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.

OPPOSITION TO APPLICATION FOR STAY PENDING APPEAL

ELIZABETH B. MURRILL
Attorney General
J. BENJAMIN AGUIÑAGA
Solicitor General
Counsel of Record
AUTUMN HAMIT PATTERSON
Special Assistant Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third St.
Baton Rouge, LA 70802
(225) 506-3746
AguinagaB@ag.louisiana.gov

Counsel for Respondents State of Louisiana, Louisiana Department of Education, and 17 Parish School Boards

(additional counsel listed on signature page)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents each represent that they do not have any parent entities and do not issue stock.

/s/ J. Benjamin Aguiñaga
J. Benjamin Aguiñaga

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT.

INTRODUCTION

Three months ago, the Department of Education promulgated a Final Rule under Title IX of the Education Amendments of 1972 that would radically impact our schools, teachers, and families. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). Specifically, the Department took Title IX and its promise of equal educational opportunities for both sexes and transformed it into a 423-page mandate that (among other things) funding recipients (a) allow boys in girls' bathrooms, locker rooms, and hotel rooms and (b) require teachers and students to use a person's preferred pronouns and so-called neopronouns (like "fae/faer/faers"). The Department did so by redefining "discrimination on the basis of sex" to include discrimination on bases other than biological sex, such as sex stereotypes and "gender identity." And that "new definition of sex discrimination[] appear[s] to touch every substantive provision" of the Rule, ranging from record-keeping provisions, to harassment provisions, to training provisions, to grievance provisions, and so on. App.728 (Sutton, C.J.).[1]

So far, the Department has failed to convince a single court that the Rule is likely lawful. Six different district courts have enjoined it in geographically- and party-limited orders—and multiple district courts plus two courts of appeals have denied stays of those injunctions. That is what happened here, where Plaintiffs are

[1] "App." refers to Plaintiffs' Appendix, which is attached to this opposition.

four States, a department of education, and more than a dozen school boards that successfully obtained an injunction limited only to their States.[2]

As the Department's losses have mounted, the Department has tried, in subsequent briefing, to salvage the Rule by throwing overboard the provisions that the Department finds least defensible. For example, as reflected in the pending application, the Department attempts to sideline the glaring problems with bathrooms and pronouns altogether. The Department's goal, of course, is to rewrite the Final Rule into a sanitized and severed version of itself that (the Department hopes) could survive preliminary judicial review. To that end, here and below the Department has couched its complaint in terms of the breadth of the injunction against the Rule. Indeed, the Department has blanketed its rewriting campaign with scary phrases like "grossly overbroad" and "gross inequity" urging some court—any court—to allow portions (it's difficult to identify *which* portions) of the 423-page Rule to take effect six days from now in the Plaintiff States, even as teachers and students return to school.

The Court should reject out of hand the Department's request that the Court create—and then bless—a Frankensteined Title IX Rule.

First, basic threshold problems foreclose the Department's request. To start, the Fifth Circuit independently denied a stay because the Department forfeited its severability argument. The Department does not seriously contest the finding here

[2] "Plaintiffs" are the States of Louisiana, Mississippi, Montana, and Idaho; the Louisiana Department of Education; and the 17 Parish School Boards in district court case number 24-CV-563 below. Case number 24-CV-567, filed by Rapides Parish School Board, was consolidated with Plaintiffs' case before the district court.

and thus cannot seriously press the argument here.

In addition, there are at least four preliminary considerations that—on the views suggested by various Members of the Court—warrant denial of the application. One, applying all relevant conceptions of the status quo, there is only one plausible status quo (*i.e.*, a no-Rule world), and the Department's request would (if granted) destroy that status quo in the Plaintiff States. Two, this case comes to the Court from dual denials of the Department's stay requests in the courts below. Three, the Department almost exclusively challenges the scope of relief, not the merits of the preliminary injunction. And four, there is no reasonable probability that this Court would grant certiorari solely on the question whether the party-limited injunction is overbroad, especially given the Department's forfeiture and other vehicle problems.

Second, the Department comes nowhere close to satisfying the ordinary stay factors. Taking likelihood of success on the merits first, the Department's chief argument is that the district court erred by enjoining the entire Rule rather than parsing it to see whether some provisions can survive judicial scrutiny. That argument depends on the Department's characterization of Plaintiffs' challenge as targeting "only" a couple of Rule provisions specific to gender identity. But that is false. Plaintiffs' papers—which the Department never cites—repeatedly leveled attacks at the entire Rule, including, for example, the redefinition of sex discrimination as to *all* grounds other than biological sex. As the courts have admonished the Department, the Rule's redefinition of sex discrimination pervades all 423 pages, such that it is virtually impossible to eliminate key provisions like that

one that establishes the "scope" of the Title IX regulations without affecting the entire Rule. 89 Fed. Reg. at 33,886. And as the Fifth Circuit criticized below, the Department's failure to actually spell out its arguments "place[d] the court in [the] untenable position" of having to speculate about "the consequences of a partial preliminary injunction." App.719.

The Department's only other merits argument is that the district court abused its discretion in enjoining the Rule's redefinition of sex discrimination because it (in the Department's view) presents a straightforward application of this Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), which addressed sex discrimination in the Title VII context. That is wrong. For one thing, *Bostock* expressly did not decide any Title IX questions, and numerous courts have identified compelling reasons why Title IX is not covered by *Bostock*—and those reasons are sufficiently compelling that the Department is not likely to succeed on the merits. For another thing, even if *Bostock* governed, it would not sanction the Rule's redefinition of sex discrimination to include discrimination on grounds other than biological sex. Either way, the Department is simply wrong.

The irreparable-harm and equities factors also cut against a stay. It is virtually undisputed that the Department will suffer no irreparable harm absent a stay, not least because the Department itself delayed issuing the Rule *for years* and because the Rule has not yet taken effect. And the Department cannot seriously dispute that Plaintiffs themselves would be irreparably harmed if any part of the Rule takes effect. Indeed, under the Department's requested "partial" stay, Plaintiffs would be required

to expend unrecoverable time and resources—*immediately* given the August 1 effective date—to understand their obligations, revise policies, and train employees all while trying to understand the practical consequences of such a stay. Moreover, the "partial" stay suggested by the Department would cause Plaintiffs to suffer much, if not all, of the irreparable harm that necessitated preliminary relief in the first place—including having to police an enormous amount of speech, facing coercion to change state laws and school board policies, and being subject to increased obligations, reporting and response requirements, complaints, investigations, and private litigation. Add in the need for Plaintiff School Boards to begin the expensive process of designing, modifying, and constructing bathrooms and locker rooms to comply with the Rule, and the equities analysis is complete in Plaintiffs' favor.

Finally, a stay is directly contrary to the public interest. As Judges Jones and Duncan recognized below, "the public interest would not be served by a temporary judicial rewriting of the Rule that may be partly or fully undone by a final court judgment." App.721. And that is especially so given that the Department's request comes "just before the start of the school year" when a stay would throw Plaintiff States into chaos. App.730. Chief Judge Sutton aptly emphasized that "educators should not be forced to determine whether this or that section of the new Rule must be followed when the new definition of sex discrimination might or might not touch the Rule." *Id.* Nor would the public interest be served by forcing families to scramble to determine whether a judicial rewrite means they should find a last-minute alternative schooling option to protect their children.

The status quo in the Plaintiff States today has been the status quo for years. The Court should reject the Department's attempt to destroy it. The application should be denied.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

A. Title IX Promotes Equal Educational Opportunities for Both Sexes by Imposing Conditions on Federal Funding.

Motivated by the "corrosive and unjustified discrimination against women" in "all facets of education," 118 Cong. Rec. 5730, 5803 (Feb. 28, 1972) (Statement of Sen. Bayh), Congress enacted Title IX "to avoid the use of federal resources to support [such] discriminatory practices," *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979). To that end, Title IX prohibits, "on the basis of sex," "discrimination under any education program or activity receiving Federal financial assistance [with statutory exceptions]." 20 U.S.C. § 1681(a). The statutory exceptions permit, for example, single-sex groups and activities like sororities and fraternities and "Boys State" and "Girls State" conferences. *Id.* § 1681(a)(6)–(7).

At the time of Title IX's enactment and today, the ordinary meaning of the term "sex" is a person's biological sex—male or female—which "is an immutable characteristic determined" at "birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality op.); *see, e.g.*, *Sex*, *Webster's Third New International Dictionary* 2081 (1966) ("one of the two divisions of organic esp. human beings respectively designated male or female"); *Sex*, *Webster's New World Dictionary* (1972) ("either of the two divisions, male or female, into which persons, animals, or plants are divided,

with reference to their reproductive functions"); *Sex*, *American Heritage Dictionary* 1187 (1969) ("a. The property or quality by which organisms are classified according to their reproduction functions. b. Either of two divisions, designated *male* and *female*, of this classification."); *see also Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (en banc). Title IX uses this ordinary meaning, as reflected throughout its provisions that refer to the binary nature of sex. *See, e.g.*, 20 U.S.C. §§ 1681(a)(2) (discussing institutions that were "changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes"), 1681(a)(8) (referring to "students of one sex" and "students of the other sex"); *see also Neese v. Becerra*, No. 2:21-cv-163-Z, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022). Title IX thus generally prohibits federal funding recipients from discriminating against persons based on their biological sex.

At the same time, Title IX recognizes "the innate biological variation between men and women that occasionally warrants differentiation—and even separation—to preserve educational opportunities and to promote respect for both sexes." *Texas v. Cardona*, No. 4:23-CV-00604-O, 2024 WL 2947022, at *32 (N.D. Tex. June 11, 2024). Section 1686 instructs, for example, that Title IX shall not "be construed" as prohibiting recipients "from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. This statutory instruction about how to interpret Title IX reflects that separating the sexes "where personal privacy must be preserved" and where biological differences matter is *not* discrimination under the statute. *See* 118 Cong. Rec. at 5807 (Statement of Sen. Bayh) (explaining Title IX "permit[s]

differential treatment by sex" when necessary, such as "in sport facilities or other instances where personal privacy must be preserved"). And the statutory instruction comports with the meaning of *discrimination*, because boys and girls are not similarly situated in contexts where differences between the sexes matter. *See, e.g.*, *Bostock*, 590 U.S. at 657 (discrimination means to treat "worse than others who are similarly situated"); *cf. United States v. Virginia*, 518 U.S. 515, 533 (1996) (acknowledging "'[i]nherent differences' between men and women" as "cause for celebration").

B. For Decades, Title IX Has Been Interpreted as Prohibiting Discrimination Based on Biological Sex that Bars Access to Educational Opportunities.

Title IX has been implemented for decades as prohibiting only *discrimination*—not justifiable differentiation—based on biological sex. Indeed, longstanding regulations, including the earliest ones which have special probative value because they were approved by Congress, reflect the original public understanding that (1) Title IX prohibits discrimination based on biological sex,[3] and (2) not all differentiation based on biological sex is unlawful discrimination for purposes of Title IX.[4] *See Grove City Coll. v. Bell*, 465 U.S. 555, 567–68 (1984)

---

[3] *See, e.g.*, 40 Fed. Reg. 24,128, 24,132 (Jun. 4, 1975) ("women" and "men"); *id.* at 24,135 ("male and female teams"); *id.* at 24,135 (contrasting payment rates between "one sex" and the "opposite sex"); *id.* at 24,134 (prohibiting discrimination "against members of either sex").

[4] *See, e.g.*, *id.* at 24,141 (permitting "separate toilet, locker room, and shower facilities on the basis of sex" and separation of "students by sex within physical education classes"); *id.* (allowing "separate sessions for boys and girls" when dealing with "human sexuality"); *id.* at 24,132, 24,141 (requiring different standards in physical education classes where necessary so women are not adversely impacted).

(explaining the Court has relatedly "recognized the probative value of Title IX's unique postenactment history"); *see also Kisor v. Wilkie*, 588 U.S. 558, 594 (2019) (Gorsuch, J., concurring) (noting that "early, longstanding, and consistent interpretation of a statute" can be "powerful *evidence* of its original public meaning"). And Title IX has been implemented by the Department of Education (and its predecessor agency) according to this original understanding for decades. *See, e.g.*, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) ("Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities."); 45 Fed. Reg. 30,802, 30,960 (May 9, 1980) (reissuing regulations, including those allowing "separate housing on the basis of sex" and "separate toilet, locker room, and shower facilities on the basis of sex"); *id.* at 30,962 (allowing sex-specific teams and requiring "equal athletic opportunity for members of both sexes"); Dear Colleague Letter, U.S. Dep't of Educ. (June 22, 2007), https://tinyurl.com/2p9cjukz (emphasizing the "strides we have made towards providing an education to all students, male and female, free of discrimination"); App.108, 116.

Courts have similarly understood Title IX (and other statutes prohibiting sex discrimination) as prohibiting only discrimination based on biological sex. Although sexual harassment or mistreatment based on sex-related characteristics can be evidence of discrimination based on biological sex, the question has remained whether "the conduct at issue … actually constituted '*discrimina*[*tion*] … because of sex,'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998), or "on the

basis of sex," 20 U.S.C. § 1681(a); *see Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992).[5] This is especially true in the Title IX context, because the statute was passed under Congress's Spending Clause power, so the conditions the statute imposes on recipients of federal funds must be unambiguous. *See Adams*, 57 F.4th at 815–17.

The Department and courts have also recognized that Title IX does not prohibit all misconduct, but is instead focused on recipients' misconduct that denies educational opportunities based on biological sex. For example, this Court noted in *Davis v. Monroe County Board of Education* that "[t]he language of Title IX *itself* … cabins the range of misconduct that the statute proscribes." 526 U.S. 629, 644 (1999) (emphasis added). *Davis* explains that Title IX's "provision that the discrimination occur 'under any education program or activity' suggests that the behavior be serious enough to have the *systemic effect of denying the victim equal access* to an educational program or activity" and that the "harassment must take place in a context subject

[5] *See also, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part."); *Bostock*, 590 U.S. at 699 (Alito, J., dissenting) (explaining Title VII does not "forbid[] discrimination based on sex stereotypes," but "discrimination based on sex stereotypes" is "relevant to prove discrimination because of sex," especially where a trait "would be tolerated and perhaps even valued in a person of the opposite sex"); *Chisholm v. St. Mary's City Sch. Dist. Bd. of Educ.*, 947 F.3d 342, 350–52 (6th Cir. 2020) (reasoning that "an offensive, gendered insult," even if intended to be "an assault on their masculinity," was not sex discrimination where "targeted to a fundamental requirement for football players—toughness"—that the coach would presumably demand of any female player); *cf. Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 184 (2005) (Title IX retaliation claim requires proof that the recipient "retaliated against [plaintiff] *because* he complained of *sex discrimination*" (second emphasis added)).

to the [recipient's] control." *Id.* at 652 (emphasis added); *see id.* at 651 ("[A] plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are *effectively denied equal access* to an institution's resources and opportunities." (emphasis added)). Accordingly, "teasing and name-calling among school children" is not necessarily a Title IX violation even if it leads to lower grades or causes a student to skip school. *Id.* at 652; *see id.* at 653 (emphasizing that the harassment at issue "was not only verbal," but also "included numerous acts of objectively offensive touching" that led to a conviction for "criminal sexual misconduct").

Not only does a heightened harassment standard flow from Title IX's text, but the Court also viewed it as necessary in light of the educational context, which involves "students [who] are still learning how to interact appropriately with their peers," *id.* at 651, and potential First Amendment problems, *see id.* at 667 (Kennedy, J., dissenting) (noting that attempts to curb allegedly harassing speech could violate the First Amendment). And the Department agreed, for decades, that "Title IX is intended to protect students from sex discrimination, not to regulate the content of speech." U.S. Dep't of Educ., *Sexual Harassment Guidance 1997*, https://tinyurl.com/3j8sbza5; *see also* U.S. Dep't of Educ., *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* 22 (Jan. 2001), https://tinyurl.com/evcm8vjh.

II. RECENT EXECUTIVE AND REGULATORY ACTIONS

A. In 2020, the Department Issued Title IX Regulations Addressing Sexual Harassment and Grievance Procedures.

A few years ago, the Department decided to address sexual harassment under Title IX in a rulemaking for the first time. The Department, under the previous administration, published Title IX regulations primarily focused on sexual harassment and grievance procedures. *See* U.S. Dep't of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,026 (May 19, 2020). The 2020 regulations adopted the *Davis* formulation of sexual harassment for "purely verbal harassment" to address First Amendment concerns. *Id.* at 30,142. Those regulations confirmed that verbal harassment can constitute discrimination under Title IX only when it is "so severe, pervasive, *and* objectively offensive that it *effectively denies* a person equal access to the recipient's education program or activity." 34 C.F.R. § 106.30(a)(2) (emphases added). The regulations also tracked this Court's precedent in other ways, including by recognizing that recipients violate Title IX only when they have "actual knowledge" of sexual harassment and are deliberately indifferent to it. 89 Fed. Reg. at 30,033–34.

B. In 2021, the Department Unsuccessfully Attempted to Change the Meaning of "Sex" in Title IX.

Following the 2020 election, the new administration sought to redefine the meaning of "sex" for purposes of Title IX. In January 2021, President Biden issued an executive order citing *Bostock* and declaring that Title IX likely "prohibit[s] discrimination on the basis of gender identity or sexual orientation" unless it

"contain[s] sufficient indications to the contrary." Exec. Order 13,988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021). The order declared that "[i]t is the policy of [the Biden] Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation" and that agency heads should take action to implement that policy. *Id.* at 7023–24.

A few months later, President Biden issued another executive order that reaffirmed his Administration's policy regarding discrimination on the basis of sexual orientation or gender identity. Exec. Order 14,021, *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, 86 Fed. Reg. 13,803, 13,803 (Mar. 8, 2021). The order also instructed the Secretary of Education specifically to take action to implement that policy. *See id.* And, just a few months after that, the Department did so. On June 22, 2021, the Department issued a notice of "interpretation" of Title IX. *See* U.S. Dep't of Educ., *Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021) ("2021 Interpretation"). In the 2021 Interpretation, the Department announced that it now "interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity." *Id.* at 32,637. It further announced that the Office of Civil Rights (OCR) would "fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity."

Id. at 32,639.

The Department subsequently released a "Dear Educator" letter notifying educators of the 2021 Interpretation and the Department's plans to "fully enforce" its new interpretation. U.S. Dep't of Educ., Office for Civil Rights, *Dear Educator Letter* (Jun. 23, 2021), https://tinyurl.com/ywrf7jb6. The letter also provided links to new guidance documents from OCR and the Department of Justice that "provide examples of the kind of incidents" that the Department can investigate. *See id.* at 2. The examples demonstrated that the Department would investigate recipients for a Title IX violation based on students' refusal to use a classmate's "preferred pronouns." *See* U.S. Dep't of Justice & U.S. Dep't of Educ., *Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families*, https://tinyurl.com/58k7pkcd.

States, including Plaintiffs in this case, sued to challenge the Department's unlawful rewriting of Title IX in these guidance documents. *See* Complaint, *State of Tenn., et al. v. U.S.*, Case No. 3:21-cv-00308 (E.D. Tenn. Aug. 30, 2021). The district court granted an injunction that prevented the Department from enforcing its erroneous interpretation of Title IX against the plaintiff States, *Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807, 842 (E.D. Tenn. 2022), and the Sixth Circuit affirmed that judgment, *Tennessee v. Dep't of Educ.*, 104 F.4th 577, 584 (6th Cir. 2024). In separate pending litigation, a federal district court vacated the guidance documents as unlawful last month. *Texas*, 2024 WL 2947022, at *52.

III. THE CHALLENGED RULE

On April 29, 2024, the Department published the Final Rule, which purports to "further Title IX's prohibition on sex discrimination" but, in reality, upends Title

IX's entire framework. 89 Fed. Reg. at 33,476. The entire Rule proceeds from one major first step—the Rule redefines (in new § 106.10) sex discrimination to include discrimination based on grounds other than biological sex: "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *Id.* at 33,476, 33,886. The Rule then repeats—and builds upon—that newly expanded scope of sex discrimination throughout virtually every provision in the 423-page Rule. Here are a few examples.

The Rule adopts (in new § 106.2) an expansive definition of "hostile environment harassment" that requires recipients to monitor and censor speech related to "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *Id.* at 33,476, 33,530, 33,884, 33,886. That means students teasing a classmate as being "girly," expressing views regarding pregnancy, or refusing to use whatever pronouns are demanded by a person is potential harassment under the Rule. *See id.* at 33,514, 33,516 (citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination*, https://tinyurl.com/mrxmwtsf ("SOGI Guidance")).

The Rule also increases reporting and response requirements regarding potential harassment. The Rule requires teachers and staff to report what "reasonably may" constitute sex discrimination based on the new definition to the Title IX Coordinator. *Id.* at 33,888. And that report then triggers additional obligations, including that the recipient (1) "promptly and effectively" take necessary action, including offering "supportive measures" and, if a complaint is made,

conducting an investigation, and (2) maintain records for seven years of the (a) report (and any complaint) and (b) the actions the recipient took in response. *Id.* at 33,563, 33,886, 33,888–89. Further, the Rule requires a recipient to assess even speech occurring outside of its programs when determining whether someone has been subject to an allegedly hostile environment. *Id.* at 33,530.

What is more, the Rule adopts (in new § 106.31(a)(2)) a new de minimis harm standard that expressly requires schools to treat people consistently with their self-professed gender identity, whether male, female, transgender, nonbinary, or something else—including when it comes to bathrooms, locker rooms, and overnight field trip accommodations. *Id.* at 33,818, 33,887.[6] The Rule warns that schools cannot impose documentation requirements to verify a person's sincerity, such as evidence of a valid gender-dysphoria diagnosis, and it allows any male, including individuals from the general community, who claims a female gender identity to use girls-only bathrooms and locker rooms. *Id.* at 33,816–18.

The Rule also interferes with schools' deference to and communication with parents. For example, schools must take steps to address purported harassment even if a child's parent does not wish to file a complaint because they believe that no harassment has occurred—and the Rule seems to require recipients to comply with students' request to change their pronouns even if their parents object. *See, e.g.*, *id.*

[6] The Rule refuses to define "gender identity," but "[t]he Department understands gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth." *Id.* at 33,809. The Rule also indicates that gender identity is subject to change at any time and is unverifiable, because "one person may not know another's gender identity without inquiring unless the other person volunteers the information." *Id.*

at 33,596–97, 33,821–22. The Rule also warns schools against disclosing a student's gender identity because it could lead to harassment, which, when combined with other provisions, means schools will need to (1) assign a boy who claims to be a girl to a girls-only room on an overnight field trip and (2) not inform the girls or parents that those girls will be sharing a room with a biological male. *See, e.g.*, *id.* at 33,622, 33,818.

The Rule itself acknowledges that it will increase recipients' obligations and compliance costs, including imposing costs to understand the 423-page Rule, revise policies, and train employees. *See, e.g.*, *id.* at 33,866–67 (explaining that recipients will incur costs to read and understand the Rule, revise grievance procedures, revise training materials, train employees, and administer more extensive training for Title IX coordinators); *id.* at 33,880 (recognizing that the Rule will likely increase costs for school districts and colleges); *id.* at 33,881 (explaining that "all regulated entities will experience an increased recordkeeping burden" and need to expend more hours on compliance); *id.* at 33,877 (recognizing there are "costs associated with" expanding sex discrimination to include grounds other than biological sex and "potential costs" with requiring recipients to consider conduct outside of their educational programs). The Rule likewise admits its changes can be expected to increase agency complaint investigations and private civil litigation. *See, e.g.*, *id.* at 33,492 (projecting a 10% increase in complaint investigations); *id.* at 33,851, 33,858 (acknowledging there may be "costs associated with litigation due to the final regulations").

IV. PRIOR PROCEEDINGS

A. The District Court Postponed the Rule's Effective Date and Issued a Geographically Limited Preliminary Injunction.

Plaintiffs filed a detailed complaint, amended complaint, and a motion for a postponement, a stay, or a preliminary injunction—which was supported by 40 exhibits, including 13 declarations from Plaintiffs. *See* App.1–497. As detailed further below, Plaintiffs attacked the entirety of the Rule, highlighting especially the legal defects in the Rule's core provisions: § 106.10 (redefinition of sex discrimination), § 106.2 (hostile environment harassment definition), and § 106.31(a)(2) (de minimis harm standard).

On June 13, 2024, the district court granted a preliminary injunction and postponed the Rule's effective date in the four Plaintiff States. App.584–85. It concluded Plaintiffs would likely succeed on their claims that the Rule is contrary to law, exceeds statutory authority, violates the Spending Clause, and is arbitrary and capricious. App.561–81. The district court also found Plaintiffs had shown they would suffer irreparable harm in the absence of preliminary relief, including unrecoverable compliance costs, induced violations of constitutional rights, coercion to change state laws, and invasion of state sovereignty. App.581–82.

Other district courts considering similar challenges to the Rule followed suit, issuing preliminary injunctions tailored to the plaintiffs in their particular cases. On June 17, 2024, a federal district court in Kentucky issued an injunction limited to the six plaintiff States and the intervening plaintiffs in that case. *Tennessee v. Cardona*, No. 2:24-cv-00072, 2024 WL 3019146, at *44 (E.D. Ky. June 17, 2024). On July 2,

2024, a federal district court in Kansas issued an injunction limited to the four plaintiff States and schools attended by members of the plaintiff organizations. *Kansas v. U.S. Dep't of Educ.*, No. 24-4041-JWB, 2024 WL 3273285, at *22 (D. Kan. July 2, 2024). On July 11, 2024, two federal district courts in Texas issued injunctions limited to the plaintiff State, individual plaintiffs, and school board plaintiff in their respective cases. *See Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ.*, No. 4:24-CV-00461-O, 2024 WL 3381901, at *7 (N.D. Tex. July 11, 2024); *Texas v. United States*, No. 2:24-CV-86-Z, 2024 WL 3405342, at *16 (N.D. Tex. July 11, 2024). Finally, on July 24, a federal district court in Missouri issued an injunction limited to the six plaintiff States and an individual plaintiff. *See Arkansas v. U.S. Dep't of Educ.*, No. 4:24-CV-636-RWS, 2024 WL 3518588, at *23 (E.D. Mo. July 24, 2024). No court has sided with the Department.

B. District Courts In This Case And Others Reject The Department's Extraordinary Requests That Some Version Of The Enjoined Rule Nonetheless Take Effect Pending Appeal.

On June 24, 2024—eleven days after the district court in this case issued preliminary relief to prevent irreparable harm and maintain the status quo in the four Plaintiff States—the Department moved for a partial stay pending appeal in the district court. App.589. The basic thrust of the Department's seven-page brief was that the district court should limit its injunction to only those portions of the Rule that the Department believes are implicated by this case. App.589–95. Two days later, the district court expedited the briefing schedule. App.599. The Department, however, filed an "emergency" motion for a partial stay with the Fifth Circuit on July 1, 2024, before district court briefing was even complete. App.600. After the

Department had already jumped to the Fifth Circuit, the district court denied the Department's motion. The district court explained the Department failed to meet its burden on any stay element, concluded that the Rule "cannot operate" without the challenged provisions, and found that allowing unspecified portions of the Rule to go into effect would "result in uncollectable compliance costs to recipient schools." App.696–97.

A similar story played out in the related *Tennessee* and *Arkansas* litigations. The *Tennessee* district court concluded the Department failed to satisfy the stay factors and the granted relief was "necessary to prevent immediate harm to the plaintiffs while the legality of the Final Rule is fully adjudicated." App.669–70. Relevant here, that court emphasized virtually all of the Final Rule's provisions "hinge on the Department's adoption of an entirely new understanding of sex discrimination." App.684–85. Permitting only some but not all of the Final Rule to take effect, therefore, would "creat[e] an inconsistent and unmanageable regulatory framework." App.685; *see also* App.687 ("Here, the challenged provisions and embedded interpretive guidance is so integral to the Final Rule that attempting to salvage provisions through severance would leave an incoherent regulatory framework."). Similarly, the *Arkansas* court rejected the Department's request that a distorted version of the Rule go into effect, "conclud[ing] that it would be a nearly impossible task to excise the remaining regulations without also eliminating those regulations that involve sex discrimination." *Arkansas*, 2024 WL 3518588, at *20.

C. Circuit Courts Reject The Same Request.

The Department's efforts to salvage the Rule failed in the courts of appeals as

well. Start with this case and the Fifth Circuit. Judges Jones and Duncan issued a per curiam opinion, denying the "emergency" stay motion and concluding that the Department failed to establish a single factor in support of a stay. App.718–21.[7] The court emphasized that, while Plaintiffs "focused on three key provisions at the heart of the 423-page Rule" (namely, §§ 106.10, 106.2, and 106.31(a)(2)), they "sought to overturn the *entire* Rule," including the "complex, lengthy and burdensome recordkeeping and enforcement requirements." App.718–19 (emphasis added). That matters for multiple reasons.

First, as the Fifth Circuit expressly held, the Department "forfeit[ed]" any argument that any injunction should be limited as the Department now requests. App.719. In particular, the Department's preliminary-injunction opposition brief stated only, "in two conclusory sentences, that the Rule's severability provision should enable the rest of the Rule to escape the preliminary injunction." *Id.* The district court rightly "made no comment about this vague attempt to limit ultimate relief," and thus the Fifth Circuit deemed the Department's entire partial-stay argument forfeited. *Id.*

Second, "[e]ven if the [Department] did not forfeit its severability argument," the Fifth Circuit emphasized that the stay motion "places [the] court in an untenable position" with respect to the ordinary stay factors. *Id.* "With no briefing or argument below on the consequences of a partial preliminary injunction, we would have to parse

[7] Judge Douglas indicated that she would grant a stay; however, she provided no opinion explaining why she believed the Department carried its heavy burden. App.700.

the 423-page Rule ourselves to determine the practicability and consequences of a limited stay." *Id.* But that court, like this Court, is "'a court of review, not first view.'" *Id.* The court added that "granting a partial stay [] would involve this court in making predictions without record support from the [Department] about the interrelated effects of the remainder of the Rule on thousands of covered educational entities." App.720. "This is especially problematic when the [Department] is asking this court to maintain, on a temporary basis, tangential provisions that might or might not have been formulated in the absence of the heart of the Rule." *Id.* And "[e]ven more problematic would be our judicial rewriting of the Rule on what may only be a temporary basis"—"[t]hat, too, is not this court's job." *Id.* The court thus easily concluded that the Department had not "shown a likelihood of success in challenging the breadth of the district court's preliminary injunction." *Id.*

The Fifth Circuit also easily disposed of the remaining stay factors in Plaintiffs' favor. For example, the Fifth Circuit confirmed that Plaintiffs showed "beyond peradventure" that a partial stay would cause "great legal uncertainty" and "significant, unrecoverable compliance costs." App.720. As for uncertainty, the Fifth Circuit underscored the unknowns regarding "a multitude of matters like the extent of compelled recordkeeping, sufficiency of 'complaints' of sex discrimination/harassment, and obligations to monitor 'offensive' speech and behavior under any partially implemented Rule." App.721. And as for unrecoverable costs, those costs "would double if the partially implemented Rule differs from a final judgment," because Plaintiffs "would have to do [compliance] all over again"—and

"the public interest would not be served by a temporary judicial rewriting of the Rule that may be partly or fully undone by a final court judgment." *Id.* In contrast, the Fifth Circuit concluded that the Department would suffer no harm because nothing prevents it "from enforcing Title IX or longstanding regulations to prevent sex discrimination." *Id.* Nor can the Department "be said to be injured by putting off the enforcement of a Rule it took three years to promulgate after multiple delays." *Id.* Accordingly, the Fifth Circuit roundly rejected the Department's stay motion.

In the related *Tennessee* litigation, the Sixth Circuit similarly rejected the Department's tactics. In an opinion by Chief Judge Sutton, joined in full by Judge Batchelder and in part by Judge Mathis, the Sixth Circuit concluded that the Department failed to show how the Rule could operate without the key challenged provisions, which "appear to touch every substantive provision of the Rule," and that a partial stay would cause confusion and impose an "onerous burden" on plaintiff States. App.728–29. Like the Fifth Circuit, the Sixth Circuit emphasized that the Department failed to properly urge its severability argument before the district court. *See* App.730 (noting that the Department "mentioned severability below in just a few lines of its briefs without telling the district court which other provisions should be severed"); App.729–30 ("[I]t bears emphasizing how the Department framed its arguments below…. [I]t mainly used them to permit the new definition of sex discrimination to go into effect, not to allow other provisions to go into effect under the prior definition of sex discrimination."). And like the Fifth Circuit, the Sixth Circuit had no trouble finding that the stay factors cut in the plaintiff States' favor.

"From an equitable perspective, educators should not be forced to determine whether this or that section of the new Rule must be followed when the new definition of sex discrimination might or might not touch the Rule." *Id.* Moreover, the undisputed "loads of time and lots of costs" portended by the Rule "will only escalate if we leave confusion over the States' obligations under the Rule"—a "particular[] problem[] given that the new definition of sex discrimination affects each provision of the Rule that the Department asked to go into immediate effect." *Id.*

Notably, *all* members of the Sixth Circuit panel agreed that three key challenged Rule provisions—34 C.F.R. §§ 106.2, 106.10, and 106.31(a)(2)—should be enjoined in their entirety, rejecting the Department's view that it should be permitted to enforce the Rule's new definition of sex discrimination in § 106.10. App.724, 727, 732–33. Judge Mathis, however, would have allowed other provisions of the Rule to go into effect and replaced all references to the enjoined definition of sex discrimination with the Department's "pre-Rule understanding of what constitutes sex discrimination under Title IX." App.731, 735 (Mathis, J., dissenting); *but see* App.729 (Sutton, C.J.) ("[W]e do not know the meaning of that pre-existing definition. As the Department points out, even that definition is the subject of separate litigation."), App.729–30 (in the lower courts, the Department sought "to permit the new definition of sex discrimination to go into effect, not to allow other provisions to go into effect under the prior definition of sex discrimination").

ARGUMENT

In this Court, the Department does *not* dispute the district court's preliminary

determination that the Final Rule is unlawful. Instead, the question presented by the Department's application is whether this Court should parse the Final Rule to permit portions of the Rule to go into effect immediately notwithstanding the injunction in this case (and others across the country). The Department has not shown—and cannot show—that the "extraordinary relief" that it seeks is justified. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1302 (2014) (Roberts, C.J., in chambers); *see Nken v. Holder*, 556 U.S. 418, 433–34 (2009) ("The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion."). *First*, threshold defects and obstacles forestall any need to reach the ordinary stay factors. And *second*, even if the Court reaches the ordinary stay factors, the Department plainly fails to satisfy them—as courts across the country have uniformly held. Either way, the Court should deny the application.

I. THRESHOLD OBSTACLES WARRANT DENIAL OF THE APPLICATION.

A. The Department Has Forfeited Its Severability Argument.

The Court's assessment of the Department's application can begin and end with forfeiture. As recounted above, the Fifth Circuit expressly held that the Department forfeited any request that any injunction be tailored in the manner that the Department now requests. To be specific, the Department dedicated "two conclusory sentences" to this issue in its preliminary-injunction briefing, App.719, and it never even identified (a) what "portions of the Rule" it believed were being challenged by Plaintiffs and should be severed, App.544; *see* App.730, or (b) which portions of the Rule could plausibly function while the Rule's core provisions are enjoined.

Although the Department disagrees with the Fifth Circuit's conclusion, it cannot explain why the Fifth Circuit's forfeiture analysis was wrong. Indeed, the Department does not even cite any authority regarding forfeiture at all. The Department instead pivots (at 25) to an argument that the district court lacked authority to issue the injunction in the first place and citing a case for the unremarkable proposition that an injunction cannot be based "only on a possibility of irreparable harm." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). Plaintiffs, however, showed the Rule's unlawful provisions will operate together to cause them irreparable harm. *See infra* Section II.C. Accordingly, the Department's failure to even assert, much less show the district court, that any specific portions of the Rule "could function sensibly" without what the Department now claims to be the key challenged provisions failed to preserve the issue. *See* App.645 (quoting *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001)); *Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016) (concluding an agency that made a "cursory" request that preliminary relief be "narrowly tailored" "waived any argument about the scope of the [relief]").

Therefore, for the same reason the Fifth Circuit deemed that "vague attempt to limit ultimate relief" insufficient for preservation purposes, App.719, this Court can and should hold the same. That warrants denial of the stay application here.

B. The Department Fails To Satisfy Recently Cited Justifications For A Supreme Court Stay.

In addition, the Department's application fails to meet threshold criteria identified by Members of this Court.

1. Status Quo. Take first the issue of maintaining the status quo, which is uniquely presented in this case. Justices Kavanaugh and Barrett recently explained that the concept of maintaining the status quo "[s]ounds attractive in theory" but can present difficulties "in practice." *Labrador v. Poe*, 144 S. Ct. 921, 930 (2024) (Kavanaugh, J., concurring in the grant of stay). Those difficulties arise, for example, when determining at which point in time to identify status quo. *See id.* ("Is the status quo the situation on the ground *before* enactment of the new law? Or is the status quo the situation *after* enactment of the new law, but before any judicial injunction? Or is the status quo the situation after any district court ruling on a preliminary injunction? Or is the status quo the situation after a court of appeals ruling on a stay or injunction?").

But this case avoids that difficulty because, under *any* conception of the status quo, granting the Department's requested stay would *disrupt* the status quo. To be precise: The Rule has never been in effect; it will not take effect under the district court's injunction; and especially after the Fifth Circuit's stay denial, the Rule will not take effect for the foreseeable future. Indeed, the present status quo has existed for over half a century. Regardless of the point in time at which the Court assesses the status quo, there is no question that status quo is a world with no Rule. The Department, by contrast, demands that this Court destroy the status quo by foisting the 423-page Rule on Plaintiffs as schools begin fall instruction, forcing schools to *immediately* determine their obligations, necessary policies, training, and so on. Whatever concerns the Court may have about "a blanket rule" for maintaining the

status quo, *id.* at 931, the status quo question in this case independently warrants denial of the Department's stay application.

2. Dual Stay Denials Below. Justices Jackson and Sotomayor have expressed the view that two stay denials in the litigation below—by the district court and the court of appeals—present a strong reason to deny a third stay request in this Court. *See Labrador*, 144 S. Ct. at 935 (Jackson, J., dissenting from grant of stay). In particular, they explain, "respect for lower court judges—no less committed to fulfilling their constitutional duties than [Supreme Court Justices] and much more familiar with the particulars of the case—normally requires an applicant seeking an emergency stay from this Court after to prior denials to carry 'an especially heavy burden.'" *Id.*; *see also id.* n.1 ("The heavier burden … has long served as a sobering reminder that, after two prior levels of review, interim relief has consistently been deemed unwarranted.").

On that view, the Department is subject to that "especially heavy burden" because both the district court and the Fifth Circuit have emphatically denied the Department's stay requests. In fact, that burden should be even higher here given that *every* court across the country to consider these requests has rejected them.

3. No Merits Error. Justices Jackson and Sotomayor likewise have expressed their view that this Court should not intervene in the stay posture where the applicant "is not seeking interim relief based on any errors by the lower courts with respect to consequential merits questions." *Id.* at 936. From their perspective, one "troubling" example of a "bid for this Court's early intervention" is when a litigant

asks the Court "to wade into the middle of ongoing lower court proceedings to weigh in on a single query concerning only one aspect of a preliminary determination by the District Court: whether the temporary relief that the District Court has afforded pending its review of the merits sweeps to broadly." *Id.* at 936–37. As they articulate their view, this Court "should resist being conscripted into service when [its] involvement amounts to micromanaging the lower courts' exercise of their discretionary authority in the midst of active litigation." *Id.* at 937.

The same concerns are present here. With one narrow exception, the Department avowedly does not contest the district court's merits decision at the preliminary-injunction stage. *See* Stay App.4 (citing "important issues that will be litigated on appeal and that may well require this Court's resolution in the ordinary course"), *but see id.* at 5 (raising one merits issue as it relates to one portion of one provision). Across the board, however, the Department's argument is that the injunction entered below is too broad. Indeed, the Department's strategy—having failed to persuade any other courts—is now to "conscript[]" this Court into rejiggering the injunction. *Labrador*, 144 S. Ct. at 937 (Jackson, J., dissenting from grant of stay). In other words, the Department wants this Court to "micromanag[e] the lower courts' exercise of their discretionary authority in the midst of active litigation." *Id.* Any concern with the same request in *Labrador* thus also weighs in favor of a stay denial here.

4. No Reasonable Probability Of Certiorari. Finally, several Members of the Court have emphasized that, "assuming all of the other stay factors [are] met, [an

applicant] needs to show 'a reasonable probability that this Court will grant certiorari' in order to obtain an emergency stay." *Id.* at 935 (quoting *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers)). As Justices Kavanaugh and Barrett put the requirement, "a stay applicant must show, among other things, 'a reasonable probability' that this Court would eventually grant certiorari *on the question presented in the stay application* if the district court's judgment were affirmed on appeal." *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1, 1 (2023) (Kavanaugh, J., respecting the denial of the application for stay) (emphasis added); *see also Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief).

But the Department plainly fails to make that showing here. The question presented in the stay application is whether the district court's geographically limited injunction against the Rule is "overbroad." Stay App.19, 24, 25, 38. There are obvious reasons why this Court likely would not grant review on that question.

First, the vehicle problem: As discussed above, *supra* Section I.A, the Department must contend with the Fifth Circuit's holding that the Department forfeited its overbreadth argument. That is a classic reason to deny review. *Second*, the other vehicle problem: The Department's stay application invites the Court to chime in on the Rule's meaning, interrelatedness, and operation *while shielding from this Court the merits questions about core portions of the Rule*. That invitation is as bizarre as it sounds. *Cf. Labrador*, 144 S. Ct. at 936 n.3 (Jackson, J., dissenting from grant of stay) (a debate "about the necessary scope of relief" does "not transform [a]

case-specific, fact-intensive request for error correction into a certworthy issue").

For its part, the Department claims certworthiness—to no avail. It principally relies (at 17) on the stay grant in *Labrador*, but that reliance is misplaced. Unlike the *Labrador* plaintiffs, Plaintiffs in this case are directly regulated and affected by the Rule—the entire Rule. *Cf. Labrador*, 144 S. Ct. at 921–22 (Gorsuch, J., concurring). Moreover, unlike in *Labrador*, the district court here did not enjoin enforcement of a democratically enacted state statute, nor did it provide "'universal' relief." *Id.* at 921. The district court instead granted (a) geographically- and party-limited relief to only Plaintiff States and their schools (b) to halt bureaucratic subversion of a democratically enacted, federal statute and (c) to maintain the status quo that has existed for decades. Finally, unlike *Labrador*, this case arises under the APA, which expressly authorizes courts to preserve the status quo pending review of an agency action. *See* 5 U.S.C. § 705. This context thus does not raise the same concerns about federal intrusion into state sovereignty or judicial overreach into the legislative branch. *See Nken*, 556 U.S. at 429 n.1 (recognizing the propriety of preliminary relief that "simply suspend[s] *administrative* alteration of the status quo"); *Wages & White Lion Investments, L.L.C. v FDA*, 16 F.4th 1130, 1144 (5th Cir. 2021) (recognizing courts can provide "interim relief" that "preserve[s] the *status quo ante*" that existed before the agency action); *Griffin*, 144 S. Ct. at 2 n.1 (Kavanaugh, J., statement regarding stay denial) (noting the difference when relief is granted in the APA context); *cf. Loper Bright Enterprises v. Raimondo*, No. 22-1219, 2024 WL 3208360, at *12 (U.S. June 28, 2024) (explaining the APA is "a check upon administrators

whose zeal might otherwise" carry "them to excesses not contemplated in legislation" (quotation omitted)).

The Department also falls short in its circuit-split argument. To start, there is no circuit split on the Department's overbreadth question; to the contrary, both the Fifth and Sixth Circuits rejected the Department's argument. The Department nonetheless gestures (at 17–18) at a circuit split on the question whether this Court's reasoning in *Bostock* extends to non-Title VII contexts. The Department notably omits the various opinions concluding that the "principles announced in the Title VII context" do not "automatically apply" in other contexts, such as Title IX. *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021); *see, e.g.*, *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1229 (11th Cir. 2023); *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir.), *cert. granted sub nom. United States v. Skrmetti*, No. 23-477, 2024 WL 3089532 (U.S. June 24, 2024). And more importantly, the Department obscures that its request for the Court to consider only the merits on only one aspect of only one Rule provision presents a far poorer vehicle to resolve that circuit split than, say, a case before this Court actually addressing the Rule's validity.

For any and all of these reasons, the Court should simply deny the Department's stay application out of hand without proceeding to the stay factors.

II. THE DEPARTMENT FAILS TO SATISFY THE ORDINARY STAY FACTORS.

Even if the Court reaches the ordinary stay factors, they are easily resolved against the Department. The Department has not shown that there is a "fair prospect" that it will succeed on the merits. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in stay grant). It has not shown "irreparable harm

from denial of a stay." *Teva Pharm.*, 572 U.S. at 1302. And it cannot show that the "equities (including the likely harm to both parties) and the public interest" weigh in its favor. *See Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in stay grant).

A. The Department Is Not Likely To Succeed On The Merits.

Start with the Department's inability to show likelihood of success on the merits. The Department raises two arguments: (1) the district court erred in enjoining the entire Rule including aspects Plaintiffs purportedly did not challenge; and (2) the district court erred in enjoining § 106.10's inclusion of gender identity in the new definition of sex discrimination. Both arguments are meritless, which is why every court to consider the Department's plea has rejected them.

1. The district court did not abuse its discretion in issuing a geographically- and party-limited injunction against the Rule.

Take the first argument first. By the Department's telling, Plaintiffs did not actually challenge the entire Rule and thus are not entitled to an injunction against the entire Rule. Nonsense. The Department's arguments rest on mischaracterizations, misdirection, and mistakes.

a. *First*, the mischaracterizations. The Department pretends (at 21) that Plaintiffs' "focus[]" on three provisions and harm in the gender-identity context means that Plaintiffs did not challenge any other provisions or identify other harms. That portrayal of Plaintiffs' legal challenge is a blatant mischaracterization of Plaintiffs' pleadings and briefs, which the Department tellingly does not cite or even include in its appendix. An accurate account of the suit and Plaintiffs' harms (substantiated by declarations that the Department also ignores, *see* App.189–298,

App.426–441) demonstrates the propriety, and indeed necessity, of the current preliminary relief against the Rule.

Plaintiffs argued that the Rule's expansion of "sex" to include *all* listed grounds other than biological sex constitutes an unlawful rewrite of Title IX and violates the Spending Clause (among other defects). *See, e.g.*, App.76–78, 81–84, 88–90; *see also* App.25; App.572. This dramatic expansion of obligations and liability necessarily harms Plaintiffs, especially when combined with the Rule's increased reporting, recordkeeping, and response requirements. *See* App.263–64; App.430; App.436; *see also* App.190–298; *cf. Tennessee*, 104 F.4th at 613 (explaining that "[r]ecognizing new forms of discrimination 'substantially changes the experience' for all regulated entities, in terms of how to carry out their obligations"). Although Plaintiffs highlighted the gender-identity context (and additionally argued that the Rule's de minimis harm provision, § 106.31(a)(2), flouts Title IX), their arguments were broader. Indeed, Plaintiffs provided examples focused on other erroneous aspects of the Rule's redefinition of sex discrimination, including by (a) highlighting that sexual orientation is treated as distinct from sex in Title IX's text and (b) noting that discrimination based on sex stereotypes does not always demand consideration of a person's sex. *See* App.77 & n.6, App.83–84; Dist. Ct. ECF No. 46 at 4.

Plaintiffs also challenged the Rule's sexual harassment definition across the board, arguing that it disregards Title IX's textual limitations, conflicts with the First Amendment, and would improperly increase Plaintiffs' obligations and liability despite Spending Clause limits. *See, e.g.*, App.85–90; Dist. Ct. ECF 46 at 4–6; *see also*

App.27–28; *see also* App.567. Plaintiffs explained how the new standard requires them to "monitor and censor speech on a myriad of topics," "particularly when combined with its expansion of 'sex' to include other concepts," and noted non-exhaustive, illustrative examples showing that the Rule would force them to police speech about gender identity, pregnancy, and sex stereotypes. *See* App.80 & n.11; App.85–86; *see also* App.28. Additionally, Plaintiffs argued that other provisions, including the Rule's increased response and recordkeeping requirements, improperly expand their obligations, compliance costs, and liability risks. *See, e.g.*, App.71–72, 85, 94–97; App.260–64; *see also* App.29–30; App.557.

Finally, Plaintiffs argued that the entire Rule is arbitrary and capricious and not a product of reasoned decisionmaking because, among other reasons, the Department failed to properly account for non-monetary harms (such as inducing violations of constitutional rights) and underestimated the costs to review and understand the internally inconsistent Rule, revise policies, and undertake training requirements. *See, e.g.*, App.91–94; *see also* App.579 (concluding "multiple failures" to properly consider relevant factors rendered the Rule arbitrary and capricious, including failing to change the Rule based on comments pointing out the numerous problems with the proposed rule).

Respectfully, the Department's portrayal of Plaintiffs' suit as not attacking the entire Rule is baseless, as is the Department's attempt to confine Plaintiffs' harm to only two provisions.

b. *Second*, the misdirection. The Department suggests that the Rule's

severability provision and Plaintiffs' failure to specifically attack every single aspect of the 423-page Rule necessarily means the district court abused its discretion by not hunting for some provisions to sever. That, of course, distracts from the Department's forfeiture of the issue. *See supra* Section I.A. But more importantly, the Department's line of argument ignores the Rule's interrelated nature and the fact that the main challenged provisions are undisputedly the crux of the Rule, which would make severance unworkable and improper in this case. *See MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 22 (explaining that, when an agency intended a "regulation [to] be treated as severable," the remaining question is "whether the *balance* of the rule can function independently" (emphasis added)).

The Rule's executive summary describes the challenged provisions when explaining the "[p]urpose" of the Rule and lists them as "[m]ajor [p]rovisions." 89 Fed. Reg. at 33,476–77. Accordingly, "[w]ithout the challenged provisions, the Final Rule loses its primary purpose." *Mayor of Baltimore v. Azar*, 973 F.3d 258, 293 (4th Cir. 2020) (en banc). That creates "substantial doubt" that the Department would have issued the Rule without the challenged portions, notwithstanding "the severability clause." *Id.* at 292.

Further, the Rule cannot "function sensibly" without "the offending portion[s]." *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 22. It would defy credulity to say that the challenged provisions—such as § 106.10's expansion of sex discrimination to include discrimination based on grounds other than biological sex—have "no connection" to other provisions and can be severed without impacting the Rule's

general operation. *See Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 352 (D.C. Cir. 2019) (concluding price adjustments to certain mail types could be severed from rate changes that applied to other categories). Indeed, this problem came to a head in the courts of appeals below.

The Fifth Circuit, for example, criticized the Department for putting the court "in an untenable position," "[w]ith no briefing or argument below on the consequences of a partial preliminary injunction." App.719. As a result, "granting a partial stay here would involve this court in making predictions without record support from the [Department] about the interrelated effects of the remainder of the Rule on thousands of covered educational entities." App.720.

Writing for the Sixth Circuit, Chief Judge Sutton drove that point home:

> [T]he problem is that these provisions, particularly the new definition of sex discrimination, appear to touch every substantive provision of the Rule. It is thus unsurprising, as the Department fairly acknowledges, that there are "numerous" references to sex discrimination throughout the Rule. Dep.t Supp. Br. 3. In reality, each of the remaining provisions that the Department seeks to implement on August 1 implicates the new definition of sex discrimination. Take the Rule's record-keeping provision, § 106.8(f), which requires schools to preserve any notice sent to the Title IX coordinator of conduct that reasonably may constitute sex discrimination, as well as the investigation and grievance records for each complaint of sex discrimination.. 89 Fed. Reg. 33886. Or § 106.2's definition of sex-based harassment, which amounts to "a form of sex discrimination … including on the bases identified in § 106.10, that [includes] … [h]ostile environment harassment." *Id.* at 33884. Or § 106.8, which imposes various new obligations on schools to comply with the new sex discrimination requirements: appointing Title IX coordinators, requiring training on the new scope of sex discrimination, and the like. *Id.* at 33885. Or § 106.11, which clarifies that the Rule generally requires schools to respond to sex discrimination in the United States and sometimes to sex discrimination elsewhere. *Id.* at 33886. Or § 106.40, which requires Title IX coordinators to "promptly and effectively prevent sex discrimination" by taking actions like ensuring

> access to lactation spaces. *Id.* at 33887–88. Or § 106.44, which requires any funding recipient "with knowledge of conduct that reasonably may constitute sex discrimination" to respond promptly with a series of corrective Or the Rule's grievance procedures and retaliation provision, §§ 106.45–46, .71, which impose new rules for dealing with complaints of sex discrimination, sex-based harassment, and retaliation for reporting the same. *Id.* at 33891–96.

App.728–29. Across the entirety of the Rule, "each of the provisions that the Department wishes to begin enforcing on August 1 implicates the new definition of sex discrimination." App.729. Unquestionably, therefore, "[i]t is hard to see how all of the schools covered by Title IX could comply with this wide swath of new obligations if the Rule's definition of sex discrimination remains enjoined." *Id.* And "[h]arder still, we question how the schools could properly train their teachers on compliance in this unusual setting with so little time before the start of the new school year." *Id.*

Remarkably, the Department accuses (at 26) the court of appeals judges of "greatly exaggerat[ing]" the difficulties posed by the interrelated nature of the Rule's provisions. In fact, the Department goes even further in claiming (*id.*) that "most of" the Rule's provisions "have nothing to do with gender identity." Respectfully, this is not true. *Every one* of the Rule's innumerable references to sex discrimination is a reference to the Rule's redefinition of that term, which includes gender identity. That is Chief Judge Sutton's point reproduced above. Accordingly, no matter the number of facially benign provisions the Department offers (such as those regarding recordkeeping or grievance obligations), the Department cannot overcome the fact that the obligations in those provisions are premised on the Rule's core substantive provisions, including the redefinition of sex discrimination to include discrimination on various grounds other than biological sex.

Summed up: The Department's suggestion that some unspecified remainder of the Rule could somehow survive without the core challenged provisions is wrong.

c. *Finally*, the mistakes. The Department disregards important differences between preliminary relief and final relief and overlooks important differences between statutes and regulations. Unlike final relief, preliminary relief is intended "to preserve the relative positions of the parties" until further judicial proceedings "can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Given that purpose and that "haste that is often necessary," parties need not "prove [their] case in full" at the preliminary-relief stage, *id.*, and district courts have "wide latitude" in determining the scope of relief that fits the equities, *Doster v. Kendall*, 54 F.4th 398, 441 (6th Cir. 2022), *vacated as moot*, 144 S. Ct. 481 (2023). That means courts do "not abuse [their] discretion if [a] temporary order is broader than final relief"—so long as that relief is warranted by the showing that the plaintiff does make. App.720.[8] And that is especially true in APA litigation where courts have express power to "preserve status or rights pending conclusion of the review proceedings" and regulated parties,

[8] Contrary to the Department's characterizations (at 27–28), *Grupo Mexicano v. Alliance Bond Fund*, 527 U.S. 308 (1999), and *De Beers Consol. Mines v. United States*, 325 U.S. 212 (1945), are not to the contrary. *De Beers* held a district court could not issue a preliminary injunction directed towards property "lying wholly outside the issues in the suit" and "which in no circumstances can be dealt with in any final injunction that may be entered," 325 U.S. at 220, and *Grupo Mexicano* simply describes *De Beers*, 527 U.S. at 326–27. Plaintiffs' challenge, by contrast, is directly targeted at the entire Rule; the district court's injunction provides preliminary relief accordingly; and indeed, when Plaintiffs prevail at final judgment, they will be entitled to vacatur of the Rule, which mirrors the preliminary relief in place now.

such as Plaintiffs, are clearly harmed by compliance costs related to revising policies and training based on all provisions. 5 U.S.C. § 705.

Moreover, plaintiffs in APA cases, including this one, often will not even receive the administrative record before the effective date of regulations, which can hamper their ability to detail all the ways in which an agency action is arbitrary and capricious. *See* Defs.' Opp, Tennessee, No. 2:24-cv-00072, ECF 116 at 7 (E.D. Ky. July 8, 2024) (claiming the administrative record cannot be compiled until September 20 due to "resource constraints"). Notably, the Department does not cite *a single APA case* to support its argument that the district court erred in enjoining Rule provisions that Plaintiffs did not specifically challenge, much less an APA case where plaintiffs argued an entire rule was arbitrary and capricious. *See* Stay App. at 19–28.

In short, the Department's effort to hold the preliminary relief in this case to a heightened standard is misplaced.

2. The district court did not abuse its discretion by enjoining the Rule's redefinition of sex discrimination.

The Department also cannot show the district court abused its discretion by enjoining § 106.10—the Rule provision that redefines sex discrimination in Title IX to include discrimination based on grounds other than biological sex. As demonstrated above, Plaintiffs challenged § 106.10 in its entirety—not just its inclusion of gender-identity discrimination—and showed how the Rule's expansion of what constitutes sex discrimination under Title IX harms them. *See supra* Section II.A(1). Other than wrongly suggesting Plaintiffs did not challenge § 106.10's inclusion of discrimination based on grounds other than gender identity, the

Department advances no arguments that the district court abused its discretion by enjoining § 106.10 as to discrimination based on other grounds. There is thus no basis for granting a stay of the injunction as it pertains to those applications of § 106.10.

Nor is there any basis to stay the injunction as it pertains to § 106.10's inclusion of gender-identity discrimination. Contrary to the Department's arguments, (a) this Court's decision in *Bostock* does not mean that Title IX's general prohibition on discrimination based on biological sex includes gender-identity discrimination, and (b) enjoining § 106.10 is necessary to prevent irreparable harm to Plaintiffs. The Department has no answer to these points.

a. As a preliminary matter, § 106.10 is not "a straightforward application" of *Bostock*, Stay App.5, because *Bostock* is inapplicable—or, at the least, arguably inapplicable—in the Title IX context. *Cf.* 89 Fed. Reg. at 33,563 (Department itself insisting that it "is not bound by Title VII standards in implementing Title IX"). That is true for no fewer than three reasons.

First, this Court said so. This Court expressly limited its *Bostock* opinion to Title VII and the specific question at hand, refusing to even "prejudge" whether sex-specific dress codes or bathrooms were permissible in even the *Title VII* context. 590 U.S. at 681; *see Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (explaining "the rule in *Bostock* extends no further than Title VII"). *A fortiori*, by its own terms, *Bostock* does not decide any Title IX question.

Second, "Title VII is a vastly different statute" than Title IX. *Jackson*, 544 U.S. at 168. Notably, Title IX allows—and sometimes requires—differentiation between

the sexes, unlike Title VII, which announces sex is "not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse*, 490 U.S. at 239; *see, e.g.*, *Meriwether*, 992 F.3d at 510 n.4 (explaining that "Title VII differs from Title IX in important respects," including that Title IX sometimes requires recipients to take "sex into account"); *Soule v. Connecticut Ass'n of Sch., Inc.*, 90 F.4th 34, 63 & n.8 (2d Cir. 2023) (en banc) (Menashi, J., concurring) (noting that "there are important differences between the two statutes," including the "fact" that "[w]hile an employer risks Title VII liability when it makes distinctions among employees based on sex, an education program risks Title IX liability when it *fails* to distinguish between student athletes based on sex"); *Adams*, 57 F.4th at 811 (highlighting that Title IX sometimes allows "differentiating between the sexes"). And the differences between the statutes do not end there.

As Chief Judge Sutton noted, the statutes also have "materially different language," App.727; *compare* 42 U.S.C. § 2000e.2(a)(1), *with* 20 U.S.C. § 1681(a), and were enacted pursuant to different powers, *compare Davis*, 526 U.S. at 640, *with Fitzpatrick v. Bitzer*, 427 U.S. 445, 452, 453 & n.9 (1976). Because Title IX was enacted under Congress's Spending Clause power, any conditions it imposes must be clear and unambiguous. *See, e.g.*, *Davis*, 526 U.S. at 640; *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *NFIB v. Sebelius*, 567 U.S. 519, 577 (2012). Any notion that Plaintiffs "could or should have been on notice" that discrimination based on gender identity constitutes discrimination based on biological sex is "untenable." *Adams*, 57 F.4th at 816. And that underscores *Bostock*'s inapplicability to Title IX. *Cf., e.g.*, *Rosa*

H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 656–57 (5th Cir. 1997) (concluding that the court could not "ignore that Congress acted here [in the Title IX context] under the spending power" and "should be reluctant to treat Title IX's anti-discrimination provisions in the same way that we treat Title VII's provisions").

Third, the employment context differs from the educational context—a context where biological sex will often be relevant. *See Soule*, 90 F.4th at 64 (Menashi, J., concurring) (explaining "context is important" when determining whether biological sex is relevant); *Davis*, 526 U.S. at 651 ("Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults."); *Adams*, 57 F.4th at 808. While biological sex may not be relevant to employment decisions, a person's biological sex can be relevant in the educational context because "equal educational opportunities for men and women necessarily requires differentiation and separation at times." *Texas*, 2024 WL 2947022, at *32.[9]

In any event, even if *Bostock* were applicable in the Title IX context, it still would not compel interpreting Title IX's general prohibition on sex discrimination as

[9] *See, e.g.*, *Soule*, 90 F.4th at 63 & n.8 (Menashi, J., concurring) (collecting cases showing recipients need to maintain sex-specific athletic teams so girls have equal opportunities to meaningfully compete); 34 C.F.R. §§ 106.43 ("If use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have that effect."); 106.34 (a)(3) ("Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls."); 106.34(a)(4) ("Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.")

prohibiting discrimination based on gender identity. *Bostock* simply held that "firing a homosexual or transgender employee qualifies as sex discrimination when the firing is 'because of' the employee's 'traits or actions' that the employer would otherwise tolerate in an employee of the opposite sex." *Texas*, 2024 WL 2947022, at *38 (quoting 590 U.S. at 660–61). The employers in *Bostock* engaged in sex discrimination when they fired men because of "traits or actions" (being attracted to men or presenting as a woman) that the employer tolerates in female employees. 590 U.S. at 660–61; *see L.W.*, 83 F.4th at 485. But that does not mean that adverse treatment based on grounds related to biological sex will *always* be prohibited sex discrimination.

An example bears this out. A religious student group would not be considering sex *at all* if it excluded students who claim a nonbinary gender identity from membership.[10] Instead, the group would not be tolerating the *same* trait—claiming a nonbinary gender identity—regardless of whether the excluded person is a boy or a girl. Because the trait that is not "tolerated" in the hypothetical is *identical* for both sexes, Title IX has "nothing to say" even if *Bostock* applied. 590 U.S. at 660.

[10] Based on guidelines from the World Professional Association for Transgender Health ("WPATH") on which the Rule relies, *see* 89 Fed. Reg. 33,819 n.90, "[n]onbinary is used as an umbrella term referring to individuals who experience their gender as outside of the gender binary." App.130. The term can be used as an umbrella term to refer to "people whose genders are comprised of more than one gender identity simultaneously or at different times (e.g., bigender), who do not have a gender identity or have a neutral gender identity (e.g., agender or neutrois), have gender identities that encompass or blend elements of other genders (e.g., polygender, demiboy, demigirl), and/or who have a gender that changes over time (e.g., genderfluid)." *Id.* It can also "function[ ] as a gender identity in its own right." *Id.*; *see* App.131 (explaining that "those who identify as eunuchs" are "part of the gender diverse umbrella," but that some view it as a "distinct gender identity with no other gender or transgender affiliation").

For any of these reasons, therefore, the Department cannot show that it is likely to succeed under a "straightforward *Bostock*" analysis.

b. It also was necessary for the district court to enjoin enforcement of § 106.10 and thereby prevent irreparable harm to Plaintiffs. Plaintiffs are unquestionably harmed by the redefinition of sex discrimination to include discrimination on grounds other than biological sex. *See Tennessee*, 104 F.4th at 613 (explaining that "[r]ecognizing new forms of discrimination 'substantially changes the experience' for all regulated entities, in terms of how to carry out their obligations"). To start, just consider Plaintiffs' increased obligations and compliance costs: Plaintiffs will need to spend time and incur costs to (1) revise policies; (2) revise training materials; (3) train employees on the changes; (4) compel employees to report anything that *may* constitute discrimination based on one of the new grounds; (5) take prompt and necessary responsive action; and (6) maintain records for seven years that document their response to the discrimination complaints based on new grounds. *See* 89 Fed. Reg. at 33,886, 33,888–89. Indeed, even the Rule itself admits there will be "costs associated" with the expansion of Title IX's scope, 89 Fed. Reg. at 33,877, which Plaintiffs' declarations corroborate, *see* App.190–298, App.427–441.

Moreover, even if the de minimis harm provision remains enjoined, § 106.31(a)(2), Plaintiffs will be required to treat persons consistently with their self-professed gender identity—whatever their "sense of their gender" is, 89 Fed. Reg. 33,809—and suffer all the attendant consequences if § 106.10 is not also enjoined. *See, e.g.*, App.255–64. This is clear on the face of § 106.10 and § 106.31(a)(l), which

(a) equate gender-identity discrimination with sex discrimination and (b) prohibit sex discrimination. The Rule additionally indicates that, while the de minimis harm provision provides "more detail," the prohibition on gender-identity discrimination in § 106.10 *itself* requires recipients to generally treat persons consistently with their claimed gender identity:

> *To comply with the prohibition on gender identity discrimination*, *a recipient* must not treat individuals more or less favorably based on their gender identity and, as described in more detail in the discussion of § 106.31(a)(2), *generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity*.

89 Fed. Reg. at 33,809 (emphases added). That means, if some sort of partial stay were granted, Plaintiffs would continue to be required to treat persons consistently with their self-professed gender identity as opposed to their biological sex—including for bathrooms, locker rooms, and pronouns—or else face enforcement actions and private litigation. *See id.*; U.S. Dep't of Justice and U.S. Dep't of Educ., *Confronting Anti-LGBTQI+ Harassment in Schools* (June 23, 2021), https://tinyurl.com/394fyph8 (indicating that refusing to refer to students by whatever pronouns they choose or barring a biological male who claims to be a "transgender high school girl" from using the girls' restroom or trying out for the girls' cheerleading team is gender-identity discrimination).

To reiterate the point: Plaintiffs still would be required (a) to allow males who claim a female gender identity into girls-only bathrooms and locker rooms, and (b) to compel staff and students to use whatever pronouns and neopronouns are demanded. *See* App.133–34 (providing examples of neopronouns, which are "pronouns besides

the ones most commonly used in a particular language"); App.130 (explaining that some nonbinary individuals use neopronouns). Plaintiffs would also need to provide gender-neutral bathrooms (at the very least) or bathrooms for all the different gender identities to avoid violating § 106.10's prohibition on treating individuals with a female or male gender identity more favorably than individuals with a nonbinary gender identity. *See* 89 Fed. Reg. at 33,809; App.130 ("Recent studies suggest nonbinary people comprise roughly 25% to over 50% of the larger transgender population, with samples of youth reporting the highest percentage of nonbinary people."); *see also supra* n.10 (explaining nonbinary can be an "umbrella term" to refer to several different gender identities or "a gender identity in its own right").

c. The Department has no rebuttal to Plaintiffs' compliance-cost harms, so they continue to ignore them and then (i) invoke a red herring; and (ii) seek to artificially cabin § 106.10's meaning. Each tactic fails.

First, the Department argues (at 29) that Plaintiffs will suffer no harm from § 106.10 because Plaintiffs do not desire to bar students from, for example, participating in a science fair based on students' self-professed gender identity. That Plaintiffs do not wish to bar students from educational opportunities like science fairs based on gender identity (or based on sex stereotypes, sex characteristics, pregnancy or related conditions, or sexual orientation), however, does not mean § 106.10 does not cause Plaintiffs harm. To the contrary, Plaintiffs will still be harmed by the dramatic expansion of their compliance costs, obligations, and liability, *see supra* pp. 44–45—not to mention the irreparable harm that Plaintiff States will suffer from the

"invasions of state sovereignty and coerced compliance." *Kentucky v. Biden*, 23 F.4th 585, 612 n.19 (6th Cir. 2022). If anything, the Department's red herring examples serve only to undermine its related argument that a stay is necessary to prevent (alleged) discrimination.

Second, the Department remarkably suggests (at 29–31) that the Rule's prohibition on gender-identity discrimination in § 106.10 does not actually require Title IX recipients to treat a person in accordance with their gender identity, at least insofar as bathrooms, locker rooms, and pronouns are concerned. That is belied by the Rule itself (which homes that general requirement in § 106.10 itself) and the Department's past positions regarding the meaning of sex discrimination (which target pronoun-related discrimination or harassment). *See* 89 Fed. Reg. at 33,809; U.S. Dep't of Justice and U.S. Dep't of Educ., *Confronting Anti-LGBTQI+ Harassment in Schools* (June 23, 2021), https://tinyurl.com/394fyph8; App.118–19; *see also* App.121–26. That the de minimis harm provision provides "more details" and is "distinct" from § 106.10 does not negate § 106.10's overarching requirement that a recipient "generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity." 89 Fed. Reg. at 33,809, 33,848.

Nor can the Department overcome this reality with a representation (at 30–31) that, if a partial stay is granted, the Department will not take "enforcement actions" based on the de minimis harm provision's requirement that "transgender students be permitted to access sex-separated spaces consistent with their gender

identity." This eleventh-hour representation is ambiguous at best and, even read generously, will not prevent Plaintiffs' harms. For example, Plaintiffs would still be bound to process and respond to complaints alleging gender-identity discrimination where male students who identify as females are denied access to girls-only bathrooms. And Plaintiffs would still be required to demolish sex-specific bathrooms or construct new bathrooms to accommodate the limitless number of gender identities. *See supra* pp. 46–47.

For these reasons, the Department again fails to demonstrate a likelihood of success on the merits, which is reason enough to deny its stay application. *See Biden v. Texas*, 142 S. Ct. 926, 926 (2021).

B. The Department Will Not Suffer Irreparable Harm Absent A Stay.

In all events, a stay is independently unwarranted because the Department has no claim to irreparable harm—and that is perhaps the easiest way to dispose of this application under the ordinary factors.[11]

The Department's only claimed irreparable harm (at 38) is that the injunction interferes with its ability to enforce Title IX to prevent discrimination. For support, the Department cites *Maryland v. King*, 567 U.S. 1301 (2012). But that "is a most curious citation for the Department to lean on," App.688, because it is about

[11] The Department's attempt (at 38) to "merge" all three remaining stay factors is wrong. The third and fourth factors "merge when the [federal] Government is the opposing party," *Nken*, 556 U.S. at 435, but not when the federal government is "applying for a stay," *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 353 (5th Cir. 2022) (per curiam) (citing *Nken*, 556 U.S. at 435).

irreparable injury to a *State* when a democratically enacted *state statute* is enjoined by a federal court, *see King*, 567 U.S. at 1303. *King* is therefore inapposite here where the Department is enjoined from implementing a unilateral, bureaucratically issued *rule* that subverts a federal statute and itself conflicts with state laws. *See* App.721 (explaining that an agency 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"). The Department has no irreparable injury from APA litigation working as it is intended—to "check" bureaucrats that have exceeded statutory authority. *Cf. Loper Bright*, 2024 WL 3208360, at *12; *see Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020) (alleged interference with the executive branch's implementation of a statute is "not irreparable")

In any event, "the preliminary injunction does not eliminate protections against discrimination." App.690. Nor "does [it] prevent the [Department] from enforcing Title IX or longstanding regulations to prevent sex discrimination." App.721. The injunction simply prevents the Department from enforcing the new, not-yet-effective Rule (in four Plaintiff States) that (a) has never been in effect and thus has generated no reliance interests and (b) subverts rather than implements Title IX. *See* App.690 (explaining the preliminary injunction "merely maintains the status quo pending a thorough judicial review of the Final Rule's legality"). Accordingly, "[t]he protections under the *existing* regulatory framework remain in place, continuing to provide a mechanism for addressing discrimination." *Id.*

The Department also cannot explain how it will suffer irreparable harm from

delaying the Rule's effective date when the Department *itself* delayed the Rule's issuance multiple times. *See* App.305. As Judges Jones and Duncan recognized below, the Department "can hardly be said to be injured by putting off the enforcement of a Rule it took three years to promulgate after multiple delays." App.721. If the Department is right that delaying the Rule's effective date is irreparable harm, then the Department itself engaged in irreparable self-harm when it delayed the Rule's issuance. This incoherence further demonstrates the Department will suffer no irreparable harm absent a stay. So too does the Department's failure (as of the time of this submission) to even file a notice of appeal, much less file a stay motion, in related cases where district courts issued similar injunctions against enforcement of the entire Rule. *See* Docket, *Texas*, No. 2:24-CV-86-Z (N.D. Tex.); Docket, *Carroll Indep. Sch. Dist.*, No. 4:24-cv-461 (N.D. Tex.); Docket, *Arkansas*, No. 4:24-CV-636 RWS (E.D. Mo.).

C. The Equities Favor Plaintiffs Who Will Suffer Irreparable Harm From A Stay.

In fact, the potential irreparable harm at issue here threatens only Plaintiffs, who would suffer from any "partial" stay. As the Fifth Circuit emphasized, Plaintiffs have shown "beyond peradventure in affidavits and submissions that an order allowing the Rule to remain in place pending appeal would inflict enormous administrative costs and great legal uncertainty on recipients of federal funds." App.720. Indeed, a partial stay "would result in substantial and immediate harm to the States, their educational institutions, and all those who rely on the services they provide." App.693.

For starters, a partial stay green-lighting the Rule's dramatic expansion of what constitutes sex discrimination would cause Plaintiffs to suffer the same irreparable harms that necessitated preliminary relief in the first place. *See* App.697–98 (concluding that, "[e]ven if only portions of the Final Rule took effect," Plaintiffs would still suffer "irreparable harm" and have "uncollectable compliance costs"). Plaintiffs would still be burdened by far greater obligations and compliance costs attendant to the expansion and would face increased risks of administrative investigations and private civil litigation. *See supra* pp. 17, 44. And, because Plaintiffs would still be subject to the unlawful gender-identity mandates, *see supra* pp. 44–46, Plaintiff States and Plaintiff School Boards would face the same coercion to change state laws and school board practices to avoid losing a significant amount of federal funding, *see, e.g.*, *Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018) (interference with States' authority "clearly inflicts irreparable harm"); *Tennessee*, 104 F.4th at 613 (concluding plaintiff States would suffer irreparable harm absent an injunction because "States with conflicting laws will be hampered in their ability to enforce their laws, and the States will continue to face pressure to change their laws to avoid legal consequences"); App.256–60; App.430; App.165–88. Plaintiff School Boards would also still need to begin the expensive process of designing, modifying, and constructing bathrooms and locker rooms to comply with the Rule while attempting to mitigate its harmful effects on privacy and safety. *See, e.g.*, App.261–62; App.300–03.

A partial stay would also injure Plaintiffs in new ways. It would, for example,

compel Plaintiffs to expend time and resources—on an even shorter time frame on the eve of a new school year[12]—to understand their obligations under a blue-penciled Rule, revise policies, and train employees. *See* App.721 (noting Plaintiffs would have less time "to digest and comply" with a "behemoth Rule" with even more uncertainty about how to implement a "partially" enjoined Rule); App.729 (questioning whether schools even could "properly train their teachers on compliance in this unusual setting with so little time before the start of the new school year").

Additionally, Plaintiffs will face "substantial administrative and operational challenges" in attempting to implement a partially enjoined Rule "without a clear resolution of its legality." App.691. Plaintiffs would be harmed by the "[l]egal uncertainty" that "would abound as to a multitude of matters like the extent of compelled recordkeeping, sufficiency of 'complaints' of sex discrimination/harassment, and obligations to monitor 'offensive' speech and behavior under any partially implemented Rule." App.721; *see* App.691 ("Requiring schools to comply with some provisions, including those which derive meaning from enjoined provisions, will require schools to embark on the highly speculative and

[12] Plaintiff School Boards have classes starting in early August. *See, e.g., Red River Parish Public Schools 2024-2025 School Calendar*, https://tinyurl.com/bp93bar5 (teachers return August 1 and students return August 5); *Natchitoches Parish Schools: 2024-2025 Calendar*, https://tinyurl.com/mr27b8rd (teachers return to school on August 6 and students return on August 7); *DeSoto Parish Schools: 2024-2025 School Calendar*, https://tinyurl.com/4sufuak8 (teachers return on August 5 and students return on August 8); *Approved 2024/25 Sabine Parish School Calendar*, https://tinyurl.com/mvhrn62d (teachers return August 5 and students return August 8); *2024-2025 Bossier Schools Calendar*, https://tinyurl.com/d3ae89cn (teachers return August 6 and students return August 8).

costly endeavor of overhauling existing policies and training programs while attempting to predict the Final Rule's ultimate form."). A partial stay would also create "considerable" "risk of legal conflict" and "force States to navigate a complex and potentially contradictory regulatory landscape, attempting to reconcile existing state laws and policies with the Final Rule's mandates." App.691.

Furthermore, a partial stay would uniquely double Plaintiffs' unrecoverable implementation and compliance costs if the temporary judicial rewriting of the Rule does not track an *identical* permanent rewriting at final judgment. In those circumstances, 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." App.721. However the Court slices the equities, therefore, the equities plainly are on Plaintiffs' side.

D. The Public Interest Weighs Against A Stay.

Finally, the public interest weighs against the Department's stay request. As one of the various courts to reject this request explained, a partial stay—whatever that looks like—would undermine the "public interest in upholding regulatory clarity, protecting constitutional rights, and avoiding unnecessary upheaval in schools." App.693.

The Department cannot seriously contest that a partial stay would sow widespread confusion. Teachers would only have days, at most, before school starts, to understand their obligations under the judicially blue-penciled Rule. And that uncertainty and harm would equally affect parents and students. In particular, due

to uncertainty about how a partially enjoined Rule would even operate—especially with respect to First Amendment rights and parental rights—parents would be unable to make informed decisions about whether public school remains the best option for their family. And in the same vein, the uncertainty would also "inevitably" chill "basic First Amendment freedoms," App.692, which is contrary to the public interest, *see, e.g.*, *Keyishian v. Bd. of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.'"); *Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). After all, injunctions that "protect[] First Amendment freedoms are always in the public interest." *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (quoting *Christian Legal Soc'y v. Walker,* 453 F.3d 853, 859 (7th Cir. 2006)).

A partial stay would also hurt the public's interest in the enforcement of democratically enacted state laws, because the Rule "undermines legislatively enacted State statutes with federal regulations imposed by unelected bureaucrats in Washington, D.C." App.689. Moreover, allowing the Department to enforce portions of the unlawful and arbitrary and capricious Rule would undermine the public interest "in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (quotation omitted).

Finally, the requested partial stay would subvert the public interest in protecting children. That is because, if a partial stay is granted, Plaintiffs would still

generally not be allowed to "prevent a person from participating in [their] education program or activity consistent with the person's gender identity." 89 Fed. Reg. at 33,809. Accordingly, a partial stay would be harmful to children—it would harm both children who do not wish to share bathrooms and locker rooms with adults and children of the opposite sex *and* children struggling with gender-identity issues. *See* App.29 (discussing evidence that "social transitioning can be harmful to a child's mental health and is a pathway to dangerous medical procedures that a growing number of experts now publicly acknowledge 'will not be the best way to manage their gender-related distress'"); App.448–97. The public interest, therefore, also weighs against this Court granting the extraordinary relief requested by the Department.

CONCLUSION

The status quo is a world in which the Rule has never been in effect, is not currently in effect, and will not be in effect for the immediate future. That is the world today under the district court's injunction. The Court should deny the Department's stay application and reject its request to destroy the status quo as children begin to return to their classrooms.

July 26, 2024

Respectfully submitted,

ELIZABETH B. MURRILL
Attorney General
J. BENJAMIN AGUIÑAGA
Solicitor General
Counsel of Record
AUTUMN HAMIT PATTERSON
Special Assistant Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third St.
Baton Rouge, LA 70802
(225) 506-3746
AguinagaB@ag.louisiana.gov

Counsel for Respondents State of Louisiana, Louisiana Department of Education, and 17 Parish School Boards

LYNN FITCH
Attorney General of Mississippi

SCOTT G. STEWART
Solicitor General
JUSTIN L. MATHENY
Deputy Solicitor General
MISSISSIPPI ATTORNEY GENERAL'S OFFICE
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3680

Counsel for Respondent State of Mississippi

AUSTIN KNUDSEN
Attorney General of Montana

CHRISTIAN B. CORRIGAN
Solicitor General
PETER TORSTENSEN
Deputy Solicitor General
MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, Montana 59601
(406) 444-2707

Counsel for Respondent State of Montana

RAÚL LABRADOR
Attorney General of Idaho

ALAN HURST
Solicitor General
JOSH TURNER
Chief of Constitutional Litigation and Policy
OFFICE OF THE ATTORNEY GENERAL OF IDAHO
700 W. Jefferson Street, Suite 201
P.O. Box 83720
Boise, Idaho 83720
(208) 334-2400

Counsel for Respondent State of Idaho

DONALD A. DAUGHERTY, JR.
Senior Counsel, Litigation
PAUL ZIMMERMAN
Senior Counsel, Policy and Regulation
MARTHA A. ASTOR
Counsel, Litigation
DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES
1455 Pennsylvania Avenue, NW, Suite 400 Washington, DC 20004
(414) 559-6902

Counsel for Respondent States