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No. 16-273

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

G.G., BY HIS NEXT FRIEND AND MOTHER,
DEIRDRE GRIMM,
Respondent.

ON WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Brief of *Amici Curiae* the State of West Virginia, 20 Other States, and the Governors of Kentucky and Maine Supporting Petitioner

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INTRODUCTION AND INTEREST OF *AMICI*

In violation of the Spending Clause, Respondent and the U.S. Department of Education seek to introduce in Title IX a condition on the States' receipt of billions of dollars in education funds that is not clearly stated in the law. Under this Court's cases, if Congress wishes to impose conditions on States in exchange for federal funds, it must unambiguously express those requirements in the statutory language, such that States would not be surprised by their obligations. But as both Respondent and the court of appeals have acknowledged, the view that Title IX requires States to permit access to sex-separated facilities based on gender identity is indisputably "new" and "novel." App. 23a; BIO 22, 31.

For more than forty years, States have accepted federal education funding on the understanding that Title IX left to them and local school boards the discretion to determine that the physical differences between males and females warrant separate restroom facilities.[1] Title IX provides that "nothing contained herein shall be construed to prohibit any educational institution receiving funds . . . from maintaining separate living facilities for the different

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[1] *Amici* are the States of West Virginia, Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wisconsin and the Governors of Kentucky and Maine. Pursuant to Supreme Court Rule 37, the parties consent to the filing of this brief. This brief was authored and funded entirely by *amici curiae* and their counsel.

sexes," 20 U.S.C. § 1686, including "separate toilet, locker room, and shower facilities on the basis of sex," so long as the facilities are "comparable," 34 C.F.R. § 106.33. When the statute was passed in 1972, the term "sex" was widely understood to refer to the physiological distinctions between males and females. Pet. Br. 7–9, 26–34.

Disrupting this settled understanding, the Department issued an unpublished opinion letter in 2015—in the context of this very dispute—that introduced a new Title IX obligation on the States. The Department claimed that Title IX makes it discriminatory for a school to separate male and female bathrooms, unless each student is allowed to select either bathroom in accordance with that student's gender identity. Compounding that error, the court of appeals below afforded this informal opinion letter controlling deference under this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997).

As recipients of grants subject to Title IX, and as the home to political subdivisions that receive grants subject to Title IX, *amici* States have direct institutional and economic interests in enforcing the Spending Clause's structural limits on federal power. Under the Respondent and Department's newfound condition, States would be forced either to relinquish control over policies designed to protect student privacy and safety or else forfeit their entire share of $55.8 billion in annual federal school funds.[2] Thus,

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[2] For a list of state laws affecting the local management of schools that would need to be modified or abandoned in light of the new interpretation of Title IX, see App. 194a–197a n.8;

when the Department attempted to apply its novel view of Title IX even more broadly in a guidance letter issued after the decision of the court of appeals in this case, many States challenged the position and obtained an injunction.[3]

More generally, the decision in this case will have consequences for all Spending Clause regimes. If the federal government may change States' obligations decades after they first agree to receive funds, the federal government will have the power to leverage the States' longstanding reliance on such funds into accepting any number of conditions. Under the decision below, little would prevent the federal government from imposing novel conditions on the States in a variety of other contexts.

The decisions must be reversed.

States PI Mot., *Texas v. United States*, No. 7:16-cv-054, 2016 WL 3877027 at 9–10 nn.8–20 (N.D. Tex. July 6, 2016) (hereinafter States PI Mot.).

[3] App. 183a (coalition of the States of Alabama, Arizona, Georgia, Kentucky, Louisiana, Maine, Mississippi, Oklahoma, Tennessee, Texas, Utah, West Virginia, and Wisconsin); *McCrory v. United States*, 5:16-cv-238 (E.D.N.C.) (filed May 9, 2016) (North Carolina); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-cv-524 (S.D. Ohio) (filed June 10, 2016) (Ohio school district); *Nebraska v. United States*, No. 4:16-cv-3117 (D. Neb.) (filed July 8, 2016) (coalition of the States of Arkansas, Kansas, Michigan, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, and Wyoming); *see also* Idaho Amicus Br., *Texas v. United States*, No. 7:16-CV-00054 (N.D. Tex. July 17, 2016) (supporting the 13-State Texas suit). This injunction applies nationally, including to the federal government's activities within the Fourth Circuit, such as in West Virginia and South Carolina. *Texas v. United States*, slip op., No. 7:16-cv-054 at *4 (N.D. Tex. Oct. 18, 2016).

SUMMARY OF ARGUMENT

I. Invoking its power under the Spending Clause, Congress enacted Title IX in 1972 to further the important public policy of eradicating discrimination against women in higher education. In exchange for States' agreement to abide by Title IX's anti-discrimination mandate and waive their sovereign immunity from suit for non-compliance, Congress offered States federal financial assistance for education programs.

Congress's power under the Spending Clause has limits, however, including that Congress must clearly indicate in its statute any conditions on the States' acceptance of federal funds. Neither Congress nor any agency charged with administering Title IX can threaten the States with loss of federal funds simply because it believes the States to have acted in a manner inconsistent with the statute. Rather, the States' obligations are limited to those "unambiguously" set forth on the face of the statute. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

This clear-statement requirement furthers important federalism principles. It ensures that the States' representatives in Congress, particularly in the Senate, deliberate and resolve the specific conditions at issue before imposing national policy on the States. It also ensures that States have full and fair notice of their obligations before they decide whether to accept federal funds and subject themselves to suit.

In this case, the statute not only lacks a clear statement supporting the Respondent and

Department's view, it unambiguously forecloses that interpretation. As Petitioner explains at length (Pet. Br. 26–41), Title IX expressly permits States and schools to separate students into different living facilities based on "sex," a term widely understood when Title IX was enacted as referring to the physiological distinction between males and females.

But even if there were some debate on this point, this Court need not definitively resolve it. It is enough that the States did not have clear, unmistakable notice that they would be required to permit students to access restrooms based on their gender identity. The court of appeals and Respondent have both acknowledged that this interpretation is "novel." *Supra* p.1.

That alone requires reversing the decisions below. This Court's cases make clear that States cannot be required to comply with obligations they could not anticipate from the enacted statutory language. Moreover, to allow such a post hoc change to States' obligations would also violate the Spending Clause's prohibition on undue coercion by the federal government. Given the billions of dollars of federal education funding on which States have long relied, States would not have any real choice but to accept the Department's new command.

II. Respondent cannot avoid the Spending Clause's clear-statement requirement by claiming deference for the Department's faulty view of Title IX and its regulations.

The deference principles in *Auer v. Robbins*, 519 U.S. 452 (1997), fundamentally conflict with the

Spending Clause's clear-statement requirement. On one hand is a judge-made theory that affords controlling weight to an agency's interpretation of an ambiguous regulation. On the other, the Constitution requires Congress to speak explicitly when it imposes grant conditions and alters the traditional balance of power between the federal government and the States.

In this clash between interpretive principles, the Constitution must prevail. The doctrine of *Auer* deference should not apply to statutes enacted under the Spending Clause. That is particularly true where, as here, the Department seeks to place new grant conditions on the States via an informal opinion letter that it did not even properly subject to public notice and comment.

ARGUMENT

This Court granted review in this case to decide two questions: (1) whether *Auer* deference is due to the Department's informal view that Title IX requires schools to open their restrooms to students on the basis of gender identity; and (2) regardless of deference, whether Respondent and the Department have correctly interpreted Title IX and its regulations.

Like Petitioner, *amici* States have reversed the order of these two questions in this brief. Part I of this brief explains that the Spending Clause prohibits the new condition that Respondent and the Department seek to read into Title IX. Part II shows why this Court's Spending Clause jurisprudence leaves no room for *Auer* deference. There are logical and practical reasons for the reversed order, as

Petitioner explains. At a minimum, the reversal reflects the reality that a new Administration assumes office in ten days. That Administration could take actions that affect the deference question but not the controversy between Petitioner and Respondent over the interpretation of the word "sex," which this Court has determined is independently worthy of review and has consequences for numerous pending cases involving the States in federal court.[4]

I. The Spending Clause Prohibits The New Condition That Respondents and The Department Seek To Read Into Title IX.

Petitioner correctly explains at length why this Court should interpret Title IX, applying general principles of statutory construction, as allowing States to provide separate restroom facilities to students based on physiological sex. Pet. Br. 24–41. *Amici* States concur with Petitioner's textual analysis and adopt it herein by reference.

But even if there were some ambiguity on this point, there is no doubt that States cannot be

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[4] *See, e.g., Carcaño v. McCrory*, No. 1:16-cv-236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016), appeal pending, No. 16-1989 (4th Cir.); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-cv-943, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016); *Privacy Matters v. United States*, No. 16-cv-03015 (D. Minn.) (filed Sept. 7, 2016); *Women's Liberation Front v. U.S. Dep't of Justice*, 1:16-cv-915 (D.N.M.) (filed Aug. 11, 2016); *United States v. North Carolina*, No. 1:16-cv-425 (M.D.N.C.) (filed May 9, 2016); *Tooley v. Van Buren Public Schools*, No. 2:14-cv-13466 (E.D. Mich.) (filed Sept. 5, 2014); *see also supra* p.3 n.3 (listing additional State-initiated cases).

required to comply with the new condition advanced by Respondent and the Department. The Spending Clause to the U.S. Constitution precludes the federal government from imposing an obligation on States, as a condition of receipt of federal funds, that Congress did not make clear in the statutory language. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 24–25 (1981). This clear-statement rule bars the newfound view that Title IX requires States to permit a student to choose a restroom consistent with the student's gender identity.

A. Congress Must Provide Adequate Notice Of All Conditions Attached To Federal Funds In The Text Of A Statute Enacted Under The Spending Clause.

To protect the residual sovereignty of the States that the Framers deemed essential to our federal system, this Court has required that any conditions imposed on States pursuant to the Spending Clause be clearly and unmistakably stated.

1. Reflecting their concern with protecting the States' residual sovereignty from federal intrusion, the Framers included several structural safeguards in the Constitution. As James Wilson explained, "'it was a favorite object in the Convention' to provide for the security of the States against federal encroachment and . . . the structure of the federal government itself served that end." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985) (quoting 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 438–39 (J. Elliot 2d. ed. 1876)). Thus,

"the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the . . . National government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Texas v. White*, 7 Wall. 700, 725 (1869)).

Numerous safeguards are found in Article I alone. Foremost, Article I protects state control over local matters by limiting Congress's authority to specified, enumerated powers. *Garcia*, 469 U.S. at 550. Article I also requires each bill to win the approval of the Senate, "where each State receive[s] equal representation." *Id.* at 551. This allows a group of Senators who represent a majority of the States, but only a minority of the population, to block federal action by rejecting or refusing to vote on federal legislation and appropriations.[5] And Article I further requires each law to win the approval of the House of Representatives and the President (or the override of a Presidential veto), which prevents the federal government from displacing any state law without the agreement of those who represent at least half the States. U.S. Const. art. I, § 7, cl. 3.

Critically, in protecting the States, these structural principles serve to "protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). By providing protections for the sovereignty of the States, the Constitution secures "'the liberties that derive'" to individual citizens "'from the diffusion of sovereign power.'" *New York v. United*

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[5] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 547–48 (1954).

States, 505 U.S. 144, 181 (1992) (internal quotation omitted). As James Madison explained, by dividing power "between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments," "a double security arises to the rights of the people": the "different governments will control each other, at the same time that each will be controlled by itself." *Garcia*, 469 U.S. at 582 (quoting The Federalist No. 51 (James Madison)). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458.

2. Given the constitutional imperative to preserve the balance of power between the federal government and the States, this Court has long interpreted federal statutes "against the backdrop" of the federal-state relationship. *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (citation omitted). This Court presumes, as "a time-honored rule,"[6] that Congress will enact statutes "consistent with principles of federalism inherent in our constitutional structure," absent a plain statement to the contrary, *Bond*, 134 S. Ct. at 2088. Put another way, this Court has long required that it be

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[6] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 143–150, 173 (2010) (cataloguing the history of the canon requiring a clear statement before interpreting a federal law to override state sovereign immunity).

"absolutely certain," *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991), before it will find that Congress displaced the States in any particular case.

This approach ensures that Congress "has in fact faced, and intended to bring into issue," the particular disruption of State authority at issue. *United States v. Bass*, 404 U.S. 336, 349 (1971). As this Court has explained, if courts instead were to "'give the state-displacing weight of federal law to mere congressional *ambiguity*,'" there would be every incentive for Congress to "'evade the [constitutional] procedure[s] for lawmaking [that] protect states' interests." *Gregory*, 501 U.S. at 464 (quoting L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988)). If Congress were not required to explain clearly its intent to displace or bind the States, its members would invariably "pass the buck to the agencies with vaguely worded statutes," whenever "hard decisions ha[d] to be made."[7] After all, on "most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat, or perhaps some independent regulatory commission, 'take the inevitable political heat.'"[8]

3. This presumption has manifested in the form of several clear-statement rules of statutory interpretation. For example, to displace a traditional sphere of state authority or preempt state law, Congress "must make its intention to do so

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[7] 122 Cong. Rec. H10,685 (daily ed. Sept. 21, 1976) (statement of Rep. Levitas) quoted in John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 131–32 (1980)

[8] Ely, *supra* n. 7 at 131–32.

'unmistakably clear in the language of the statute.'" *Gregory*, 501 U.S. at 460 (citation omitted). Without a "clear and manifest" statement, this Court will not read a statute to preempt "the historic police powers of the States," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or to permit an agency to regulate a matter in "areas of traditional state responsibility," *Bond*, 134 S. Ct. at 2089.

Similarly, to abrogate the States' historic immunity from suit, Congress must state its intent "expressly and unequivocally in the text of the relevant statute." *Sossamon v. Texas*, 563 U.S. 277, 290–91 (2011). Congress has the power to abrogate state sovereign immunity under the Fourteenth Amendment, as well as the power to make the States' waiver of sovereign immunity a condition to receipt of federal funds. But before this Court will find that Congress has done so, it will ask whether Congress has made abundantly clear its intent to do so. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

Relevant here, a clear-statement requirement also applies to statutes enacted under the Spending Clause. To ensure that the federal government does not use federal funds to coerce States into carrying out federal policy, this Court has treated Spending Clause statutes "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). This puts an important limit on Congress's power, by requiring that "the State voluntarily and knowingly accepts the terms of the 'contract.'" *Ibid.* And there can "be no knowing acceptance if a State is unaware

of the conditions or is unable to ascertain what is expected of it," unless Congress speaks clearly. *Ibid.*

The "crucial inquiry" for a court interpreting a spending statute, therefore, is "whether Congress spoke so clearly that [the court] can fairly say that the State could make an informed choice." *Id.* at 25. Congress may not "surpris[e] participating States with post acceptance or 'retroactive' conditions." *Ibid.* "[I]f Congress intends to impose a condition on the grant of federal moneys," it "must do so unambiguously"—and not leave a State's obligations under the Act indeterminate. *Id.* at 17. This is "a particularly strict standard." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) (citations omitted). As a result, courts "must interpret Spending Clause legislation narrowly, in order to avoid saddling the States with obligations that they did not anticipate." *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 84 (1999) (Thomas & Kennedy, JJ., dissenting).

In setting forth a condition, the statutory text must be clear at the time of enactment. As this Court has said, the law must be viewed "from the perspective of a state official who is engaged in the process of deciding whether the State should accept [the] funds and the obligations that go with those funds." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Following this Court's settled rules of statutory interpretation, such an official would discern those obligations based on the meaning of the statutory language at the time Congress passed the law. *See Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) ("We begin with the ordinary meaning of the word 'now,' as understood when the

IRA was enacted"); *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994) ("[W]e must seek to ascertain the ordinary meaning of 'burden of proof' in 1946, the year the APA was enacted."); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[W]e look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute in 1961").

B. Title IX Does Not Provide Sufficiently Clear Notice That States Must Give Students Restroom Access Consistent With Their Gender Identity.

1. This 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). Title IX intrudes on an "area[] of traditional state responsibility," *Bond*, 134 S. Ct. at 2089, namely the control of schools, which is "perhaps the most important function of state and local governments," *Honig v. Doe*, 484 U.S. 305, 309 (1988) (internal quotation marks omitted). Indeed, "[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). Under Congress's Spending Power, Title IX displaces this traditional state authority by conditioning "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).

Accordingly, state obligations under Title IX must be unambiguously set forth in the statute. Because it is a Spending Clause statute, grant

recipients subject to Title IX are only responsible for conditions expressed in the "clear terms" of the statute itself, *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 642 (1999). In addition, because the statute intrudes on an area "where States historically have been sovereign," *United States v. Lopez*, 514 U.S. 549, 564 (1995), Congress must speak clearly where it seeks to regulate.

This Court's Title IX cases are consistent with this requirement. For example, in *North Haven Board of Education v. Bell*, this Court considered whether Title IX "prohibit[s] federally funded education programs from discriminating on the basis of gender with respect to employment." 456 U.S. 512, 514 (1982). This Court held that Title IX does prohibit employment discrimination because "[e]mployees who directly participate in federal programs or who directly benefit from federal grants, loans, or contracts *clearly* fall within the first two protective categories described in § 901(a)." *Id.* at 520 (emphasis added). This Court went on to find that the legislative history, among other things, "confirms Congress' desire to ban employment discrimination in federally financed education programs." *Id.* at 530–31.

Similarly, even in a line of cases concerning the scope of the implied private right of action under Title IX, this Court has consistently acknowledged the requirement that States have clear notice of the scope of their liability. Because the cases concerned an *implied* private right of action found in a pre-*Pennhurst* case, *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979), which this Court has

declined to reconsider, this Court could not demand clarity from any particular statutory terms. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998) ("Because Congress did not expressly create a private right of action under Title IX, the statutory text does not shed light on Congress' intent with respect to the scope of available remedies."). Nevertheless, this Court has repeatedly reiterated that "Title IX's contractual nature has implications for our construction of the scope of available remedies." *Id.* at 287; *see also Davis*, 526 U.S. at 640 ("Because we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause, . . . private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue.").

Thus, in *Gebser*, this Court held that private suits based on the implied right of action cannot impose monetary liability for sexual harassment by a teacher unless the school has actual notice of the conduct. 524 U.S. at 292–93. The Court determined that it would not satisfy the clear-statement rule to hold a school liable in such cases "on principles of constructive notice or *respondeat superior*" because the school was likely "unaware of the discrimination." *Id.* at 287. The Court found support in Title IX's plain text, noting that an enforcement of Title IX by the federal government—which is provided for expressly in the statute—"operates on an assumption of actual notice to officials of the funding recipient." *Id.* at 288.

2. Applying this clear-statement rule to the statutory language that all parties agree is at issue

in this case, it is plain that Respondent and the federal government cannot impose their novel condition on the States.

For decades, Title IX and its implementing regulation have been widely understood to include an express provision authorizing States to provide separate restrooms based on physiological sex. The law promises States that they may decide at the local level whether to "maintain[] separate living facilities for the different sexes." 20 U.S.C. § 1686, including "separate toilet, locker rooms, and shower facilities on the basis of sex," so long as the facilities are "comparable" for students of both sexes, 34 C.F.R. § 106.33. At the time of Title IX's passage in 1972, dictionaries defined sex as a biological category based principally on physical anatomy, App. 53a–55a, and this physiological understanding prevailed in every prior case to consider the question of restrooms.[9]

Disregarding this settled understanding, Respondent and the Department now argue that Title IX actually requires States to provide students access to restrooms consistent with their gender identity. But that cannot be squared with the Spending Clause's clear-statement rule. There is no plausible argument that this exemption in Title IX *unmistakably* requires what Respondent and the government suggest. If anything, Congress has decided in clear terms to permit States to provide separate facilities by physiological sex. Pet. Br. 7–9,

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[9] State Amici Br., *G.G. v. Gloucester County School Board*, No. 15-2056, 2015 WL 7749913 at *7–8, 14 & n.1 (4th Cir. Nov. 30, 2015) (surveying cases).

24–41. Thus, even Respondent has admitted that when Title IX was enacted, "few would have conceived" that States would face the question of bathroom access based on gender identity. BIO 1. And the Fourth Circuit has done so, too, conceding that Respondent and the Department's position was not "intuitive" in light of the statute's text. App. 23a; *see also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981) (noting that it "strains credulity to argue that participating States should have known of their 'obligations' . . . when . . . the governmental agency responsible for the administration of the Act . . . has never understood [the statutory provision] to impose conditions on participating States").

Accordingly, the decisions below must be reversed. While restroom access in schools may be an important and evolving public policy question, States and local school boards cannot be required under Title IX to give students access based on gender identity because Congress has not "sp[oken] directly" to the issue. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998). In fact, this Court need not even determine the best or most plausible reading of Title IX's reference to "sex" may be, though Petitioner does show persuasively that the term refers to physiological sex. It is enough that the statute does not unmistakably require the position advanced by Respondent and the Department. Under this Court's case law, the States cannot be said to have agreed to any such obligation as a condition of receiving federal funds.

To permit the decisions below to stand would be wrong not only for this case, but would have

consequences for Spending Clause legislation more broadly. Allowing this intrusion into state sovereignty to go unchecked will encourage federal courts and agencies to introduce new conditions in other Spending Clause statutes to impose other policy changes that Congress could not approve through ordinary political channels. Indeed, the federal government has already begun similar efforts to expand the definition of sex relating to healthcare.[10]

3. Respondent has previously offered three arguments why the Spending Clause's clear-statement rule does not apply to constrain the interpretation of Title IX advanced here. None has merit.

First, Respondent has alleged that any consideration of the clear-statement rule was waived in this case, BIO 28, but that is untrue. The question at issue is the proper interpretation of the word "sex" in Title IX and its supporting regulations. The Spending Clause clear-statement rule is merely a tool of statutory construction to be used in resolving that question. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981). It is no more waivable than any other principle of statutory interpretation, such as *ejusdem generis* or *exclusio unius est expressio alterius*.

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[10] *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92), preliminarily enjoined by *Franciscan Alliance v. Burwell*, slip op., No. 7:16-cv-00108 at *32–34 (N.D. Tex. Dec. 31, 2016).

Moreover, even if the Spending Clause clear-statement rule is considered a distinct legal argument, this Court will not deem waived any "particular legal theories advanced by the parties" to resolve a question under review. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (internal quotation marks omitted). The grant of a question for review includes the consideration of any theory "predicate to an intelligent resolution" of the question presented, and "fairly included therein," such as a particular argument as to the meaning of a statute. *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (quoting inter alia Sup. Ct. R. 14.1(a)). After all, "[p]arties cannot waive the correct interpretation of the law simply by failing to invoke it." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2101 n.2 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) (citing, *e.g.*, *EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (per curiam)); *see Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996).

In any event, Respondent can hardly argue inadequate notice. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469–70 (2000). The States raised this specific argument about the clear-statement rule in depth in their briefs before the Fourth Circuit at both the panel and petition for *en banc* stages, as well as before this Court at the petition stage (as did Petitioner).[11]

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[11] *See* Pet. at 36–37; State Amici Br., *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273, 2016 WL 5543363 (U.S. Sept. 27, 2016) (petition for certiorari); State Amici Br., *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2015 WL 7749913 at *8 (4th Cir. Nov. 30,

Second, Respondent has argued that the clear-statement rule does not apply to "requests for injunctive relief," but rather "merely [to] the availability of 'money damages.'" BIO 28–29 (quoting *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999), and *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998).

But neither *Davis* nor *Gebser* held that the clear-statement rule is inapplicable to claims for injunctive relief. Those cases concerned only the availability of money damages for certain claims of sexual harassment brought under the implied private right of action. *See Davis*, 526 U.S. at 639 ("We must determine whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages."); *Gebser*, 524 U.S. at 277 ("The question in this case is when a school district may be held liable in damages in an implied right of action under Title IX . . . for the sexual harassment of a student by one of the district's teachers."). Neither case had occasion for the Court to reach the question of the applicability of the clear-statement rule to injunctive relief, and neither did so.

Moreover, the rationale behind the Spending Clause clear-statement rule applies equally to claims for injunctive and monetary relief. In both circumstances, Congress seeks to "impose a condition on the grant of federal moneys," and therefore "must do so unambiguously," so that a court "can fairly say

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2015) (panel); State Amici Br., *id.*, 2016 WL 2765036 at *4–5 (4th Cir. May 10, 2016) (petition for rehearing en banc).

that the State [had] ma[d]e an informed choice." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 25 (1981). If that canon prohibits a court from awarding money damages when a statute is unclear, it certainly prohibits imposition of costly new compliance conditions via injunction—such as monitoring restroom access or modifying existing facilities.

Regardless, Respondent *does* seek money damages in this case, and, therefore, cannot escape application of the clear-statement rule on this ground. BIO 11 n.10.

Third, Respondent has alleged that "Title IX puts recipients on notice of liability for *all* forms of intentional discrimination for purposes of *Pennhurst*," arguing that the federal government "need not 'prospectively resolve every possible ambiguity concerning particular applications' of the statute and regulations." BIO 28–29 (quoting *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985)). This, too, is unavailing.

As a threshold matter, this argument entirely misses the point. Even if it is true that States are on notice of liability under Title IX for "all forms of intentional discrimination" on the basis of sex, that does not answer the critical question: the meaning of "sex."

And to the extent Respondent is suggesting that the case law permits Congress to impose conditions through broad or vague terms to be interpreted on a case-by-case basis, that is simply incorrect. A clear statement is necessary both to make a statute apply

to the States and to show that the statute applies in the particular manner claimed. *E.g., Arlington Cent. Sch. Dist. Bd. of Edu. v. Murphy*, 548 U.S. 291, 296 (2006); *Gregory v. Ashcroft*, 501 U.S. 452, 460–70 (1991). After all, a chief purpose of a clear-statement rule is to ensure that Congress has "specifically considered" an issue and "intentionally legislated on the matter." *Sossamon v. Texas*, 563 U.S. 277, 290–91 (2011).

Congress may not through loose draftsmanship put "upon the States a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 190 n.11 (1982). If a statute does not spell out a new obligation plainly, it "may not be implied" later on by a court. *Sossamon*, 563 U.S. at 284, 290–91. A statute that merely uses broad or general terms, under which a particular obligation on the States is a permissible or plausible inference, lacks the necessary clarity. *Dellmuth v. Muth*, 491 U.S. 223, 232 (1989).

For example, in *Sossamon v. Texas*, this Court held that Congress had not plainly authorized money damages against the States under the Religious Land Use and Institutionalized Persons Act—even though the statute provided for "appropriate relief" against the States. 563 U.S. at 288. Noting the existence of "plausible arguments" both ways as to the meaning of the term "appropriate relief," this Court held that the term was not "so free from ambiguity that we may conclude that the States, by receiving federal funds, have unequivocally expressed intent to waive their sovereign immunity

to suits for damages." *Ibid.* Accordingly, the Court "strictly construe[d]" the statute "in favor of the sovereign—as we must." *Ibid.*

Other cases interpreting the Spending Clause or applying similar federalism canons prove the same point. For instance, in *Pennhurst*, this Court held that Congress did not provide States clear notice of their obligations under the Developmentally Disabled Assistance and Bill of Rights Act—even though the Act said that the disabled have a right to appropriate treatment from States, a broad right that arguably included some form of specific obligation by States. 451 U.S. 1, 13, 25 (1981). Similarly, in *Gregory v. Ashcroft*, this Court held that Congress had not specifically included state judges in the Age Discrimination in Employment Act—even though the Act covered state "appointee[s] on the policymaking level," a category that could plausibly be read to include state judges. 501 U.S. 452, 467 (1991). Likewise, in *Arlington Central School District Board of Education v. Murphy*, this Court held that Congress, under the Individuals with Disabilities Education Act (IDEA), had not given clear notice of its intent to provide for the recovery of expert witness fees against States—even though the statute provided for the recovery of attorney's fees "as part of the costs" of a case, a category arguably ambiguous enough to include expert witness fees. 548 U.S. 291, 296–300 (2006) (citation omitted). So, too, in *Bond v. United States*, this Court held that Congress in a federal criminal law did not provide "a clear statement that Congress meant the statute to reach local criminal conduct" and intrude upon traditional state criminal jurisdiction—even though the law included an extremely broad prohibition on

any use of a chemical weapon, a definition arguably broad enough to include applying harmful chemicals to the property of another person. 134 S. Ct. 2077, 2090 (2014).

Respondent's reliance on *Bennett v. Kentucky Department of Education*, for the proposition that agencies may resolve how a broadly-worded statutory condition in a Spending Clause statute should be applied is misplaced. BIO 29 (citing 470 U.S. 656, 669 (1985)). In that case, this Court deemed the language at issue under Title I unambiguous and found it unnecessary to decide how to handle cases of potential ambiguity. *Id.* at 666, 670. But this Court made clear, at minimum, that the States have not "guaranteed that their performance under the grant agreements would satisfy whatever interpretation of the terms might later be adopted by the Secretary." *Id.* at 670. That is what Respondent seeks to do here, by imposing a grant condition on the States articulated for the first time decades after the States first accepted Title IX funds. Nothing in *Bennett* suggests that a State can be held to conditions or obligations of which it did not have notice.

Nor do the Title IX cases cited by Respondent stand for such a proposition. In both, this Court reaffirmed not only that Title IX is a Spending Clause statute, but also that a funding recipient must have "adequate notice" of the conditions imposed. *See Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181–82 (2005).

C. Were This Court To Expansively Interpret Title IX, States Would Be Unconstitutionally Coerced Into Accepting New Grant Conditions Long After the Receipt of Funds.

Beyond violating the clear-statement rule, Respondent and the Department's new condition raises a second, independent problem under the Spending Clause: unconstitutional coercion. The "Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). Thus, this Court reaffirmed just four years ago that "Congress may use its spending power to create incentives for States to act in accordance with federal policies," but "when 'pressure turns to compulsion,' the legislation runs contrary to our system of federalism." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J.) (internal citation omitted).

Respondent and the Department's view of the law would exert through Title IX a "power akin to undue influence." *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937). States would face a choice between giving up their reserved power to set policies for the use of school facilities or the entirety of their federal education funding on which they have come to rely for decades. This "financial 'inducement'" is "much more than 'relatively mild encouragement.'" *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2604. Like the threatened loss of all Medicaid funding on which States had long relied in *National Federation of Independent Business*, the threatened loss of 100% of a State's federal education funding based on a

newfound condition "is economic dragooning that leaves the States with no real option but to acquiesce." *Id.* at 2605.

The import of federal funding to local education can hardly be overstated. School districts throughout the country share nearly $56 billion in annual funding that the federal government directs to education.[12] These funds amount to an average of 9.3 percent of total spending on public elementary and secondary education nationwide, roughly $1,000 per pupil.[13] West Virginia's public elementary and secondary schools receive an average of $380,192,000 in federal funds annually, $1,343 per pupil, which amounts to about 10.7 percent of the State's total revenue for public elementary and secondary schools.[14] In some States, like Arizona, Kentucky, Tennessee, and Texas, the numbers reach higher and comprise nearly 20% of the total school budget.[15] Much of the money goes to poor and special-needs children.[16] It is difficult to imagine a clearer instance

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[12] Not counting funds paid directly to state education agencies, or funds paid for non-elementary and secondary programs, the national amount of direct federal funding to public elementary and secondary schools alone exceeds $55,862,552,000 on average annually. U.S. Dep't of Educ. & Inst. of Educ. Scis., Nat'l Ctr. For Educ. Statistics, Digest of Education Statistics, Table 235.20, available at https://nces.ed.gov/programs/digest/d15/tables/dt15_235.20.asp?current=yes (hereinafter Digest of Education Statistics).

[13] States PI Mot., 2016 WL 3877027 at *13.

[14] Digest of Education Statistics, Table 235.20.

[15] States PI Mot., 2016 WL 3877027 at *13.

[16] Two of the most important ways the States use federal school funds is to feed poor students, National School Lunch Act, Pub. L. 79-396, 60 Stat. 230 (1946), and to provide special-education

of unlawful coercion. *See Com. of Va., Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (Luttig, J.) (describing the threat of withholding education funding as raising a "Tenth Amendment claim of the highest order").

II. *Auer* Deference Has No Application In This Case.

Respondent cannot escape the requirements of the Spending Clause by claiming deference under *Auer v. Robbins* to the Department's informal opinion letter. 519 U.S. 452 (1997). The *Auer* doctrine, under which a court affords controlling deference to an agency's interpretation of an ambiguous regulation, cannot be squared with judicial enforcement of the Spending Clause's clear-statement rule, which requires that Congress speak unequivocally in statutory text if it intends to place a binding condition on the States' receipt of federal funds. Indeed, while *Pennhurst* requires clear statutory notice at the time of enactment, the Department adopted its interpretation in this case only after the school board had allegedly violated the statute. *See* Pet. Br. 13. It is fundamentally unfair, and indeed, impermissibly retroactive, to impose regulatory obligations on States in this manner. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

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teachers for disabled students, Individuals with Disabilities Education Act, Pub. L. 101-476, 104 Stat. 1142 (1990).

A. Because Statutes Enacted Under The Spending Clause Must Clearly Articulate The States' Obligations, Agencies Cannot Receive Controlling Deference For Interpretations of Their Own Rules.

Whatever place *Auer* deference may have in other contexts, it can have no role in interpreting statutes enacted pursuant to the Spending Clause. Under the Fourth Circuit's unrestrained understanding of *Auer*, a court provides controlling deference to an agency's preferred interpretation of a rule without first discerning *either* whether Congress spoke clearly to the question at issue *or* whether Congress intended to delegate interpretive authority on that question to the agency. Pet. Br. 44–49, 55–58. Moreover, that interpretation can occur, as here, decades after the regulation itself or the underlying statute was enacted.

This approach to regulation is fundamentally inconsistent with the Spending Clause clear-statement rule and the federalism principles motivating that rule. As explained earlier, when Congress places conditions on the States' receipt of federal funds, it must make those conditions explicit in the text of the statute at the time of enactment. Like this Court's other clear-statement federalism canons, this rule is designed to ensure that courts are "absolutely certain," *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991), before finding that Congress displaced the States in any particular case. The core principle in *Auer*—that a court need not inquire at all into congressional intent—cannot be reconciled with that requirement.

Auer deference also should not apply in Spending Clause cases because of its retroactive effect. This Court has applied a clear-statement rule to Spending Clause cases in part because Spending Clause legislation is treated much like a contract. To ensure that States have knowingly and voluntarily decided whether to accept certain costly obligations in exchange for receipt of federal funds, this Court has required that Congress state those conditions clearly on the face of the statute. But *Auer* presumes that deference is owed to agency interpretations regardless of when the interpretation is made, which effectively allows an agency to "modify past agreements with recipients by unilaterally issuing guidelines." *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997). This is fundamentally unfair, contrary to this Court's repeated statements that States must have plain notice of their obligations when accepting federal funds, and should not be permitted. Indeed, retroactive regulatory power does not exist in *any* circumstances absent a clear statement from Congress. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

In this clash of interpretive principles, the one rooted in the Constitution—the federalism clear-statement rule—must prevail.[17] Even in the context of *Chevron* deference, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), this

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[17] For scholarship on this topic, *see, e.g.*, Abbe R. Gluck, *Our (National) Federalism*, 123 Yale L.J. 1996, 2028 (2014); Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 742, 799–800 (2004); Peter J. Smith, Pennhurst, Chevron, *and the Spending Power*, 110 Yale L.J. 1187, 1189–91 (2001).

Court has applied clear-statement rules, rather than defer to a contrary agency position, when necessary "to avoid the significant constitutional and federalism questions raised by [an agency's] interpretation." *Solid Waste Agency of N. Cook Cty. (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–74 (2001). In *Gregory v. Ashcroft*, for instance, this Court relied on *Pennhurst*, and rejected a contrary agency interpretation, when it declined to extend the protections of the federal Age Discrimination in Employment Act to state judges. 501 U.S. at 470. The Court reasoned that the Act's reference to "appointee[s] on the policymaking level" was "at least ambiguous" as applied to state judges "in light of the ADEA's clear exclusion of most important public officials." *Ibid.* This Court thus concluded that, absent clearer language, it would not presume that Congress intended to intrude on States' traditional authority over the judiciary. *See ibid.* In so doing, the Court declined to afford any deference to the EEOC's competing interpretation of the statute, over a dissent urging that the agency's position be accorded *Chevron* deference. *See Gregory*, 501 U.S. at 493 (Blackmun, J., dissenting).[18]

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[18] Federal circuit courts have also read this Court's opinions as affording interpretive precedence to clear-statement rules over agency deference. *E.g., Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 277 (6th Cir. 2009); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997); *Com. of Va., Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc); *Doe v. Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200*, 115 F.3d 1273, 1278–79 (7th Cir. 1997); *see also Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731, 734 (6th Cir. 2013) (Sutton, J., concurring); *Harris v. James*, 127 F.3d 993, 1009 (11th Cir. 1997).

Amici are not aware of any case in which this Court has ever applied *Auer* deference when interpreting a statute subject to a clear-statement rule, including under Title IX. This case should not be the first. Instead, this Court should resolve the tension between *Auer* and the clear-statement rule by reaffirming that the Constitution's clear-statement rule takes precedence over the judge-made theory of *Auer* deference.

B. This Court Need Not Address Whether Any Other Controlling Deference Is Appropriate In Spending Clause Cases.

While *SWANCC* and *Gregory* suggest that there may be circumstances where a clear-statement rule trumps even *Chevron* deference, that issue is not presented in this case, and should not deter this Court from addressing the tension between *Auer* and the Spending Clause clear-statement rule. For *Chevron* deference to apply, a court must first assure itself that Congress explicitly intended to delegate interpretive authority to an agency, and that the agency acted with the degree of formality required by Congress under the implementing statute and the APA—which in the case of rules requires, at minimum, notice and an opportunity to comment. *See United States v. Mead Corp.*, 533 U.S. 218, 229–34 (2001)). These protections, which help ensure that States have a meaningful role in both the legislative and rulemaking processes before courts defer to a regulatory interpretation, are not satisfied here.

To begin with, there is no indication that Congress intended to delegate to the agency interpretive authority over the statutory language at

issue. The Department has purported to interpret the term "sex"—a plain English word that appears both in Title IX and in the implementing rule—to require schools to permit students to access intimate areas consistent with their gender identity. But there is no evidence that Congress considered the term "sex" ambiguous or intended to delegate to the Department the authority to interpret it; nor is there any reason to believe the Department has any special expertise in elucidating the meaning of that word. What is more, the word the Department purports to interpret appears in an explicit statutory safe harbor. There is no reason to believe that Congress intended that safe harbor to be a font of additional *liability* for States to arise whenever the Department changed its view of the meaning of the word "sex." And finally, given the *Pennhurst* clear-statement rule, this Court should not strain to locate a source of congressional delegation in this Spending Clause statute where one does not exist.

Even if there were a clear congressional mandate in Title IX for the Department to interpret the term "sex," the Department's opinion letter still would not trigger *Chevron* deference, because it failed to act with the requisite formality required by Title IX and the APA. As Petitioner explains, Title IX provides that the Department can only bind regulated parties with the force of law if the Department issues a "rule, regulation, or order" that is approved by the President. Pet. Br. 61–62 (quoting 20 U.S.C. § 1682). And under the APA, rules can only be enacted following notice and an opportunity for public comment. *See* 5 U.S.C. § 553. These are clear instructions on the conditions under which the Department could issue a binding regulation under

Title IX—procedures that the States were aware of when they first agreed to accept funds under the statute. The Department's letter failed to meet those requirements and thus cannot have any force or effect on the States.

To be sure, the Department did issue a formal rule concerning restroom access that provides that funding recipients "may provide separate toilet, locker room, and shower facilities on the basis of *sex*." 34 C.F.R. § § 106.33 (emphasis added). But that rule does not purport to interpret the term "sex" in Title IX; it merely parrots the statutory language. If the Department hoped to obtain any deference for its interpretation of the term "sex" in Title IX, it would need first to comply with Title IX's procedures for valid rulemaking—which it has not done here.

These protections are vitally important, because "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting). Because agencies are not subject to structural checks that provide "adequate protection against agency failure to take federalism concerns seriously," the only way in which States can influence regulatory action is through the APA's "opportunities for state notification and participation created by notice-and-comment rulemaking procedures and amplified by substantive requirements of agency explanation and reasoned decisionmaking." Gillian E. Metzger, *Administrative Law As the New Federalism*, 57 Duke L.J. 2023, 2083–84 (2008). Uncritical deference to informal opinion letters robs the States of this role in the

rulemaking process—and deprives States of any semblance of notice to guide their future actions.

* * *

Ultimately, Respondent seeks to prohibit the States from doing what Title IX promises the States they may do: decide at the local level whether to separate school facilities by physiological sex. Reinterpreting Title IX to mean the opposite of what it says, decades after funds were accepted, coerces the States into accepting conditions that they could not possibly have voluntarily or knowingly accepted at the time they first opted into the Title IX regime. The Spending Clause to the U.S. Constitution prohibits that result.

CONCLUSION

The decisions below should be reversed.

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