No. 25-10651

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Carroll Independent School District,
Plaintiff-Appellee,

v.

United States Department of Education; Linda McMahon, Secretary, U.S. Department of Education; Kimberly Richey*, in her official capacity as Assistant Secretary for Civil Rights at the United States Department of Education; United States Department of Justice; Pamela Bondi, U.S. Attorney General; Harmeet Dhillon, in her official capacity as Assistant Attorney General for the Civil Rights Division of the United States Department of Justice,
Defendants-Appellees,
and

Victim Rights Law Center*; A Better Balance,
Movants-Appellants

On Appeal from the United States District Court
for the Northern District of Texas
Case No. 4:24-cv-00461-O
The Honorable Reed O'Connor

APPELLANT VICTIM RIGHTS LAW CENTER'S OPENING BRIEF

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**The caption reflects the recent confirmation of Kimberley Richey as Assistant Secretary for Civil Rights. It also reflects that Jane Doe, a proposed intervenor-defendant, is no longer participating in this matter as her claim is now moot.*

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have 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.

1. Plaintiff-Appellee

Carroll Independent School District.

2. Defendants-Appellees

U.S. Department of Education; Linda McMahon, in her official capacity as Secretary of the U.S. Department of Education; Kimberly Richey, in her official capacity as Assistant Secretary for Civil Rights at the U.S. Department of Education; U.S. Department of Justice; Pamela J. Bondi, in her official capacity as Attorney General of the United States; and Harmeet K. Dhillon, in her official capacity as Assistant Attorney General for Civil Rights at the U.S. Department of Justice.

3. Proposed Intervenor-Defendant-Appellants

Victim Rights Law Center[1] and A Better Balance.

4. Counsel for Plaintiff-Appellee

Matthew W. Hoffman; John J. Bursch; Natalie D. Thompson; Jonathan A. Scruggs; Tyson C. Langhofer, Timothy E. Davis; Allison Allman; and Trevor Paul.

5. Counsel for Defendants-Appellees

David L. Peters; Steven A. Myers; and Charles W. Scarborough.

[1] Jane Doe, a former college student in Massachusetts, also noticed an appeal as a proposed intervenor-defendant. Her claim has since become moot, so she will no longer be participating in this matter.

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/s/ Rachel Smith
Rachel Smith
Attorney of Record for Appellant Victim Rights Law Center

STATEMENT REGARDING ORAL ARGUMENT

Victim Rights Law Center requests oral argument as it believes it could significantly aid the decisional process in this case.

TABLE OF CONTENTS

Jurisdictional Statement 1
Statement of the Issues 1
Statement of the Case 1
Standard of Review 10
Summary of Argument 11
Argument 15
I. VRLC has standing because the 2024 Rule's vacatur and reversion to the 2020 Rule are impairing its core business activities. 15
A. The 2024 Rule's vacatur and reversion to the 2020 Rule are injuring VRLC. 16
B. The vacatur is causing VRLC's injuries, and narrowing it will redress those injuries. 25
II. VRLC is entitled to intervention, whether mandatory or permissive. 27
A. Mandatory intervention 27
1. VRLC timely moved to intervene when it became clear Defendants would not appeal, leaving its interests unrepresented. 28
2. Denying VRLC intervention would impair its legal interests. 33
3. VRLC's interests are now unrepresented. 35
B. Permissive intervention 36
III. The definition of sex discrimination and de minimis harm standard, Sections 106.10 and 106.31(a)(2), should be severed and the remainder of the 2024 Rule should go into effect. 37
A. The definition of sex discrimination and de minimis rule, Sections 106.10 and 106.31(a)(2), are severable and should be severed. 39
B. The definition of hostile-environment harassment and remaining provisions Carroll challenges are lawful 43
Conclusion 53
Certificate of Compliance 55
Certificate of Service 56

TABLE OF AUTHORITIES

Cases **Page(s)**

Ams. for Prosperity Found. v. Bonta,
594 U.S. 595 (2021).....47

Ass'n of Pro. Flight Attendants v. Gibbs,
804 F.2d 318 (5th Cir. 1986).....30

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675 (1986).....48

Black Fire Fighters Ass'n of Dallas v. City of Dallas,
19 F.3d 992 (5th Cir. 1994).....35

Book People, Inc. v. Wong,
91 F.4th 318 (5th Cir. 2024).....17, 18, 19

Brumfield v. Dodd,
749 F.3d 339 (5th Cir. 2014).....35

Buchanan v. Alexander,
919 F.3d 847 (5th Cir. 2019).....49

Cameron v. EMW Women's Surgical Ctr., P.S.C.,
595 U.S. 267 (2022).....29, 30, 32

Career Colls. & Schs. of Tex. v. U.S. Dep't of Educ.,
98 F.4th 220 (5th Cir. 2024).....18

In re Chamber of Com. of U.S. of Am.,
105 F.4th 297 (5th Cir. 2024).....40

City of Houston v. Am. Traffic Sols., Inc.,
668 F.3d 291 (5th Cir. 2012).....35

Consumer Data Indus. Ass'n v. Texas,
No. 21-51038, 2023 WL 4744918 (5th Cir. July 25, 2023).....27

Czyzewski v. Jevic Holding Corp.,
580 U.S. 451 (2017).....19, 26

Davis v. Monroe County Board of Education,
526 U.S. 629 (1999).....15, 45, 46

Deep S. Ctr. for Env't Just. v. U.S. Env't Prot. Agency,
138 F.4th 310 (5th Cir. 2025) 22. 23

Dep't of Commerce v. New York,
588 U.S. 752 (2019).....25

Department of Education v. Louisiana,
603 U.S. 866 (2024).....42

Diamond Alternative Energy, LLC v. Env't Prot. Agency,
145 S. Ct. 2121 (2025).....16, 19, 20, 23

Doe v. Edgewood Indep. Sch. Dist.,
964 F.3d 351 (5th Cir. 2020) 48

Edwards v. City of Houston,
78 F.3d 983 (5th Cir. 1996) 30, 33

Entergy Gulf States La., L.L.C. v. U.S. E.P.A.,
817 F.3d 198 (5th Cir. 2016) 27, 35

Fennell v. Marion Indep. Sch. Dist.,
804 F.3d 398 (5th Cir. 2015) 46

Food & Drug Admin. v. All. for Hippocratic Med.,
602 U.S. 367 (2024).....17, 21, 22, 23

Ford v. City of Huntsville,
242 F.3d 235 (5th Cir. 2001) 11, 28, 32

Freedom Found. v. Int'l Bhd. of Teamsters Loc. 117,
No. 23-3946, 2024 WL 5252228 (9th Cir. Dec. 31, 2024) 25

Gebser v. Lago Vista Indep. Sch. Dist.,
524 U.S. 274 (1998).....46

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982).....10, 21, 22

U.S. ex rel Hernandez v. Team Fin., L.L.C.,
80 F.4th 571 (5th Cir. 2023) 11, 36

Hollis v. Lynch,
827 F.3d 436 (5th Cir. 2016), *abrogated in part on other grounds by United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024) 26

Howell v. Austin Indep. Sch. Dist.,
323 F. App'x 294 (5th Cir. 2009) 48

I.F. v. Lewisville Indep. Sch. Dist.,
915 F.3d 360 (5th Cir. 2019) 48

Indus. Energy Consumers of Am. v. FERC,
125 F.4th 1156 (D.C. Cir. 2025) (Henderson, J., concurring).....16

La Union del Pueblo Entero v. Abbott,
29 F.4th 299 (5th Cir. 2022) 34

In re Lease Oil Antitrust Litig.,
570 F.3d 244 (5th Cir. 2009) 30, 31, 32

Loera v. Kingsville Indep. Sch. Dist.,
151 F.4th 813 (5th Cir. 2025) 47

Louisiana v. Burgum,
132 F.4th 918 (5th Cir. 2025) 31

Louisiana v. U.S. Dep't of Educ,
No. 24-30399, 2024 WL 3452887 (5th Cir. July 17, 2024) 43, 47

Madsen v. Women's Health Ctr.,
512 U.S. 753 (1994).....52

Mahanoy Area Sch. Dist. v. B.L.,
594 U.S. 180 (2021).....49, 50

Merrill v. Milligan,
142 S. Ct. 879 (2022).....42

Mil.-Veterans Advoc. v. Sec'y of Veterans Affs.,
130 F.4th 965 (Fed. Cir. 2025) 24

McKinney ex rel. N.L.R.B. v. Creative Vision Res., L.L.C.,
783 F.3d 293 (5th Cir. 2015) 11

Nairne v. Landry,
151 F.4th 666 (5th Cir. 2025) 21, 24

Nat'l Ass'n of Mfrs. v. U.S. Sec. & Exch. Comm'n,
105 F.4th 802 (5th Cir. 2024) 38, 40

Nat'l Credit Union Admin. v. First Nat. Bank & Tr. Co.,
522 U.S. 479 (1998).....17, 18, 19

New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.,
732 F.2d 452 (5th Cir. 1984) 36

Newby v. Enron Corp.,
443 F.3d 416 (5th Cir. 2006) 36

OCA-Greater Houston v. Texas,
867 F.3d 604 (5th Cir. 2017) 24

Okla. Firefighters Pension & Ret. Sys. v. Six Flags Ent. Corp.,
No. 23-10696, 2024 WL 1674125 (5th Cir. Apr. 18, 2024).....27

Republican Nat'l Comm. v. N.C. State Bd. of Elections,
120 F.4th 390 (4th Cir. 2024) 24

Roe v. Cypress-Fairbanks Indep. Sch. Dist.,
53 F.4th 334 (5th Cir. 2022) 48

Salazar v. S. San Antonio Indep. Sch. Dist.,
953 F.3d 273 (5th Cir. 2017) 48

Sanchez v. R.G.L.,
761 F.3d 495 (5th Cir. 2014) 27

Seven Cnty. Infrastructure Coal. v. Eagle Cnty.,
605 U.S. 168 (2025).....44, 51

Sierra Club v. Espy,
18 F.3d 1202 (5th Cir. 1994) 28, 29, 31, 35

Students for Fair Admissions, Inc. v. Univ. of Texas at Austin,
37 F.4th 1078 (5th Cir. 2022) 10

Tennessee v. McMahon,
E.D. Ky. No. 2:24-cv-00072 6

Tex. Corn Producers v. U.S. Env't Prot. Agency,
141 F.4th 687 (5th Cir. 2025) 16, 23

Tex. Trib. v. Caldwell Cnty.,
121 F.4th 520 (5th Cir. 2024) 21, 24

Texas v. United States,
126 F.4th 392 (5th Cir. 2025) .....*passim*

Texas v. United States,
805 F.3d 653 (5th Cir. 2015) 10, 27, 33

Trudeau v. Univ. of N. Tex.,
861 F. App'x 604 (5th Cir. 2021) 49

United Airlines, Inc. v. McDonald,
432 U.S. 385 (1977).....29, 32

United States v. Vargas,
74 F.4th 673 (5th Cir. 2023) 26

Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n,
834 F.3d 562 (5th Cir. 2016) 27, 28, 34

Weathers v. Houston Methodist Hosp.,
116 F.4th 324 (5th Cir. 2024) 38

Wisconsin v. Mitchell,
508 U.S. 476 (1993).....47

Young Conservatives of Tex. Found. v. Smatresk,
73 F.4th 304 (5th Cir. 2023) 19, 20

Constitution

U.S. Const. amend. I. .....*passim*

U.S. Const. amend. II. 26

Statutes

5 U.S.C. § 706 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 2201 1

Administrative Procedure Act, 5 U.S.C. §§ 551–559 3

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 51

Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 – 12138 51

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq 51

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq 44

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq ..... *passim*

Other Authorities

34 C.F.R. § 106 ..... 2, 14

34 C.F.R. § 106.2 ..... 4, 38, 45, 49

34 C.F.R. § 106.9 ..... 6, 39

34 C.F.R. § 106.10 ..... *passim*

34 C.F.R. § 106.16 ..... 6, 39

34 C.F.R. § 106.24 ..... 6, 39

34 C.F.R. § 106.31 ..... *passim*

34 C.F.R. § 106.40 9

34 C.F.R. § 106.44 ..... 4, 43, 50

34 C.F.R. § 106.45 ..... 4, 52

34 C.F.R. § 106.48 .....6, 39

34 C.F.R. § 106.62 .....6, 39

34 C.F.R. § 106.72 .....6, 39

34 C.F.R. § 106.82 .....6, 39

59 Fed. Reg. 11,448 (Mar. 10, 1994).....45

62 Fed. Reg. 12,034 (Mar. 13, 1997).....44

85 Fed. Reg. 30,026 (May 19, 2020) .....*passim*

89 Fed. Reg. 33,474 (Apr. 29, 2024) .....*passim*

Applicant's Brief, *U.S. Dep't of Educ. v. Louisiana*, No. 24A78 2024 WL 3510278, (July 2024).....47

13A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 3531.5 (3d ed. 2008 & Supp. 2022) 20

Fed. R. App. P. 29.....55

Fed. R. App. P. 32.....55

Fed. R. Civ. P. 24..... 13, 27, 28, 27, 34, 36

U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/dcl-factsheet-201010.pdf.....50

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JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. Plaintiff Carroll Independent School District filed this matter under the Administrative Procedure Act, 5 U.S.C. § 706, and Declaratory Judgment Act, 28 U.S.C. § 2201. The district court entered final judgment for Carroll on February 19, 2025. ROA.4867-75. The district court extended the time to file a notice of appeal until May 21, 2025. ROA.5358. Victim Rights Law Center filed its notice of appeal on May 21, 2025. ROA.5555-57. This Court has jurisdiction under 28 U.S.C. § 1291 because the judgment below is a final judgment of a United States District Court.

STATEMENT OF THE ISSUES

1. Did the district court err in holding Victim Rights Law Center (VRLC) lacks standing to appeal the district court's vacatur of provisions of the 2024 Title IX rule?
2. Is VRLC entitled to mandatory or permissive intervention in this matter?
3. Did the district court err in vacating the 2024 Title IX Rule in its entirety rather than simply severing two provisions found unlawful, Sections 106.10 and 106.31(a)(2), from the lawful remainder of the Rule?

STATEMENT OF THE CASE

Title IX promises that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in a federally funded school. 20 U.S.C. § 1681(a). But because of the district court's decision here striking down the most recent Title IX Rule, more

students—predominantly girls and women—will suffer sexual abuse and degradation in silence, knowing neither their school nor the Department of Education will help them. More students—particularly girls and women—will drop out of school because of it.

VRLC is a nonprofit organization that provides legal assistance to student survivors of sex-based harassment, including sexual assault, to help them rebuild their lives and reengage in school in the aftermath of an assault or harassment. The 2024 Title IX rule, which the district court vacated in its entirety, contained vitally important protections for VRLC's clients and other students who have endured sex-based harassment—including sexual assault, dating violence, domestic violence, and stalking. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024) (the "2024 Rule"); 34 C.F.R. § 106 (2024). Those vacated provisions ensured that their schools provided them with effective supportive measures and investigations into the harm they had endured.

The 2024 Rule marked a return—in line with decades of prior U.S. Department of Education ("Department") policy—to vigorously enforcing Title IX's promise of education free of sex-based harassment. It rolled back numerous harmful provisions of the previous Title IX Rule issued in 2020. The 2020 Rule had required schools to ignore many incidents of sex-based harassment. It also

required them to use unfair and burdensome investigation procedures for sex-based harassment complaints not required for investigations of any other student or employee misconduct. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (the "2020 Rule"). These provisions chilled many student survivors from reporting sex-based harassment to their schools as they feared being subjected to unfair and retraumatizing investigations—and so chilled them from seeking VRLC's assistance. ROA.5035 (VRLC declaration describing need for 2024 Rule). For those who did report, the 2020 Rule either foreclosed investigation of their Title IX complaints entirely or decreased the likelihood of fair and accurate investigation outcomes. *Id*. The 2020 Rule's unfair and unclear requirements meant that VRLC had to spend more time and resources to assist each client, while also achieving fewer beneficial outcomes for them. *Id*. The combined effect of these provisions reduced deterrence of sex-based harassment in schools, making them less safe for students. *Id*.

Plaintiff Carroll Independent School District (Carroll) sued in May 2024, bringing Administrative Procedure Act (APA) claims focused on a few provisions of the 2024 Rule. ROA.31-84. One challenged provision stated that for purposes of Title IX, sex-based discrimination included discrimination based on gender identity. 34 C.F.R. § 106.10; *see* 89 Fed. Reg. 33,476. Another said that generally,

where Title IX "permits different treatment or separation on the basis of sex," a school could not "carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm." 34 C.F.R. § 106.31(a)(2); 89 Fed. Reg. 33,814-26. A third reinstated almost verbatim a definition of hostile-environment sex-based harassment that the Department had enforced for decades before the 2020 Rule. *See* 34 C.F.R. § 106.2; 89 Fed. Reg. 33,498. Specifically, it defined hostile-environment harassment as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." *Id.*

Carroll also nominally raised but minimally briefed challenges to another handful of provisions: requiring schools to promptly and effectively end sex discrimination when they have knowledge of it, *see* 34 C.F.R. § 106.44(f)(1); 89 Fed. Reg. at 33,889; detailing when Title IX coordinators may initiate a sex-discrimination complaint without a complainant, *see* 34 C.F.R. § 106.44(f)(1)(v); 89 Fed. Reg. at 33,889; and requiring schools to take reasonable steps to protect parties' and witnesses' privacy during investigations, *see* 34 C.F.R. § 106.45(b)(5); 89 Fed. Reg. at 33,891.

The district court granted a preliminary injunction in July 2024, enjoining the Department from enforcing the 2024 Rule in its entirety against Carroll. However, its analysis in that order only focused on the definition of sex-based discrimination and the de minimis harm standard, Sections 106.10 and 106.31(a)(2). ROA.912-25.

On February 19, 2025, the district court granted Carroll summary judgment, holding that the 2024 Rule "undermines the purpose of Title IX, … violate[s] the Constitution and [is] the result of arbitrary and capricious agency action." ROA.4867. The court held that including gender identity in the definition of "on the basis of sex" was inconsistent with "the distinction between male and female [] at the heart of Title IX" and that "the Final Rule's new de-minimis harm standard is arbitrary in the truest sense of the word." ROA.4871-72. It also held that the 2024 Rule's definition of hostile-environment harassment violated the First Amendment because of how it interacted with Section 106.10, the definition of sex-based discrimination that included discrimination based on gender identity. Specifically, it held that, in light of Section 106.10, "repeated failure to use gender-identity-based pronouns could constitute sex-based harassment." ROA.4872-73.

The district court then vacated the Rule in its entirety. ROA. 4873-74. It so ruled despite the 2024 Rule's express severability clauses, despite finding just a few out of the Rule's dozens of provisions unlawful, and despite having only found

the hostile-environment definition unlawful when paired with the (severable) definition of discrimination on the basis of sex. *See* 34 C.F.R. §§ 106.9, 106.16, 106.24, 106.48, 106.62, 106.72, 106.82 (severability clauses for each of the Rule's subparts).[2] The court did not even analyze whether it could have severed the provisions it found unlawful from the lawful remainder, or whether the hostile-environment definition was lawful once the sex-discrimination definition was severed. *See id*. This decision came on the heels of a January 8 decision from the Eastern District of Kentucky that also vacated the 2024 Rule in its entirety on similar grounds. ROA.4839-61.[3]

The government vigorously defended the 2024 Rule through January 2025. Then, on February 17, after the district court here ordered a status report on whether this case was moot due to the Kentucky judgment, Defendants hedged, indicating that they were still determining whether to appeal the Kentucky judgment. ROA.4863-64.

This alarmed VRLC because the 2024 Rule's vacatur was already impairing its ability to serve clients. VRLC serves the legal needs of victims of sex-based

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[2] The summary-judgment decision (at ROA.4871) incorporated the court's earlier preliminary-injunction decision, which itself incorporated three other district courts' opinions, ROA.915-16. Neither the district court here nor any of the other courts' decisions it incorporated considered the lawfulness of the hostile-environment standard apart from that of the sex-discrimination definition.

[3] For purposes of this brief, we use the shorthand "Kentucky case" or "Kentucky matter" to refer to this case: *Tennessee v. McMahon*, E.D. Ky. No. 2:24-cv-00072.

harassment, including survivors of sexual assault, dating violence, and stalking. ROA.5034. In doing so, it helps to ensure that they can stay in school, protect their physical safety and academic needs, preserve their employment and scholarships, maintain their safe housing, receive accountability for the harm they experienced, and more. *Id*. A substantial portion of this practice is providing education-related legal consultation and representation. VRLC attorneys represent student victims to communicate effectively with school administrators, acquire supportive measures to restore and preserve their education, prepare for and attend grievance proceedings, file appeals, and if necessary, file complaints against their schools with the Department. *Id*.

The 2024 Rule's vacatur and resulting reversion to the 2020 Rule are causing VRLC to lose clients while also draining its resources, doubly preventing it from taking on more clients. ROA.5035. The reversion to the 2020 Rule, with its unfair and retraumatizing procedures, is chilling many student survivors from reporting sex-based harassment to their schools—and thus from seeking VRLC's assistance. *Id*. VRLC clients are already more hesitant to continue their pending Title IX complaints that were initiated under the 2024 Rule or to file new Title IX complaints based on incidents of harassment that occurred while the 2024 Rule was in effect (August 1, 2024, to January 8, 2025). *Id*. For example, in the first six weeks following the 2024 Rule's vacatur, VRLC received 41% fewer requests for

legal assistance than in the first six weeks following the implementation of the 2024 Rule. *Id*. These injuries are consistent with VRLC's previous experiences when the 2020 Rule was in effect (August 1, 2020, to July 31, 2024). ROA.5036. At that time, there was an immediate decline in the number of victims willing to make a report, file a formal complaint, or continue a pending investigation. *Id*. Consequently, VRLC received fewer requests from students for legal assistance with their school's Title IX proceedings or to file an administrative complaint against their school with the Department. *Id*.

In those cases where students are still seeking legal assistance, the 2024 Rule's vacatur and consequent reversion to the 2020 Rule are making each representation more time- and resource-intensive. And the increased time and resources necessary to assist each client under the 2020 Rule also means VRLC can help significantly fewer students. *Id*. For example, under the 2020 Rule, schools must permit adversarial cross-examination, so "it now takes at least four times the amount of time to prepare adversarial cross-examination of each opposing party and all witnesses" than it took to prepare under the 2024 Rule. ROA.5044. It also takes substantially longer to prepare VRLC's clients, because under the 2020 Rule, schools cannot exclude misleading and unduly prejudicial questions and questions that assume facts not in evidence, so VRLC must

extensively prepare its clients to answer such unfair questions. *Id*. This "reduc[es] the overall number of survivors VRLC can represent." *Id*.

VRLC first moved to intervene to redress these harms in the Kentucky case. Defendants opposed its motion to intervene there by arguing that they had "not yet made a final determination concerning appeal in this case," but that "should Defendants appeal," VRLC would be adequately represented. *See* ROA.5057-70.

Defendants then failed to appeal the Kentucky court's judgment on March 10. This clarified that they would, going forward, decline to defend the 2024 Title IX Rule. *See* ROA.5071-72 (government noting in March 11 Sixth Circuit filing that it "declined to seek further review of the district court's judgment").

In light of that clarification, VRLC moved to intervene in this case on March 31 to appeal the district court's vacatur of the provisions pertaining to sex-based harassment.[4] ROA.4988-5141. A Better Balance (ABB), a nonprofit legal organization that serves pregnant and postpartum students, also moved to intervene to appeal the vacatur of the provisions pertaining to the rights of pregnant and postpartum students. ROA.4883-4926.

[4] VRLC does not, on this record, have standing to defend the provision of the 2024 Rule stating that discrimination on the basis of sex included discrimination on the basis of sexual orientation or gender identity, § 106.10, or the de minimis harm provision, § 106.31(a)(2). It also does not, on this record, have standing to defend the familial-status and pregnancy provisions at § 106.40.

The district court denied VRLC and ABB's motions to intervene, holding they lacked organizational standing. ROA.5543-51. The court distinguished *Havens Realty Corp. v. Coleman*, in which the Supreme Court held that a housing-counseling organization had standing where the defendant had "perceptibly impaired [the organization's] ability to provide counseling and referral services for low-and moderate-income homeseekers." ROA.5549 (quoting *Havens*, 455 U.S. 363, 379 (1982)). It held that the 2024 Title IX Rule's vacatur had not interfered with VRLC's ability to provide legal assistance to survivors, despite VRLC's evidence that the 2024 Rule's vacatur and resulting reversion to the 2020 Rule are chilling students from reporting harassment and so causing it to lose clients. ROA.5546-51. VRLC timely appealed. ROA.5555.[5]

STANDARD OF REVIEW

The district court's rulings on standing, mandatory intervention, and summary judgment are reviewed without deference. *Students for Fair Admissions, Inc. v. Univ. of Texas at Austin*, 37 F.4th 1078, 1083 (5th Cir. 2022) (summary judgment and standing reviewed de novo); *Texas v. United States*, 805 F.3d 653, 656 (5th Cir. 2015) (*Texas I*) ("A ruling denying intervention of right is reviewed

[5] Jane Doe, a proposed intervenor-defendant below, also noticed an appeal. ROA.5555. Since then, her claims have become moot, and she will not be participating further in this case.

de novo.").[6] A decision on permissive intervention is generally reviewed for abuse of discretion. *U.S. ex rel Hernandez v. Team Fin., L.L.C.*, 80 F.4th 571, 577 (5th Cir. 2023). The Court reviews vacatur of a rule for abuse of discretion. *Texas v. United States*, 126 F.4th 392, 405 (5th Cir. 2025) (*Texas II*). Where "a district court rests its legal analysis on an erroneous understanding of governing law, it has abused its discretion." *McKinney ex rel. N.L.R.B. v. Creative Vision Res., L.L.C.,* 783 F.3d 293, 298 (5th Cir. 2015).

SUMMARY OF ARGUMENT

VRLC's motion to intervene should be granted. The 2024 Rule's vacatur and the 2020 Rule's resulting reinstatement are harming VRLC by causing it to lose clients, staff time, and money. As a result, VRLC has Article III standing. And VRLC meets all the requirements for intervention: it timely moved to intervene when it became clear that its interests were no longer represented; its protectible interests will be impaired absent intervention; and, as no party disputed below, its interests are no longer represented at all.

On the merits, the district court erred in failing to heed the Rule's express severability provisions. This Court should limit the vacatur to just two provisions: the definition of discrimination on the basis of sex and the de minimis rule.

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[6] The intervention analysis includes a timeliness prong that "is typically reviewed for abuse of discretion," but "is reviewed de novo where the district court failed," as here, "to make any findings regarding … timeliness." *Ford v. City of Huntsville*, 242 F.3d 235, 239 (5th Cir. 2001).

Although the district court held that 2024 Rule's administrative standard for hostile-environment harassment was unlawful when combined with the (explicitly severable) sex-based discrimination definition, it failed to consider its lawfulness if the sex-based discrimination definition is severed. The 2024 Rule's hostile-environment harassment standard, which is substantially similar to the standard the Department previously enforced for decades and the Supreme Court had approvingly cited, is lawful and hardly arbitrary or capricious. Nor is any other provision Carroll challenged arbitrary or capricious. This Court should thus permit the entire Rule except the definition of discrimination on the basis of sex and the de minimis rule to go into effect, thereby reviving its protections for survivors of sexual harassment and assault.

VRLC has standing. The 2024 Rule's vacatur and the resulting revival of the 2020 Rule's unfair and retraumatizing procedures for sex-based harassment, including sexual-assault complaints, are injuring VRLC by chilling students from asserting their rights, which is suppressing demand for VRLC's services. Such a loss of clients is a quintessentially cognizable harm. Additionally, the return to the 2020 Rule's onerous and time-consuming school grievance procedures consumes substantially more of VRLC's resources to represent each client than was required under the 2024 Rule. These increased costs directly harm VRLC's core business

model and are classic cognizable injuries. A ruling narrowing the vacatur would redress them.

Next, VRLC is entitled to intervene to defend the 2024 Rule. Under Federal Rule of Civil Procedure 24(a), "[o]n timely motion, the court must permit anyone to intervene" who has an interest "that is the subject of the action" that may be impaired absent intervention and is not adequately represented by existing parties. VRLC moved to intervene just weeks after it became clear that the federal government would cease defending the 2024 Rule, so its motion is more than timely. It has sufficient interests at stake in the case: the 2024 Rule's vacatur and reversion to the 2020 Rule are harming it to such an extent as to give rise to Article III standing. Those interests will be impaired if VRLC is not allowed to intervene; it has little other way of resurrecting the 2024 Rule's protections, and thereby regaining its clientele and ability to efficiently serve them, if the vacatur is not narrowed. And now that Defendants have made clear that they will no longer defend the 2024 Rule, no existing parties represent VRLC's interests *at all*. VRLC therefore meets all the criteria for mandatory intervention.

It also meets all the criteria for permissive intervention. "On timely motion, the court may permit anyone to intervene who: … has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). VRLC timely moved to intervene after it became clear its interests were

unrepresented, and it seeks to raise defenses that Defendants have already asserted in this matter.

Finally, this Court should limit the 2024 Rule's vacatur. The district court here vacated the entire Rule nationwide principally based on its holding that two specific provisions were unlawful: the definition of sex-based discrimination and the de minimis rule (the "invalidated provisions"). While the court also held the hostile-environment definition unlawful, it reached that conclusion only by construing it together with the invalidated definition of sex-based discrimination that included discrimination based on gender identity, holding that, combined, they would compel or chill speech related to gender identity. ROA.4872. The court erred as a matter of law by failing to even *consider* whether more limited relief would suffice. And it would have: the Rule was explicitly severable. *See, e.g.*, 34 C.F.R. § 106; 89 Fed. Reg. at 33,848 (explaining 2024 Rule is severable consistent with the 2020 Rule, which also addressed severability). The Rule could function sensibly without either invalidated provision. The 2020 Rule did not contain either one, and neither Carroll nor Defendants contend that the 2020 Rule does not function sensibly without them.

Carroll's remaining challenges to the 2024 Rule fail. It argued that several parts of the Rule other than the invalidated provisions were arbitrary and capricious, including the definition of hostile-environment harassment that revived

nearly verbatim a standard the Department had long enforced, and which the Supreme Court approvingly cited in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 647 (1999). This longstanding definition of hostile-environment harassment, and the remaining provisions Carroll challenged, were well reasoned and reasonably explained. This Court should uphold them.

ARGUMENT

I. VRLC has standing because the 2024 Rule's vacatur and reversion to the 2020 Rule are impairing its core business activities.

VRLC has established injury, causation, and redressability. The 2024 Rule's vacatur and resulting reversion to the 2020 Rule are injuring VRLC by imposing classic downstream harms on it—causing it to lose clients and making its business model more expensive. Causation is clear. The 2020 Rule engineered the harm that VRLC is enduring. By defining "sexual harassment" narrowly, requiring schools to dismiss Title IX complaints unless they meet that narrow standard, and imposing unfair and burdensome procedures on survivors, the 2020 Rule chilled sexual harassment reporting and created obstacles to fair investigations, which harmed VRLC. The 2024 Rule was promulgated to address these harms. Its vacatur thus renewed these harms. Redressability is also easily established because a decision severing just Sections 106.10 and 106.31(a)(2), the definition of sex-based discrimination and the de minimis harm exception, and permitting the remainder of the Rule to remain in effect would redress the harm to VRLC.

A. The 2024 Rule's vacatur and reversion to the 2020 Rule are injuring VRLC.

VRLC has standing here because the 2024 Rule's vacatur and the consequent reversion to the 2020 Rule are causing it to lose clients and requiring it to spend more staff time and money to meet the new, more resource-intensive, legal regime's demands. All of this impairs its core service of assisting survivors in obtaining legal benefits. These are typical downstream injuries from government regulation that the Supreme Court and this Court have repeatedly held give rise to standing. That VRLC is a nonprofit does not render these harms incognizable under Article III. If "an organization *qua* organization" is concretely and particularly injured as VRLC is here, "it has a right to the redress thereof just like a natural plaintiff. Its standing has a pedigree going back to the founding." *Indus. Energy Consumers of Am. v. FERC*, 125 F.4th 1156, 1167 (D.C. Cir. 2025) (Henderson, J., concurring) (citing *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)).

Downstream injuries from regulation are cognizable. *See, e.g.*, *Diamond Alternative Energy, LLC v. Env't Prot. Agency*, 145 S. Ct. 2121, 2135 (2025) (approving downstream injury of decreased customer demand due to regulation; collecting cases finding standing based on similar downstream injuries); *Tex. Corn Producers v. U.S. Env't Prot. Agency*, 141 F.4th 687, 692 (5th Cir. 2025) (approving downstream injuries to organizations that "span the gasoline supply

chain" from rule that created "substantial risk" of increasing fuel-economy standards and so decreasing gasoline demand); *Book People, Inc. v. Wong*, 91 F.4th 318, 330 (5th Cir. 2024) (approving downstream economic injury to booksellers from regulation of schools). Such cognizable injuries arise in innumerable "familiar circumstances" where "the government regulates (or under-regulates) a business, … caus[ing] downstream or upstream economic injuries to others in the chain, such as certain manufacturers, retailers, suppliers, competitors, or customers." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 384-85 (2024).

Such downstream injuries can take many forms, including decreased business or increased costs. "[L]ost business" and fewer customers are, of course, a cognizable "economic injury." *Book People*, 91 F.4th at 331 (holding booksellers' lost sales due to state regulation of schools was cognizable injury); *see also Nat'l Credit Union Admin. v. First Nat. Bank & Tr. Co*., 522 U.S. 479, 488 (1998) (regulatory action regarding credit unions that allowed for greater competition caused banks injury in the form of fewer customers).

Increased costs, including staff time, are another cognizable injury. For example, this Court held that a state law regulating schools, requiring books sold to schools to be rated for sexual content, harmed booksellers because they would have "to divert extensive time and resources from … normal operations" to rate

books if they wished to continue selling to schools—a classic "economic injury." *Book People*, 91 F.4th at 331. And, of course, courts routinely recognize "preparatory analysis, staff training, and reviews of existing compliance protocols" done to ensure compliance with new regulations as "concrete injuries." *Career Colls. & Schs. of Tex. v. U.S. Dep't of Educ*., 98 F.4th 220, 234 (5th Cir. 2024). Carroll's standing here, for instance, is premised in part on "hav[ing] to spend time and resources" revising its policies and training staff. ROA.57.

VRLC has suffered classic cognizable injuries in the form of decreased business and increased costs. One of its core business activities is providing legal representation to student victims of sex-based harassment to help rebuild their lives. ROA.5034. The 2024 Rule's vacatur and the resulting reversion to the 2020 Rule have caused VRLC to lose clients—just as it lost clients the last time the 2020 Rule was in effect. ROA.5035-36. This is a cognizable harm. *Nat'l Credit Union Admin.,* 522 U.S. at 488.

The 2024 Rule's vacatur and reversion to the 2020 Rule are also requiring VRLC to spend time adapting its services to the new regulatory requirements—not merely because the requirements are different, but specifically because they impose higher hurdles on VRLC's clients. It is now far more time- and resource-intensive for VRLC to continue providing its core services to survivors. ROA.5035-47. The increased time and resources necessary to assist each client

also mean VRLC is able to serve fewer clients. *See* ROA.5035-36, 5044. That these harms affect many of VRLC's routine activities does not, contra the district court, ROA.5549, undermine its standing, because they are making its routine activities more staff- and cost-intensive. *See Book People*, 91 F.4th at 331.

Such downstream costs need not be devastating—they establish standing even if small. "For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp*., 580 U.S. 451, 464 (2017); *Young Conservatives of Tex. Found. v. Smatresk*, 73 F.4th 304, 309 (5th Cir. 2023) (reciting that "injury need not measure more than an identifiable trifle") (quotation omitted). Here, the district court nonsensically held that because VRLC could continue offering its services in some form, it was not harmed. ROA.5546-51. But a gas company need not be put out of business before it can challenge regulations depressing demand. *Diamond Alternative Energy*, 145 S. Ct. at 2135. Banks need not lose their entire clientele before they can challenge regulatory actions that will cause them to lose customers. *Nat'l Credit Union Admin*., 522 U.S. at 488. Booksellers need not be foreclosed from selling any books before they can challenge laws imposing costs on them. *Book People*, 91 F.4th at 331. A nonprofit service provider need not be entirely foreclosed from providing its services before it can challenge a law that depresses demand for those services and imposes costs on it.

Moreover, if government action harms an organization's business model, the fact that the organization entered the business voluntarily—as organizations generally do—does not defeat standing. A gas company voluntarily sells gas, but that does not mean it is the architect of its own harm when new-vehicle-fleet regulations depress gas demand. *Diamond Alternative Energy*, 145 S. Ct. at 2135. If government action requires spending money to engage in a voluntary activity that, but for the government action, would be cheaper, that cost is a cognizable injury. *Young Conservatives of Tex. Found.*, 73 F.4th at 310 (holding "[j]ust because" out-of-state residents "agreed to" pay higher tuition "does not mean they are not, in fact, harmed by the 900% higher price"); *see also* 13A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 3531.5 (3d ed. 2008 & Supp. 2022) ("Standing is not defeated merely because the plaintiff has in some sense contributed to his own injury …. Standing is defeated only if … the injury is so completely due to the plaintiff's own fault as to break the causal chain."). That VRLC, like any other organization, voluntarily entered its field does not defeat standing.

Finally, VRLC's nonprofit status does not exempt it from these ordinary principles of standing. Just like a gas company or bookseller, an organization like VRLC has standing where the conduct challenged in the suit causes it to lose clients, imposes costs, makes delivering its services more time- and resource-

intensive, or otherwise impairs its "core business activities." *All. for Hippocratic Med.*, 602 U.S. at 395; *see also Nairne v. Landry*, 151 F.4th 666, 681 (5th Cir. 2025) (holding organization had standing to challenge law that required it to "reallocate[] staff, and devote[] additional time and resources" to counteracting law's effects) (mandate currently withheld); *Tex. Trib. v. Caldwell Cnty.,* 121 F.4th 520, 527 (5th Cir. 2024) (holding organizations had standing to challenge policy that "frustrate[d]" their work "to keep the public informed regarding a crucial part of the criminal justice system" and "prevented" one from doing an aspect of its mission-critical work supporting arrestees).

In *Alliance for Hippocratic Medicine*, the Supreme Court reaffirmed its earlier decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), where it held that a housing-counseling organization had standing because the defendant's conduct—lying about apartment availability based on race—"perceptibly impaired [its] ability to provide" its "services" and created a "consequent drain on the organization's resources." "Critically," *Alliance* noted, the *Havens* plaintiff "not only was an issue-advocacy organization, but also operated a housing counseling service" that the defendant harmed. 602 U.S. at 395 (quoting *Havens*, 455 U.S. at 379). This contrasted with the *Alliance* organizational plaintiff, a policy organization that tried to "spend its way into standing simply by expending money to gather information and advocate against the defendant's

action." *Id.* at 394. *Alliance* clarified that plaintiffs cannot base standing on their own advocacy against the defendant. *See id*. But *Alliance* reaffirmed that, as in *Havens*, where a defendant impairs a plaintiff's preexisting business, the plaintiff has standing to challenge that impairment. *See id*. at 395.

This Court also recently held that an organization could not, like the *Alliance* plaintiff, premise standing on its education and policy activities advocating against the defendant's actions. *Deep S. Ctr. for Env't Just. v. U.S. Env't Prot. Agency*, 138 F.4th 310, 318 (5th Cir. 2025). It noted that the defendant had done nothing to "detract" from the organization's "routine activities" and so had not harmed it. *Id* at 320. The Court withheld *Deep South*'s mandate while it rehears en banc another organizational-standing case. ECF No. 117 at 1-6. As Carroll pointed out, "until the mandate issues, a judgment is not final anyway, so litigants rely on it at their peril." ECF No. 91 at 5. But even if that judgment were final, it would not apply here for two reasons. The first is that this case fits under *Havens*'s facts, not *Alliance*'s. VRLC, "[c]ritically," is "not only … an issue-advocacy organization, but also operate[s] a … counseling service" that is being harmed. *Alliance*, 602 U.S. at 395. Second, the vacatur is impairing and detracting from VRLC's routine activities in numerous ways, including by causing it to lose clients and incur expenses from the additional time spent representing clients under the

requirements of the 2020 Rule, so under *Deep South*'s terms, VRLC establishes standing. ROA.5035-47.[7]

Additionally, *Deep South* held that "Article III requires 'direct interference'" to establish standing. *Id*. at 319. That is no problem here, as "[a] high risk of economic injury is sufficiently … direct" to establish injury, and VRLC is suffering economic injury in the form of drains on its staff time and resources. *Tex. Corn Producers*, 141 F.4th at 696 (quotation omitted); ROA.5036-52 ("The drain on VRLC's resources is already stretching and will continue to stretch its ability to provide legal services for victims beyond current funding parameters."). And even if this language from *Deep South* could be read as foreclosing the type of "downstream or upstream economic injuries" that *Alliance* recognized as establishing standing, 602 U.S. at 384, the Supreme Court's post-*Deep South* decision in *Diamond Alternative Energy* clarified that downstream injuries due to regulation remain as viable as ever. 145 S. Ct. at 2135.

In sum, where government action is impairing organizations' core business activities and detracting from their ability to carry out their services, they have standing to challenge it—just as gas or book sellers would. Thus, for example, an

[7] Relatedly, the district court puzzlingly held that "VRLC that does not contend that the Court's vacatur of the Final Rule has perceptibly impaired its ability to provide legal representation to victims of sex-based harassment," ROA.5548, but of course, that is incorrect. The vacatur is chilling clients from obtaining VRLC's services to assert Title IX complaints, impairing VRLC's ability to provide its servies. ROA.5035-36.

organization with a mission of "voter outreach and civic education" had standing to challenge a law restricting English-limited voters' use of interpreters at the polls because the law "frustrat[ed] and complicat[ed] its routine community outreach activities," reducing the number of people it could help and impairing its core activities of getting out the vote. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610-12 (5th Cir. 2017). Voting-rights organizations had standing to challenge laws that required them to undertake "previously unplanned response strategies" to counteract the laws' effects depressing voter engagement. *Nairne*, 151 F.4th at 681. News and advocacy organizations had standing to challenge a policy that impaired their ability to carry out their missions of informing the public about the local criminal-justice system and supporting arrestees. *Tex. Trib.,* 121 F.4th at, 527.

Likewise, the Republican National Committee had standing to sue a state election board that "stymied" its "core mission" of combatting election fraud and getting out the vote. *Republican Nat'l Comm. v. N.C. State Bd. of Elections*, 120 F.4th 390, 397 (4th Cir. 2024). A legal organization serving military members and veterans had standing where the government frustrated its goal of representing veterans by, among other things, "causing its attorneys to lose veteran clients." *Mil.-Veterans Advoc. v. Sec'y of Veterans Affs*., 130 F.4th 965, 970 (Fed. Cir. 2025). And a nonprofit that advocates for public employees to refrain from paying

union dues had standing to sue unions for rejecting dues-revocation forms it filed for employees because, by rejecting the forms, the union was impairing one of its core activities. *Freedom Found. v. Int'l Bhd. of Teamsters Loc. 117*, No. 23-3946, 2024 WL 5252228, at *1 (9th Cir. Dec. 31, 2024). VRLC has standing for the same reason: the vacatur is impairing its ability to carry out its core services.

B. The vacatur is causing VRLC's injuries, and narrowing it will redress those injuries.

A "predictable effect" is all that is required to show causation, and the 2024 Rule's vacatur and resulting reversion to the 2020 Rule are predictably—indeed, inevitably—harming VRLC. *Dep't of Commerce v. New York*, 588 U.S. 752, 768 (2019) (causation established based on "predictable effect of Government action on the decisions of third parties"). The 2020 Rule engineered the chill on reporting and obstacles to obtaining fair and accurate investigations that are harming VRLC. It did so by defining "sexual harassment" narrowly, requiring schools to dismiss Title IX complaints that do not meet that narrow standard, and imposing more unfair and burdensome procedures on survivors. Indeed, the 2020 Rule expressly anticipated that it would decrease the number of Title IX investigations. *See* 85 Fed. Reg. 30,566. The 2024 Rule ameliorated these harms. *See* ROA.5032-41 (VRLC declaration describing injuries to its services from 2024 Rule's vacatur and revival of 2020 Rule); 89 Fed. Reg. 33,476-78 (noting commenters on the 2024 Rule described how the 2020 Rule "fail[s] to protect complainants" and how

"amendments [we]re required to fully effectuate Title IX's sex discrimination prohibition"). Vacating the 2024 Rule *automatically*—not just predictably—resurrected those barriers, thus harming VRLC and its clients. *See id*.

Narrowing the relief granted in this case would redress those injuries. *See* ROA.5034-51 (VRLC declaration explaining how 2024 Rule's vacatur is harming its business model). A Supreme Court decision in this matter might ultimately be required for full redress because of the Kentucky district court's parallel vacatur ruling, which VRLC is also seeking to appeal. *See supra* p.9; ECF No. 83. But that hardly defeats redressability. *See United States v. Vargas*, 74 F.4th 673, 680 (5th Cir. 2023) (lower "courts must follow directly applicable Supreme Court precedent"); *Hollis v. Lynch*, 827 F.3d 436, 442 (5th Cir. 2016), *abrogated in part on other grounds by United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024) (plaintiff established causation and redressability in challenge to federal machine-gun ban despite existence of unchallenged state machine-gun ban because if court held "federal law[] unconstitutional on Second Amendment grounds, it is likely that [the] state law[] would also be unconstitutional"). And a ruling from this Court vacating the lower court's order would remove an obstacle from VRLC obtaining complete relief, reducing the risk it will obtain no relief at all. This satisfies redressability. *See Czyzewski*, 580 U.S. at 464 (holding parties had standing because a decision in their favor would restore their lost "chance to obtain a

settlement"); *Consumer Data Indus. Ass'n v. Texas*, No. 21-51038, 2023 WL 4744918, at *6 (5th Cir. July 25, 2023) (reducing "total amount of risk" satisfies redressability); *Sanchez v. R.G.L.,* 761 F.3d 495, 506 (5th Cir. 2014) (redressability satisfied because "a court order … has the potential, in whole or in part, to redress the claimed injury").

II. VRLC is entitled to intervention, whether mandatory or permissive.

A. Mandatory intervention

A "court must permit anyone to intervene who" meets four requirements: (1) timeliness; (2) an "interest" in "the subject of the action"; (3) impairment of that interest absent intervention; and (4) inadequate representation by existing parties. Fed. R. Civ. P. 24(a); *Texas I*, 805 F.3d at 657. Rule 24 establishes a "broad policy favoring intervention," *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016), and is "to be liberally construed," with "doubts resolved in favor of the proposed intervenor." *Entergy Gulf States La., L.L.C. v. U.S. E.P.A.*, 817 F.3d 198, 203 (5th Cir. 2016) (quotation omitted). VRLC easily meets all four requirements—a point Defendants have not disputed. And Carroll does not dispute that VRLC shows impairment and that its interests are now wholly unrepresented.

This Court may rule on intervention in the first instance. *See Okla. Firefighters Pension & Ret. Sys. v. Six Flags Ent. Corp.,* No. 23-10696, 2024 WL

1674125, at *5 (5th Cir. Apr. 18, 2024) (reversing district court's holding that putative intervenor lacked standing and holding in first instance that it was entitled to intervene); *Ford*, 242 F.3d at 239-41 (addressing Rule 24(a) factors in first instance and reversing, holding putative intervenor entitled to intervene).

1. VRLC timely moved to intervene when it became clear Defendants would not appeal, leaving its interests unrepresented.

"Timeliness is not limited to chronological considerations but is to be determined from all the circumstances." *Wal-Mart,* 834 F.3d at 565 (quotations omitted). Whether a motion to intervene is timely depends on (1) how long "the would-be intervenor actually knew or reasonably should have known of its interest in the case before" moving to intervene; (2) any prejudice to existing parties due to failure to move to intervene at its earliest opportunity; (3) prejudice "the would-be intervenor may suffer if intervention is denied"; and (4) "unusual circumstances militating either for or against a determination that the application is timely." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (reversing lower court and holding motion to intervene timely where movants did not discover until eight years into case, after injunction issued, that their interests were adversely affected).

First, VRLC's moving to intervene just three weeks after learning its interests were unrepresented supports intervention. The question is whether it "sought to intervene as soon as it became clear that [its] interests would no longer

be protected by the parties in the case." *Cameron v. EMW Women's Surgical Ctr., P.S.C.,* 595 U.S. 267, 279-80 (2022) (quotations omitted). As this Court clarified, the clock does not run from "the date on which the would-be intervenor became aware of the pendency of the action," as that would only encourage "premature intervention that wastes judicial resources." *Sierra Club*, 18 F.3d at 1206. Thus, an intervention motion filed in the appeal period after final judgment, even many years into litigation, can be timely if filed soon after the intervenor learned the existing parties would not appeal. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 390 (1977). Intervention can even be timely after trial, final judgment, and a decision on appeal, if the existing parties decline to petition for rehearing en banc or a writ of certiorari. *Cameron,* 595 U.S. at 280.

VRLC did exactly what was required: it moved to intervene within the appeal window after learning the existing parties would not appeal. *See id*.; *McDonald*, 432 U.S. at 390. Two days before the district court here issued its February 19 vacatur order, Defendants submitted a joint status report in this case saying they had not decided whether they would continue to defend the 2024 Rule in the Kentucky case by appealing that district court's vacatur ruling. *See* ROA.4863-64, ECF No. 85 at 1-2. Then, on March 7, Defendants opposed VRLC's motion to intervene in Kentucky on the grounds that they had "not yet

made a final determination concerning appeal" there, and if they appealed, they would adequately represent VRLC's interests. ROA.5057-58.

It was not until the March 10 appeal deadline passed with no appeal from Defendants that it became clear VRLC's interests were no longer represented in either matter. *See* ROA.5071-72 (March 11 filing in which Defendants explained deadline to appeal was March 10 and they had declined to appeal). At that point, when "it became clear that [its] interests would no longer be protected by the parties in the case," *Cameron,* 595 U.S. at 279-80 (quotations omitted), VRLC's entitlement to intervene crystallized, starting the timeliness clock.

Accordingly, VRLC moved to intervene in this case, anticipating that Defendants would likewise fail to appeal and protect its interests here, just three weeks after Defendants made clear they would not appeal. This is more than timely. *See Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996) (motion to intervene forty-seven days after learning of interest timely); *Ass'n of Pro. Flight Attendants v. Gibbs*, 804 F.2d 318, 321 (5th Cir. 1986) (motion timely when filed five months after learning of interest); *In re Lease Oil Antitrust Litig*., 570 F.3d 244, 248 (5th Cir. 2009) (granting motion to intervene filed almost two years after intervenor learned of interest). Even if the clock started running on February 17, when Defendants said they had not decided if they would appeal, VRLC intervened just forty-two days later, which would also be timely. *See id*.

Any argument that VRLC should have attempted to intervene much earlier fails. If it had done so, the parties could have defeated that attempt on the grounds that Defendants represented its interests—as *Defendants actually argued* when VRLC moved to intervene in the Kentucky matter before Defendants announced the decision not to appeal.[8] ROA.5057-58. And lack of adequate representation is no toothless requirement. This Court recently held an official was an adequate representative despite his having issued an order to "plan steps 'to suspend, revise, or rescind' the Rule" at issue, because while his "order might lead to a future shift in … litigation approach," that had "not yet happened." *Louisiana v. Burgum*, 132 F.4th 918, 923 (5th Cir. 2025). An argument that VRLC should have intervened earlier is heads-I-win-tails-you-lose: intervene too early and you're adequately represented; intervene too late and you're untimely. That, of course, is not the law. *See Sierra Club*, 18 F.3d at 1206.

Second, because VRLC moved to intervene quickly after discovering Defendants would not appeal—in other words, soon after it became possible for it to intervene—there is no prejudice to the parties. "The only proper concern" on this prong "is how much more prejudice would come from" intervening now versus earlier. *In re Lease Oil Antitrust Litig.*, 570 F.3d 248. "Any potential

[8] VRLC was forced to move to intervene in the Kentucky matter before receiving confirmation that Defendants would not appeal because they had to move before that earlier appeal window closed—and then, of course, they were forced to contend with Defendants arguing adequate representation.

prejudice caused by the intervention itself is irrelevant, because it would have occurred regardless of whether the intervention was timely." *Id*. A motion to intervene to appeal, filed in the appeal window on discovering that the existing parties will not represent the intervenor's interests, causes no prejudice. *See McDonald*, 432 U.S. at 394 (holding existing party could "hardly contend that its ability to litigate the issue was unfairly prejudiced simply because [of] an appeal"). In *Cameron*, the Supreme Court held that the existing parties were not prejudiced by a motion to intervene to file petitions for rehearing en banc and certiorari. 595 U.S. at 281-82. The Supreme Court faulted the lower court for failing to heed *McDonald*'s holding that no prejudice flows from having to litigate an appeal that an existing party could have taken but chose not to. *See id*. This motion, like those in *McDonald* and *Cameron*, causes no prejudice.

Third, VRLC will be prejudiced if its motion is denied. It is suffering significant harm from the 2024 Rule's vacatur and resulting reinstatement of the 2020 Rule. *See* ROA.5033-51; *supra* Section I.A. Apart from intervening here, it has few other avenues to preserve the 2024 Rule's protections. This degree of prejudice strongly militates in favor of intervention. *In re Lease Oil*, 570 F.3d at 249 (granting Texas intervention and noting that "[i]f the motion is denied, Texas's opportunity to appeal would be quite limited"); *Ford*, 242 F.3d at 240 (holding movant established prejudice because "any potential remedy" in a future suit "will

be restricted by the … order issued here"); *Edwards*, 78 F.3d at 1002 (granting intervention where, "without intervention," intervenors "may be precluded from raising any subsequent independent challenge").

Finally, unusual circumstances militate in favor of intervention. Because the Court vacated the entire 2024 Rule nationwide and did not sever only the provisions it found unlawful or limit the relief to the parties, it effectively adjudicated the rights and interests of numerous parties not before the court, including victims of sex-based harassment and the organizations that advocate for them, like VRLC. It did so without hearing from any such victims or considering whether that harm was necessary to remedy Carroll's alleged injuries. And Defendants abruptly ceased defending the Rule, leaving no original party that represents VRLC's interests. These unusual circumstances support allowing VRLC to intervene to defend the 2024 Rule's protections.

2. Denying VRLC intervention would impair its legal interests.

VRLC has more than sufficient legal interests to intervene. Such interests must be "concrete" and "personalized" but "need not be legally enforceable." *Texas I,* 805 F.3d at 659 (potential recipients had sufficient interests in DAPA program to defend it; noting leaders of charter-amendment drive had "specific" interest in defending it). Moreover, the "interest requirement may be judged by a more lenient standard" in a case involving "a public interest question" that is

"brought by a public interest group," as this one is. *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 305–06 (5th Cir. 2022) (quotations omitted). The harms to VRLC that establish standing, see *supra* Section I, give it more than sufficient interests to intervene. *See id.* at 306 & n.3 (group could intervene to challenge law that forced it to "expend significant resources" and "change[d] the legal landscape" for its work; expressing no view on whether this met the bar for standing); *Wal-Mart*, 834 F.3d at 566 n.3 (suggesting that "movant who shows standing is deemed to have a sufficiently substantial interest to intervene").

Moreover, as no party has disputed, disposition of this matter without intervention will impair VRLC's ability to protect those interests. Fed. R. Civ. P. 24(a)(2). Proposed intervenors need only show "that if they cannot intervene, there is a possibility that their interest could be impaired," not that impairment is certain. *La Union*, 29 F.4th at 307. VRLC's interests are being impaired, among other reasons, because, like in *La Union*, the "relief sought by the plaintiffs" is forcing VRLC "to expend resources," and the provisions at issue benefitted VRLC and will "be taken away if the plaintiffs prevail." *Id.* (holding political committees entitled to intervene where plaintiffs' requested relief would force them to expend resources and would take away rights the challenged law conferred on them).

If VRLC is not permitted to intervene to appeal the vacatur, that will impair its ability to protect its interests because it will be unable to invoke or defend the

2024 Rule's protections in subsequent proceedings. *See Sierra Club*, 18 F.3d at 1207 (recognizing "stare decisis effect" of court's judgment can impair intervenor's interest); *Black Fire Fighters Ass'n of Dallas v. City of Dallas*, 19 F.3d 992, 994 (5th Cir. 1994) (firefighters permitted to intervene to challenge consent decree because it would interfere with their opportunities going forward). Finally, "[w]ithout these intervenors' participation, [Defendants] might well be inclined to settle the litigation on terms that preserve the adverse ruling on the" 2024 Rule, making it harder to protect their interests going forward. *City of Houston v. Am. Traffic Sols., Inc.,* 668 F.3d 291, 294 (5th Cir. 2012).

3. VRLC's interests are now unrepresented.

Because Defendants have stopped defending the 2024 Rule, VRLC's interests are now undisputedly unrepresented. The burden of showing inadequate representation is "minimal"; the intervenor need only show that its interests "may be" inadequately represented. *Entergy Gulf States*, 817 F.3d at 203 (quotations omitted). VRLC's interests are suddenly diametrically opposed to those of all the existing parties: it seeks to defend portions of the 2024 Rule, which no party does. *See Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014) (holding "lack of unity in all objectives, combined with real and legitimate additional or contrary arguments, is sufficient to demonstrate that the representation may be inadequate").

B. Permissive intervention

VRLC also satisfies the even more lenient requirements for permissive intervention. A "court may permit anyone to intervene who" timely moves to intervene and "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). The court assesses "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id*. at 24(b)(3). It may also consider factors such as "whether the intervenors' interests are adequately represented by other parties" and whether the intervenors "will significantly contribute to full development of the underlying factual issues in the suit." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co*., 732 F.2d 452, 472 (5th Cir. 1984).

VRLC's motion is timely because, as explained *supra* Section II.A.1, it moved to intervene just weeks after Defendants declined to appeal the 2024 Rule's vacatur in *Tennessee*, making clear that they would no longer defend the Rule and would leave VRLC's interests unrepresented here. *See U.S. ex rel Hernandez*, 80 F.4th at 578 (district court erred in holding movant untimely where he moved to permissively intervene several years into case, because relevant question is whether he intervened soon after learning his interests had become unprotected).

Next, VRLC has a defense that shares common questions of law with the main action—a requirement this Court "construe[s] liberally." *Newby v. Enron*

Corp., 443 F.3d 416, 422–23 (5th Cir. 2006). VRLC easily satisfies this requirement because it intends to appeal the district court's vacatur of the 2024 Rule and press defenses that Defendants argued for below and could have presented on appeal.

Intervention will not unduly delay or prejudice existing parties' rights. As explained *supra* Section II.A.1, intervention will cause no undue delay or prejudice because VRLC intends to pick up where Defendants left off. And on the flip side, the benefits of allowing VRLC to challenge the vacatur are significant—narrowing the relief granted in this matter would revive protections for thousands of student survivors of sex-based harassment, including sexual assault, domestic violence, dating violence, and stalking, nationwide.

Finally, as discussed above, VRLC's interests are no longer represented by other parties. And now that Defendants have ceased defending the Rule, VRLC's arguments will significantly contribute to the development of the issues. *Id*. The factors therefore all support permissive intervention.

III. The definition of sex discrimination and de minimis harm standard, Sections 106.10 and 106.31(a)(2), should be severed and the remainder of the 2024 Rule should go into effect.

Time and again, this Court has held that where a rule expressly says that a challenged provision is severable, and the rule could operate without that provision, it should be severed and the remainder of the rule should stay in effect.

See Texas II, 126 F.4th at 421; *Nat'l Ass'n of Mfrs. v. U.S. Sec. & Exch. Comm'n*, 105 F.4th 802, 816 (5th Cir. 2024). But the district court ignored that command, vacating the entire Rule with no mention—let alone analysis—of that controlling precedent, despite Defendants having briefed it. ROA.4873-74 (district court opinion); ROA.1754-58, 4833-36 (Department's summary-judgment severability briefing). A "district court abuses its discretion when it does not consider a relevant factor that should have been given significant weight." *Weathers v. Houston Methodist Hosp.,* 116 F.4th 324, 328 (5th Cir. 2024) (quotation omitted). The district court committed legal error, per se abusing its discretion, in failing to consider the severability factors this Court has set out.

Because the definition of sex discrimination and de minimis harm standard, Sections 106.10 and 106.31(a)(2), are explicitly severable under the Rule and the Rule can operate without them, they should be severed and the remainder of the 2024 Rule should go into effect. *See Texas*, 126 F.4th at 420 (holding "district court erred by not severing" provision held unlawful). Carroll bears the burden of showing the Rule is not severable, and it cannot do so. *See Nat'l Ass'n of Mfrs.*, 105 F.4th at 816 (holding party challenging rule failed to show that it was not severable). The definition of hostile-environment harassment in Section 106.2 and the remaining provisions Carroll challenged are lawful, and the district court erred

in vacating them. The Court should permit them to go into effect with the rest of the lawful Rule.

A. The definition of sex discrimination and de minimis rule, Sections 106.10 and 106.31(a)(2), are severable and should be severed.

This Court will generally "adhere to the text of a severability clause." *Texas II*, 126 F.4th at 419 (quotation omitted). "In the context of agency rulemaking, a two-prong inquiry guides" the Court's severability analysis: (1) "the intent of the agency"; and (2) "whether the remainder of the regulation could function sensibly without the stricken provisions." *Id*. (cleaned up). Under both prongs, the definition of sex discrimination and de minimis rule, Sections 106.10 and 106.31(a)(2), can and should be severed. The Rule made clear they were severable. And the 2020 Rule contains no analogous provisions, so if they are dropped from the 2024 Rule, then the 2024 Rule will function no less sensibly than the 2020 Rule. No party has argued that the 2020 Rule does not function sensibly without these provisions.

The Department intended these provisions to be severable; each of the Rule's seven subparts contains a severability clause. *See* 34 C.F.R. §§ 106.9, 106.16, 106.24, 106.48, 106.62, 106.72, 106.82. The Rule also discussed at length the severability of each individual provision and expressly stated that "each of the provisions" is "intended to operate independently" and that "the potential invalidity of one provision should not affect the other provisions." 89 Fed. Reg. at

33,848. It included this lengthy discussion to "to remove any 'doubt that [it] would have adopted the remaining provisions of the Final Rule' without any of the other provisions, should any of them be deemed unlawful." *Id*. (quoting *Mayor of Baltimore v. Azar*, 973 F.3d 258, 292 (4th Cir. 2020) (en banc) (citation and quotation marks omitted)).

As this Court has held, a severability clause "dispels any doubt" about the agency's intent regarding severability. *Nat'l Ass'n of Mfrs.*, 105 F.4th at 816 (holding severability clause alleviated any doubt about whether agency would have proceeded without challenged provision). In fact, just this year, this Court reversed a district court that had "unduly ignore[d] the severability clause" in a rule. *Texas*, 126 F.4th at 419. Yet that is exactly what the district court did here. It "unduly ignore[d] the severability clause[s]" and this Court's instruction to generally adhere to the text of such clauses, per se abusing its discretion. *Texas*, 126 F.4th at 419; *see also In re Chamber of Com. of U.S. of Am.,* 105 F.4th 297, 308 (5th Cir. 2024) (holding district court abused discretion where its "analysis clashes head-on with our recent decision … which provided significant guidance on" relevant issue).

Next, the remainder of the Rule could function sensibly without the definition of sex discrimination and de minimis rule, Sections 106.10 and 106.31(a)(2). This analysis does not depend on whether the challenged provisions

are subjectively the "heart" of the rule if they are objectively "legally distinct and can be decoupled." *Texas*, 126 F.4th at 420. This Court recently reversed a decision where a district court failed to recognize this. *Id*. But again, the district court here failed to follow this Court's command. The 2024 Rule expressly discussed Section 106.10's severability. *See* 89 Fed. Reg. at 33,848. And for good reason: The now-operative 2020 Rule contains no analogous provision defining the scope of sex discrimination, so severing Section 106.10 from the 2024 Rule will make the 2024 Rule function no less sensibly than the 2020 Rule. Carroll does not contend that the 2020 Rule does not function sensibly without a section defining the scope of "discrimination on the basis of sex," and it cannot contend that the 2024 Rule will not function sensibly without one, either.

Similarly, Section 106.31(a)(2), the de minimis harm rule, has no analogue in the 2020 Rule. Section 106.31(a)(1) in both the 2020 and 2024 Rules states that generally, "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination" in education programs and activities. The 2024 Rule added, in Section 106.31(a)(2), that where "Title IX or this part permits different treatment or separation on the basis of sex, a recipient must" generally "not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm," and that "a practice that prevents a person from participating in

an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex." Severing this second provision that the 2024 Rule added would, again, make the 2024 Rule function no less sensibly than the 2020 Rule. And again, no party contends that the 2020 Rule does not function sensibly without Section 106.31(a)(2)'s de minimis harm rule.

Finally, while the Supreme Court declined, on a limited record in an emergency posture, to partially stay injunctions against the 2024 Rule in *Department of Education v. Louisiana*, 603 U.S. 866 (2024), that does not provide a reason to, on summary judgment, disregard the Rule's express severability provisions and the fact that it could function sensibly if severed. A "stay order is not a ruling on the merits, but instead simply stays the District Court's injunction *pending a ruling on the merits*." *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring). Because *Louisiana* opined on neither severability factor, it does not weigh on the severability analysis. Likewise, this Court's denial of the government's motion to partially stay an injunction of the Rule has no bearing here because there, the government had insufficiently briefed severability. Thus, the Court would have had to "parse the 423-page Rule [itself] to determine the practicability and consequences of a limited stay," which it would not do.

Louisiana v. U.S. Dep't of Educ, No. 24-30399, 2024 WL 3452887, at *2 (5th Cir. July 17, 2024).

B. The definition of hostile-environment harassment and remaining provisions Carroll challenges are lawful.

Finally, Carroll challenges a fistful of provisions that made the 2024 Rule more protective for survivors—and in some cases for respondents, too—and in so doing better effectuated Title IX's demands than the 2020 Rule. These include the 2024 Rule's use of a definition of hostile-environment harassment for administrative-enforcement purposes that was nearly identical to the definition the Department had enforced for decades, which the Supreme Court has approvingly cited. They also include the 2024 Rule's requirement that schools take prompt and effective action to address sex discrimination "when notified of conduct that reasonably may constitute sex discrimination." § 106.44(f)(1). These provisions reflect reasoned judgment and should be upheld.[9]

The Department acted reasonably—not remotely arbitrarily or capriciously—and well within the bounds of the First Amendment in defining hostile-environment sex-based harassment for administrative-enforcement purposes as "[u]nwelcome conduct that, based on the totality of the circumstances, is subjectively and objectively offensive *and* is so severe *or* pervasive that it limits

[9] Each provision is also expressly severable and should be severed if the Court finds it unlawful. *See* 89 Fed. Reg. at 33,848 (discussing severability).

or denies a person's ability to participate in or benefit from the recipient's education program or activity." 89 Fed. Reg. 33,884 (emphases added). On arbitrary-and-capricious review, "a court asks not whether it agrees with the agency decision, but rather only whether the agency action was reasonable and reasonably explained." *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 180 (2025).

This definition is reasonable for multiple reasons, as the Department more than reasonably explained. *See* 89 Fed. Reg. 33,490-518. First, it closely mirrors definitions of hostile-environment harassment applied in "numerous civil rights laws, including Title VII," which would "reduce confusion and provide consistency for students and employees." 89 Fed. Reg. at 33,497, 33,508. It also closely aligns with the Department's 1997 definition of harassment, which it enforced for over two decades before the 2020 Rule. That definition, which memorialized the Department's "longstanding … policy and practice," stated that "sexual harassment must be sufficiently severe, persistent, *or* pervasive that it adversely affects a student's education *or* creates a hostile or abusive educational environment." Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12034-35, 12045 (Mar. 13, 1997) (emphasis added).

Moreover, Section 106.2's definition of hostile-environment harassment "more closely aligns with the hostile environment analysis that [the Department] applies to complaints of harassment based on race, color, national origin, or disability for administrative enforcement purposes," which defines harassment as conduct that is so "severe, pervasive, *or* persistent so as to interfere with or limit a student's ability to participate in or benefit from the services" of the school. 89 Fed. Reg. 33,642.[10] Aligning the standards makes them more administrable, particularly in cases involving both sex- and race- or disability-based harassment. *See id*.

This definition is also consistent with the Supreme Court's decision in *Davis*, which issued two years following that 1997 guidance, expressly discussed it, and cast no doubt on it. As the Department explained, "[t]he Court in *Davis* did not set forth any definition of hostile environment sex-based harassment—it articulated the circumstances under which sexual harassment is sufficiently serious to create institutional liability for private damages when a recipient is deliberately indifferent to it." 89 Fed. Reg. 33,498 (citing 526 U.S. at 639). *Davis*'s imposition of a heightened standard in private damages actions flowed from the requirement "that funding recipients have notice of their potential liability" to such damages

[10] Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994); *see also* U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter on Prohibited Disability Harassment (July 25, 2000), https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html.

actions. 526 U.S. at 641. This is fundamentally different from administrative enforcement proceedings, where sanctions can be imposed only after notice and unsuccessful efforts to obtain compliance. *See Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 290 (1998); *see also Davis*, 526 U.S. at 649 (observing that notice requirement "bears on the proper definition of 'discrimination' in the context of a private damages action"). In fact, *Davis* "repeatedly and approvingly cited the Department's then-recently published guidance regarding sexual harassment." 89 Fed. Reg. 33,498 (citing 526 U.S. at 647–48, 651). As the 2024 Rule's hostile-environment harassment definition closely mirrored that guidance, it comfortably coexists with *Davis*, just as its pre-2020 predecessor did.

Underscoring this point, while *Davis* supplies the standard for private damages suits for race-based harassment, the Department's administrative-enforcement standard for race-based harassment is—again—nearly identical to the pre-2020 and 2024 Title IX standards. *See* 89 Fed. Reg. 33,642 (administrative-enforcement standard for race-based harassment); *Fennell v. Marion Indep. Sch. Dist*., 804 F.3d 398, 408 (5th Cir. 2015) (*Davis* standard applies to Title VI damages suits for race-based harassment). There is no reason why the administrative-enforcement standard for race-based harassment claims may differ from *Davis*'s private-litigation standard, but the administrative-enforcement standard for sex-based claims under Title IX may not.

The Supreme Court's denial of applications to partially stay injunctions of the 2024 Rule is not to the contrary otherwise because 106.2's merits were not before the Court. *See* Br. for Applicant, *U.S. Dep't of Educ. v. Louisiana*, 2024 WL 3510278, at *4 (No. 24A78). The government did not seek to stay 106.2's injunction, forgoing "emergency" review on its merits and instead asking the Court to partially stay the injunction as to provisions of the Rule that the plaintiffs had not challenged. *See id*. Nor did this Court rule on 106.2's merits in *Louisiana*. 2024 WL 3452887, at *1.

Next, the 2024 Rule's definition of hostile-environment harassment is not overbroad under the First Amendment. "[A] law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021) (citation omitted). The hostile-environment harassment definition's plainly legitimate sweep vastly outstrips any possible outlying unconstitutional applications. First, a substantial portion of hostile-environment harassment is non-speech conduct such as physical assaults, which do not implicate the First Amendment at all. 89 Fed. Reg. 33,884; *see Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (holding "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment"); *see also, e.g.*, *Loera v. Kingsville Indep. Sch. Dist.,* 151 F.4th 813, 817 (5th Cir.

2025) (teacher sexually abused student); *Doe v. Edgewood Indep. Sch. Dist.,* 964 F.3d 351, 356 (5th Cir. 2020) (school peace officer sexually assaulted and impregnated student); *Salazar v. S. San Antonio Indep. Sch. Dist.,* 953 F.3d 273, 275 (5th Cir. 2017) (principal "repeatedly molested" student); *Howell v. Austin Indep. Sch. Dist.,* 323 F. App'x 294, 294 (5th Cir. 2009) (student "alleged that he was sexually abused by a school contractor").

Next, much hostile-environment harassment is the kind of "lewd," "vulgar," "indecent," and "plainly offensive" speech that receives no First Amendment protection in school. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *see also, e.g., I.F. v. Lewisville Indep. Sch. Dist.,* 915 F.3d 360, 373 (5th Cir. 2019) (classmates called student a "whore," a "slut," and student she said raped her "wore the pants that he raped [her] in to school, which had [her] blood on them from intercourse, and stood on the lunch table and said, these are the pants that I took [her] virginity in"); *Roe v. Cypress-Fairbanks Indep. Sch. Dist*., 53 F.4th 334, 343 (5th Cir. 2022) (classmate said he had "a tool," meaning a gun, "coming for" student, and other classmates called her "scum," told her to kill herself, and "harassed [her] to the point of attempted suicide"). And even to the extent that the Rule requires schools to regulate protected speech, schools may do so to prohibit "serious or severe bullying or harassment targeting particular individuals," which

is exactly what the 2024 Rule asks of them. *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 188 (2021).

Likewise, schools may regulate sex-based harassment by educators, as such "speech that does not serve an academic purpose is not of public concern" and so is unprotected. *Trudeau v. Univ. of N. Tex.*, 861 F. App'x 604, 610 (5th Cir. 2021) (professor's "comments relating to students' sex lives [and] encouraging nudity in class … did not involve a matter of public concern"); *Buchanan v. Alexander*, 919 F.3d 847, 854 (5th Cir. 2019) (professor's "profanity and discussion of professors' and students' sex lives" fell outside First Amendment protection). The definition of hostile-environment harassment, in short, has a vast legitimate sweep that either does not implicate or does not violate the First Amendment. Any outlying unconstitutional applications do not suffice to show overbreadth.[11]

It also hardly raises First Amendment concerns that, under the 2024 Rule, schools are obligated to address hostile environments in their education programs and activities "even when some conduct alleged to be contributing to the hostile environment occurred outside" of them. 89 Fed. Reg. at 33,530. "The school's

[11] Carroll's concerns around compelled speech, viewpoint discrimination, and vagueness arise from 106.10's definition of sex-based discrimination as including discrimination based on gender identity. ROA.1200-02, 3831-35. Section 106.2's definition of hostile-environment harassment does not compel any speech or discriminate based on viewpoint; it just requires schools to address "serious or severe bullying or harassment targeting particular individuals," as the First Amendment permits. *Mahanoy,* 594 U.S. at 188. And Carroll's concerns about 106.10's vagueness would be remedied if Section 106.10 is severed.

regulatory interests remain significant in some off-campus circumstances," including student-on-student bullying and harassment. *Mahanoy*, 594 U.S. at 188.

Next, it is hardly arbitrary or capricious that the 2024 Rule requires schools to "take prompt and effective action to prevent, eliminate, and remedy sex discrimination occurring in" their programs by taking certain steps "when notified of conduct that reasonably may constitute sex discrimination," such as offering supportive measures and initiating grievance procedures. § 106.44(f)(1). This replaced the 2020 Rule's requirement that a school with "actual knowledge" of sexual harassment had to respond in a manner that was "not deliberately indifferent," which "enable[d] recipients to ignore sexual harassment if it is reported to the wrong employee, [and] to respond inadequately." 89 Fed. Reg. 33,559.

As the Department explained, the 2024 Rule's "duty to take prompt and effective action is a standard familiar to recipients from the Title IX regulations issued in 1975 as well as OCR's prior guidance and decades of the Department's enforcement of Title IX predating the 2020 amendments." 89 Fed. Reg. 33,591. Moreover, this provision's requirements will "best effectuate Title IX's nondiscrimination mandate." *Id*. at 33,588. It is also consistent with the requirements for race- and disability-based harassment. See U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26,

2010), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/dcl-factsheet-201010.pdf (noting that under Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, and Title VI of the Civil Rights Act, if "harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, and prevent its recurrence"). It is reasonable and administrable to use similar standards for sex, race, and disability discrimination and so should be upheld. *Seven Cnty. Infrastructure Coal.*, 605 U.S. at 180.

Next, Carroll's arguments regarding the 2024 Rule's rules around grievance initiation absent a complaint, § 106.44(f)(1)(v), are baffling since the 2020 Rule also permitted and sometimes required schools "to investigate and potentially sanction a respondent in situations where the complainant does not wish to file a formal complaint." 85 Fed. Reg. 30,120. But in fact, the 2024 Rule provided more guidance and constraints on grievance initiation absent a complaint than the 2020 Rule did, *see* § 106.44(f)(1)(v)(A), 89 Fed. Reg. 33,554, thereby addressing Carroll's concern that Title IX coordinators should not have too much leeway to initiate grievances absent a complaint. Responding to such concerns is quintessentially "reasonable." *Seven Cnty. Infrastructure Coal.*, 605 U.S. at 180. And Carroll's requested relief of vacating the 2024 Rule has not remedied its concerns around grievances without complainants—it has *worsened* the situation.

Indeed, "since the 2024 Rule's vacatur, VRLC has already had multiple clients' requests to withdraw their complaints be denied because the 2020 Rule does not articulate a set of enumerated factors for Title IX coordinators when considering complainants' withdrawal requests." ROA.5041. The 2024 Rule's reasoned guardrails should be reinstated.

Finally, Carroll curiously challenges protections that "mitigate the harm a falsely accused respondent may experience"—specifically, requirements to protect the privacy of parties and witnesses during the pendency of grievance procedures. *See* § 106.45(b)(5); 89 Fed. Reg. 33,495. This tailored requirement applies only "to protect the privacy of parties and witnesses during" the grievance proceedings—which is to say it protects the privacy of students who are victims of, *and accused of*, sex-based assault and harassment at the time they are most vulnerable. 89 Fed. Reg. 33,674. They may still, for instance, publicly criticize the school's handling of the proceedings. *See id*. And schools explicitly must "not restrict the ability of the parties to: obtain and present evidence, including by speaking to witnesses," (except retaliatorily); "consult with their family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures." § 106.45(b)(5). That limited measure to protect students' privacy and grievance proceedings' integrity "burden[s] no more speech than necessary to serve a significant government interest," *Madsen* v. *Women's Health Ctr.,* 512 U.S. 753,

765 (1994): redressing sex discrimination, preventing retaliation, and protecting complainants' and respondents' privacy in particularly vulnerable moments. It is therefore consistent with the First Amendment and hardly arbitrary or capricious.

CONCLUSION

For the foregoing reasons, VRLC respectfully requests that this Court reverse the district court's erroneous holding that VRLC lacks standing, hold that VRLC is entitled to intervene, and sever Sections 106.10 and 106.31(a)(2), permitting the remainder of the 2024 Rule to remain in effect.

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CERTIFICATE OF SERVICE

I certify that on December 15, 2025, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 11,866 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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