No. 24-60035

In the United States Court of Appeals for the Fifth Circuit

M.K., a Minor by and through is father and next friend, Gregg Koepp
Plaintiff-Appellants,

v.

Pearl River County School District; P.B., a minor by and through his parents; P.A., a minor by and through his parents; I.L., a minor by and through his parents; L.M., a minor by and through his parents; W.L., a minor by and through his parents; ALAN LUMPKIN, individually and as Superintendent; CHRIS PENTON, individually and as employee; AUSTIN ALEXANDER, individually and as employee; STEPHANIE MORRIS individually and as employee; TRACEY CRENSHAW, individually and as employee; BLAKE RUTHERFORD, individually and as employee; john does 1-10
Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Southern District of Mississippi
Case No. 1:22-cv-25-HSO-BWR, Hon. Halil Suleyman Ozerden

UNOPPOSED MOTION OF THE DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES AFFIRMING THE DECISION OF THE DISTRICT COURT

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August 5, 2024

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Pursuant to this Court's Rule 29.2 and Federal Rule of Appellate Procedure 26.1, movant the Defense of Freedom Institute for Policy Studies submits this supplemental certificate of interested persons to fully disclose all those with an interest in this motion and provide the required information as to their corporate status and affiliations.

The undersigned counsel of record certifies that the following listed entities as described in the Rule 28.2.1 has an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Movant **Defense of Freedom Institute for Policy Studies** is a non-profit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

The above-listed movant is represented by **Donald A. Daugherty, Jr.** and **Martha A. Astor** of the **Defense of Freedom Institute for Policy Studies**.

In addition, the following individuals may have an interest in the outcome of this case.

Plaintiffs-Appellants

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Defendants-Appellees

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Dated: August 5, 2024
Washington, D.C.

s/ Martha Angelique Astor
Martha A. Astor
Counsel of Record for Amicus Curiae

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES

Pursuant to Federal Rule of Appellate Procedure 29(a) and Fifth Circuit Rule 29.1, the Defense of Freedom Institute for Policy Studies ("DFI") moves for this Court's leave to file a brief of 3701 words as *amicus curiae* in support of Defendants-Appellees.

I. Movant's Interest in These Proceedings

Movant is an organization with strong interests in ensuring that the government's education mandates comport with the requirements of the Constitution, including the Spending Clause.

DFI is a nonprofit, nonpartisan 501(c)(3) institute dedicated to defending freedom and opportunity for every American family, student, entrepreneur, and worker, as well as to protecting their civil and constitutional rights at school and in the workplace. Founded by former senior leaders of the U.S. Department of Education (the "Department"), DFI possesses significant legal and policy expertise relating to accreditation and to the Department's oversight of accreditation agencies.

DFI respectfully submits that the Department's statutory authority to implement rules does not extend to violating Congress's exercise of its spending powers by (1) imposing a requirement that was not unambiguously clear to potential recipients such as Defendants when Title IX was enacted in 1972 and (2) effectively coercing Defendants into now exposing themselves to civil liability for sexual orientation discrimination in exchange for funds that they first began receiving five decades ago.

DFI offers unique and important perspectives on the implications of Plaintiffs' and Defendants' argument and request for relief, and believes this briefing will benefit the Court. DFI urges the Court to affirm the judgment of the District Court.

II. Desirability and Relevance of Movants' Proposed Brief

The brief of *Amicus Curiae* will be useful to this Court's resolution of the important issues in this case. Movant can contribute to the informed consideration of the questions before this Court.

"[C]ourts should welcome amicus briefs." *Lefebure v. D'Aquilla*, 15 F.4th 670, 675 (5th Cir. 2021). An amicus brief "should normally be allowed" when "the amicus has unique information or perspectives that

can help the court beyond the help that the lawyers for the parties are able to provide." *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012) (quotations omitted). This is exactly what Movant provides.

DFI provides considerable knowledge regarding Title IX and the federal rulemaking process. This includes the knowledge of the Senior Counselor to the Secretary of Education and Regulatory Reform Officer of the Department from 2017 to 2020, who was also the Deputy General Counsel of the Department from 2005 to 2009. The Senior Counselor was responsible for implementing the Secretary's regulatory reform agenda at the Department, including its rulemaking from 2018 to 2020. It also provides the knowledge of Senior Advisor, Office of the Secretary, from 2017 to 2018 and as Assistant Secretary of Education, Office of Planning, Evaluation, and Policy Development, from 2018 to 2021. Both have significant experience in federal education policy, the operations of the Department, and the agency's oversight of educational facilities. This expertise allows Movant to speak with authority on the impact overturning the district court's judgments could have on the educational system. The brief also provides valuable insight and experience

concerning the scope of powers of the Department and the Executive Branch.

All parties have consented to the filing of the proposed brief, which Movant submits contemporaneously with this motion.

CONCLUSION

For the foregoing reasons, the Court should grant Movants' motion for leave to file a brief as amici curiae in support of Defendants-Appellees' motion to affirm the district court's judgment.

August 5, 2024

Respectfully submitted,

s/ Martha Angelique Astor
Martha A. Astor

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<u>*s/ Martha Angelique Astor*</u>
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STATEMENT OF INTEREST

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing educational freedom and opportunities for every American family and student and to protecting the civil and constitutional rights of Americans at school. As part of that effort, DFI is co-counsel for Mississippi, Louisiana, Montana, and Idaho, along with the Attorneys General for those four states, in *Louisiana v. U.S. Dep't. of Educ.*, No. 24-30399, 2024 U.S. App. LEXIS 17886 (5th Cir. 2024), which challenges new regulations under Title IX published by the Department of Education on April 29, 2024, *see Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "New Rule").[1]

[1] The District Court enjoined enforcement of the New Rule in the plaintiff-states in *Louisiana*, No. 3:24-cv-563, 2024 U.S. Dist. LEXIS 105645 (W.D. La. June 13, 2024). The Department moved for a partial stay of the district court's order granting a preliminary injunction at the Fifth Circuit, which was denied. *Louisiana*, 2024 U.S. App. LEXIS 17886, at *7. The Department has since applied to the Supreme Court for a stay pending appeal. *U.S. Dep't. of Educ. v. Louisiana*, No. 24A78 (2024).

SUMMARY OF ARGUMENT

On the day he was inaugurated, President Biden directed all federal agencies to revise their policies to reflect the reasoning of the Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020). *See* Exec. Order 13,988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021). *Bostock* held that Title VII's prohibition on employment discrimination "because of [an] individual's . . . sex" included terminating an employee simply for being gay or transgender because, under that statute's text, "[s]ex plays a necessary and undisguisable role" in such decisions. *Bostock*, 590 U.S. at 652, 658.

Consistent with the inaugural directive, the United States contends in its amicus brief filed in this case that "*Bostock*'s reasoning applies here and makes clear that sexual-orientation discrimination constitutes impermissible sex discrimination under Title IX, just as it does under Title VII." Brief for the United States as Amici Curiae Supporting Plaintiff-Appellant. *M.K. v. Pearl River Cnty. Sch. Dist.* No. 24-60035, at 7, ECF No. 32. Furthermore, the United States argues, the District Court "fail[ed] to recognize that [Title IX] provides sufficient notice under

the Spending Clause that it reaches intentional sexual-orientation discrimination." *Id.* at 8.

However, since the United States filed its brief in April 2024, at least eight federal courts have rejected contentions identical to those it makes in this case that *Bostock* controls the scope of sex discrimination prohibited by Title IX, and that Title IX clearly states a ban on sexual orientation discrimination, as required by the Spending Clause. *See Tennessee v. Cardona*, No. 2:24-cv-00072, 2024 U.S. Dist. LEXIS 106559 (E.D. Ky. June 17, 2024); *Kansas v. U.S. Dep't of Educ.*, No. 24-4041-JWB, 2024 U.S. Dist. LEXIS 116479 (D. Kan. July 2, 2024); *Texas v. United States*, No. 2:24-CV-86-Z, 2024 U.S. Dist. LEXIS 121812 (N.D. Tex. July 11, 2024); *Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ.*, No. 4:24-CV-00461-O, 2024 U.S. Dist. LEXIS 122716 (N.D. Tex. July 11, 2024); *Arkansas v. U.S. Dep't of Educ.*, No. 4:24-CV-636-RWS, 2024 U.S. Dist. LEXIS 130849 (E.D. Mo. July 24, 2024); *Oklahoma v. Cardona*, No. CIV-24-00461-JD, 2024 U.S. Dist. LEXIS 135314 (W.D. Ok. July 31, 2024); *see also Alabama v. Dep't. of Educ.*, No. 24-12444 (11th Cir. July 31, 2024) (appellate order granting preliminary injunction) (collectively referred to as the "New Rule Litigation"). As in those decisions, the

District Court here held that *Bostock* was distinguishable, and that an interpretation that Title IX encompassed such discrimination would render the statute constitutionally suspect under the Spending Clause.[2] ROA.359-63. Like those district courts and the District Court, this Court should reject the United States' misinterpretation of *Bostock* and Title IX.

While Title IX was enacted pursuant to Congress's Spending Clause authority, Title VII was enacted pursuant to its power to regulate interstate commerce. As a result, the Spending Clause is completely irrelevant to Title VII and was not mentioned or considered in *Bostock*; nonetheless, it is essential to properly analyzing Title IX because it constrained Congress's authority to place conditions on funds provided under that statute.

A prohibition under Title IX on discrimination motivated in any part by perceived sexual orientation, as the United States argues for here

[2] Besides, Louisiana, Mississippi, Montana, and Idaho, *see supra* n.1, the New Rule is also currently enjoined in 22 other states – namely, Oklahoma, Alabama, Georgia, Florida, South Carolina, Kansas, Alaska, Utah, Wyoming, Tennessee, Kentucky, Ohio, Indiana, Virginia, West Virginia, Texas, Arkansas, Missouri, Iowa, Nebraska, North Dakota, and South Dakota. *See Oklahoma*, 2024 U.S. Dist. LEXIS 135314, at *33-34; *Tennessee,* 2024 U.S. Dist. LEXIS 106559, at *131; *Kansas*, 2024 U.S. Dist. LEXIS 116479, at *74; *Texas*, 2024 U.S. Dist. LEXIS 121812, at *47; *Arkansas*, 2024 U.S. Dist. LEXIS 130849, at *67; *Alabama*, No. 24-12444 at 2.

and in the New Rule Litigation, would violate Congress's exercise of its spending powers by (1) imposing a requirement that was not unambiguously clear to states when Title IX was enacted in 1972 and (2) effectively coercing Defendants into now exposing themselves to civil liability for sexual orientation discrimination in exchange for funds that they first began receiving five decades ago. *Id.*

ARGUMENT

I. Because Title IX Was Enacted Pursuant to the Spending Clause, Which Sets Limits On Congress's Authority That Do Not Apply To Title VII, *Bostock* Does Not Control.

The Supreme Court has recognized that notwithstanding some textual similarities, Titles VII and IX are "vastly different." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-84 (1998)). Most notably, Title VII focuses exclusively on hiring and firing in employment, while Title IX's entire purpose is to ensure equal educational opportunities for women and girls.

Another significant difference is that Congress enacted Title IX under its Spending Clause power, *see Davis v. Monroe Cnty, Sch. Bd.*, 526 U.S. 629, 640 (1999), and Title VII under the Commerce Clause, *see*

EEOC v. Ass'n of Cmty. Orgs for Reform Now, 1996 U.S. App. 44921, at *2-3 (5th Cir. 1996). Thus, while Title VII regulates employers directly pursuant to Congress's expressly enumerated power under Article I, Section 8, *see Students for Fair Admissions, Inc. v. President & Fellows of Harv. College*, 600 U.S. 181, 238, 256-57 (2023), Title IX creates an arrangement in the nature of a contract between the federal government and states and other recipients accepting funds it offers under the statute, *see Jackson*, 544 U.S. at 181-82. Under its Spending Clause authority, Congress may impose conditions on recipients of federal funds that go beyond its expressly enumerated powers. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012). ("Congress may use this power to . . . condition such a grant [of federal funds] upon the States' 'taking certain actions that Congress could not require them to take.'") (citation omitted); *Davis*, 526 U.S. at 640; *Gruver v. La. Bd. of Supervisors*, 959 F.3d 178, 182 (5th Cir. 2020). "That contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition." *Gebser*, 524 U.S. at 286.

Congress's spending clause authority "is of course not unlimited .

. . but is instead subject to several general restrictions." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). The two restrictions relevant here are that conditions imposed upon states receiving federal funds (1) must be "unambiguous[]" so that states can "exercise their choice knowingly, cognizant of the consequences of their participation," and (2) must not "be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 207–11 (internal quotations omitted); *see also Gruver*, 959 F.3d at 182. Each of these requirements is "equally important" and each must be "equally" satisfied for a condition on funding to be constitutional. *West Virginia v. Dep't of Treasury*, 59 F.4th 1124, 1142 (11th Cir. 2023).

These restrictions "ensur[e] that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Sebelius*, 567 U.S. at 577. For example, the restrictions help to preserve "the political accountability key to our federal system." *Id.*, at 578. "[W]hen a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds," "state officials can fairly be held politically accountable for choosing to accept or refuse [a] federal offer." *Id.*

By contrast, Title VII was enacted pursuant to Congress's interstate commerce authority, which grants expansive regulatory authority. *Id.*, at 549-50. Thus, "the requirement that recipients receive adequate notice of Title IX's proscriptions . . . bears on the proper definition of 'discrimination' in [the context of] a private damages action," *Davis*, 526 U.S. at 651 (cleaned up), but "whether a specific application [of Title VII] was anticipated is irrelevant," *Bostock*, 590 U.S. at 677 (cleaned up). The limits imposed by the Spending Clause were not at issue in *Bostock*, yet they are fundamental to any analysis under Title IX.

II. The Interpretation of Title IX Urged by the United States Would Violate Spending Clause Restrictions.

The proposed condition advanced by the United States fails the two Spending Clause requirements. First, such a condition on the acceptance of federal funding is not "unambiguously" clear from the face of Title IX. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Discrimination on the basis of "sex" and of "sexual orientation" do not have identical meanings, *see Bostock*, 590 U.S. at 669 ("We agree that homosexuality and transgender status are distinct concepts from sex."), so being on statutory notice of the former does not necessarily

mean being on notice of the latter. And this would seem to also be true at the time Title IX was enacted. *See Bostock,* 590 U.S. at 686, 702-04 (Alito, J., dissenting). Thus, Defendants could not "voluntarily and knowingly" agree that in exchange for federal funds under Title IX, they would expose themselves to civil liability for failing to prohibit sexual orientation discrimination. *Sebelius*, 567 U.S. at 577.

Second, forcing Defendants to now choose between accepting a condition that went unmentioned for decades and facing the potential loss of a significant percentage of their education funding "is economic dragooning that leaves the States with no real option but to acquiesce." *Id.* at 582. The Spending Clause gives Congress no authority to engage in such federal coercion.

A. Title IX Does Not So Clearly State The Proposed Condition That Recipients of Federal Funds Could Exercise Their Choice Knowingly and Cognizant Of The Consequences.

Given that "[t]he legitimacy of Congress's power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract,'" the Supreme Court "insist[s] that Congress speak with a clear voice" when it imposes conditions on the receipt of federal funds. *Pennhurst State Sch. and*

Hosp. v. Halderman, 451 U.S. 1, 17 (1981). "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.*; *see also Texas Educ. Agency v. Dep't of Educ.*, 992 F.3d 350, 361 (5th Cir. 2021). "'[L]egislation enacted pursuant to the spending power is much in the nature of a contract,' and therefore, to be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*, 451 U.S. at 17). Like any party entering into a contract, "[s]tates cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Arlington*, 548 U.S. at 296 (quoting *Pennhurst*, 451 U.S. at 17).

A recipient's understanding of the deal it entered into with the federal government is critical to the Spending Clause analysis. "'[T]he key is not [Congressional intent] but what the States are clearly told regarding the conditions that go along with the acceptance of those funds.'" *Texas Educ. Agency*, 992 F.3d at 359 (quoting *Arlington*, 548 U.S. at 304); *see also Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 218 (2022) (courts must "construe the reach of Spending Clause

conditions with an eye toward 'ensuring that the receiving entity of federal funds [had] notice that it will be liable'") (quoting *Gebser*, 524 U.S. at 287). The clear statement rule requires that a state "has been put on notice clearly and unambiguously by the federal statute that [its] particular conduct or transaction will subject it to federal court suits brought by individuals." *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 282 (5th Cir. 2005) (citation omitted).

The "bargain" struck between Congress and the states in the mid-1970's did not clearly and unambiguously include the latter consenting to potential liability for sexual-orientation discrimination in exchange for federal funds. Black letter contract law holds that Defendants' understanding of the bargain trumps any different understanding now put forth by the United States:

> Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made . . . that party [here, Defendants] did not know of any different meaning attached by the other [here, the United States], and the other knew the meaning attached by the first party.

Restatement (Second) of Contracts, § 201(2)(a). Although there is no dispute that the parties here knew that they both understood Title IX to prohibit discrimination on the basis of an individual's sex, there was no

reason for Defendants to know that the United States had a more expansive understanding until, five decades later, it first asserted that Title IX also prohibited sexual orientation discrimination. At the least, the United States "had reason to know the meaning attached by" Defendants to the term "sex" when it first began providing funding under Title IX, *id.*, § 201(2)(b), which also supports the conclusion that Defendants' understanding prevails.

As *Bostock* acknowledged repeatedly, reading Title VII's language to encompass sexual orientation discrimination was, at the least, "a new application" that was largely "unexpected" by Congress when it enacted the statute. *See, e.g., Bostock*, 590 U.S. at 649, 673-82. But if a ban on sexual orientation discrimination is a new application not anticipated when Title VII was passed, recipients of federal funds under Title IX were not clearly on notice that that the statute might similarly extend to the type of claim asserted here by Appellants.

The District Court correctly recognized that the extension of liability under Title IX to these "unexpected applications" was not consistent with Congress's Spending Clause authority: "The Court is not inclined to conclude that the language of Title IX reflects that Congress

unambiguously intended to cover student-on-student harassment on the basis of sexual orientation. The statute's language exclusively discusses discrimination on the basis of sex, and sex is a different concept from sexual orientation." ROA.361.

Similar to Defendants here, the plaintiffs in the New Rule Litigation challenge the United States' misinterpretation of *Bostock*. Specifically, their lawsuits challenge the New Rule, which the Education Department published in April 2024 and which, inter alia, construed Title IX to prohibit sexual orientation and gender identity discrimination. *New Rule*, 89 Fed. Reg. 33,474. The New Rule was the Department's response to President Biden's inaugural directive to make *Bostock* applicable across the federal government. 86 Fed. Reg. 7023, 7023. Here, although Appellants brought their claims before the New Rule was published or would have become effective, their claims present the same dispositive issue of what types of sex discrimination does Title IX encompass.

Like the District Court, the courts in the New Rule Litigation rejected the United States' contention that *Bostock* controlled their interpretation of Title IX. *See, e.g., Louisiana*, 2024 U.S. Dist. LEXIS

105645, at *29-30, 34; *Kansas*, 2024 U.S. Dist. LEXIS 116479, at *27-28; *Texas*, 2024 U.S. Dist. LEXIS 121812, at *13-14; The courts further concluded that when Title IX was enacted in 1972, it did not clearly and unambiguously encompass sexual orientation discrimination, such that recipients would have had notice of the condition. *See Louisiana*, 2024 U.S. Dist. LEXIS 105645, at *29; *Kansas*, 2024 U.S. Dist. LEXIS 116479, at *27-28; *Tenn*, 2024 U.S. Dist. LEXIS 106559, at *41; *Arkansas*, 2024 U.S. Dist. LEXIS 130849, at *42.

The United States asserts that "Title IX provides adequate notice [of the proposed condition] under the Spending Clause here by making clear that all forms of intentional sex discrimination are impermissible in covered education programs and activities in the absence of an applicable statutory exception." Amicus Brief, *supra*, at 20, ECF No. 32. Undermining this contention, however, is the United States' separate allegation in the New Rule Litigation that the New Rule only "clarifies" the meaning of the term "sex." *See, e.g.* Defendants' Consolidated Opposition to Louisiana's and Rapides Parish School Board's Motion for a Preliminary Injunction and § 705 Stay, *Louisiana v. Dep't. of Educ.*, 2024 U.S. Dist. LEXIS 105645, at *1, 5, ECF No. 38; *see also New Rule*,

89 Fed. Reg. at 33476. As the courts in those cases stated, this begs the question if Title IX has clearly and unambiguously encompassed sexual orientation since 1972, why is the New Rule now needed to clarify it? *See, e.g., Louisiana*, 2024 U.S. Dist. LEXIS 105645, at *27-28; *Tenn*, 2024 U.S. Dist. LEXIS 106559, at *95-98; *Oklahoma*, 2024 U.S. Dist. LEXIS 135314, at *10-13; *see also Texas Educ. Agency*, 992 F.3d at 361 (clarity required by Spending Clause "must come directly from the statute" at issue, and cannot be provided by, for example, administrative regulations). Title IX did not, in fact, give the constitutionally-required notice, which explains why the United States hopes to "clarify" it with the New Rule.

The proposed condition was simply not part of the original bargain that Defendants consented to under Title IX. The United States hopes to inject it into the parties' agreement after-the-fact, which supports the conclusion that the United States seeks to coerce acceptance out of Defendants. *Sebelius*, 567 U.S. at 584 (quoting *Pennhurst*, 451 U.S. at 25) ("'Congress' power to legislate under the spending power . . . does not include surprising participating States with postacceptance or 'retroactive' conditions.'").

B. Pressuring Defendants to Acquiesce to the Proposed Condition Would Be So Coercive As To Constitute Compulsion.

Assuming, *arguendo*, that Title IX clearly states the proposed condition, acceptance by Defendants cannot be voluntary if it has been coerced out of them by the federal government. *See Pace*, 403 F.3d at 279; *Gruver*, 959 F.3d at 182. Thus, courts must "scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a 'power akin to undue influence.' . . . [W]hen 'pressure turns into compulsion,' the legislation runs contrary to our system of federalism." *Sebelius*, 567 U.S. at 577 (citations omitted)[3].

Among other things, federal coercion erodes political accountability: "when the State has no choice, the Federal Government can achieve its objectives without accountability. . . Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers." *Sebelius*, 567 U.S. at

[3]Although Chief Justice wrote for a plurality that the federal government had engaged in unconstitutional coercion in attaching conditions to the Affordable Care Act, "because the plurality struck down Medicaid expansion on narrower grounds than the joint dissent, the plurality opinion is binding." *Gruver*, 959 F.3d at 183 n.5 (citations omitted).

578; *see also New York v. United States*, 505 U.S. 144, 168 (1992) ("where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished").

The United States' interpretation would effectively impose a new condition by leveraging the potential loss of long-existing funding. If a recipient of federal funds fails or refuses to comply with Title IX, the federal government can take steps to terminate its funding. *See* 20 U.S.C. § 1682; U.S. Dep't. of Justice; Civil Rights Division, Title IX Legal Manual, V*. Federal Funding Agency Methods to Enforce Compliance*, available at https://tinyurl.com/byjsscde. The termination of federal funding would cripple a recipient; Mississippi and its local programs received at least $1,592,288,396 of funding from the Department last year and are projected to receive at least $ 1,678,255,514 this year. *See* U.S. Dep't. of Educ., *Funds for State Formula-Allocated and Selected Student Aid Programs, by State*, available at https://tinyurl.com/4k2rr5hh (last accessed August 2, 2024).

Furthermore, the reason why the proposed condition is coercive is not only that Defendants may lose funding, but that the "threatened loss" of funding alone gives them no option "but to acquiesce" to the United

States' interpretation of Title IX. *Sebelius*, 567 U.S. at 582. The mere prospect of a loss of substantial funding Defendants have long relied on to educate students is so staggering that they would have no real choice.

It is entirely reasonable for recipients like Defendants to be concerned about their federal funding if they do not adhere to the United States' interpretation of Title IX, which is undoubtedly a high priority for the Biden Administration. The Executive Branch is pursuing an (overly) aggressive interpretation of Title IX not just in this case, but in the New Rule Litigation as well, in which it is now seeking emergency relief from the Supreme Court.

Besides the possible loss of federal funding, Defendants will face certain exposure to litigation like the discrimination claims at the heart of this lawsuit. Furthermore, because the United States' position as demonstrated by the New Rule is that Title IX encompasses not only sexual orientation discrimination but also gender identity and other types of discrimination, *see New Rule*, 89 Fed. Reg. at 33376, Defendants would almost certainly have to defend against many new varieties of Title IX claims in the future.

CONCLUSION

For the foregoing reasons, as well as those set forth in Defendants-Appellees' brief, the judgment of the District Court should be affirmed.

August 5, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century font. The brief contains 3701 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I e-filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on August 5, 2024.

Dated: August 5, 2024
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