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-Appellant.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA AT NEWPORT NEWS,
NO. 4:15-CV-0054, HON. ROBERT C. DOUMAR

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEE IN SUPPORT OF AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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If yes, identify all parent corporations, including all generations of parent corporations:

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Lawrence J. Joseph Date: 11/30/2015

Counsel for: Eagle Forum Educ & Legal Def Fund

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I certify that on 11/30/2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

RULES AND REGULATIONS

OTHER AUTHORITIES

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[1] Founded in 1981, Eagle Forum has consistently defended federalism and supported autonomy in areas (like education) of predominantly local concern. Eagle Forum has a longstanding interest in applying Title IX consistent with its anti-discrimination intent, without intruding any further into schools' educational missions. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

A female high school student (hereinafter, "G.G.") diagnosed with gender dysphoria has begun the process of living as a male. Spurred on by sub-regulatory guidance documents from the federal Department of Education ("DOE"), G.G. sued the Gloucester County School Board ("School Board") under Title IX and the Equal Protection Clause for denial of access to the boy's restrooms at the school. *Amicus* Eagle Forum respectfully submits that DOE lacks the authority to expand Title IX's sex-based protections to include gender-identity issues and that the Equal Protection Clause does not compel schools to allow biological girls into the

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

boys' restroom and vice versa.

The Equal Protection Clause prohibits state and local government from denying anyone the equal protection of the laws, U.S. CONST. amend. XIV, §1, cl. 4, and Title IX prohibits sex-based discrimination in federally funded education. *See* 20 U.S.C. §1681(a). Title IX authorizes federal funding agencies to terminate a recipient's federal funding for violating Title IX. 20 U.S.C. §1682.

Congress enacted Title IX in 1972[2] and modeled it on Title VI of the Civil Rights Act of 1964, except that Title IX prohibits sex-based discrimination in federally funded education. 20 U.S.C. §1681(a). Like Title VI, Title IX prohibits only intentional discrimination (*i.e.*, action taken *because* of sex, not merely *in spite of* sex), *Alexander v. Sandoval*, 532 U.S. 275, 282-83 & n.2 (2001). Like Title VI, Title IX authorizes funding agencies to issue rules, regulations, and orders of general applicability to effectuate the statutory prohibition against intentional discrimination. 20 U.S.C. §1682. According to the Senate sponsor, that authority "permit[s] differential treatment by sex" such as the need for privacy in locker rooms and classes for pregnant women. 118 CONG. REC. 5807 (1972). Congress intended §902 to mirror §602, *compare* 20 U.S.C. §1682 *with* 42 U.S.C. §2000d-1,

[2] In 1988, Congress amended Title IX's definition of "program or activity" to reach beyond the specific programs and activities that receive federal funds. Pub. L. No. 100-259, 102 Stat. 28 (1988).

so §602's legislative history controls.[3]

That history makes clear that agencies must effectuate the statute via rules, regulations, and orders,[4] 42 U.S.C. §2000d-1, which do not take effect unless and until signed by the President in the *Federal Register*.[5] 42 U.S.C. §2000d-1; 110 CONG. REC. 2499-00 (1964) (Rep. Lindsay) (presidential-approval amendment). Title VI's proponents repeatedly cited presidential approval as a bulwark against bureaucratic overreaching. *See* 110 CONG. REC. 6562 (Sen. Kuchel); 110 CONG. REC. 7059 (Sen. Pastore); 110 CONG. REC. 5256 (Sen. Humphrey); 110 CONG. REC. 6544 (Sen. Humphrey); 110 CONG. REC. 6749 (Sen. Moss); 110 CONG. REC.

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[3] *See* 118 CONG. REC. 5803 (Title IX has same procedural protections as Title VI) (Sen. Bayh). *id.* 5808 ("These provisions [including §902] parallel Title VI of the 1964 Civil Rights Act") (Sen. Bayh); *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 170 (1975) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI") (prepared statement of Sen. Bayh).

[4] The House bill permissively authorized agencies to proceed by rule, regulation, or order, H.R. 7152, 88th Cong. §602 (1963) ("Such action *may* be taken by… rule regulation or order") (emphasis added), but Senator Dirksen's substitute bill amended §602 to its current form. 110 CONG. REC. 11,926, 11,930 (1964); *see Bd. of Pub. Instruction of Taylor County v. Finch,* 414 F.2d 1068, 1075-77 & n.13 (5th Cir. 1969) (§602's procedural provisions are mandatory).

[5] In 1980, the President delegated rule-approval and enforcement authority to the Attorney General, 45 Fed. Reg. 72,995 (1980) (Executive Order 12,250), who delegated enforcement authority to the Assistant Attorney General for Civil Rights. 46 Fed. Reg. 29,704 (1981).

6988 (explanatory memorandum by Rep. McCulloch, inserted by Sen. Scott); 110 CONG. REC. 7058 (Sen. Pastore); 110 CONG. REC. 7066 (Sen. Kuchel); 110 CONG. REC. 7067 (Sen. Kuchel); 110 CONG. REC. 7103 (Sen. Javits); 110 CONG. REC. 11,941 (Attorney General Kennedy's letter, inserted by Sen. Cooper); 110 CONG. REC. 12,716 (Sen. Humphrey); 110 CONG. REC. 13,334 (Sen. Pastore); 110 CONG. REC. 13,377 (Sen. Allott).

The federal Department of Health, Education & Welfare ("HEW") issued the first Title IX regulations in 1975. *see* 40 Fed. Reg. 24,128 (1975). When it was formed from HEW, DOE copied the HEW regulations, with DOE substituted for HEW in the relevant places. 45 Fed. Reg. 30,802 (1980). The rest of HEW became the federal Department of Health & Human Services ("HHS"). Both agencies retain their own regulations for the recipients of their funding, as do all federal funding agencies. *See, e.g.*, 7 C.F.R. pt. 15a (U.S. Department of Agriculture). These regulations allow recipients to maintain sex-segregated restrooms: "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." *See* 45 C.F.R. §86.33 (HHS); 34 C.F.R. §106.33 (DOE); 7 C.F.R. §15a.33 (Agriculture).

STATEMENT OF FACTS

Amicus Eagle Forum adopts the facts as stated in the School Board's brief.

See Appellee's Br. 1-3, 4-7. In summary, although G.G. potentially may undergo sex reassignment surgery in the future, for now G.G. retains the physiology of a female. According to the *amicus* brief filed by the United States in support of G.G. (hereinafter, "Federal *Amicus* Br."), "the majority of transgender people do not have genital surgery." Federal *Amicus* Br. 4 (*citing* Jaime M. Grant *et al.*, *Injustice At Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, at 2, 26 (2011)).

G.G. initially used the single-person restroom the school nurse's office, but subsequently asked school officials for permission to use the sex-segregated restrooms for male students. The negative public response to G.G.'s use of the boys' restroom prompted the School Board to add additional single-person restrooms and to adopt a restroom policy that limits "male and female restroom and locker room facilities … to the corresponding biological genders," and commits to "provide[] an alternative appropriate private facility" for "students with gender identity issues." JA:18, ¶43. Rejecting the School Board's accommodation, G.G. sued under Title IX and the Equal Protection Clause to enjoin denial of access to the boys' restroom.[6] The District Court denied G.G.'s motion for a

[6] G.G. takes physical education at home, JA:30, and apparently does not use locker rooms.

preliminary injunction and granted the School Board's motion to dismiss G.G.'s Title IX claims. G.G. filed this interlocutory appeal.

SUMMARY OF ARGUMENT

Before addressing the merits, this Court should reject the claims that DOE guidance on the scope of allowable transgender restroom policies warrants judicial deference. First, Title IX does not delegate unique Title IX interpretative authority to DOE any more than it delegates authority to any other federal agency that distributes federal funds. Because no single agency has unique Title IX authority, this Court should reject the claim that Congress intended DOE to have such authority. Instead, each agency may issue regulations, rules, and orders consistent with the funding statutes that these agencies administer. *See* Section I.A. Second, for Spending-Clause legislation like Title IX, recipients like the School Board are entitled to clear notice of the requirements that the federal government has attached to the federal funds that the recipients accept. No such notice on transgender restroom rights has ever been issued and taken effect in the manner authorized by Title IX, and this Court should therefore hold that no such rights exist under Title IX. *See* Section I.B.1. Finally, Title IX inserts federal authority into education, a field historically occupied by state and local government; in interpreting the statutory prohibition of sex-based discrimination, this Court should use the presumption against preemption to interpret the word "sex" narrowly to mean the

biological characteristic, not broadly to include gender-identity issues. *See* Section I.B.2.

On the Title IX merits, the clear-notice rule for Spending-Clause legislation and the presumption against preemption for fields traditionally occupied by state and local government combined with the unanimous judicial understanding that "sex" did not include gender-identity issues when Congress enacted Title IX in 1972 and amended it in 1988 confine Title IX to that understanding of "sex." *See* Sections II.A.1-2. In particular, G.G.'s citation of more recent decisions supporting gender-identity issues relates to the disconnect when sex stereotypes diverge from one's biological sex (*e.g.*, men wearing women's clothes or vice versa) that occurs As long as dress or sex is not a bona fide occupational qualification, it does not matter what – for example – an accountant wears, as long as he or she can do the accounting. Here, by contrast, biological sex is the salient feature in permissibly sex-segregated restrooms. Consequently, the sex-stereotype cases are not relevant here. *See* Section II.A.1.

On the equal-protection merits, the School Board's restroom policy does not discriminate on the basis of sex because it applies equally to biological females seeking to use the boys' restroom and to biological males seeking to use the girls' restroom. Moreover, G.G. has not challenged the constitutionality of sex-segregated restrooms, so the discrimination, if any, is against individuals whose

subjective gender identity differs from their biological sex. Because that class of persons is not a protected class under the Equal Protection Clause, the School Board's restroom policy need only meet the rational-basis test, and the School Board's interest in student privacy suffices to meet that test. *See* Section II.B.

ARGUMENT

I. THIS COURT SHOULD NOT DEFER TO FEDERAL AGENCIES' INTERPRETATIONS OF THE LEGAL STANDARDS HERE.

In connection with interpreting the Title IX regulations, G.G. claims that this Court owes "controlling deference" to the interpretations of federal agencies. *See* Appellant's Br. 31-38. While federal courts owe no deference whatsoever to federal agencies' interpretations of the Equal Protection Clause, *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (the "power to interpret the Constitution … remains in the Judiciary"), courts sometimes defer to agency constructions of both statutes and regulations. *Compare Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843-44 (1984) *with Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997). In particular, when a legal "test is a creature of [an agency's] own regulations, [the agency's] interpretation of it is … controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotations omitted). Here, the federal agencies' views are not entitled to any judicial deference for several reasons.

A. Courts generally should not defer to federal agencies' interpretations of Title IX because multiple agencies hold the same authority.

At the outset, Congress did not delegate interpretive authority to any one agency for Title IX:

> *Each Federal department and agency* which is empowered to extend Federal financial assistance to any education program or activity … is authorized and directed to effectuate the provisions of [20 U.S.C. §1681] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be *consistent with achievement of the objectives of the statute authorizing the financial assistance* in connection with which the action is taken.

20 U.S.C. §1682 (emphasis added). Instead, Title IX delegates the same authority to multiple agencies. Senator Bayh's failed 1971 amendment explicitly delegated rulemaking authority only to DOE's predecessor, 117 CONG. REC. 30,399, 30,404 (1971); *accord id.* 30,407 (Sen. Bayh), whereas his 1972 amendment (which, with the House bill, became Title IX) delegates regulatory authority to *all* federal agencies. 118 Cong. Reg. 5803 (1972); 20 U.S.C. §1682. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). To have authority over transgender restroom policies, a federal agency would need to administer a "*statute authorizing … financial assistance* in

connection" with restrooms, and that statute (not Title IX) would need to delegate the authority to direct recipients' behavior. 20 U.S.C. §1682. Consequently, no single federal agency "owns" Title IX in any way that triggers *Chevron* deference.

While it may well receive federal funds from DOE, the School Board also receives funds from other federal agencies, such as the Department of Agriculture under the National School Lunch Act. *See* 42 U.S.C. §1752. With more than one agency equally involved, *Chevron* deference does not apply. *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998); *U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001); *Bowen v. Am. Hospital Ass'n*, 476 U.S. 610, 643 n.30 (1986) (plurality); *Wachtel v. O.T.S.*, 982 F.2d 581, 585 (D.C. Cir. 1993) (*Chevron* deference is "inappropriate" to affirmative-action statute administered by four agencies). As to *Auer* and the lesser *Skidmore* standards, deference is inappropriate for the reasons stated below.

B. Courts should not defer to federal agencies' interpretations of Title IX on the specific issues of transgender rights and sex-segregated bathrooms.

In addition to denying deference to federal agencies under multi-agency delegations like Title IX, this Court also should decline to extend any deference to the federal agencies' substantive claims that Title IX's statutory prohibition against discrimination based on "sex" somehow also includes discrimination based on "gender identity." 20 U.S.C. §1681(a). As explained below, in addition to being "plainly erroneous [and] inconsistent with the regulation," *Auer*, 519 U.S. at 461

(internal quotations omitted), the agencies' interpretation violates the clear-notice requirement for Spending-Clause legislation and the presumption against preemption.

1. Spending-Clause legislation requires clear notice to recipients before obligations are imposed, and the federal government has not provided that notice.

Courts analogize Spending-Clause programs like Title IX to contracts struck between the government and recipients, with the public as third-party beneficiaries. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). To regulate recipients based on their accepting federal funds, however, Congress must express Spending-Clause conditions unambiguously. *Gorman*, 536 U.S. at 186. Indeed, "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of th[at] 'contract.'" *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981). The Supreme Court recently clarified that this contract-law analogy is not an open-ended invitation to interpret Spending-Clause agreements *broadly*, but rather – consistent with the clear-notice rule – applies "only as a potential *limitation* on liability." *Sossamon v. Texas*, 131 S.Ct. 1651, 1661 (2011) (emphasis added). This clear-notice rule requires this Court to reject the federal government's recent invention of the new rights for transgender students in Title IX claimed here.

DOE's concern for transgender students under Title IX is of relatively recent

vintage and did not involve actually amending the Title IX regulations, including the procedures that Title IX itself requires for generally applicable agency action to take effect: "No such rule, regulation, or order shall become effective unless and until approved by the President." 20 U.S.C. §1682; *Lujan v. Franklin County Bd. of Educ.*, 766 F.2d 917, 923 (6th Cir. 1985) (presidential approval "a prerequisite to [an agency memorandum's] validity as a binding general order"); *Ranjel v. City of Lansing*, 417 F.2d 321, 323 (6th Cir. 1969) (agency guidance without presidential approval "does not rise to the dignity of federal law"). In *Sch. Dist. v. H.E.W.*, 431 F.Supp. 147, 151 (E.D. Mich. 1977), DOE's predecessor HEW "assert[ed] that Title VI does not require Presidential approval of these regulations, as they are procedural only and do not define what constitutes discriminatory practices prohibited by Title VI." Adding gender-identity protections to a sex-discrimination is by no means merely procedural and instead – as relevant here – would go to "defin[ing] what constitutes discriminatory practices." *Id.* As such, the School Board was entitled to notice of the new gender-identity requirements before those requirements took effect.

Significantly, as indicated, the House bill for Title VI permissively authorized agencies to proceed by rule, regulation, or order, *see* note 4, *supra*, but Senator Dirksen's substitute bill amended the statute to its current form to address concerns about federal agencies' overreaching. *Id.* Because Senator Dirksen

needed these concessions against administrative overreaching to break a filibuster, *Mohasco Corp. v. Silver*, 447 U.S. 807, 819-20 (1980); *EEOC v. Commercial Office Prod. Co.*, 486 U.S. 107, 117 (1988) (Civil Rights Act's opponents feared "the steady and deeper intrusion of the Federal power"), the revised "language was clearly the result of a compromise" to which courts must "give effect … as enacted." *Mohasco Corp.*, 447 U.S. at 818-19. Under §1682, the federal agency's action required approval in the *Federal Register* before taking effect and applying generally.[7] Without the federal agencies' meeting the required procedures, the School Board lacked the clear notice that Spending-Clause requires.

2. The presumption against preemption counsels against this Court's accepting the federal agencies' expansive interpretation of "sex" under Title IX.

Although the assertion of federal power over local education would be troubling enough on general federalism grounds, *U.S. v. Morrison,* 529 U.S. 598, 618-19 (2000), it is even more troubling here because of the historic *local* police power that the federal power would displace. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("the education of the Nation's youth is primarily the

[7] Because an agency can act only by rule or by order, 5 U.S.C. §551(4), (6); *FTC v. Standard Oil Co.,* 449 U.S. 232, 238, n.7 (1980), the federal agencies' actions qualify as "rules, regulations, or orders of general applicability" if they apply generally to the School Board. There is no middle ground: issuing a non-rule guidance *is an order.* 5 U.S.C. §551(6). Whether an unapproved *rule* or an unapproved *order,* these agency actions never took effect.

responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *cf. Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170, 175, 409 S.E.2d 446 (1991) (under Virginia law, local government retains the authority to "legislate … unless the General Assembly has expressly preempted the field"). The police power that state and local government exercises in these fields compel this Court to reject the expansive interpretation of Title IX pressed by G.G. and her federal *amicus*.

Specifically, in fields traditionally occupied by state and local government, courts apply a presumption *against* preemption under which courts will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added).[8] This presumption applies "because respect for the States as independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted). Thus, this Court must consider whether – and reject the suggestion that – Congress intended to prohibit discrimination based on gender

[8] Alternate strands of federalism-related authorities reach the same conclusion without invoking the presumption against preemption *per se*. "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *U.S. v. Bass*, 404 U.S. 336, 349 (1971); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (same). For simplicity, *amicus* Eagle Forum refers to these federalism-based canons as the presumption against preemption.

identity along with the clear and manifest congressional intent to prohibit discrimination based on sex.

Unlike the statutes at issue in the cases cited by G.G. and her *amici* to support deference to federal agencies, *see* Appellant's Br. 33-36; Federal *Amicus* Br. 24-28, Title IX is subject to the presumption against preemption. Unlike with those other statutes, therefore, one must interpret Title IX to avoid preemption. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). While *amicus* Eagle Forum respectfully submits that it would be fanciful to argue that Congress in 1972 intended "sex" to include "gender identity," that is what G.G. must establish as clear and manifest in order for Title IX to regulate gender identity. Although neither the School Board nor Eagle Forum concedes that G.G.'s proposed gender-identity interpretation is viable, that is not the test. The burden is on G.G. to show that the sex-only interpretation *is not* viable.

Significantly, the presumption against preemption applies equally to federal agencies and federal courts, at least whenever federal agencies ask a federal court to defer to an administrative interpretation. Put another way, the presumption is one of the "traditional tools of statutory construction" used to determine congressional intent, which is "the final authority." *Chevron*, 467 U.S. at 843 n.9. If that analysis resolves the issue, there is no room for even the most deferential form of deference: "deference is constrained by our obligation to honor the clear

meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 411-12 (1979) (internal quotations omitted). Much like the Supreme Court's refusing to presume that Congress cavalierly overrides co-equal state sovereigns, this Court must reject the suggestion that federal agencies can override them by asking for deference. To the contrary, the presumption against preemption is a tool of statutory construction that an agency must (or a reviewing court will) use at "*Chevron* step one" to reject a preemptive reading of a federal statute over the no-preemption reading.

In a dissent joined by the Chief Justice and Justice Scalia, and not disputed in pertinent part by the majority, Justice Stevens called into question the entire enterprise of administrative preemption vis-à-vis presumptions against preemption:

> Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance.

Watters v. Wachovia Bank, N.A., 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, *Watters* arose under banking law that is more preemptive than federal law generally. *Id.* at 12 (majority); *accord Nat'l City Bank v. Turnbaugh*, 463 F.3d 325, 330-31 (4th Cir. 2006) (presumption against preemption does not apply to the regulation of federally chartered banks). Although this Court does not appear to have addressed the issue, other circuits have adopted a similar approach

against finding preemption under these circumstances.[9] Clearly federal agencies – which draw their delegated power from Congress – cannot have a freer hand here than Congress itself.

3. The federal agencies' interpretations are inconsistent with Title IX and the implementing regulations because "gender identity" is not the same as "sex."

The resolution of this case hinges on whether discrimination on the basis of "sex" includes discrimination on the basis of "gender identity." As explained in Section II.A.1, *infra*, "sex" in Title IX refers to the immutable and objective biological fact of a person's sex, not to that person's subjective gender identity. As such, the federal agencies' interpretations are "plainly erroneous [and] inconsistent with the regulation" and ineligible for deference under *Auer*, 519 U.S. at 461 (internal quotations omitted). But this latter-day attempt to redefine Title IX's key term more than forty years after enactment also counsels against deference because, although consistency of interpretation can increase deference, *Skidmore*, 323 U.S. at 140, inconsistency can decrease or nullify it. *Id.; Morton v. Ruiz*, 415

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[9] *See Nat'l Ass'n of State Utility Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1252-53 (11th Cir. 2006) ("[a]lthough the presumption against preemption cannot trump our review … under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate"); *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 247-51 (3d Cir. 2008); *Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt*, 194 F.3d 176, 182-83 (1st Cir. 1999); *see also Albany Eng'g Corp. v. F.E.R.C.*, 548 F.3d 1071, 1074-75 (D.C. Cir. 2008); *Massachusetts v. U.S. Dept. of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996).

U.S. 199, 237 (1974). Here, the federal agencies' interpretations are inconsistent with the history of Title IX and its implementation across seven presidencies.

Significantly, the federal government acknowledges – as it must – that this Court decides *de novo* whether a regulation is ambiguous: *i.e.*, the federal agencies do not ask this Court to defer to them on whether to defer to their interpretation. Federal *Amicus* Br. 26 n.12 (*citing Humanoids Grp. v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2004)). In light of the presumption against preemption and the clear-notice rule, as well as the unanimous position of the federal courts when Congress enacted and amended Title IX, *see* Section II.A.1, *infra*, neither Title IX nor the implementing regulations are ambiguous on sex-versus-gender-identity questions.

II. AS A BIOLOGICAL FEMALE, G.G. LACKS A RIGHT TO USE THE SEX-SEGREGATED RESTROOMS FOR MALE STUDENTS.

Neither Title IX nor the Equal Protection Clause protects subjective gender-identity issues to the point of allowing biological males or females to use the sex-segregated restrooms intended for the opposite biological sex. G.G cannot and does not contend that the Congress and the States that enacted and ratified those provisions intended that sea change. Instead, G.G. relies on sympathetic bureaucrats in federal agencies under Title IX and hopes for an activist panel under the Equal Protection Clause. On both counts, this Court should decline to expand federal law coercively at the expense of state and local sovereignty.

A. Title IX does not provide biological females the right to use sex-segregated restrooms for male students.

Given the presumption against preemption and the clear notice required for Spending-Clause legislation, *see* Sections I.B.1-I.B.2, *supra*, this Court must hold that Title IX prohibits what Congress enacted: discrimination "on the basis of sex." 20 U.S.C. §1681(a). The words "sex" and "gender" mean different things now, and they meant different things in 1972 when Congress enacted Title IX.[10] Because G.G. does not challenge Title IX's implementing regulations, Appellant's Br. 31, and those regulations allow sex-segregated restrooms, 45 C.F.R. §86.33; 34 C.F.R. §106.33, G.G. cannot prevail unless the statutory term "sex" includes "gender identity." Because "sex" is a biological characteristic, and "gender" is not, G.G. cannot prevail under Title IX.

1. Title IX regulates discrimination based on objective sex, not on subjective gender identity.

As G.G. and her *amici* acknowledge, the judicial context when Congress enacted Title IX in 1972 and extended the statutory reach in 1988 did not support G.G. *See* Appellant's Br. 23-24; Federal *Amicus* Br. 9-10. For example, the Supreme Court recognized that the term "sex" referred to "an immutable

[10] Although a secondary definition of the word "gender" is "sex," the same is not true in reverse. *See* BLACK'S LAW DICTIONARY 1541 (4th ed. 1968) ("The sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female."); BLACK'S LAW DICTIONARY 1233 (5th ed. 1979) (same). Black's Law Dictionary did not even define "gender" at the relevant times.

characteristic determined solely by the accident of birth" "like race and national origin." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *see also Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001) (same, quoting *Frontiero*); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977). Even without the clear-notice requirement for Spending-Clause legislation and the presumption against preemption for federal intrusion into predominantly state and local spheres, a reviewing Court should regard the sex-versus-gender issue as decided in 1972 or, at the latest, when Congress amended Title IX in light of the then-controlling judicial construction by not only the Supreme Court but also the unanimous courts of appeals: "If a word or phrase has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015) (interior quotation and ellipses omitted). Accordingly, sex means sex, and it does not mean gender.[11] Although the foregoing suffices to reject

[11] As G.G. notes, one Supreme Court decision uses "gender" loosely to argue that Title IX prohibits denying educational access "on the basis of gender." *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999), but that opinion uses "sex" and "gender" interchangeably and does not hinge on sex-versus-gender issues. As such, the *Davis* opinion merely represents the usage of "gender" to mean "sex." It does not hold "sex" to mean "gender."

G.G.'s position, *amicus* Eagle Forum counters four additional arguments that G.G. and her supporting *amici* make.

First, the authorities – such as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny – based on stereotypes cited for G.G. are wholly irrelevant.[12] *See* Appellant's Br. 22-24; Federal *Amicus* Br. 10-14. These "stereotype" cases concern whether a female exhibits masculine traits or dress or whether a male exhibits feminine traits or dress. In *Hopkins*, an accounting firm denied partnership to a female accountant who did not wear makeup or jewelry and instead was macho. *Id.* For purposes of Title VII and her actually doing accounting, it did not matter whether a female accountant wore a dress, a man's suit, a flak jacket, or a wetsuit. Whatever impact these decisions have on employers' ability to require masculinity in men or femininity in women, the male employees remain male, and the female employees remain female.

Second, although G.G. and her *amici* would conflate Title IX and Title VII for all purposes, the Supreme Court's use of Title VII standards in sexual-harassment cases does not go that far. *See Davis*, 526 U.S. at 651; *Franklin v.*

[12] If possible, the other Supreme Court decision on which G.G. relies – *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998) – is even less relevant. *Oncale* stands for the modest proposition that sex-based discrimination includes male-on-male harassment just as much as male-on-female harassment, as well as the other two permutations. *Id.* That has nothing to do with whether Title IX allows students like G.G. to use sex-segregated restrooms for the opposite sex.

Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007). Quite the contrary, where there are differences between the two statutes, the Supreme Court has held precisely the opposite: the Spending-Clause legislation and Title VII "*cannot* be read in *pari materia*." *United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979) (first emphasis added). Sensibly enough, like things are alike, except where they are different. For example, Title IX must be read to require clear notice under the Spending Clause, which does not apply to Title VII.

Third, G.G. cites *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008), for the sophistic analogy between a hypothetical law that impermissibly discriminates against religious converts and the discrimination against transgender males and females. *See* Appellant's Br. 22; *accord* Federal *Amicus* Br. 11-12. The problem with this analogy is that G.G. concedes that schools permissibly may discriminate on the basis of sex in restrooms and G.G. has not *converted* to the male sex. As such, G.G. lacks standing to litigate the rights of transgender students who actually have undergone sex-reassignment surgery; such students would have a better argument that they no longer are their original biological sex, but that argument is not available to G.G. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (litigants must assert their own rights, not the rights of absent third parties). Someone in G.G.'s position, by contrast, is a female who *wants to convert* to the

male sex; because G.G. has not yet done so, however, the permissible sex-segregation in our case causes a different result than the impermissible religious discrimination in the *Schroer* analogy.

Fourth, G.G. and the supporting *amicus* briefs cite extra-circuit appellate and district court decisions, which cannot bind this Court. *Virginia Soc'y for Human Life, Inc. v. F.E.C.*, 263 F.3d 379, 393 (4th Cir. 2001) ("a federal court of appeals's decision is only binding within its circuit"), *abrogated in part on other grounds*, *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 550 n.2 (4th Cir. 2012); *Am. Elec. Power Co. v. Connecticut*, 131 S.Ct. 2527, 2540 (2011) ("federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court"). "A contrary policy would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Virginia Soc'y for Human Life*, 263 F.3d at 393 (internal quotations omitted). *Amicus* Eagle Forum respectfully submits that this Court would need to decide these important issues for itself, even if G.G.'s extra-circuit, stereotype-based authorities applied here.

2. Even if the federal government had permissibly added transgender protections to Title IX, the School Board could decline to accept the new overlay to the Title IX regime.

As indicated, Title IX does not provide students in G.G.'s situation the right to use a sex-segregated restroom of the sex to which they aspire. But even if

Congress – or *a fortiori* federal agencies – had successfully amended Title IX to give G.G. that right, the School Board could decline to accept the amended Title IX regime because federal courts "scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a power akin to undue influence." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2602 (2012) ("*NFIB*") (interior quotation omitted). Consequently, in order to prevail here, G.G. must argue that similarly situated students could have asserted the same right immediately after Title IX's enactment in 1972 or possibly immediately after the initial regulations' promulgation in 1975. Otherwise, the federal agencies are trying to coerce the School Board to adopt a new requirement based on the threat of terminating the School Board's federal funding. 20 U.S.C. §1682(1). As the Supreme Court recently explained in *NFIB*, the federal government cannot add new requirements to existing Spending-Clause regimes on threat of losing the whole of a recipient's federal funds.

On a blank slate, with a new piece of Spending Clause legislation, federal courts would "look to the States to defend their prerogatives by adopting the simple expedient of not yielding to federal blandishments when they do not want to embrace the federal policies as their own." *NFIB*, 132 S.Ct. at 2603 (interior quotation omitted). Thus, if Congress enacted a Transgender Restroom Act ("TRA") under the Spending Clause, the School Board could simply decline to

participate and thus avoid a federal policy of allowing students like G.G. to use the sex-segregated restrooms reserved for the other sex.

Here, however, the federal agencies have purported to do via informal memoranda what *NFIB* held that Congress itself cannot do by statute: tie not only new TRA funds but also all pre-existing federal educational funding to the School Board's accepting the new TRA conditions.

> The legitimacy of Congress's exercise of the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system.

NFIB, 132 S.Ct. at 2602 (interior quotation omitted). Under *NFIB*, 132 S.Ct. at 2605, the federal agencies' overlay onto Title IX is impermissible as "economic dragooning that leaves the States with no real option but to acquiesce in the [statutory] expansion."

Indeed, the federal agencies' attempt to protect transgender students like G.G. is an even greater expansion of Title IX than the expansion that the Supreme Court rejected in *NFIB* as an impermissible "shift in kind, not merely degree." *NFIB*, 132 S.Ct. at 2605. There, Congress expanded a statute "designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children" to one designed "to meet

the health care needs of the entire nonelderly population with income below 133 percent of the poverty level." *NFIB*, 132 S.Ct. at 2605-06. The federal agencies here attempt to change a statute designed to prevent discrimination based on an immutable, biological characteristic – sex – into a statute championing the more controversial question of subjective gender identity. While *NFIB* holds that Congress itself could not impose those new conditions on the School Board under Title IX, *amicus* Eagle Forum respectfully submits that this Court must reject the attempt by mere federal agencies to do so.

B. The Equal Protection Clause does not provide biological females the right to use sex-segregated restrooms for male students.

Under the Equal Protection Clause, a state and local government actor like the School Board cannot lawfully "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1, cl. 4. Because G.G. does not challenge sex-segregated restrooms, Appellant's Br. 31, 39, this Court need not evaluate whether the Equal Protection Clause allows public schools to segregate restrooms by sex. *Mironescu v. Costner*, 480 F.3d 664, 677 (4th Cir. 2007) (an appellate party waives arguments that it fails to raise in its principal brief); *cf. Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (discussing the "need for privacy" and "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns"). Instead, the equal-protection issue here is the easier question of whether a government actor must

allow a person of one biological sex to use the restroom of the opposite sex based on that person's subjective gender identity.

Having correctly conceded that society lawfully may segregate restrooms by sex, G.G. does not bring a case for sex-based discrimination. Instead, G.G.'s claim is that society may not exclude females with male gender identity from male restrooms. Insofar as the School Board's restroom policy applies in the same way to transgender males and transgender females, the discrimination – if any – is on the basis of a misalignment between the plaintiff's gender identity and sex. But "an individual's right to equal protection of the laws does not deny … the power to treat different classes of persons in different ways." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original); *cf. Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (to state an equal-protection claim vis-à-vis the government's treatment of another class, the two classes must be "in all relevant respects alike"). Put another way, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366-67 (2001) (interior quotations omitted). Here, G.G. attempts to compare a class of biological males versus a class of biological females with male gender

identities, but those classes are not comparable for equal-protection purposes.[13]

In any event, because sex-versus-gender-identity misalignment is not a protected class, plaintiffs claiming an equal-protection violation on the basis of such a misalignment must establish that the government action does not "further[] a legitimate state interest" and lacks any "plausible policy reason for the classification." *Nordlinger*, 505 U.S. at 11-12. The privacy interest of other students easily satisfies this test. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *Faulkner*, 10 F.3d at 232. Moreover, unlike heightened scrutiny, rational-basis review does not require narrowly tailoring policies to legitimate purposes: "[r]ational basis review … is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," and "[a] statute does not fail rational-basis review because it is not made with mathematical nicety or because *in practice it results in some inequality*." *Thomasson v. Perry*, 80 F.3d 915, 928, 930-31 (4th Cir. 1996) (interior quotations omitted, emphasis added); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976). Indeed, courts give economic and social legislation a presumption of rationality, and "the Equal Protection Clause is

[13] Significantly, "a legislative choice [like the School Board' restroom policy] is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988) (interior quotations omitted). For all these reasons, G.G. cannot state a claim – much less prevail – on equal-protection grounds.

CONCLUSION

For the foregoing reasons and those argued by the School Board, this Court should affirm the District Court's dismissal of G.G.'s Title IX claims and the denial of a preliminary injunction.

Dated: November 30, 2015

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