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Via Federal eRulemaking Portal (Regulations.gov)
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U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585-0121

RE: Significant Adverse Comment to Direct Final Rule Rescinding Regulation Related to Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (DOE-HQ-2025-0025)

Dear Mr. Taggart:

Signatory States Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin submit this comment letter to oppose both the Department of Energy's rescission of subsection (b), Remedial and Affirmative Action and Self-Evaluation, of 10 C.F.R. § 1042.110, and its use of a direct final rule (DFR) for this rescission. Rescinding Regulations Related to Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance ("DFR"), 90 Fed. Reg. 20,788 (May 16, 2025) (to be codified at 10 C.F.R. 1042).[1]

Under 10 C.F.R. § 1042.110(b), recipients of federal education funding "may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation . . . by persons of a particular sex" in an "education program or activity." DOE states without any rationale or support that it has decided to eliminate this long-standing express grant of permission because it is "unnecessary" and "contains no substantive right or obligation." DFR, 90 Fed. Reg. at 20,789. As discussed below, contrary to DOE's statement, this a significant regulatory change, which is wholly inappropriate to promulgate through a DFR, and the decision to eliminate this provision is also arbitrary and capricious under the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 551–59.

[1] Signatory States do not oppose the rescission of subsections (c) and (d); Signatory States agree with DOE's assessment that these provisions are long expired. *See* DFR, 90 Fed. Reg. at 20,789.

Signatory States receive billions of dollars of education funding from DOE and operate numerous education programs and activities that receive federal funds, such as state-operated universities and community colleges, and pass federal funding through to local educational agencies. Where, as here, Signatory States have submitted a significant adverse comment, DOE is required to withdraw this DFR. 5 U.S.C. § 553(c); *see also* Section (II)(D), *infra.*

I. Background

A. The DFR's Rescission of the "Affirmative Action" Safe Harbor.

The DFR amends longstanding regulations governing the remedial and affirmative actions that may be taken by recipients of funding contained in 10 C.F.R. § 1042.110. The regulation currently consists of four subsections. Subsection (a) provides: "[i]f the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination." This provision remains in effect.

Subsection (b), entitled "Affirmative action," specifies in its first sentence that "[i]n the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex" ("Affirmative Action Provision"). The DFR would eliminate this subsection. In other words, the rule, as amended by the DFR, would no longer create a safe harbor affirmatively permitting funding recipients to remain compliant with Title IX while taking "affirmative action" to overcome the effects of conditions that resulted in limited participation in an education program or activity by persons of a particular sex before there is a specific finding of discrimination on the basis of sex in the education program or activity.

As justification for this immediate and substantive change, the DFR offers a conclusory statement that subsection (b) "contains no substantive right or obligation" and that the provision is "unnecessary" without any further reasoning or support. DFR, 90 Fed. Reg. at 20,789.

B. Regulatory History.

The current iteration of the Affirmative Action Provision originates from a public process that was based on a strong history of public participation and a desire for consistency across public agencies. DOE promulgated § 1042.110 on January 18, 2001 as part of a regulatory package intended to replace existing DOE regulations with provisions from a common rule published by the United States Department of Justice ("U.S. DOJ") in order to promote consistent and adequate enforcement of Title IX" across federal agencies. *See generally* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. 4,627 (Jan. 18, 2001) ("Title IX Common Rule"). The Title IX Common Rule adopted provisions that "for the most part, are identical to those established by the Department of Education ('ED')." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858, 52,859

(Aug. 30, 2000). The underlying rationale for promulgating the Title IX Common Rule included "the history of public participation in the development and congressional approval of ED's regulations" and that the regulations were the "result of an extensive public comment process and congressional review," wherein "more than 9700 comments" were received and reviewed before the final regulation was drafted. *Id.*

As U.S. DOJ explained, the substance of the ED regulations (which had originally been issued by the predecessor agency to ED, the Department of Health, Education, and Welfare ("HEW")), were part of a package of Title IX regulations that was promulgated by the agency and, under a process set out in the statute, set before Congress. "[A]fter the final [HEW] regulations were issued, but before they became effective, Congress held six days of hearings to determine whether the regulations were consistent with the statute. Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. (1975)." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,858. This in-depth process of statutory delegation of rulemaking authority, followed by congressional review and approval, has led courts to afford the HEW/ED regulations substantial deference. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (describing statutory process and affording deference to HEW/ED Title IX regulation on employment); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) ("The degree of deference [to the ED athletics regulation] is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.").

II. The Department of Energy Cannot Use a Direct Final Rule to Rescind 10 C.F.R. § 1042.110, Subsection (b).

DOE impermissibly seeks to circumvent notice and comment rulemaking required under the APA to rescind subsection (b) of 10 C.F.R. section 1042.110 by DFR, effective July 15, 2025, unless significant adverse comments are received by June 16, 2025. *See generally* DFR, 90 Fed. Reg. 20,788.

The Administrative Conference of the United States ("ACUS"), an independent federal agency established by Congress to promote "efficiency, adequacy, and fairness of the procedures by which federal agencies conduct regulatory programs,"[2] recognizes that agencies may use direct final rulemaking only where the agency "for good cause finds that it is 'unnecessary' to undertake notice-and-comment rulemaking," and "concludes that the rule is unlikely to elicit any significant adverse comments."[3] In such circumstances, the agency should publish in the Federal

[2] Admin. Conf. of the U.S., *About ACUS,* https://www.acus.gov/about-acus (last visited June 9, 2025) (Attached as Exhibit 1).

[3] Admin. Conf. of the United States, *Public Engagement in Agency Rulemaking Under the Good Cause Exemption* (Dec. 12, 2024), https://www.acus.gov/sites/default/files/documents/Public-Engagement-Agency-Rulemaking-Good-Cause-Exemption-Final-Recommendation.pdf [hereinafter "ACUS 2024-6"] (Attached as Exhibit 2); *see also 5* U.S.C. § 553(b)(B); Off. of the Fed. Reg., *A Guide to the Rulemaking Process* 9, https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf (last visited

Register that it is proceeding by DFR and explain "the basis for the agency's finding that it is unnecessary to undertake notice-and-comment rulemaking."[4]

Here, it is procedurally improper for DOE to use the DFR process to rescind the Affirmative Action Provision within the Remedial and Affirmative Action and Self-Evaluation Regulation, 10 C.F.R. § 1042.110. First, the narrow good cause exception to notice and comment does not apply here, nor does the agency invoke any other exception to APA rulemaking. DOE must therefore undertake notice and comment procedures for its proposed rescissions. Second, the agency impermissibly raises the standard for what constitutes "significant adverse comments" that would prevent the rule from becoming effective next month. Third, DOE fails to provide adequate notice of the legal authority for this action. And fourth, the agency must commit to withdrawing the rule after receiving any significant adverse comments such as this one.

A. DOE's Rescission Must Undergo Notice and Comment Procedures.

As an initial matter, to enact this recission, DOE must use the same notice and comment process as it would to enact new regulations. *See* 5 U.S.C. § 553. The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) ("[T]he APA 'make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.'" (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))).

While the APA creates exceptions to notice and comment rulemaking, none are applicable here. The APA provides an exception "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B); *see also id.* § 553(d)(3) (exempting a substantive rule from publication or service requirements "for good cause found and published with the rule."). The good cause exception is "narrowly construed and only reluctantly countenanced," *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) and courts must "carefully scrutinize the agency's justification for invoking the 'good cause' exception." *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 19 (D.D.C. 2010). It is not a tool for agencies to "circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them." *N.J. Dep't of Env't Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (citing *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979)). Instead, the good cause exception is typically utilized "in emergency situations, where delay could result in serious harm, or when the very announcement of a proposed rule itself

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June 9, 2025) (direct final rulemaking is appropriate where a rule "would only relate to routine or uncontroversial matters") (Attached as Exhibit 3).

[4] ACUS 2024–6, *supra* note 3, at 5; *see also* Todd Garvey, Cong. Research Serv., R41546, *A Brief Overview of Rulemaking and Judicial Review* 4 (Mar. 27, 2017), https://www.congress.gov/crs-product/R41546 (noting "even a single adverse comment" is sufficient to withdraw a direct final rule) (Attached as Exhibit 4).

could be expected to precipitate activity by affected parties that would harm the public welfare." *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 72 F.4th 1324, 1339–40 (D.C. Cir. 2023).

Here, DOE did not articulate a good cause finding, per 5 U.S.C. § 553(b)(B), and instead provided only a conclusory statement that the Affirmative Action Provision "contains no substantive right or obligation but rather grants permission for a recipient to 'take action . . . consistent with law.' Accordingly, DOE finds this provision to be unnecessary." DFR, 90 Fed. Reg. at 20,789. DOE has it backward: the APA calls for a determination that the *notice and comment process* is "unnecessary," not the regulation.[5] DOE makes no such claim, much less provides any support for it. In any case, as discussed in detail *infra*, these regulations are necessary: they provide a safe haven permitting recipients, consistent with Title IX, to "take affirmative action" to overcome the effects of conditions that resulted in limited participation in an education program or activity by persons of a particular sex, before there is a specific finding of discrimination on the basis of sex in the education program or activity.

Moreover, the "unnecessary" prong of the good cause exception is "confined to those situations in which the administrative rule is a *routine* determination, *insignificant* in nature and impact, and *inconsequential* to the industry and to the public." *Mack Trucks*, 682 F.3d at 94 (citing *Util. Solid Waste Activities Grp. v. EPA,* 236 F.3d. 749, 755 (D.C. Cir. 2001)) (emphasis added).[6] As this letter demonstrates, this rescission is plainly not an insignificant or merely technical change, and it is of great consequence to the public. DOE is substantively altering its regulations to eliminate the safe haven that currently exists, clearly permitting recipients, consistent with Title IX, to "take affirmative action" to overcome the effects of conditions that resulted in limited participation in an education program or activity by persons of a particular sex, before there is a specific finding of discrimination on the basis of sex in the education program or activity. Allowing this affirmative action to occur prior to the finding allows the effects of conditions that resulted in limited participation to be mitigated more quickly.

The "unnecessary" prong may also apply "when the agency lacks discretion regarding the *substance* of the rule."[7] As a threshold matter, it is the province of the judicial branch, not the executive, "to say what the law is," *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (quoting *Marbury v. Madison*, 5 U.S. 107, 177 (1803)). But even where an agency claims a rescission is necessary to conform to current legal standards—which is not true here—public

[5] 5 U.S.C. § 553(b)(B); *see also* ACUS 2024–6, *supra* note 3, at 4 (Direct final rulemaking is only appropriate where the agency "for good cause finds that it is 'unnecessary' to undertake notice-and-comment rulemaking" and "concludes that the rule is unlikely to elicit any significant adverse comments").

[6] *See also* Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 Stan. L. Rev. 237, 244 (2021) (APA legislative history clarified the meaning of "unnecessary" as instances involving "minor or merely technical amendment") (Attached as Exhibit 5); Tom C. Clark, Att'y Gen., U.S. Dep't of Just., *Attorney General's Manual on the Administrative Procedure Act*, FSU Coll. of L. (1947), https://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/1947cover.html ("'Unnecessary' refers to the issuance of a minor rule or amendment in which the public is not particularly interested.") (Attached as Exhibit 6).

[7] ACUS 2024–6, *supra* note 3, at 2 (*citing Metzenbaum v. Fed. Energy Regul. Comm'n*, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (Notice and comment were not required for the agency's "nondiscretionary acts required by [statute]")).

comment is important, for example to ensure that the agency action is not arbitrary and capricious for failure to consider "serious reliance interests," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), or "important aspect[s] of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency thus "cannot simply brand [a prior action] illegal and move on." *Louisiana v. U.S. Dep't of Energy*, 90 F.4th 461, 475 (5th Cir. 2024) (finding DOE was required to consider alternatives to repealing a purportedly "invalid" rule *in toto*).

It would also not be "impracticable" for DOE to engage in notice and comment in this instance. The impracticability exception may apply where an agency "finds that due and timely execution of its functions would be impeded by the notice otherwise required [by the APA]." *Util. Solid Waste Activities Grp.*, 236 F.3d at 754. However, impracticability "is generally confined to emergency situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018); *see also Mack Trucks*, 682 F.3d at 93 (collecting cases). DOE has not articulated, and the undersigned are not aware of, any emergency situation or imminent safety threat that would justify rescission of the regulation permitting recipients to engage in affirmative or remedial actions to mitigate the effects of discrimination on the basis of sex by means of a DFR.

Lastly, the regular notice and comment procedures are not "contrary to the public interest" here. This exception "is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest." *Mack Trucks*, 682 F.3d at 95. For example, it would be contrary to the public interest to undertake notice and comment where "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent." *See Util. Solid Waste Activities Grp.*, 236 F.3d at 755. Here, providing the public the opportunity to review and comment in a robust process in fact furthers the public interest in light of the longstanding critical opportunities clearly articulated in the Affirmative Action Provision. And DOE provides no reason to suspect that adequate advance notice of changes to a regulation regarding permission to engage in affirmative action to mitigate the effects of discrimination on the basis of sex would catalyze unlawful action against the public interest.

Nowhere in the Federal Register notice does DOE invoke any of the remaining exceptions to notice and comment rulemaking,[8] and agency action must be evaluated "solely by the grounds invoked by the agency." *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

B. DOE Impermissibly Attempts to Raise the Standard for "Significant Adverse Comments."

[8] *See* 5 U.S.C. §§ 553(a)(1) (exception for "a military or foreign affairs function of the United States"); 553(a)(2) (exception for "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts"); 553(b)(A) (exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

Next, the DFR violates the APA because DOE attempts to impermissibly raise the bar for a "significant adverse comment" that would require the agency to withdraw the DFR. DOE mistakenly defines significant adverse comments as "ones which oppose the rule and raise, alone or in combination, a serious enough issue related to *each of the independent grounds* for the rule that a substantive response is required." *See* DFR, 90 Fed. Reg. at 20,789 (emphasis added). But DOE's attempt to apply a more exacting standard to the public's comments is inconsistent with widely accepted legal interpretations and longstanding agency practice.[9] Instead, the agency's unjustified heightened requirements impose an extra barrier to meaningful public participation in DOE's development of this rulemaking.

According to ACUS, "an agency should consider *any comment* received during direct final rulemaking to be a significant adverse comment if the comment explains why: (a) [t]he rule would be inappropriate, including challenges to the rule's underlying premise or approach; or (b) [t]he rule would be ineffective or unacceptable without a change."[10] Unlike the DFR, prior direct final rules advanced by DOE committed to responding to "adverse comments" or "significant adverse comments" without qualification.[11]

The heightened standard for adverse comments that the DFR articulates also deviates from the standard routinely applied by DOE and other agencies. For example, the statutory requirements for DOE Energy Conservation DFRs instruct that the Secretary "shall withdraw the direct final rule if [] the Secretary receives 1 or more adverse public comments relating to the direct final rule" and determines that the comments provide a reasonable basis for withdrawal. 42 U.S.C. § 6295(p)(4)(C)(i). For the Environmental Protection Agency's direct final rulemaking on significant new uses for chemical substances, the agency's regulations state that it will withdraw a DFR "[i]f notice is received within 30 days after the date of publication that someone wishes to submit adverse or critical comments[.]" 40 C.F.R. § 721.170(d)(4)(i)(B). And the Federal Aviation Administration's regulations likewise provide: "[if] we receive an adverse comment, we

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[9] For example, in notice-and-comment rulemaking—where agencies have an obligation to respond to "significant comments received during the period for public comment," *Perez*, 575 U.S. at 96, this has been interpreted to include "comments that can be thought to challenge a fundamental premise underlying the proposed agency decision," *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (internal quotation marks omitted), or those which "raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule." *City of Portland v. EPA.*, 507 F.3d 706, 715 (D.C. Cir. 2007) (emphasis omitted).

[10] ACUS 2024–6, *supra* note 3, at 5 (emphasis added).

[11] *See, e.g.*, *Implementation of OMB Guidance on Drug-Free Workplace Requirements*, 75 Fed. Reg. 39,443, 39,444 (July 9, 2010) ("Accordingly, we find that the solicitation of public comments on this direct final rule is unnecessary and that 'good cause' exists under 5 U.S.C. § 553(b)(B) and 553(d) to make this rule effective . . . without further action, unless we receive adverse comment[.]"); *Defense Priorities and Allocations System*, 73 Fed. Reg. 10,980, 10,981 (Feb. 29, 2008) ("The direct final rule will be effective . . . unless significant adverse comments are received[.]"); *Collection of Claims Owed the United States*, 68 Fed. Reg. 48,531, 48,532 (Aug. 14, 2003) ("This rule will be effective . . . without further notice unless we receive significant adverse comment[.] If DOE receives such an adverse comment on one or more distinct amendments, paragraphs, or sections of this direct final rule, DOE will publish a timely withdrawal in the Federal Register indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment.").

will either publish a document withdrawing the direct final rule before it becomes effective" and may issue a notice of proposed rulemaking, or may proceed by other means permissible under the APA. 14 C.F.R. § 11.134. These agencies' rules and practices demonstrate that DOE's threshold for "significant adverse comments" is artificially heightened in contrast with established interpretations that welcome public input.[12]

C. DOE Does Not Cite Adequate Legal Authority for the DFR.

The DFR also does not provide adequate "reference to the legal authority under which the rule is proposed." 5 U.S.C. § 553(b)(2); *cf. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683–84 (2020) (finding interim final rule satisfied this requirement where the agency's request for comments "detailed [its] view that they had legal authority" to promulgate exemptions under two statutes). As an initial matter, Executive Order Number 12,250, Leadership and Coordination of Nondiscrimination Laws, which was signed 45 years ago in 1980, delegates authority to the Attorney General to "coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions" such as Title IX of the Education Amendments of 1972. Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250 § 1–2 (Nov. 2, 1980). But the DFR does not mention any involvement by the Department of Justice or the Attorney General in the rescission of the Title IX regulations at issue here.

D. DOE Must Rescind the DFR After Receiving This Significant Adverse Comment.

Lastly, once DOE receives a significant adverse comment, such as ours, DOE must withdraw the DFR. Failure to withdraw the rule would be contrary to the APA's requirement that the agency "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments." 5 U.S.C. § 553(c); *see also Perez*, 575 U.S. at 96 ("An agency must consider and respond to significant comments received during the period for public comment."); *cf. Little Sisters of the Poor*, 591 U.S. at 686 (finding interim final rule satisfied APA § 553(c) comment requirement where agency "requested and encouraged public comments on all matters addressed in the rules" (cleaned up)).[13]

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[12] In another deviation from established notice-and-comment practices that facilitate public participation, DOE is not contemporaneously publishing the public comments it has received in response to the DFR. *Compare* Dep't of Energy, *Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance,* Regulations.gov, https://www.regulations.gov/document/DOE-HQ-2025-0025-0001
(7,551 comments received and 0 comments publicly posted as of 11:00 AM on June 13, 2025), *with* Dep't of Justice, *Withdrawing the Attorney General's Delegation of Authority,* Regulations.gov, https://www.regulations.gov/document/DOJ-OAG-2025-0003-0001 (11,868 comments received and 11,826 comments publicly posted as of 11:00 AM on June 13, 2025).

[13] The DOE has already received 7,551 comments on the DFR. Dep't of Energy, *Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance,* Regulations.gov, https://www.regulations.gov/document/DOE-HQ-2025-0025-0001 (last visited June 13, 2025, 8:05 PM).

Here, DOE states that in response to significant adverse comments it will either withdraw the rule or "issu[e] a new final rule" that responds to the comments. DFR, 90 Fed. Reg. at 20,789. But that is not the proper procedure. A significant adverse comment undermines the agency's finding that there is good cause to bypass notice and comment rulemaking, including through issuing a new DFR.[14] DOE had permissible avenues available to it to facilitate expeditious rulemaking if it desired: it could have issued a "companion proposed rule" alongside the DFR in order to be well-positioned to proceed with notice-and-comment rulemaking in the event the DFR was withdrawn.[15] However, DOE chose not to do so, and DOE may not undercut the public's right to lawful process required under the APA due to the agency's haste.

III. States Have Relied on the Affirmative Action Provision in Crafting Education Programs to Promote Gender Equality Consistent with Title IX and the Constitution.

While the Affirmative Action Provision does not create a substantive right or obligation, *see* DFR, 90 Fed. Reg. at 20,790, this subsection does provide that "a recipient may take affirmative action consistent with law" even before there has been a "finding of discrimination on the basis of sex" by a "designated agency official." 10 C.F.R. § 1042.110(a)–(b). A designated agency official means "the Director, Office of Civil Rights and Diversity or any official to whom the Director's functions under this part are relegated." § 1042.105. The regulation thus clarifies that a recipient will not violate Title IX where the recipient takes affirmative steps, even absent an investigation or finding by the Agency, to "overcome the effects of conditions that resulted in limited participation" in recipient's programs or activities "by persons of a particular sex." § 1042.110(b).

In reliance on this regulation, the Signatory States have historically crafted a variety of approaches to remedy past discrimination. For example, New York provided grants to local educational agencies to provide career and technical education programs with support and resources to, *inter alia*, promote gender diversity in non-traditional career paths.[16] Additionally, California provided train-the-trainer grants to local educational agencies to establish a program of professional development in the identification and elimination of gender bias and inequality in

[14] *See* ACUS 2024–6, *supra* note 3, at 2 (Noting public engagement may be "especially important" where notice and comment does not occur because it can "help agencies determine whether the good cause exemption is applicable.").

[15] *See* ACUS 2024–6, *supra* note 3, at 6 ("If the agency previously requested comments in a companion proposed rule . . . the agency may proceed with notice-and-comment rulemaking consistent with the proposed rule" after DFR is withdrawn due to significant adverse comments); *see also* Off. of the Fed. Reg., *supra* note 3, at 9 ("If adverse comments are submitted, the agency is required to withdraw the direct final rule before the effective date. The agency may re-start the process by publishing a conventional proposed rule or decide to end the rulemaking process entirely."); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1057 (N.D. Cal. 2018) (EPA published a proposed rule alongside its direct final rule; after receiving negative comments, the agency withdrew the direct final rule and proceeded with revisions on the proposed rule track).

[16] N.Y. State Dep't of Educ., *Removing Barriers to CTE Programs for English Language Learners and Students with Disabilities Grant Application*, https://www.p12.nysed.gov/funding/2017-2018-cte-ell-swd/home.html (last updated Mar. 17, 2017).

California's local educational agencies.[17] Furthermore, the Department of Energy itself has provided grants to Signatory States for programs that may be characterized as promoting "affirmative action consistent with law." For example, one of Washington's community colleges received the Community Capacity Building Grant from the Department of Energy to, *inter alia*, create more inclusive teaching and training to serve all students while limiting barriers for historically underrepresented students.[18]

IV. The Rescission of the Rule Jeopardizes the States' Efforts to Remedy Discrimination, Subjects States to Enforcement Actions, and Opens Them to Liability from Private Litigants.

In addition to jeopardizing the remedial approaches described above, rescinding the Affirmative Action Provision may place States in the untenable position of providing programs that further the goals of Title IX, while risking implementation challenges by DOE or private litigants. Furthermore, by removing this provision, DOE may create doubt as to recipients' (including States') authority under Title IX to proactively remedy instances of sex discrimination or "limited participation" in their programs. DOE has previously recognized the importance of Title IX protections for women and girls in STEM, stating that Title IX helps to secure "a clean energy future by closing the gender gap in math and science."[19] As DOE notes, Title IX is critical to "ensure that the recruitment, retention, training and education practices at the school are inclusive for both men and women."[20] Chilling efforts to promote gender equality will undermine rather than effectuate the purpose of Title IX to eliminate discrimination on the basis of sex. *See* 20 U.S.C. § 1681(a).

The rescission of this provision raises particular concerns for the Signatory States in light of the current administration's overt hostility to affirmative efforts to remedy discrimination. The administration has taken steps to stamp out efforts—in both government and the private sector—focused on remedying past and present discrimination, and continuing disparities, based on race, sex, and other characteristics protected by civil rights laws. For example, Executive Order Number 14,173 condemns "sex-based preferences," "diversity," "affirmative action," and "workforce balancing" as "dangerous, demeaning, and immoral" and as "illegal, pernicious discrimination," Ending Illegal Discrimination and Restoring Merit-Based Opportunity, Exec. Order No. 14,173, 90 Fed. Reg. 8,633, 8,633–34 (Jan. 31, 2025), even though many such programs have lawfully sought to *remedy* discrimination and effectuate civil rights laws.

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[17] Cal. Dep't of Educ., *Gender Equity Train-the-Trainer Grants*, https://www.cde.ca.gov/fg/fo/profile.asp?id=226 (last updated Aug. 3, 2007).
[18] Columbia Basin College, *Clean Energy Learning Center Full Application Submitted to Department of Energy Community Capacity Building Grant Program (DE-FOA-0003131)* (Apr. 30, 2024); Off. of Env't Mgmt, U.S. Dep't of Energy, *DOE Announces $18.9 Million Financial Assistance Grant Award Selections to 12 Disadvantaged Communities Across Country* (Sept. 12, 2024), https://www.energy.gov/em/articles/doe-announces-189-million-financial-assistance-grant-award-selections-12-disadvantaged.
[19] U.S. Dep't of Energy, *Title IX: More Than Just Sports* (June 23, 2011), https://www.energy.gov/articles/title-ix-more-just-sports (Attached as Exhibit 7).
[20] *Id.*

Similarly, Executive Order Number 14,151 characterizes "diversity, equity, and inclusion" programs as "illegal," "immoral," and "shameful discrimination," and directs the Office of Management and Budget to "review and revise . . . all existing Federal employment practices, union contracts, and training policies or programs" to "terminate" any "factors, goals, policies, mandates, or requirements" to promote diversity. Ending Radical and Wasteful Government DEI Programs and Preferencing, Exec. Order No. 14,151, 90 Fed. Reg. 8,339, 8,339 (Jan. 29, 2025). The administration has also begun to require recipients of federal grants and funding, including State recipients of Title IX and Title VI funds, to provide assurances that they will not promote diversity, equity, or inclusion in their programs.[21]

Given these actions, it is evident that the current administration regards as impermissible any program to remedy discrimination or its ongoing effects—far beyond the forms of affirmative action that courts have found unlawful. The administration's actions also run directly counter to Signatory States' ongoing efforts to eliminate discrimination, remedy its ongoing effects, and foster equal opportunity for all. Without express permission to redress sex discrimination—which the Affirmative Action Provision currently provides—recipients, including Signatory States, may not know which remedial efforts will be regarded as lawful, and which will be subject to arbitrary enforcement action by DOE.

Furthermore, because Title IX creates a private right of action, including money damages, *e.g.*, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639–40 (1999), removing the Affirmative Action Provision might expose recipients, including Signatory States, to potential liability to private litigants. Even if such private lawsuits were ultimately deemed meritless, rescinding recipients' express permission under the Affirmative Action Provision may invite private litigants to challenge States' efforts to remedy discrimination, which will require States to divert scarce resources and personnel to defend against such challenges. Consequently, the rescission will also create a risk that States will be needlessly and improperly chilled from taking lawful remedial action to effectuate Title IX, potentially halting or reversing decades of progress.

V. The Signatory States Oppose the Rescission of 10 C.F.R. § 1042.110(b) and Raise Sufficiently Serious Objections to Require DOE to Withdraw the DFR.

DOE has not offered a sufficient justification or explanation for the withdrawal of the Affirmative Action Provision. *See State Farm*, 463 U.S. at 43 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"). The sole basis for DOE's determination that the Affirmative Action Provision is "unnecessary" is that the provision "contains no substantive right or obligation but rather grants permission for a recipient to 'take action . . . consistent with law.'" DFR, 90 Fed. Reg. at 20,789 (ellipsis in original). But this is no explanation at all—DOE does not articulate why a regulatory grant of permission is "unnecessary," or why that grant of permission, which clarifies recipients' ability to address sex

[21] *See, e.g.,* U.S. Dep't of Educ., *ED Requires K–12 School Districts to Certify Compliance with Title VI and* Students v. Harvard *as a Condition of Receiving Federal Financial Assistance* (Apr. 3, 2025), https://www.ed.gov/about/news/press-release/ed-requires-k-12-school-districts-certify-compliance-title-vi-and-students-v-harvard-condition-of-receiving-federal-financial-assistance (Attached as Exhibit 8).

discrimination under Title IX, should be rescinded. Put differently, there are at least two fatal gaps in DOE's reasoning: Why is a grant of permission an unnecessary regulation? And even if the provision merely clarifies recipients' permission, without creating substantive rights or obligations, why is its rescission justified on that basis? DOE's anemic explanation—comprising all of two sentences—cannot justify the withdrawal of this longstanding provision of the Title IX Common Rule, which, as discussed above, was adopted after extensive public commentary and congressional review.

This failure of reasoned explanation renders the DFR arbitrary and capricious, in violation of 5 U.S.C. § 706(2)(A). *See State Farm*, 463 U.S. at 43. The rescission is also arbitrary and capricious because DOE has "entirely failed to consider" at least three "important aspect[s] of the problem." *See id.* First, in withdrawing the Affirmative Action Provision, DOE has failed to account for the fact that recipients, including Signatory States and their educational agencies, rely on clear guidance as to what efforts to remedy discrimination are permissible, and in what circumstances. DOE has not addressed the potential confusion and lack of clarity that will be created when the express grant of permission in the Affirmative Action Provision is rescinded. Second, DOE has not considered the difficult question of what standards will be applied, in the absence of the Affirmative Action Provision, to determine whether a remedial plan is permissible, or the potential chilling effect of withdrawing the grant of permission to recipients—who may feel compelled to wait for a finding of noncompliance before undertaking remedial efforts. Third, the resulting lack of clear standards, and potential chilling effect, are likely to undermine recipients' efforts to redress the very discrimination Title IX seeks to prohibit, *see* 20 U.S.C. § 1681(a), while DOE offers no explanation whatsoever as to how the withdrawal of the Affirmative Action Provision serves to effectuate the goals of Title IX.

DOE also misrepresents the impact that the rescission of the Affirmative Action Provision will have on the States. The DFR asserts that "DOE has examined this rescission and has tentatively determined that it would not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government." DFR, 90 Fed. Reg. at 20,790. This conclusion is simply incorrect. By revoking recipients' grant of permission to remedy discrimination absent a finding by the Agency, DOE is necessarily arrogating a greater degree of decision-making authority for itself. States and their educational agencies, absent express permission, will have less clarity about their ability to remedy discrimination and the circumstances in which they can take action. As a result, the local and state actors who are best positioned to understand any discrimination that may be present in their institutions, and the steps needed to remedy such discrimination, will be discouraged from implementing such remedies without a finding of discrimination by DOE. Contrary to DOE's conclusion, then, the DFR thus inherently shifts "power and responsibilities" in the educational context away from the local and state levels and towards the federal level.

These serious deficiencies of the DFR require its withdrawal. As discussed in Section (II) above, if DOE wishes to proceed with this misguided deregulatory action, it must undertake notice-and-comment rulemaking in accordance with the APA and cure the DFR's shortcomings under the arbitrary-and-capricious standard.

VI. Conclusion

For the reasons stated above, the Signatory States oppose the rescission of the Affirmative Action Provision, subsection (b) of 10 C.F.R. § 1042.110. Signatory States also oppose DOE's use of a direct final rule on the procedural grounds stated herein.

Sincerely,

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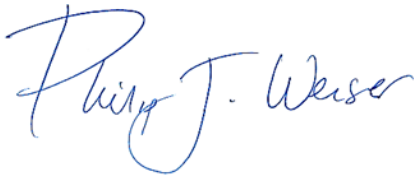

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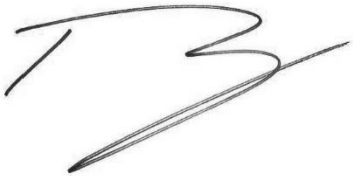

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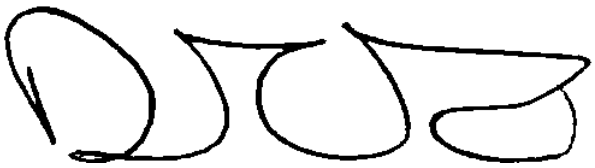

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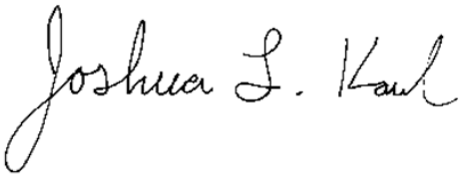

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