UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT,	:	**Case No. 2:16-cv-524**
Plaintiff,	:	**Judge Algenon L. Marbley**
v.	:	**Magistrate Judge Kimberly A. Jolson**
U.S. DEPARTMENT OF EDUCATION, et al.,	:	
Defendants.	:	

MOTION OF THE STATE OF OHIO FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF HIGHLAND LOCAL SCHOOL DISTRICT'S MOTION FOR PRELIMINARY INJUNCTION

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MOTION FOR LEAVE TO FILE

The State of Ohio through its Attorney General Mike DeWine respectfully requests leave to file the attached amicus brief in support of the Highland Local School District's preliminary injunction motion.

Respectfully submitted,

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OHIO ATTORNEY GENERAL

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MEMORANDUM IN SUPPORT

The Local Civil and Criminal Rules of this Court contemplate the occasional submission of *amicus curiae* briefs, *see* Local Civil Rule 7.1.1 (disclosure requirements extend "to entities appearing as *amici curiae*"), and leave to appear as an amicus is "a matter of privilege committed to 'the sound discretion of the court.'… Grant of leave to appear as *amici* is appropriate where such parties have 'an important interest and a valuable perspective on the issues presented …,'" *United States v. City of Columbus*, No. 2:99-cv-1097, 2000 WL 1745293, at *1 (S.D. Oh. 2000) (citation omitted); *see also, e.g., United States ex rel. Fry v. The Health Alliance of Greater Cincinnati*, No. 1:03-cv-167, 2009 WL 485501, at *6 (S.D. Oh. 2009) (amicus brief received; the

"Court finds in this instance no prejudice to Relator or the government by the submission of Amici's memorandum").

The State of Ohio has a strong interest in the local operation of Ohio public schools and in leaving appropriate authority over public school policies with their communities to the extent consistent with constitutional guarantees. *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) ("the 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").

Significant legal issues implicated by this case and said to arise from requirements for recipients of federal education funds under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, *et seq.*, potentially extend well beyond the particular Highland Local School District plaintiff and could be argued to affect other jurisdictions, educational institutions, and citizens across the State. The State of Ohio is a party plaintiff in *State of Nebraska, et al. v. United States, et al.*, filed on July 8, 2016 in the United States District Court for the District of Nebraska as case number 4:16-cv-03117, concerning related issues. The State of Ohio has a special responsibility and perspective both in preserving those federalism interests protected by the proper application of Title IX according to the terms that Congress specified (leaving such matters as curriculum development and designation of boys' and girls' locker rooms to schools at the state and local level, *see, e.g.*, 20 U.S.C. 1232a; 20 U.S.C. 1686), and in vindicating the Supreme Court's teaching that federal regulators are not empowered to strip federal funding from local schools unless the schools violate particular funding conditions that Congress "unambiguously" has tied to such money, *see, e.g., Penhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (courts "insist[ ] that Congress speak with a clear voice"

before they will interpret any spending legislation to impose rules that arise by virtue of the funding). The proposed amicus brief here elaborates on the State's perspective of the law supporting both of these principles.

People of good faith within their local communities can work through school locker room and bathroom designation issues involving transgender students, taking into account the dignity and privacy interests of those students and of all the school children involved. Because this is not a matter that Title IX commits to federal funding administrators as opposed to our communities, the State of Ohio respectfully submits the attached amicus brief and requests that the Court permit its filing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2016, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by regular mail upon the following parties for whom counsel have not yet entered their appearance:

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STATE OF OHIO *AMICUS CURIAE* BRIEF IN SUPPORT OF HIGHLAND LOCAL SCHOOL DISTRICT'S MOTION FOR PRELIMINARY INJUNCTION

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Claiming to act under the auspices of Title IX of the Education Amendments of 1972, the federal Department of Education insists that the Highland Local School District provide gender-identity-related "instruction to all students … including [instruction on] the types of conduct prohibited [under the Department's view] with respect to sex-specific facilities," and insists further that the district may not provide students with group locker rooms, bathrooms, and overnight accommodations as designated for use by biological sex instead of gender identity. Verified Complaint at ¶¶ 112, 119. Because governing law prudently leaves these sorts of policy determinations to local school districts to resolve in what they conclude is the most appropriate manner respecting the needs, privacy rights, and dignity of all students, and because the law does not vest authority in federal Department of Education personnel to dictate such determinations to Ohio schools, the State of Ohio through its Attorney General submits this friend of the court brief urging that the improperly issued regulatory edicts of federal administrative officials not trump the rule of law.

INTRODUCTION

This case relates to federal regulatory policies spelled out in a May 13, 2016 "Dear Colleague Letter on Transgender Students" issued by the Assistant Secretary for Civil Rights at the U.S. Department of Education and the Principal Deputy Assistant Attorney General for Civil Rights at the U.S. Department of Justice. "Dear Colleague Letter," *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf; *see also* Verified Complaint at ¶ 123 (Defendant U.S. Department of Education transmittal of "Dear Colleague Letter" to plaintiff school district as purporting to summarize a school's "Title IX[ ] obligations regarding transgender students").

The State of Ohio has a strong interest in maintaining state and local control over the operation of its public schools consistent with constitutional structures and protections, and in

preserving both the horizontal and vertical separation of powers that our federal 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) ("the 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*, 131 S. Ct. 2355, 2364 (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 undersigned Ohio Attorney General therefore wrote to the U.S. Attorney General and the Secretary of Education on May 27, 2016, urging that they "take a step back and reconsider the unlawful and ill-advised federal decree that the Dear Colleague letter seeks to impose."

That critique observed that the Dear Colleague missive purports to recite rules requiring that local schools "must allow transgender students access to [restroom and locker room] facilities consistent with their gender identity" as determined by the individual student's "internal sense of gender," while also specifying that "[a] school may not require transgender students … to use individual user facilities when other students are not required to do so." The premise of the Dear Colleague letter, as Ohio's communication noted, is that local solutions undertaken in good faith must be displaced by edict from Washington, D.C.

The Ohio Attorney General continued by observing that while the Dear Colleague directive says that a school's "desire to accommodate others' discomfort cannot justify a policy" other than that required by the Dear Colleague "guidance," Ohio communities are in fact much better equipped than are Washington regulators to advance the important dignity and privacy interests of all their students. And the Ohio Attorney General further underscored that our

federal Constitution provides that national policy of the sort that the Dear Colleague suggested may be achieved only through legislation passed by Congress and submitted to the President – legislation that has not even been proposed by the federal Administration at this point. He observed, too, that 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 group locker room, bathroom, and overnight accommodation policies that the federal Department of Education would impose on Ohio schools, Congress in fact has specified that its laws shall not be read to bar schools from providing separate intimate living facilities.

To date, the Ohio Attorney General has received no response from either federal Department as to any of these points, and federal officials have persisted in their course of action against the plaintiff Ohio school district here as the Verified Complaint reflects. Ohio's Attorney General thus submits this amicus brief contesting the scope of the federal regulatory power that these Defendants assert.

I. Title IX does not authorize federal officials to command that local schools stop providing students with group locker rooms and bathrooms designated by biological sex. The law leaves such policies to determinations by the schools.

Since the time of its adoption some 44 years ago, Title IX 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). That protection extends to all students, including transgender students, but does not impose a federal requirement that schools must treat students differently in determining what boys' or girls' rooms they may use depending on their gender identities. 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. Title IX does not say otherwise.

Indeed, 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. As the federal Education Department's own formal regulations acknowledge: "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; *cf.* 34 C.F.R. 106.61 (further 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").

Simply put, a school rule reserving group locker rooms and bathrooms for people of the same biological sex does not violate Title IX. *See, e.g., Johnston v. University of Pittsburgh*, 97 F. Supp.3d 657, 673 (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 Cnty. Sch. Dist.*, No. 2:06-cv-1074, 2008 WL 4372872, at *4 (D. Nev. 2008) ("Accordingly, Plaintiffs' Title IX [school restroom] claim must fail"); *cf. Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994) ("it is clear that Title IX and its regulations do not require gender-integrated classes in prisons. Institutions may have separate toilet, shower and locker room facilities.").

Federal law appropriately leaves such determinations to the schools. Even in the separate, Title VII employment setting, courts in this Circuit have held that company rules precluding a pre-operative transsexual woman designated a male at birth from using the women's public restroom do not constitute unlawful discrimination and in particular do not

amount to sexual stereotyping as proscribed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 999-1000 (N.D. Oh. 2003), *aff'd* 98 Fed. App'x 461, 462 (6th Cir. 2004).

The case here involving a local school district that under its policies allows elementary school student A the option to use single-use restrooms or boys' rooms but not girls' open locker rooms, showers, or restrooms, *see* Verified Complaint at ¶¶ 82-83, 93-96, thus accords with *Johnson* and does not involve circumstances like those in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) or *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), both of which confronted gender discrimination arising from a person's failure to conform with another's "stereotypes concerning how a man should look and behave," *Barnes*, 401 F.3d at 737. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (*Smith* "explained that an individual's status as a transsexual should be irrelevant to the availability of Title VII protection"); *Johnston*, 97 F. Supp. 3d at 680-81 (*Smith* was a sex stereotyping case involving employer's view of plaintiff's "mannerisms, appearance, conduct, and behaviors," whereas *Johnson* found "no discrimination where employer did not require plaintiff to conform her appearance to a particular gender stereotype, but instead only required plaintiff" to follow rules for "gender-distinct public restrooms"). A rule even at the university level assigning group locker rooms and restrooms by birth sex rather than by gender identity "simply does not constitute … sex stereotyping." *Id.* at 681.

Price Waterhouse emphasized that for Title VII employment decisions, the preclusion against taking gender into account "appears on the face of the statute," 490 U.S. at 239: "'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes'," *id*. at 251 (citations omitted). *Cf. Smith*, 378 F.3d at 574

("After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup … are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex[.]").

By sharp contrast, a rule allowing local schools to "maintain[ ] separate living facilities for the different sexes," including comparable locker room, toilet, and shower facilities, is itself permitted "on the face of the [Title IX] statute," 20 U.S.C. 1686, and by definition imposes no "disparate treatment" of men and women in seeking to advance and balance students' interest in bodily privacy. *See, 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 (emphasis omitted) (alleged school bathroom policy has "not discriminated against Mary Doe under any education program … *because of her 'sex,'* i.e., because she is a 'male,' 'female,' and/or because she failed to act like a 'male' or 'female' … applying the expanded *Price Waterhouse v. Hopkins* definition"); *Cf. Etsitty*, 502 F.3d at 1225 (Title VII case: "Because an employer's requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes, [the public transit authority's] proffered reason of concern over restroom usage is not discriminatory on the basis of sex").

Local school districts may determine that Congress's injunction that nothing in Title IX shall be construed to prohibit schools from maintaining separate living facilities "for the different sexes" could advance what the Sixth Circuit 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." *See Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008); *see also, e.g.*, *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005) ("[s]tudents of course have a significant interest in their unclothed bodies;" also noting that "public school locker rooms" do not afford much privacy protection). Protections envisioned by that allowance for schools to provide separate spaces for the performance of intimate bodily functions might be deemed obviated if Title IX's references to "sex" and "the different sexes" somehow is read not to encompass (and allow separate living accommodation for) biological sex.

In fact, at the time of the law's enactment (and beyond), nearly every dictionary defined "sex" with regard to physiological and reproductive distinctions between males and females, and those factors are encompassed within the terms of the statute. *See, e.g., G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, __ F.3d __, 2016 WL 1567467, at *21 (4th Cir. 2016) (Niemeyer, J., dissenting) (citing, among other sources, *Webster's Third New International Dictionary* 2081 (1971) ("the sum of the … peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation…."); *American Heritage Dictionary* 1187 (1976) ("the property or quality by which organisms are classified according to their reproductive functions"); *American College Dictionary* 1109 (1970) ("the sum of those anatomical and physiological differences with reference to which the male and female are distinguished …")); *Oxford American Dictionary* 622 (1980) ("1. either of the two main groups … into which living things are placed according to their reproductive functions, the fact of belonging to one of these"). The Sixth Circuit has noted that *Price Waterhouse* "established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender

norms." *Smith*, 378 F.3d at 573. Federal administrators here seek to read gender identity into the terms of the statute, but not even that effort reads biological sex *out*.

To the extent that Highland or other school systems choose to provide separate locker rooms "for the different sexes" on the basis of anatomy, they breach no prohibition and are acting as federal law explicitly authorizes. Under the plain statutory text, and with the statute itself allowing schools to decide whether to maintain sex-separated living spaces, "Title IX and its implementing regulations clearly permit schools to provide students with certain sex-segregated spaces, including bathroom and locker room facilities, to perform certain private activities and bodily functions consistent with an individual's birth sex." *Johnston*, 97 F. Supp. 3d at 678.

II. Because Congress itself has not "explicitly" and "unambiguously" expressed any such requirement, federal officials may not command that local schools -- on penalty of losing their federal funds -- surrender their ability to provide students with group locker rooms, bathrooms, and overnight facilities designated by biological sex. Further, federal officials may not use federal purse strings to coerce such a result.

Notwithstanding even Title IX's explicit nod to the power of local schools to "maintain separate living facilities for the different sexes," the federal Department of Education here threatens to revoke all federal funding to the Highland Local School District precisely because of such rules. Verified Complaint at ¶¶ 130-31. That funding reduction of well over one million dollars per year would, Highland attests, cause it "to eliminate special-education classes and programs, end many of its educational-advancement programs …, increase class sizes …, and cut the number of free and reduced-cost lunches available to students." *Id.* at ¶¶ 128, 130. But such penalty is unlawful not only because it runs counter to the statutory language, but also because Congress never explicitly and unambiguously tied federal funding to the locker room rule that federal administrators now seek to impose on Highland. Moreover, federal officials may not put a funding "gun to the head" of local schools to achieve the federal demands.

The Supreme Court consistently has held that "if Congress intends to impose a condition on the grant of federal moneys, it must do so *unambiguously*." *Pennhurst State Sch. & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added). "Title IX was enacted as an exercise of Congress' powers under the Spending Clause," *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005), and "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*, 451 U.S. at 17. The courts therefore "insist[ ] that Congress speak with a clear voice" before they will interpret any spending legislation to impose rules that arise by virtue of the funding. *Id.*

As the need perceived by the federal administrators in 2016 to issue what their "Dear Colleague" letter calls "significant guidance" might suggest, nothing in the 1972 legislation at issue "unambiguously" gives "clear voice" to a requirement that local schools do away with group locker rooms and bathrooms designated by biological sex regardless of what they determine to be the best approach for all students. To the best of Ohio's knowledge, no court has understood Title IX unambiguously to establish such a rule: indeed, the lone court that apparently has accepted such interpretation of the law, in a ruling issued just some two months ago, did so only after adopting the federal Department's arguments that its own regulations in the area are themselves "ambiguous," and only after then finding that "the Department's interpretation, although perhaps not the intuitive one," is one way to look at things and not "plainly erroneous." *See G.G. ex rel. Grimm*, 2016 WL 1567467 at **6, 7; *see also id.* at * 15, 16 (Neimeyer, J., dissenting) ("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;"

further noting that majority relies only on Department's interpretation of what it proclaims as its ambiguous rules).

Congress has never amended Title IX to specify the locker room requirements at issue here, and by no estimation can be said to have expressed "unambiguously" the rule that the federal Department now urges. *Cf. Arlington Central Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006) ("when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously'") (citations omitted). And it is, of course, "Congress [that] must express clearly its intent to impose conditions on the grant of federal funds …." *Pennhurst*, 451 U.S. at 24. Where "Congress has intended the States to [undertake particular actions] as a condition of receiving federal funds, it has proved capable of saying so explicitly." *Id.* at 17-18.

Without such clear expression, the claimed federal funding rule does not apply: "If Congress intended otherwise, the ball is properly left in its court to make that clear." *Sch. Dist. of the City of Pontiac v. Sec'y of the U.S. Dep't of Educ.*, 584 F.3d 253, 277 (divided en banc) (opinion of Cole, J., with six other Judges); *see also id.* at 271 ("Text of the Act" must provide "*clear notice to the States* of their obligation"), 277 (fact that Department's interpretation is "correct" or "plausible" is not relevant if the legislative statement is not "clear"); *see further id.* at 284-85 (opinion of Sutton, J., with five other Judges) ("the federal courts have required Congress to state [Spending Clause] conditions 'unambiguously' in the text of the statute;" a "*plausible* alternative interpretation of the law" can establish ambiguity defeating the claimed condition), 294 ("*Pennhurst* clear-statement rule turns on textual ambiguity," not on legislative history or extraneous conflicting statements by the Secretary of Education).

This clear statement rule applies with even greater force here because not only does the federal Department advance the locker rooms rule as a condition of funding, but such a rule also seeks to affect the federal-state balance. "By and large, public education in our Nation is committed to the control of State and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Tinker*, 393 U.S. at 507 ("comprehensive authority of States and of school officials … to … control conduct in the schools"); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005) (from curriculum to discipline and beyond, "these issues of public education are generally 'committed to the control of state and local authorities'") (citations omitted). And "as explained by Justice Marshall, when legislation 'affects the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision'." *Bond*, 134 S. Ct. at 2089, (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). *See also, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (alterations of federal-state balance must be made "'unmistakably clear in the language of the statue'") (citation omitted); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

Thus, the Supreme Court's "cases have recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives." *National Federation of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J., with Breyer and Kagan, JJ.; seven Justices invalidate attempted coercion through the Spending Clause). Respecting the limitations inherent in the voluntary, 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.* "That system 'rests on what might at first seem a counter-intuitive insight, that freedom is enhanced by the creation of two governments,

not one'." *Id.*, (quoting *Bond*, 131 S. Ct. at 2364) (further interior quotation marks and citations omitted).

And that imperative means that even beyond requiring clear statement by Congress in order 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. But the federal threat effectively to eliminate Highland programs for special education, reduced-price lunches, and more unless it capitulates on bathroom designations amounts to precisely such coercion. Here, as in *NFIB v. Sebelius*, 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 id.*

Further still, even clearly stated and relatively modest funding conditions are not permitted unless they "govern the use of the funds" allocated. *Id.* at 2604. "When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes." *Id.* That is not allowed because "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). In the case now before this Court, the federal bureaucracy threatens to 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). Verified Complaint at ¶¶ 128-129. The Constitution and well established Supreme Court precedent flatly precludes this sort of federal arm twisting. *See also, e.g.*, 20 U.S.C. 1682 (any Title IX funding

cut-off in connection with claimed rules violations "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found").

Again, however, and most fundamentally, Congress did not specify that schools must forgo providing their students with locker rooms and bathrooms as designated by biological sex in order to receive federal education funding. Even the Fourth Circuit panel majority in finding that federal administrators could stretch their own regulations to that effect was constrained to remark that such a reading was "perhaps not … intuitive," and other courts have found such a construction completely insupportable. No one, in any event, can point to language in which Congress expressed such a funding condition "unambiguously." Under the controlling Supreme Court analysis of *Pennhurst* and all its progeny, federal authorities may not apply their locker rooms directive against Highland.

III. Law also precludes federal administrators from imposing curriculum requirements on local schools compelling them to implement gender identity instruction at all grade levels.

Highland's Verified Complaint attests that federal officials invoke Title IX to demand, among other things, that Highland "engage a third-party consultant … with expertise in child and adolescent gender identity … to support and assist" the local schools, that Highland "conduct mandatory training on issues related to gender nonconformance … for all District administrators" and for all "faculty and staff who interact with students at any grade level regarding the District's obligations to prevent and address gender-based discrimination," and that the schools provide "instruction to all students on gender-based discrimination and … examples of prohibited conduct …, including the types of conduct prohibited with respect to sex-specific facilities." Verified Complaint at ¶¶ 107, 112.

Title IX gives federal officials no authority to impose such requirements. Its provisions say nothing of the sort, and certainly do not express "unambiguously" any requirement that

Highland surrender control over its curriculum as a condition of receiving federal education funding. And as the Sixth Circuit has stated, "[w]hether it is the school curriculum [or numerous other matters], these issues of public education are generally 'committed to the control of state and local authorities'." *Blau*, 401 F.3d at 395 (quoting *Goss v. Lopez*, 419 U.S. 565, 578 (1975)).

Congress has taken some pains to make clear (as it is equipped to do) that federal Department of Education officials may not attempt to do what they are doing here. Indeed, in establishing the federal Department of Education, Congress expressly provided that: "No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system … or over the selection or content of … instructional materials by any educational institution or school system, except to the extent authorized by law." 20 U.S.C. 3403(b).

And if that is not clear enough, Congress further underscores that "[n]o provision" of any program for which the Secretary or the Department has administrative responsibility, *see* 20 U.S.C. 1221(c)(1), "shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system …" 20 U.S.C. 1232a.

Yet the actions of Department officials here to direct curriculum and training and instruction and consultant hiring resemble exactly what that law is designed to prevent: "the possibility of [the federal agency] assuming the role of a national school board." *Wheeler v.*

Barrera, 417 U.S. 402, 416 (1974). Like their efforts to prohibit schools from maintaining their own policies on whether to provide students with bathrooms and locker rooms designated by biological sex, the actions of the federal Defendants here to establish curriculum and methods of instruction for local schools cannot be justified and affronts the law and our constitutional system of divided powers.

CONCLUSION

On the basis set forth above, the State of Ohio respectfully encourages this Court to grant the Highland Local School District's motion for preliminary injunction: Highland schools face a serious threat to their special needs and other educational programming and reduced-price lunch efforts; the public interest counsels in favor of preserving Highland's educational funding in the face of the federal government's unrelated threats; the balance of equities favors a school's attempt to serve all needy students through such programs while following its own determinations as to how best to uphold the dignity and privacy interests of every student consistent with congressional enactment; and Congress rather than expressly prohibiting the designation of group locker rooms, bathrooms, and overnight accommodations by biological sex has in fact expressly approved "maintaining separate living facilities for the different sexes" if that is the policy determined by a school as most appropriate to the circumstances of its students.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2016, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by regular mail upon the following parties for whom counsel have not yet entered their appearance:

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