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 UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are 80 Members of the United States Senate and the United States House of Representatives. The Appendix to this Brief sets forth a complete list of *amici curiae.*

As Members of Congress, *amici* have a compelling interest in the proper resolution of this case. Under our tripartite system, Congress is tasked with writing the laws and the Executive has the responsibility to enforce them. The Executive has no constitutional authority to rewrite a federal law—let alone to do so via an informal agency directive.

Yet that is just what the Department of Education ("Department") did here. Through an unpublished letter, the Department declared that Title IX's prohibition on "sex" discrimination "include[s] gender identity" and, as a result, a funding recipient providing sex-separated facilities "must generally treat transgender students consistent with their gender identity." By rewriting Title IX in this fashion, the Department has seized power that Article I vests in Congress and undermined the rule of law. *Amici* have a strong interest in ensuring that the Executive faithfully interprets and enforces the laws of the United States as written.

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The Fourth Circuit's decision to afford the Department's unpublished letter "controlling" deference under the doctrine set forth in *Auer v. Robbins*, 519 U.S. 452 (1997), is untenable. Even accepting *Auer* deference as legitimate, which it is not, this unpublished letter is not in accordance with law.

First, no principle of administrative deference can save an interpretation of a federal law as ill-considered as this one. The Fourth Circuit allowed the Department to rewrite Title IX's prohibition on "sex" discrimination to achieve the agency's policy preferences. Title IX provides that "[n]o person … shall, on the basis of sex … be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The ordinary meaning of "sex" at the time the statute was passed referred to the physiological distinctions between males and females. No member of Congress or the public would have understood "sex" to encompass "gender identity." The Fourth Circuit, which itself called the Department's construction "novel," did not disagree. Petition Appendix ("Pet. App.") 23a. This understanding ought to be decisive. No theory of agency deference allows the Department to override Title IX's plain terms.

Additional principles of statutory interpretation confirm the Fourth Circuit's error. The Department's interpretation would eviscerate Title IX's protections for schools "maintaining separate living facilities for the different sexes." 20 U.S.C § 1686. The legislative history shows that Congress aimed to protect women from sex-

based discrimination; gender identity appears nowhere in the legislative history. And, when Congress does want to create protections on the basis of "gender identity," it knows how to do so. *See, e.g.*, 42 U.S.C. § 13925(b)(13)(A) (separately protecting "sex" and "gender identity" in the Violence Against Women Act).

Second, the Department's letter is not entitled to *Auer* deference. Even if *Auer* deference remains viable, it is inapplicable here because the agency's pronouncement violated the Administrative Procedure Act's ("APA") notice-and-comment command. Agency rules that have the force and effect of law must be promulgated through notice-and-comment procedures. There can be no doubt that this rule imposes binding obligations on recipients of federal funding. Indeed, that was the Administration's aim from the outset.

But even if the Department had followed notice-and-comment procedures, *Auer* deference still would be unavailable. The underlying regulation the Department interpreted is merely a restatement of the statute itself. The Court has held that such "parroting" regulations are not owed deference because they do not fulfill the key function that animates the doctrine: the agency is not using its expertise to fill a statutory gap.

Third, the Department's interpretation of Title IX violates the Spending Clause. The Spending Clause prevents Congress from surprising recipients of federal funds with retroactive conditions. A statute must provide clear notice of the obligations that recipient entities will endure by accepting federal funding. The Department's novel interpretation of Title IX does not even come close

to meeting this requirement. Congress never intended for "sex" to include the term "gender identity" let alone made that intention clear. As the Court has held, constitutional avoidance supersedes agency deference. Accordingly, the serious Spending Clause problem with the Department's interpretation requires reversal.

Fourth, the lack of care and thought that went into this hastily issued letter highlights why such a sensitive issue should be resolved by Congress—not an agency. Whether "gender identity" should be covered by Title IX raises a host of difficult issues, including the privacy rights of students, the economic costs of a new federal mandate, and the moral and religious rights of affected students. Only Congress is equipped to answer complex questions such as these.

ARGUMENT

I. Title IX's Ban On "Sex" Discrimination Does Not Encompass Gender Identity.

The Department's interpretation of Title IX's ban on "sex" discrimination is untenable. The law provides, in relevant part, that "[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). It further provides that "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act ... from maintaining separate living facilities for the different sexes." *Id.* § 1686. Interpreting "sex" to include "gender identity" is irreconcilable with Title IX's plain meaning.

Because Title IX does not define "sex," the term's ordinary meaning controls. *See Burrage v. United States*, 134 S. Ct. 881, 887 (2014). When Congress enacted Title IX, the ordinary meaning of "sex" encompassed biological sex—not gender identity. As Judge Niemeyer explained, "virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions." Pet. App. 54a (collecting sources). The statutory inquiry can end there. The "preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRocs Ltd., LLC v. United States,* 541 U.S. 176, 183 (2004) (alteration in original) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The Department may disagree with Congress's decision to confine Title IX's protections to biological sex. But "federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress." *In re Aiken Cty.*, 725 F.3d 255, 260 (D.C. Cir. 2013).

The Fourth Circuit's interpretation also conflicts with the "broader structure" of Title IX. *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015). Construing Title IX's ban on "sex" discrimination to encompass gender identity would defeat Congress's determination that recipients of federal funds may have separate living facilities for "the *different* sexes." 20 U.S.C. § 1686 (emphasis added). If the Department's interpretation were correct, it would be impossible to enforce Section 1686 as written. Title IX did not use the same term to mean biological sex, *i.e.*, different sexes, and also gender identity, *i.e.*, people of the same sex who identify as the opposite biological sex.

Basic principles of statutory interpretation require "sex" to "be construed uniformly throughout Title IX and its implementing regulations." Pet. App. 50a (Niemeyer, J., dissenting) (citing *Sullivan v. Stroop,* 496 U.S. 478, 484 (1990)). The Department's novel construction violates that rule.

Title IX's legislative history confirms that "sex" means biological sex. Congress's focus was on protecting women from discrimination. *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495, at *2 (N.D. Tex. Aug. 21, 2016) ("The legislative history shows Congress hailed Title IX as an indelible step forward for women's rights."). During the debates, however, there was concern that Title IX would bar educational institutions from maintaining separate intimate facilities. *See, e.g.*, 117 Cong. Rec. 30,407 (1971); 118 Cong. Rec. 5807 (1972). Senator Bayh, for example, proposed that Title IX be amended "to permit differential treatment by sex" in "instances where personal privacy must be preserved." 118 Cong. Rec. 5807. Representative Thompson also voiced concern about men and women using the same intimate facilities and proposed that Title IX be amended to preserve the ability to have "separate living facilities for the different sexes." 117 Cong. Rec. 39,260 (1971). These concerns resulted in Congress passing Section 1686. *See id.* at 39,263. This legislative history is incompatible with the Department's conclusion that "sex" discrimination under Title IX encompasses gender identity. No member of the Congress that debated and enacted this statute shared that novel view.

Last, "Congress knows how to" statutorily protect gender identity "when it wants to." *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 416 (2009) (quoting *Omni*

Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 106 (1987)). The 2009 federal hate crimes law, for example, applies to "gender identity." 18 U.S.C. § 249(a)(2). The 2013 reauthorization of the Violence Against Women Act similarly affords statutory protection based on "sex" and "gender identity." 42 U.S.C. § 13925(b)(13)(A). Therefore, it would be inappropriate to presume that "Congress, by its silence, impliedly approved" of statutory protection for gender identity in Title IX. *United States v. Powell*, 379 U.S. 48, 55 n.13 (1964). This is further proof that Title IX's ban on "sex" discrimination, by its plain terms, encompasses only biological sex.

II. The Department's Interpretation Of Title IX To Include Gender Identity Is Not Entitled To *Auer* Deference.

The Fourth Circuit rejected this common-sense interpretation of Title IX under the guise of *Auer* deference. Pet. App. 18a-25a. Although *Auer* deference should be reconsidered, the doctrine is nevertheless inapplicable here because (1) the Department failed to comply with the APA's notice-and-comment requirement and (2) the letter is simply too informal to warrant judicial respect, and (3) the regulation the Department is interpreting is little more than a restatement of the statute itself.

First, the pronouncement at issue here cannot even get out of the starting gate because the Department failed to comply with the APA's notice-and-comment command. *See* 5 U.S.C. § 553. Even the possibility of deference to an agency's interpretation presupposes that the regulation complies with the APA. A rule is subject to notice and

comment if it will "have the 'force and effect of law.'" *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979)). The agency rule therefore is subject to notice and comment if it "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014). Notice and comment "improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review." *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (citation omitted).

In contrast, an agency rule is not subject to notice and comment under Section 553 if it merely "express[es] the agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities." *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980). But this exception must be narrowly construed. The APA's legislative history is "scattered with warnings that various of the exceptions are not to be used to escape the requirements of section 553." *Am. Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (citing S. Doc. No. 79-248 (2d Sess. 1946)); *see also Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 384 (2d Cir. 1978) ("The legislative history of the [APA] demonstrates that Congress intended the exceptions in § 553(b)(B) to be narrow ones." (citing S. Rep. No. 79-752, (1st Sess. 1945))). The exceptions to Section 553's notice-and-comment requirement, in sum, are not an excuse for making "important policy judgments [outside of] the more

formal deliberative processes that produce ... legislative rules." John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 917 (2004).

The Department's letter has the force and effect of law. That is the whole point—the Department's aim is to coerce entities accepting federal funds to conform to the Administration's policy agenda. Otherwise, this Court would not have needed to stay the Fourth Circuit's judgment. Petitioner sought that relief precisely because the Department has made clear that noncompliance will have drastic ramifications for funding recipients. Simply put, compliance is compulsory in nature. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). "Permitting the definition of sex to be defined in this way would allow [the Department] to 'create de facto new regulation' by agency action without complying with the proper procedures. This is not permitted." *Texas v. United States*, 2016 WL 4426495, at *12 (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)).

Importantly, failure to comply with Section 553 is no trivial error. Congress enacted Section 553 because it understood that agency procedures must be "adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses." S. Doc. No. 77-8, at 102 (1st Sess. 1941). From the beginning, there has been a consensus that notice-and-comment rulemaking is needed "to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Id.* at 103. In other words, "advance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory

era." *Chamber of Commerce v. OSHA*, 636 F.2d 464, 472 (D.C. Cir. 1980) (Bazelon, J., concurring in the result).

This is not an isolated incident. The Executive, as the Court is well aware, tried this gambit on the issue of immigration. *See Texas v. United States*, 809 F.3d 134, 171-78 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). But the Executive also evaded notice and comment on issues garnering less publicity. *See, e.g.*, *United Steel v. Fed. Highway Admin.*, 151 F. Supp. 3d 76, 89 (D.D.C. 2015) (DOT waiver of "Buy America" rule); *Mendoza v. Perez*, 754 F.3d 1002, 1025 (D.C. Cir. 2014) (new DOL wage and working conditions rule); *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014) (new FCC telecommunications reimbursement rule); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012) (new EPA diesel engine rule); *EPIC v. DHS*, 653 F.3d 1, 8 (D.C. Cir. 2011) (new TSA airport screening rule).

Reversal is needed if the APA is to continue performing its vital function. The statute is "a 'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'" *FCC v. Fox Television Stations*, Inc., 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (quoting Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1248 (1982)). But it is no compromise at all if administrative agencies, as the Department did, may bypass notice and comment in the name of expediency. The Court should reverse the decision to ensure the APA's procedures are rigorously enforced.

Second, even if the Department's interpretation were not subject to notice and comment, deference would be inappropriate given the letter's informality. "Just as varying degrees of deference are appropriate for regulations or other forms of guidance issued by agencies, so too are different levels of deference appropriate for interpretations of regulations offered by agencies." *Joseph v. Holder*, 579 F.3d 827, 832 (7th Cir. 2009); *see United States v. Lachman*, 387 F.3d 42, 54 (1st Cir. 2004). "When the agency speaks formally, *Auer* holds that the agency's interpretation is controlling unless it is plainly erroneous or inconsistent with the regulation. An off-the-cuff response to an interpretive question from the first person who answers the telephone would be quite a different matter." *Joseph*, 579 F.3d at 832.

The Department's interpretation is far too informal to warrant judicial deference. "To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (alteration in original) (quoting *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)); *see also infra* at 13-15.

Third, *Auer* deference is inapplicable because "the underlying regulation does little more than restate the terms of the statute itself." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). Any basis for judicial deference dissipates when the agency's interpretation of its own regulation does not fill a statutory gap. As the Court has explained, "the existence of a parroting regulation does not change the fact that the question here is not the meaning of the

regulation but the meaning of the statute." *Id.* A federal agency "does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Id.*

That is what the Department did. Title IX, again, does not "prohibit any educational institution receiving funds ... from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The Department issued a regulation providing that "[a] recipient may provide separate housing on the basis of sex" so long as it is "[p]roportionate in quantity" and "[c]omparable in quality and cost." 34 C.F.R. § 106.32(b). The neighboring regulation, upon which the Department relies, merely extends that same principle to other intimate facilities. *See id.* § 106.33 ("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.").

As a consequence, neither regulation fills any gap in Title IX with regard to the meaning of "sex." They simply parrot the statutory language. No *Auer* deference thus is due the Department's interpretation.

III. The Department's Interpretation Of Title IX Violates The Spending Clause.

Courts must avoid interpreting a statute to raise a serious constitutional question if the law's text will allow it. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575

(1988). The avoidance canon, when applicable, supersedes any appeal to administrative deference. *See Miller v. Johnson*, 515 U.S. 900, 923 (1995). The canon applies here. The Department's interpretation of Title IX violates the Spending Clause.

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). As the Court has explained, "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). "The legitimacy of Congress' power to legislate under the spending power," consequently, depends on whether the recipient of the federal funds "voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* Like any other contract, "if Congress desires to condition the ... receipt of federal funds, it 'must do so unambiguously …, enabl[ing] the [recipients] to exercise their choice knowingly, cognizant of the consequences of their participation.'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (second and third alterations in original) (quoting *Pennhurst*, 451 U.S. at 17).

The Spending Clause thus prevents Congress from surprising recipients of federal funds, like Petitioner, "with postacceptance or 'retroactive' conditions." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2606 (2012) (opinion of Roberts, C.J.) (quoting *Pennhurst*, 451 U.S. at 25). Unless "Congress spoke so clearly that [the Court] can fairly say that the [recipient] could make an informed choice," the statute cannot be interpreted to impose the condition.

Pennhurst, 451 U.S. at 25. Recipients "cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296, (2006) (quoting *Pennhurst*, 451 U.S. at 17). In sum, the statute must provide recipients with "clear notice" of the condition that acceptance of federal funds purportedly imposed. *Id.*

The Department's interpretation of Title IX does not even come close to meeting this demanding standard. It is not the better interpretation of Title IX—let alone the unambiguously correct interpretation of it. *See supra* at 4-7. The Fourth Circuit agreed. The court conceded the Department's interpretation was "novel," admitted it was "perhaps not the intuitive one," and acknowledged that "there was no interpretation of how § 106.33 applied to transgender individuals before January 2015." Pet. App. 23a. No more is necessary to see the Spending Clause problem. No such agency directive can meet the standard of "clear notice."

This result follows directly from *Pennhurst*. There, the Court deemed language "ambiguous" in part because the statute did not expressly impose the mandate at issue. *Pennhurst*, 451 U.S. at 19. The Court reasoned that "in those [other] instances where Congress ha[d] intended the States to fund certain entitlements as a condition of receiving federal funds, it ha[d] proved capable of saying so explicitly." *Id.* at 17-18. Similarly, Congress has "proved capable" of explicitly prohibiting discrimination on the basis of "gender identity" in laws which previously only barred discrimination on the basis of "sex." *See supra* at 6-7. The absence of any express congressional directive to expand Title IX to encompass "gender identity" confirms

that imposing the funding condition at this juncture would violate the Spending Clause.

IV. Congress Must Decide Whether Title IX Will Be Amended To Address "Gender Identity" Issues.

This Court has been appropriately reluctant to presume that Congress has empowered an agency to resolve a significant political, social, or economic issue. *See Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)*; FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000). This hesitation recognizes that certain issues are so important that they demand legislative attention. For good or for ill, Congress does not always move at the brisk pace that proponents of a given cause might wish it did. The "rough and tumble of the legislative process," *Robbins v. Chronister*, 435 F.3d 1238, 1243 (10th Cir. 2006), is not without its detractors. Yet the legislative process must be respected. "[T]he lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving v. United States,* 517 U.S. 748, 758 (1996).

This may "appear 'formalistic' … to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity." *New York v. United States*, 505 U.S. 144, 187 (1992). However, the Constitution "divides power … among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id.* As a result, the courts "are not at liberty to rewrite [laws] to reflect a meaning [they] deem more desirable." *Ali v. Fed. Bureau of Prisons,* 552 U.S. 214, 228 (2008). "The Constitution's structure requires a stability which transcends the convenience of

the moment." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring). Congress has been entrusted with "the final say on policy issues." *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225, 234 (1956).

Whether Title IX should be extended to protect "gender identity" exemplifies the point. This issue raises sensitive and complex questions that require careful study, discussion, and debate. Accommodations for those who identify with the opposite biological sex must be weighed against the rights and needs of those who do not. Further, the issue is not as simple as adding "gender identity" to the list of protected classes under Title IX. For example, Congress will need to grapple with whether covering gender identity under Title IX would maintain "athletic opportunities for women," *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982), or compromise athletic safety, *see, e.g., B.C. v. Bd. of Educ., Cumberland Reg'l Sch. Dist.*, 220 N.J. Super. 214, 220 (App. Div. 1987), among myriad other issues, *see* Pet. App. 50a-53a (Niemeyer, J., dissenting). Only Congress is equipped to address these complicated policy questions in a balanced fashion.

Nor has this controversial issue suffered for lack of attention. As noted above, in the 2013 reauthorization of the Violence Against Women Act, Congress prohibited recipients of certain federal grants from invidiously discriminating on the basis of both "sex" and "gender identity." 42 U.S.C. § 13925(b)(13)(A). Congress also has ensured that recent hate crimes legislation applies to "gender identity." 18 U.S.C. § 249(a)(2). At the same time, though, Congress has yet to add gender identity protections to Title IX. Indeed, while Congress has

expressly added "gender identity" to other civil rights statutes, it has not changed the terms of Title IX, despite numerous proposals to do so. *See* H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015); S. 811, 112th Cong. (2011) (rejecting similar amendments to Title VII); H.R. 2981, 111th Cong. (2009) (same); H.R. 2015, 110th Cong. (2007) (same).

Congress's judgment as to how best to address the "gender identity" question must be honored. In the end, "[n]othing prevents the President from returning to Congress" and "judicial insistence upon that consultation does not weaken" our ability to confront controversial issues. *Hamdan v. Rumsfeld,* 548 U.S. 557, 636 (2006) (Breyer, J., concurring). "To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means." *Id.*

CONCLUSION

For these reasons, the Court should reverse the Fourth Circuit's judgment.

Respectfully submitted,

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APPENDIX

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Appendix

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