GENTNER DRUMMOND
ATTORNEY GENERAL

May 15, 2023

Secretary Miquel A. Cardona
Secretary of Education
United States Department of Education
Lyndon Baines Johnson Building
400 Maryland Ave., SW
Washington D.C. 20202

***Re*: Oklahoma's comments regarding NPRM, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams," 88 Fed. Reg. 22860 (Apr. 13, 2023).**

Dear Secretary Cardona,

Oklahoma submits these comments in opposition to the Proposed Rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams." *See* 88 Fed. Reg. 22860 (Apr. 13, 2023) (hereinafter the "proposed rule").

More than half a century ago, Congress enacted Title IX of the Education Amendments of 1972 to promote equal opportunity for male and female athletes. *See* 20 U.S.C. § 1681(a). The text of the statute and corresponding regulations recognize an "equal athletic opportunity for members of both sexes," and refer to those two sexes as, "Boy," and "Girl." 34 C.F.R. § 106.41(c); 20 U.S.C. § 1681(a)(7). In passing this "major" accomplishment, women were provided a level playing field with men and were no longer denied "an equal opportunity to participate in sports." *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1779 (2020) (Alito, J., dissenting).

Since the enactment of Title IX, the thematic intent of the statute – providing equality for students in athletics – has been carried out by schools across the country. From its inception to present day, not only has the statute recognized the natural differences between men and women, but so too has our highest Court. *See U.S. v. Virginia*, 518 U.S. 515, 534 (1996) (Ginsberg, J.) ("Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'") (quoting *Ballard v. U.S.*, 329 U.S. 187, 193 (1946)). Under this core principle, Title IX granted men and women an "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *Id.* at 532.

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The proposed rule flips this fifty (50) year achievement on its head. The proposed rule rewrites Title IX. It ignores the literal text of the statute and the purpose behind its creation. It disregards the lack of public support for the proposed rule, and it jeopardizes the equal opportunity that has been afforded to female athletes ever since the establishment of the statute. The proposed rule attempts to make these drastic and detrimental changes while relying on a Supreme Court case that has no connection to Title IX. Perhaps worst of all, an implementation of the proposed rule would serve to isolate and deny the group of athletes that the statute was originally designed to promote and protect – female athletes. The fallout will dilute the rights of female athletes. It will oust female athletes from opportunities to play on sports teams, while those spots and positions will be occupied by biologically born males. It will create an unfair level of competition, while overlooking the female athletes' privacy and safety.

The proposed rule also usurps authority that belongs to the States and to Congress. It violates the Tenth Amendment of the Constitution by attempting to expand into public school issues that must be left to the states and boards of education. Specific to Oklahoma, the proposed rule runs in direct conflict with an already existing statute: the "Save Women's Sports Act." *See* OKLA. STAT. tit. 70, § 27-706. The decisions of states and boards of education should be undisturbed by the federal system unless the state's action is "clearly unconstitutional." *See Sandusky v. Smith*, 2012 WL 4592635, at *8 (W.D. Ky. Oct. 2, 2012) (quoting *Petrey v. Flaugher*, 505 F. Supp. 1087, 1090 (W.D. Ky. Jan. 28, 1981)). Such an action would interfere with each States' decision-making authority in educational settings, a right established by the Constitution and our highest Court. There is no need for such federal overreach here.

The proposed rule also intercepts congressional authority. Simply put, the responsibility and power to make new legislation "lies in Congress." *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1753 (2020) (majority opinion). While agencies do have authority to propose new rules, that authority does not extend to rules which go against statutory language and longstanding interpretation of the law. A founding principle of this country is that the power to make law is delegated to elected representatives, not unelected agency officials. And when agency officials do propose new rules, those rules should not go "beyond what Congress could reasonably be understood to have granted." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). In other words, new rules should consider what Congress meant at the time the laws were written. In contrast, the proposed rule attempts to expand the meaning of Title IX in a way that is unreasonable and unconstitutional.

Additionally, the proposed rule provides a blurred standard similar to intermediate scrutiny to assess "sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team." *See* 88 Fed. Reg. 22871. However, the Department of Education blatantly misapplies constitutional law and standards by requiring the states to apply a heightened scrutiny standard when "gender identity" is not a suspect or quasi-suspect class. The correct standard applied when no suspect or quasi-suspect classification is involved is rational basis review.

Moreover, rather than provide needed clarity, the proposed rule creates more questions and confusion. If the proposed rule were implemented by states and schools, it would be coupled with a countless number of issues. The rule would only serve to inject confusion about the treatment of transgender individuals based on the types of sport, level of competition, age, individual skill,

individual size, individual strength, and other areas of individual development, among many others. Given that the proposed rule ignores biological sex and allows a transgender individual to be placed on a team based on those developmental attributes, it would force states and schools to rely on subjective stereotypes about male and female athletes by their generalized abilities, rather than objective criteria like biological sex. This is in direct conflict with federal law. *See U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (stating that sex-based classifications should not be based on "generalizations about the different talents, capacities, or preferences of males and females," while also affirming that biological sex is not a stereotype).

The proposed rule is riddled with flaws. Based on the numerous reasons articulated within this Letter, Oklahoma requests the Department of Education withdraw and abandon the proposed rule.

I. The Proposed Rule Negates Title IX's Success and Misapplies Federal Law.

Despite a collective understanding of Title IX's longstanding purpose, the proposed rule relies on disconnected case law, ignores the statute's specific language, and worst of all, harms and restricts the entire class of individuals that Title IX originally sought to build up and protect – female athletes.

A. The Proposed Rule Harms a Protected Class.

A school "that offers women a smaller number of athletic opportunities than the statute requires" detours from Title IX's purpose. *See Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993). "Equal opportunity to participate lies at the core of Title IX's purpose." *Id.*; *see also B.P.J. v. West Va. State Bd. of Educ.*, 2023 WL 111875, at *9 (S.D. W.Va. Jan. 5, 2023) ("Title IX used 'sex' in the biological sense because its purpose was to promote sex equality."). Simply put, Title IX was enacted to allow sex-separated athletic teams in the interest of equality and fairness to both sexes – male and female.

Ironically, the proposed rule would deny female athletes the exact opportunity that the statute was initially designed to safeguard. There are multiple issues in terms of how this rule would negatively affect a female athlete's ability to participate in sports equally and fairly. For starters, if schools were forced to include biological males on female sports teams, then there will be fewer opportunities for female athletes to participate in sports. The fact is simple and based on elementary math. There are a finite number of spots available on female sports teams. Adding biologically born males to that pool of spots will limit the number of positions for biologically born females. Like sports in general, the situation described is a zero-sum game. Title IX was an achievement for female athletes. The proposed rule forces female athletes to lose.

Further, female athletes (who do get to keep their spots) are immediately disadvantaged by competing with biological males. This is a scientific fact. Plus, there are issues of a female athlete's privacy and safety. The proposed rule overlooks and negates Title IX's benefits to female athletics. "[T]here are inherent differences between those born male and those born female and that those born male, including transgender women and girls, have physiological advantages in many sports." *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 819 (11th Cir. 2022) (Lagoa, J., concurring). A plethora of studies and documented research bolster this fact. There are simply undeniable

differences in "physical attributes that contribute to elite athletic performance" of a male versus a female in athletics. *See The Role of Testosterone in Athletic Performance*, DUKE CTR. FOR SPORTS L. & POL'Y (Jan. 2019). Studies provide the following differences between post-pubescent males and females:

Males jump 25% percent higher than Females.
Males throw 25% further than Females.
Males run 11% faster than Females.
Males accelerate 20% faster than Females.

Jennifer C. Braceras, et al, *Competition: Title IX, Male-Bodied Athletes, & the Threat to Women's Sports*, INDEP. WOMEN'S F. & INDEP. WOMEN'S L. CTR. 20 (2021) (footnotes omitted).

Specifically, as to studies on transgender females, even those who have lowered their testosterone levels to a range of an average biological female still retain many puberty-related advantages of muscle mass and strength seen in biological males. *See* Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression & Performance Advantage*, 51 SPORTS MED. 200 (2021). "[T]rans women and girls remain fully male-bodied in the respects that matter for sport; [and] because of this, their inclusion effectively de-segregates the teams and events they join." *See* Doriane Lambelet Coleman, et al., *Re-affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL'Y 69, 108 (2020).

Perhaps the Eleventh Circuit sums it up best: "But why does it matter if women and girls are given the equal opportunity to compete in sports? The answer cuts to the heart of why Title IX is seen as such a success story for women's rights." *Adams*, 57 F.4th at 820 (Lagoa, J., concurring). "Affirming the . . . conclusion that 'the meaning of "sex" in Title IX includes "gender identity"' would open the door to eroding Title IX's beneficial legacy for girls and women in sports." *Id.*

The proposed rule also ignores psychology, privacy, and safety. A recent study points out that "limited research has explored girls' experiences of competing on boys' sports teams," noting unique challenges to female athletes. Melissa L. DeJonge, et al., *One of These is Not Like the Other: The Retrospective Experiences of Girl Athletes Playing on Boys' Sports Teams During Adolescence*, QUALITATIVE RES. IN SPORT, EXERCISE & HEALTH (Mar. 9, 2023). Female athletes describe "having to navigate tensions and problematic assumptions of girls' inferiority in sport." *Id.* Meanwhile, research shows that female athletes are more willing to participate in single-sex athletics and less likely to feel self-conscious in single-sex athletics. *See* Crystal Vargos, et al., *The Effects of Single-Sex Versus Coeducational Physical Education on American Junior High PE Students' Physical Activity Levels and Self-Competence*, 13 BIOMEDICAL HUM. KINETICS 170 (2021); Kelly Morgan, et al., *Formative Research to Develop a School-Based, Community-Linked Physical Activity Role Model Programme for Girls: Choosing Active Role Models to Inspire Girls*, BMC PUB. HEALTH (2019).

Further, in addition to disregarding female athletes' protections on the field or court, the proposed rule also ignores female athletes' privacy and safety in locker rooms, bathrooms, and other facilities which imply the need for personal privacy. The Department of Education has heard such commentary before. The proposed rule's commentary discusses the need for this personal

privacy in the context of transgender individuals. However, it gives no consideration to the personal privacy and safety of female athletes. One does not have to stretch the bounds of his or her imagination to foresee the detrimental effect to female athletes in these close quarter locker room settings: harassment, exclusion, embarrassment, fear, and vulnerability, for starters.

B. *Bostock* Does Not Affect the Meaning or Interpretation of Title IX.

Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020) does not support the proposed rule. The 2020 Supreme Court opinion relied upon in the proposed rule involved: 1) a different statute, 2) different language, 3) a different group of individuals, and 4) different factual groundwork. *See generally id.* Because the proposed rule relies heavily on *Bostock*, it must be discussed here; not for its connections to Title IX, but rather its irrelevance.

In *Bostock*, the Supreme Court addressed Title VII. It held that through the narrow lens of Title VII of the Civil Rights Act, an employer cannot take adverse employment actions because of an individual's sexual orientation or gender identity. 140 S. Ct. 1731, 1740 (2020). This adverse action was prohibited discrimination towards an employee "because of sex." *Id.* As if these factors were not distinct enough from the proposed rule, even in *Bostock*, the Supreme Court noted that "sex" referred "only to biological distinctions between male and female." *Id.* at 1739. It also stated that "transgender status" is a "distinct concept[] from sex." *Id.* at 1746–47. *Bostock*'s rationale was entrenched in the fact that Title VII's "because of" language "incorporates the 'simple' and 'traditional' standard of but-for causation." *Id.* at 1739 (citing *Nassar*, 570 U.S. at 360).

"Title VII is a vastly different statute" than "Title IX." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005). Title IX is protecting a separate group of individuals than workplace employees in Title VII. And to state the obvious, Title IX involves an entirely separate statute than the one at issue in *Bostock*. Additionally, Title IX does not use the "because of sex" language or incorporate a "but-for" standard like Title VII. Instead, Title IX's statutory language involves discrimination "on the basis of sex." *See* 20 U.S.C. § 1681(a). *Bostock* even explicitly refrains from addressing gender identity in any other context than Title VII. 140 S. Ct. at 1753 (stating that it would not "address bathrooms, locker rooms, or anything else of the kind"). In fact, foreseeing how its opinion could be erroneously construed going forward, the Court in *Bostock* expressly declared that "none of these other laws are before us . . . and we do not prejudge any such question today." *Id.* In sum, *Bostock* did not prejudge nor interpret Title IX. *Bostock* is therefore irrelevant to the interpretation or rulemaking of Title IX.

In comparison, the ultimate purpose of protecting athletes under Title IX is carried out by schools specifically accounting for a student's biological sex. In other words, Title IX allows schools to draw sex-based distinctions. It allows schools to provide "Boy or Girl conferences," and "[f]ather-son or mother-daughter activities." 20 U.S.C. § 1681(a)(7)–(8). Separate teams are created under the rules to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(b)–(c). These philosophies behind Title IX have stood for more than five (5) decades. Thus, the proposed rule cannot rely on *Bostock* when it is distinguished by statutory authority, statutory language, and the group of individuals in which the statute is designed to protect.

C. The Proposed Rule Defies Title IX's Intent and Statutory Language.

Every school which accepts federal funds is bound by the following language:

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

20 U.S.C. § 1681(a) (emphasis added). "A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of *both sexes*." 34 C.F.R. 106.41(c) (emphasis added). Even the proposed rule acknowledges the two sports teams' classification. *See* 88 Fed. Reg. 22860, 22860 (proposed 34 C.F.R. § 106.41(b)). And the phrase, "discrimination on the basis of sex," has been interpreted as a school denying equal treatment to either sex.

However, the proposed rule as a whole pursues an enormous detour from Title IX's purpose and intent. It states that "if a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity, those criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied." *Id.* (proposed § 106.41(b)).

The proposed rule is inherently inconsistent with both the text of Title IX and the provisions of 34 C.F.R. 106.41 requiring a Title IX recipient provide equal athletic opportunity for members of both sexes. The proposed rule tries to circumvent proper avenues of lawmaking and re-define the word "sex" as it has always been understood.

At the time Title IX was enacted in 1972, "sex" carried a "narrow, traditional interpretation." *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085–86 (7th Cir. 1984). During that time, "virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020), as amended (Aug. 28, 2020) (Niemeyer, J. dissenting) (collecting dictionary definitions). *See also* THE OXFORD ENGLISH DICTIONARY 578 (1961) ("[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these."); THE AMERICAN COLLEGE DICTIONARY 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished . . ."); THE RANDOM HOUSE COLLEGE DICTIONARY 1206 (rev. ed. 1973) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions."); THE AMERICAN HERITAGE DICTIONARY 1187 (1976) ("[t]he property or quality by which organisms are classified according to their reproductive functions"); WEBSTER'S NEW COLLEGIATE DICTIONARY 1054 (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); THE RANDOM HOUSE COLLEGE DICTIONARY 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1187 (1980) ("two divisions" of organisms,

"designated male and female," classified "according to their re-productive functions."). Again, the proposed rule turns decades of common understanding of the term "sex" on its head.

The proposed rule also attempts to create a new "balancing test," while not addressing the harm the proposed rule would cause to the large percentage of men and women who have been protected by Title IX since its inception. By ignoring the textual language of Title IX, the proposed rule creates an impossible task for schools to apply a new and inconsistent framework.

In short, Title IX's original purpose was to thwart discrimination, and to build up and protect females, including female athletes. The proposed rule literally accomplishes the exact opposite.

II. Decisions in Female Sports Should be Left to the States and Congress.

The proposed rule oversteps the powers instilled in the States and Congress. At the state level, Oklahoma, and many other states across the county, have enacted a law which defines and instructs treatment of males and females in school athletics. *See* OKLA. STAT. tit. 70, § 27-106. At the federal level, "All legislative Powers . . . shall be granted in a Congress of the United States." U.S. CONST. art. I, § 1. While federal agencies such as the Department of Education are given rulemaking authority, courts have addressed a "recurring problem" with those "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). The proposed rule violates each of these rights – those of the States and left to Congress.

A. The Proposed Rule is in Direct Violation of the Tenth Amendment and the Save Women's Sports Act.

The State of Oklahoma has a specific law regarding male and female sports, and that law cannot be hindered by inappropriate, federal overreach. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States." U.S. CONST. amend. X. Under this authority, Oklahoma's statutory code is designed "to provide for a state system of public school education and for the establishment, organization, operation and support" of the State. OKLA. STAT. tit. 70, § 1-102. This "prerogative of managing the public schools belongs to the states and the boards of education and administrators to whom the state has delegated it. The federal courts have the power to supersede their decisions only where their actions are clearly unconstitutional." *See Sandusky v. Smith*, 2012 WL 4592635, at *8 (W.D. Ky. Oct. 2, 2012) (quoting *Petrey v. Flaugher*, 5050 F. Supp. 1087, 1090 (W.D. Ky. Jan. 28, 1981)). "Without a fundamental right, the Court will uphold the government's decision where it was rationally related to a legitimate state interest." *Sandusky*, 2012 WL 4592635, at *8.

Set out in Oklahoma's Save Women's Sports Act, "[p]rior to the beginning of each school year, the parent or legal guardian of a student who competes on a school athletic team shall sign an affidavit acknowledging the *biological sex* of the student at birth." OKLA. STAT. tit. 70, § 27-106(D) (emphasis added).[1] "If there is any change in the status of the biological sex of the student, the affiant shall notify the school within thirty (30) days of such change." *Id.* Female athletic teams

[1] If the student is eighteen (18) years of age, that student will sign the affidavit "acknowledging his or her biological sex at birth." *Id.*

"shall not be open to students of the male sex." § 27-106(E)(1). "Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of [§ 27-106(E)(1)] shall have a cause of action for injunctive relief, damages and other relief available permitted by law against the school." § 27-106(E)(2).

The proposed rule obstructs and conflicts with Oklahoma's established law. It does so in a manner that interferes with states' traditional authority to safeguard privacy expectations in educational settings, absent any evidence that Congress intended that result. *See* U.S. CONST. amend. X; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (States' powers are "not to be superseded by" federal actions "unless that was the clear and manifest purpose of Congress"). The proposed rule strangles Oklahoma's law by attempting to redefine who consists of "a male or female athletic team." 88 Fed. Reg. 22860, 22860 (proposed § 106.41(b)). Oklahoma law clearly separates its male and female teams based on an individual's "biological sex at birth." § 27-106(D). The proposed rule oversteps, requiring Oklahoma, and many other states, to ignore their own, established law. This proposal does not consider its unconstitutionality, its large opposition across the county, and its unneeded injection of uncertainty into student athletics. In sum, the proposed rule directly violates the Tenth Amendment because it is "not in accordance with law," it is "contrary to constitutional right, power, privilege, [and] immunity," and it is "in excess of statutory jurisdiction, authority, [and] limitations." *See* 5 U.S.C. § 706(2)(A)–(C).

B. The Proposed Rule Exceeds Congressional Authorization.

At the broadest level, the Department of Education's proposed rule violates the separation-of-powers principle within the Constitution. "All legislative Powers herein granted shall be vested in . . . Congress." U.S. CONST. art. I, § 1. "The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress." *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1753 (2020) (majority opinion). Agency rulemaking power is constrained by the statutory language. Ultimately, courts will invalidate an agency's proposed rule if the rule fails to adhere to this congressional power. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring an arbitrary and capricious standard under the Administrative Procedure Act such that "the agency must examine the relevant data and articulate a satisfactory explanation for its actions including a 'rational connection between the facts found and the choices made'") (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962)).

The proposed rule oversteps this legislative power. And as discussed above, the law in which the proposed rule relies upon is entirely disconnected from the statute the Department of Education seeks to turn upside down. "If Congress could hand off all its legislative power to unelected agency officials, it 'would dash the whole scheme' of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives." *See Nat'l Fed'n of Ind. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring). The government's *power to make laws* "remains where Article I of the Constitution says it *belongs–with the people's elected representatives*." *Id.* at 668 (Gorsuch, J., concurring) (emphasis added).

Moreover, the substance of the proposed rule itself directly conflicts with the legislative intent of Title IX. A "recurring problem" with proposed rules from federal agencies is when a

"highly consequential" proposed rule goes "beyond what Congress could reasonably be understood to have granted." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). Justice Scalia described this reasonable understanding in the following way: "In their full context, words mean what they conveyed to reasonable people at the time they were written." ANTONIN SCALIA, ET AL., READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (1st ed. 2011). The term "gender identity" appears nowhere in the text of Title IX. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 197, 815–16 (11th Cir. 2022). The term "sex," on the other hand, has a well-established and longstanding meaning. *See supra* Section I(C). The proposed rule is inconsistent with that historical understanding.

Finally, the Department of Education's rush in its allowance for comment highlights even more of the proposed rule's arbitrary and capricious nature. At least one court has noted the "usual 90 day" time period for comment once the proposed rule is published in the Federal Register. *See Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 453 (3d Cir. 2011). Here, the Department of Education denied requests for extensions and provided only thirty-two (32) days for comment.

The bottom line is that our Constitution provides explicit authority to the States and Congress. The proposed rule violates both.

III. The Proposed Rule Contradicts and Misapplies the Fourteenth Amendment.

The proposed rule attempts to implant the wrong level of judicial scrutiny. An analysis of the Equal Protection Clause affirms this issue with the proposed rule. Instead of following the Constitution and decades' worth of judicial precedent, the Department of Education provides a blurred standard similar to intermediate scrutiny to assess "sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team." *See* 88 Fed. Reg. 22871. Through a close review of the standard of scrutiny provided in the proposed rule, the following section explains why the proposed rule is inappropriate and supplies the correct standard the judicial scrutiny doctrine is meant to foster when no suspect or quasi-suspect classification is involved.

A. The Proposed Rule Improperly Imposes a Heightened Scrutiny Standard on School District Decisions.

The Equal Protection Clause in the Fourteenth Amendment to the U.S. Constitution provides, in part, that no state can "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Specifically, Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Courts have developed the following three tiers of scrutiny for reviewing Equal Protection challenges: (1) strict scrutiny; (2) intermediate scrutiny; (3) rational basis review. *See U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Each level of scrutiny triggers different responsibilities from those challenging a law and those defending it. First, under strict scrutiny, the government must show that its action furthers a compelling government interest and is narrowly tailored to achieve that interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Strict scrutiny is triggered when a government action involves

a fundamental right or a "suspect classification," such as race, religion, national origin, or alienage. *Id.*; *see Carolene Prods. Co.*, 304 U.S. at 152 n.4. As such, it is the most rigorous standard of review utilized by the courts. Second, intermediate scrutiny requires the government to show that its action furthers an important government interest by using means that are substantially related to that interest. *Craig v. Boren*, 429 U.S. 190, 197 (1976). Intermediate scrutiny is triggered by a "quasi-suspect classification," such as sex or legitimacy of birth. *Id.* Parties seeking to uphold government sex-based actions must show an "exceedingly persuasive justification" for the policy. *Id.* at 198. Such classifications must serve an important government interest, and the "discriminatory means employed" must be "substantially related" to achieving that interest. *Id.* Lastly, rational basis review requires the challenger to prove that the government action is not rationally related to a legitimate government interest. *F.C.C. v. Beach Commc'n, Inc.*, 508 U.S. 307, 313–15 (1993). As in the case here, rational basis review provides the standard when neither a suspect nor a quasi-suspect class is involved.

A three-step process of constitutional scrutiny should be applied in evaluating the proposed rule. The first two steps, categorization and classification, are rule based. *See Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002). Categorization and classification can be viewed as future-oriented rules meant to constrain and guide courts in cases that have not yet arisen. The third step, application, involves the application of one of the three standards of scrutiny to the particular facts of the case. *See Save Palisade FruitLands*, 279 F.3d at 1210. It permits courts some flexibility to measure the parties competing interests to determine whether a regulation violates the standard set in an earlier case. Therefore, this step requires courts to engage in case-specific weighing of means and ends.

B. Gender Identity is Not a Protected Class Under the Equal Protection Clause.

Rationale basis applies to state or local decisions involving the decision to segregate sports teams by biological sex because "gender identity" is not a protected class under the Equal Protection Clause, nor synonymous with "sex" as used and understood in Title IX. The threshold inquiry in evaluating an Equal Protection claim is whether the classification at issue warrants heightened review because it jeopardizes a fundamental right or categorizes on the basis of an inherently suspect characteristic. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The proposed rule readily lends itself to resolution by categorization. The Department of Education attempts to muddy this categorization. The question whether "gender identity" is a distinct category recognized by the Supreme Court of the United States can be answered clearly: No.

The proposed rule attempts to improperly categorize "gender identity" as a quasi-suspect class by the mere inclusion of the word "gender" to invoke a heightened level of scrutiny. The proposed standard implies that gender identity is a suspect or a quasi-suspect class. It is not.

First, gender identity is not one of the suspect classes: race, religion, national origin, or alienage. Accordingly, there is no dispute that gender identity is not a suspect class and thus strict scrutiny is not triggered. Second, gender identity is not a quasi-suspect class. Quasi-suspect classification is a classification established on sex or legitimacy of birth. *Bostock* itself was built on the foundational fact that "sex" at a baseline refers "to biological distinctions between male and female." *Bostock*, 140 S. Ct. at 1749. Therefore, the proposed rule does not involve a quasi-suspect class. As a result, rational basis review is the correct standard to be applied.

The Supreme Court of the United States has not recognized a new suspect class in over forty (40) years. Betrall L. Ross II, *Administering Suspect Class*, 66 DUKE L. J. 1807, 1814 (2017). Throughout this time period, the Court has denied claims of entitlement to suspect-class protection by the poor, the elderly, the disabled, and the LGBTQ community. *Id.*; *see, e.g.*, *Maher v. Roe*, 432 U.S. 464, 471 (1997); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–46 (1985); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Although the Court has subjected laws that classify on the basis of race or gender to a heightened scrutiny, the Court has clarified that this is not because the laws discriminatorily harm a subordinated racial or gender class. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Craig v. Boren*, 429 U.S. 190, 197–98 (1976). Instead, it has determined that racial and gender classifications are subject to a heightened scrutiny because it is presumptively inappropriate for governments to use this criterion as bases for decision making. *Id.* Ultimately, Congress has the authority to rewrite Title IX and redefine its terms at any time. *See* U.S. Const. art. I, § 1. However, Congress has chosen not to do so.

The proposed rule mandates a higher burden than allowed under the Constitution. Under the second step of the constitutional scrutiny process, a court identifies a pre-defined category and pairs it with a pre-defined class, which then corresponds with a pre-defined scrutiny application. *See Save Palisade FruitLands*, 279 F.3d at 1214. Thus, it is a critical factor to identify the correct classification because it controls which standard of review will be applied and provides consistency within the courts before an action arises. Nevertheless, the Department of Education has even muddied these waters.

The proposed rule provides a blurred "heightened scrutiny" standard incorporating an intermediate scrutiny standard to evade classification and to avoid courts dictating in the future whether intermediate or strict scrutiny applies. The proposed rule mandates that "sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team" must: (i) be *substantially related* to the achievement of an important educational objective; and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied. 88 Fed. Reg. 22860, 22891 (proposed § 106.41(b)) (emphasis added).

Accordingly, the "substantially related" to the achievement of an important educational objective language mirrors the intermediate scrutiny standard. However, intermediate scrutiny is triggered by a quasi-suspect classification. Yet, "gender identity" is not a quasi-suspect class and therefore intermediate scrutiny cannot be triggered. Thus, not only does the proposed standard reflect the incorrect standard when there is no suspect or quasi-suspect class, it mandates that states have to "[m]inimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied." *Id.* (proposed § 106.41(b)). The latter requirement in the proposed rule makes as little sense as the choice of intermediate scrutiny.

Moreover, sex, as that term has long been understood, *is* a quasi-suspect classification subject to intermediate scrutiny. By applying an intermediate scrutiny standard, the proposed rule appears to place "gender identity" *on equal ground* with sex. Yet, the proposed rule makes no attempt to clarify how states are to weigh these competing classifications: sex, which is a quasi-suspect classification, and "gender identity," which is not. Nor does the proposed rule provide

clarity on what a school should do when these classifications collide. Inevitably, if the proposed rule forces that schools cater to a student's "gender identity," conflicts will arise when that "gender identity" differs from the individual's sex. As a result, the proposed rule would require a school to prioritize consideration of "gender identity" to the detriment of "sex."

The concept of classification uses rules to provide consistency and rhetorical familiarity into the law. But these benefits are lost because the proposed rule classifies ambiguously and contrary to longstanding law. The proposed rule muddles the correct standard to be applied. Because the classes of scrutiny are consistent across many fields of constitutional law, it runs the consequence of causing confusion across all areas of constitutional law. The issues that would ensue if this fundamental change in our laws were made by way of agency overreach would be catastrophic. The heightened standard will likely force school districts to allow all transgender students to compete on the teams consistent with their gender identity. Such an outcome would violate the purpose of Title IX.

Accordingly, contrary to the purported standard the Department of Education proposes, the correct standard to be applied is rational basis review. For this reason, the proposed rule is unconstitutional.

IV. Administration of the Proposed Rule is Incomprehensible.

Well intentioned or not, the proposed rule will create far more problems than solutions. If schools attempted to implement the rule, the application of it is impossible. The proposed rule's "test" identifies "each sport, level of competition, and grade or education level" as criteria for allowing a biological male to play on a female athletic team. These "categories" of athletic teams do not fit into organized boxes. And an attempt at the proposed rule's "analysis" will create an incalculable variance of issues.

For starters, although the most negatively affected will be female athletes, the repercussions do not stop there. This proposal will affect thousands of schools and millions of students, parents, coaches, teachers, and anyone else with a vested interest in school athletics in this country. Each sport, among the hundreds, if not thousands, will have its own backlash. It will cause more division, and it will cause less clarity.

From a practical perspective, differing levels of competition, age, and development add to the difficulty in administration of the proposed rule. Does the "test" change when you reach a certain age? If so, what is that age? Does the "test" change when an individual reaches puberty? How do you reconcile the fact that individuals reach puberty at different ages? Does the "test" change when an individual reaches a certain height? Or weight? Are these "tests" based on comparisons to teammates, or would the "test" also need to forecast how that individual would perform with athletes in cities and towns across their respective state? "[S]ports that schools offer each have unique rules and prioritize varied skills and attributes." 88 Fed. Reg. 22860, 22876 (proposed § 106.41(b)). So, there would be no uniform "test," and each sport would be viewed differently. Consequently, does the proposed rule suggest that the definition of "sex" will now be different in each sport?

The Department of Education acknowledges that separate "male and female teams can advance . . . equal opportunity in the unique context of athletics by creating meaningful participation opportunities that were historically lacking for women and girls." *Id.* (proposed § 106.41(b)). This Letter has addressed the contradictory nature of the proposed rule in terms of its effect on female athletes. On top of that, the Department of Education contradicts itself again by its use of stereotyping in its proposed rule.

Sex-based classifications should not be based on "generalizations about the different talents, capacities, or preferences of males and females." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996). Unlike levels of individual athleticism, biological sex "is not a stereotype." *Nguyen v. INS*, 533 U.S. 53, 68 (2001) (citing *Virginia*, 518 U.S. at 533). Meanwhile, the proposed rule asserts that States may leave participation based on a transgender individual's biological sex if the rationale is "substantially related to the achievement of an important educational objective" and "minimize harms to students whose *opportunity to participate* on a male or female team *consistent with their gender identity would be limited or denied.*" 88 Fed. Reg. 22860, 22860 (proposed § 106.41(b)) (emphasis added). Thus, given the language of the proposed rule, a school would be forced to ignore biological sex when making its determination on a transgender individual's proper team (male or female). Instead, it would place a transgender individual on a team based on "skills, size, strength, and other attributes" in order to ensure that a transgender individual's opportunity to participate was not "limited or denied" based on "their gender identity." *Id.* at 22876, 22860.

If the "test" is based on competition level for each sport, does that mean a transgender individual can play on a male team in the winter and a female team in the spring? The discussion and questions within this section only scratch the surface on the confusion and spinoff questions that would follow if this rule were actually enacted. Common sense, and constitutional law, provide that the justifiable reason to differentiate male and female is biological. *Virginia*, 518 U.S. at 533. Like so much of the Department of Education's commentary on the proposed rule, the actual administration of the proposed rule is unclear and lacks the necessary direction to move forward.

Title IX has been widely accepted and celebrated for over a half century. The proposed rule would be received in the opposite way. It is deeply divisive, and it stifles more than fifty (50) years of progress in female athletics. The law on which it relies is irrelevant to the subject matter. And the subject matter of that law is explicitly left to the States and Congress under our own Constitution. For these reasons and more, the Department of Education should withdraw and abandon the proposed rule.

Sincerely,

Gentner F. Drummond
Oklahoma Attorney General