SPEECH FIRST

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Hon. Miguel Cardona
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202
Attn: Docket ID No. ED-2021-OCR-0166

Dear Secretary Cardona:

Speech First is a nationwide membership organization of students, alumni, and other concerned citizens. Speech First is dedicated to preserving civil rights secured by law, including the freedom of speech guaranteed by the First Amendment. Speech First seeks to protect the rights of students and others at colleges and universities through litigation and other lawful means.

We write in strong opposition to the Department's proposal to radically redefine "harassment" under Title IX and universities' obligations under federal civil rights laws. *See* 87 Fed. Reg. 41,390, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, (July 12, 2022) (the "Proposed Rule"). Historically, colleges and universities have been bastions of free speech, fostering discussion and debate about the most important political, social, and economic ideas of each generation. But today, colleges and universities around the country are ceding that prized role in American history to shield students from uncomfortable or unpopular ideas. Indeed, universities across the country are failing to protect the free speech rights of their students, leaving many students afraid to speak at all. Speech First has fought back against this chilling trend by challenging "bias response teams," speech codes, prior restraints, and other practices and policies that unconstitutionally deter, suppress, and punish open debate on campus.

The Proposed Rule will only accelerate the rise of self-censorship and ideological intolerance in American higher education. The Proposed Rule defines Title IX harassment in overbroad terms that plainly encompass protected speech. If enacted, it will inevitably chill student speech by requiring universities to enact policies that impose

content and viewpoint-based restrictions on protected speech and unconstitutionally compel speech about matters of public debate.

I. Free Speech Is Critically Important on College Campuses

"The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

As the Supreme Court has long recognized, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools [of higher education]." *Healy v. James*, 408 U.S. 169, 180 (1972). American universities are "peculiarly the marketplace of ideas," training future leaders "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. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (cleaned up). "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234, 250 (1957).

Put simply, "First Amendment protections [do not] apply with less force on college campuses than in the community at large," *Healy*, 408 U.S. at 180, and the "mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency,'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973). Because "independent thinking" requires "constant questioning" and "the expression of new, untried and heterodox beliefs," universities must be "great bazaars of ideas where the heavy hand of regulation has little place." *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1064 (4th Cir. 1981).

Institutions of higher education play a unique role in forming the next generation of American citizens and leaders—protecting bedrock constitutional freedoms on campus is therefore critical to health of our society. After all, "[a] university that turns itself into an asylum from controversy has ceased to be a university; it has just become an asylum." *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1130 (11th Cir. 2022) (Marcus, J., concurring).

II. Freedom of Speech at Universities Is Under Attack.

Despite the importance of free speech on college campuses, universities across the country are failing to protect the free speech rights of their students. Speech codes are the tried-and-true method of suppressing unpopular student speech. They prohibit

expression that would otherwise be constitutionally protected. *See* Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2021*, 10, https://bit.ly/3pdQ09E. Speech codes punish students for undesirable categories of speech such as "harassment," "bullying," "hate speech," and "incivility." *Id.*

Because these policies impose vague, overbroad, content-based (and sometimes viewpoint-based) restrictions on speech, federal courts regularly strike them down. *Id.* at 10, 24; *Speech First v. Fenves*, 979 F.3d 319, 338-39 n.17 (5th Cir. 2020) (collecting "a consistent line of cases that have uniformly found campus speech codes unconstitutionally overbroad or vague"); *McCauley v. Univ. of V.I.*, 618 F.3d 232 (3d Cir. 2010) ("emotional distress"); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) ("sexual harassment"); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) ("racial harassment"); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *Coll. Republicans at SFSU v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) ("civility"); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) ("insults," "epithets," "ridicule," "personal attacks," "sexually harassing speech"); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) ("intolerance," "harassment," "intimidation"); *Booher v. N. Ky. Univ. Bd. of Regents*, 1998 WL 35867183 (E.D. Ky. July 21) ("sexual harassment"); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) ("sexual harassment"); *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994) ("sexual harassment"); *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) ("hostile learning environment" based on race and sex); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wisc. 1991) ("racist or discriminatory" speech); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) ("discrimination" and "discriminatory harassment").

In addition to speech codes, universities are turning to a new, innovative way to deter disfavored speech: bias-response teams. *See Free Speech in the Crosshairs: Bias Reporting Systems on Campus*, Speech First, https://bit.ly/3e0ajDQ (surveying 824 colleges and universities and finding that 56% had official mechanisms for students to report "biased" speech from classmates). Living up to their Orwellian name, these teams encourage students to monitor each other's speech and to report incidents of "bias" to the University. "Bias" is defined in an incredibly broad manner and covers wide swaths of protected speech; in fact, whether speech is "biased" often turns on the *listener's subjective reaction* to it. *See Spotlight on Speech* Codes at 19. Students have been reported to bias-response teams for writing a satirical article about "safe spaces," tweeting "#BlackLivesMatter," chalking "Build the Wall" on a sidewalk, defending Justice Kavanaugh, watching a video of Ben Shapiro, and much more. *See* FIRE, *2017 Report on Bias Reporting Systems*, 15-18, https://bit.ly/2P9iEaj.

After receiving reports of a bias incident, the bias-response team can log the incident, investigate it, meet with the relevant parties, attempt to reeducate the "offender," and recommend formal or informal discipline. *E.g.*, *Fenves*, 979 F.3d at 325-26; *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 762-63 (6th Cir. 2019). Bias-response teams are usually staffed not by students or professors, but by university administrators, disciplinarians, and even police officers—a literal "speech police." *Free Speech in the Crosshairs* at 5; Cabranes, *For Freedom of Expression, For Due Process, and For Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 Yale L. & Pol. Rev. 345, 360 (2017).

Unsurprisingly, these erosions of First Amendment rights on campus are causing unprecedented numbers of college students to self-censor. According to a September 2020 survey of more than 20,000 American college students, an astonishing 42 percent of students believe their university would punish them for making an offensive or controversial statement. *2020 College Free Speech Rankings*, 19, FIRE (Sept. 2020), bit.ly/3w4miVG. In a second survey, which also involved of tens of thousands of students and was conducted in 2021, 80% of respondents reported self-censoring. *See Free Speech in the Crosshairs* at 6. A third survey found that, among non-freshman college students, nearly half reported that "sharing ideas and asking questions without fear of retaliation, even when those ideas are offensive to some people," had become "more difficult." *Campus Expression Survey Report 2020*, 3, Heterodox Academy (Mar. 2021), bit.ly/31oG-Biy.

Not only is that retreat from discourse bad for the personal development of students, but it is also harmful to the country. A real threat occurs when dangerous ideas are silenced and forced underground where they do not have the benefit of being refined and tested against other arguments; and where ideas can lose outside perspective and become dangerously singular in focus. Higher education is supposed to be the first line of defense to combat radical ideology by seeking transparency, objectivity, and understanding. It is impossible for a university to foster honest discourse in the classroom when mainstream political viewpoints are discouraged and chilled.

III. The Proposed Rule Would Violate Students' First Amendment Rights.

A. The Proposed Rule's Definition of "Harassment" is Unconstitutionally Overbroad and Conflicts with Supreme Court Precedent.

In *Davis v. Monroe County Board of Education*, the Supreme Court held that schools can violate Title IX's ban on sex-based discrimination if they are deliberately indifferent to sexual harassment by students. 526 U.S. 629, 633 (1999). But *Davis*, recognizing that

public schools are constrained by the First Amendment, adopted a narrow definition of sexual harassment: Actionable harassment under Title IX must be "behavior [that] is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education." *Id.* at 652.

The Department formally addressed this issue when it revised its Title IX regulations in 2020. Those rules "adopt[ed]" the Supreme Court's definition of sexual harassment from *Davis* "verbatim." *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,036 (May 19, 2020) (the "2020 Rule"). Broader definitions of harassment, the Department found, have "infringed on constitutionally protected speech" and have led "'many potential speakers to conclude that it is better to stay silent.'" *Id.* at 30,164-65 & nn.738-39. The *Davis* standard "ensures that speech … is not peremptorily chilled or restricted" because it applies only when harassment rises to the level of "serious *conduct* unprotected by the First Amendment." *Id.* at 30,151-52 (emphasis added); *see also id.* at 30,162-63. The 2020 Rule thus defined "[s]exual harassment" to mean, in relevant part, "[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(a).

The Proposed Rule goes beyond the Supreme Court's definition of harassment in *Davis*. While the Supreme Court requires harassment to be "severe, pervasive, *and* objectively offensive," *Davis*, 526 U.S. at 652 (emphasis added), the Proposed Rule requires harassment to be "severe *or* pervasive," 87 Fed. Reg. at 41,414 (emphasis added). And while the Supreme Court asks whether harassment "*denies* its victims the equal access to education," *Davis*, 526 U.S. at 652 (emphasis added), the Proposed Rule asks whether harassment "*limits* a person's ability to participate in or benefit from the recipient's education program or activity," 87 Fed. Reg. at 41,410 (emphases added).

By defining harassment more broadly than *Davis*, the Proposed Rule sweeps in protected speech. The *Davis* standard marks the line where verbal harassment crosses from speech into conduct. Though *Davis* was not a First Amendment case, the Court had the First Amendment in mind when it defined harassment under Title IX. As the Department noted in the 2020 Rule, the Court "repeated the 'severe and pervasive' formulation five times." 85 Fed. Reg. at 30,149. It stressed "these very real limitations" on Title IX in direct response to "the dissent" from Justice Kennedy, which raised First Amendment concerns. 526 U.S. at 652-53 (citing the dissent four times).

Justice Kennedy argued that, if universities are liable for student-on-student harassment, then they will adopt "campus speech codes" that "may infringe students' First Amendment rights." 526 U.S. at 682; *see also id.* at 667 (noting that universities' power to discipline students for harassment is "circumscribed by the First Amendment"). Addressing those concerns, the Court explained that its narrow definition of harassment accounts for "the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored." *Id.* at 652-53 (citing the dissent). Those "practical realities," the Court agreed, include the need to comply with the First Amendment. *See id.* at 649 (agreeing with the dissent that schools face "legal constraints on their disciplinary authority" and explaining that its interpretation of Title IX would not require universities to risk "liability" via "constitutional … claims").

The Department claims that the Proposed Rule's expansion of the definition of hostile environment harassment is consistent with "the key concepts articulated by the Court in *Davis*." 87 Fed. Reg. at 41,414. But the Department fails to explain how, precisely, that is the case. By expanding actionable harassment to include anything that is "severe *or* pervasive" instead of "severe, pervasive, *and* objectively offensive," *cf. Davis*, 526 U.S. at 652 (emphasis added), the Department dramatically increases the amount of speech prohibited by Title IX, including "single instance[s]" of "one-on-one" interactions—a standard the Court explicitly rejected in *Davis*, *see id.*

The Department's only effort to explain its departure from *Davis* is its contention that, "[a]lthough the *Davis* Court described the conduct at issue in the case as 'persistent,' that term was not part of the Court's analysis or the definition adopted by the Court." 87 Fed. Reg. at 41,414. That is simply incorrect. *See Davis*, 526 U.S. at 562 ("In the context of student-on-student harassment," liability only attaches "where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."). Moreover, it is not the Department's prerogative to create a separate standard it believes to be similar in spirit to the standard announced by the Supreme Court rather than simply following the Supreme Court's rule "verbatim," as the current regulations do. *See* 85 Fed. Reg. at 30,036.

B. The Proposed Rule Imposes Content and Viewpoint-Based Regulations on Protected Speech.

The Proposed Rule would also impose content and viewpoint-based restrictions on protected speech. "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Simon & Schuster, Inc. v. Members of N.Y.*

State Crime Victim's Bd., 502 U.S. 105, 118 (1991). "Content-based regulations" are "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Accordingly, "any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009); *see, e.g., Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 123 (D. Mass. 2003) (school policy allowing only "responsible" speech was a content-based regulation subject to strict scrutiny). In addition, "the First Amendment's hostility to content-based regulation extends" to "restrictions on particular viewpoints." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). Viewpoint discrimination is flatly prohibited. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019); *Mahanoy*, 141 S. Ct. at 2046 (schools cannot "suppress speech simply because it is unpopular").

Here, the Proposed Rule subjects students to discipline for the content and viewpoint of their speech. The Proposed Rule redefines Title IX harassment as "unwelcome sex-based conduct" that is "sufficiently severe or pervasive" that it "creates a hostile environment." 87 Fed. Reg. at 41,569. It further specifies that "conduct would be unwelcome if a person did not request or invite it and regarded the conduct as undesirable or offensive." 87 Fed. Reg. at 41,411. This new definition expands the scope of Title IX to cover even single instances of pure speech.

Thus, a student could run afoul of Title IX if a listener considers the student's speech about sex-based issues (which now include controversial topics of public debate such as gender identity) to be "unwelcome" and takes "severe" offense to the opinion expressed by the student. This is a classic content-based and viewpoint-based regulation of speech. *See, e.g., Saxe v. State College Area School District*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) (bans on "'harassment'" covering speech impose "'content-based'" and often "'viewpoint-discriminatory'" restrictions on that speech). Moreover, because the Proposed Rule expands the universe of complainants to bystanders who are not directly involved in an incident, students can be disciplined even when their speech is not directed toward the "offended" individual. In short, the Proposed Rule effectively authorizes a "heckler's veto" whenever a student expresses views that fall outside the campus consensus. *Biden's New Title IX Rule Guts Protections for Women and Girls. Here's How to Fight It*, The Heritage Foundation, (July 18, 2022), https://herit.ag/3R7ryS6. That is patently unconstitutional.

C. The Proposed Rule Will Require Universities to Unconstitutionally Compel Student Speech.

The Supreme Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. Am.*

Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018). "[T]he latter is perhaps the more sacred of the two rights." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Janus*, 138 S. Ct. at 2463.

In recent years, a broad array of public and private universities have enacted "preferred pronoun" policies requiring students to refer to other individuals by their self-described gender identity rather than their biological sex. This trend is only accelerating, even though federal courts have repeatedly held that these policies violate the First Amendment. In *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), for example, the Sixth Circuit held that a similar "preferred pronoun" requirement was "anathema to the principles underlying the First Amendment." *Id.* at 510. "Indeed, the premise that gender identity is an idea 'embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.'" *Id.* (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000)).

Although the Proposed Rule does not provide specific examples of harassment based on gender identity, experience proves that the Rule will necessarily infringe on students' First Amendment rights by compelling speech and regulating it based on content and viewpoint. In its 2016 Dear Colleague Letter, for instance, the Department announced that it would "treat[] a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." *2016 Dear Colleague Letter on Title IX and Transgender Students*, *2*, https://bit.ly/3dIcBaz. Based on this atextual interpretation of "sex," the Department informed universities that failing to "use pronouns and names consistent with a student's gender identity" constituted unlawful harassment under Title IX. *Id.* Even though that guidance was later enjoined by a federal court, *see Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016), the Department has adopted a virtually identical position.

The aftermath of the Department's recent "notice of interpretation" regarding Title IX only confirms that the Proposed Rule will lead to compelled speech on campus. On June 22, 2021, the Department published a guidance document that purported to "interpret" Title IX to include gender identity, "in light of the Supreme Court's decision in *Bostock v. Clayton County*." *See generally Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1872 with Respect to Discrimination Based on Sexual Orientation and*

Gender Identity in Light of Bostock v. Clayton Cnty., 86 Fed. Reg. 32637 (June 22, 2021). That action, too, has been enjoined by a federal court. *See Tennessee v. United States Dep't of Educ.*, No. 3:21-cv-308, 2022 WL 2791450, at *24 (E.D. Tenn. July 15, 2022). Before the June 2021 guidance was enjoined, however, a public school in Wisconsin used the Department's guidance to bring a Title IX action against two students who declined to use a classmate's "preferred pronouns." *See* Rick Esenberg & Luke Berg, *The Progressive Pronoun Police Come for Middle Schoolers*, Wall Street Journal (May 23, 2022), https://on.wsj.com/3NTV50b.

The Proposed Rule inevitably requires the same approach. Coupled with the Proposed Rule's new position that even single instances of speech can constitute prohibited harassment, the Proposed Rule poses a grave threat to students' First Amendment rights. Millions of students across the country believe that biological sex is immutable and that a person cannot "transition" from one sex to another. For some of those students, that conviction stems from their religious beliefs. Others believe it to simply be a matter of common sense. Regardless, by forcing students to refer to a biological male by female pronouns or vice versa—or to "affirm" that another student is neither male nor female—the Department will "[c]ompel[] [them] to mouth support for views they find objectionable." *Cf. Janus*, 138 S. Ct. at 2463. Thus, the Proposed Rule is no different from the rule requiring schoolchildren to pledge allegiance to the flag in *Barnette*. Like the West Virginia State Board of Education in *Barnette*, the Proposed Rule would require students to affirmatively declare statements that they believe to be false and affirm ideologies with which they deeply disagree. Like the policy in *Barnette*, the Proposed Rule is therefore unconstitutional.

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Because the Proposed Rule poses significant dangers to students' First Amendment rights, Speech First opposes it in its entirety.

Respectfully submitted,

/s/Cherise Trump

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