COMMENT ON THE PROPOSED TITLE IX REGULATION

Title IX Regulation Should Not Attempt to Incorporate Policies Developed for the Workplace Setting

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This Comment is to be included as part of the Administrative Record

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The proposed Title IX regulation improperly applies workplace standards to people's private lives, including students' homes. The proposed regulation purports to "align" Title IX with Title VII workplace standards, by banning conduct that is severe "or" pervasive rather than severe "and" pervasive, refusing to use the "severe" *and* "pervasive" standard used in the Supreme Court's *Davis* decision. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41390, 41415 (July 12, 2022) ("it is appropriate to more closely align the hostile environment category of "sex-based harassment" in the context of OCR's administrative enforcement of Title IX with how hostile environment sexual harassment is defined by courts and the EEOC under Title VII in the employment context"); § 106.2 (defining "hostile environment harassment" to include "severe or pervasive" conduct); *compare Davis v. Monroe County Board of Education*, 526 U.S. 629, 633, 650, 651, 652, and 654 (1999) (emphasizing five times that the conduct must be "severe, pervasive, and objectively offensive" to violate Title IX).

But the Supreme Court has ruled that the First Amendment provides very broad protection to people's speech in their own homes and abutting property. *See City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (signs cannot be forbidden on residential property) ("A special respect for individual liberty in the home has long been part of our culture and our law....; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there."). Indeed, even otherwise unprotected speech, such as obscenity, can be protected in the home, meaning that the First Amendment gives speech uniquely broad protection in the home. *See Stanley v. Georgia*, 394 U.S. 557 (1972) (private possession of obscene materials in the home is protected, even though such materials are unprotected outside the home).

By contrast, speech in the workplace is more subject to regulation, such as when it has coercive undertones. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (First Amendment rights in the workplace "must take into account the economic dependence of the employees on their employers"). Those limits do not apply outside the workplace. As a federal appeals court noted in *White v. Lee*, 227 F.3d 1214, 1236-37 (9th Cir. 2000), in finding bigoted speech protected even though it interfered with housing for disabled people, bigoted speech outside the workplace, such as in the housing context, cannot be similarly restricted by the civil-rights laws, because "The First Amendment rights of employers 'in the context of [the] labor relations setting' are limited to an extent that would rarely, if ever, be tolerated in other contexts.....Regulations

controlling such expressive activity would almost certainly be invalid outside the labor relations setting.'"), *quoting NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

Yet the proposed Title IX regulation states in § 106.11 that conduct is covered even when it occurs in students' off-campus dwellings, if it has on-campus impact, or if it "occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution." See § 106.11 ("this part applies to all sex discrimination" and "conduct" that "occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority. A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.")

Since it reaches speech in society as a whole, not just in schools, the regulation cannot be justified, as workplace harassment rules have been in some lower court rulings, by calling it a time-place-manner restriction on speech. And even a time-place-manner restriction on speech can be unconstitutional when applied to speech on a homeowner's property, as the Supreme Court made clear in striking down a ban on residential signs in *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994).

Moreover, hostile-environment regulations like this one cannot be treated as a time-place-manner regulation of student speech, because they are not viewpoint-neutral, and the Supreme Court has ruled that time-place-manner restrictions are not allowed to be viewpoint-discriminatory. *See Saxe v. State College Area School District*, 240 F.3d 200, 206 (3d Cir. 2001) ("when anti-discrimination laws are 'applied to . . . harassment claims founded solely on verbal insults, pictorial or literary matter, the statute[s] impose content-based, viewpoint-discriminatory restrictions on speech.'").

The fact that sexual discussions can be banned in a factory workplace does not mean they should be banned everywhere. As a federal appeals court noted in a workplace harassment case, "most complaints of sexual harassment are based on actions which, although they may be permissible in some settings, are inappropriate in the workplace." (See *Sparks v. Pilot Freight Carriers*, 830 F.3d 1554, 1562 n.13 (11th Cir. 1987); *cf. Speech First v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022) (striking down university harassment policy even though it required "severe or pervasive" conduct).

A judge ruled that sexually suggestive calendars' presence in the workplace violated Title VII. *See Stair v. Lehigh Valley Carpenters*, 855 F.Supp. 990, 991 (E.D. Pa. 1994) (discussing judge's prior finding of hostile work environment solely based on the calendars produced by a union and displayed in plaintiff's workplace). But people can possess, read, and display sexually suggestive -- or even explicit -- material in their own homes. *See Stanley v. Georgia*, 394 U.S. 557 (1972) (private possession of obscene materials in the home is protected, even though such materials are unprotected outside the home).

People should be allowed to make non-violent sexual advances in their own homes, even in situations where that would be forbidden in workplaces. *Cf. Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984) (dating is protected by freedom of intimate association).

The Second Circuit has said that housing providers are not liable for hostile housing environments created by tenants, even though employers are liable for hostile environments created by employees. *Francis v. Kings Park Manor,* 992 F.3d 67 (2d Cir. 2021) (en banc).