APP NO. 24A78

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.,

Applicants,

v.

STATE OF LOUISIANA, ET AL.,

Respondents.

RESPONSE IN OPPOSITION TO APPLICATION FOR A PARTIAL STAY OF THE INJUNCTION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Rapides Parish School Board states that there are no parent corporations and no publicly held stock.

To the Honorable Samuel A. Alito, Jr., as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Pursuant to this Court's Rules 22, 23, and 33.2, Respondent Rapides Parish School Board objects to the Application for a Partial Stay of the Injunction Entered by the United States District Court for the Western District of Louisiana (Appl.).

INTRODUCTION

Title IX is Spending Clause legislation, to which a strong clear-statement rule and the major-questions doctrine apply. The Department of Education's new Title IX Rule cannot hope to satisfy those requirements. It redefines "sex-based discrimination" and adopts a capacious understanding of "hostile environment harassment" that infringes on First Amendment freedoms. It also creates a new form of discrimination available *only* based on gender identity—and only in some contexts. This, the Government cannot bring itself to defend to this Court. Indeed, the Rule's new "de minimis harm" form of discrimination, with its illogical exceptions and conclusion that Congress intended schools to impose cognizable injuries on some students, is indefensible. And it is intertwined with the rest of the Rule.

The Government's partial stay would be harmful in itself. Schools would have to work out how the Rule functions without its key provisions, amend their policies, and train their staff accordingly—all by next week—and then do it all again after judicial review. That is anathema to the equitable principles the Government invokes. So six district courts and two courts of appeals (so far) have agreed that the entire Rule is properly subject to preliminary relief while judicial review proceeds. But all six district courts have acquiesced to the Government's request that relief be

limited to the parties before the Court, i.e., have declined to issue universal preliminary injunctions. Appropriately tailored injunctions that preserve the status quo do not warrant this Court's intervention.

The Court should deny the Government's application and maintain the status quo.

BACKGROUND

Title IX. Congress passed Title IX to ensure equal opportunities for women by prohibiting discrimination in education "on the basis of sex." 20 U.S.C. 1681(a); see Education Amendments of 1972, Pub. L. No. 92-318, title IX, § 901, June 23, 1972, 86 Stat. 373. As an exercise of Congress's spending power, Title IX places conditions on all educational institutions receiving federal funds. 20 U.S.C. 1681(a). The statute has had resounding success in promoting women's equality and opportunity in education. The Act achieved that success by recognizing that the two sexes "are not fungible," *United States* v. *Virginia*, 518 U.S. 515, 533 (1996), including a rule of construction recognizing respect for "personal privacy." 118 Cong. Rec. 5807 (1972) (Sen. Bayh); see 20 U.S.C. 1686.

The Department of Education (ED) and the Department of Justice (DOJ) (together, the Government) have reimagined Title IX, citing *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), as cover. First, they issued "interpretations" and "guidance" documents declaring not only that *Bostock*'s reasoning applies to Title IX, but also that it mandates using gender identity when assigning sex-specific spaces and programs like locker rooms and sports teams. DOJ repeatedly made the same arguments in courts across the country. Many courts have (correctly) rejected this.

See, e.g., *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811–17 (11th Cir. 2022) (en banc) (rejecting DOJ's argument as to school bathrooms); *Texas* v. *Cardona*, No. 4:23-CV-00604-O, 2024 WL 2947022, at *32 (N.D. Tex. June 11, 2024) (rejecting ED's guidance documents addressing restrooms and school sports). But other courts did not.

The Title IX Rule. Now, ED has promulgated a rule to enshrine *Bostock* in Title IX and create a new type of "sex-based discrimination" that is available based on gender identity alone. Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the Rule). To implement ED's preferred policy of treating gender identity as sex, the Rule relies on the courts that have (incorrectly) imported *Bostock* to Title IX and held that *Bostock* requires gender identity to control in school restrooms, sports, and the like. See, e.g., 89 Fed. Reg. at 33,808, 33,818.

Start with the main change. The Rule defines "sex-based discrimination" to include distinctions based on "gender identity," "sex stereotypes," and other traits. 89 Fed. Reg. at 33,886 (to be codified at 34 C.F.R. § 106.10). Such distinctions violate Title IX, the Rule says, because they "necessarily" require noticing "a person's sex," even if "sex" means the "physiological or 'biological distinctions between male and female,' as the Supreme Court assumed in *Bostock*." *Id.* at 33,802. This transforms the statute.

Next, the Rule creates a new type of discrimination available only for "gender identity." The Rule allows sex distinctions when they are based on long-accepted

differences between male and female, but it forbids them when it comes to a person who identifies as transgender. See *id.* at 33,887 (to be codified at 34 C.F.R. § 106.31(a)(2)). Though the provision says sex-based distinctions become discrimination if they cause "more than de minimis harm," there is only one thing that causes such harm: a policy or "practice that prevents a person from participating in" education "consistent with [their] gender identity." *Id.* at 33,820. Together, § 106.10 and § 106.31(a)(2) generally forbid sex-specific distinctions unless students may participate "consistent with [their] gender identity." *Id.* at 33,818. This new form of discrimination stretches beyond *Bostock* to favor gender-identity-based claims over sex-based claims.

The new form of discrimination can be invoked in some circumstances, but not others. The gender-identity proviso applies to longstanding regulations for "separate toilet, locker room, and shower facilities," 34 C.F.R. § 106.33, "[c]ontact sports in physical education classes," lessons on "[h]uman sexuality," *id.* § 106.34(a)(1), (3), and "interscholastic, intercollegiate, club or intramural athletics," *id.* § 106.41(a). That means schools must assign males who self-identify as female to the health class covering the female reproductive system. They must allow biological males to play against girls in sports and P.E. class. Yet the Rule permits schools to limit "living facilities" based on biological sex—but only in "housing," like dormitories, *id.* § 106.32(a), not in other bathrooms and showers, or in overnight accommodations on field trips, *id.* § 106.33. That patchwork is because, the Rule reasons, Congress *intended* schools to sometimes impose legally cognizable injury to "protected

individual[s]." 89 Fed. Reg. at 33,818 (explaining that statutory carveouts allow "sex-specific policies and practices … that may cause more than de minimis harm to a protected individual").

The Rule also rejects this Court's interpretation of Title IX in *Davis ex rel. LaShonda D.* v. *Monroe County Board of Education*, 526 U.S. 629 (1999). It imposes a "broader standard" for hostile-environment harassment when enforcement is by an agency than when a private lawsuit alleges sex-based harassment. 89 Fed. Reg. at 33,498. Harassment now need only be severe *or* pervasive. Complainants need not "demonstrate any particular harm," or show that the conduct denied them access to the educational program. 89 Fed. Reg. at 33,511. Harassment can be anything the student finds "unwelcome" or that "limits" the student's ability to benefit. *Id.* at 33,884 (to be codified at 34 C.F.R. § 106.2). The new definition of sex-based harassment is unlawful in itself. Combined with § 106.10, it imposes a new mandate, forcing students and school staff to avoid saying sex is binary and to endorse gender-identity ideology by using opposite-sex pronouns, among other things. This violates the First Amendment.

These are just two of many examples. The Rule's new definition of sex discrimination affects how many provisions will apply.

Rapides Parish School Board. The school board administers a school district comprising 40 K-12 schools and serving over 20,000 students in Rapides Parish, Louisiana. ROA.2572–73. In the 2024 fiscal year, the school board received about $30 million from federal funding sources. ROA.2693. Federal funds account for around

10% of the school board's annual budget, *ibid.*, and losing eligibility for this funding would cause significant financial harm, ROA.2692–94.

To comply with the Rule's conditions would force the school board to change many policies and practices that it has adopted over the decades to protect students' privacy, promote safety in athletics, and generally recognize that in many respects its male and female students are not similarly situated. E.g. ROA.2573–74, ROA.2580, ROA.2582, ROA.2605, ROA.2692. The school board protects privacy by, among other things, assigning restrooms, locker rooms, and changing rooms based on sex, not gender identity, ROA.2574; and by respecting sex differences for overnight housing during school activities, ROA.2603; and by requiring that any search of a student's person be conducted and witnessed by staff of the same sex, ROA.2593. The school board also recognizes that boys and girls are not similarly situated when it comes to athletics, so it separates school sports teams as well as physical education (P.E.) classes based on sex, ROA.2573–74—its high schools have separate gyms for boys and girls, ROA.2692. And the school board protects staff and students' free-speech rights; it will not force anyone to participate in a "social transition" by using a gender-identity-based name or pronouns or otherwise speak in favor of gender ideology. ROA.2574.

Procedural History. The school board filed suit challenging the Rule under the Administrative Procedure Act (APA) on April 30, 2024, ROA.2519–2610, and sought a delay of effective date and preliminary injunction, ROA.2647–90. The case was consolidated with the related challenge filed by the States of Louisiana, Idaho,

Mississippi, and Montana. See ROA.538–90, 1140–43, 1153–94. The district court granted preliminary relief preventing the Rule from going into effect on August 1, 2024, and enjoining the Government from enforcing it while this litigation proceeds. 9a–48a, *Louisiana* v. *Dep't of Educ.*, No. 3:24-CV-563, 2024 WL 2978786 (W.D. La. June 13, 2024).

The Government appealed. ROA.2402–04. It also moved the district court and then the Fifth Circuit to stay the preliminary order, but only in part. ROA.2405–14, No. 24-30399, ECF 28 (5th Cir. July 1, 2024). Then, as now, the Government did not seek a stay for the Rule's new provisions 34 C.F.R. § 106.31(a)(2), the new form of discrimination for gender identity created through a de minimis harm standard, or 34 C.F.R. § 106.2's definition of "hostile environment harassment" as applied to discrimination on the basis of gender identity. See ROA.2414. But it asked for a stay as to everything else, including the Rule's new definition of sex-based harassment (§ 106.10), and its new, "broader" definition of hostile environment harassment (§ 106.2) as to everything but "gender identity." See ROA.2409–13.

The courts below refused to partially stay the preliminary order. See 49a–53a; *Louisiana* v. *Dep't of Educ.*, No. 24-30399, 2024 WL 3452887 (5th Cir. July 17, 2024) (per curiam) (1a–7a). The district court explained that many regulatory changes in the Rule are likely contrary to law and will imminently—and irreparably—harm the plaintiffs. 52a. The court "did not enjoin the Final Rule based upon only two provisions," but based on its conclusion that "numerous provisions in the Final Rule violated the Constitution." 53a.

The Fifth Circuit also refused the Government's requested stay. The panel observed that the Government "has given us little to assess the likelihood of success" and forfeited the issue of a limited injunction. 4a. As to severability, all the Government had offered the district court was "two conclusory sentences." *Ibid.*; see ROA.2153–54. Because it provided "no briefing or argument below on the consequences of a partial preliminary injunction," the court "would have to parse the 423-page Rule [itself] to determine the practicability and consequences of a limited stay." *Ibid.* The Fifth Circuit explained that a district court has "wide latitude to craft a temporary remedy in accordance with the equities" and "to maintain the status quo," so it "will not abuse its discretion if its temporary order is broader than final relief." 4a–5a. In addition, granting a partial stay "would involve [the Fifth Circuit] in making predictions without record support from the [Government] about the interrelated effects of the remainder of the Rule on thousands of covered educational entities." 5a.

As to irreparable harm and the equities, the Fifth Circuit agreed that the partial stay likely "would double" the plaintiffs' irreparable "implementation and compliance costs." 5a–6a. Plaintiffs "would first have to amend their policies, alter their procedures, and train their employees to comply with a partial version of the Rule pending appeal, and then they would have to do it all over again to comply with the Rule as it stands at the conclusion of the litigation." 6a. And the Government is not "injured by putting off the enforcement of a Rule it took three years to promulgate after multiple delays." 6a. "[A]n administrative agency," the Fifth Circuit held, does

not "have the same claim to irreparable harm when its bureaucratically issued rule is enjoined as a democratically elected legislative body has when one of its statutes is enjoined." 6a; see No. 24-30399, ECF 28 at 20.

The Government now asks this Court for a partial stay. Its brief has expanded from 7 pages to 39, but what it wants is the same: "stay [the] preliminary injunction to the extent it extends beyond the following provisions of the 2024 Rule: (i) 34 C.F.R. § 106.31(a)(2), and (ii) the 'hostile environment harassment' definition in 34 C.F.R. § 106.2, as applied to discrimination on the basis of gender identity." ROA.2414; compare *ibid.*, with Appl. 39. This Court should deny the Government's application and preserve the status quo.

REASONS TO DENY THE APPLICATION

I. The interlocutory order does not warrant this Court's attention.

The lower courts are unanimous. To date, six different district courts have issued preliminary relief to prevent the Rule from going into effect on August 1, 2024. Starting with the decision below, each has concluded that the Rule is likely unlawful as an interpretation of Title IX, inconsistent with the Spending Clause and the major-questions doctrine, and will irreparably harm schools if it goes into effect next week, even in part. *Louisiana*, 2024 WL 2978786; *Tennessee* v. *Cardona*, __ F. Supp. 3d __, 2024 WL 3019146 (E.D. Ky. June 17, 2024); *Kansas* v. *Dep't of Educ.*, No. 5:24-CV-4041, 2024 WL 3273285 (D. Kan. July 2, 2024); *Texas* v. *United States*, No. 24-cv-86, 2024 WL 3405342 (N.D. Tex. July 11, 2024); *Carroll Indep. Sch. Dist.* v. *U.S. Dep't of Educ.*, __ F. Supp. 3d __, 2024 WL 3381901 (N.D. Tex. July 11, 2024); *Arkansas* v.

U.S. Dep't of Educ., No. 4:24-CV-636, ECF 54 (E.D. Mo. July 24, 2024). Each court limited relief to the parties before it.

The courts are also unanimous in denying the Government's requests for a partial stay pending appeal. Along with the Fifth Circuit here, see 1a–7a, the Sixth Circuit refused to stay a materially indistinguishable injunction. *Tennessee* v. *Cardona*, No. 24-5588, 2024 WL 3453880, at *3 (6th Cir. July 17, 2024). The Sixth Circuit held that ED likely exceeded its power by misreading *Bostock* to redefine sex discrimination in Title IX because Title VII and Title IX (1) "use materially different" text, (2) serve "different goals," and (3) "have distinct defenses." *Ibid.* And because Title IX is Spending Clause legislation, the Sixth Circuit explained, Congress "must speak with a clear voice before it imposes new mandates on the States." *Ibid.* The Sixth Circuit declined to issue a partial stay because the challenged "provisions, particularly the new definition of sex discrimination, appear to touch every substantive provision of the Rule." *Ibid.* The Sixth Circuit also agreed that the Government forfeited the scope-of-injunction issue because it never told the district court which specific provisions "should be severed." *Id.* at *4. Given this failure and uncertainty, the Sixth Circuit (like the Fifth) upheld the injunction to prevent irreparably harming the plaintiffs—costing them "loads of time" and trouble for no reason. *Ibid.*

This Court ordinarily does not intervene when lower courts agree on the question presented. Here, that is true as to the scope of the injunction as well as the unlawfulness of the Rule.

The interlocutory order maintains the status quo. As a result of the lower courts' assessment of the Rule, it is subject to a stay under 5 U.S.C. 705 or a preliminary injunction in 20 states and thousands of schools spread across the nation. Yet the Government would have it go into effect—but only in part—just one week from today.

This Court seldom grants certiorari to review interlocutory orders like the preliminary relief issued here. The district court's order—like those of the five others that have preliminarily stayed or enjoined enforcement of the Rule—merely maintains the status quo while litigation proceeds. Given the Rule's fast-approaching effective date and the pace of litigation thus far, it will likely not be long before at least one of the challenges to the Rule reaches final judgment. That could prevent the Court from having to weigh into many of the contested issues here. If the Rule has misapplied the statute that Congress enacted—whether because of plain-text differences between Title IX and Title VII or based on canons of construction like the major-questions doctrine—the Court will not have to address constitutional issues like whether Spending Clause legislation can preempt state law. And if final relief includes the severance that the Government seeks, the appellate courts will not be tasked with conducting their own severability analysis without briefing or argument from the parties—and schools will not have to twice amend policies and train staff.

The Government created its own emergency. ED took three years to promulgate a 423-page regulation, then gave schools across the country just three months to implement myriad significant new requirements. 6a. It did so with full knowledge that many state laws—including Louisiana's—conflict with the Rule's new

provisions. Instead, ED declared that the Rule's new conditions on federal funding will "preempt" inconsistent state laws. See 89 Fed. Reg. at 33,806. But Louisiana—and many other states—say differently. All of this causes serious confusion and uncertainty for respondents and the thousands of other institutions across the country facing conflicting mandates about gender identity in locker rooms and athletics and related to free speech.

Moreover, after the district court issued preliminary relief six weeks before the Rule's effective date, the Government waited nearly two weeks to appeal or even ask the district court to stay its order. See ROA.2402–15. It now demands that this Court act in less time than it took to seek a stay in the first place. And having waited so long to issue the Rule and seek a stay, the Government has made it practically impossible for schools to amend their policies and make required changes required by the rule in the six days that remain before August 1. This too counsels against granting the Government's requested stay.

The claimed circuit split shows that the injunction is proper. The Government points to a conflict with courts that have concluded "discrimination against transgender persons is sex discrimination for Title IX purposes, just as it is for Title VII purposes." Appl. at 17–18 (citing *A.C. by M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023); *Doe* v. *Snyde*r, 28 F.4th 103, 114 (9th Cir. 2022); *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020)). For at least three reasons, that supports the injunction, not a stay.

First, if these courts are correct that *Bostock*'s but-for logic applies to Title IX independent of the Rule, then the Government is not harmed by preliminary relief preventing the Rule from immediately taking effect. On that reading, the Rule's new definition of sex-based discrimination is doing no work not already done by the statute alone. That alone means the Government has not shown it needs a stay as to § 106.10.

Second, these decisions show why the Court should reject the Government's characterization. The Seventh and Fourth Circuits concluded *Bostock* required gender identity to control in sex-specific facilities like restrooms and locker rooms, and the Government agrees that § 106.10 incorporates *Bostock*. Despite the Government's current litigation position, the Rule itself relied on these decisions in support of § 106.10. See 89 Fed. Reg. at 33,807 (citing, *inter alia*, *A.C.*, 75 F.4th at 769; *Grimm*, 972 F.3d at 616). The Government cannot both rely on these precedents and claim that its new definition of sex-based discrimination is innocuous.

And the likelihood that this Court will someday address how Title IX applies to restrooms, locker rooms, and athletics is irrelevant because of the Government's litigation strategy in seeking only a partial stay. See Appl. 18. The Government's theory is that it is only 34 C.F.R. § 106.31(a)(2) that requires schools "to allow transgender students to use restrooms, locker rooms, and other sex-separated facilities consistent with their gender identity." Appl. 29. But the Government does not seek a stay to allow § 106.31(a)(2) to go into effect on August 1. So any conflict between the six district courts that have found the Rule likely unlawful and the courts

that applied *Bostock* to require gender identity in sex-specific contexts is irrelevant to the Government's requested stay.

Whichever view one takes, the Government's partial stay would be improper.

II. The Government is unlikely to succeed on the merits.

The Government makes no effort to defend two of the Rule's key provisions, and rightly so. It cannot show it is likely to succeed on the merits of its appeal as to the new gender-identity-only form of discrimination, 34 C.F.R. § 106.31(a)(2), or its new standard for hostile environment harassment when it comes to speech relating to gender identity, 34 C.F.R. § 106.2. Instead, the Government says the injunction below is "overbroad." Appl. 19. It is unlikely to succeed on the merits there, either.

A. First, the Government says other parts of the Rule can be severed because respondents do not challenge every possible provision or application. Appl. 19–28. It says most revisions "have nothing to do with gender identity." Appl. 21. But courts need not do a roving severability analysis before preserving the status quo while litigation continues. Nor has the Government shown the Rule is severable. In any case, the Government forfeited this argument below.

The Government says the injunction is overbroad because respondents "have not challenged the vast majority" of the Rule. Appl. 19. That's not true. In their motion for a stay and preliminary injunction, respondents said the entire Rule is "arbitrary and capricious." ROA.2650. And they challenged § 106.10's redefinition of sex discrimination, e.g., ROA.2532, ROA.2669, and § 106.31(a)(2)'s de minimis harm form of gender-identity-only sex discrimination, ROA.2534–36, both of which pervade the Rule. That differs from the plaintiffs in *Labrador* v. *Poe*, 144 S. Ct. 921 (2024), for

example, who admittedly did not challenge the entire statute that the lower court enjoined. See *id.* at 922 (Gorsuch, J., concurring). Here, the injunction fits the challenge.

Take § 106.10's definition of "sex discrimination." That provision is "one of a number of [Rule] provisions that, working together," produce an APA violation. *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010); see *United States* v. *Booker*, 543 U.S. 220, 316–317 (2005) (Thomas, J., dissenting) (explaining that "the concerted action" between a statute and guidelines and procedural rules resulted in the unlawful act).

And without knowing how to define "sex discrimination," schools cannot apply the Rule. So a line-item injunction is highly impractical, even if the Government had articulated what one would look like. Though it wants to implement § 106.10 pending review, Appl. 39 (asking to limit injunction to "(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"), that doesn't fully protect respondents. And though severability clauses may call for severance, they don't help courts pick which provisions to sever. See *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 258 (2020) (Thomas, J., concurring).

This case also differs from *Poe* because it arises under the APA, where vacatur is the likely final remedy at the end of this case. Under the APA, the reviewing court must "set aside" agency action found unlawful. 5 U.S.C. 706. Vacatur is the normal remedy when the agency action is so contrary to law that the agency cannot show how to "rehabilitate" it. *Long Island Power Auth.* v. *Fed. Energy Regul. Comm'n*,

27 F.4th 705, 717 (D.C. 2022); see *Humane Soc'y of United States* v. *Zink*e, 865 F.3d 585, 614 (D.C. Cir. 2017) (courts typically vacate rules with "major shortcomings that go to the heart" of the agency's rulemaking decision). Here, no one disputes that 106.10's redefinition of "sex discrimination" applies to respondents. Because that provision informs and pervades the entire Rule, and the Government has not shown a workable alternative that remedies the rule's harm yet allows it to partially apply, the current injunction is proper.

The Government forfeited its severance argument below, making just two passing references. To preserve an issue, a party must do more than cursorily mention it. Issues mentioned "in a perfunctory manner," without development argument, are "waived." *McPherson* v. *Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997); e.g. *Ladner* v. *United States*, 358 U.S. 169, 173 (1958) (declining to address "important and complex" issue based on "short discussion" and "passing reference").

The Government below did not specify in any detail how the Rule could be severed yet still protect respondents. In its opposition to respondents' requests for preliminary relief, the Government devoted exactly two sentences to asking the district court to sever any provisions not found unlawful. ROA.2153–54. And it identified no such provisions, much less did it explain its new theories that § 106.10 is irrelevant to respondents' injuries and that the hostile environment standard could be different for gender identity than for everything else.

Even when it sought a stay from the lower courts, the Government gave none of the explanation now offered about how the Rule would function without its core

provisions. Compare ROA.2410–11, with Appl. 22–24, 26–27. For example, the application contends (at 22) that "[e]ven 106.10 … addresses much more than gender-identity discrimination," including "sex characteristics."[1] That argument appeared for the first time in a footnote in the Government's reply brief requesting a stay. ROA.2498. The courts below cannot be faulted for holding the Government to the same forfeiture and party-presentation principles that apply to every other litigant, particularly when it seeks extraordinary relief. Because the severability point was inadequately briefed below, this Court should "decline[ ] to entertain" it. *Ohio* v. *EPA*, 144 S. Ct. 2040, 2057 (2024) (quoting *Kingdomware Technologies, Inc.* v. *United States*, 579 U.S. 162, 173 (2016)).

In any event, the courts below properly concluded the challenged provisions are central to the Rule. They redefine "sex discrimination" in 34 C.F.R. § 106.10, create a new form of discrimination for gender identity in 34 C.F.R. § 106.31(a)(2)'s de minimis harm provision, and adopt an undisputedly broad definition of hostile-environment harassment in 34 C.F.R. § 106.2. These provisions—especially the redefinition of "sex discrimination"—inform and pervade the entire Rule.

Consider 34 C.F.R. § 106.8, a provision the Government claims is severable. See Appl. 22. This provision requires Title IX coordinators to "ensure the recipient's consistent compliance with its responsibilities under Title IX and this part." But without the challenged provisions, the coordinators' responsibilities are unclear.

[1] To be clear, "gender identity" is not the only aspect of the new definition that the school board challenges. E.g. ROA.2562, ROA.2569.

Schools must record "each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination." 89 Fed. Reg. at 33,886 (to be codified at 34 C.F.R. § 106.8(f)(2)). Whether "conduct … reasonably may constitute sex discrimination" turns on the meaning of "sex discrimination," which in turn depends both on the Rule's new definition of sex discrimination and on whether the de-minimis-harm provision applies. A school cannot keep compliant records—much less investigate anything that "*may* constitute sex discrimination"—without knowing what that term means.

The Government's other referenced parts of the Rule are also intertwined. Take the "recipient's response" duty for sex-discrimination claims, 89 Fed. Reg. at 33,888–91 (to be codified at 34 C.F.R. § 106.44), the new "parental rights" provision, 89 Fed. Reg. at 33,885–86 (to be codified at 34 C.F.R. § 106.6), the new "grievance procedures," 89 Fed. Reg. at 33,891–95 (to be codified at 34 C.F.R.§ 106.45–106.46), and the new "prohibit[ions on] retaliation," 89 Fed. Reg. at 33,896 (to be codified at 34 C.F.R. §§ 106.2, 106.71). Appl. 21–22. Schools cannot implement these provisions without knowing the meaning of sex discrimination and what defines harassment.

B. Turning to a provision everyone agrees is challenged, the Rule's new standard for hostile environment harassment, the Government claims the injunction is *still* overbroad. It contends that respondents "focus their [First Amendment] challenge" only on one application of the new "hostile environment harassment" definition—namely, "gender-identity discrimination." Appl. 23. Not so. The Rule's replacement of this Court's *Davis* standard is unlawful even beyond the gender

identity context. ROA.2648; see 30a–31a, 52a. And the same conduct could be characterized as based on sex stereotypes, sex characteristics, or some other theory—§ 106.10's list, after all, is not supposed to be exhaustive. An injunction that "almost" protects respondents is not good enough. Appl. 23.

Even if the Government were correct about the scope of respondent's challenge, its requested partial stay is unworkable. The Government cannot seriously mean for schools to apply one standard to alleged harassment related to gender identity and another to allegations related to anything else where sex is a but-for cause, like sex stereotypes. Appl. 30. If a male student is called "girly" and teased for perceived nonconformity to sex stereotypes, see 89 Fed. Reg. at 33,514, the Rule's new definition determines whether there is hostile environment harassment, 89 Fed. Reg. at 33,884. But if a female student who identifies as a boy (as the Government would put it, a "transgender male") is called "girly" and teased, there is harassment only if it meets *Davis*'s higher threshold. That gives the transgender student *less* protection than everyone else.

The absurdity does not stop there. For instance, say a Title IX coordinator receives a report of harassment that might be based on "sex characteristics" (which would fall under the Rule's new standard) or might be based on "gender identity" (which would fall under the *Davis* standard). The school won't know which basis applies until it investigates, but the result of the investigation depends on which standard applies. This is not a workable solution. Schools should not have to use a

different standard for gender identity claims than for everything else, and authorizing the Government to do so invites arbitrary enforcement.

C. Finally, the Government challenges the merits of the district court's decision on the Rule's new definition of sex-based discrimination, arguing the injunction should not cover § 106.10 at all. Appl. 28–38.

The Government's first argument is based on a syllogism. *Bostock* didn't "address bathrooms, locker rooms, or anything else of the kind," 590 U.S. at 681; § 106.10 is just "a straightforward application of … *Bostock*," Appl. 5; therefore § 106.10 doesn't injure respondents. Appl. 28–31. The major premise is true, but the minor premise doesn't hold up. In promulgating § 106.10, the Rule relied on authorities that ignored the significance of the major premise, and the Government has repeatedly done the same, making this no mere "straightforward application" of *Bostock*. See supra at 3–4, 13–14. And if ED has changed its mind about how *Bostock* applies in the context of Title IX, it had to say so and explain why. *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 221 (2016) (agency must "display awareness that it is changing position"). That failure alone warrants denying a stay because § 106.10 is arbitrary and capricious. And if the Government is right about what § 106.10 does, there is no need for a stay because Title IX already applies to everything listed in § 106.10. So the Government will be able to go on enforcing the statute accordingly whether or not § 106.10 is in effect.

The application (at 31) suggests the Government's litigation position should be given controlling weight, stating, "the Department has represented in seeking a

partial stay that an injunction limited to Section 106.31(a)(2) and the application of Section 106.2's definition of hostile-environment harassment to gender-identity discrimination would prevent the Department from taking the enforcement actions to which respondents object." That is not how judicial review of agency action normally works—an agency does not get to change the meaning of a regulation as it goes, much less in a litigation posture. Cf. *DHS* v. *Regents of the Univ. of Cal.*, 591 U.S. 1, 20 (2020). And to the extent ED is simply promising not to enforce the Rule in this way, that does not help schools faced with private lawsuits alleging discrimination based on policies preventing participation based on gender identity (and the school board has many, see supra at 7).

The Government next contends (at 31) that § 106.10 "reflects a straightforward application of *Bostock*'s textual analysis to the materially similar language in Title IX" and (at 5) that it "is compelled by" that analysis. In other words, *Bostock* must be transplanted to Title IX. Again, if that were right then § 106.10 would be doing no work, so a stay would not be necessary. But transplanting *Bostock* to Title IX is impermissible for many reasons, including the textual differences between Title IX and Title VII, the heightened clarity required by the Spending Clause, and the major-questions doctrine.

Title IX's plain text prohibits differential treatment that disfavors, denies, or treats one sex worse than the other when it comes to the full and equal enjoyment of educational opportunities. See, e.g., *Adams*, 57 F.4th at 811 (explaining Title IX's "purpose, as derived from its text, is to prohibit sex discrimination in education"). As

many courts recognize, "Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick* v. *Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 704 & n.36 (1979). That means "Title IX's remedial focus is, quite properly, not on the overrepresented gender, but on the underrepresented gender; in this case, women." *Cohen* v. *Brown Univ.*, 101 F.3d 155, 175 (1st Cir. 1996); *Miami Univ. Wrestling Club* v. *Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002).

And where biological differences are relevant, Title IX protects individual boys and girls by "ensur[ing] equal treatment between groups of men and women." Cf. *Bostock*, 590 U.S. at 671. Title IX includes a rule of construction requiring respect for "personal privacy," 118 Cong. Rec. 5807 (1972) (Sen. Bayh), by stating that it is not discrimination to have "separate living facilities for the different sexes." 5 U.S.C. 1686. In many contexts, Title IX, unlike Title VII, requires schools to "treat[ ] males and females comparably as groups." *Bostock*, 590 U.S. at 665 (rejecting this reading of Title VII). Title IX exempts "father-son or mother-daughter activities" if "opportunities for reasonably comparable activities [are] provided for students of [both sexes]." 20 U.S.C. 1681(a)(8). The longstanding regulations similarly allow schools to "provide separate housing on the basis of sex," but it must be "[c]omparable in quality and cost to the student." 34 C.F.R. § 106.32(b); see also *id.* § 106.32(c)(2) (similar). "[T]oilet, locker room, and shower facilities" for the two sexes must also be comparable. 34 C.F.R. § 106.33. The list goes on. See, e.g., *id.* §§ 106.31(c),

106.34(b)(2), 106.37(c), 106.41(c)(1). As the agency has said, a school is "required to provide separate teams for men and women in situations where the provision of only one team would not 'accommodate the interests and abilities of members of both sexes.'" Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24,127, 24,134 (June 4, 1975). The many textual and structural differences mean Title IX cannot be understood through a uniform adoption of *Bostock*'s logic.

More than that, § 106.10 contradicts *Bostock*'s own logic. *Bostock* did not change the meaning of "sex" in Title VII or Title IX. Nor does the Rule purport to equate gender identity and sex. E.g., 89 Fed. Reg. at 33,807. But the Rule declares that "[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 89 Fed. Reg. at 33,886 (to be codified at 34 C.F.R. § 106.10). To justify this new definition, the Rule says that "on the basis of sex" means the same thing as "because of such individual's … sex," so *Bostock*'s logic must apply to Title IX. See 89 Fed. Reg. at 33,807; see also *id.* at 33,803 ("the bases in § 106.10 [are] examples to clarify the scope of Title IX's coverage of sex discrimination, which includes any discrimination that depends in part on consideration of a person's sex."). By elevating gender identity to the same level as sex, § 106.10 would create a litany of new protected classes. And § 106.10 does not merely explain what ED understands "sex" to mean under *Bostock*'s but-for-causation logic; § 106.10 defines "sex-based discrimination." Contra 89 Fed. Reg. at 33,803. Redefining Title IX's core

antidiscrimination rule by referencing additional attributes contradicts the statute. And while the Rule assumes that "sex" means biological differences, it refuses to define the term. 89 Fed. Reg. at 33,802. That makes § 106.10 arbitrary and capricious too.

Bostock's logic also contradicts the Rule's other provisions, particularly § 106.31(a)(2)'s new form of discrimination. For example, the Rule in theory allows boys' and girls' restrooms, just assigned by gender identity instead of sex. 89 Fed. Reg. at 33,818. But per § 106.10, facilities designated by gender identity still discriminate based on sex: "it is impossible to discriminate against a person because of their … gender identity without discriminating against that individual based on sex." *Id.* at 33,816 (cleaned up). So the statute forbids schools from considering sex per *Bostock*, yet the Rule overrides the statute, discards *Bostock*, and allows these forbidden distinctions. Nothing supports this logic. It should be no surprise, then, that the Government prefers to hide § 106.31(a)(2)'s new form of discrimination by requesting only a partial stay.

What's more, Title IX, unlike Title VII, is Spending Clause legislation. The Rule's redefinition of sex discrimination is a "highly consequential" and "transformative" change to our nation's educational system. *West Virginia* v. *EPA*, 597 U.S. 697, 724 (2022). A groundbreaking new reading of Spending Clause legislation must be supported by a "clear statement" from Congress. *Davis*, 526 U.S. at 640; *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981).

The Government claims (at 36) that Congress merely needs to "place[] recipients of federal funds clearly on notice that they must comply with the prohibition on sex-based discrimination in all of its forms." Even if that were correct, it would not help the Government's case for a stay. After all, on the Government's theory § 106.10 does not speak to any particular form of discrimination, and the new form of discrimination the Rule does create (in § 106.31(a)(2)) is not at issue in the Government's stay request. See 89 Fed. Reg. at 33,848.[2] But in any event, this raises the generality level too high. It is not enough to "unambiguously notif[y]" recipients that conditions exist; recipients must have clear notice of what the conditions require. *Sossamon* v. *Texas*, 563 U.S. 277, 283 (2011). For example, a statute allowing "reasonable attorney's fees as part of the costs" created a funding condition; but it still did not give clear notice that recipients must pay an opposing party's expert fees. *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006). The Spending Clause alone precludes the Rule from grafting *Bostock* onto Title IX.

Clear congressional authorization is required for two more reasons—the Rule has addressed a question of major political significance, *West Virginia*, 597 U.S. at 723; and seeks to disrupt "the balance between federal and state power" in an area traditionally regulated by the states, *Sackett* v. *EPA*, 598 U.S. 651, 679 (2023).

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[2] The Rule's preamble states that § 106.10 "lists bases of discrimination that involve consideration of sex," including "sex stereotypes, sex characteristics, … and gender identity," "which are distinct from the various forms of sex discrimination that may occur, including sex-based harassment, sexual violence, and the prevention of participation consistent with gender identity, which are addressed in §§ 106.2 and 106.31(a)." 89 Fed. Reg. at 33,848; see also *id.* at 33,802.

Bostock did not involve agency action, so the major questions doctrine was not at issue. Indeed, *Bostock* admitted that "many, maybe most, applications of Title VII's sex provision were 'unanticipated' at the time of the law's adoption." 590 U.S. at 679; see *id.* at 649 ("unexpected consequences"), 660 (calling its holding "momentous"). That cannot be reconciled with the argument that Congress clearly and unambiguously required schools across the country to treat gender identity, sex stereotypes, and the like as if they are the same thing as sex. Much less can it be reconciled with requiring schools to eliminate sex-specific private spaces and women's sports by giving males access whenever they identify as female.

III. The remaining factors favor preserving the status quo.

To obtain a stay pending appeal, the applicant must show not only a likelihood of success but also that the balance of harms and the public interest favor a stay. *Nken* v. *Holde*r, 556 U.S. 418, 434 (2009). The remaining stay factors favor respondents. A partial rollout would impose heavy compliance costs and confuse educators and students. And delay would not harm the Government, as Title IX's protection would continue as it has for over 50 years.

A. The proposed stay would irreparably harm respondents.

Costs. Unrecoverable compliance costs—like costs to update policies and train educators and students—impose irreparable harm. *Ohio*, 144 S. Ct. at 2053; see *Alabama Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 594 U.S. 758, 765 (2021); *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring) ("[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs."). The Rule accepts that

changes related to the maintenance of "records related to sexual harassment"—to which the new definition of "sex discrimination" is critical—will cost some recipients "approximately $13,022,034 in Year 1." 89 Fed. Reg. at 33,873. Other compliance costs include modifying spaces and hiring more Title IX coordinators. The request for a *partial* stay only *worsens* this irreparable harm. If the Government had its way, schools would have to comply not just once, but *at least* twice. That's a waste.

Title IX has been read one way for over fifty years. Now, the Government would have schools amend their policies and procedures, modify their spaces, and train their employees on some parts of the Rule, all within a matter of days. Schools must do this with no idea how to interpret sex discrimination in 34 C.F.R. § 106.10 consistent with Title IX's many permissible sex distinctions. And they must apply the Rule's "broader" harassment provision, but not if the complainant alleges gender-identity harassment, in which case the prior regulations presumably remain in place. That piecemeal approach is troubling enough. But then, they would have to do this all over again when the case ends. The Government believes the whole Rule is lawful. See Appl. 18. But here, it does not defend key provisions. So schools nationwide must amend and train now to partially enforce the Rule, then re-amend and re-train later to enforce the entire Rule—at twice the compliance costs. This scuttles the Rule's own cost estimate, 89 Fed. Reg. at 33860–81, and irreparably injures those affected.

Confusion. The injunction below rightly delays the compliance date for the new rule entirely. It allows schools to avoid wholesale changes to their practices until the end of this case, sparing the confusion and headache of trying to learn and comply

with shifting requirements. For example, the Government never explains how schools can comply with § 106.10 if it goes into effect but § 106.31(a)(2) does not. How can schools prevent discrimination based on gender identity under § 106.10 *and* prevent discrimination based on sex when they cannot do both? And how can schools decide whether a hostile environment complaint addresses gender identity, sex characteristics, or sex stereotypes? No one knows.

Forcing teachers to enforce such contradictory requirements will mire them in regulatory mud and impede their ability to engage their students. The best approach is to delay the Rule's effective date and enjoin its enforcement entirely until litigation ends—precisely what the district court's order contemplates. *Cf. Ohio State Conf. of NAACP* v. *Husted*, 769 F.3d 385, 389 (6th Cir. 2014) (refusing to stay preliminary injunction when it would create "confusion" among affected individuals and risk placing regulated officials in a "position of trying to communicate" multiple, conflicting instructions). Schools need clarity. The current injunction provides it.

B. In contrast, the Government has not shown it would suffer *any* harm if the current injunction remains until final judgment. And if the public interest merges with the Government's, a stay is not in the public interest either. See *Nken*, 556 U.S. at 435; but see *U.S. Navy Seals 1-26* v. *Biden*, 27 F.4th 336, 353 (5th Cir. 2022) (observing that the public interest does not so merge when the Government is the applicant, not the party opposing a stay of injunction). The balance of equities and public interest favor retaining the injunction.

The Government says any time "a sovereign 'is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" Appl. 38 (quoting *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). But it omits key text from its source: "[A]ny time *a State* is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 567 U.S. at 1303 (cleaned up). ED isn't a State or a sovereign. Nor is it effectuating a duly enacted statute. It is an agency trying to rewrite a statute contrary to law. There is no sovereign injury if the Rule is enjoined.

The Government also suggests (at 29) that the injunction may harm others, with imagined situations like barring transgender-identifying students "from participat[ion] in the science fair, the marching band, or student government." But it provides no evidence this has occurred or that it will. Indeed, it recognizes that respondents do not "wish to punish transgender students" in this way. Such speculation cannot show irreparable harm that warrants a stay. See *Wis. Gas Co.* v. *FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (bare speculation has "no value since the court must decide whether the harm will *in fact* occur"); *Reynolds Metals Co.* v. *FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985) (emphasizing the "stringency" of this requirement). To obtain a stay, the alleged injury "must be both certain and great; it must be actual and not theoretical." *Wis. Gas*, 758 F.2d at 674 (quoting *Connecticut* v. *Massachusetts*, 282 U.S. 660, 674 (1931)).

And in any event, on the Government's own theory, the statute has always prohibited such things, so the Rule's new definition in § 106.10 does no work. See supra at 14. Either way, the equities favor respondents, not the Government.

Schools will continue to apply Title IX based on the regulations that have been in place for decades. Maintaining the status quo until final judgment is necessary to prevent irreparable harm, as the courts below recognized.

CONCLUSION

The district court issued preliminary relief to maintain the status quo for respondents while this litigation continues. The Government has not shown entitlement to the extraordinary relief of a stay pending appeal. The Court should deny the application.

Respectfully submitted.

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July 2024

**Practicing under D.C. App. Rule 49(c)(8)*

CERTIFICATE OF SERVICE

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