



September 12, 2022

VIA REGULATIONS.GOV

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

Re: *Proposed Rulemaking – Title IX of the Education Amendments of 1972*  
Docket ID ED-2021-OCR-0166

Dear Secretary Cardona,

The New Civil Liberties Alliance (NCLA) submits the following commentary in response to the *Proposed Rulemaking—Title IX of the Education Amendments of 1972*, 87 Fed. Reg. 41390 (June 23, 2022), which the U.S. Department of Education (ED) has promulgated.

NCLA sincerely appreciates this opportunity to comment and express its concerns about the Proposed Rulemaking. Congress passed Title IX in 1972 to rectify the injustices that have occurred as a result of sex-based discrimination and to provide women with opportunities they had been denied in the past. NCLA firmly believes, however, that the Proposed Rulemaking is an impermissible response to address ongoing discrimination “on the basis of sex” as prohibited by Title I. The effort to redefine “sex” to include “gender” or “gender identity” not only turns the intent of the law on its head, but it also unlawfully usurps Congress’s sole power to legislate. Furthermore, many aspects of the Proposed Rulemaking are anathema to the United States Constitution, the constitutions of many states, and to the civil liberties of students, faculty, and staff on university campuses everywhere. The proposed changes would severely curtail due process protections in Title IX proceedings, as well as violate people’s First Amendment rights to free speech, expression, association, and religious exercise.

## **I. Statement of Interest**

NCLA is a nonpartisan, nonprofit civil rights organization founded for the purpose of protecting constitutional freedoms from violations by the administrative state. NCLA’s original litigation, amicus curiae briefs, regulatory comments, and other means of advocacy strive to tame these agencies’ unlawful exercise of power.

Not only does the administrative state evade constitutional limits through administrative rulemaking, adjudication, and enforcement, but increasingly, agencies coerce state and local actors by

conditioning receipt of federal funds upon acquiescence to certain policies. The Proposed Rulemaking here does all of those things.

Where agencies are poised to act beyond their lawful powers, NCLA encourages them to curb the illegitimate exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act (APA), laws of Congress, and the Constitution. ED should do so here, and NCLA will be forced to file suit to stop implementation of this rule if ED proceeds undeterred.

## II. The Proposed Rulemaking Violates Due Process

Title IX was adopted to prohibit the use of federal funds in any education program that discriminates on the basis of sex. ED's efforts to expand Title IX dramatically to address *other* perceived problems stretches the definitions of "sex" and "sexual harassment" beyond their statutory boundaries. Threatening to withhold federal funds to force schools to accede to these non-statutory definitions is unlawful. Title IX did not require schools to become courts of law adjudicating allegations of rape and sexual misconduct in the first place, and doing so for these expanded categories is simply a bridge too far.

The Proposed Rule's overly-broad, detailed, and stringent requirements dictating the investigatory and grievance procedures that schools and universities must follow are outside of the ED's authority under Title IX. They are unnecessarily prescriptive and far too complicated for the purpose at hand (prohibiting discrimination on the basis of sex). ED does not have the authority to micromanage schools and universities to this extent, and it should focus on implementing Title IX rather than rigging pre-determined outcomes in Title IX proceedings.

In the context of Title IX, and despite the recent trend of turning inept schools and universities into ersatz legal tribunals, any allegations of sexual assault, harassment, or other types of sex discrimination should be dealt with through our civil and criminal justice systems. Schools may refer matters to legal authorities for investigation and prosecution, but they have no business trying allegations of sexual misconduct themselves. Nor should this failed experiment be expanded.

Title IX has been used and implemented in on-campus adjudications throughout the country in a manner that violates virtually every tenet of due process. The Proposed Rulemaking does nothing to alleviate those problems or redirect such proceedings back to the purpose of Title IX (prohibiting discrimination on the basis of sex); it in fact makes this situation much worse, returning campuses to the state of affairs in place five or ten years ago when schools were repeatedly and successfully sued for violating students' civil rights.

In short, based on the widespread demonstrated inability of campus tribunals to honor the civil liberties of accused parties, NCLA believes that on-campus sexual assault and sexual harassment/discrimination adjudications should be eliminated entirely and referred to the criminal justice system where they belong (for crimes like rape) or else to the civil justice system (for harassment). If, however, they are going to be dealt with on campus, then such adjudications must protect the due process rights of both the accuser and the accused.

For the person accused of violating Title IX, the adjudicatory process must: (a) use a reasonable standard of proof such as “clear and convincing” evidence rather than a mere preponderance of the evidence; (b) inform the accused of the charges against him, at a minimum, requiring the filing of a written formal complaint; (c) provide the accused with an adequate opportunity to defend himself, including by providing defense witnesses and documentary evidence; (d) provide the accused with the opportunity to confront his accuser and cross-examine both his accuser and other witnesses; (e) have an independent adjudicator, as opposed to combining the role of prosecutor and trier of the fact; and (f) treat the accuser and accused “equally” rather than “equitably” as described in the Proposed Rulemaking. These bare minimum process requirements must be adopted for these tribunals to have any semblance of fairness—and for them to comport with the Bill of Rights. The Proposed Rulemaking fails on all counts; as a result, it is entirely inadequate for setting the standard that schools and universities must follow when addressing Title IX complaints and allegations.

It is well and long established that government employees and students are entitled to due process of law prior to having any discipline imposed on them. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 573 (1975) (“[A] state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process.”); *see also Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017) (“State universities must afford students minimum due process protections before issuing significant disciplinary decisions.”); *Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019) (“When a right is protected by the Due Process Clause, a state ‘may not withdraw [it] on grounds of misconduct absent[] fundamentally fair procedures to determine whether the misconduct has occurred.’”) (quoting *Goss*, 419 U.S. at 574). This right stems from the Fourteenth Amendment’s prohibition on deprivation “of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV.

As far back as Blackstone, the law has recognized that “[t]he right of personal security consists in a person’s ... reputation.” 1 W. Blackstone, *Commentaries on the Laws of England* 125.

The Due Process Clause also forbids arbitrary deprivations of liberty. ‘Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,’ the minimal requirements of the Clause must be satisfied. ... It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

*Goss*, 419 U.S. at 575 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). True enough, “injury to reputation by itself is not a ‘liberty’ interest protected under the” Due Process Clause. *Siebert v. Gilley*, 500 U.S. 226, 233 (1991). “Instead, a plaintiff must demonstrate that his reputational injury was accompanied by a state action that ‘distinctly altered or extinguished’ his legal status if he wants to succeed.” *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 315 (4th Cir. 2012) (quoting *Paul v. Davis*, 424 U.S. 693, 711 (1976)); *see also Purdue Univ.*, 928 F.3d at 661. This demonstration has been referred to as the “stigma plus” test.

Addressing these requirements in turn, it is beyond cavil that someone accused of sexual misconduct or harassment has a reputational interest in not being branded as a sexual miscreant who engages in nonconsensual or otherwise improper sexual relationships. “A finding of responsibility for

a sexual offense can have a ‘lasting impact’ on a [person]’s personal life, in addition to his ‘educational and employment opportunities ... .’” *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018) (quoting *Univ. of Cincinnati*, 872 F.3d at 400). As the Sixth Circuit observed, “[a]n individual accused of sexual misconduct ‘will see his own rights curtailed. ... [H]e may face severe restrictions, similar to being put on a sex offender list, that curtail his ability to gain a higher education degree’” or future employment. *Id.* (quoting Emma Ellman–Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 Mich. L. Rev. 155, 175 (2017)).<sup>1</sup>

The Seventh Circuit, in an opinion by now-Justice Amy Coney Barrett, addressed this issue in *Doe v. Purdue University*, 928 F.3d 652, 663 (7th Cir. 2019). The plaintiff alleged that Purdue University wrongly found him liable for sexual misconduct and in doing so “inflicted reputational harm by wrongfully branding him as a sex offender; that Purdue changed his legal status by suspending him ... and that these actions impaired his right to occupational liberty by making it virtually impossible for him to seek employment in his field of choice, the Navy.” 928 F.3d at 661. In rejecting Purdue’s attempt to dismiss its former student’s complaint for failure to state a claim, Judge Barrett wrote that Purdue’s

determination [that Doe was guilty of sexual misconduct] changed John’s status: he went from a full-time student in good standing to one suspended for an academic year. And it was this official determination of guilt, not the preceding charges or any accompanying rumors, that allegedly deprived John of occupational liberty. It caused his expulsion from the Navy ROTC program (with the accompanying loss of scholarship) and foreclosed the possibility of his re-enrollment in it.

*Id.* at 662-63. On the basis of these facts, the Seventh Circuit found that the plaintiff “satisfied the ‘stigma plus’ test.” *Id.* at 663.

Due process must include, at a minimum, the right to confront and cross-examine one’s accuser. As the Sixth Circuit recently explained in another Title IX case, “[d]ue process requires cross-examination in circumstances [where a person is accused of sexual misconduct] because it is ‘the greatest legal engine ever invented’ for uncovering the truth.” *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (quoting *Univ. of Cincinnati*, 872 F.3d at 401-02). Similarly, the Third Circuit recognized that “notions of fairness ... include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her.” *Doe v. Univ. of the Sciences*, 961 F.3d 203, 214 (3d Cir. 2020). The Proposed Rulemaking obtusely proposes to do away with these constitutional rights, by eliminating the guarantee of live hearings, at which the accused can cross-examine his accuser, returning to a single investigator model, and reducing the evidence that a college must share with the

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<sup>1</sup> The fact that the imposed sanction may not be particularly severe only “slightly diminishe[s]” the individual liberty interest. See *Doe v. Cummins*, 662 F. App’x 437, 446 (6th Cir. 2016) (unpublished). It is not exactly clear why the interest is diminished *at all*, because the reputational harm stems from “[a] finding of responsibility for a sexual offense,” *Miami Univ.*, 882 F.3d at 600, and not from any particular sanction. At the same time, it is plausible that the lower the sanction, the less opprobrium will be experienced by the individual. Whatever the right answer, a mild sanction clearly does not “zero out” an accused’s liberty interest in her reputation.

accused. U.S. District Court Judge Dennis F. Saylor described Title IX proceedings that involved a single investigator, that did not allow the accuser to see the accusation, and denied him the right of confrontation and cross-examination as “closer to Salem 1792 than Boston, 2015.” Transcript of Oral Argument at 9, *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016) (No. 15-11557-FDS), ECF No. 47. How can ED possibly think its mere *ipse dixit* suffices to overturn federal court precedent?

Through representation of clients, NCLA has become all too familiar with the injustices that result from systems that disregard fundamental aspects of due process, as does the one proposed here. Dr. Mukund Vengalattore, one such client, was a highly esteemed physics professor at Cornell University before his career was derailed and his reputation destroyed by baseless allegations of sexual misconduct that he had no genuine opportunity to rebut. His accuser was a graduate student who had worked in his laboratory and struggled with her lab assignments. After she quit, she alleged both a romantic relationship and sexual assault that Dr. Vengalattore denied. Though he was cleared of the false sexual assault charge, Cornell’s investigation resulted in a report that ultimately destroyed his career there—or anywhere else. Dr. Vengalattore was not allowed to see the accusations against him or question witnesses, and he was not given crucial information such as the date on which the alleged assault was supposed to have occurred. He was not allowed to confront his accuser or even defend himself at a hearing—the Title IX process denied him a hearing altogether. The standard of proof was low—mere preponderance of the evidence—and while his accuser was permitted an attorney, he was not. Because he was not provided an opportunity to defend himself, or present evidence that the accuser had stated she would ensure Dr. Vengalattore did not get tenure as revenge for her unsuccessful academic performance in his lab; nor was evidence allowed that other faculty and students had reported the accusations were false and malicious, he was denied due process. Cornell’s adoption of these unfair procedures was a direct response to ED threats to cut off federal funding unless the school “properly” enforced Title IX by limiting the procedural rights of those accused of sexual misconduct.

The manifold due process deprivations in this case led the Second Circuit to reverse the district court’s dismissal of the case. *See Vengalattore v. Cornell Univ.*, 36 F.4th 87 (2d Cir. 2022). Judge José Cabranes’s concurrence likened the proceedings to an English star chamber, observing that:

this case describes deeply troubling aspects of contemporary university procedures to adjudicate complaints under Title IX and other closely related statutes. In many instances, these procedures signal a retreat from the foundational principle of due process, the erosion of which has been accompanied—to no one’s surprise—by a decline in modern universities’ protection of the open inquiry and academic freedom that has accounted for the vitality and success of American higher education.

*Id.* at 114 (Cabranes, J., concurring). By ignoring Judge Cabranes’s sage advice and concerns, the Title IX Proposed Rulemaking marks a step backward into these dark-age tribunals.

Alyssa Reid is another NCLA client whose case illustrates the life-destroying consequences that occur when campus tribunals severely diminish due process protections. Ms. Reid, employed at James Madison University, had a relationship with a female graduate student over whom she had no supervisory authority, so the relationship violated no campus policy. When they broke up, the other woman weaponized Title IX due process deprivations to exact revenge on Ms. Reid, *even though* Ms. Reid had previously been cleared of wrongdoing in an earlier investigation of the relationship. Unlike

Dr. Vengalattore, Reid had some semblance of a hearing. Still, she was not given notice of the allegations ahead of time, was not permitted to cross-examine her accuser or the witnesses, and was not allowed to have an attorney present. She was also denied the opportunity even to interview for a promotion. Ms. Reid’s career was ruined due to her reputation as a sexual abuser—she was unable to find another job in academia—leaving her personally, professionally, and financially devastated.

These are merely two cases, out of many, that show why Obama-era Title IX proceedings are morally wrong, and violate every principle of fairness that should govern legal proceedings in Western democracies. Yet, ED now seeks not only to return to a system that proved to be deeply unjust, but also to exacerbate the injustices perpetuated in these star chambers by diminishing due process protections even more and expanding them to cover gender and gender identity-related accusations.

### III. The Proposed Rulemaking Violates the First Amendment

The proposed rulemaking violates almost every right under the First Amendment, including the right to freedom of speech, freedom of expression, free exercise of religion, and freedom of association.

The proposed rule’s overly broad definition of sexual harassment sweeps within its ambit a significant amount of constitutionally protected speech. The Supreme Court has long held that “the sporadic use of abusive language, gender-related jokes, and occasional teasing” do not rise to the legal definition of harassment and constitute protected speech. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (quoting B. Lindemann & D. Kadue, *Sexual Harassment in Employment Law* 175 (1992)). In contrast, the proposed rule makes actionable any even mildly offensive statement by anyone in the university merely because the listener may have had other upsetting interactions with other members of the university community, whether or not such interactions were known to the speaker. Because § 106.45(e) of the proposed rule allows for consolidation of “complaints of sex discrimination against more than one respondent,” the rule, as written, permits the finding of a Title IX violation against an individual for a single “use of abusive language [or] gender-related joke[]” in direct contravention of binding Supreme Court precedent. Furthermore, such a system threatens to illegally punish individuals not for any prohibited individual conduct, but merely for unwittingly being part of a group of unknown individuals, some of whom may (or may not) have engaged in Title IX violations. *Cf. Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (“A law which applies to membership without the ‘specific intent’ to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of ‘guilt by association’ which has no place here.”).

The proposed rule also runs afoul of constitutional guarantees of freedom of association. Under the proposed rule’s definition of discrimination in § 106.31, any activity occurring “in a building [whether on- or off-campus] owned or controlled by a student organization that is officially recognized by a postsecondary institution,” § 106.11, may not discriminate “on the basis of sex.” § 106.31. Under this view, universities will have to prohibit single-sex clubs and activities ranging from fraternities and sororities, to *a cappella* groups, to intramural and intercollegiate sports teams, to affinity groups like Women’s Bar Associations. The proposed rules would put into jeopardy university-run single-sex dormitories, even though an appreciable portion of women students view female-only dormitories as not merely preferable, but important for both emotional and physical safety.

Not only would such an outcome be terrible from a policy perspective, but it also would violate students’ rights of free association. *See Hurley v. Irish Am. Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557 (1995). And though these student groups may benefit from federal funding provided to their

parent universities, the existence of such funding does not transform the actions of these essentially private groups into state action. *See, e.g., S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987) (private entity could not be sued under the Constitution for discriminating against gay group, even though it received special privileges from the federal government); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) (state giving valuable liquor license to racially discriminatory group did not render their racial discrimination a constitutional violation); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974) (state approval of regulated utility's procedures did not make them subject to constitutional limits). But these regulations, which infringe upon student or faculty rights of speech and association, *are* forbidden state action that only expose universities to well-grounded suits for such infringement.

The proposed rule also violates students' and faculty members' religious liberty for at least two separate reasons. First, by requiring educational institutions "to end any sex discrimination that has occurred in its education program or activity," § 106.44, the proposed rule would require universities to disband student groups that differentiate by sex *because of* sincerely held religious belief. For instance, a student group dedicated to the study and practice of Orthodox Judaism may have to cease to exist under the rule, because a number of activities in Judaism (*e.g.*, putting on a tallit (prayer shawl) or tefillin (phylacteries) or being called to read from the Torah) is limited to men. Under the proposed rule, such activity would constitute sex discrimination and universities would be obligated to end their sponsorship of student groups that engage in such traditional—and protected—religious practices.

Second, under the proposed rule, a religious student group that, in the exercise of its sincerely held religious beliefs, proselytizes its views on what is "marriage" or the nature of the sex/gender dichotomy, may be held to have engaged in Title IX discrimination if such speech is viewed as "offensive" and/or "discriminatory" by the listener. As New York State's recent efforts to force such views on Yeshiva University demonstrate, the Proposed Rulemaking's attempts to force unorthodox views on Orthodox Judaism will lead to predictable, meritorious litigation to preserve the free exercise rights of that religious community. Order, *Yeshiva Univ. v. YU Pride All.*, No. 224A184 (Sup. Ct. Sept. 9, 2022) (Sotomayor, J., in chambers) (staying injunction of New York trial court).

Furthermore, under the proposed rule, an educational institution would be obligated to investigate religious activities of some students "even if [the activity] occurred outside the recipient's education program or activity or outside the United States," § 106.11, should a complainant allege that such activities discriminated against him or her on the basis of sex. For example, if a faculty member were to invite a group of students to his house for a festive Shabbat meal, but then invite only female students to light candles, as is traditional in Orthodox Judaism, the proposed rules would classify such behavior as discrimination "on the basis of sex" in violation of Title IX. Thus, the proposed rules threaten religious freedom of students and faculty not just on campus, but worldwide because they could be extended to off-campus social and educational contexts including study-abroad programs.

Religiously-affiliated educational institutions themselves would also be required to abandon religiously dictated policies that differentiate between students on the basis of sex. For example, the University of Notre Dame—one of the Nation's premier universities—assigns students exclusively to single-sex dorms and prohibits members of the opposite sex from being in such dorms between midnight (or 2 A.M. on the weekends) and 9 A.M. The rule stems from Notre Dame's adherence to the "Catholic Church's teaching that a genuine and complete expression of love through sex requires a commitment to a total living and sharing together of two persons in marriage." <https://bit.ly/3eF8NYh>. Of course, the University of Notre Dame is not the only institution that follows similar policies. For example, the Yeshiva University—another premier research institution—

has, also for religious reasons, entirely separate campuses for men and women pursuing undergraduate studies, and it does not permit opposite-sex overnight visitors in either male or female dormitories. Educational institutions like Notre Dame or Yeshiva University currently are able to impose discipline on a male student found in a female dormitory (or vice versa) during the prohibited hours, but because similar discipline would not be imposed on a person of the same sex visiting someone else's dorm, the proposed rules treat such discipline as prohibited "discrimination on the basis of sex." Such an outcome would undermine the universities' faithful adherence to their religious mission.

Finally, the proposed rules abridge students' and faculty members' freedom of expression. School (especially post-secondary) is the time when students explore, adopt, and discard various ideas as their learning and understanding evolves. Faculty members engaged in research and publishing are also often engaged in exploration of controversial topics. Some of these ideas, or the way they are expressed, may deal with issues about sexuality, gender roles, criminal or civil liability for certain sexual conduct, and other topics closely intertwined with sex and gender. Not all expression is or will necessarily follow Marquess of Queensberry debate rules. To the contrary, some expression, especially whether occurring in or outside the classroom may be (and ought to be) quite robust, and even raucous.

It is beyond dispute that students and faculty have a constitutional right not only to hold particular views, but also to express them in a way they see fit. *See, e.g., Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2044 (2021) ("[S]tudents do not 'shed their constitutional rights to freedom of speech or expression,' even 'at the school house gate.'") (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). The courts are uniform in holding that any policy that "prohibits a substantial amount of non-vulgar, non-sponsored student speech," *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216 (3d Cir. 2001), must satisfy the exacting standards of *Tinker*. *See also DeJohn v. Temple Univ.*, 537 F.3d 301, 317-19 (3d Cir. 2008). Furthermore, under *Mahanoy*, an educational institution cannot punish off-campus speech even if it is vulgar. 141 S. Ct. at 2047-48. And of course, college students are adults who enjoy even more robust protection for their speech than do students in primary or secondary institutions. *See id.* at 2047 (noting that the minor in that case "uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection."); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) ("Sexual expression which is indecent but not obscene is protected by the First Amendment.") (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). The proposed rules, in contrast, would not only permit, but require schools to police and punish non-obscene, but vulgar or controversial speech to which someone takes offense irrespective of whether it occurs in or out of the classroom or on- or off-campus. *See* § 106.11.

The above-described problems with the proposed rules are not an exhaustive list but are meant to highlight the key failings in the proposal. It may well be that in practice, some of the more extreme and problematic actions permitted by these regulations will not be taken. However, colleges have a disturbing recent record of routinely violating student and faculty free speech, association and due process rights. So, it would be both naïve and unwise to arm complainants with regulations that weaponize such excesses and trust to restraint (or a kind of 'prosecutorial discretion') in their administration. In addition, educational institutions, students, and faculty should not live in fear of investigations and sanctions for constitutionally protected speech and activities where the process—and reputational cost it exacts—becomes the punishment. Even if investigations and charges will be undertaken infrequently and even more rarely result in penalties, the significant chilling effect on speech, religious exercise, expression, and association that these rules will create supplies more than enough reason to reject them. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) ("[A]

‘chilling’ effect would be antithetical to the First Amendment’s protection of true speech on matters of public concern ...”). The chilling effect on student speech has been dramatic. David Steel, *Afraid to Speak Up or Out*, Inside Higher Educ., June 2, 2022 (Percentage of college students who believe the political and social climate on their campus prevents people from freely expressing themselves rose from 54.7 percent in 2019 to 63.5 percent in 2021). The chilling effect on faculty expression is also well documented. Jeannie Suk Gersen, *Laura Kipnis’s Endless Trial by Title IX*, New Yorker, Sept. 20, 2017 (faculty refraining from teaching and writing on topics “related to gender and sexuality ... for fear of attracting Title IX complaints, which bring possibilities of termination, demotion, pay cuts and tens of thousands of dollars in legal fees”).

In sum, the Proposed Rulemaking displays—and its adoption would entail—a shocking disregard for the constitutional rights and civil liberties of Americans on college campuses and, as noted, even those on campuses abroad. We therefore urge ED to abandon this ill-considered rulemaking altogether. At a bare minimum, it must reconsider and revise this proposal in light of the constitutional and practical critiques NCLA has offered. As noted above, in the unfortunate event ED chooses not to deviate from this blatantly unconstitutional path, NCLA is prepared to litigate to protect the rights of all Americans. The far better course of action would be for ED to desist from violating these rights in the first place.

Very truly yours,

/s/ Greg Dolin  
/s/ Harriet Hageman  
/s/ Peggy Little  
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