Nos. 24A78 and 24A79

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF EDUCATION, ET AL., APPLICANTS

v.

STATE OF LOUISIANA, ET AL.

MIGUEL CARDONA, ET AL., APPLICANTS

v.

STATE OF TENNESSEE, ET AL.

REPLY IN SUPPORT OF APPLICATIONS FOR PARTIAL STAYS OF THE INJUNCTIONS ENTERED BY THE UNITED STATES DISTRICT COURTS FOR THE WESTERN DISTRICT OF LOUISIANA AND THE EASTERN DISTRICT OF KENTUCKY

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The district courts fundamentally erred by (1) enjoining dozens of regulatory provisions without finding those provisions likely unlawful; and (2) interpreting Title IX to permit schools to penalize transgender students simply for being transgender. In attempting to defend those rulings, respondents focus on the Rule's implications for "bathrooms," "locker rooms," "pronouns," and other contexts involving differentiation based on sex. Louisiana Opp. 1; see, e.g., Tennessee Opp. 1 (same). But the government has not sought to stay the injunctions as to those aspects of the Rule, and granting the requested stays would not require respond-

ents to change their policies addressing those issues. These applications thus do not present any question about restrooms, locker rooms, or pronouns. Instead, the only questions before this Court are whether the district courts erred in enjoining other provisions of an omnibus rule that have nothing to do with gender identity and have never been found likely unlawful, and whether the courts erred in enjoining 34 C.F.R. 106.10, which recognizes that Title IX prohibits a school from excluding or penalizing a student "simply for being * * * transgender," Bostock v. Clayton Cnty., 590 U.S. 644, 651 (2020). Respondents' oppositions confirm that the answer to both of those questions is yes.

Respondents do not seriously argue that district courts can enjoin portions of a rule they have not found likely unlawful. Instead, respondents principally assert that the government failed to show that the rest of the Rule is severable from the three discrete provisions they challenged. But that gets things backwards: As the parties seeking extraordinary preliminary relief, respondents bore the burden to justify the scope of any injunction. In any event, respondents' argument against severability contradicts the governing severability clauses, this Court's precedents, and common sense. Neither respondents nor the lower courts have explained how the Rule's other provisions -- such as its protections for pregnant women and new mothers, see Organizations Serving Pregnant & Parenting Students Amici Br. 1-10 -- depend in any way on the three challenged provisions. The other unrelated provisions

could have been an entirely separate rule; their mere inclusion in the same Federal Register notice provides no basis for enjoining them.

Respondents also fail to justify enjoining Section 106.10's recognition that discrimination based on gender identity is necessarily discrimination "on the basis of sex," 20 U.S.C. 1681. Respondents cannot establish irreparable harm from that provision because they disclaim any desire to violate it. And on the merits, respondents have no answer to Bostock's insight that "it is impossible to discriminate against a person for being * * * transgender without discriminating against that individual based on sex." 590 U.S. at 660. Indeed, respondents do not offer anything like a conventional textual analysis of Section 1681(a). As in Bostock, respondents' policy arguments and assertions about congressional purpose provide no justification for departing from the plain meaning of the words Congress wrote.

This Court has not hesitated to grant emergency relief when lower courts "clearly stray[] from equity's traditional bounds." Labrador v. Poe, 144 S. Ct. 921, 923 (2024) (Gorsuch, J., concurring). The district courts here did just that, and this Court should again step in to enforce traditional equitable limits and "promote more carefully reasoned judicial decisions attuned to the facts, parties, and claims at hand." Id. at 927-928.

I. THIS COURT WOULD LIKELY GRANT REVIEW IF THE COURTS OF APPEALS AFFIRMED THE DISTRICT COURTS' INJUNCTIONS

If the courts of appeals affirmed the district courts' sweeping injunctions, this Court would likely grant certiorari because those injunctions are inconsistent with fundamental limits on equitable relief, block an important rule, and conflict with circuit-court decisions recognizing that Title IX bars discrimination based on gender identity. Louisiana Appl. 16-18. Respondents' various objections to that straightforward conclusion lack merit.

Respondents assert (e.g., Tennessee Opp. 23-24) that because the injunctions are limited to the respondent States, this Court would be unlikely to intervene to correct their substantive overbreadth. But that ignores the Court's approach in Labrador, where the Court stayed not only the injunction's universal scope but also its application to provisions that the plaintiffs and the district court had "failed to 'engage' with." 144 S. Ct. at 923 (Gorsuch, J., concurring) (citation omitted).

In addition, respondents do not and could not deny that decisions affirming the injunctions would squarely conflict with decisions of the Fourth, Seventh, and Ninth Circuits recognizing that Bostock's interpretation of Title VII governs the equivalent text of Title IX. Louisiana Appl. 17-18.[1] Respondents err in

[1] Louisiana objects that we did not cite decisions from other circuits stating that Bostock's reasoning does not "automatically apply" outside Title VII. Opp. 32 (citation omitted). But none of those decisions holds that Title IX permits discrimination based on gender identity -- and even if they had, they would

asserting that these cases would be an "'imperfect'" or "artificial" vehicle for resolving "Bostock's applicability to Title IX" because they do not involve "bathrooms and sports." Tennessee Opp. 22 (citation omitted); see Louisiana Opp. 32. Just the opposite: In Bostock itself, this Court held that Title VII prohibits discrimination based on gender identity without addressing "bathrooms, locker rooms, or anything else of the kind." 590 U.S. at 681. Here, too, the question whether Title IX prohibits schools from penalizing transgender students simply for being transgender is itself an important one that merits this Court's review.

Finally, respondents note (e.g., Tennessee Opp. 24) that these cases are in a preliminary-injunction posture. But this Court often grants certiorari to resolve important legal questions -- including challenges to federal regulations or policies -- in that posture. See, e.g., Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2396-2397 (2024); Murthy v. Missouri, 144 S. Ct. 1972, 1984-1985 (2024); FDA v. Alliance for Hippocratic Med., 602 U.S. 367, 376-378 (2024). The same course would be warranted here.

II. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

If the Court granted certiorari, it would likely reverse the relevant portions of the preliminary injunctions. The district courts fundamentally erred by enjoining provisions of the Rule that the courts did not find likely unlawful and by extending the

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only deepen the circuit split that would be created by decisions affirming the injunctions at issue here.

injunction to Section 106.10's recognition that Title IX prohibits gender-identity discrimination.

A. The District Courts Erred In Enjoining Aspects Of The Rule That The Courts Did Not Find Likely Invalid

The district courts erred in enjoining provisions of the Rule that they did not even purport to find are likely unlawful. Louisiana Appl. 19-28. Respondents do not seriously contend that courts have the authority to enjoin lawful regulations. Instead, they mainly argue that no part of the Rule can be severed from the allegedly invalid provisions and that the government forfeited its contrary argument. Respondents also quibble with our description of the scope of their challenges and assert that it would be more convenient if they could defer compliance with any provision of the Rule until these cases are fully resolved. None of those arguments justifies the district courts' sweeping injunctions.

1. It is axiomatic that the scope of any equitable relief must "be determined by the nature and scope of the [legal] violation." Missouri v. Jenkins, 515 U.S. 70, 88 (1995) (citation omitted). A plaintiff seeking a preliminary injunction thus "must establish that [it] is likely to succeed on the merits" with respect to each provision of the law or rule it seeks to enjoin. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). And a court may grant relief only as to provisions and applications it deems likely unlawful. See, e.g., South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021). Earlier this month, for

example, this Court vacated a decision affirming a preliminary injunction reaching all applications of a state law because the lower courts had not "address[ed] the full range of activities the law[] cover[s]." NetChoice, 144 S. Ct. at 2397.

2. Respondents do not appear to dispute those principles.[2] Instead, they assert (e.g., Louisiana Opp. 35-39) that the district courts properly enjoined the entire Rule because the government failed to show that the challenged provisions are severable. But it is the parties requesting a preliminary injunction that "b[ear] the burden of establishing their entitlement to relief" as to every provision they seek to have enjoined. South Bay, 141 S. Ct. at 717 (Barrett, J., concurring); see Winter, 555 U.S. at 22. Accordingly, it was respondents who were required to show that the rest of the Rule cannot be severed from the three provisions they challenged. Respondents have not carried that burden.

a. The Department specifically instructed that the provisions of the Rule are independent and subject to preexisting severability clauses directing that the rest of the regulations "shall not be affected" by the invalidity of "any provision" or any of its "application[s]." 34 C.F.R. 106.9; see Louisiana Appl. 11,

[2] Tennessee briefly suggests (Opp. 24) that courts "arguably have more leeway" in granting preliminary relief. But it cites no authority suggesting that courts can preliminarily enjoin statutes or regulations without finding them likely unlawful; to the contrary, the decision it cites emphasizes that courts can invoke the equities to grant less than the "total relief" a plaintiff's claims might justify. Trump v. International Refugee Assistance Project, 582 U.S. 571, 580 (2017) (per curiam) (citation omitted); see, e.g., Winter, 555 U.S. at 31-33.

23-24. Respondents assert (e.g., Tennessee Opp. 34-35) that the lower courts were free to ignore those clauses or that the Department did not really mean what it clearly said. "That kind of argument may have carried some force back when courts paid less attention to statutory [or regulatory] text," but this Court now "hew[s] closely to the text of severability or nonseverability clauses." Barr v. American Ass'n of Political Consultants, Inc., 591 U.S. 610, 625 (2020) (AAPC) (plurality opinion). The lower courts thus had no authority to disregard "[t]he plain text of [the] severability provision[s]." Executive Benefits Ins. Agency v. Arkison, 573 U.S. 25, 36 (2014).[3]

b. "[E]ven in the absence of a severability clause," moreover, this Court's precedents "reflect a decisive preference for surgical severance rather than wholesale destruction." AAPC, 591 U.S. at 626 (plurality opinion). So long as the remainder of a statute or rule is "capable of functioning independently," it must be allowed to stand. Id. at 628 (citation omitted); see, e.g., K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 294 (1988). The lower

[3] Respondents err in asserting (Tennessee Opp. 35; CEA Opp. 27) that this Court's decision in Ohio v. EPA, 144 S. Ct. 2040 (2024), justifies the lower courts' disregard of the governing severability clauses. There, the Court stayed the application of a rule because it concluded that the agency had not adequately responded to comments objecting that the agency's justification for the rule would no longer be valid if the rule applied in fewer States than originally contemplated. Id. at 2054-2055. Respondents do not suggest that they or anyone else raised any similar objection to severability during the rulemaking process here. To the contrary, the Rule's preamble notes that there were no comments on severability. 89 Fed. Reg. 33,848.

courts did not attempt to reconcile their sweeping injunctions with that "strong presumption of severability." AAPC, 591 U.S. at 625 (plurality opinion).

Even now, respondents do not meaningfully engage with most of the Rule's provisions, much less show that those provisions would not function if some or all of the challenged provisions remained enjoined. Consider just a few representative examples:

- The Rule requires schools to accommodate pregnant and post-partum students with reasonable modifications and to notify pregnant students of their rights. 34 C.F.R. 106.40(b) and 106.57; see Organizations Serving Pregnant & Parenting Students Amici Br. 1-10.

- The Rule alters the definition of "complainant" to permit complaints by former students and employees who suffered discrimination while participating or attempting to participate in a covered program. 34 C.F.R. 106.2; see 89 Fed. Reg. at 33,481-33,884.

- The Rule clarifies that funding recipients must prohibit retaliation, including peer retaliation, and take appropriate action in response to information about conduct that reasonably may constitute retaliation. 34 C.F.R. 106.71.

- The Rule provides schools with more flexibility regarding the timing and structure of their grievance procedures. 34 C.F.R. 106.45-106.46.

- The Rule affirms that recipients may disclose certain information to parents and legal guardians about their children. 34 C.F.R. 106.44(j)(2).

None of those amendments depends in any way on the challenged provisions addressing gender-identity discrimination and harassment, and all of them would remain fully operative if the challenged provisions were enjoined in whole or in part.

Indeed, the Rule's other provisions could just as easily have been one or more entirely separate rules. The procedural changes, for instance, make important reforms to the way schools handle all claims of sex discrimination. To take just one example, the Rule expands the availability of an "informal resolution process" as an alternative to grievance procedures, 34 C.F.R. 106.44(k), for responding to "sex discrimination" -- regardless of how that term is understood.

c. Rather than engaging with the other provisions of the Rule in any detail, respondents assert (e.g., Louisiana Opp. 38; Tennessee Opp. 35; Rapides Opp. 23) that the district courts properly enjoined the entire Rule because none of its provisions can function without Section 106.10's clarification of the scope of the term "sex discrimination." That is doubly wrong.

First, it assumes that the district courts properly enjoined Section 106.10 in its entirety. But there was no basis for enjoining Section 106.10 at all. Louisiana Appl. 28-36; pp. 16-27, infra. And at a minimum, any injunction should have been limited to the portion of Section 106.10 recognizing that sex discrimination includes gender-identity discrimination. Louisiana Appl. 22.

Second, even if Section 106.10 were enjoined in full, the remaining provisions of the Rule would continue to function by simply incorporating Title IX's prohibition against discrimination "on the basis of sex," without any further regulatory gloss. Tennessee Appl. 24-25. The fact that the Title IX regulations have

functioned for almost half a century without such a regulatory gloss confirms that the analogous provisions of the Rule would likewise remain fully operative even if Section 106.10 were enjoined. Indeed, although respondents assert (Rapides Opp. 17-18; CEA Opp. 23-25) that the Rule's provisions regarding the responsibilities of the Title IX coordinator, grievance procedures, and the responses to sex discrimination cannot operate without Section 106.10, the 2020 Rule -- which respondents appear to endorse (e.g., Tennessee Opp. 7) -- addressed similar topics and included similar references to sex discrimination, yet did not include any explanatory provision like Section 106.10.

3. Respondents badly err in asserting (e.g., Louisiana Opp. 25; Tennessee Opp. 16) that the government somehow forfeited its severability argument. Again, respondents bore the burden to establish their entitlement to an injunction covering the entire Rule, but their preliminary-injunction motions did not even try to do so -- indeed, they did not say a word to suggest that the challenged provision are not severable.

Faced with motions challenging just three discrete provisions of a wide-ranging rule, the government devoted an entire section of its oppositions to arguments about severability and the appropriate scope of relief. Among other things, the government argued that because respondents "challenged only certain provisions of the Rule * * * the remainder should be permitted to go into effect," and that preliminary relief should be limited to "portions

of the Rule as to which the Court has found that [respondents] have established a likelihood of success." Tennessee D. Ct. Doc. 73, at 24-25 (May 24, 2024); see Louisiana D. Ct. Doc. 38, at 37-40 (June 5, 2024). The lower courts' demand for more detail would transform APA litigation into "a game of gotcha," AAPC, 591 U.S. at 627 (plurality opinion), granting challengers the windfall of overbroad relief unless the government anticipates and refutes arguments that the challengers themselves fail to make.

4. Shifting away from severability, respondents briefly assert that they alleged and the district courts held that "the whole rule likely violates the APA." Tennessee Opp. 34; see, e.g., CEA Opp. 30; Louisiana Opp. 35. In fact, respondents' "complaint[s] and request[s] focused on three key provisions" -- Sections 106.2, 106.10, and 106.31(a)(2). Louisiana Appl. App. 3a; see Louisiana Opp. 34 (conceding that respondents' request for injunctive relief "highlighted the gender identity context"). The district courts did not even discuss most of the Rule's other provisions, much less hold them likely invalid.

Respondents similarly fail to refute our observation that they did not challenge the portion of Section 106.10 explaining that sex discrimination includes "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, [and] sexual orientation." 34 C.F.R. 106.10. Rapides Parish, for example, responds (Opp. 18 n.1) in only a single conclusory sentence buried in a footnote -- asserting simply that

"'gender identity' is not the only aspect of the new definition that the school board challenges." And Tennessee attempts to show that it challenged the provision in full not by citing its briefing or the preliminary injunction order, but instead invoking the district court's subsequent decision denying a partial stay -- which came too late to plug the gaps in the preliminary-injunction order. See Tennessee Opp. 32 (citing Tennessee Appl. App. 119a-120a).

Respondents' failure to challenge other aspects of Section 106.10 is unsurprising. Since Title IX's enactment, for example, the Department has recognized that it prohibits discrimination based on pregnancy and related conditions. See 40 Fed. Reg. 24,128 (June 4, 1975) (codified at 45 C.F.R. 86.30(b) (1975)). It is likewise well-established that Title IX prohibits funding recipients from making decisions based on "stereotypical assumptions" about the sexes. Pederson v. Louisiana State Univ., 213 F.3d 858, 880 (5th Cir. 2000); cf. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989). And Section 106.10's inclusion of "sex characteristics" accords with respondents' own view that "sex" refers to "biological distinctions between male and female." CEA Opp. 13 (citation omitted).

Respondents' contention (e.g., Tennessee Opp. 31-32) that they challenged all applications of the definition of hostile-environment harassment in Section 106.2 is likewise flawed. To begin, respondents do not even attempt to argue that their district court briefing alleged legal defects in all aspects of Section

106.2, which defines a host of other terms beyond "hostile-environment harassment." And although respondents are correct that they briefly (and erroneously) asserted that the hostile-environment definition is contrary to this Court's decision in Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), they focused primarily on the definition's alleged suppression of their ability to use the pronouns of their choosing and to otherwise engage in speech regarding gender identity. See, e.g., Louisiana D. Ct. Doc. 24, at 8-11 & n.10 (May 15, 2024); Tennessee D. Ct. Doc. 19-1, at 16-17 (May 3, 2024). Respondents' narrower emphasis was reflected in the district courts' orders, which likewise focused on harassment based on gender identity. See Tennessee Appl. App. 56a-71a; Louisiana Appl. App. 30a-31a. And even if the Court concludes that the district courts held that respondents are likely to succeed in invalidating all applications of Section 106.2's definition of hostile-environment harassment, that would at most justify leaving the injunctions in place as to that definition -- not extending relief to the entire Rule.

5. Finally, respondents appear to assert that the entire Rule should remain enjoined because it would be more convenient for them to implement all of the Rule's provisions at once, rather than implementing some now and others at the end of the litigation. But that is flatly inconsistent with the fundamental rule that injunctive relief must be tailored to the "scope of the [legal] violation." Missouri, 515 U.S. at 88. Regulated parties will

almost always prefer to delay implementation of a new statute or rule until all legal challenges are resolved, but that preference is no justification for enjoining concededly valid provisions.

In any event, respondents greatly exaggerate the costs of phased compliance. Louisiana reiterates (Opp. 54) the Fifth Circuit's assertion that respondents' costs would "double" if they are required to implement some changes now and others later. But if respondents revise their policies and train their staff in accordance with the unchallenged provisions now, they will not need to repeat that exercise at the end of the litigation. For example, if respondents take steps now to ensure that pregnant and nursing staff and students have access to private spaces for their lactation needs, they would not need to do it again later based on a change to the treatment of gender identity. So too if respondents revise their grievance procedures and recordkeeping policies now.

To be sure, respondents may need to update their policies and procedures to reflect the courts' ultimate disposition of their challenges to the discrete provisions of the Rule at issue in these suits. But that is unremarkable: Schools are often required to make such updates in response to regulatory changes or new judicial decisions, and those updates can be accomplished through edits to their online policy manuals or email notifications to staff. Cf. 89 Fed. Reg. 33,867 (explaining that the Department assumes, "based on its enforcement experience and discussions with internal sub-

ject matter experts," that compliance can be achieved through "efficient" employee trainings).

Nor is there any merit to respondents' assertion (e.g., Louisiana Opp. 4-5, 52-53) that the entire Rule should remain enjoined because of the imminence of the August 1, 2024 effective date. The Department gave regulated entities more than three months of notice about the Rule's new provisions, and schools around the Nation are prepared to comply with the Rule in full. If respondents chose not to take steps to prepare to comply with the unchallenged provisions, that is a difficulty of their own making. They cannot use that choice to justify an overly broad injunction now. Rather, if respondents believe that they cannot comply with the Rule by August 1, the appropriate course is to work with the Department to come into compliance; there is no threat of immediate enforcement proceedings or funding withdrawal for entities making good-faith efforts to comply. See 20 U.S.C. 1682 (authorizing legal action or funding withdrawal only if "compliance cannot be secured by voluntary means").

B. The District Courts Erred In Enjoining Section 106.10's Inclusion Of Gender-Identity Discrimination

Our applications explained that the district courts erred in enjoining Section 106.10, which recognizes that penalizing transgender students simply for being transgender is necessarily discrimination on the basis of sex. Respondents err in asserting that an injunction covering Section 106.10 is necessary to avoid

their asserted harms based on restrooms, locker rooms, and pronouns. And on the merits, respondents have no good answer to our showing that Section 106.10's treatment of gender identity follows directly from Title IX's plain text and this Court's decision in Bostock.

1. Respondents' assertion that they will suffer irreparable harm unless Section 106.10 remains enjoined is premised on a misunderstanding of that provision. As we have explained (e.g., Louisiana Appl. 28-30), Section 106.10 recognizes something "simple and momentous," Bostock, 590 U.S. at 660: Discrimination on the basis of gender identity is necessarily a form of sex discrimination under Title IX. That means that a school may not exclude or discriminate against a student simply for being transgender. Critically, however, Section 106.10 does not address restrooms or other sex-separated contexts, and it does not address hostile-environment harassment. Those contexts are instead specifically addressed in Sections 106.31(a)(2) and 106.2.

Respondents disclaim any intent to engage in or permit discrimination against transgender students simply for being transgender. Louisiana Opp. 47; Rapides Opp. 30; Tennessee Opp. 37-38; CEA Opp. 35. Instead, their oppositions focus on harms they would allegedly suffer if schools are required to allow transgender students to use "bathrooms," "locker rooms," and other sex-separated facilities consistent with their gender identity, and if gender-identity discrimination can take the form of action-

able hostile-environment harassment (potentially implicating, for instance, pronouns). Louisiana Opp. 1; see, e.g., Tennessee Opp. 1; CEA Opp. 2. But as already explained, it is Section 106.31(a)(2) and the definition of hostile-environment harassment in Section 106.2, respectively, that are the sources of those alleged harms. And if the Court grants the government's partial stay request, both of those provisions would remain enjoined in relevant part. In plain terms, that means, contra respondents' assertions (e.g., Louisiana Opp. 46), that the Rule as enjoined would not require respondents to allow transgender girls "into girls-only bathrooms and locker rooms" or "compel staff and students to use" particular pronouns. That is the primary relief respondents wanted, and they will have it for the duration of appellate proceedings. Against that backdrop, the only effect of leaving Section 106.10 enjoined would be to eliminate the Rule's protection against discrimination aimed at transgender students simply for being transgender.

Respondents' contrary arguments are meritless. Some respondents maintain (e.g., Louisiana Opp. 45-47) that Section 106.10 would require schools to allow transgender students to use bathrooms consistent with their gender identity even if Section 106.31(a)(2) remained enjoined. But as already explained (e.g., Louisiana Appl. 31), the Rule makes clear that Section 106.10 does no such thing. To the contrary, the Department specifically declined "to revise § 106.10 to address separation of students based

on sex," explaining that the issue is instead governed by "§ 106.31(a)(2)." 89 Fed. Reg. at 33,809.

Cobbling together snippets of the preamble, Tennessee asserts that "the rule says §106.31 simply 'clarif[ies]' the scope of §106.10 by giving 'examples' of the sex discrimination that §106.10 'prohibit[s].'" Opp. 33 (quoting 89 Fed. Reg. at 33,528). That is wrong: The quoted passage does not say that Section 106.31 "clarifies the scope of Section 106.10"; it says that Section 106.31(a)(2) "clarif[ies] sex discrimination" -- i.e., Title IX itself. 89 Fed. Reg. at 33,528. Both Section 106.10 and Section 106.31(a)(2) reflect the Department's interpretation of Title IX's prohibition on sex discrimination, but they address "distinct" aspects of that prohibition. Id. at 33,803.[4]

Some respondents assert (e.g., CEA Opp. 11-12) that because Section 106.10 relies on Bostock, it necessarily "vitiates sex distinctions in situations where sex matters -- like showers and locker rooms." But again, Bostock held only that Title VII pro-

[4] For related reasons, respondents err in asserting (e.g., CEA Opp. 11) that the government's position here is inconsistent with its position prior to the Rule. The government has argued that Title IX itself requires schools to allow transgender students access to certain sex-separate facilities consistent with their gender identity. See, e.g., U.S. Statement of Interest, Roe v. Critchfield, No. 23-cv-315, at 3, 20 (D. Idaho Aug. 8, 2023). That understanding is codified in Section 106.31(a)(2). But it is not codified in Section 106.10, which simply reflects Bostock's core textual insight that discrimination based on gender identity necessarily involves discrimination based on sex. Nothing in the government's prior arguments is inconsistent with the Department's decision to codify that principle in a provision separate from the provision addressing sex-separated contexts such as restrooms.

hibits discrimination based on gender identity, while specifically declining "to address bathrooms, locker rooms, or anything else of the kind." 590 U.S. at 681. Section 106.10 takes the same approach; it is Section 106.31(a)(2), not Section 106.10, that governs sex-separated restrooms and the like. See 89 Fed. Reg. 33,802-33,806.

Tennessee suggests (Opp. 33) that "enjoining §106.31[(a)(2)] but not §106.10 could make things worse" because "[t]he rule would still declare that sex discrimination includes discrimination based on gender identity; but, without the de minimis provision, the rule would no longer explain what that means for Title IX's exceptions." This argument is difficult to understand. If Section 106.31(a)(2) remains enjoined, the pre-existing statutory and regulatory exclusions allowing sex separation would remain in effect, permitting sex-based differentiation in those contexts. And because Section 106.31(a)(2) would be enjoined, nothing in the Rule would require recipients to modify their policies to recognize that otherwise permissible sex-based separation can constitute impermissible discrimination as applied to transgender students. Leaving Section 106.10 in place, meanwhile, would not affect sex-separated spaces, but instead would simply retain the Rule's protection against discrimination aimed at transgender students for being transgender. See p. 18, supra.

Finally, respondents assert that even though they do not wish to violate Section 106.10 by, for example, excluding transgender

students from the marching band or the science fair, the cost of updating their training manuals and policies to prevent such violations suffices to justify an injunction. Louisiana Opp. 47-48; Rapides Opp. 27-28; Tennessee Opp. 39; CEA Opp. 33. But as already explained (Louisiana Appl. 38), those routine administrative costs do not justify enjoining a provision that respondents assert they do not seek to violate. That is particularly obvious with respect to Section 106.10: Respondents' Title IX policies and manuals must address Title IX's prohibition on sex discrimination in any event, and respondents have not identified any additional monetary costs associated with incorporating the understanding reflected in Section 106.10 -- and certainly none sufficient to justify extraordinary relief.

2. More fundamentally, the district courts had no basis for enjoining Section 106.10's treatment of gender-identity discrimination because it is compelled by a straightforward application of this Court's decision in Bostock to Title IX's plain text. Respondents' shifting and atextual defenses of the lower courts' contrary holdings only underscore that conclusion.

a. The Fifth Circuit panel majority entirely failed to address the validity of the Louisiana district court's injunction as to Section 106.10. The Sixth Circuit panel majority, for its part, held that Bostock's textual analysis does not apply to Title IX because the majority perceived a "material[]" -- but unexplained -- distinction between discrimination "because of" sex and dis-

crimination "on the basis of" sex. Tennessee Appl. App. 5a. Our application demonstrated that no such distinction exists and that discrimination based on gender identity is necessarily discrimination "on the basis of sex" prohibited by Title IX, 20 U.S.C. 1681(a). Tennessee Appl. 32-35; see Scholars Amicus Br. 5-17. Respondents conspicuously fail to defend the Sixth Circuit's contrary reasoning -- or, for that matter, to offer anything like a traditional textual analysis of Title IX's operative language.

b. Because the foundation of the Sixth Circuit's order does not withstand scrutiny, respondents pivot to other arguments that wander increasingly far from the statutory text. Those arguments also lack merit.

First, respondents assert (CEA Opp. 2) that recognizing that Title IX prohibits gender-identity discrimination "turns Title IX upside down" by eliminating its "well-established, biological, and binary concept of sex." But as respondents elsewhere acknowledge, the Rule -- like the Court in Bostock -- recognizes that discrimination based on gender identity is sex discrimination even if "'sex' refers only 'to biological distinctions between male and female.'" CEA Opp. 13 (quoting 89 Fed. Reg. at 33,804-33,805). The Rule, like Bostock, simply recognizes that sex, so defined, "plays an unmistakable" role when a recipient penalizes a student based on their gender identity -- i.e., "for traits or actions that it tolerates in [someone] identified as [a different sex] at birth." Bostock, 590 U.S. at 660.

Second, respondents argue that the statutory exceptions in Title IX -- involving, for instance, military academies, fraternities and sororities, father-son or mother-daughter activities, and living facilities, 20 U.S.C. 1681(a)(1)-(9), 1686 -- compel a different understanding of what constitutes sex discrimination. Respondents assert, for example, that "[b]ecause Title IX permits and sometimes requires sex distinctions, Bostock cannot apply to Title IX." CEA Opp. 20 (emphasis omitted); see also, e.g., Tennessee Opp. 27-28. But Bostock recognized that "sex-segregated bathrooms, locker rooms, and dress codes" have long been understood to be consistent with Title VII. 590 U.S. at 681.

Relatedly, respondents assert (e.g., Tennessee Opp. 28) that Title IX's exclusions establish "a different understanding of what sex discrimination means." But respondents do not define that understanding with any precision and do not agree among themselves on what it is. CEA, for instance, appears to suggest that because the exclusions sometimes allow separate but equal activities or facilities, Title IX seeks only to "ensur[e] equal treatment between groups of men and women." Opp. 15 (citation omitted). Tennessee, for its part, maintains (Opp. 28) that because the exclusions reflect "differences that are rooted in biology, safety, and privacy," any sex-based distinction purportedly rooted in similar concerns "is not discriminatory."

Those arguments draw exactly the wrong inference from Title IX's exclusions. The exclusions enumerate particular circum-

stances where Congress determined that sex-separation or differentiation should be permitted; their very existence shows that Congress understood that Title IX's general prohibition against sex discrimination otherwise could have prohibited such separation or differentiation. See Arnold, Constable & Co. v. United States, 147 U.S. 494, 499 (1893) ("[T]he exception of a particular thing from general words proves that, in the opinion of the law giver, the thing excepted would be within the general clause had the exception not been made.") (citation omitted). Title IX's specific exceptions do not give courts license to create additional exceptions or to depart from the statute's plain language based on surmise about the policies reflected in the exceptions.[5]

Respondents also assert (Tennessee Opp. 27) that "given its many exceptions and exclusions, Title IX would fall apart if it accepted Bostock's premise that males and females are similarly situated or that sex is an irrelevant consideration." But Bostock simply recognizes that to treat someone worse because they are transgender is to treat them worse "because of" -- or, to say the same thing, "on the basis of" -- sex. The Court emphasized that employer policies governing restrooms and other sex-separated contexts "might or might not qualify as unlawful discrimination or find justifications under other provisions" of the statute. 590

[5] In any event, Tennessee never explains why reading Title IX to permit "[t]reating people differently based on real differences between the sexes" (Tennessee Opp. 30) would allow schools to punish transgender students simply for being transgender.

U.S. at 681. The same is true under Title IX. And the statutory exclusions specifically authorizing certain forms of sex separation or differentiation only confirm that Section 1681(a)'s general prohibition on sex discrimination means what it says.

Third, respondents depart from the text altogether by asserting that interpreting Title IX to require schools to permit students to use sex-separate facilities consistent with their gender identity cannot be reconciled with Title IX's purpose of protecting its "primary beneficiaries" -- "women." CEA Opp. 2. But that objection has no application to Section 106.10, which does not address sex-separated facilities or athletics (which the Rule does not address at all). And, more fundamentally, respondents' appeal to congressional purpose reflects "exactly the sort of reasoning this Court has long rejected" by "seek[ing] to displace the plain meaning of the law in favor of something lying beyond it." Bostock, 590 U.S. at 676.

Finally, respondents invoke clear-statement principles premised on the Spending Clause and the major-questions doctrine. E.g., Tennessee Opp. 26. But as we explained (Louisiana Appl. 36), those objections have no bearing on Section 106.10 because discrimination based on gender identity is necessarily a form of sex discrimination covered by Title IX's unambiguous text. Just as the major-questions doctrine posed no obstacle to Bostock's recognition that the Equal Employment Opportunity Commission had correctly interpreted Title VII to prohibit gender-identity dis-

crimination, it poses no obstacle to recognizing that the Department has correctly interpreted the parallel text of Title IX.

c. Perhaps unsurprisingly given the textual challenges of their position, some respondents urge the Court not to consider the merits of Section 106.10 at all. Tennessee, for instance, asserts that the Court should not provide a "merits preview" on that issue. Opp. 25 (citing Does 1-3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring). But the Court is reluctant to consider likelihood of success in an emergency posture only "in cases that it would be unlikely to take" following a decision by the court of appeals. Does 1-3, 142 S. Ct. at 18 (Barrett, J., concurring). As we have explained, these are not such cases, and the Bostock issue in particular is undeniably certworthy. See pp. 4-5, supra. Accordingly -- as in many other "consequential" emergency applications -- the district courts' overbroad injunctions blocking an important rule both justify and require an "assess[ment]" of "likelihood of success on the merits." Labrador, 144 S. Ct. at 933-934 (Kavanaugh, J., concurring).

Tennessee also asserts that "[e]ven if [Section] 106.10 comported with Title IX," the federal government is not entitled to a partial stay because it failed to address the Tennessee district court's purported "alternative holdings" that "the reasoning behind [Section 106.10] was arbitrary and capricious." Opp. 25 (citing Tennessee Appl. App. 79a-92a). That is wrong. To start, the district court's arbitrary-and-capricious analysis focused on

the Rule's treatment of sex-separated facilities, which is addressed in Section 106.31(a)(2), not Section 106.10. See pp. 18-20, supra. The Sixth Circuit did not endorse any of those alternative grounds; it held only that Section 106.10 likely "exceeds the Department's authority" because "Bostock is a Title VII case." Tennessee Appl. App. 4a. And because Section 106.10's inclusion of gender-identity discrimination is compelled by the plain text of Title IX, the district court's view that the Department provided an insufficient "rationale" for that statutorily required result would provide "no cause for upsetting [the Rule]" even if it were correct. Morgan Stanley Capital Grp. Inc. v. Public Util. Dist. No. 1, 554 U.S. 527, 544-545 (2008).

III. THE EQUITIES FAVOR A PARTIAL STAY

The remaining factors overwhelmingly favor granting the limited stay the government seeks. Denying the partial stay will cause direct, irreparable harm to the United States and the public by preventing the Department from fulfilling its statutory mandate to effectuate Title IX. See 20 U.S.C. 1682. Any harms to respondents pale in comparison because the government tailored its stay request to avoid the primary harms respondents allege.

In arguing otherwise, respondents deny that a court imposes irreparable harm on the United States and the public when it prohibits the federal government from enforcing regulations that vindicate Congress's statutory mandates. On their telling (e.g., Louisiana Opp. 49-50), it is only States that suffer irreparable

harm when they are precluded from enforcing their laws. That is wrong. The federal government has a "weighty" interest in enforcing its duly adopted regulations and policies. Labrador, 144 S. Ct. at 929 (Kavanaugh, J., concurring); see id. at 929 n.1 (explaining that the considerations governing injunctions of "state laws" also apply to "regulations and executive policies"). And of course, this Court frequently stays injunctions blocking federal regulations precisely because those injunctions irreparably harm the government and the public.

Respondents seek to minimize the government's interests by highlighting (e.g., Tennessee Opp. 38) the length of the rulemaking process. But it is not uncommon for agencies to take years to complete the notice-and-comment process for important regulations. Here, the length of the process reflects the resources and care the Department invested in the Rule, the volume of public comments received, and the breadth and significance of the many different subjects the Rule addresses. Those factors all provide powerful additional reasons to grant partial stays and allow the bulk of the Rule to take effect.

Finally, respondents contend (e.g., Tennessee Opp. 1-2, 39) that even though the government's stay request was tailored to avoid the primary harms of which respondents complained, they will nonetheless experience irreparable harm in the form of compliance costs. But any harm imposed by the routine compliance costs associated with implementing the Rule cannot outweigh the far greater

harm to the federal government and the public that will occur if the government is prevented from enforcing regulations effectuating Title IX's vital protections for the civil rights of individuals in our Nation's schools.

CONCLUSION

This Court should partially stay the district court's preliminary injunction pending the completion of further proceedings in the courts of appeals and, if necessary, this Court. Specifically, the injunction should be stayed except to the extent it bars the Department from enforcing the following provisions of the 2024 Rule: (i) 34 C.F.R. 106.31(a)(2) and (ii) the hostile-environment harassment standard in 34 C.F.R. 106.2 as applied to discrimination on the basis of gender identity.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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