NO. 15-2056

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

G.G., by his next friend and mother DEIRDRE GRIMM,
Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 16 OTHER STATES SUPPORTING DEFENDANT-APPELLEE

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INTRODUCTION AND INTEREST AND IDENTITY OF *AMICI*

This case concerns whether Title IX should be interpreted to impose a condition on *amici* States' receipt of billions of dollars in education funds that Congress did not clearly state on the face of the statute at the time of its enactment.[1] Appellant seeks to interpret Title IX's reference to "sex"—which Congress and the courts historically have understood to refer to physiological sex—as mandating that States accommodate students' choice of restroom based on their gender identity. Under this Court's case law, the Spending Clause to the U.S. Constitution prohibits courts from interpreting statutes to impose such new obligations on the States that are not set forth unambiguously in the text of the law itself. *Com. of Va., Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc) (Luttig, J.).

This Court previously acknowledged that Appellant's construction of Title IX was "novel" and deemed Title IX's reference to "sex" ambiguous in certain respects. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 722 (4th Cir. 2016). Accordingly, this Court deferred to an interpretation of the term "sex" as including gender identity, set forth in an unpublished U.S. Department of Education opinion

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[1] *Amici* are the States of West Virginia, Alabama, Arizona, Arkansas, Georgia, Kansas, Louisiana, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Utah, and the Governor of Kentucky. *Amici* States file this brief pursuant to Rule 29(a) of the Federal Rule of Appellate Procedure, which provides that a State may "file an amicus-curiae brief without the consent of the parties or leave of court." Fed. R. App. P. 29(a).

letter. *Id.* at 723. *Amici* States agreed with Appellee at that time, and continue to believe, that the term "sex" in Title IX in fact unambiguously refers to physiological sex. Appellee's Br. 20–45.

But even if this Court continues to hold that the term "sex" is in some manner ambiguous, *amici* States respectfully submit that a different outcome is appropriate now than the one previously reached by the Court. The Department of Education has since repealed its informal opinion letter, leading the U.S. Supreme Court to remand the case to this Court after having granted certiorari. This case thus now no longer presents the question whether a court should defer to an agency interpretation of an ambiguous statutory or regulatory provision enacted pursuant to the Spending Clause.

Instead, the case simply presents the Court with an (allegedly) ambiguous term that requires resort to ordinary principles of statutory interpretation to resolve. Under the Spending Clause, "[i]t is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted." *Riley*, 106 F.3d at 567. In other words, assuming this Court's prior finding of ambiguity, this Court must apply the Spending Clause's clear-statement canon to resolve the ambiguity *against* imposing an admittedly novel obligation (*see* G.G. S. Ct. Br. in Opp. at 22, 31) on the States.

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 Appellant'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]

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 Appellant's view, little would prevent the federal government from imposing novel conditions on the States in a variety of other contexts.

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

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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 Texas v. United States*, 201 F. Supp. 3d 810, 820 n.8 (N.D. Tex. 2016); 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.).

women in higher education. In exchange for the 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. Congress cannot 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.

II. In this case, the statute not only lacks a clear statement supporting the Appellant's view, it unambiguously forecloses that interpretation. 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 Appellant has acknowledged that this interpretation is “novel.” *Supra* p.1.

That alone requires rejecting Appellant’s view. The Supreme Court’s cases make clear that States cannot be required to comply with obligations they could not anticipate from the enacted statutory language.

Appellant’s three arguments that the Spending Clause’s clear-statement requirement does not apply in this case are unpersuasive. *First*, Appellant attempts to limit *Pennhurst* to only actions seeking money damages—a limitation the Supreme Court has never imposed. *Second*, Appellant argues that this Court cannot consider the *Pennhurst* clear-statement rule even though such rule is a statutory-construction rule no different from any other an *amicus* might raise in support of a statutory interpretation advanced by a party. *Third*, Appellants fail to persuasively argue that Title IX provides the States with sufficient notice of liability in this case because the statute provides no clear notice with respect to the definition of “sex.”

III. Were this Court to interpret Title IX as Appellant requests, States would be unconstitutionally coerced into accepting new grant conditions long after they receive federal funds. Appellant's view would force States to 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.

ARGUMENT

Appellee 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. Appellee's Br. 20–35. *Amici* States concur with Appellee's textual analysis and adopt it herein by reference.

But even if there were some ambiguity on this point, as this Court previously concluded, that ambiguity must be resolved in favor of Appellee's reading of the statute. 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). If, as this Court held, Title IX is unclear as to whether students must be allowed to use the restroom

consistent with their gender identity, the statute cannot be read as mandating that result.

I. 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, the Supreme Court has required that any conditions imposed on States pursuant to the Spending Clause be clearly and unmistakably stated.

A. 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)).

A number of 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.

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 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.

B. Given the constitutional imperative to preserve the balance of power between the federal government and the States, the Supreme 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). The Supreme Court presumes, as "a time-honored rule,"[3] 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, the Supreme Court has long required that it be "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 the Supreme 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)).

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[3] 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).

C. 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 'unmistakably clear in the language of the statute.'" *Gregory*, 501 U.S. at 460 (citation omitted). Without a "clear and manifest" statement, the Supreme 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 the Supreme 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, the Supreme 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); *see also Maryland Psychiatric Soc., Inc. v. Wasserman*, 102 F.3d 717, 721 (4th Cir. 1996). This puts an important limit on Congress's power, by requiring that "the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* 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. *Id.*

The "crucial inquiry" for a court interpreting a Spending Clause 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." *Id*. "[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. As this Court has held, "[i]t is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted." *Comm. of Va., Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997).

The requirement of an unambiguous statement 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 the Supreme 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 the Supreme 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").

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

A. The Supreme Court has "repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause." *Davis Next Friend LaShonda D. v. Monroe Cnty. 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 Cnty. 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.

The Supreme Court's Title IX cases are consistent with this requirement. For example, in *North Haven Board of Education v. Bell*, the Supreme Court considered whether Title IX "prohibit[s] federally funded education programs from discriminating on the basis of gender with respect to employment." *N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 514 (1982). The Supreme 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). The 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, the Supreme Court has consistently acknowledged the requirement that States must have clear notice of the scope of their liability. Because these 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 the Supreme Court has declined to reconsider, the Supreme Court acknowledged that "the statutory text does not shed light on Congress' intent with respect to the scope of available remedies." *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). Nevertheless, even with respect to this judicially-created right, the

Supreme 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*, the Supreme 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 Supreme 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.

B. This case does not concern the scope of available remedies under Title IX's implied right of action but rather the meaning of the term "sex" that appears on the face of the statute. Applying this clear-statement rule to the statutory language that

all parties agree is at issue in this case, it is plain that Appellant cannot impose his 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, *Gloucester Cnty.*, 822 F.3d at 735–37 (Niemeyer, J., concurring in part), and this physiological understanding prevailed in every prior case to consider the question of restrooms.[4]

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[4] *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1219, 1221 (10th Cir. 2007); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 145, 749 n.1 (4th Cir. 1996*); Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085–87 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 748–50 (8th Cir. 1982); *see also Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011) ; *Barnes v. City of Cincinnati*, 401 F.3d 729, 734-35 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1194 (9th Cir. 2000) ; *United States v. Southeastern Okla. State Univ.*, No. 5:15-CV-324, 2015 WL 4606079, at **1-**2 (W.D. Okla. July 10, 2015) ; *Rumble v. Fairview Health Services*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at 3-6 (D. Minn. Mar. 16, 2015); *Lewis v. High Point Regional Health*

Disregarding this settled understanding, Appellant now argues 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 Appellant suggests. Indeed, this Court previously concluded that "the regulation is susceptible to more than one plausible reading." *Gloucester Cnty.*, 822 F.3d at 720; *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, this Court must uphold the decision of the district court. 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

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Sys., 79 F. Supp. 3d 588, 589-90 (E.D.N.C. 2015); *Finkle v. Howard Cnty.*, 12 F. Supp. 3d 780, 782-83 (D. Md. 2014); *Muir v. Allied Integration Tech.*, No. DKC 13-0808, 2013 WL 6200178, at *2, *10 (D. Md. Nov. 26, 2013); *Schroer v. Billington*, 577 F. Supp. 2d 293, 295-99 (D.D.C. 2008); *Hart v. Lew*, 973 F. Supp. 2d 561, 581 (D. Md. 2013).

issue. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998). In fact, this Court need not even determine what the best or most plausible reading of Title IX's reference to "sex" may be. It is enough that the statute and regulation do not unmistakably require the position advanced by Appellant—a conclusion this Court already reached in its prior consideration of this case. *Gloucester Cnty.*, 822 F.3d at 721. Under the Supreme Court's case law, the States cannot be said to have agreed to any such obligation as a condition of receiving federal funds.

Appellant's position would have consequences for Spending Clause legislation more broadly. Allowing this intrusion into state sovereignty would 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.

C. Appellant 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, Appellant has alleged that any consideration of the clear-statement rule was waived in this case, G.G. S. Ct. Br. in Opp. at 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 simply "a rule of statutory construction" that *amici* States put forth as further support of the arguments

advocated by Appellee. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). To consider the *Pennhurst* rule is no different from considering any number of other ordinary tools of statutory construction—such as legislative history, *ejusdem generis*, or *noscitur a sociis*—that might bolster a statutory interpretation preserved and advanced by a party. To determine whether Appellant's interpretation of Title IX and its regulations is correct, this Court must determine whether the relevant legal texts are ambiguous and, if so, what interpretation that ambiguity permits. But because Title IX is indisputably a Spending Clause statute, those questions cannot be answered without addressing the clear-statement rule.

Moreover, even if the Spending Clause clear-statement rule is considered a distinct legal argument, a court is not limited to "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). 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, the argument regarding the *Pennhurst* clear-statement rule is not new, and Appellant can hardly argue inadequate notice. *Nelson v. Adams USA, Inc.*,

529 U.S. 460, 469–70 (2000). Appellee raised the rule as a defense in its Answer to the Complaint. ECF No. 77 at 12. The States also raised this specific argument about the clear-statement rule in depth in their briefs before this Court at the panel and petition for *en banc* stages, as well as before the Supreme Court at the petition and merits stages (as did Appellee).[5]

Second, Appellant has argued that the clear-statement rule does not apply to "requests for injunctive relief," but rather "merely [to] the availability of 'money damages.'" G.G. S. Ct. Br. in Opp. at 28–29 (quoting *Davis Next Friend LaShonda D. v. Monroe Cnty. 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. As explained above, 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; *Gebser*, 524 U.S. at 277. Neither case had occasion for the Supreme Court to reach the question of the applicability of the clear-statement rule to injunctive relief, and neither did so.

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[5] *See* Pet. at 36–37; State Amici Br., *Gloucester Cnty. 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 Cnty. Sch. Bd.*, No. 15-2056, 2015 WL 7749913 at *8 (4th Cir. Nov. 30, 2015) (panel); State Amici Br., *id.*, 2016 WL 2765036 at *4–5 (4th Cir. May 10, 2016) (petition for rehearing en banc).

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 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, Appellant *does* seek money damages in this case, and, therefore, cannot escape application of the clear-statement rule on this ground. *See* ECF No. 15.

Third, Appellant 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." G.G. S. Ct. Br. in Opp. at 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 Appellant 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. *See 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 Cnty. 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*, the Supreme 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," the Supreme 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." *Id*. Accordingly, the Court "strictly constru[ed]" the statute "in favor of the sovereign." *Id*.

Similarly, in *Pennhurst*, the Supreme 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). Here, too, the Supreme Court declined to infer from broad statutory text a specific obligation that was not clear on the face of the statute. The same outcome is appropriate in this case.

III. 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, Appellant'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, the Supreme 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).

Appellant'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.[6] 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.[7] 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.[8] In some States, like Arizona, Kentucky, Tennessee, and Texas, the numbers reach higher and comprise nearly 20% of the total school budget.[9] Much of the money goes to poor and special-needs children.[10] It is difficult to imagine a clearer instance of unlawful coercion, and for that reason too, Appellant's interpretation of Title IX must be rejected. *See Comm. of Va., Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (Luttig,

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[6] 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).

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

[8] Digest of Education Statistics, Table 235.20.

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

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

J.) (describing the threat of withholding education funding as raising a "Tenth Amendment claim of the highest order").

CONCLUSION

The decision of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,199 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on May 15, 2017, the foregoing document was served on the counsel of record for all parties through the CM/ECF system. Four paper copies of this brief will be sent to the Clerk of Court via Federal Express.

/s/ Thomas M. Johnson, Jr.	May 15, 2017
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