No. 16-4117
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT, ET AL., Third-Party Defendants-Appellants, v. U.S. DEPARTMENT OF EDUCATION, ET AL., Defendants, and JANE DOE, A MINOR BY AND THROUGH HER LEGAL GUARDIANS JOYCE AND JOHN DOE Intervenor-Third Party Plaintiff-Appellee.	:	On Appeal from the United States District Court for the Southern District of Ohio at Columbus District Case No. 2:16-cv-00524

AMICUS BRIEF OF OHIO, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, KANSAS, LOUISIANA, MISSOURI, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND WEST VIRIGINIA IN SUPPORT OF THIRD-PARTY DEFENDANTS-APPELLANTS

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STATEMENT OF *AMICUS* INTEREST AND INTRODUCTION

The States that file this *amicus* brief have a strong interest in maintaining state and local control over the operation of their public schools consistent with constitutional structures and protections, and in preserving both the horizontal and vertical separation of powers that the Constitution provides to enhance the liberty of all citizens. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."); *Bond v. United States*, 564 U.S. 211, 222 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

The States believe that local communities are better equipped than Washington regulators to advance the important dignity and privacy interests of their students. And our Constitution provides that national policy of the sort made by the district court's injunction in this case may be achieved only through legislation passed by Congress and submitted to the President. The Supreme Court has emphasized repeatedly that federal officials may not use government spending programs to impose conditions on state and local governments where Congress has not spelled out such requirements clearly and explicitly. Here, far from mandating

the bathroom policies that the injunction's view of Title IX would impose on local schools, Congress in fact has specified that its laws shall not be read to bar schools from providing separate intimate living facilities. The States thus file this *amicus* brief in support of the Third-Party Defendants-Appellants (collectively, the "School District") because the law leaves these sorts of policy choices to local schools to resolve in what they conclude is the most appropriate manner respecting the needs, privacy rights, and dignity of all students. *See* Fed. R. App. P. 29(a)(2).

REGULATORY BACKGROUND

Title VII of the Civil Rights Act of 1964 prohibited any discriminatory "employment practice . . . because of . . . sex." Pub. L. 88-352, § 703(a); 78 Stat. 241, 255 (1964). Title IX was added in 1972. It provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a); *see* Pub. L. 92-318, § 901(a); 86 Stat. 235, 373 (1972).

Title IX also contained various clarifying exemptions, ranging from military institutions, to beauty pageants, to fraternities and sororities, to YMCA and YWCA. *See* 20 U.S.C. § 1681(a)(1)-(8). As relevant here, privacy concerns received special emphasis in a separate section:

> Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

20 U.S.C. § 1686. Regulations issued in the 1970s clarified that "living facilities" within the meaning of this safe harbor included "toilet, locker room, and shower facilities." 34 C.F.R. § 106.33; *see* 39 Fed. Reg. 22228-30 (June 20, 1974).

From that time until January 2015, federal agencies provided "no interpretation as to how § 106.33 applied to transgender individuals." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 722 (4th Cir. 2016), *vacated*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017). An Office of Civil Rights opinion letter then opined for the first time that schools must '"treat transgender students consistent with their gender identity'" whenever providing separate bathroom facilities. *Id*. at 715 (citation omitted). The Fourth Circuit, deferring to that interpretation of the agency's regulation under *Auer v. Robbins*, 519 U.S. 452 (1997), held that the letter must be "accorded controlling weight." *Gloucester Cty.*, 822 F.3d at 723. Soon after—without notice and comment—a "Dear Colleague Letter" from the U.S. Department of Education and Department of Justice charged schools to "allow transgender students access to" restrooms, locker rooms, and housing and overnight accommodations "consistent with their gender identity" or risk losing Title IX funding. May 2016 Dear Colleague Letter, *available at* https://www.justice.gov/opa/file/850986/download.

After staying the Fourth Circuit's decision, the Supreme Court agreed to review *Gloucester County*. A lower court also issued a nationwide stay of the new guidance. *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (excluding certain pending cases). After the change in federal administrations, the federal agencies issued a new letter "withdraw[ing] and rescind[ing]" both earlier letters. Letter, 6th Cir. Doc.41-2, Ex. A. The Supreme Court therefore vacated the Fourth Circuit's opinion and remanded the case. *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017).

ARGUMENT

I. THE DISTRICT COURT IGNORED THE "CLEAR-STATEMENT RULE" WHEN IT INTERPRETED TITLE IX TO BAR SCHOOLS FROM PROVIDING STUDENTS WITH BATHROOMS DESIGNATED BY THEIR BIOLOGICAL SEX

The School District's opening brief illustrated that Title IX's text *unambiguously allows* local school districts to provide students with bathrooms based on their biological sex. Br. of Third-Party Defendants-Appellants, at 17-37. This *amicus* brief highlights why the Court must rule for the School District under the longstanding "clear-statement rule" even if this Court believes that Title IX contains some ambiguity on this point.

A. As One Example Of The General Clear-Statement Rule, The Federal Government May Impose Only *Unambiguous* Conditions On Funds Disbursed To The States Under Its Spending Power

To implement the Constitution's federalism design, the Supreme Court has repeatedly invoked a "clear-statement rule" when interpreting federal statutes that

implicate traditional state authority. As relevant here because Title IX was passed under Congress's Spending Power, this rule requires that Congress be *unambiguous* as to any conditions imposed on federal funds granted to the States.

1. The "clear-statement rule" of statutory interpretation implements the Constitution's federalism design

"It is incontestible that the Constitution established a system of 'dual sovereignty'" between the federal government and the States. *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). On the one hand, Article I delegates to Congress "limited powers," *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2577 (2012) (Roberts, C.J., op.), and the Supremacy Clause gives Congress the ability to preempt state law so long as it acts within those powers, *Gregory*, 501 U.S. at 460. On the other hand, the States retain broader police powers to take all actions that they deem necessary for the public welfare, including "punishing street crime, *running public schools*, and zoning property for development, to name but a few." *NFIB*, 132 S. Ct. at 2578 (Roberts, C.J., op.) (emphasis added).

"By splitting the atom of sovereignty" in this manner, *Alden v. Maine*, 527 U.S. 706, 751 (1999) (internal quotation marks and brackets omitted), the Constitution's federalism structure enhances both personal liberty (freedom against government) and political liberty (freedom to govern oneself). *See Bond v. United States*, 564 U.S. 211, 221-22 (2011). With respect to the former, "[f]ederalism . . .

protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* With respect to the latter, federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society," "increases opportunity for citizen involvement in democratic processes," and "allows for more innovation and experimentation in government." *Gregory*, 501 U.S. at 458.

This system of dual sovereignty and its liberty-protecting purpose have long affected the manner in which the Supreme Court interprets federal law. If federalism's "'double security' is to be effective," the Supreme Court has noted, "there must be a proper balance between the States and the Federal Government." *Id.* at 459. Yet the Supremacy Clause gives the federal government a "decided advantage" to tip this balance. *Id.* at 460. In order to protect the balance from unintentional congressional encroachment, therefore, the Court has long "refer[red] to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014); *see* Laurence Tribe, *American Constitutional Law* § 6-25, p.480 (2d ed. 1988).

Under this settled rule, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (citation omitted). This is because, as Justice

Frankfurter noted, "[w]hen the Federal Government takes over local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [have been] reasonably explicit." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 540 (1947).

This clear-statement rule manifests itself in many ways. Indeed, "there is a raft of more recent cases and contexts in which the clear statement rule has been applied." *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 572 (6th Cir. 2013) (en banc) (Clay, J., concurring) (citing cases and noting that the "clear statement rule 'implies a special substantive limit on the application of [even] an otherwise unambiguous mandate'" (citation omitted)). The Supreme Court, for example, has invoked the rule so as not "to construe federal law in a manner that interferes with 'States' arrangements for conducting their own governments." *Sheriff v. Gillie*, 136 S. Ct. 1594, 1602 (2016) (quoting *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004)); *see, e.g.*, *United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty.*, 842 F.3d 407, 416-17 (6th Cir. 2017). The Supreme Court has likewise invoked the rule to create a "presumption against preemption" of state law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). And it has invoked the rule to avoid a broad interpretation of federal criminal laws that would "effect a significant change in the sensitive relation

between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see Bond*, 134 S. Ct. at 2089-90.

2. Because Title IX was passed under Congress's Spending Power, this Court should read it as imposing only those statutory conditions on the States that are *unambiguous*

As relevant here, Congress passed Title IX under its spending power. This case thus implicates a specific version of the general clear-statement rule that applies to Spending Clause legislation.

a. The Constitution grants Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. The Supreme Court has "recognized that Congress may use this power to grant federal funds to the States, and may *condition* such a grant upon the States' 'taking certain actions that Congress could not require them to take.'" *NFIB*, 132 S. Ct. at 2601 (Roberts, C.J., op.) (citation omitted; emphasis added). Thus, "[o]ne of the distinguishing features of the spending power is that it allows Congress to exceed its otherwise limited and enumerated powers by regulating in areas that the vertical structural protections of the Constitution would not otherwise permit." *Haight v. Thompson*, 763 F.3d 554, 568 (6th Cir. 2014).

As long as the States voluntarily *consent* to these funding conditions, the conditions may sometimes be imposed even if they would exceed Congress's

Article I powers. *Id.* In this way, "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). But the States cannot voluntarily consent to what would otherwise be unconstitutional conditions if the conditions are themselves vague or unclear as to their scope. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

Hence, the clear-statement rule for those funding conditions: The Supreme Court has consistently held that "if Congress intends to impose a condition on the grant of federal moneys, it must do so *unambiguously*." *Pennhurst*, 451 U.S. at 17 (emphasis added); *e.g.*, *Arlington*, 548 U.S. at 296; *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). That is, "Congress must speak with clarity—'clearly,' 'expressly,' 'unequivocally,' 'unambiguously'"—to impose such a condition. *Haight*, 763 F.3d at 568 (quoting *Sossamon v. Texas*, 563 U.S. 277, 283-92 (2011)). This clear-statement rule applies broadly—"[c]larity is demanded *whenever* Congress legislates through the spending power." *Id.*; *see also Sch. Dist. of the City of Pontiac v. Sec'y of the U.S. Dep't of Educ.*, 584 F.3d 253, 271 (6th Cir. 2009) (equally divided en banc Court) (Cole, J., op.).

Two examples illustrate the rule's effect. Example One: Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) under its spending power. *Sossamon*, 563 U.S. at 289. A remedial provision of RLUIPA authorizes private actions seeking "appropriate relief" for violations of the statute's commands. *Id.* at 282. The Supreme Court refused to interpret the phrase "appropriate relief" as encompassing a request for money damages because that phrase did not clearly waive the States' sovereign immunity against damages actions. *Id.* at 283-92; *see Haight*, 763 F.3d at 568-69 (extending *Sossamon* to suits against state officials in their individual capacities). Example Two: Congress also passed the Individuals with Disabilities Education Act (IDEA) under its spending power. *Arlington*, 548 U.S. at 295. An IDEA fee-shifting provision authorizes courts to "award reasonable attorneys' fees as part of the costs" in suits brought to enforce the statute. *Id.* at 293. The Supreme Court refused to interpret this provision as allowing courts to shift a plaintiff's expert fees to local school districts because the text did not *unambiguously* include those fees as part of the recoverable costs. *Id.* at 296-303.

b. This version of the clear-statement rule applies to the requirements that Title IX imposes on the States and their local school districts. To begin with, the Supreme Court has "repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause." *Davis Next Friend LaShonda*

D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 640 (1999); *see Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005). That is so because Title IX conditions "an offer of federal funding on a promise by the recipient not to discriminate." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

In addition, Title IX implicates a prototypical area of traditional state authority. The States "historically have been sovereign" in the educational context. *United States v. Lopez*, 514 U.S. 549, 564 (1995). And "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken v. Bradley*, 418 U.S. 717, 741 (1974); *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973). Thus, the Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969). All "issues of public education," including school curriculum and discipline, "are generally 'committed to the control of state and local authorities.'" *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005) (citation omitted).

The Supreme Court, therefore, has repeatedly held that Congress must have spoken "'with a clear voice'" before courts will interpret a particular funding condition to apply against the States under Title IX. *Davis*, 526 U.S. at 640

(quoting *Pennhurst*, 451 U.S. at 17). As a result of this clarity requirement, for example, the Court has held that under Title IX school districts may be held liable for a teacher's harassment of a student *only* if the appropriate authorities had knowledge of the harassment, not on a respondeat superior theory. *Gebser*, 524 U.S. at 288-90; *see Barnes*, 536 U.S. at 187. And, in a case implicating the remedies available under Title VI of the Civil Rights Act (which the Court has interpreted interchangeably with Title IX, *see Barnes*, 536 U.S. at 185), the Court has held that punitive damages are not available for violations. *See id.* at 189. School districts would not have *clear* notice that they could be subject to punitive damages merely by accepting federal funds, the Court reasoned, because "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract." *Id.* at 187.

B. All Agree That Title IX Does Not *Unambiguously* Prohibit Local School Districts From Providing Students With Bathrooms Designated By Their Biological Sex

The district court premised its statutory ruling on the view that Title IX is ambiguous—and thus reinforced the lack of any clearly stated legislative prohibition on local schools designating bathrooms or showers by biological sex. Op., Doc. 95, PageID#1756-57 ("The Court finds that the term 'sex' in Title IX and its implementing regulations regarding sex-segregated bathrooms and living facilities is ambiguous . . . ."); *see also id.* at PageID#1756 ("For the Court to find

that the statute was ambiguous, it need not find that the agencies' interpretation is the *only* plausible reading of 'sex' in the statute, but, rather, that it is *one* of the plausible readings"). The district court's own analysis therefore disclaimed the sort of legislative clear statement that would be necessary to uphold the statutory reading that the district court adopted.

Because the clear-statement rule applies under Title IX, this Court must conclude that the statute *unambiguously prohibits* school districts from dividing bathrooms based on biological sex in order to uphold the district court's preliminary injunction in this case. That is, the Court must find that Title IX's text "furnishes *clear notice*" that school districts must grant students bathroom access based on their gender identity rather than their biological sex. *See Sch. Dist. of the City of Pontiac*, 584 F.3d at 271 (Cole, J., op.) (emphasis added). Both text and precedent prove that Title IX does not contain this required clear notice.

1. *Text.* Since its adoption 45 years ago in 1972, the statute has provided that no person shall be discriminated against "on the basis of sex" under any federally funded education program. 20 U.S.C. § 1681(a). Yet the statute has just as long contained a safe harbor from this rule: Title IX specifies that nothing in its provisions "shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities *for the different sexes*." 20 U.S.C. § 1686 (emphasis added). And regulations have long explained

this safe harbor: "A recipient may provide separate toilet, locker room, and shower facilities *on the basis of sex*, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33 (emphasis added); *cf.* 34 C.F.R. § 106.61 (providing that schools may consider "an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex").

The Court must rule for the School District so long as it is reasonable to conclude that "sex" means "biological sex" within the meaning of Title IX's safe harbor (and its implementing regulations). That interpretation is, to say the least, a reasonable one. As the School District notes, *see* Br. of Third-Party Defendants-Appellants, at 26-28, at the time of Title IX's enactment (and well beyond), nearly every dictionary defined "sex" with regard to biological distinctions between males and females. *See, e.g.*, *Gloucester Cty.*, 822 F.3d at 736 (Niemeyer, J., dissenting) (citing dictionary definitions). When Congress seeks to legislate with respect to "gender identity," by contrast, it uses that phrase. The Violence Against Women Act, for example, bars discrimination based on "sex" *or* "gender identity." 42 U.S.C. § 13925(b)(13)(A).

2. *Precedent*. No court has ever understood Title IX *unambiguously* to bar school districts from using biological sex when providing students with bathrooms. To the contrary, several courts have held that Title IX permits a school to reserve

group locker rooms and bathrooms for individuals of the same biological sex. *See, e.g.*, *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 672-73 (W.D. Pa. 2015) ("the University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination"); *Doe v. Clark Cty. Sch. Dist.*, No. 2:06-cv-1074, 2008 WL 4372872, at *4 (D. Nev. 2008) ("Accordingly, Plaintiffs' Title IX [school restroom] claim must fail"). Even in the Title VII employment setting (which lacks Title IX's safe harbor), courts have held that company rules precluding a pre-operative transsexual woman from using the women's public restroom did not constitute unlawful discrimination. *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 999-1000 (N.D. Ohio 2003), *aff'd*, 98 F. App'x 461 (6th Cir. 2004).

Conversely, recent decisions that have found it unlawful under Title IX to divide bathrooms based on biological sex have themselves *conceded* that the statute is at least ambiguous on this point. The vacated Fourth Circuit decision noted that Title IX's regulations in this area are "ambiguous," and that the federal government's since-withdrawn prior "interpretation, *although perhaps not the intuitive one*," is one way to look at things and not "plainly erroneous." *See Gloucester Cty.*, 822 F.3d at 721-22 (emphasis added); *see also id.* at 730 (Niemeyer, J., dissenting) (noting that "the majority's opinion, for the first time

ever, holds that a public high school may not provide separate restrooms and locker rooms on the basis of biological sex"). And, as noted, the district court in this case followed this ambiguity-based rationale. Op., Doc.95, PageID#1756-57.

If anything, by rewriting Title IX in this fashion decades after its enactment, these decisions create grave constitutional questions. The Supreme Court's "cases have recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives." *NFIB*, 132 S. Ct. at 2602 (Roberts, C.J., with Breyer and Kagan, JJ.). Respecting the limitations inherent in the contract-based nature of Spending Clause legislation "is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Id.* This is particularly true when the terms of the "contract" seemingly change decades later. Thus, even beyond requiring a clear statement by Congress to impose federal objectives on States through strings attached to money, courts will also "scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a 'power akin to undue influence.'" *Id.* (citation omitted). Such conditions cannot be used as "a gun to the head." *Id.* at 2604. The Supreme Court, for example, struck down the Affordable Care Act requirement that all States must expand their Medicaid programs at the risk of losing *all* Medicaid funding because that condition

amounted to "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." *Id.* at 2605.

In this case, the district court's newfound interpretation of Title IX would take more than one-fourteenth of the Highland school system's entire budget, cutting off funding for programs ranging from special education to reduced-cost lunches (and *not* related to programs for building facilities or bathroom maintenance). Compl., Doc.1, ¶¶ 128-129, PageID#27-28. Here, as in *NFIB*, the threat is not to make simply a small percentage cut in federal funding for the programs at stake, but to cut "*all* of it." *See* 132 S. Ct. at 2604 (Roberts, C.J., op.). The statute can and should be interpreted to avoid this result.

C. The District Court's Contrary Interpretation Is Now Outdated, And Was Mistaken In Any Event

The district court could reach a contrary result only by ignoring this clear-statement rule. *See* Op., Doc.95, PageID#1749-59. It did so by relying on two factors to hold that Title IX prohibits school districts from providing bathrooms designated by biological sex: (1) the court held that the federal government's since-withdrawn guidance interpreting Title IX's regulations was entitled to deference under *Auer*, and (2) the court held that this interpretation was supported by this Court's Title VII cases concerning gender nonconformity.

Both arguments are mistaken.

1. Auer *Deference*. This Court should reject the district court's decision to defer to the federal government's guidance about Title IX's regulations. Most obviously, the district court's decision is now outdated. The federal government withdrew the guidance documents on which the district court relied. When doing so, it noted that the documents did not "contain extensive legal analysis or explain how [their] position [was] consistent with the express language of Title IX, nor did they undergo any formal public process." Letter, 6th Cir. Doc.41-2, Ex. A. The federal government also recognized that "there must be due regard for the primary role of the States and local school districts in establishing educational policy." *Id.* Because the federal government's position has now changed, the preliminary injunction cannot be supported under *Auer*.

Regardless, the district court's (implicit) conclusion that agency deference under *Auer* trumps the clear-statement rule conflicts with this Court's cases. *See, e.g.*, *Tennessee v. FCC*, 832 F.3d 597, 612 (6th Cir. 2016). Federal courts defer to an agency's view of a regulation (under *Auer*) or of a law (under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)) *only if* the regulation or law is *ambiguous*. And to decide whether a statute or regulation is unambiguous (so as to defeat administrative deference) or ambiguous (so as to trigger it), the Court applies the usual "canon[s] of construction." *Tennessee*, 832 F. 3d at 612. A regulation that is ambiguous in the abstract may become unambiguous after

considering those canons, including the various "clear statement rule[s]." *Id.* In this way, "[a]ll manner of presumptions, substantive canons and clear-statement rules take precedence over conflicting agency views." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring).

This Court's recent decision in *Tennessee* illustrates this principle well. That case considered whether an FCC order could validly preempt a state law prohibiting municipalities from offering broadband service outside of their territories. 832 F.3d at 600. In *Nixon*, the Supreme Court had previously held that the Telecommunications Act of 1996 allowed a State to bar its municipalities from offering telecommunications services altogether. 541 U.S. at 129. When doing so, the Court invoked the clear-statement rule because a reading of the act that intervened between a State and its municipalities threatened "to trench on the States' arrangements for conducting their own governments." *Id.* at 140. In *Tennessee*, the FCC "sought to distinguish *Nixon* on the ground that the Court was upholding the agency's order, rather than reversing it." 832 F.3d at 612. That is, the agency argued that *Chevron* deference had not applied in *Nixon* but should apply in *Tennessee*. This Court rejected the FCC's call for agency deference, noting that the statute was unambiguous *once* the Court invoked the clear-statement rule on which *Nixon* had relied. *Id.*; *see also id.* at 615 (White, J., concurring in part and dissenting in part) (noting that the FCC was not entitled to

deference because the "very silence or ambiguity with respect to whether Congress intended to preempt the states' regulation . . . triggers application of the clear statement rule; thus application of *Chevron* deference to the FCC's determination that it has the authority to preempt in this situation . . . would turn the clear statement rule on its head").

This logic applies here. *Auer* deference does not get triggered under Title IX because the "clear-statement rule[]" that applies in the Spending Clause context takes "precedence over conflicting agency views." *Carter*, 736 F.3d at 731 (Sutton, J., concurring); *see Tennessee*, 832 F.3d 597 at 610 (holding that "the clear statement rule applies" even when the agency argues for deference), *id.* at 615 (White, J., concurring in part and dissenting in part) ("I agree that the FCC's preemption decision is not entitled to *Chevron* deference."). Even if Title IX (and its regulations) were ambiguous *before* considering the clear-statement rule that applies in this context, the statute cannot be considered ambiguous *after* considering that rule. Because Title IX contains no clear statement prohibiting school districts from designating bathroom access based on biological sex, the statute should be considered as unambiguously allowing school districts to do so under the clear-statement rule. *See Tennessee*, 832 F.3d at 612. Even when the federal government's guidance remained in effect, therefore, the district court's decision to invoke *Auer* deference conflicted with this Court's cases.

2. *Gender Nonconformity*. The district court also relied on this Court's Title VII cases holding that plaintiffs can state sex-discrimination claims if they suffer adverse employment actions because of their "'gender non-conformity'" under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See* Op., Doc.95, PageID#1754 (quoting *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), and citing *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005)). *Smith* and *Barnes* confronted claims asserting that a plaintiff was discriminated against because of the plaintiff's failure to conform with another's "stereotypes concerning how a man should look and behave." *Barnes*, 401 F.3d at 737.

This case does not implicate these gender-nonconformity claims. As a general matter, "courts that have considered similar claims have consistently concluded that requiring individuals to use bathrooms consistent with their birth or biological sex rather than their gender identity is not discriminatory conduct in violation of federal and state constitutions and statutes." *Johnston*, 97 F. Supp. 3d at 680-81 (citing cases). That list includes a court within this circuit, which, when rejecting such a claim, held that a company "did not require Plaintiff to conform her appearance to a particular gender stereotype, instead, the company only required Plaintiff to conform to the accepted principles established for gender-distinct public restrooms." *Johnson*, 337 F. Supp. 2d at 999-1000, *aff'd*, 98 F. App'x at 462. "However far *Price Waterhouse* reaches," courts have refused to

"conclude it requires employers to allow biological males to use women's restrooms." *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007).

Regardless, in this case, the Court need not even decide whether a policy dividing bathrooms by biological sex qualifies as "sex discrimination" under federal statutory provisions. That is because Title IX expressly permits the practice "on the face" of its safe harbor. *Price Waterhouse*, 490 U.S. at 239. Title IX allows school districts to "maintain[ ] separate living facilities for the different sexes," including comparable locker room, toilet, and shower facilities. *See* 20 U.S.C. § 1686; *e.g.*, *Johnston*, 97 F. Supp. 3d at 678 ("the University's policy of separating bathrooms and locker rooms on the basis of birth sex is permissible under Title IX"); *Doe*, 2008 WL 4372872 at *4 (same). That is all the Court needs to decide to rule for the School District here.

* * *

In sum, under the controlling analysis of *Pennhurst* and its progeny, the preliminary injunction must be reversed. This Court should conclude that the clear-statement rule applies to the legal question presented in this case. That requires it to rule for the School District because Title IX does not *unambiguously* prohibit school districts from providing students with bathrooms designated by their biological sex. Under this reading, Title IX's protections extend to all students, including transgender students, but cannot be read to impose a federal

requirement that schools treat students differently in determining what boys' or girls' rooms they may use depending on their gender identities. Instead, such local determinations may well be based appropriately on differing facts and circumstances including not only the physical layout and facilities of the school for the grades it serves, but also the privacy and dignity interests of all students under the particular situations the school seeks best to resolve.

II. THE EQUAL PROTECTION CLAUSE DOES NOT PROHIBIT SCHOOLS FROM PROVIDING STUDENTS WITH BATHROOMS DESIGNATED BY BIOLOGICAL SEX

The School District's opening brief also illustrated that the Equal Protection Clause does not invalidate Title IX's express allowance for designating bathrooms on the basis of biological sex. *See* Br. of Third-Party Defendants-Appellants, at 37-52. This *amicus* brief highlights three items: (1) the district court created a new suspect classification in direct conflict with this Court's cases; (2) the district court misunderstood the classification that the School District's policy draws here; and (3) the district court ignored the substantial interests at stake.

A. *New Suspect Class*. Contravening binding precedent, the district court created a new gender-identity classification that it said triggered heightened scrutiny. It seemingly concluded that if sexual orientation is a suspect class, transgender status must be as well. Op., Doc.95, PageID#1760-64. But its underlying premise (that sexual-orientation classifications trigger heightened

scrutiny) conflicts with this Court's cases. Under the Equal Protection Clause, a State's classification generally "is presumed to be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). States acting on social or economic issues receive "wide latitude," because "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.*

Under this rubric, this Court has "*always* applied rational-basis review to state actions involving sexual orientation." *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015) (emphasis added) (citing *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260-61 (6th Cir. 2006); *Stemler v. City of Florence*, 126 F.3d 856, 873-74 (6th Cir. 1997)). And contrary to the district court's conclusions, Op., Doc.95, PageID#1761-62, this Court has already held that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), "did not abrogate those prior cases." *Ondo*, 795 F.3d at 609. The Supreme Court was "explicitly asked" to treat sexual orientation as "a specially protected class" in *Obergefell*, but the Court declined. *Id.* It held instead that "the Equal Protection Clause was violated because the challenged statutes interfered with the fundamental right to marry, not that homosexuals enjoy special protections." *Id.*

Ondo thus concluded—after *Obergerfell*—that those rulings bind this Court and "can be reconsidered only by the full court sitting en banc." *Id.*; *cf. Johnston*, 97 F. Supp. 3d at 668 (recognizing that "neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause"). The district court in this case nevertheless held that it had the authority to do what *Ondo* said a panel of this Court could not do—announce a "new classification." The Court should now reject this claim, and direct the district court to follow its precedent.

B. *Neutral Policy*. Even if gender identity were a suspect classification triggering heightened scrutiny for laws that draw distinctions based on gender identity, the School District's policy here does *not* classify on that basis. It classifies on the basis of *biological sex*. To trigger heightened scrutiny for a law that is "neutral on its face" with respect to a suspect class, a challenger must show *both* that the law has a disparate impact on that class *and* that the law was passed with discriminatory intent against it. *E.g. Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979); *Washington v. Davis*, 426 U.S. 229, 240 (1976). Here, however, the district court nowhere concluded that the School District decided to designate bathrooms based on biological sex as pretext to discriminate against transgender students (rather than to protect student privacy).

C. *Rational Basis*. Lastly, local school districts may rationally determine that a general policy of separate bathroom facilities for the different sexes substantially advances what this Court eight years ago termed "the constitutional right to privacy, which includes the right to shield one's body from exposure to viewing by the opposite sex." *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008); *e.g.*, *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604-05 (6th Cir. 2005) (noting that "[s]tudents of course have a significant interest in their unclothed bodies" and that "public school locker rooms" do not afford much privacy protection). Indeed, "[t]his justification has been repeatedly upheld by the courts." *Johnston*, 97 F. Supp. 3d at 669. Any other ruling would raise serious doubts about the constitutionality of Title IX *itself*, which contains an express safe harbor allowing state and local governments to maintain "separate living facilities for the different sexes," 20 U.S.C. § 1686, including "separate toilet, locker room, and shower facilities," 34 C.F.R. § 106.33. That policy question should be left where it belongs—with local school districts.

CONCLUSION

The Court should reverse the district court's preliminary injunction against the Third-Party Defendants-Appellants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B):

1. Exclusive of the portions of the brief exempted by 6th Cir. R. 32 (b)(1), the brief contains 6,194 words.

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CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served through the Court's electronic filing system on this 26th day of April 2017. Electronic service was therefore made upon all counsel of record on the same day.

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