No. 25-10651

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; JANE DOE; 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 / Hon. Reed C. O'Connor

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CERTIFICATE OF INTERESTED PERSONS

Under Fifth Circuit Rule 28.2.1, the number and style of the case are No. 25-10651, *Carroll Independent School District v. U.S. Department of Education, et al.*

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.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellee agrees that oral argument would aid the Court in resolving this appeal.

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STATEMENT OF ISSUES

1. Whether the proposed intervenors established a concrete injury traceable to vacatur of the Department of Education's 2024 Title IX Rule, or whether proposed intervenor A Better Balance identified a deprivation of a procedural right that could give it standing to appeal.

2. Whether the proposed intervenors are entitled to intervene under Federal Rule of Civil Procedure 24(a)(2); and, if not, whether denying permissive intervention under Rule 24(b) would be an abuse of discretion.

3. Whether the district court was correct to hold unlawful the Rule's hostile-environment harassment standard and other procedural provisions and to vacate the entire Rule.

INTRODUCTION

Title IX binds "recipients" of federal education funds. 20 U.S.C. § 1681(a); 34 C.F.R.§ 106.2. For a school district like Carroll Independent School District, changes to Title IX regulations directly "require or forbid some action." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 382 (2024) ("*AHM*"). That makes its standing "easy." *Id.* Not so for advocacy organizations like the proposed intervenors, Victim Rights Law Center ("VRLC") and A Better Balance ("ABB"). They are unregulated parties complaining about "unlawful regulation … of someone else," so establishing standing is "substantially more difficult." *Id.* (citation modified). The district court correctly rejected both organizations' standing theories.

It would have been correct to deny intervention, too. Neither organization made a timely request. The organizations also lack a legally protectable interest; interests belonging to someone else—here, to students—don't permit intervention.

While the Court need not reach the merits or severability, those arguments also fail. The 2024 Rule's hostile-environment harassment standard is inconsistent with Title IX and, along with the procedures for grievances, infringes on First Amendment rights. This "harassment" policing scheme permeates the Rule, whether considered alone or along with the gender-identity provisions that neither organization defends. The district court properly vacated the entire 2024 Rule.

STATEMENT OF THE CASE

I. The Department of Education's 2024 Rule was meant to remake Title IX in the image of *Bostock v. Clayton County*.

In 2024, the Department of Education tried to recast Title IX in the image of *Bostock v. Clayton County*, 590 U.S. 644 (2020). *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33474 (Apr. 29, 2024) ("2024 Rule"). It redefined "sex-based discrimination" to include "gender identity" and "sex stereotypes." 89 Fed. Reg. at 33886 (34 C.F.R. § 106.10).[1] Such distinctions violate Title IX, the Department said, because they "necessarily" require noticing "a person's sex." *Id.* at 33802 (citing *Bostock*, 590 U.S. at 655).

But Title IX itself allows—and sometimes requires—sex-based distinctions. For example, 20 U.S.C. § 1686 says Title IX cannot "be construed to prohibit … separate living facilities for the different sexes." And longstanding regulations provide for sex-specific athletic teams. 34 C.F.R. § 106.41. Yet the Department said any sex-based distinction that causes more than "de minimis harm" is impermissible. 89 Fed. Reg. at 33887 (34 C.F.R. § 106.31(a)(2)). Then it defined "preventing a person from participating" in school programs "consistent with [their] gender identity" to be more than de minimis harm. *Id.* at 33819.

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[1] Citations to 34 C.F.R. are to the 2024 version unless otherwise noted.

The Department also expanded what counts as hostile-environment harassment. The new standard would broaden schools' liability beyond the Supreme Court's interpretation of Title IX in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999), which the Department had previously codified. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) ("2020 Rule"). In *Davis*, the Supreme Court held that a school is liable for violating Title IX if it "acts with deliberate indifference to known acts of harassment in its programs or activities … [and] only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." 526 U.S. at 633.

Under the 2024 Rule's admittedly "broader" standard, speech that, in the "totality of the circumstances," somebody considered "subjectively" "unwelcome" could be "harassment." 89 Fed. Reg. at 33884; 34 C.F.R. § 106.2. Liability wouldn't require finding "any particular harm" to an individual or that anyone was denied access to programs. 89 Fed. Reg. at 33511. And harassment could be either "severe or pervasive"—unlike under *Davis*, it need not be both. *Id.* at 33498, 33884.

The Department also eliminated procedures it promulgated in 2020 to protect due process and First Amendment rights. The 2020 Rule

had aligned recipient responsibility for sex discrimination with its actual knowledge of the underlying conduct and deliberate indifference to discrimination. 85 Fed. Reg. at 30574. It required a formal complaint to initiate the grievance process unless "necessary" to maintain a "non-deliberately indifferent response" to sex discrimination. *Id.* at 30131. And to benefit both complainants and respondents, the 2020 regulations prevented gag orders during grievance proceedings. *Id.* at 30295.

The 2024 Rule required recipients to "promptly and effectively end any sex discrimination," regardless of their actual knowledge and even without deliberate indifference. 89 Fed. Reg. at 33889. It instructed Title IX coordinators to initiate a grievance proceeding even in "the absence of a complaint," and after "the withdrawal of any or all of the allegations." 89 Fed. Reg. at 33889 (34 C.F.R. § 106.44(f)(1)(v)). It required schools to place speech restrictions on the parties to a grievance proceeding—including the very gag orders rejected in 2020. 89 Fed. Reg. at 33891 (34 C.F.R. § 106.45(b)(5)).

The Department linked its regulatory "purpose" to the gender-identity mandate and the new harassment standard. 89 Fed. Reg. at 33476, 33859–60. It continually emphasized that gender-identity discrimination is prohibited sex discrimination under the Rule, even declaring that lactating students "can voluntarily access a lactation space … regardless of a student's gender identity or gender expression." 89 Fed. Reg. at 33788.

II. From April 2024 to February 2025, VRLC and ABB watched as nationwide litigation went from filing to final judgment.

The Rule was issued on April 29, 2024, with an effective date of August 1, 2024. In the weeks that followed, numerous plaintiffs challenged it under the APA. This is one such lawsuit.

Carroll Independent School District filed this APA challenge on May 21, 2024, alleging the Rule was substantively unlawful, in violation of constitutional rights, and arbitrary and capricious, ROA.66–78. Along with the gender-identity provisions and hostile-environment harassment definition, Carroll alleged the Rule's procedural changes forced schools to infringe on First Amendment rights. ROA.52–53. It sought delay of the Rule's effective date or a preliminary injunction against enforcement. ROA.143–86; *see* 5 U.S.C. § 705.

Proposed intervenors were aware of the challenges. On May 7, VRLC held a webinar "exploring" "lawsuits filed challenging" the Rule. ROA.5419; ROA.5472.

A. Eight courts held the 2024 Rule likely unlawful and preliminarily prohibited its enforcement.

Court after court determined that the Rule was likely unlawful and its provisions could not be severed. The first preliminary injunction was issued on June 13. *Louisiana v. U.S. Dep't of Educ.*, 737 F. Supp. 3d 377, 410 (W.D. La. 2024). Others quickly followed. *Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *8 (11th Cir. Aug. 22, 2024); *Oklahoma v. Cardona*, 743 F. Supp. 3d 1314, 1333 (W.D.

Okla. 2024); *Arkansas v. U.S. Dep't of Educ.*, 742 F. Supp. 3d 919, 947 (E.D. Mo. 2024); *Kansas v. U.S. Dep't of Educ.*, 739 F. Supp. 3d 902, 932 (D. Kan. 2024); *Texas v. United States*, 740 F. Supp. 3d 537, 559 (N.D. Tex. 2024); *Tennessee v. Cardona*, 737 F. Supp. 3d 510, 521 (E.D. Ky. 2024).

In this case, the district court also held the Rule likely unlawful and issued a preliminary injunction. ROA.912–26; *see Carroll v. U.S. Dep't of Educ.*, 741 F. Supp. 3d 515 (N.D. Tex. 2024).

B. The Supreme Court, this Court, and the Sixth Circuit refused to sever the Rule.

Meanwhile, the Department of Education pursued emergency relief from the first two preliminary injunctions, *Louisiana* and *Tennessee*. The Department sought to preserve the gender-identity provisions, arguing "no Plaintiff establishes any harm stemming from the Rule's basic [transgender] nondiscrimination requirement." Defs.' Mem. in Supp. of Mot. for a Partial Stay Pending Appeal 2, *Louisiana v. U.S. Dep't of Educ.*, No. 3:24-cv-00563 (W.D. La. June 24, 2024), ECF No. 59-1. Both district courts denied the Department's stay motions. They concluded "the challenged importation of *Bostock*'s reasoning is so central to the Final Rule that severing expressly challenged provisions is not a viable option." *Tennessee v. Cardona*, No. 2:24-cv-072-DCR, 2024 WL 3631032, at *7–8 (E.D. Ky. July 10, 2024); *accord Louisiana v.*

U.S. Dep't of Educ., No. 3:24-CV-00563, 2024 WL 3584382, at *3 (W.D. La. July 11, 2024).

The Department appealed the preliminary injunctions. In this Court and the Sixth Circuit, it also asked for a stay pending appeal. It argued injunctive relief should be limited to "the application of two discrete provisions": the de-minimis harm provision, 34 C.F.R. § 106.41(a)(2), and "the definition of 'hostile environment harassment' within 34 C.F.R. § 106.2" in "particular contexts" relating to gender identity and sex-based distinctions like restrooms. *E.g.*, Emergency Mot. Under Circuit Rule 27.3 for a Partial Stay Pending Appeal 1, *Louisiana v. U.S. Dep't of Educ.*, No. 24-30399 (5th Cir. July 1, 2024), ECF No. 28. The Department listed as examples half a dozen provisions it claimed "have nothing to do with gender identity." *Id.* at 11. It argued the district court "erred in enjoining the provisions of the Rule that plaintiffs do not argue are unlawful" or cause "harm." *Id.* at 2.

Both courts rejected the Department's request. The Sixth Circuit concluded, "all of the provisions the Department now asks to go into effect implicate the new definition of sex discrimination." *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *4 (6th Cir. July 17, 2024). This Court suggested the Department's cursory briefing may have "forfeit[ed] its severability argument." *Louisiana ex rel. Murrill v. U.S. Dep't of Educ.*, No. 24-30399, 2024 WL 3452887, at *2 (5th Cir. July 17, 2024) (per curiam). But even if preserved, the Department's request

would place the Court in the "untenable position" of "pars[ing] the 423-page Rule … to determine the practicability and consequences of a limited stay." *Id.* This Court refused to allow "tangential provisions" to go into effect absent the "heart of the Rule." *Id.*

Finally, the Department went to the Supreme Court. The Solicitor General's stay application observed that "[t]he 2024 Rule makes a variety of changes to the Department's existing regulations, ranging from recordkeeping requirements to grievance procedures to protections for pregnant and postpartum students and employees." *See* Appl. for Partial Stay of the Inj. Issued by the U.S. Dist. Ct. for the W. Dist. of La. 2, *Dep't of Educ. v. Louisiana*, No. 24A78 (U.S. July 22, 2024) ("Appl."). It claimed the plaintiffs "object to three discrete provisions of the Rule" without "challeng[ing] the vast majority." *Id.* The application led with the argument that redefining sex discrimination to include gender identity causes no harm, *id.*, then complained that the preliminary "injunction[s] would block the Department from implementing dozens of provisions of an important Rule." *Id.* at 6.

The Supreme Court, too, rejected the Department's severability argument. Although four justices would have found some provisions severable, all nine agreed that the core gender-identity-discrimination and hostile-environment harassment provisions were properly enjoined. *Dep't of Educ. v. Louisiana*, 603 U.S. 866, 867–68 (2024) (per curiam).

And the majority concluded the Department failed to "adequately identif[y] which particular provisions, if any, are sufficiently independent … and thus might be [severable]." *Id.* at 868.

The proposed intervenors took notice. A few days later, ABB published a notice about the "eight preliminary injunctions" against the Rule. ROA.5452–55. The injunctions stopped "*all* of the 2024 Rule's provisions from going into effect," ROA.5452, ABB emphasized, and it noted that the "Supreme Court kept two of these preliminary injunctions in place" while the cases proceeded, ROA.5453. VRLC published a newsletter discussing the "injunctions" "in 26 states and in many K-12 schools and higher-ed institutions located in other states." ROA.5473.

C. Two district courts—including this one—vacated the Rule.

On the day the Supreme Court denied the Solicitor General's application, Carroll moved for summary judgment and vacatur of "the entire Rule." ROA.1207. On severability, Carroll argued the Department had "not contemplate[d] enforcement of the Rule without *any* of the core provisions." ROA.1207–08. The Department also sought judgment as a matter of law, making the same severability argument the Supreme Court had rejected. *Compare* ROA.1750–51, *with* Appl. at 21–22.

While these dispositive motions were pending, the *Tennessee* district court held the Rule unlawful. *Tennessee v. Cardona*, 762 F. Supp. 3d 615, 626 (E.D. Ky. 2025). It concluded the Rule's new definition of sex-based discrimination, de-minimis-harm provision, and hostile environment harassment standard "fatally taint the entire rule." *Id.* That court refused to sever the Rule's other provisions, explaining, "it simply is not proper for the Court to rewrite the regulations by excising the offending material." *Id.* at 627.

Immediately, ABB "[c]ondemn[ed]" the judgment as a "dangerous attack on vulnerable students." ROA.5465–67.

Two days later, the district court here entered final judgment vacating the Proposed Rule "in its entirety." ROA.4873; *Carroll ISD v. U.S. Dep't of Educ.*, 2025 WL 1782572 (N.D. Tex. Feb. 19, 2025). "[E]xpanding the meaning of 'on the basis of sex' to include 'gender identity' turns Title IX on its head," the court explained, "and the Final Rule's new de-minimis harm standard is arbitrary in the truest sense of the word." ROA.4871. The district court ruled that the "broader" harassment standard "turns recipients of federal funds into federally commandeered censors of speech." ROA.4872–73.

III. Proposed intervenor organizations moved to intervene—after final judgment.

VRLC describes itself as a "nonprofit organization" with a "mission … to provide legal representation to" victims of "sex-based

harassment." ROA.5034. A Better Balance is "a national nonprofit legal advocacy organization" that works to protect the "rights" of "pregnant, parenting, and caregiving workers and students" through "legislative advocacy, direct legal services, and strategic litigation." ROA.4915. Both sought intervention in February 2025, *after* final judgment.

A. Victim Rights Law Center wants to appeal vacatur of everything *but* the gender-identity provisions.

On February 28, 2025, VRLC and an individual (who no longer seeks intervention) moved to intervene in the *Tennessee* case. That same day, VRLC's counsel released a statement acknowledging that "Trump's Department of Education announced it would immediately revert back to enforcing Trump's 2020 Title IX rule." ROA.5477. About a month later, VRLC moved to intervene in the court below. Its motion to intervene—like the one in *Tennessee*— criticized the district court for "vacat[ing] the entire 2024 Rule … without hearing from" "victims of sex-based harassment." ROA.5020–21.

VRLC sought "specifically to appeal the vacatur of the 2024 Rule's provisions that pertain to sex-based harassment." ROA.5033. VRLC says vacatur of the 2024 Rule "frustrate[s] VRLC's mission" and "divert[s]" its "resources." ROA.5004. First, VRLC says that because of the vacatur, fewer students will seek its assistance with Title IX proceedings. ROA.5035. Second, VRLC asserts that representing such

students is now more burdensome, so it has "fewer resources" for "other programs and services." ROA.5036.

B. A Better Balance wants to appeal vacatur of pregnancy-related provisions.

ABB first moved to intervene in *Tennessee*, citing a joint status report from this case. Mem. in Supp. of Proposed Intervenor-Def. [ABB's] Mot. to Intervene 5, *Tennessee v. Cardona*, No. 2:24-072-DCR (E.D. Ky. Feb. 26, 2025), ECF No. 152-1 (citing ROA.4863–66). A month after that, ABB filed a parallel motion here. ROA.4883–4912. It sought intervention "for the limited purpose of appealing a portion of the judgment to the Fifth Circuit to argue it should revive the portions of the Rule that protect pregnant and postpartum students." ROA.4889.

ABB states that a "core part of [its] mission" is to "counsel[ ] workers and students" on its "free legal helpline." ROA.4891. ABB says the Rule "would allow" it "to more efficiently and effectively counsel students who call [its] helpline, deploying resources with better results." ROA.4918.

IV. The district court denied the organizations' motions to intervene for lack of standing.

The district court denied both motions to intervene for lack of Article III standing to appeal. Under *AHM*, a simple "drain on [an] organization's resources" is not a concrete injury—rather, standing requires a "perceptible impair[ment] to [the] organization's ability to

carry out its mission." ROA.5544; *Carroll ISD v. U.S. Dep't of Educ.*, 2025 WL 1782571 (N.D. Tex. May 15, 2025). The court also rejected the organizations' invocation of *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). ROA.5544; ROA.5549. "[N]ot every diversion of resources rises to an injury sufficient to confer standing." ROA.5544 (citation modified). For organizational standing, "'diverting' resources from one core mission activity to another, *i.e.*, prioritizing which 'on-mission' projects, out of many potential activities, an entity chooses to pursue, does not suffice." ROA.5546 (quoting *La. Fair Hous. Action Ctr., Inc. v. Azalea Garden Properties, L.L.C.*, 82 F.4th 345, 355 (5th Cir. 2023) ("*LaFHAC*") (citation modified)).

The court concluded both organizations' "counteractions to" the Rule's vacatur do not "differ from their routine activities." ROA.5544–45. For VRLC, "spending time and resources providing legal assistance and representing students in grievance proceedings squarely comports with its routine activities." ROA.5548–49. ABB, too, "has furthered its mission by spending more time with callers, counseling them on changes in the Title IX legal landscape, and providing them with legal services, all of which are part of ABB's routine organizational activities." ROA.5545.

As the court explained, although the organizations "may be less successful in securing legal victories *for their clients*, this does not arise to cognizable injuries" to the organizations themselves. ROA.5551.

Whatever "clients may experience as a result of the Court's vacatur of the Final Rule," it does not give VRLC or ABB organizational standing. ROA.5548. Finally, the court rejected ABB's theory that the Department's "refusal to defend the Final Rule on appeal deprives ABB of the right to participate in notice-and-comment rulemaking, thereby resulting in ABB's standing to intervene." ROA.5551–52.

SUMMARY OF THE ARGUMENT

The district court correctly rejected both groups' organizational standing arguments. VRLC claims it has lost clients, but that doesn't give it standing. VRLC's clients don't pay anything, so it suffers no monetary loss; the claimed decrease isn't supported by evidence or specifics; and the chain of causation is too attenuated.

VRLC also argues that it's more costly to provide its services—representation to students in schools' Title IX proceedings—but that doesn't meet organizational-standing requirements. Standing cannot be based on voluntarily incurred expenses of providing advice and representation to someone else. Even if VRLC's clients had injuries traceable to vacatur of the 2024 Rule, injuries to clients don't give their lawyers standing to sue.

ABB, too, lacks standing. It also relies on the increased cost of helping students obtain "modifications" at school. But if a school refuses a requested modification, that is an injury to the student, not ABB.

Using its resources on students' behalf is ABB's choice, and self-inflicted injuries don't create standing.

ABB's "procedural injury" theory also fails. A procedural injury theory of standing requires the claimant to identify deprivation of a procedural right that protects a concrete interest. But there's no procedural right to notice and comment on a court's judgment or the Government's litigation decisions. And loss of the opportunity to comment in a hypothetical, future rulemaking does not give ABB standing today.

Though the district court didn't reach the factors for intervention under Rule 24, this is an alternative ground to affirm. VRLC and ABB had been aware their interests were at risk since the day this lawsuit was filed. Yet they did nothing until after final judgment. That delay is inexcusable and prejudicial. Moreover, they have no legally protectable interest in vindicating rights that belong to students. They also cannot show that denying permissive intervention would be an abuse of discretion.

On the merits, VRLC defends the Rule's broader definition of hostile-environment harassment and its procedures for grievance adjudication. The district court correctly held these provisions unlawful and vacated them along with the rest of the Rule.

Finally, the Rule is not severable. Despite VRLC's and ABB's claims, the Rule's independently unlawful provisions—including those

that VRLC defends on the merits—permeate the rest. Like the many courts that refused to sever the Rule when the Department appealed preliminary injunctions against enforcement—including the Supreme Court—the district court properly declined the request to unravel the 2024 Rule at final judgment.

ARGUMENT

I. The organizations lack Article III standing to appeal.

To invoke a federal court's jurisdiction, any party must show an injury in fact caused by the action challenged and redressable by a judgment in its favor. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Because the Department did not appeal, the proposed intervenors must establish appellate standing. *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017). That requires "demonstrate[ing] some injury *from the judgment below*." *Sierra Club v. Babbitt*, 995 F.2d 571, 575 (5th Cir. 1993).

The proposed intervenors cannot show injury-in-fact or traceability. VRLC has not shown downstream economic injuries traceable to vacatur of the Rule. Neither has ABB, and there is no procedural right to support ABB's "procedural injury" theory of standing. The district court correctly concluded both organizations lack standing to appeal.

A. VRLC's alleged injuries are neither concrete nor traceable to the Rule's vacatur.

Standing can be based on "downstream or upstream economic injuries to others in the chain [of commerce with regulated entities], such as certain manufacturers, retailers, suppliers, competitors, or customers." *AHM*, 602 U.S. at 384. Pointing to such a chain-of-commerce-standing theory, VRLC says it is injured in two ways by the judgment: first, it has "los[t] clients," and, second, its "business model [is] more expensive." VRLC.Br.15–16. Neither one supports standing.

1. "Decreased business" does not give VRLC standing.

VRLC's lost clientele theory fails for three reasons.

First, because VRLC provides its services without charge, a decrease in clients is not an economic injury. Even if fewer clients seek VRLC's free representation, there's no impact on its "bottom line." *Diamond Alternative Energy, LLC v. EPA*, 606 U.S. 100, 114 (2025).

So chain-of-commerce standing cases are inapplicable. *See* VRLC.Br.16–18. "[F]uel producers make money by selling fuel," so a "decrease in purchases of gasoline and other liquid fuels" caused by the challenged law "hurts their bottom line," and "[t]hose monetary costs are of course an injury." *Diamond Alternative*, 606 U.S. at 113–114 (citation modified); *accord Tex. Corn Producers v. EPA*, 141 F.4th 687, 701 (5th Cir. 2025) (finding associational standing to challenge EPA regulation shown to "depress[] demand for [members'] products").

Likewise, bookstores make money by selling books, so a decrease in sales to schools—unless the bookstores incurred other costs to meet the law's conditions—hurts a bookstore's bottom line. *Book People, Inc. v. Wong*, 91 F.4th 318, 331–32 (5th Cir. 2024). Even assuming vacatur reduced requests for VRLC's free legal representation, it wouldn't cause monetary injury.

Second, the lost-clientele theory isn't supported by evidence. What VRLC offers are generic allegations: "clients are already more hesitant to continue their pending Title IX complaints … or to file new [ones]," ROA.5035, and VRLC expects "an immediate decline in the number of victims willing to make a report, file a formal complaint, or continue a pending investigation," ROA.5036. Unless backed up with specifics, such generalities can't establish a concrete injury. *See Tenn. Conf. of NAACP v. Lee*, 139 F.4th 557, 567 (6th Cir. 2025) (organization "did not identify any specific individuals covered by the [challenged law] whom it planned to help"); *Stringer v. Whitley*, 942 F.3d 715, 722 (5th Cir. 2019) ("evidence that a plaintiff has taken an action in the past does not, by itself, demonstrate a substantial risk that the plaintiff will take the action in the future").

VRLC's closest brush with specifics is saying that "[i]n 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." ROA.5035. That naked percentage

establishes nothing. Without a baseline, a percentage change is meaningless; it's impossible to say whether a 41% decrease is monumental or a rounding error.

Third, VRLC's causal chain from vacatur to the claimed decrease in clientele is faulty. VRLC must show that regulated entities, as well as other "third parties," "will likely react in predictable ways that in turn will likely injure [VRLC]." *AHM*, 602 U.S. at 383. It cannot establish causation based on speculation and "hypotheticals." *La Union Del Pueblo Entero v. Abbott*, 151 F.4th 273, 288 (5th Cir. 2025).

VRLC also relies on speculation. While it's safe to presume recipient schools will adopt policies that comply with the applicable Title IX regulations, both versions give schools discretion in crafting procedures for addressing sex-based harassment. And schools may go beyond what is required by Title IX. In addition, many of VRLC's predictions of injury are premised on legal errors. *E.g.*, ROA.5038 ("mistakenly believe that they must dismiss"); ROA.5039 ("mistakenly attempt to end supportive measures"); ROA.5046 ("erroneous decisions"). It's not predictable that recipients will make such mistakes.

The rest of the necessary links require speculation about how other third parties will react. VRLC must show that predictable reactions by schools lead to predictable behavior on campus and predictable reactions by Title IX coordinators and other school officials, which—on VRLC's theory—lead to a decrease in clientele. The necessary links are

too many and too weak to satisfy causation. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411–12 (2013). Individuals may choose to report an incident—or not to report it—for many reasons (as VRLC acknowledges elsewhere, ROA.5038). And even the grievance process involves many independent decisionmakers—school officials, the person accused of harassment, attorneys, and witnesses, to name a few. Any connection between vacatur of the 2024 Rule and lost clientele relies on a long "chain of contingencies." *Id.* at 410.

The actions of third parties are uncertain even on VRLC's telling. For example, VRLC takes issue with the "2020 Rule's requirement that two different people [act] as investigator and decisionmaker" because "decision-makers are *often* drawn from a wider pool," "*tend to be* less highly trained and skilled at conducting trauma-informed questioning" and "*often* ask duplicative questions." ROA.5044–45 (emphasis added). Assuming that's true, it's speculative that these things will happen. And the 2024 Rule itself did not require schools to appoint one person for both investigation and decisionmaking. 34 C.F.R. § 106.45(b)(2).

Article III requires the claimant to address other possible causes, if not to rule them out. *See Murthy v. Missouri*, 603 U.S. 43, 68 & n.8 (2024) (discounting causation because of a "real possibility" the claimed injury had an independent cause). A difference in call volume could be caused, for example, by the time of year. The first six weeks following August 1 are the beginning of a new school year, when students return

to campus with new classes, housing, and social dynamics. Not so in January and February. VRLC has no basis for ignoring that distinction.

Finally, any connection is too attenuated for Article III. The "causation requirement … rules out" standing "where the government action is so far removed from its distant (even if predictable) ripple effects." *AHM*, 602 U.S. at 383. There's too great a distance between vacatur and the alleged loss of clients—causation must run through schools' choice of policies, students' agency, decisionmakers' discretion, and respondents' litigation choices. Standing cannot be predicated on such "independent action of some third party not before the court." *Lujan*, 504 U.S. at 560.

2. "Increased costs" does not give VRLC standing.

VRLC claims it is "require[d]" to spend more time representing each client. VRLC.Br.18. "For example," it "now spends more time opposing dismissals of new complaints … and spends at least four times as much time as before to prepare for a college or graduate student client's grievance process." ROA.5036. But Title IX regulations don't *require* VRLC to do anything at all—it is complaining about the regulation of somebody else. VRLC.Br.15–16. Even assuming VRLC proved increased costs, it "cannot manufacture standing by voluntarily incurring costs." *Bost v. Ill. State Bd. of Elections*, 146 S. Ct. 513, 522 (2026) (citation modified).

This Court has long recognized that advocacy organizations "have no legally-protected interest in *not* expending their resources on behalf of individuals for whom they are advocates." *Ass'n for Retarded Citizens of Dall. v. Dall. Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994) ("*ARC*"). Indeed, *AHM* rejected a theory of injury based on a law making the organization's "efforts more costly by requiring it to spend extra time and money on those efforts." *Tenn. Conf. of NAACP v. Lee*, 105 F.4th 888, 905 (6th Cir. 2024) (citation modified); *accord Deep S. Ctr. for Env't Just. v. EPA*, 138 F.4th 310, 318 (5th Cir. 2025), *mandate held* (June 13, 2025). Organizational standing requires more than spending money in response to the challenged action—it requires showing "*impair[ment]*" to the organization's "activities." *Havens*, 455 U.S. at 379 (emphasis added).

One way to distinguish between a voluntary response and a cognizable impairment is to ask whether the plaintiff will "be injured if it does nothing." *LaFHAC*, 82 F.4th at 357 (Ho, J., concurring). In *Book People*, the answer was yes—the Court explained the bookstores "will be harmed if they comply with [the law's conditions] and harmed if they don't." 91 F.4th at 331. Either way, they'd lose money. *Id.* In *Diamond Alternative*, also yes—if fuel producers did not challenge the regulation, decreased demand for fuel would "hurt their bottom line." 606 U.S. at 114.

For VRLC, the answer is no. Doing nothing would cost it nothing. To be sure, VRLC's *cause* could be set back if it stopped representing students. VRLC wants more students to pursue Title IX grievances, and to obtain "legal benefits" at the end of the process, VRLC.Br.16, in service of its "mission to deter and redress sex-based harassment," ROA.5043. Such policy goals are "abstract social interests" that are not cognizable under Article III. *Havens*, 455 U.S. at 379.

At most, VRLC has identified injuries to the students it represents. It acknowledges that the 2020 Rule "impose[s] higher hurdles *on VRLC's clients*." VRLC.Br.18 (emphasis added). And "there is no doctrine of attorney standing that permits [a law firm] to sue in place of its injured clients." *S.C. State Conf. of the NAACP v. S.C. Dep't of Juv. Just.*, No. 25-1032, 2026 WL 233528, at *6 (4th Cir. Jan. 29, 2026). VRLC "cannot manufacture organizational standing out of whatever injuries [its] clients might sustain." *Id.* at *7.

If VRLC stopped providing free representation, students would have to hire another lawyer (or do without), and that could be an injury to the student. But injuries to clients are not injuries to their lawyers. *See Kowalski v. Tesmer*, 543 U.S. 125, 130–31 (2004); *Conn v. Gabbert*, 526 U.S. 286, 292 (1999). "[J]ust as an individual who earnestly desires to counsel [students] in his free time cannot complain that some new law will lead him to spend resources to counsel [them] more effectively, so too a political organization [like VRLC] cannot." *United States v.*

Texas, 144 F.4th 632, 695–96 (5th Cir. 2025) (Oldham, J., dissenting), *reh'g en banc granted, maj. opinion vacated*, 150 F.4th 656 (5th Cir. 2025).

Another way to rule out voluntary expenditures is to ask whether "the organization's activities in response to the defendant's conduct 'detract or differ from its routine activities.'" *Deep S.*, 138 F.4th at 320 (quoting *Tenth St. Residential Ass'n v. City of Dallas*, 968 F.3d 492, 500 (5th Cir. 2020)); *accord Ariz. All. for Retired Americans v. Mayes*, 117 F.4th 1165, 1180 (9th Cir. 2024), *reh'g en banc granted, opinion vacated*, 130 F.4th 1177 (9th Cir. 2025). VRLC's do not. In the ordinary course, "VRLC attorneys represent victims to communicate effectively with school administrators, acquire supportive measures … , prepare for and attend grievance proceedings, file appeals, and if necessary, file complaints against their schools." ROA.5034. VRLC's allegedly injurious responses are of a kind. Opposing motions to dismiss and preparing one's client for cross-examination, for example, are means of "providing legal assistance to student survivors in their schools' Title IX proceedings." ROA.5035–36. Doing these things doesn't detract from VRLC's mission—it *is* the mission.

VRLC's counterarguments do not help it.

VRLC argues monetary costs need not be large to support standing. VRLC.Br.19. That's correct, but irrelevant. The problem is not the

amount of VRLC's alleged expenses, but that self-inflicted injury isn't cognizable.

VRLC next contends voluntariness doesn't matter. VRLC.Br.20. To be sure, an injury can be cognizable "even if [it] could be described in some sense as willingly incurred." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 297 (2022). "That [a law's challengers] chose to subject themselves to [the law's] provisions does not change the fact that they *are* subject to them," *id.*, and standing is straightforward for anyone subject to a law's requirements, *see AHM*, 602 U.S. at 382. That's not what's happening here—VRLC is not "subject to" Title IX regulations.

In chain-of-commerce cases, an impacted business may have standing even though its continued business operations are "voluntary." The Sixth Circuit recently explored such a reading of *AHM*, observing, "[o]ne could similarly describe [a] retailer's decision to buy at the higher prices as a *voluntary* one and thus the retailer's higher costs as 'self-inflicted' harms." *Lee*, 139 F.4th at 564. But *AHM* acknowledged the retailer would have standing, *see id.*, so that cannot be what voluntariness means in standing doctrine.

Instead, *AHM* and this Court's precedent acknowledge that a plaintiff has standing when he is between a rock and a hard place (so long as both the rock and the hard place are cognizable). Bookstores could give up selling to schools rather than meet the law's conditions for those sales—they have a choice—but they're injured either way. *See*

Book People, 91 F.4th at 331. For fuel producers, staying in business is "in some sense" voluntary, *Cruz*, 596 U.S. at 297, but avoiding decreased demand by shutting down would be its own injury-in-fact. *See Diamond Alternative*, 606 U.S. at 114. In the First Amendment context, a would-be speaker could choose not to speak instead of risking imminent prosecution, but foregoing protected speech is an injury too. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–61 (2014); *Inst. for Free Speech v. Johnson*, 148 F.4th 318, 327 (5th Cir. 2025) ("chilled speech or self-censorship is an injury sufficient to confer standing" (citation modified)).

An organization can't "manufacture standing by voluntarily incurring costs" to avoid a harm that would not itself satisfy Article III. *Bost*, 146 S. Ct. at 522 (citation modified). The injuries VRLC identifies are to abstract social interests or belong to students. If VRLC stops incurring the additional costs of representation under the 2020 Rule, the organization suffers no cognizable injury. VRLC is not between a rock and a hard place.

Havens Realty doesn't help, *contra* VRLC.Br.21–23, because there is no informational injury here. In *Havens*, the defendant's "*falsehoods* perceptibly impaired [the organization's] ability to provide accurate information to [its own] clients." *Deep S.*, 138 F.4th at 319 (citation modified; emphasis added). Misrepresentation is a wrong long recognized by the law. *See TransUnion LLC v. Ramirez*, 594 U.S. 413,

417 (2021) ("Central to assessing concreteness is whether the asserted harm has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." (citation modified)). So unlawful withholding of information causes "'a sufficiently distinct injury to provide standing to sue.'" *TransUnion*, 594 U.S. at 454 (Thomas, J., dissenting) (quoting *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 449 (1989)).

Finally, VRLC cites strings of cases holding that a nonprofit organization had standing. VRLC.Br.20–21, 24–25. Certainly, some nonprofits have established standing. But VRLC is not like the nonprofits in its cited cases. One showed a pocketbook injury caused by the defendant's allegedly unlawful acts. *Freedom Found. v. Int'l Bhd. of Teamsters Loc. 117*, No. 23-3946, 2024 WL 5252228, at *1 (9th Cir. Dec. 31, 2024) ("at a cost of approximately $14 for each rejected form"). Another was subject to the challenged regulation, *Mil.-Veterans Advoc. v. Sec'y of Veterans Affairs*, 130 F.4th 965, 970 (Fed. Cir. 2025), so it was an object of the regulation with standing to sue, *see Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 265 (5th Cir. 2015) (explaining that a regulation's "targets" are among its "objects").

In other cases, standing was based on informational injury. In *Republican National Committee v. North Carolina State Board of Elections*, 120 F.4th 390 (4th Cir. 2024), the state had (allegedly unlawfully) failed to remove ineligible voters from the rolls. As a result,

the RNC was "unable to ascertain which [of the people on the rolls] will be able to vote in the upcoming election," which interfered with its ability to encourage eligible "voters to support Republican candidates." *Id.* at 397. Rather than focus on eligible voters, the RNC had to waste resources communicating with ineligible individuals, too, because it couldn't tell the difference. And in *Texas Tribune v. Caldwell County*, 121 F.4th 520 (5th Cir. 2024), this Court explained that "[p]reventing [news organizations] from accessing [criminal court] proceedings frustrates [their] ability to keep the public informed." *Id.* at 527. VRLC isn't complaining about misinformation or missing information.

VRLC also points to *Nairne v. Landry*, 151 F.4th 666 (5th Cir. 2025) (per curiam), *mandate held* (Aug. 15, 2025), and *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017). VRLC.Br.24. They are unpersuasive. Relying on *Havens* as applied in *OCA*, the *Nairne* panel concluded the challenged law "interfered directly with the [organizations'] core operations—namely, advancing Black political participation," *Nairne*, 151 F.4th at 682, giving it standing to bring vote-dilution claims under the Voting Rights Act, *id.* at 681. Unlike here, traceability was not disputed; circuit precedent says, "the invalidity of an election statute is 'without question, fairly traceable to and redressable by the ... Secretary of State.'" *Id.* at 680 & n.6 (quoting *OCA*, 867 F.3d at 613). That doesn't help VRLC, which can't invoke *OCA*'s holding about state election officials and has not otherwise

shown traceability. And to the extent *OCA* could support VRLC's capacious organizational-standing theory, it has been overruled by *AHM*.

B. ABB also lacks organizational standing.

For similar reasons, ABB has not established standing based on diversion of resources, and its "procedural injury" theory doesn't work.

1. "Worse results" and "more time and resources" do not give ABB standing.

ABB focuses on the "free legal helpline" it operates "to counsel pregnant and parenting students who face discrimination." ABB.Br.20. "ABB lawyers must spend significantly more time and resources to respond to each call," it says, so ABB "cannot provide as many services to as many people," and lawyers "achieve worse results for callers." ABB.Br.20; *see* ROA.4925. These voluntarily incurred costs do not give it standing.

ABB's "worse results" theory fails because injuries to clients are not injuries to their lawyers. *See supra* at 24. So even assuming the past incidents ABB describes predict imminent future injury, that would permit standing for students, not ABB. ABB.Br.21–22. ABB seeks to intervene on its own behalf, not as a representative of these students.

ABB's "more time and resources" theory fails too. Even assuming the Rule's vacatur makes operating its helpline more costly, ABB.Br.20–22, that's not an "impairment." After vacatur, ABB can still

provide counseling to students. Vacatur of the Rule just changes the governing law.

ABB is wrong to say an organization has standing if the challenged action "forc[es] it to spend additional time and effort to serve its target population." ABB.Br.19. As ABB acknowledges, being put to a choice between "one core mission activity [and] another" is not a cognizable injury. ABB.Br.33 (quoting *LaFHAC*, 82 F.4th at 355). ABB "ha[s] no legally-protected interest in *not* expending [its] resources on behalf of [the] individuals for whom [it] advocates." *ARC*, 19 F.3d at 244. Assisting each caller may take more of ABB's time, but—like the organization in *LaFHAC*—ABB "could [avoid] the injury by simply doing 'nothing.'" ABB.Br.34 (quoting *LaFHAC*, 82 F.4th at 357 (Ho, J., concurring)). Just as with VRLC, Title IX regulations do not "compel" ABB to do anything. *Contra* ABB.Br.32 (quoting *Deep S.*, 138 F.4th at 319–20). Its expenses are voluntarily incurred.

ABB also has not "show[n] that … third parties will likely react" to the vacatur "in predictable ways that in turn will likely injure [ABB]." *AHM*, 602 U.S. at 383 (citation modified). It would have to point to predictable reactions by schools (the regulated entities), students, and individual school employees. It hasn't made the necessary causal links. "[R]emote instruction" or "reschedul[ing] an exam" isn't necessarily reasonable for any given student, ROA.4919, so ABB can't show such modifications would have been permitted under the 2024

Rule. 89 Fed. Reg. at 33777 (explaining that "whether a particular or requested modification is reasonable is a fact-specific inquiry that must be individualized to the student in the context of the recipient's education program or activity").

ABB also doesn't account for other causal factors. ABB says it "spends resources to provide basic information about Title IX and Title IX coordinators," ROA.4897, but schools are still required to publicize that information. *See* 34 C.F.R. 106.8(c) (2020). If schools have failed to do that or ABB's callers have not looked, the lack of information is not traceable to vacatur of the 2024 Rule. *Cf. Lee*, 139 F.4th at 567 (plaintiff did not "show that any prior need to track down an applicant's criminal records had been caused by the [challenged law] rather than by, say, an applicant's failure to remember [relevant information]"). And if the caller has not informed the school she is pregnant, the 2024 Rule wouldn't have saved any time—it did not "require a school employee to approach a student unprompted …or make assumptions about the student's needs." 89 Fed. Reg. at 33767. ABB's evidence does not address these possible causes.

ABB's counterarguments also do not help it show standing.

ABB contends its "injury here is just like the one in *Havens*." ABB.Br.24. It's not. As discussed, *Havens* standing involves informational injury, and ABB knows what the Title IX regulations say.

ABB argues *LaFHAC*'s focus on divergence from routine activities "is just another way of saying an organization does not have a *Havens*-style injury if its 'daily operations' would remain the same." ABB.Br.34–35 (quoting *OCA*, 867 F.3d at 611–12). To the contrary, if the organization keeps doing what it "already does," there's no "impairment" or "interference with its business operations." *Deep S.*, 138 F.4th at 319–20; *see also Fair Hous. Ctr. of Metro. Detroit v. Singh Senior Living, LLC*, 124 F.4th 990, 992 (6th Cir. 2025). If each call were shorter, ABB "would have" used the extra time to "[assist someone] else" instead. ABB.Br.35 (citing *LaFHAC*, 82 F.4th at 352). By contrast, in *Vote.Org v. Callanen*, 89 F.4th 459 (5th Cir. 2023), the challenged law prevented an organization from using a software application it had developed, and "[i]t [wa]s the shutdown of the app … that produced the diversion of resources." *Id.* at 471. The "concrete and demonstrable injury for organizational standing" is the "perceptible impairment" (*i.e.* the app shutdown), "not the drain on the organization's resources." *LaFHAC*, 82 F.4th at 353 (citation modified). ABB hasn't shown a perceptible impairment.

And in any event, ABB's daily operations *have* remained the same. As before, it "counsels workers and students" on its "free legal helpline." ROA.4891.

ABB's other cases do not help either. As discussed, *Nairne* and *OCA* do not support such expansive diversion-of-resources standing.

Contra ABB.Br.29–30. In *ACORN v. Fowler*, 178 F.3d 350 (5th Cir. 1999), the court found standing based on money spent to "counteract[]" the defendant's allegedly illegal acts. *Id.* at 361. That expansive reading of *Havens* was repudiated in *AHM*. *See* 602 U.S. at 394–95.

ABB next argues *Deep South*, and thus *AHM*, is inapplicable because ABB provides "direct services to people," not just "issue advocacy." ABB.Br.31–32. Organizational standing doctrine does not carve out direct services in this way. Services provided voluntarily—like other costs incurred voluntarily—do not create standing.

Finally, ABB says "an entity's core activities need not grind to a halt before it can sue." ABB.Br.37. To be sure, an "impairment" that is less-than-complete, but "perceptible" could create standing, as in *Havens*. But ABB doesn't have *any* cognizable injury traceable to the vacatur.

2. ABB doesn't have a "procedural injury."

ABB's procedural injury theory doesn't work. Yes, an agency's failure to follow processes required by the APA can result in procedural injury and support standing. *E.g.*, *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 447 (5th Cir. 2019) ("[a] violation of the APA's notice-and-comment requirements is … a deprivation of a procedural right"). But ABB does not have any procedural rights here.

It doesn't matter that "a federal regulation adopted through notice-and-comment rulemaking can be rescinded only through notice-and-comment rulemaking." ABB.Br.38. This regulation was not rescinded by the agency; it was vacated by a court. When a court "set[s] aside agency action ... found to be ... not in accordance with law," 5 U.S.C. § 706(2), that vacatur is not agency action and APA procedural requirements do not apply. *Contrast* 5 U.S.C. § 553, *with* 5 U.S.C. § 706. There's no right to notice and comment in that context.

Likewise, there is no right to notice and comment on the Government's litigation decisions. DOJ decided not to appeal, and "[a] new administration is … entitled to do that." *Ariz. v. City & Cnty. of S.F.*, 596 U.S. 763, 765 (2022) (per curiam) (Roberts, C.J., concurring in dismissal). Just as no potentially interested parties had the right to notice and comment on DOJ's initial decision to defend the Rule, ABB had no right to notice and comment on DOJ's decision not to appeal. (ABB points (at 39) to the Department's guidance letter informing the public that it would not enforce the vacated Rule but does not argue that letter required notice and comment.) To be sure, ABB would be able to comment if the Department ever initiated rulemaking to rescind the 2024 Rule. But that hypothetical possibility is too speculative for Article III.

ABB seems to accept that these things, standing alone, lack a procedural right that could undergird procedural-injury standing.

Instead, it argues "the combination of the vacatur and the Government's subsequent collusive litigation tactics are denying ABB procedural rights to participate in the regulatory process." ABB.Br.38. That doesn't work. Without a procedural right in the equation, the solution cannot include a procedural injury.

II. The organizations haven't met Rule 24's requirements for intervention.

Though the district court did not reach the merits of intervention, this Court can affirm on any basis supported by the record. *Kovac v. Wray*, 109 F.4th 331, 335 (5th Cir. 2024). Neither organization is entitled to mandatory or permissive intervention on this record.

"A would-be intervenor bears the burden to prove an entitlement to intervene." *Rotstain v. Mendez*, 986 F.3d 931, 937 (5th Cir. 2021). That requires showing (1) timeliness; (2) an "interest relating to the property or transaction which is the subject of the action"; (3) impairment to that interest; and (4) inadequate representation. *Id.* at 936–37 (citation modified); *see* Fed. R. Civ. P. 24(a)(2).

A. Intervention must be timely—this was not.

Timeliness includes "the length of time the movant waited to file, the prejudice to the existing parties from any delay, the prejudice to the movant if intervention is denied, and any unusual circumstances." *Rotstain*, 986 F.3d at 937. "[T]he length of a delay allowed depends on the particular circumstances," *Effjohn Int'l Cruise Holdings, Inc. v.*

A&L Sales, Inc., 346 F.3d 552, 561 (5th Cir. 2003), and moving to intervene after judgment "weigh[s] against timeliness," *Sommers v. Bank of Am., N.A.*, 835 F.3d 509, 513 (5th Cir. 2016).

1. To be timely, ABB and VRLC needed to seek intervention "as soon as it became clear" that their interests "would no longer be protected" by the Department. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). Timeliness is measured based on notice that the representation "*may* be inadequate." *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 308 (5th Cir. 2022). ABB and VRLC have followed the lawsuits challenging the Rule, and the possibility that the Government's representation might be inadequate was apparent many months before they finally sought intervention in February 2025.

Before final judgment, moving to intervene would not have been "premature." *Contra* VRLC.Br.31; ABB.Br.45. The burden to show "inadequate representation" is "minimal," as both organizations concede. VRLC.Br.35; ABB.Br.50. The interests of issue-advocacy groups like VRLC and ABB "are different in kind from the public interests of" the Department. *La Union*, 29 F.4th at 309. All along, the organizations' "interests [have been] less broad than those of the governmental defendants, which *may* lead to divergent results." *Id.* at 308. Neither organization defends the gender-identity provisions that were the focus of the Department's merits defense. Their "real and legitimate additional or contrary arguments" would have been

"sufficient to demonstrate that the representation *may* be inadequate." *Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014).

Later events made the inadequacy clear. In July 2024, the district court observed that Carroll was "substantially certain" to succeed in showing some portions of the Rule—including those that VRLC defends—were unlawful. ROA.1154. Then the Supreme Court rejected the Solicitor General's severability arguments. Seven months was too long to wait. *See Effjohn*, 346 F.3d at 561 (2.5 months delay untimely); *Save Our Springs All. Inc. v. Babbitt*, 115 F.3d 346, 347 (5th Cir. 1997) (less than three months was "too long a delay").

At the latest, the organizations should have moved to protect their interests during summary judgment briefing. The parties' briefing—or lack thereof—can put a potential intervenor on notice that its interests may not be protected. *See Taylor v. KeyCorp*, 680 F.3d 609, 617 (6th Cir. 2012) (affirming denial of motion to intervene because a "12(b)(1) motion" put the movant "on notice" that the class representative "may not be … adequate"); *Jansen v. City of Cincinnati*, 904 F.2d 336, 341 (6th Cir. 1990) (holding that a defendant's "failure to rely on relevant paragraphs of [a] consent decree" in its summary-judgment opposition "alerted the proposed intervenors that their interest was not being adequately protected"). Here, the Department's briefs recycled the same generalized severability argument rejected all the way up to the

Supreme Court. VRLC and ABB did not have to wait until it failed yet again. *See Brumfield*, 749 F.3d at 344.

Contrary to VRLC's claim, identifying inadequate representation here does not involve speculation about future "litigation position[s] or defenses." *Louisiana v. Burgum*, 132 F.4th 918, 923 (5th Cir. 2025); VRLC.Br.31. VRLC followed the Department's litigation in real time. *See United States v. Covington Cnty. Sch. Dist.*, 499 F.3d 464, 466 (5th Cir. 2007) (per curiam) (motion to intervene was untimely when threat to interest was "well-publicized for more than six months"). And unlike in *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994), where "the status of the [plaintiffs'] claims changed dramatically over the course of the lawsuit," Carroll has asserted its claims from the beginning. *Id.* at 1206.

2. Timeliness also involves prejudice caused by "the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case." *Rotstain*, 986 F.3d at 938. "This factor is the most important consideration." *Id.* (citation modified). And sometimes a court will excuse a delay because of the absence of prejudice. For example, in *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 250 (5th Cir. 2009), the proposed intervenor disputed only the distribution of funds, so its delay was not prejudicial to the parties. *See* ABB.Br.45.

Here, there is prejudice. VRLC and ABB's delay prevented the district court from hearing their unique perspectives. Allowing them to

press these arguments for the first time on appeal would prejudice Carroll by requiring it to relitigate the judgment or address the organizations' unique arguments for the first time on appeal. *See Rotstain*, 986 F.3d at 938–39 (examining how the delay impacts the litigation).

3. Finally, a proposed intervenor may argue that "unusual circumstances" excuse its delay. ABB didn't claim unusual circumstances below, so it has forfeited that argument. *See* ROA.4903–05; *Rollins v. Home Depot USA*, 8 F.4th 393, 398 (5th Cir. 2021). In this Court, neither organization has identified anything unusual. VRLC faults the district court for vacating the rule "without hearing from … victims" of "sex-based harassment." VRLC.Br.33. It was VRLC's delay that deprived the district court of such an opportunity. And ABB complains that the district court vacated the pregnancy-related provisions "without considering whether the Rule was severable." ABB.Br.47. That's not accurate (the court considered the severability argument presented to it), and the point is irrelevant to timeliness; ABB knew how the Department's severability arguments were faring at every stage.

B. Neither organization has a legally protected interest in the subject-matter of this litigation.

To intervene as of right, an intervenor's "interest must be direct, substantial, and legally protectable." *Saldano v. Roach*, 363 F.3d 545,

551 (5th Cir. 2004) (citation modified); Fed. R. Civ. P. 24(a). "[A]dvocating the pursuit of a particular policy" doesn't suffice. *Lelsz v. Kavanagh*, 710 F.2d 1040, 1046 (5th Cir. 1983). And "an intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological, economic, or precedential reasons; that would-be intervenor merely prefers one outcome to the other." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015).

Here, ABB and VRLC's bedrock complaints are about injuries to students, not injuries to themselves. VRLC acknowledges that the Rule's "protections" belong to "VRLC's clients and other students." VRLC.Br.2. ABB describes it the same way. ABB.Br.37 ("protections to pregnant and postpartum students"). But these students are not before the court. And under Rule 24(a), there is no right to "intervention for the purpose of asserting the substantive rights of others." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 465 (5th Cir. 1984) ("*NOPSI*"). Intervention may be appropriate for "intended beneficiaries of" a law. *Texas*, 805 F.3d at 661; *see also Brumfield*, 749 F.3d at 344 (allowing "primary intended beneficiaries" to intervene). But VRLC and ABB are not the 2024 Rule's beneficiaries. They seek to represent beneficiaries: students.

VRLC also says it wants to "invoke" the 2024 Rule's "protections in subsequent proceedings," VRLC.Br.34–35, presumably referring to future Title IX grievances or lawsuits on behalf of students. That is not

an interest belonging to VRLC. When a lawyer advocates for a client, he raises the client's rights, not his own. That is true even if the lawyer stands to benefit economically from vindicating his client's rights (something not shown here). *See United States v. Chamberlain*, 341 F. App'x 963, 965 (5th Cir. 2009) (per curiam) (attorney could not intervene to claim his former client's entitlement to funds that would have triggered a contingency-fee agreement); *Smith v. S. Side Loan Co.*, 567 F.2d 306, 307 (5th Cir. 1978) (per curiam) (similar).

Both proposed intervenors say vacatur "is forcing [it] to expend resources." VRLC.Br.34; *see* ABB.Br.48. But "something more than" such "an economic interest is necessary." *NOPSI*, 732 F.2d at 464. By contrast, in *La Union*, the challenged law did not merely require the intervenors to expend resources; it "regulate[d] the conduct of the [intervenors'] volunteers and poll watchers." 29 F.4th at 306.

"[I]deological" and "precedential" interests also do not warrant intervention. *Texas*, 805 F.3d at 657. For example, "an advocacy organization opposing abortion" could not intervene to defend an abortion law because it "had only an ideological interest in the litigation, and the lawsuit d[id] not involve the regulation of the organization's conduct in any respect." *Id.* at 658 (discussing *Northland Fam. Plan. Clinic, Inc. v. Cox*, 487 F.3d 323, 343 (6th Cir. 2007) (citation modified)).

Like the *Northland* advocacy group—and unlike the *La Union* intervenors—these organizations seek to defend the Rule out of an ideological interest. ABB's desire that schools provide pregnancy-related modifications for students is ideological. The same is true of VRLC's goals, like "deterr[ing] sex-based harassment in schools," or encouraging "student survivors [to report] sex-based harassment to their schools." VRLC.Br.3. That's not enough.

C. The other intervention factors do not help.

Proposed intervenors must also show that "an adverse resolution of the action would impair their ability to protect their interest." *Sierra Club*, 18 F.3d at 1207. Without a legally protectable interest, neither organization can do that.

The judgment's "stare decisis effect" does not matter. VRLC.Br.35. A desire to avoid negative precedent does not warrant intervention as of right. *See Texas*, 805 F.3d at 657. In any event, the lawfulness of future regulations would not be controlled by the judgment here. And to the extent VRLC's concern is that finality for this judgment will prevent it from effectively challenging the *Tennessee* judgment, that would be an improper bootstrap. VRLC is no more entitled to intervene in *Tennessee* than it is here—it lacks standing and a legally protectable interest in both cases. An intervenor cannot show impairment of its interests by pointing to other cases in which it also cannot intervene.

D. Neither VRLC nor ABB should be granted permissive intervention.

Rule 24(b) allows "permissive intervention when (1) timely application is made by the intervenor, (2) the intervenor's claim or defense and the main action have a question of law or fact in common, and (3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 n.2 (5th Cir. 1989). ABB and VRLC's requests for intervention were untimely, so "no further analysis is needed." *St. Bernard Par. v. Lafarge N. Am., Inc.*, 914 F.3d 969, 976 (5th Cir. 2019). But intervention would also unduly delay the case and prejudice Carroll. *See supra* at 39–40.

III. The district court correctly held the Rule's harassment provisions unlawful.

Addressing the merits of the district court's judgment, VRLC argues the Rule's harassment definition and grievance procedures should not have been vacated (except insofar as they incorporate the unlawful gender-identity provisions). VRLC.Br.43–53. Its arguments are unavailing. As Carroll explained, many provisions are unlawful beyond their application to gender identity. *E.g.*, ROA.1199–1206; ROA.3829–38; *contra* VRLC.Br.49 n.11. The harassment definition is inconsistent with the statute. And along with the Rule's procedural requirements—like prior restraints on speech—it infringes on First Amendment rights.

A. The Rule's hostile-environment standard was inconsistent with Title IX and unconstitutional.

1. The Rule's new definition of hostile-environment harassment admittedly created a "broader standard" than the Supreme Court's in *Davis*. 89 Fed. Reg. at 33498. It is independently unlawful for trying to regulate speech and conduct not included in Title IX's text. *See Alabama*, 2024 WL 3981994, at *5. The *Davis* Court interpreted "the same word in the same statute to address the same legal question: the meaning of 'discrimination' under Title IX." *Id.* The same text cannot mean one thing in a private lawsuit and another to the Department. *Contra* 89 Fed. Reg. at 33498–99. As the Department recognized in 2020, "Nothing in … *Davis* purports to restrict [its] framework only to private lawsuits for money damages." 85 Fed. Reg. at 30033.

Davis's references to then-recent agency guidance on sexual harassment—which used the language "severe or pervasive"—does not justify the broader definition. *Contra* VRLC.Br.45–46. The Court cited the guidance for two irrelevant points: that Title IX covers "student-on-student harassment," and that "the ages of the harasser and the victim and the number of individuals involved" are relevant. *Davis*, 526 U.S. at 647–48, 651. By contrast, the Court repeated the severe-*and*-pervasive standard five times. Eliminating the actual knowledge requirement also contravenes Title IX. The statute's conditions "prevent recipients … from using [federal] funds in a discriminatory manner," and liability

must be based on "a recipient's own misconduct." 85 Fed. Reg. at 30038. Schools are held responsible for their own failure to prevent or remedy harassment caused by an individual. And a school "cannot commit its own misconduct unless [it] first knows of the sexual harassment that needs to be addressed." *Id.*

2. The broader liability standard also infringes on First Amendment rights. "[N]o categorical rule … divests 'harassing' speech … of First Amendment protection." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (Alito, J.). The Supreme Court crafted the *Davis* rule to respect First Amendment protections, explaining "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." 526 U.S. at 649. Courts have invalidated similarly overbroad definitions of harassment. *E.g.*, *Saxe*, 240 F.3d at 215–18; *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1114–15, 1125 (11th Cir. 2022); *Speech First, Inc. v. Khator*, 603 F. Supp. 3d 480, 482 & n.6 (S.D. Tex. 2022).

The district court correctly did the same. The Rule's harassment definition discriminates based on content and viewpoint, it is overbroad, and it is unconstitutionally vague.

a. The definition unconstitutionally regulates speech based on content and viewpoint. *Contra* VRLC.Br.49. This Court has noted that when Title VII's "severe or pervasive" standard "is applied to sexual

harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596–97 (5th Cir. 1995). Indeed, the definition is content-based because "it prohibits speech about" a specific "characteristic[ ]": "sex." *Cartwright*, 32 F.4th at 1126. It discriminates based on viewpoint by targeting "offensive" speech—after all, "[g]iving offense is a viewpoint." *Matal v. Tam*, 582 U.S. 218, 243 (2017) (plurality).

Other courts have invalidated similar policies applied to university employees. *E.g.*, *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995). It's one thing to uphold school disciplinary action against a First Amendment retaliation claim, as in VRLC's cases, VRLC.Br.49, but it's quite another to restrict employee speech ex ante. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995). As a prior restraint on speech, the hostile-environment harassment definition infringes on First Amendment rights.

The definition is also unconstitutional in lower schools. *Contra* VRLC.Br.48–49. Students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). "*Tinker*'s demanding standard" protects student speech unless schools show it "materially disrupts classwork or involves substantial

disorder or invasion of the rights of others" or is "indecent," "lewd," or "vulgar." *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 187–88, 193 (2021) (citation modified).

b. On overbreadth, the "new definition of 'discrimination' is similar in its sweep to the 'discriminatory harassment' policy in *Cartwright*." *Alabama*, 2024 WL 3981994, at *6. Like the unconstitutional policy in *Cartwright*, the Rule applies to "severe *or* pervasive" speech that merely "*limits*" some educational opportunity. *Id.* (quoting *Cartwright*, 32 F.4th at 1114–15). Those terms "cover substantially more speech than the First Amendment permit[s]." *Id.* (quoting *Cartwright*, 32 F.4th at 1125–27) (citation modified). The broader definition was "substantially overbroad." *Saxe*, 240 F.3d at 216.

To argue the definition has a "legitimate sweep" that "outstrips" its unconstitutional applications, VRLC first relies on cases discussing sexual assault. VRLC.Br.47–48. That doesn't factor into the overbreadth analysis because vacatur doesn't change anything about liability arising from assault—it's equally wrongful under the 2020 Rule. *See* 34 C.F.R. § 106.30 (2020). And because the harassment definition "d[id] not confine itself merely to vulgar or lewd speech," VRLC "cannot take solace in the relatively more permissive *Fraser*" rule. *Saxe*, 240 F.3d at 216; *contra* VRLC.Br.49.

In any event, VRLC's cited cases don't discuss the constitutional implications of the harassment definition; they discuss Title IX liability

based on actions that would be hostile environment harassment even under *Davis* and the 2020 Rule. *See I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 372 (5th Cir. 2019); *Roe v. Cypress-Fairbanks Indep. Sch. Dist.*, 53 F.4th 334, 342 (5th Cir. 2022).

Contrary to VRLC's contention, the Rule's extraterritorial application exacerbates its overbreadth. VRLC.Br.49–50. The harassment definition can sweep up online activities and even speech outside the country. *See* 89 Fed. Reg. at 33532. The Rule only restricts its application to "conduct that is subject to the recipient's disciplinary authority." 89 Fed. Reg. at 33886. That's no limitation at all; a school can always discipline a current student or employee. The Rule thus "include[s] all the speech a student utters during the full 24-hour day." *B.L.*, 594 U.S. at 189. But "courts must be more skeptical of a school's efforts to regulate off-campus speech." *Id.* at 189–90.

c. The harassment definition is also unconstitutionally vague. "Because the First Amendment needs breathing space," regulations touching on speech must be "clear." *Serv. Emps. Int'l Union, Loc. 5 v. City of Hou.*, 595 F.3d 588, 596 (5th Cir. 2010) (citation modified). The vagueness doctrine protects against laws that fail to give "reasonable" warning of what "conduct is prohibited" or that use "indefinite" terms "allow[ing] arbitrary and discriminatory enforcement." *Women's Med. Ctr. of Nw. Hou. v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001).

Here, the Department "grant[ed] extraordinary discretion to whoever may be tasked with interpreting a suspected instance of harassment." *Tennessee*, 737 F. Supp. 3d at 551. The Rule required a "totality of the circumstances" analysis for assessing "*some impact*" on someone's participation in education. *Id.* at 550 (quoting 89 Fed. Reg. at 33511). Anything could be "some impact." The Rule also instructed administrators to consider factors like the "degree" of interference with education, the "parties' ages," and their "previous interactions." 89 Fed. Reg. at 33884. Such open-ended terms "authorize[ ], if not encourage[ ], arbitrary and discriminatory enforcement." *Tennessee*, 737 F. Supp. at 550.

B. The Rule unlawfully removed procedural protections.

The Rule required recipients to "promptly and effectively end any sex discrimination"—regardless of whether they had actual knowledge of it. *See* 89 Fed. Reg. at 33889 (34 C.F.R. § 106.44(f)(1)). It instructs Title IX coordinators to initiate a grievance even in "the *absence* of a complaint or the *withdrawal* of any or all of the allegations in a complaint." 89 Fed. Reg. at 33889 (34 C.F.R. § 106.44(f)(1)(v)) (emphasis added). Taken together, this standard required Title IX coordinators to investigate even single instances of speech or rumored conduct that "could" constitute "harassment." In an era when protected speech is said to threaten mental and emotional safety, that turns Title IX

coordinators into omnipresent speech monitors. *E.g.*, *Perlot v. Green*, 609 F. Supp. 3d 1106, 1114 (D. Idaho 2022) (student claimed professor's agreement with comments that the Bible reserves marriage to one man and one woman "caused [her] to fear for [her] life").

The Department also mandated that recipients issue gag orders during harassment grievance proceedings. 89 Fed. Reg. at 33891 (34 C.F.R. § 106.45(b)(5)). These "privacy" protections, *id.*, would prohibit respondents and complainants alike from discussing the case with the media or publicly criticizing the recipient's handling of the process. Such prior restraints, which bear a heavy presumption of unconstitutionality, require substantive and procedural safeguards. *See Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 280–82 (5th Cir. 2003). Students and teachers have "a clearly established right to be free of prior restraints except where they are designed to maintain discipline or to prevent school disruption and are narrowly drawn to achieve that goal." *Id.* at 282. Yet the Rule's gag orders apply to any speech during a grievance proceeding. They are unconstitutional whether applied to respondents or complainants. *Contra* VRLC.Br.52.

Contrary to VRLC's claim, the gag-order requirement authorizes "restrictions on discussing the allegations or investigation in an article or on social media." 89 Fed. Reg. at 33674; VRLC.Br.52. The Rule's First Amendment disclaimer doesn't save it because the gag-order requirement lacks the necessary substantive guardrails (like well-

defined, narrow terms) and procedural protections (like a limited duration and the ability to challenge). *See Dambrot*, 55 F.3d at 1183 (disregarding saving clause in harassment policy); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 168–69 (5th Cir. 1978).

C. The Rule was arbitrary and capricious.

The broader harassment definition and related provisions. An agency acts arbitrarily when it changes its policy without "provid[ing] a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). It must "show that there are good reasons for the new policy." *Id.* (citation modified). The Department had no good reason to deviate from the well-considered requirements it promulgated in 2020.

That year, the Department adopted the *Davis* definition and recognized that the First Amendment demands a "narrowly tailored" harassment definition to avoid censoring protected speech. 85 Fed. Reg. at 30142; *accord id.* at 30033 ("Including the *Davis* definition of sexual harassment for Title IX purposes … helps ensure that Title IX is enforced consistent with the First Amendment."). The gag-order requirement was also arbitrary. The Department recognized in 2020 that such a requirement "impose[s] prior restraints on students' and employees' ability to discuss … the allegations under investigation." 85 Fed. Reg. at 30295. It unreasonably abandoned these constitutional safeguards in 2024. *Contra* VRLC.Br.44.

The Department acted arbitrarily by removing the actual knowledge or deliberate indifference requirement and adding the mandate to "end" discrimination and the self-initiation power. As discussed, Title IX restricts the recipient's own misconduct. VRLC's concerns about reports to a "wrong employee" or inadequate responses don't justify extending liability to conduct the recipient doesn't know about. VRLC.Br.50. Under the 2020 regulations, a report to *any* employee at an elementary or secondary school triggers the actual-knowledge requirement. 85 Fed. Reg. at 30574. And at postsecondary institutions, reports to one of myriad employees wouldn't suffice to give the "recipient" notice.

The Department recognized that under the 2020 regulations, recipients could "initiate" the grievance process when "necessary" to prevent being deliberately indifferent to sex discrimination. 89 Fed. Reg. at 33594; 85 Fed. Reg. at 30131. For example, if the recipient acquires "actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority." 85 Fed. Reg. at 30089. But taken together, the 2024 changes far exceed that limited power. *Contra* VRLC.Br.51. Without the safeguards of requiring actual knowledge and deliberate indifference, the 2024 Rule required recipients to investigate protected speech or rumors of alleged conduct. *See* 89 Fed. Reg. at 33595–96. The Department had no good reason to revamp Title IX liability in this way.

IV. The district court properly vacated the entire Rule.

As to severability, both organizations wish to step into the Department's shoes. That means they are bound by the Department's forfeitures. In a challenge to a 423-page regulation, the agency had to show the district court how vacatur could be narrowed. Even after the Supreme Court told the Department it had not "adequately identified which particular provisions, if any, are sufficiently independent of the enjoined definitional provision and thus might be able to remain in effect," *Louisiana*, 603 U.S. at 868, the Department filed a materially identical summary judgment brief in the court below. *Compare* ROA.1750–51, *with* Appl. at 21–22. It does not suffice to request that a judgment pausing agency action be "narrowly tailored." *Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016).

When it comes to the provisions ABB and VRLC invoke, the severability point was inadequately briefed below. The Department listed some of them as examples without explaining how they could be unraveled from the unlawful gender-identity and hostile-environment harassment provisions. *See supra* at 10. The Court should "decline[ ] to entertain" these arguments now. *Ohio v. EPA*, 603 U.S. 279, 298 (2024) (citation modified).

Forfeiture aside, the unlawful provisions "are intertwined with and affect other[s]." *Louisiana*, 603 U.S. at 868. Even "an express severability clause is an aid merely." *Texas v. United States*, 691 F.

Supp. 3d 763, 788–89 (S.D. Tex. 2023) (citation modified). To determine severability, courts ask whether the agency would have enacted the rule absent the unlawful provisions, *see id.*, and "whether the removal of the unlawful provisions will 'impair the function of the statute as a whole.'" *Louisiana*, 2024 WL 3584382, at *2 (quoting *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)).

VRLC argues that only the gender-identity provisions—34 C.F.R. §§ 106.10 and 106.31(a)(2)—were properly vacated. But as this Court has recognized, these provisions lie "at the heart of the 423-page Rule," and it cannot function as designed without them. *Louisiana*, 2024 WL 3452887, at *1. Put another way, the 2024 Rule's "definition of sex discrimination … touch[es] every substantive provision of the Rule." *Tennessee*, 2024 WL 3453880, at *3. For example, schools must record "information about conduct that reasonably may constitute sex discrimination." 89 Fed. Reg. at 33886 (34 C.F.R. § 106.8(f)(2)). That "implicates the new definition of sex discrimination," which in turn includes the overbroad harassment definition. *Tennessee*, 2024 WL 3453880, at *3. Indeed, the Department made no secret that the gender-identity provisions carried over even to the provisions ABB says are severable, requiring that lactation spaces be accessible to any lactating student regardless of "gender identity or gender expression." 89 Fed. Reg. at 33788.

A court "cannot rewrite [the law] and give it an effect altogether different from that sought by the measure viewed as a whole." *Murphy v. NCAA*, 584 U.S. 453, 481–82 (2018) (citation modified). And it should not assume the Department "would have preferred to apply the [Rule] in as many" situations "as possible" if "key" provisions were held invalid. *United States v. Booker*, 543 U.S. 220, 248 (2005). These principles foreclose severing the 2024 Rule. It was "highly complex" and riddled with "interrelated provisions," *id.*, and it was designed to implement "one coherent policy," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 (1999); *see* 89 Fed. Reg. at 33476 (Rule meant "to fully effectuate Title IX's sex discrimination prohibition."). The Department said that redefining sex discrimination is "essential" to this goal. *Id.* at 33500. It's "not this court's job" to embark on a "judicial rewriting of the Rule." *Louisiana*, 2024 WL 3452887, at *2.

In addition, the Department justified the Rule and its high costs based on benefits expected from implementing the gender-identity provisions—especially §§ 106.10 and 106.31(a)(2). 89 Fed. Reg. at 33861–62. The cost-benefit analysis didn't incorporate "allowing" the Rule "to go into effect with a *different* definition of sex discrimination." *Tennessee*, 2024 WL 3453880, at *4. And the whole Rule was arbitrary and capricious. *See supra* III.C.

ABB argues the pregnancy provisions "can operate without any of the other 2024 amendments." ABB.Br.3. It has not always thought so. At one time, for example, ABB wanted the Department to replace "breastfeeding" and similar terms with more "gender neutral" language. ROA.5440, 5450; *see also* ROA.5421–27. In any event, the Department did not promulgate these provisions independently—indeed, it refused to do so. *See* 89 Fed. Reg. at 33773. It instead used a rulemaking justified by redefining sex discrimination, and it incorporated its gender-identity mandates even with respect to the pregnancy provisions. *See supra* at 3–5. A court shouldn't sever a regulation when "there is substantial doubt that the agency would have adopted the severed portion on its own." *Mayor of Balt. v. Azar*, 973 F.3d 258, 292 (4th Cir. 2020) (en banc) (citation modified). And the independently unlawful provisions contaminate the pregnancy provision along with the rest of the regulation. The district court did not err when it vacated the whole 2024 Rule.

CONCLUSION

The district court correctly denied VRLC and ABB's motions to intervene. The judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32 because this brief contains 12,741 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in Word 365 using a proportionally spaced typeface, 14-point Century Schoolbook.

Dated: February 19, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

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