No. 24A79

In the Supreme Court of the United States

MIGUEL CARDONA, ET AL.,

Applicants,

v.

STATE OF TENNESSEE, ET AL.,

Respondents.

STATE RESPONDENTS' OPPOSITION TO APPLICATION FOR A PARTIAL STAY

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INTRODUCTION

When the Department issued its Title IX rule in April 2024, the rule was challenged by 26 States across six lawsuits. No wonder. The rule adopts a controversial worldview about "gender identity," orders schools in every State to conform their policies to it, and threatens dissenters with the loss of billions in federal funding. *See* 89 Fed. Reg. 33,474 (Apr. 29, 2024). If the rule goes into effect on August 1, schools can violate Title IX if they do not

- let males into female restrooms
- let males shower and undress in female locker rooms
- let males box and wrestle females in P.E. class
- let males share a room with females on overnight trips
- punish students and teachers who refuse to use someone's "preferred pronouns"
- punish students and teachers who express "offensive" views on same-sex marriage, abortion, gender identity, or other controversial topics

and more.

Nothing in Title IX, which passed Congress with strong bipartisan majorities in 1972, warns States that taking federal money means consenting to these radical changes. Yet the Department unilaterally imposed them nationwide, requiring thousands of schools to spend immense sums complying with hundreds of pages of rules in just three months. Among other obligations, the States and their schools must train every employee who interacts with students on campuses (pre-K through college) about the rule's new gender-identity mandates. And they must set up elaborate regimes to suss out and punish any arguable instance of "sex discrimination," as revolutionized by the rule's new definitions.

The courts presiding over challenges to the rule have adhered to this Court's decision in *Labrador*. Most directly, they are refusing to grant preliminary injunctions that extend beyond "the plaintiffs." *Labrador v. Poe*, 144 S.Ct. 921, 921 (2024).[1] By "issuing interlocutory relief limited to the parties," their decisions are allowing "multiple judges and multiple circuits to weigh in," a percolation that "aids" this Court. *DHS v. New York*, 140 S.Ct. 599, 600 (2020) (Gorsuch, J., concurring). The government just doesn't like how that percolation is going: Its rule is 0-6 in district court and 0-2 on appeal.

So, too, are these courts carefully exercising their "'discretion'" to tailor preliminary relief to the parties' injuries. *Labrador*, 144 S.Ct. at 922-24 (Gorsuch, J., concurring). In rejecting a partial stay, the courts below parsed the rule's many interlocking provisions to explain why the central legal flaws flowed throughout. (Even that went above and beyond, since the government never made its new severability arguments in the district court. App.7a-8a.) The courts likewise found that the harms and equities strongly favor enjoining the entire rule, given the evidence about how disastrous partial compliance would be. Balancing all this, the courts declined to red-pencil hundreds of pages of agency work and hurl schools into a scramble that would

[1] App.108a (limited to the six plaintiff States); *Louisiana v. Dep't of Educ.*, 2024 WL 2978786, at *21 (W.D. La. June 13) (the five plaintiff States); *Arkansas v. Dep't of Educ.*, 2024 WL 3518588, *22-23 (E.D. Mo. July 24) (the six plaintiff States and one individual plaintiff); *Texas v. United States*, 2024 WL 3405342, at *16 (N.D. Tex. July 11) (the one plaintiff State); *Kansas v. Dep't of Educ.*, 2024 WL 3273285, at *22 (D. Kan. July 2) (the four plaintiff States and two plaintiff associations).

compound their compliance costs and create widespread confusion. That was an *exercise* of discretion, not an abuse. That same equitable reasoning would alone suffice to deny a stay here, no *Bostock* discussion needed.

By contrast, the government's application for a partial stay seeks a "'merits preview'" from this Court to stem the tide of adverse decisions. *Labrador*, 144 S.Ct. at 931 (Kavanaugh, J., concurring). Granting the government's application, it understands, would "hamper percolation" by making the lower courts feel less free to resolve these cases independently. *Id.* at 934. Worse, the government's proposed "partial stay" artificially conceals how extending *Bostock* to Title IX would explode longstanding policies. The government is arguing elsewhere that, because *Bostock* governs Title IX, schools cannot bar transgender students from using bathrooms or playing sports of the opposite sex—under Title IX itself, regardless of any regulations. *E.g.*, U.S. Br. at 24-29, *B.P.J. v. W.V. Bd. of Educ.*, Nos. 23-1078, 23-1130, Doc.68-1 (4th Cir. Apr. 3, 2023); *Title IX Guidance*, 86 Fed. Reg. 32,637, 32,639 (June 22, 2021). The government wants this Court to endorse that *statutory* argument by agreeing that the rule's "inclusion of gender-identity discrimination is compelled by … *Bostock*." U.S.-Br.5. The fallout from that endorsement would hardly be "partial." *Labrador* is no license to slice and dice cases in the hope of eliciting a rushed resolution of critical legal questions without full awareness of the consequences.

This request for a merits preview is particularly inappropriate in this posture. The Court would not grant certiorari to review the scope of the district court's preliminary injunction. Despite the government's repeated assertions, the States who

brought this suit are injured by the *whole* rule and argued that the *whole* rule violates the APA. And the district court credited undisputed testimony about how partial compliance would inflict significant harm on the States and their schools. Whether the district court abused its discretion by enjoining too much of a concededly illegal rule—preliminarily, in the short window between now and summary judgment—is a fact-bound inquiry that implicates no circuit split or important question. Even more so because, as the Sixth Circuit stressed, the government never presented its arguments on this front to the district court. App.7a-8a. As for *Bostock*'s application to Title IX, this Court would not answer that important question on an interlocutory appeal, in an administrative challenge to the rule, where the government is conceding that core provisions should remain enjoined. The district court's alternative holdings that the rule is arbitrary and capricious—which the government never acknowledges or addresses—would also deter this Court by rendering any ruling on *Bostock* advisory.

But if a merits preview is warranted, then this Court should preview that the rule is likely going down. As Chief Judge Sutton explained below, *Bostock*'s reasoning about Title VII does not justify the rule's wholesale importation of "gender identity" into Title IX. Under the Spending Clause, Title IX must "clear[ly]" contain *Bostock*'s Title VII analysis; but it doesn't. App.5a. The two statutes use "materially different language," exist in different contexts, and serve "different goals." App.5a. And because the rule's pivotal definition of sex discrimination is unlawful, the rest of the rule is too. The Department never "contemplated" that the rule would "go into effect with a *different* definition of sex discrimination," let alone analyzed that scenario

"during the rulemaking process." App.7a. The rule's severability boilerplate does not stand in for contemporaneous agency reasoning.

This Court should not award the same relief that the district court and the Sixth Circuit reasonably withheld. The government's application should be denied.

STATEMENT OF THE CASE

Congress passed Title IX in 1972 by large margins (88-6 in the Senate and 275-125 in the House). *See* 118 Cong. Rec. 6,277 (Mar. 1, 1972); 118 Cong. Rec. 16,842 (May 11, 1972). That statute was an exercise of Congress's authority under the Spending Clause. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). Its core command is only 37 words: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a).

After this general ban on sex discrimination, Title IX lists a series of sex-based practices that the statute does not forbid. For example, schools can have fraternities and sororities (§1681(a)(6)); Boys and Girls State (§1681(a)(7)); and scholarships for "beauty" pageants (§1681(a)(9)). Schools can also have father-daughter dances if they provide "reasonably comparable activities" for "the other sex." §1681(a)(8). And Title IX's ban on sex discrimination cannot be "construed" to prohibit "separate living facilities for the different sexes." §1686.

Title IX's many statutory exclusions were quickly supplemented with regulations. 40 Fed. Reg. 24,128, 24,141-43 (June 4, 1975). Those 1975 regulations provide strong evidence of Title IX's original meaning because they were issued soon after

Congress passed the statute and because Congress got the chance to disapprove them before they could go into effect. *Grove City Coll. v. Bell*, 465 U.S. 555, 568 (1984); *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 530-35 (1982). One regulation deals with restrooms and clarifies that schools can have sex-separated "toilet, locker room, and shower facilities." 34 C.F.R. §106.33. Another deals with sports and clarifies that schools can have sex-separated teams. §106.41(b). According to the Department, these regulations are interpretations of Title IX's general ban on sex discrimination, not any of the statutory exceptions. 89 Fed. Reg. at 33,821; D.Ct.Doc.73 at 12-13. And according to the Department, these regulations allow strict sex separation; they do not require exceptions for students who identify as a different gender. 89 Fed. Reg. at 33,821; D.Ct.Doc.73 at 19-20.

Under this Court's precedent, Title IX's ban on sex discrimination also reaches sexual harassment. Schools can violate Title IX when their teachers sexually harass students. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). But in *Davis v. Monroe County Board of Education*, this Court held that schools can also violate Title IX when they fail to stop *students* from sexually harassing other students. Justice Kennedy's dissent worried that this holding would make schools adopt broad harassment codes that punish students for speech, raising grave First Amendment concerns. 526 U.S. at 682-83. In response, the majority stressed that its definition of actionable harassment has "very real limitations": A school must be "deliberately indifferent" to harassment that is "so severe, pervasive, and objectively offensive" that it "denies" its victims an equal education. *Id.* at 650-52. The deliberate-indifference

requirement aligns Title IX with the Spending Clause by ensuring fair notice. *Id.* at 640-44. And the severity-and-pervasiveness and denial requirements align Title IX with the First Amendment by excluding mere "comments" and "name-calling," a "single" isolated "instance," or smaller harms like "a mere 'decline in grades.'" *Id.* at 652. *Davis*'s standard for actionable harassment under Title IX is higher than Title VII's standard because "schools are unlike the adult workplace." *Id.* at 651.

A. The Department's existing rules on Title IX carefully distinguish between Title IX and Title VII.

The Department's existing rules, last updated in 2020, honor *Davis* and the distinctions between Title IX and Title VII. *See* 85 Fed. Reg. 30,026 (May 19, 2020). The latest rule refuses modern calls to import "gender identity" into Title IX. *Id.* at 30,177. And it "adopt[s]" *Davis*'s definition of sexual harassment "verbatim," finding that broader definitions had "infringed on constitutionally protected speech." *Id.* at 30,036, 30,151-52, 30,162-65 & nn.738-39. Lawsuits challenging the 2020 rule failed. *E.g.*, *Pennsylvania v. DeVos*, 480 F. Supp. 3d 47, 59-60 & n.11 (D.D.C. 2020); *New York v. Dep't of Educ.*, 477 F. Supp. 3d 279, 287-88 (S.D.N.Y. 2020).

One month after the 2020 rule came out, this Court decided *Bostock*. The Department published a memo analyzing *Bostock* and concluded that it did not affect its rules. *See Memorandum re: Bostock v. Clayton Cnty.*, OCR (Jan. 8, 2021), perma.cc/CJE3-GH52. "Title IX['s] text is very different from Title VII['s]," it explained. *Id.* at 1. Unlike Title VII, Title IX has "statutory and regulatory text permitting or requiring biological sex to be taken into account in an educational setting," and it often treats a "person's biological sex" as "relevant." *Id.* at 6-7.

B. The Department finalizes a new rule in late April, overhauling Title IX's regime and ordering compliance by August 1.

The Biden administration saw things differently. On his first day in office, the President directed every agency to adopt the position that "laws that prohibit sex discrimination"—including "Title IX"—also "prohibit discrimination on the basis of gender identity." Exec. Order No. 13,988, 86 Fed. Reg. 7,023, 7,023 (Jan. 20, 2021). The Department imposed this view via guidance, but courts deemed that guidance unlawful. *E.g.*, *Tennessee v. Dep't of Educ.*, 104 F.4th 557 (6th Cir. 2024); *Texas v. Cardona*, 2024 WL 2947022 (N.D. Tex. June 11). The Department also imposes its views on gender identity via litigation and enforcement. In litigation, it files amicus briefs arguing that, because Title IX covers gender identity, its *own* regulation on sports is partially invalid. *See, e.g.*, U.S. Br. at 24-27, *B.P.J. v. W.V. Bd. of Educ.*, Nos. 23-1078, 23-1130 (4th Cir. Apr. 3, 2023). And in enforcement actions, it treats "mis-gendering" as an actionable form of harassment. *E.g.*, *OCR Announces Resolution of Sex-Based Harassment Investigation of Taft College in California* (Oct. 19, 2023), perma.cc/47U8-VP2N; *OCR Resolves Sex-Based Harassment Investigation in Rhinelander School District in Wisconsin* (July 6, 2023), perma.cc/79G5-F9T6.

The Department eventually proposed a notice-and-comment rule on these issues in July 2022. 87 Fed. Reg. 41,390. The proposed rule was met with significant opposition from both sides of the aisle, numerous major faith groups, and generations old and new. Two years later, the Department finished it. 89 Fed. Reg. 33,474 (Apr. 29, 2024). Though the final rule spans hundreds of pages, imposes a slew of new procedural and training requirements, and came out in late April, the Department set

its effective date for August 1. *Id.* at 33,476. Three of its provisions are most relevant here: §106.10's definition of sex discrimination, §106.31's de minimis provision, and §106.2's definition of harassment.

Definition of Sex Discrimination (§106.10). The rule defines sex discrimination to include, in all circumstances, discrimination based on "gender identity." 89 Fed. Reg. at 33,886 (proposed 34 C.F.R. §106.10). The rule does not define "sex" or dispute that it means "biological sex." It contends that, "even assuming 'sex' means 'biological sex,'" Title IX's "prohibition on sex discrimination encompasses … gender identity discrimination" under *Bostock*. *Id.* at 33,807.

Though including gender identity raises a host of difficult questions, the rule pays them little mind. The rule never defines "gender identity," except to call it an internal, subjective "sense." *Id.* at 33,809. And the rule prohibits schools from taking meaningful steps to verify a person's "gender identity." *Id.* at 33,819. At the same time, the rule dismisses commenters' evidence that eliminating strict sex separation in sensitive spaces creates serious privacy and safety concerns, saying only that it "does not agree." *Id.* at 33,820. And the rule dismisses the costs of building new "gender-neutral or single-occupancy facilities." *Id.* It apparently assumes that schools will comply by letting any male who claims to be transgender (or gender fluid, or agender, or gender questioning) use the existing restrooms for females, and vice versa. *Id.*

The rule also implicates parental rights. It introduces gender identity while clarifying that Title IX trumps other laws, like FERPA, that let parents access information about their children. 89 Fed. Reg. at 33,885 (proposed 34 C.F.R. §106.6(e)).

The rule acknowledges concerns that this combination might bar schools from "notify[ing] a student's parents of the student's gender transition or gender identity" or letting parents access "information about their child's gender identity." *Id.* at 33,821-22. And a school might have to "treat a student according to their" gender identity, even over the parents' objection. *Id.* Yet after creating these problems, the rule gives the schools no solutions, merely "declin[ing] to opine" on specifics. *Id.*

De Minimis Provision (§106.31). To accomplish its policy ends, the rule could not simply add "gender identity" to the definition of sex discrimination in §106.10, since Title IX and its implementing regulations *allow* schools to treat the sexes differently in many contexts. To get around this issue, proposed §106.31 creates the concept of "de minimis harm." This provision states that, even when a practice is exempted from Title IX's general ban on sex discrimination, a school can still violate Title IX if the practice imposes "more than de minimis harm" on any student based on sex. 89 Fed. Reg. at 33,887 (proposed §106.31(a)(2)). And preventing someone from participating "consistent with [their] gender identity," the rule explains, always imposes "more than de minimis harm." *Id.*

The de minimis provision divides Title IX's exceptions into two classes. If an exception appears in a regulation that interprets Title IX's general ban on sex discrimination, then schools must allow students to participate consistent with their gender identity, not sex. *Id.* at 33,821. But if the exception appears in the statute or in a regulation that interprets one of the statutory exceptions, then schools can require students to participate consistent with their sex, not gender identity. *Id.* at

33,816-17, 33,821. For example, schools must let a male who identifies as female use female restrooms and locker rooms (even if visiting campus), attend the female sex-education class, room overnight with females, and play contact sports like boxing and wrestling against females in P.E.—since those exceptions are found only in regulations that interpret Title IX's general ban on sex discrimination. *Id.* at 33,816 (discussing 34 C.F.R. §§106.33, 106.34); *see id.* at 33,481-84 ("broadened" definition of "complainant" covers visitors). But schools need not let a male who identifies as a female attend Girls State, play on female sports teams, or live in the female dormitory—since those exceptions appear in the statute and the regulations interpreting those statutory exceptions. *Id.* at 33,816-17 (discussing 20 U.S.C. §1681(a)(1)-(9), §1686; 34 C.F.R. §§106.12-.15, .32(b), .41(b)).

This dichotomy raises many difficult questions. For one, the Department never explains why a rational Congress would design a scheme where schools must let males—for example—share a hotel room with females but not a dorm room, play contact sports against females in gym class but not after school, or shower in front of females but not attend Girls State. For another, the rule abandons its own internal reasoning by classifying sports on the "statutory" side of the line. As the rule admits, Title IX contains no statutory exception for sports; that exception exists only in a regulation that interprets Title IX's general ban on sex discrimination. *Id.* at 33,816-17 (discussing 34 C.F.R. §106.41(b)). But the rule insists that the sports regulation is *like a statute* because—shortly after the passage of Title IX—Congress instructed the Department's predecessor to create "proposed regulations" implementing Title IX

that "shall include" provisions governing college "sports," Pub. L. 93-380, §844 (1974), and then Congress reviewed and did not disapprove the agency's regulation on sports, *see* 89 Fed. Reg. at 33,816-17. But, of course, the same goes for the regulatory exemptions for bathrooms, locker rooms, and gym class—provisions that were prompted by the same bill, drafted at the same time, enacted in the same batch of regulations, and reviewed by Congress at the same time as the sports regulation. *See* 40 Fed. Reg. at 24,141-43. Yet the rule does not give those areas the elevated treatment that it gives to sports; nor does it explain why that disconnect is warranted.

Redefinition of Sexual Harassment (§106.2). The rule also redefines actionable harassment under Title IX by replacing the *Davis* standard, which the 2020 rule adopted verbatim, with something much broader. Under proposed §106.2, schools can be liable for student-on-student harassment that consists of "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." 89 Fed. Reg. at 33,884. The rule expands schools' potential liability for harassment to conduct that occurs online, off campus, outside the United States, or even before the relevant individuals attended the school. *Id.* at 33,886, 33,527. And it requires schools to prohibit not just harassment, but also "retaliation, including peer retaliation." *Id.* at 33,896 (proposed 34 C.F.R. §106.71).

The Department concedes that this new definition of harassment is "broader" than this Court's definition in *Davis*. *Id.* at 33,498. The rule deletes *Davis*'s requirement that the school be "deliberately indifferent" to the harassment. *Id.* at 33,889 (proposed §106.44(f)(1)). And the rule broadens *Davis* by covering harassment that is "severe *or* pervasive" and that "limits *or* denies" the victim's education. *Id.* at 33,884 (emphases added). The Department insists that it need not follow *Davis*: That case defined harassment for purposes of damages suits under Title IX's private right of action, while the rule defines harassment for purposes of enforcement actions brought by the Department. *Id.* at 33,499, 33,560. Though both *Davis* and the rule define the same word in Title IX ("discrimination"), the Department saw no problem with giving that same word two different meanings.

The rule dismisses the notion that, by incorporating this broader definition of harassment into their student codes of conduct, all schools (and public universities especially) would be forced to violate the First Amendment. *But see, e.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 498-99 (6th Cir. 2021); *Speech First v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022). As the Department previously found, harassment policies that go beyond *Davis* risk regulating not just harassing conduct, but also controversial speech on all sorts of sex-related topics—while imposing viewpoint-discriminatory restrictions on that speech. 85 Fed. Reg. at 30,162-65 & nn.738-39. And by going beyond *Davis* while also incorporating gender identity, the rule appears to make schools punish students and teachers for "misgendering" or for expressing dissident views on transgender issues. Rather than deny the problem, the rule agrees that such speech

can be prohibited harassment. *See* 89 Fed. Reg. at 33,516 (misgendering); *id.* at 33,504 (citing approvingly *L.M. v. Middleborough*, 2023 WL 4053023 (D. Mass. June 26), where a school banned a student from wearing a shirt that said "there are only two genders").

* * *

The rule contains other innovations,[2] but the heart of the rule is §106.10, which defines Title IX's overall "scope" and equates sex discrimination with gender-identity discrimination. App.25a; App.6a. This new definition of sex discrimination "implicates" and "permeates" the entire rule. App.7a; App.105a. Even the government admits that the definition is "referenced in or relevant to numerous other provisions." CA6-Doc.36 at 4-5. Indeed, the new definition of sex discrimination "touch[es] every substantive provision" in the rule. App.6a. By defining what sex discrimination means, it dictates what schools must train their employees on (proposed 34 C.F.R. §106.8); how schools must notify students and keep records (§106.8(f)); how many complaints schools must process (§106.2); what schools must investigate (§§106.2, .40, .44); which cases the grievance procedures cover (§§106.45-.46, .71); and more. Compliance with the rule, the Department concedes, will cost schools millions. 89 Fed.

[2] The rule's new grievance scheme largely rolls back procedural protections for the accused—including by allowing schools to deny students a live hearing with cross-examination and resurrect the "single-investigator model" where a single school official investigates, adjudicates, and punishes students. *See* 89 Fed. Reg. at 33,891-96 (proposed 34 C.F.R. §§106.45, .46). One court (so far) has deemed those changes illegal because the Department failed to reasonably address the due-process concerns that its prior rule stressed. *Texas*, 2024 WL 3405342, at *11-16. Further, the rule contains pregnancy-related provisions that arguably require state-run insurance plans to "cover abortion." *Id.* at *9 (citing 89 Fed. Reg. at 33,888; proposed 34 C.F.R. §106.40(b)(4)). One court has deemed this provision likely unlawful too. *Id.* at *9-11.

Reg. at 33,851, 33,861. The rule largely justifies these costs by referencing the benefits from its broad gender-identity mandates. *See id.* at 33,861-62. The rule's "cost-benefit analyses" do not even "contemplat[e] the idea of allowing these provisions to go into effect with a *different* definition of sex discrimination." App.7a.

C. The district court preliminarily enjoins the rule, but only in the Plaintiff States.

Once the rule was published, Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia immediately sued challenging it under the APA. These States asked the district court to enter, before August 1, a preliminary injunction barring the rule's enforcement or a stay of the rule's effective date under 5 U.S.C. §705.

The States challenged the rule in its entirety. Their briefs explained why the rule's central provisions are contrary to law and arbitrary and capricious. And those defects, they asserted, mean that the whole rule violates the APA. *See, e.g.*, D.Ct.Doc.19 at 3; D.Ct.Doc.92 at 20.

The States also put on evidence proving that the whole rule injures them. *See, e.g.*, D.Ct.Docs. 19-1–15, 92-1, 92-2, 109 at 2142. The rule itself concedes that the costs of complying with its new mandates is "$4.6 million to $18.8 million." 89 Fed. Reg. at 33,851, 33,861. Those costs stem from the rule as a whole: "reading and understanding" its many provisions, "revising" policies, training officials, increasing "the number of investigations," increasing the amount of "supportive measures," and more. *Id.* at 33,483, 33,492, 33,548, 33,850-51, 33,862-69, 33,876. But the actual costs, according to the States' unrebutted witnesses, are "enormous." App.110a. They are especially high given the rule's length and complexity, combined with its unusually

short compliance period. App.95a. Absent interim relief, the States would have to "hire additional staff" and "incur registration fees, travel costs, and payment for substitute teachers." App.96a. And they would suffer intangible costs like taking time away from "student discipline." App.96a. The rule also puts the States in a bind: Either stop enforcing their contrary laws,[3] or endanger critical programs that depend on the billions they get in federal funds. App.97a-101a.

The government opposed interim relief. Despite its framing now, the government understood then that the States were challenging the rule's central provisions in full. *E.g.*, D.Ct.Doc.73 at 22. And it understood that the States wanted relief against the entire rule. *See id.* at 31-32. The government's brief, however, did not tell the court how to disentangle the rest of the rule if its central provisions were unlawful. Though the government gestured to the concept of severability, its entire analysis of the rule was one conclusory sentence and one citation:

> Finally, the Final Rule is severable. *See* 89 Fed. Reg. at 33,848 ("[R]emov[ing] any 'doubt that it would have adopted the remaining provisions of the Final Rule' without any of the other provisions, should any of them be deemed unlawful.").

Id. at 32. The government did the same thing in its other briefs in other courts, which largely model the brief that it filed here. *Compare id.*, *with, e.g.*, *Louisiana v. Dep't of*

[3] *E.g.*, Ky. Rev. Stat. §156.070(2)(g)(3), §158.189, §164.2813(1)(b) (bathrooms and sports); Tenn. Code Ann. §49-2-805(a), §49-6-310(a), §49-7-180 (same); Tenn Code Ann. §49-6-5102(b), §49-7-2405 (protecting speech in higher education); Tenn Code Ann. §49-6-2904 (protecting "religious viewpoints in a public school"); Ky. Rev. Stat. §158.191(5)(b), (c) (similar); Tenn Code Ann. §49-6-5106 (enrollment must match birth certificate).

Educ., Doc. 38 at 47, No. 3:24-cv-563 (W.D. La. June 5, 2024); *Alabama v. Cardona*, Doc. 24 at 69, No. 7:24-cv-533 (N.D. Ala. June 5, 2024).

The district court entered a preliminary injunction on June 17. It refused to grant relief that would benefit nonparties. Noting the recent criticisms of "nationwide injunctions," it "limited" its injunction "to the plaintiff-States." App.105-06a, 108a. But the district court agreed that the enforcement of the whole rule should be temporarily enjoined in those six States. App.103a-06a.

The district court explained why each of the rule's central provisions—§106.10's definition of sex discrimination, §106.31's de minimis provision, and §106.2's redefinition of sexual harassment—violated the APA in full. And once the court found §106.10's definition of sex discrimination unlawful, the government never explained how the rest of the rule could stand. App.105a-07a.

Separately, the district court found that the whole rule was "arbitrary and capricious." App.105a. The rulemaking does not reasonably address, among other issues, its changed position on *Bostock*, the conflict it creates with parental rights, its inconsistent treatment of bathrooms and sports, the safety and privacy concerns with letting males in sensitive female spaces with no ability to test their sincerity, schools' reliance interests, or the First Amendment problems created by the harassment definition. App.47a-92a. This lack of reasoned decision-making pervades the rule and makes it "invalid in its entirety." App.105a.

Seven days later, the government asked the district court for a partial stay. D.Ct.Doc.104. Like it does now, the government asked the district court to let a

Frankensteinian version of the rule go into effect on August 1: The rule would still define sex discrimination to include gender identity, but the de minimis provision would stay enjoined, and the definition of sexual harassment would stay enjoined only to the extent it covers gender identity. Mischaracterizing the States' injuries, the government insisted that the definition of sex discrimination could not harm them, outside of bathrooms, because they never claimed a desire to discriminate based on gender identity. The government also insisted that the States' sole concern with the harassment definition was not its noncompliance with *Davis* generally, but the fact that it reached gender identity and thus the use of "preferred pronouns." *But see* D.Ct.Doc.73 at 22 (government acknowledging in the district court that the States challenged the "harassment definition" for "three reasons," including that its scope "is inconsistent with the definition in *Davis*").

The district court disagreed and denied the government's request for a partial stay. Throughout, the district court rejected the government's framing of the dispute because it "ignores entirely" the States' arguments and the district court's findings. App.113a. The full redefinition of sex discrimination (§106.10) does injure the States, the court explained, because that expanded definition "drastically and impermissibly alters the obligations of educational institutions" and "introduces considerable uncertainty and complexity, necessitating comprehensive changes in school policies, training, and enforcement mechanisms." App.120a; *see, e.g.*, D.Ct.Doc.92-1 at 5-7. As for the redefinition of harassment (§106.2), neither the "plaintiffs' criticisms" nor the "Court's analysis" were "limited to the context of gender identity." App.122a. And all

of the rule's central provisions, the district court reminded the government, are "procedura[lly]" invalid because they are arbitrary and capricious. App.121a, 81a. The court also deemed it inappropriate to "scour" the rule's "more than four-hundred pages," with little help from the government, to determine which provisions could stand after the rule's central provisions were deemed unlawful. App.123a.

Finally, the district court stressed the unique harms that the government's piecemeal approach would inflict on the States. Again crediting the States' unrebutted testimony from the preliminary-injunction hearing, the court found that a partial stay would require schools "to comply with some provisions, including those which derive meaning from enjoined provisions," while "attempting to predict the Final Rule's ultimate form." App.132a. That "endeavor" would be "highly speculative," "costly," and fraught with "litigation risks." App.132a. This "substantial" and "immediate" harm to the States, which would accrue August 1 with a partial stay, was itself a reason to "maintai[n] the injunction until a final decision is issued." App.133a.

D. The Sixth Circuit declines to stay the preliminary injunction, but expedites the government's appeal.

When the government sought the same relief from the Sixth Circuit, that court denied it too. In an opinion by Chief Judge Sutton, the court explained that all three judges "agree[d] that th[e] central provisions of the Rule"—the redefinition of sex discrimination in §106.10, the redefinition of hostile-environment harassment in §106.2, and the de minimis harm addition in §106.31—"should not be allowed to go into effect on August 1." App.5a (cleaned up).

Though the panel had a "modest disagreement" about "whether the other parts of the Rule can be separated from these central provisions," the majority was not persuaded. App.5a. The rule's definition of sex discrimination could not be separated from the other provisions. App.6a-8a. The Department never considered or explained "during the rulemaking" how it could be. App.7a. And the government never made that argument to the district court. App.7a-8a. It "mentioned severability below in just a few lines of its briefs without telling the district court which other provisions should be severed" or suggesting that anything could be severed from the definition of sex discrimination. App.8a. The Sixth Circuit thus deemed it inappropriate, especially "in the context of this emergency stay motion," to give the government "more relief than [it] sought below." App.8a.

"To mitigate any harm" to the government, however, the Sixth Circuit sua sponte "expedite[d]" the government's interlocutory appeal. App.9a. It scheduled oral argument (before a new "randomly assigned" panel) for October 2024. App.9a. Meanwhile, in the district court, the proceedings are not stayed. *See* D.Ct.Doc.121. The States are filing their opening summary-judgment motion today, and the parties will be finished with summary-judgment briefing on September 13—weeks before the Sixth Circuit will hear argument on the preliminary injunction. *Id.*

ARGUMENT

On its third try, the government asks this Court to grant the same partial stay that the district court and the Sixth Circuit denied. But this Court will do so "only in extraordinary circumstances." *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). To carry that "heavy burden," *id.*, the government must make a

"'strong showing'" that it is "'likely to succeed on the merits,'" that it "'will be irreparably injured'" without a stay, that a stay will not "'substantially injure the other parties,'" and that a stay furthers "'the public interest,'" *Nken v. Holder*, 556 U.S. 418, 434 (2009). The government cannot satisfy any of these factors.

I. This Court would not review—much less reverse—a decision upholding the district court's preliminary injunction.

A. The government's narrow complaints about the preliminary injunction's scope are not certworthy.

This Court's jurisdiction is mostly discretionary; so it often denies stays where, even if the court of appeals affirmed the district court, four Justices would not grant certiorari. *Does 1-3 v. Mills*, 142 S.Ct. 17, 18 (2021) (Barrett, J., concurring). "Grant certiorari" in this context means "grant certiorari *on the question presented in the stay application*." *Griffin v. HM Fla.-ORL*, 144 S.Ct. 1, 1 (2023) (Kavanaugh, J., respecting denial of stay) (emphasis added). And those questions are strangely narrow here because the government concedes away major parts of the rule and seeks only a "partial stay"—a strategy that significantly affects certworthiness. *Id.* at 1-2.

Specifically, the government's application presents two questions: whether the rule lawfully extends *Bostock*'s reasoning about gender identity to Title IX, and whether the preliminary injunction is overbroad. The only circuits to consider these questions in cases about the validity of the rule—the Sixth Circuit here, and the Fifth Circuit in *Louisiana*—agree on the answers. App.1a-13a; *Louisiana v. Dep't of Educ.*, 2024 WL 3452887 (5th Cir. July 17). But even if another circuit later disagrees, neither of the government's questions will be certworthy in this "very unusual" posture. *United States v. Texas*, 144 S.Ct. 797, 798 (2024) (Barrett, J., concurring).

On *Bostock*'s applicability to Title IX, this case is an "an imperfect vehicle" to answer that "general question." *Griffin*, 144 S.Ct. at 2. That issue is teed up here only indirectly: The controversy between the parties is not whether *Bostock* applies to Title IX, but whether *this particular rule* violates the APA. And the rule violates the APA for reasons independent of *Bostock*'s asserted application to Title IX. The district court held that its definition of sex discrimination is illegal as applied to hostile-environment harassment, since it raises grave First Amendment problems. App.56a-71a. The government succumbs to that ruling for now. *See* U.S.-Br.4. The district court also held that the definition of sex discrimination is arbitrary and capricious, since it fails to treat like cases alike, gives no guidance on "gender identity," ignores both reliance interests and safety/privacy concerns, unreasonably addresses parental rights, and more. App.79a-92a. The government never responds to those alternative rulings—either here, in the Sixth Circuit, or in the district court. D.Ct.Doc.104; CA6-Doc.19 at 12 n.4. These independent defects with the rule would make this Court hesitant to address *Bostock* here, instead of waiting for a case that presents the statutory question directly. *Cf.* U.S.-Br.17 (citing examples of such cases from the Fourth, Seventh, and Ninth Circuits).

The government's strategy also raises *Bostock* in an artificial posture. The government wants this Court to address whether Title IX covers "gender identity" without addressing two key contexts: bathrooms and sports. Longstanding regulations allow sex separation in bathrooms and sports, 34 C.F.R. §§106.33, 106.41, and the government concedes that those regulations do not require schools to make exceptions

for transgender students. The rule concedes that point for sports. *See* 89 Fed. Reg. at 33,817-18, 33,839. And the government temporarily tables that point for restrooms by not seeking a stay of the rule's de minimis provision. U.S.-Br.4. But the bathroom and sports regulations were passed shortly after Title IX, were reviewed and approved by Congress, and (according to the government) interpret Title IX's general ban on sex discrimination. 40 Fed. Reg. at 24,141-42; *N. Haven*, 456 U.S. at 531-33; 89 Fed. Reg. 33,821. So they are "stron[g]" evidence of those terms' original meaning. *Grove City*, 465 U.S. at 568. In other words, the government's concessions elide a crucial part of the interpretative debate. And for a reason: The government does not want this Court to focus on the reality that, if an opinion of this Court endorses its vision of *Bostock* and Title IX, then sex-separated bathrooms and sports violate the statute too—and always have.

As for the scope of the preliminary injunction, that question is simply not certworthy. This case does not implicate the ongoing debates about vacatur or "universal" injunctions that reach beyond the parties. *Cf. Labrador*, 144 S.Ct. at 928-34 (Kavanaugh, J., concurring); *Griffin*, 144 S.Ct. at 2 n.1 (Kavanaugh, J., concurring). The district court granted an injunction, not vacatur, and limited its injunction to the Plaintiff States. App.103a-08a. It also thoroughly considered whether certain "aspect[s]" of the rule should take effect now, but concluded that both the rule's structure and the particular burdens of the States' partial compliance cut against that course. *Cf. Labrador*, 144 S.Ct. at 922 (Gorsuch, J., concurring). Though the government complains that this scope calculus was wrong, this Court does not concern itself with

factbound error correction; it would not use its limited resources to review whether a district court abused its discretion by enjoining too much of a concededly illegal rule with many overlapping provisions. This case would not even present that question cleanly. The government relies on severability, but it forfeited these arguments by not adequately briefing them below. *See* App.8a; *Louisiana*, 2024 WL 3452887, at *2. And this case involves only a *preliminary* injunction, where district courts arguably have more leeway given the need to quickly prevent irreparable harm. *See Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (when crafting a preliminary injunction, "a court ... may mold its decree to meet the exigencies of the particular case" (cleaned up)).

This case is also "interlocutory," further decreasing its certworthiness on any question. *NFL v. Ninth Inning*, 141 S.Ct. 56, 57 (2020) (statement of Kavanaugh, J.). The district court entered a preliminary injunction, the government took an interlocutory appeal, and the Sixth Circuit agreed to hear that appeal in October. But the underlying proceedings in the district court are not stayed. D.Ct.Doc.121 at 4. In fact, the district court ordered the parties to finish their cross-motions for summary judgment in September. *Id.* So there may never be a Sixth Circuit decision on the preliminary injunction for this Court to review, as the district court's final judgment will moot any dispute over preliminary relief. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund*, 527 U.S. 308, 314 (1999). And that final judgment could remove whole issues from the case—if, for example, the district court deems the rule arbitrary and capricious instead of contrary to law or grants vacatur instead of an injunction.

Rather than jumping the gun by granting certiorari from a mid-case Sixth Circuit decision soon subject to mooting by final judgment, this Court would deny certiorari in this posture. So it should not give the government a "merits preview" now, short-circuiting the substantial percolation that is currently happening in the lower courts. *Does 1-3*, 142 S.Ct. at 18 (Barrett, J., concurring). Nor should the government want that preview: As shown next, it would likely lose on both questions presented.

B. The definition of sex discrimination likely violates the APA.

While the government (and its scholar amici) want this Court to say that §106.10 is lawful because *Bostock* governs Title IX, that argument need not be addressed in this emergency posture. Even if §106.10 comported with Title IX, the district court held that the reasoning behind it was arbitrary and capricious on parental rights, misgendering, reliance interests, the meaning of gender identity, the agency's prior position, and more. App.79a-92a. Those defects stem directly from "§106.10" and its decision to import gender identity into Title IX. App.120a-21a.

The government does not address these alternative holdings anywhere in its application. That is so even though the States called the government out for not briefing them in the Sixth Circuit, *see* CA6-Doc.21 at 4, 12, 14, 21, and the district court twice told the government that these rulings independently doom the rule, *see* App.105a, 120a-24a. The government, with "its ample resources and voluminous briefing," shouldn't get to sandbag the States by saving its responses for reply. *Ohio v. EPA*, 144 S.Ct. 2040, 2057 (2024); *Stern v. Marshall*, 564 U.S. 462, 481-82 (2011). It was the government's "burden" to prove its entitlement to a stay. *Nken*, 556 U.S.

at 433-34. It cannot carry that burden without explaining why §106.10 is not procedurally invalid, independently of whether it is "substantively invalid." *Dep't of Commerce v. New York*, 588 U.S. 752, 785 (2019).

Regardless, §106.10 is substantively invalid too: It goes well beyond Title IX. The government rightly concedes that "sex" in Title IX means "biological sex" and does not include "gender identity." U.S.-Br.37; 89 Fed. Reg. at 33,802. To justify its wholesale importation of gender identity into Title IX, the rule relies exclusively on *Bostock*'s reasoning about Title VII. *Id.* at 33,806-07. That analysis fails for many reasons. *See* App.4a-5a, 31a-47a, 113a-20a. The States preview the picture here.

Right out of the gate, the government must overcome two clear-statement rules that were not present in *Bostock*. Unlike Title VII, Title IX is authorized only under the Spending Clause. *Davis*, 526 U.S. at 640; App.5a. Because the Constitution requires Congress to give recipients clear notice of what they are agreeing to when they take federal funds, Title IX cannot "impose" any "condition" unless the statute does so "unambiguously." *Pennhurst v. Halderman*, 451 U.S. 1, 17 (1981). Also unlike *Bostock*, this case is a challenge to agency action under the APA. So the government must prove that, when Congress delegated the authority to "effectuate" Title IX, it also gave the agency the power to resolve the gender-identity question. 20 U.S.C. §1682. Because that question has great political and economic significance, *see Kansas*, 2024 WL 3273285, at *11-12, the government needs "'clear congressional authorization'" for its approach, *West Virginia v. EPA*, 597 U.S. 697, 723 (2022).

The government lacks that clear statement where, as Chief Judge Sutton put it, "many jurists have explained" that *Bostock*'s analysis of Title VII does not "neatly map onto" other laws and contexts. App.4a-5a (citing, among others, *SFFA v. Harvard*, 600 U.S. 181, 290, 308 (2023) (Gorsuch, J., concurring)). *Bostock* itself refuses to "prejudge" whether its analysis of Title VII governs "other federal … laws that prohibit sex discrimination." 590 U.S. 644, 681 (2020). The "only question" it decides is if an employer violates Title VII when it "fires" someone for being transgender. *Id.* For firing, hiring, and several other employment practices covered by Title VII, *see* 42 U.S.C. §2000e-2, males and females are "similarly situated," *Bostock*, 590 U.S. at 657. Title VII treats "sex" just like "race," *see* 42 U.S.C. §2000e-2, and generally deems these characteristics "not relevant to employment decisions," *Bostock*, 590 U.S. at 660. But Title IX is not limited to employment decisions; its general ban on sex discrimination sweeps broadly over "any education program or activity." 20 U.S.C. §§1681(a), 1687. And 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 across this context.

Start with the statute itself. Unlike Title VII's sweeping but-for causation for hiring and firing, Title IX takes a more nuanced approach to discrimination "on the basis of sex" in the educational setting. 20 U.S.C. §1681(a). Sometimes it allows outright segregation, as in traditionally single-sex schools (§1681(a)(5)), Boys and Girls State (§1681(a)(7)), and greek life (§1681(a)(6)). Other times it allows sex separation, so long as males and females are treated equally on a *group* level. *E.g.*, §1681(a)(8)

(dances). And other times it says it is not discriminatory to treat males and females differently based on privacy concerns or physical differences. *E.g.*, §1686 (living facilities); §1681(a)(4) (military academies); Pub. L. 93-380, §844 (sports).

Because the rule reads sex discrimination to mean gender-identity discrimination, it treats these above provisions as instances where Congress expressly *allowed discrimination* against students whose sex and gender identities differ. *See* 89 Fed. Reg. at 33,814-21. That reading is bizarre. No rational Congress would want to stop males from attending Girls State (a statutory exception) but let them undress and shower with females (not a statutory exception, according to the rule). Instead, these statutory provisions reflect a different understanding of what sex discrimination means: Treating males and females differently based on real differences that are rooted in biology, safety, and privacy is not discriminatory; it is beneficial and sometimes necessary to ensure equal opportunities for women. *See generally City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468-69 (1985) (Marshall, J., concurring in part and dissenting in part); *United States v. Virginia*, 518 U.S. 515, 551 n.19 (1996).

Consider also the longstanding regulatory exceptions. Soon after Title IX was passed in 1972, Congress directed the Department's predecessor to create implementing regulations. 88 Stat. 484, 612 (1974). The agency wrote those regulations, Congress reviewed them, and Congress declined to disapprove them. *N. Haven*, 456 U.S. at 531-33. Many of these original regulations are intact today. They explain that schools can have separate bathrooms and sex-ed classes for males and females. 34

C.F.R. §§106.33, 106.34(a)(3). And schools can separate males and females in all sports after school, and in contact sports like "wrestling" and "boxing" during school. §§106.34(a)(1), 106.41(b). Per the Department, these regulations do not interpret any statutory exception in Title IX; they interpret Title IX's general ban on sex discrimination. 89 Fed. Reg. at 33,821; D.Ct.Doc.73 at 12-13. And they allow schools to separate the sexes and maintain that separation even with respect to transgender students. 89 Fed. Reg. at 33,819-21.

But if the government is right that all gender-identity discrimination is sex discrimination under Title IX, then these early regulations would be invalid. Though the government embraces that result, *see id.*; U.S.-Br.2-3, that result indicts its central statutory argument. These early regulations have long been thought to "accurately reflect" Title IX's original meaning. *Grove City*, 465 U.S. at 568. Even sans *Chevron*, they remain powerful evidence of Title IX's meaning because they are "roughly contemporaneou[s] with the enactment" of Title IX and have "remained consistent over time." *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2258 (2024).

Because *Bostock* cannot make sense of Title IX as a whole, its logic should not be extended to Title IX period. But at a minimum, *Bostock*'s logic cannot be extended to Title IX across the board, as the rule tries to do with §106.10. The government focuses on (what it admits are theoretical) examples of discrimination like excluding transgender students from "the science fair, the marching band, or student government." U.S.-Br.29. But §106.10 is not limited to science fairs and marching bands. It defines "gender identity" discrimination to *be* "sex discrimination"; so under the rule,

treating someone according to their sex instead of their gender identity "necessarily" violates Title IX. U.S.-Br.9, 29, 36. That sweeping rule covers not just clubs, but also rooming arrangements on overnight trips, intramural sports, and much more. And it goes further than *Bostock* by regulating "bathrooms, locker rooms, and dress codes." 590 U.S. at 681; *see* 89 Fed. Reg. at 33,821. These applications of §106.10 are plainly unlawful. Treating people differently based on real differences between the sexes is not sex discrimination under Title IX. So even under the government's logic, the rule is not remotely tailored enough to satisfy the APA.

C. The preliminary injunction is not overbroad.

Nor did the district court abuse its discretion by temporarily barring enforcement of the whole rule in the Plaintiff States while the parties litigate expedited cross-motions for summary judgment. Though the government defends the harassment provision (in part) and the definition of sex discrimination (in whole), both are fully illegal. Even if the only illegal part of the rule were the latter's inclusion of gender identity, that defect alone justifies the district court's injunction.

1. The redefinition of harassment in §106.2 is illegal soup to nuts. All three judges on the Sixth Circuit agreed that it should be enjoined in full. App.5a. The district court ruled that it was both contrary to law, App.57a-71a, and arbitrary and capricious, App.69a, 122a. The government's application never responds to the district court's analysis or addresses arguments that this provision violates *Davis* and conflicts with fundamental First Amendment protections.

Even if the government could make new arguments in reply, no argument could salvage §106.2's definition of harassment. The rule admits that it departs from

the Court's authoritative definition of actionable harassment under Title IX in *Davis*. 89 Fed. Reg. at 33,498, 500-01. It deletes *Davis*'s "deliberate indifference" requirement. *Compare id.* at 33,889, *with* 526 U.S. at 650-51. It changes *Davis*'s "severe and pervasive" requirement to a "severe or pervasive" requirement. *Compare* 89 Fed. Reg. at 33,884, *with* 526 U.S. at 652. And it lowers *Davis*'s "denies" requirement to a "limits" requirement. *Compare* 89 Fed. Reg. at 33,884, *with* 526 U.S. at 652. Even before *Chevron* was overruled, the Department had no power to override this Court's authoritative interpretation of Title IX, since it was crafted to avoid constitutional concerns under the Spending Clause and the First Amendment. *See Davis*, 526 U.S. at 648-49, 652-53.

The government's defense in the rulemaking—that *Davis* is just a case about private lawsuits for damages—was arbitrary. 89 Fed. Reg. at 33,499, 33,560. Whether enforced by the Department or by private litigants, Title IX has a single ban on sex discrimination with "a single, best meaning." *Loper*, 144 S.Ct. at 2266. *Davis* interpreted that ban, and that interpretation is binding even if certain contexts might not implicate the Court's constitutional concerns. *See Clark v. Martinez*, 543 U.S. 371, 382 (2005) (statutory text is not "a chameleon" whose "meaning [is] subject to change depending on the presence or absence of constitutional concerns in each individual case"). And *Davis*'s concerns *are* implicated by administrative enforcement. Schools that impermissibly penalize speech, or adopt overbroad harassment policies to avoid the Department's ire, can violate the First Amendment no less than private suits.

The government continues to insist that the States' challenge to §106.2 was limited to gender identity, U.S.-Br.22, but the government continues to be wrong. The States argued below that the whole definition of harassment violated the APA. *E.g.*, D.Ct.Doc.19-1 at 23-24; D.Ct.Doc.92 at 14. The government understood below that the States were making at least "three" broad arguments: "the definition is inconsistent with the definition in *Davis*," "the definition's breadth runs afoul of the First Amendment," and the government "failed to consider and respond to significant comments." D.Ct.Doc.73 at 22. And most importantly, the district court confirmed that the States' challenges to "the 'hostile environment harassment' provision—and this Court's analysis—*were not limited to the context of gender identity*." App.122a (emphasis added).

2. The definition of sex discrimination in §106.10 is fully illegal too. As explained, the rule misapplies *Bostock*; and the government never responds to the district court's alternative arbitrary-and-capricious rulings. App.31a-47a, 81a-92a. The district court's analysis on that score was not limited to the words "gender identity." It explained why the defects it identified with "gender identity" coverage also apply to §106.10's use of "sex characteristics" and "sex stereotypes," and how the rule did not reasonably address a series of broader problems created by §106.10's "vague terms" and their "nested and equally undefined subterms," including "pregnancy." App.119a-20a. That reflects the States' evidence showing that §106.10's broadening of sex discrimination to all forms of "'sex-based' harassment" would increase investigation costs substantially. D.Ct.Docs.92-1 at 5-7, 92-2 at 4-5; *see* 89 Fed. Reg. at

33,851. Tellingly, all three judges on the Sixth Circuit agreed that this provision should remain enjoined in full. App.5a-6a.

Even the parts of the rule that the government wants to leave enjoined—§106.31's de minimis provision, and §106.2's definition of harassment as applied to gender identity—are defects with §106.10. Though the government now claims that the de minimis provision is what governs bathrooms, the rule says that §106.31 simply "clarif[ies]" the scope of §106.10 by giving "examples" of the sex discrimination that §106.10 "prohibit[s]." 89 Fed. Reg. at 33,528. And though the government casts §106.2 as itself covering harassment based on gender identity, that provision does not even use the word "gender identity." It extends to "harassment on the basis of sex" and incorporates by reference the definition of sex-based discrimination in "§106.10." *Id.* at 33,884. So if the government wants to concede that the rule's treatment of bathrooms and misgendering is unlawful, then it must concede that those *applications* of §106.10 are unlawful—further justifying the district court's preliminary injunction regarding that provision.

If anything, enjoining §106.31 but not §106.10 could make things worse. The 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. Perhaps the statutory exceptions (where courts are the key interpreters) would continue to allow strict sex separation. But what about the regulatory exceptions, like bathrooms and sports? The de minimis provision is the *only* provision that exempts athletics from §106.10's ban on gender-

identity discrimination. *See* 34 C.F.R. §106.31(a)(2) (excepting §106.41(b)). Without §106.31, the fate of it and the other regulatory exceptions (where the Department is the key interpreter, *see Kisor v. Wilkie*, 588 U.S. 558 (2019)) will be in limbo. The resulting vacuum will be filled by the Department—which already thinks schools cannot prevent transgender students from using bathrooms or playing sports designated for the opposite sex. *See* 89 Fed. Reg. at 33,821; *supra* 3, 23.

3. The government's remaining arguments all assume that, if §106.10's inclusion of "gender identity" is unlawful, then those two words should have been preliminarily excised while the rest of the rule went into effect on August 1. But the district court had no duty to redline the rule, with virtually no help from the government, in an order granting only interim relief.

The government seems to accept that, if the whole rule likely violates the APA or one of its illegal provisions is likely inseverable from the rest, then the preliminary injunction was proper; yet both are true here. The district court ruled that the many separate deficiencies in the rulemaking process likely rendered the rule arbitrary and capricious. *See* App.121a, 123a-26a, 105a. The government again declines to answer.

As for severability, the district court did not abuse its discretion by not considering arguments that the government never made. As Chief Judge Sutton explained, the government "mentioned severability below in just a few lines of its briefs." App.8a; *accord Louisiana*, 2024 WL 3452887, at *2 (government "forfeit[ed] its severability argument"). The government says it cited the rule's severability provision. U.S.-Br.22-23, 27-28. But even if that stray citation somehow preserved the more intricate

arguments that the government started making on appeal, "the ultimate determination of severability will rarely turn on the presence … of such [provisions]." *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968); *accord Reno v. ACLU*, 521 U.S. 844, 884 n.49 (1997). The government did not make any developed arguments under the law of severability, or even "tel[l] the district court which other provisions should be severed." App.8a. It wasn't an abuse of discretion for the district court to refuse to "rewrite" the government's rule for it based on *post hoc* points the rule nowhere contains. App.122a; *accord Louisiana*, 2024 WL 3452887, at *2.

The government had no good arguments to make anyway. A "severability provision" cannot "solv[e] the agency's problem" when a rule's remainder would function in an arbitrary-and-capricious or ill-explained manner. *Ohio*, 144 S.Ct. at 2054-55. Nor can it justify severance that would "impair the function of the … whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988). As Chief Judge Sutton and the district court explained below, §106.10's "impermissible definition … permeates the remaining regulations," App.105a, "touch[ing] every substantive provision," App.6a. Contra the government, these provisions incorporate the meaning of sex discrimination *in* §106.10, not some other hypothetical, post-severance understanding; so these provisions also employ a definition that likely violates Title IX. *See* App.6a-7a. The government also has no response to Chief Judge Sutton's other point, which is that the government "did not contemplate enforcement of the Rule without *any* of the core provisions" or "with a *different* definition" of sex discrimination. App.7a. That patch-

work rule would be entirely disconnected from the reasoning, evidence, and cost-benefit analysis the agency proffered to justify the rule. Imposing it after the fact would "recruit the Court into the rulemaking process," an "improper judicial excursion" that contravenes the Constitution's separated roles. App.128a.

Even if some provisions of the rule are lawful and severable, the preliminary injunction still was not "more burdensome to the defendant than necessary *to redress the plaintiff's injuries*." *Labrador*, 144 S.Ct. at 927 (Gorsuch, J., concurring) (emphasis added; cleaned up). The States challenged the whole rule. And the district court found that their injuries stem from the rule generally—and would only grow with the government's partial-stay approach. *See* App.97a, 110a, 127a, 132a-34a. The government does not explain why these findings were clearly erroneous.

Nor should the district court have been expected to pick through the rule with a fine-toothed comb in an emergency posture, where relief was quickly needed before the rule's August 1 effective date. App.7a-8a, 123a; *Louisiana*, 2024 WL 3452887, at *2-3. This Court should not be expected to in this "emergency posture" either, U.S.-Br.4, with even less time to spare. The APA contemplates this scenario: To "prevent irreparable injury," it allows district courts to "postpone the effective date" of a rule, "pending conclusion of the review proceedings." 5 U.S.C. §705. That relief typically freezes the entire rule for all, since most rules (including this one) have only one "effective date." 89 Fed. Reg. at 33,476. So the district court, if anything, granted narrower relief than permitted, since its injunction targeted just the Plaintiff States. It committed no reversible error.

II. The government faces no irreparable harm, especially after the Sixth Circuit expedited the appeal.

Independently, this Court "need not conside[r]" "likelihood of success on the merits" because the government "fails to show irreparable injury from the denial of the stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers). Though it asserts two harms—sovereignty and discrimination—neither is supported, let alone to a degree sufficient to outweigh the States' patent injuries.

The government asserts a sovereign interest in enforcing its rule, U.S.-Br.38, but the case that it cites says "'a *State*'" suffers irreparable injury when a court enjoins "'*statutes* enacted by representatives of its people,'" *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (emphases added). The only statutes presently at play are the States', which have been displaced by the government's "bureaucratically issued rule." *Louisiana*, 2024 WL 3452887, at *3. Regardless, the claimed sovereign harm is not implicated here, where the preliminary injunction keeps in place the Department's existing rules and where the government concedes that its new rule must remain partially enjoined. Nor could this purported harm be irreparable before the government completes the "expedited" review that both the district court and the Sixth Circuit are giving the rule. *Yeshiva Univ. v. Yu Pride All.*, 143 S.Ct. 1, 1 (2022).

The government also speculates that an injunction will open the door to "discrimination," U.S.-Br.39-40, but a mere "possibility" of harm is not enough, *Nken*, 556 U.S. at 434. The government concedes that the States will not engage in the narrow categories of discrimination (like excluding transgender students from the science

fair) that its partial stay targets. U.S.-Br.29. The district court, for its part, found that this form of discrimination was "entirely theoretical"; the agency had introduced "no evidence" otherwise in the rulemaking—let alone any aimed at "the Plaintiff States' jurisdictions." App.130a. Nor has the government shown that the "*existing* regulatory framework," including its current Title IX rules and other state and federal laws, are somehow unable to stop such discrimination. App.131a; *see generally* CA6-Doc.37 (detailing provisions). The district court found that this regime was sufficiently protective pending final adjudication on the merits. App.131a, 134a. And the government's actions confirm it. Though the presidential administration changed in 2021, the Department waited "three years" to promulgate this rule, "after many delays." *Louisiana*, 2024 WL 3452887, at *3. Its "failure to act with greater dispatch tends to blunt [its] claim of urgency and counsels against the grant of a stay." *Ruckelshaus*, 463 U.S. at 1318.

III. Any harm to the government is negligible compared to the harm to the Plaintiff States and the public interest.

The equities also weigh against the government. These factors usually follow the merits, since neither the government nor the public has an interest in an illegal rule. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020); *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 766 (2021). But this case is one of the rare times when, even if the merits favored the government, the equities are so lopsided that the request for a partial stay should be denied.

The district court found that the requested partial stay would exacerbate the rule's already "extraordinary" costs to the States and cause "widespread confusion"

as well. App.97a, 110a. Contra the government, these harms do not "arise primarily from the aspects of the Rule that would remain enjoined" under the partial stay. U.S.-Br.38. Instead, the district court found—based on unrebutted live testimony and detailed declaration evidence—that permitting "portions of the Final Rule" to take effect would inflict independent compliance costs and be "incredibly confusing." App.132a-33a; D.Ct.Doc.109 at 22. The Sixth Circuit agreed, crediting the States' unrebutted "evidence" the same way as the district court. App.8a.

It's easy to see why the government's partial-roll-out proposal is "particularly problematic." App.8a. It would require the States' school systems to hold scores of public meetings to "overhau[l]" school-district policies, App.132a; *see* D.Ct.Doc.109 at 12-14; train hundreds of thousands of employees, App.96a; *see* §106.8(d); and revamp and republish reams of handbooks, non-discrimination guidance, and related materials, App.95a; *see* §106.8(b)-(c). Then, on top of these unrecoverable costs, a piecemeal approach would require the States and schools to sink more sums into figuring out what the partial stay means across the rule's interrelated provisions and retraining employees after final judgment. App.8a, 132a; *accord Louisiana*, 2024 WL 3452887, at *2. And this "enormous waste of resources" would have little upside, since the layers of new rule-made bureaucracy would still leave schools' core obligations unsettled, App.110a, 132a; *accord* App.8a-9a. School officials would be left guessing how the rule applies in a range of areas where sex, gender identity, speech rights, privacy, and safety routinely conflict. *E.g.*, App.8a, 110a; *Louisiana*, 2024 WL 3452887, at *2.

Those challenges compound every day that the rule's August 1 compliance date ticks closer. Yet based on its application, the government apparently wants this Court to partially reinstate the rule on or even after August 1—forcing schools in these six States to *immediately* implement piecemeal policies "on the eve of a new school year." App.9a. As both courts below explained, these equitable considerations cut against ordering "premature enforcement" of a rule that would confound rather than clarify schools' Title IX obligations. App.134a; *accord* App.8a.

This Court should not upset that judgment and unleash eleventh-hour havoc—and needless diversion of valuable resources—on schools, students, and sovereign States. The only way to preserve the status quo is to leave the preliminary injunction in place, ensuring that schools in these six States can continue using the basic "Title IX regulations" that have been in place "for nearly 50 years." U.S.-Br.25.

CONCLUSION

This Court should deny the government's application.

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