September 12, 2022

United States Department of Education
Office for Civil Rights

RE: Docket ID ED–2021–OCR–0166

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Comments of the American Center for Law and Justice

To the Office for Civil Rights of the U.S. Department of Education:

The American Center for Law and Justice ("ACLJ") submits the following comments in opposition to the Notice of Proposed Rulemaking issued by the U.S. Department of Education ("Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance"), as published in the Federal Register on July 12, 2022 (hereafter, the "Proposed Rule"). More specifically, the ACLJ opposes the Proposed Rule's expanding the meaning of discrimination based on "sex" under Title IX to include "termination of pregnancy," i.e., abortion.

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in several significant cases involving the freedoms of speech and religion and have submitted formal comments regarding proposed rulemaking on a wide variety of issues.

Title IX prohibits recipients of federal financial assistance from discriminating on the basis of sex in education programs or activities: "[n]o person in the United States shall, **on the basis**

See, *e.g.*, *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (holding that the government is not required to accept counter-monuments when it displays a war memorial or Ten Commandments monument); *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that minors have First Amendment rights); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that denying a church access to public school premises to show a film series violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (striking down an airport's ban on First Amendment activities).

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). Thanks to Title IX, many barriers that once prevented people, on the basis of sex, from participating in educational opportunities and careers of their choice have been removed. While the ACLJ supports the original purpose underlying that statute, i.e., equal opportunity in education, it opposes the current administration's attempt to politicize and taint that important law with its abortion agenda.

The alleged purpose behind the Proposed Rule is to "better align the Title IX regulatory requirements with Title IX's nondiscrimination mandate, and to clarify the scope and application of Title IX and the obligation of all [educational institutions that receive federal financial assistance from ED] to provide an educational environment free from discrimination on the basis of sex, including through responding to incidents of sex discrimination." 87 Fed. Reg. 41390. In so doing, however, the Proposed Rule broadly expands the meaning of "discrimination on the basis of sex" to include, among other categories, "pregnancy or related conditions," which in turn is defined as: "(1) Pregnancy, childbirth, **termination of pregnancy**, or lactation; (2) Medical conditions related to pregnancy, childbirth, **termination of pregnancy**, or lactation; or (3) Recovery from pregnancy, childbirth, **termination of pregnancy**, lactation, or their related medical conditions." *Id.* at 41515 (emphasis added).

While the Proposed Rule never uses the word "abortion," there is obviously no dispute as to what "termination of pregnancy" entails it is a euphemism for the destruction of unborn human life. And in light of the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), it is a medical decision that it is not afforded any special status or protection under the U.S. Constitution. To the contrary, because "procuring an abortion is not a fundamental constitutional right [and] has no basis in the Constitution's text or in our Nation's history," restrictions placed on abortion need only satisfy rational-basis review. *Id.* at 2283.

The current administration's recent rhetoric and actions have made it clear that it supports an aggressive agenda of access to abortion without restriction,[2] but there is no principled reason to include abortion within the scope of Title IX and the Proposed Rule doesn't even pretend to articulate one.

As the Supreme Court recently observed, there is a distinction between discrimination based on sex and discrimination based on the medical choice to procure an abortion:

> Neither *Roe* nor *Casey* saw fit to invoke this [equal protection] theory, and it is squarely foreclosed by our precedents, which establish that **a State's regulation of abortion is not a sex-based classification** and is thus not subject to the

[2] *See* July 8, 2022, Executive Order of President Biden ("Protecting Access to Reproductive Health Care Services"), stating that "[i]t remains the policy of my Administration to support women's right to choose and to protect and defend reproductive rights. Doing so is essential to justice, equality, and our health, safety, and progress as a Nation." *See also* June 24, 2022, statement of HHS Secretary, Xavier Becerra, stating that, in light of *Dobbs*, "I have directed every part of my Department to do any and everything we can here. As I have said before, we will double down and use every lever we have to protect access to abortion care. To everyone in this fight: we are with you."

> "heightened scrutiny" that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other." *Geduldig v. Aiello*, 417 U. S. 484, 496, n. 20 (1974). And as the Court has stated, the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273-274 (1993) (internal quotation marks omitted). Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny.

Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245-46 (2022) (emphasis added).

Unlike, for example, placing obstacles in the path of girls and women wishing to participate in school-sponsored STEM programs, "the disfavoring of abortion . . . is not *ipso facto* sex discrimination." *Bray*, 506 U.S. 272-73. Far from evincing an inherently discriminatory purpose, "there are common and respectable reasons for opposing [abortion], other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class as is evident from the fact that men and women are on both sides of the issue." *Id.* at 270. *Cf. Maher v. Roe*, 432 U.S. 464, 470 71 (1977) (denial of funding for abortion "involves no discrimination against a suspect class. An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases").

Placing abortion on par with natural characteristics of motherhood, i.e., pregnancy, childbirth, and lactation, is to confuse biological realities with a medical procedure and a socially, morally, and politically controversial one at that. *Cf. Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) ("[M]illions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child."). Even in terms of medical procedures, abortion is "inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life," *Harris v. McRae*, 448 U.S. 297, 325 (1980), or more accurately, the purposeful termination of a life with potential. In abortion, "the fetus will be killed," *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007), or, to put it less clinically, the procedure will "abort the infant life [which the mother] once [pro]created and sustained," *id*. Abortion implicates "the bond of love the mother has for her child" and it is no wonder that "some women come to regret their choice to abort the infant life they once created and sustained." *Id.*

Our country's earliest advocates for women's equality, who would have applauded the passage of Title IX in 1972, and the promises of equality it would create in education, understood that abortion was not a means of achieving such equality:

> Elizabeth Cady Stanton considered abortion a form of "infanticide." She adamantly opposed abortion, writing, "When we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we see fit." Most significantly, an editorial from the newspaper that she edited identified women's equality as a means of ending abortion: "There must be a remedy even for such a crying evil as [abortion]. But where shall it be found, at least where [shall it] begin, if not in the complete enfranchisement and elevation of women?" Victoria Woodhull, the first female presidential candidate,

> was a strong advocate for the right to life of the unborn. She, too, believed abortion hurt women's equality: "Every woman knows that if she were free she would never bear an unwished-for child, nor think of murdering one before its birth." Finally, Alice Paul, the author of the original Equal Rights Amendment ("ERA"), opposed the later development linking the ERA and abortion.

Mary Catherine Wilcox, "Why the Equal Protection Clause Cannot 'Fix' Abortion Law," 7 Ave Maria L. Rev. 307, 329 (Fall, 2008).

Pro-life feminists of today have echoed and advanced these same sentiments. One such writer, Daphne Clair de Jong, equated abortion with the continued subjugation of women when she wrote, "To say that in order to be equal with men it must be possible for a pregnant woman to become un-pregnant at will is to say that being a woman precludes her from being a fully functioning person." "The Feminist Sell-Out," in PROLIFE FEMINISM, YESTERDAY AND TODAY, 232 (2006).

As Elizabeth Fox-Genovese, distinguished social historian and founder of the Emory University Women's Studies Department, put it:

> By trivializing and even denigrating women's ability to bear children, legalized abortion has stripped women of their distinct dignity as women; it has shredded the primary tie among women of different classes, races, ethnicities and national origins; it has seriously diminished women's prospects for marriage and even further diminished their prospects for a lasting marriage; and it has exposed them to unprecedented levels of sexual exploitation.

"Abortion: A War on Women," in THE COST OF CHOICE: WOMEN EVALUATE THE IMPACT OF ABORTION, Erika Bachiochi, ed., 59 (2004).[3]

Indeed, unlike Title IX, which has undoubtedly advanced women's economic and social equality, abortion has "harmed women in the realms of personal relationships as well as in the development of law and policy accommodating women's childbearing and parenting." AMICUS BRIEF OF 240 WOMEN SCHOLARS AND PROFESSIONALS AND PROLIFE FEMINIST ORGANIZATIONS, *Dobbs v. Jackson Women's Health Org.*, at 41. The historical data amassed in that amicus brief demonstrates that "[w]omen surged forward as they resorted less and less to abortion." *Id*.

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[3] *See also* Rosemary Oelrich Bottcher, "Abortion Threatens Women's Equality," in PROLIFE FEMINISM: YESTERDAY AND TODAY, 238, 239 (1995) ("Those who advocate legal abortion concede that pregnant women are intolerably handicapped; they cannot compete in a male world of wombless efficiency."); Teresa Stanton Collett, "Dissenting," in WHAT ROE V. WADE SHOULD HAVE SAID, 189 (2005) ("Women are making great progress in our society, and it is not by means of denying their capacity to conceive and bear children. By adopting this Court's counsel of despair, employers and society at large lose all incentive to adapt to women's unique nature."); Fox-Genovese, "Wrong Turn: How the Campaign to Liberate Women has Betrayed the Culture of Life," in LIFE AND LEARNING XII, 12 (2002) ("[T]he courts have assumed that the pregnant woman deserves to be freed from the pregnancy—from the baby she is carrying—which amounts to the claim that being a woman is itself a disability and inherently an undesirable condition. The emphasis upon a pregnant woman's right to an abortion effectively undercuts the dignity of the woman who is pregnant and, by extension, of all women who may become pregnant.").

In short, incorporating abortion into Title IX would not help achieve the equality of opportunity that statute was adopted to advance. The Proposed Rule inserts a highly morally divisive issue into what should be a goal all Americans can share: equal opportunity in education.

In addition, by treating discrimination against sex as including abortion, the Proposed Rule raises the serious concern that the Proposed Rule will open the door to claims of sex-based harassment based on groups or persons being vocal about their opposition to abortion. This could take two forms: (1) retaliating against groups or persons for expressing their convictions and (2) adopting prophylactic measures to try and ensure that such harassing conduct does not take place in the first place. Both raise obvious constitutional concerns.

As for retaliatory measures taken against pro-life speech deemed to be "sex-based harassment" by public school officials, courts have consistently rejected the government's effectuation of a heckler's veto. *See*, *e.g*., *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (it is a "bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend"); *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975) (the government has no power to "selectively . . . shield the public from some kinds of speech on the ground that they are more offensive than others."); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it") (citations omitted); *Texas v. Johnson*, 491 U.S. 397 (1989) (speech does not lose its First Amendment protection because it would be regarded as "offensive" by some); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (ordinance prohibiting "conduct annoying to persons passing by" facially violative of the right to free assembly and association).

In fact, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). This admonition takes on added strength where the arena for speech is colleges or universities:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (citations omitted).

The Proposed Rule also raises the distinct possibility that, in an effort to avoid claims of sex-based harassment based on speech opposing abortion, schools will take prophylactic measures that chill the exercise of First Amendment freedoms, impacting students and teachers who wish to give voice to their pro-life convictions. This too raises constitutional issues. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone. . . ."); *accord Riley v. National Fed'n of Blind*, 487 U.S. 781, 801 (1988) (same); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (same). *See also* Eugene Volokh, How Harassment Law Restricts Free Speech, 47 Rutgers L. Rev. 563 (1995) ("[T]he vagueness of harassment law means the law actually deters much more speech than

might ultimately prove actionable."); Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 Ohio St. L. J. 481, 483 (1991) ("A broad definition of sexual and racial harassment necessarily delegates broad powers to courts to determine matters of taste and humor, and the vagueness of the definition of 'harassment' leaves those subject to regulation without clear notice of what is permitted and what is forbidden. The inescapable result is a substantial chilling effect on expression.")

The Proposed Rule's disregard for the First Amendment is seen also in its broadening of the scope of what constitutes "unwelcome sex-based conduct." While the current Rule borrows its language directly from the Supreme Court's decision in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999), limiting unwelcome conduct to mean conduct "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity," the Proposed Rule weakens that standard, defining unwelcome sex-based conduct to include conduct that is "sufficiently severe **or** pervasive that, based on the totality of the circumstances and evaluated **subjectively and objectively**, it denies or limits a person's ability to participate in or benefit from the recipient's education program or activity." 87 Fed. Reg. 41569 (emphasis added).

One need not hypothesize about the free speech issues this change in language raises. Just this year, in *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1125 (11th Cir. 2022), a student wished to express his views on a variety of topics, including that "abortion is immoral," on the grounds of the University of Central Florida. The student, joined by two others who wanted to express similar viewpoints, felt unable to "fully express himself or talk about certain issues" because he feared reprisals under, *inter alia*, the university's "discriminatory-harassment policy." That policy, similar in terms to the language in the Proposed Rule, defined "hostile environment harassment" as follows:

> Discriminatory harassment that is so severe **or** pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education (e.g., admission, academic standing, grades, assignment); employment (e.g., hiring, advancement, assignment); or participation in a university program or activity (e.g., campus housing), when viewed from both **a subjective and objective perspective**.

Id. at 1114-15 (emphasis added).

Ruling that the discriminatory-harassment policy is "almost certainly" unconstitutional, the Eleventh Circuit held:

> The policy, in short, is staggeringly broad, and any number of statements some of which are undoubtedly protected by the First Amendment could qualify for prohibition under its sweeping standards. To take a few obvious examples, the policy targets "verbal, physical, electronic or other conduct" based on "race," "ethnicity," "religion [or] non-religion," "sex," and "political affiliation." Among the views that Speech First's members have said they want to advocate are that "abortion is immoral," . . . Whatever the merits or demerits of those sorts of statements, they seem to us to constitute "core political speech," with respect to

> which "First Amendment protection is 'at its zenith.'" *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 183 (1999) (citation omitted); *accord, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). Because the discriminatory-harassment policy restricts political advocacy and covers substantially more speech than the First Amendment permits, it is fatally overbroad.

Id. at 1125.

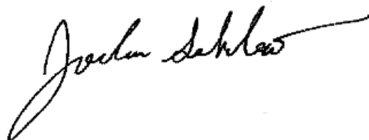
That is not all. The Eleventh Circuit held that the university's "discriminatory-harassment policy" was also impermissibly content-based (because it imposed differential burdens upon speech on account of the topics discussed) and viewpoint-based (because it prohibited *only* speech that is "discriminatory."). *Id*. at 1126 27. The court observed that "in prohibiting only one perspective, [the university] targets 'particular views taken by' students, and thereby chooses winners and losers in the marketplace of ideas which it may not do." *Id*. at 1127 (citing *Matal v. Tam*, 137 S. Ct. 1744, 1767 (2017) (Kennedy, J., concurring in part and concurring in the judgment) ("The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing")).

What the Eleventh Circuit held to be an unconstitutional restriction of free speech applies with equal force here. The Proposed Rule, if finalized, will give the green light to schools to create and enforce policies like the one preliminarily enjoined in *Speech First, Inc.* Students and teachers wishing to express the view shared by millions of Americans that abortion is immoral could be subject to disciplinary measures that will, ironically enough, deprive them of important educational opportunities. This was not the view of the Congress that adopted Title IX in 1972. Unless the Proposed Rule is amended to cure this First Amendment problem, there is no telling how many students and teachers will be chilled in the exercise of their free speech rights.

CONCLUSION

The ACLJ unequivocally supports Title IX's purpose of ensuring equal opportunities in education. It does not support, but indeed opposes, the Proposed Rule's incorporation of abortion into what can constitute discrimination based on sex. The Proposed Rule, if adopted in full, will have profoundly negative impacts on women and First Amendment liberties. The ACLJ asks that all references to "termination of pregnancy" be deleted in any final rule.

Very truly yours,



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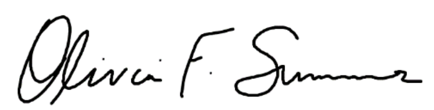

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