast, in the Rule's preamble, the Department acknowledged and addressed this issue. The Department recognized that "consistency with respect to administrative enforcement of Title IX and other civil rights laws (such as Title VI and Title

VII) is desirable." 85 Fed. Reg. 30,382. And the Department made clear that it was up to recipients to decide if their own procedures under Title VI should be consistent with Title IX. 85 Fed. Reg. 30,449. The Department explained that "a recipient has discretion to determine whether the non-sex discrimination issue such as race discrimination should go through a process like the process described in § 106.45." *Id.* In cases where both racial discrimination and sexual harassment are alleged, recipients can "use the process described in § 106.45 to address" both. In other words, there is nothing preventing recipients from modifying their Title VI processes to include the important due process protections the Department now requires for Title IX proceedings. Plaintiffs characterize allowing different proceedings as "absurd and inequitable." Plaintiffs' Br. 51. But any inconsistency ultimately results from how funding recipients choose to handle Title VI complaints, not from the Rule that Plaintiffs challenge. *Cf. Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 619 (1991) ("The fact that petitioner can point to a hypothetical case in which the rule might lead to an arbitrary result does not render the rule 'arbitrary or capricious.' ").

Plaintiffs also argue that the Department failed to adequately explain limits on who can file a Title IX complaint by declining to allow a "student who dropped out of school because of sexual harassment and does not want to return" to file a complaint. Plaintiffs' Br. 51–52. The Plaintiffs further take issue with the inability to investigate a remaining community member once the complainant leaves campus. *Id*. But the Department explained that this limitation "tethers a recipient's obligation to investigate a complainant's formal complaint to the complainant's involvement (or desire to be involved) in the recipients' education program or activity." 85 Fed. Reg. 30,087. This, the Department concluded, would be a better alternative than adopting statutes of limitations for various offenses, which would "add[] yet another level of complexity to a recipient[s'] response."

Id. At the same time, however, the Rule gives recipients (and complainants) sufficient time to address allegations of sexual harassment. The open-ended nature of the limitation allows complainants who "may be affiliated with a recipient over the course of many years" to have recourse even after a statute of limitations would have run; this is an especially important accommodation for complainants since "sometimes complainants choose not to pursue remedial action in the immediate aftermath of a sexual harassment incident." *Id*. At the same time, the Department's approach accounts for funding recipients' interest in not being indefinitely responsible when a complainant "no longer has any involvement" with the school. Thus, the Department considered a potential alternative, considered complainants' interest in being given reasonable time to report an allegation of sexual harassment, and recipients' interest in being able to respond to sexual harassment without incurring indefinite responsibility for investigating incidents that occurred in the distant past. Plaintiffs "may disagree with [the Department's] policy balance, but it does not reflect a failure to consider relevant factors." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 211 (D.C. Cir. 2007).

B. The Rule's grievance procedures are not arbitrary and capricious.

As previously discussed, the Department's provisions for a live hearing with cross-examination are generally required by the Due Process Clause. On that basis alone, those provisions cannot be considered arbitrary and capricious. Nevertheless, Plaintiffs, raise numerous concerns with many of the details of the grievance procedures that they argue make certain elements of the Rule arbitrary and capricious. The Department's considered and reasoned decision-making belies Plaintiffs' arguments.

1. Allegation and Evidence Sharing Provisions.

Plaintiffs first assert that the Department "bars schools from setting reasonable limitations on the parties and their advisors to prevent the indiscriminate and harmful sharing of allegations and evidence." Plaintiffs' Br. 32. Plaintiffs argue that "[a]dopting regulations that fail to adequately protect sensitive information and consider less harmful alternatives is not reasonable decision-making." *Id.* at 33. But the Department carefully considered and accounted for Plaintiffs' concerns in the Rule, and Plaintiffs' criticisms of the Department's policy judgment do not come close to showing that any aspect of the Rule is arbitrary and capricious.

To properly assess this issue, it is necessary at the outset to distinguish between two provisions of the Rule that Plaintiffs conflate. Under Section 106.45(b)(5)(iii), recipients may not "restrict the ability of either party to discuss the *allegations* under investigation or to gather and present relevant evidence." (emphasis added). Some of the comments submitted to the Department criticized university "gag orders" that restrict free speech and inhibit accused students from seeking advice and support. 85 Fed. Reg. 30,295. Section 106.45(b)(5)(iii) prevents funding recipients from imposing such prior restraints that prevent those involved in a Title IX grievance proceeding from discussing and investigating the substance of the allegations at issue. In contrast, Section 106.45(b)(5)(vi) requires funding recipients to "[p]rovide both parties an equal opportunity to inspect and review any *evidence* obtained as part of the investigation that is directly related to the allegations raised in a formal complaint." (emphasis added). Unlike 106.45(b)(5)(iii), this latter provision pertains to evidence rather than allegations and does not address the right of those involved to disclose publicly what they learn through the Title IX proceeding.

The distinction between these two provisions is important because Plaintiffs appear to

assume that Section 106.45(b)(5)(iii)'s requirement that parties be permitted to discuss *allegations* will also apply to prevent any restrictions on the dissemination of *evidence* acquired under Section 106.45(b)(5)(vi). That is simply not so. As every litigator who has produced or received documents subject to a protective order knows, the right to access and review evidence does not bring with it a concomitant right to disseminate that evidence to the public. The Department explicitly stated that Section 106.45(b) provides that recipients can adopt additional rules and practices so long as these rules "apply equally to both parties" and do not conflict with the recipients' other obligations. The Department explained that "[r]ecipients . . . may specify that the parties are not permitted to photograph the evidence or disseminate the evidence to the public" and can use a "file sharing platform that restricts the parties and advisors from downloading or copying the evidence." 85 Fed. Reg. 30,432. The Department recommended that "[s]uch measures may be used to address sensitive materials such as photographs with nudity." *Id.* And to further reduce the concerns from commenters about improper sharing of medical records, the Department barred recipients "access[ing], consider[ing], disclos[ing], or otherwise us[ing] a party's" medical record without their consent. *Id.* at 30,431. Far from condoning indiscriminate sharing of evidence, the Rule takes steps to ensure evidence is not used or accessed improperly.

The Department acted reasonably in ensuring that the parties to a Title IX grievance proceeding would have broad authority to discuss allegations even while leaving the door open to restrictions on the sharing of evidence. An accused student who cannot describe the allegations against him cannot meaningfully investigate those allegations or effectively defend himself. *See* 85 Fed. Reg. 30,295. The Department reasonably concluded that the need to guarantee students could seek out support during a Title IX grievance process and discuss allegations outweighed the

risk of improper discussions of allegations. After all, "the grievance process is stressful, difficult to navigate, and distressing for both parties, many of whom in the postsecondary institution context are young adults 'on their own' for the first time, and many of whom in the elementary and secondary school context are minors." 85 Fed. Reg. 30,295. Restrictions on speech in this context would make a difficult experience even worse and unnecessarily leave those most in need of support "feeling isolated or alone." *Id.* This need "outweigh[ed]" the "negative[] impact" on a party's "social relationships" that harmful "discussion and gossip" may have.

Nevertheless, following commenters' concerns, the Department adopted Section 106.71 to address schools' ability to respond to actions with malicious intent. Under Section 106.71, "[n]o recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX." This retaliation provision served to clarify that the final Rule "in no way immunizes a party from abusing the right to discuss the allegations under investigation." 85 Fed. Reg. 30,296. Thus, although parties retain a wide ability to seek out support and discuss allegations, the Department ensured that schools may also step in to prevent retaliation and misconduct with respect to the sharing of those allegations.

These provisions show the Department balanced the need to ensure access to support networks and evidence, addressed and considered concerns over improper sharing of information, and came to a reasoned decision with several accommodations adopted in light of commenters' concerns. Here too, Plaintiffs "may disagree with this policy balance, but it does not reflect a failure to consider relevant factors" or otherwise render the Department's approach arbitrary and capricious. *Owner-Operator Indep. Drivers Ass'n, Inc*, 494 F.3d at 211.

2. Live Hearing and Cross-Examination Provisions for Postsecondary Institutions.

Plaintiffs next take aim at the various alleged deficiencies in the reasoning provided for the Rule's requirement that postsecondary institutions' grievance proceedings include a live hearing with cross-examination by a party's advisor. Plaintiffs' Br. at 42–48. None of Plaintiffs' arguments are availing.

First, Plaintiffs argue that the Department failed to explain why postsecondary institutions are the only Title IX recipients that must fulfill the live hearing and cross-examination requirement, while K-12 schools, and non-postsecondary institutions do not. Instead, these institutions can resolve complaints using the Plaintiffs' preferred alternative: written submissions with indirect cross-examination. Plaintiffs' Br. at 42. In explaining its decision, the Department repeatedly emphasized (as have courts across the country) that cross-examination in a live hearing is a core tenet of Due Process. *See supra* Part I.B. "'[T]he available evidence suggests that the adversary system is the method of dispute resolution that is most effective in determining truth and that 'gives the parties the greatest sense of having received justice.'" 85 Fed. Reg. 30,359 (quoting Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 73–74 (1998)). As for cross-examination in particular, the Department explained that cross-examination can highlight "specific details, inherent plausibility, internal consistency, and corroborative evidence" of a witness's narrative. 85 Fed. Reg. 30,321. These features are "important factors" for a decisionmaker who is tasked with making life-altering decisions that frequently turn on witness credibility. In particular, "studies demonstrate that inconsistency is correlated with deception," and inconsistency can be drawn out through cross-examination. *Id.* (citing H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal*

Engine Ever Invented, 27 CORNELL J. OF L. & PUB. POL'Y 145, 161 (2017) ("While not all inconsistencies arise from deceit, studies have reliably established a link between consistency in testimony and truth telling. And in general, deceitful witnesses have a harder time maintaining consistency under questioning that builds upon their previous answers.") (internal citations omitted))).

The Department also addressed concerns about trauma in sexual harassment cases and implemented mitigation efforts in its hearing and cross-examination provisions. The Department allowed recipients to apply "trauma-informed approaches in the training provided to Title IX Coordinators, investigators, decision makers, and persons who facilitate informal resolutions;" the Department "revised § 106.45(b)(6)(i) in a manner that builds in a 'pause' to the cross-examination process" to ensure only "relevant" questions are asked; and the Department explained that colleges and universities were empowered to ensure advisors did not ask questions "in an abusive or intimidating manner." 85 Fed. Reg. 30,323–24; see also *id.* at 30,320 ("[P]ostsecondary institutions are capable of appropriately controlling party advisors even without the power to hold attorneys in contempt of court.").

With the virtues of cross-examination well-established and with measures to mitigate retraumatizing victims of sexual misconduct, the Department reasonably required postsecondary institutions to hold live hearings with cross-examination. In fact, the Department concluded that the benefits of cross examination and a live hearing would be particularly salient in postsecondary institutions because "students generally are young adults." 85 Fed. Reg. 30,335. Thus, such parties "can reasonably be expected to answer questions during a live hearing and to benefit from the procedural right to question the other party (through the asking party's advisor)." *Id.*

The Department explained, however, that it would not extend this requirement to K-12

schools or other non-postsecondary institutions because "parties in elementary and secondary schools generally are not adults with the developmental ability and legal right to pursue their own interests on par with adults." 85 Fed. Reg. 30,364. Thus, the Department did not *require* a hearing, but still allowed those K-12 institutions the option to adopt a hearing "within a recipient's discretion." 85 Fed. Reg. 30,365. The Department also explained that for "any other recipient that is not a postsecondary institution," it would not extend this requirement although "the nature of such a recipient's operations may lead such a recipient to desire a hearing model for adjudications." *Id*. The Department made live hearings optional in those other contexts because "the live hearing require[ments] for postsecondary institutions . . . may prove unworkable in a different context," *id.* at 30,446; *see also id.* at 30,566 (noting that other non-postsecondary institutions "generally . . . are very small and have few employees and no full-time students."). Given the differences and concerns about workability that are not evident in postsecondary institutions, *see, e.g.,* Ohio State Comment pg. 3, AR 139579, the Department reasonably permitted flexibility for other funding recipients.[2]

Second, Plaintiffs argue that the Department "[b]rushed aside critical facts" about disparities in representation by requiring advisors to conduct cross-examination. Plaintiffs' Br. at 45. Plaintiffs contend the rule will create "inequitable hearings." But the Department did not brush aside these concerns; it addressed them head on. Any inequities of representation are mitigated by a number of steps the Department requires or allows funding recipients to take. The Department explained that the burden of proof is ultimately on the *recipient* that must objectively evaluate the

[2] Defendant-Intervenors note, however, that to the extent such entities are public, the Constitution remains an ever-present check on their actions and Due Process may demand those entities adopt certain procedures that the Department does not currently require.

strength of the case based on the evidence, and not based on whether a party's advisor is an attorney or not. 85 Fed. Reg. 30,332. This duty to consider and evaluate all relevant evidence, including inculpatory and exculpatory evidence," means "the skill of a party's advisor is not the only factor in bringing evidence to light for a decision-maker's consideration." *Id.* What is more, the Department empowered recipients to address any inequities in representation. Recipients must provide an advisor, free of charge, to a party in the grievance process, reducing inequity between parties of different financial means. Recipients retain discretion to ensure this advisor is an attorney to reduce inequity. And to further reduce any inequities, recipients have the discretion to limit the involvement of advisors beyond cross-examination. As the Department explained, the final regulations give all students an "equal opportunity" to select an advisor of choice and "navigate the process with [their] assistance." 85 Fed. Reg. 30,332–33.

Third, Plaintiffs argue that the Rule's simplified evidence rules "arbitrarily undermine[ ] the truth-seeking process by barring reasonable limits on unreliable evidence while excluding relevant and reliable testimonial evidence." Plaintiffs' Br. at 45. But far from drawing arbitrary lines, the Rule's evidentiary provisions reflect the Department's considered judgment that "schools are neither civil nor criminal courts" capable of administering "comprehensive rules of evidence." 85 Fed. Reg. 30,097. Instead, the Department explained that it would adopt evidentiary rules designed to avoid "over-legalizing" a grievance process that in many instances will be implemented by "non-lawyer recipient officials." *Id.* at 30,026, 30,348. Thus, the rule that bars testimony that did not undergo cross-examination is easier to administer than the panoply of exclusions and exceptions to hearsay in modern rules of evidence. *Id.* at 30,348. Moreover, the Department noted that because recipients are not courts, recipients lack "the authority to compel appearance and

testimony." *Id.* Since witness unavailability is a bedrock of many hearsay exceptions, *see e.g.*, FED R. EVID. 804, the inability to compel testimony would render certain traditional hearsay rules unworkable or subject to gamesmanship—potentially allowing a witness to render his or her own out-of-court statements admissible simply by refusing to attend the in-person hearing. The Department declined the alternative of allowing in all testimony that was not subject to cross-examination because determinations about the reliability of that testimony would "likely result in inconsistent and potentially inaccurate assessments of reliability." 85 Fed. Reg. 30,348. The fact that Plaintiffs would prefer different rules of evidence does not make the Department's reasoned decision arbitrary and capricious. *Cf. Emily's List v. FEC*, 581 F.3d 1, 22 n. 20 (D.C. Cir. 2009) ("Agencies generally do not violate the . . . arbitrary-and-capricious standard when they employ bright-line rules . . . , so long as those rules fall within a zone of reasonableness and are reasonably explained.").

III. Contrary to Plaintiffs' arguments, the Rule "effectuates" Title IX by addressing sexual harassment and establishing clear rules for funding recipients.

Congress "authorized and directed" the Department to "effectuate the provisions" of Section 1681 of Title IX "by issuing rules, regulations, or orders of general applicability." 20 U.S.C. § 1682. Plaintiffs argue that the Rule must be thrown out because it does not "effectuate" Section 1681. But as explained above, key features of the Rule do nothing more than require funding recipients to follow policies that are already required by the Constitution. The canon of constitutional avoidance thus counsels strongly against interpreting Title IX to mandate the more extensive restrictions on speech and weakened procedural protections that Plaintiffs advocate. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568,

574–75 (1988). Moreover, it makes no difference that the Department did not fully embrace Defendant-Intervenors' constitutional arguments in the Rule's preamble, for "[t]he *Chenery* doctrine has no application" when an agency is "required, under [a Supreme Court decision], to apply" a particular rule. *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty. Wash.*, 554 U.S. 527, 544–45 (2008).

Moreover, independent of those constitutional considerations, the Rule "effectuate[s]" the provisions of Title IX because it seeks to reduce sexual harassment while establishing clear and much-needed rules that funding recipients must follow to avoid jeopardizing their federal funding. In *Cannon*, the Supreme Court explained that Title IX "sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979). Those twin, "somewhat different," objectives are ever-present when the Department seeks to regulate Title IX recipients: it must act to reduce discrimination on the basis of sex in educational programs *and* decide under what circumstances it will "terminat[e] . . . federal financial support for institutions engaged in discriminatory practices." *Id.* at 704. As the Supreme Court recognized in *Cannon*, the termination of federal support is a "severe" remedy and "often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred." *Id.* at 704–05. It was, *inter alia*, because the "complete cut-off of federal funding" is at stake when the Department takes an enforcement action under Title IX that the Court implied a private right of action. *Id.* at 705–06.

As *Cannon* underscores, when the Department takes action in this area it must do so in a

manner that reflects the remedial regime Congress created. Congress was explicit that "[c]ompliance with any requirement adopted pursuant to [§ 1682] may be effected by . . . termination of or refusal to grant or to continue assistance." 441 U.S. at 684 n.4. In essence, this establishes "a contract between the Government and the recipient of funds," in which the Government "condition[s] an offer of federal funding on a promise by the recipient not to discriminate." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). As the Supreme Court has explained, this makes Title IX different from other remedial statutes like Title VII, which "applies to all employers without regard to federal funding and aims broadly to eradicate discrimination throughout the economy." *Id.* at 287 (internal brackets omitted). Title IX instead "carrie[s] out" its antidiscrimination mandate through "recipients of federal funds." As the Supreme Court made clear in *Gebser*, "Title IX's contractual nature has implications for [the] construction of [its] scope." *Id.*

Plaintiffs' repeated arguments in their briefing with respect to whether the Rule "effectuate[s]" Title IX miss the mark because these arguments ignore the "two, somewhat different, objectives" of Title IX and Title IX's "contractual nature." When the Department adopts a Rule, it must *both* (1) provide protections against discrimination on the basis of sex *and* (2) establish to what extent it will seek to hold federal recipients liable for "ultimately the termination of federal funding." *Id.* at 281. As the Supreme Court noted in *Cannon*, this "severe" remedy may not be desirable or even "appropriate" in all instances. *Cannon*, 441 U.S. at 706. Thus, as with any agency, the Court recognized that the Department's predecessor, the Department of Health, Education, and Welfare, had an interest in "efficiently . . . allocat[ing] its enforcement resources" in the administrative procedure it created. *Id.* at 706 n. 41 (noting then-existing regulations declined "[to] allow the complainant to participate in the investigation or subsequent enforcement

proceedings").

To that end, the Rule "effectuates" Title IX by providing, "for the first time, legally binding rules on recipients with respect to responding to sexual harassment." 85 Fed. Reg. 30,029; *see Cannon*, 441 U.S. at 704. And, importantly, the Rule "hold[s] recipients accountable for responses to sexual harassment." 85 Fed. Reg. 30,044; *Cannon*, 441 U.S. at 704. The conditions that the Department has chosen are "designed to protect complainants' equal educational access, and provide due process protections to both parties before restricting a respondent's educational access." *Id.* In other words, the Department has set clear rules for when the "severe" remedy of termination of federal funds may be on the table.

The bulk of Plaintiffs' arguments suggest that the Department's conditions do not "effectuate" Title IX because the Rules do not, in Plaintiffs' opinion, go far enough in preventing and responding to sexual harassment on campus. Plaintiffs' Br. at 10–22 (noting what they believe to be a "narrow interpretation of what constitutes cognizable sexual harassment," reducing "[t]he number of incidents," or "[l]imiting who can file a complaint"). These arguments completely ignore that the Department also needed to decide when and how it will hold recipients liable for "ultimately the termination of federal funding." *Gebser*, 524 U.S. at 281. After all, the conditioning of federal funding is one of Title IX's "objectives," which the Department is tasked with effectuating through regulations. *Cannon*, 441 U.S. at 704. And as the preamble explains at length, the Department also needed to determine the scope of recipient liability for loss of federal funding. The fact that the Department limited, in various ways, under what circumstances recipients could face this ultimate penalty does not mean it failed to effectuate Title IX—it *proves* that the Department acted consonant with one of Title IX's central objectives. *Cannon*, 441 U.S. at 704.

In the end, Plaintiffs' arguments confuse their policy preferences with what is required by the text of Title IX and the Constitution. The text authorizes the Department to "effectuate" Title IX. As previously discussed, *supra* Part I, many of the Rule's key provisions could go no further without running afoul of the First Amendment and Due Process Clause. And even for those provisions that do not implicate constitutional rights, the word "effectuate" does not require the Department to "pursue[ ] its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam). It is "simplistic[] to assume," as Plaintiffs appear to do, "that *whatever* furthers the statute's primary objective must be the law." *Id.* That is not what Title IX requires of the Department. "'The [Department] must do everything necessary to achieve its broad purpose' is the slogan of the enthusiast, not the analytical tool of the arbiter." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting). The Department was authorized to adopt a Rule that addressed sexual harassment and established the conditions for federal funding. The fact that Plaintiffs would have had the Department draw different lines or dictate different terms for the contract between the federal government and funding recipients does not mean the Department has failed to "effectuate" Title IX or acted beyond its statutory authority.

IV. The Department provided sufficient notice of the contents of the final Rule.

"To satisfy the APA's notice requirement, the NPRM and the final rule need not be identical: '[a]n agency's final rule need only be a 'logical outgrowth' of its notice.'" *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (quoting *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006)). A final rule will fail if "interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*,

407 F.3d 1250, 1259–60 (D.C. Cir. 2005) (internal quotation marks and citations omitted). But "if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period," then the final Rule was a "logical outgrowth" of the proposed rule and thus adequately fulfilled APA's notice requirement. *CSX Transp. Inc.*, 584 F.3d at 1079–80.

Plaintiffs briefly argue four provisions were not logical outgrowths of the proposed Rule. First, Plaintiffs argue that they did not have sufficient notice that the final Rule would contain a preemption provision. Plaintiffs' Br. at 64. Yet the proposed Rule had a federalism section and numerous commenters raised issues regarding federalism and preemption, which the preamble to the final Rule addresses. 85 Fed. Reg. 30,454–63. These comments show that "commenters clearly understood that" preemption was "under consideration." *Appalachian Power Co. v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1998). Second, Plaintiffs argue they lacked sufficient notice that recipients cannot investigate misconduct under Title IX if a student is not "participating in or attempting to participate in the education program or activity." But the proposed Rule raised the possibility that individuals might not be permitted to bring a Title IX claim in similar circumstances, 83 Fed. Reg. at 61,468, and this limitation relates to the *actual* text of Title IX. Plaintiffs plainly had "fair notice." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). Third, Plaintiffs argue that they lacked noticed of the final Rule's "dismissal" provision about complaints against a respondent who "is no longer enrolled or employed by the recipient." But this provision was in response to comments giving recipients "sufficient leeway to halt investigations." 85 Fed. Reg. 30,282. Here, too commenters clearly understood that limits on when recipients had to investigate were "under consideration." *Appalachian Power Co.*, 135 F.3d at 816. Finally, Plaintiffs claim

they lacked sufficient notice of the Rule's consolidation procedures. But, here again, this was a change brought on by consideration of comments. "[A]gency modification of a proposed rule, in response to the comments it solicited and received on alternative possibilities, complies with the requirements of administrative law." *Id.*

As many universities acknowledged, the final Rule was long-expected. For instance, Baylor University noted that it "ha[d] already been reviewing our current policies in anticipation of the new regulations." Intervenors' Mem. in Opp. App'x, Doc. 64-1 at 79 (July 8, 2020) ("Intervenors' App'x"). The University of Minnesota acknowledged that "[s]ince the *initial* DOE announcement, the University's Office of Equal Opportunity and Affirmative Action . . . has consulted broadly with students, faculty and staff systemwide to determine how the University can best meet these federal mandates on all five of its campuses." Intervenors' App'x at 52. The University of Toledo noted how it "ha[d] been anticipating these new guidelines for *a long time*." Intervenors' App'x at 56 (emphasis added). And the Colorado School of Mines explained that it too "ha[d] been aware and preparing for these regulations since the proposed regulations were provided in November 2018." Intervenors' App'x at 74. These statements are yet further proof that the proposed rulemaking that generated over 124,000 comments gave sufficient to notice to all stakeholders involved of the regulatory changes that the Department was considering and eventually adopted. "The object, in short, is one of fair notice," and the Department complied with its notice obligations under the APA. *Long Island Care*, 551 U.S. at 174.

CONCLUSION

The Court should deny Plaintiffs' motion for summary judgment and grant summary judgment for Defendants and Defendant-Intervenors.

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/s/ Charles J. Cooper
Charles J. Cooper (D.C. Bar #248070)
Brian W. Barnes (pro hac vice)
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com
bbarnes@cooperkirk.com

Counsel for Foundation for Individual Rights in Education

Respectfully submitted,

/s/ William S. Consovoy
William S. Consovoy (D.C. Bar #493423)
Cameron T. Norris
Alexa R. Baltes (pro hac vice)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com
cam@consovoymccarthy.com
lexi@consovoymccarthy.com

Counsel for Speech First, Inc. and Independent Women's Law Center