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

Brief of *Amici Curiae* the State of West Virginia, 18 Other States, and the Governors of Kentucky and North Carolina Supporting Petitioner

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INTRODUCTION AND INTEREST OF *AMICI*

This case is about whether federal agencies receive deference when they attempt to impose conditions on the States' receipt of federal funds, especially when those conditions conflict with the plain text of the statute authorizing the grant and when they appear for the first time in an informal letter issued without opportunity for notice and comment. The U.S. Department of Education is seeking, via a novel interpretation of Title IX, to take from the States a decision that Congress explicitly left to the discretion of local schools—namely, whether to separate school restrooms based on sex.[1] And it is attempting to do so behind the veil of a form of deference that several Justices of this Court have called into serious question.

For more than forty years, the States have taken federal education funding on the clear understanding under Title IX that "nothing contained herein shall be construed to prohibit any educational institution receiving funds . . . from maintaining separate living facilities for the different sexes," 20 U.S.C. § 1686,

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[1] *Amici* are the States of West Virginia, Alabama, Arizona, Arkansas, Georgia, Kansas, Louisiana, Mississippi, Montana, Nebraska, Nevada, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wisconsin and the Governors of Kentucky and North Carolina. For a list of state laws affecting the local management of schools that would need to be modified or abandoned in light of the Department's new interpretation of Title IX, see App. 194a–197a n.8; States' Mot. For Inj., *Texas v. United States*, 2016 WL 3877027 at 9–10 nn.8–20 (N.D. Tex. July 6, 2016). Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified the parties of their intent to file this brief and the parties consent to the filing of this brief.

including "separate toilet, locker room, and shower facilities on the basis of sex," so long as the facilities are "comparable," 34 C.F.R. § 106.33.

Notwithstanding this clear statement by Congress affirming the States' freedom to choose whether to separate restrooms by sex, the Department asks this Court to defer to a recent unpublished opinion letter. Therein, the Department claims to make it *discriminatory* for a school to separate male and female bathrooms, unless each student is allowed to select either bathroom in accordance with that student's asserted gender identity.

Expansively reading this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), the Fourth Circuit gave the Department's new interpretation controlling deference. Soon afterwards, emboldened by this ruling, the Department (along with the Department of Justice) issued a "Dear Colleague" letter threatening the States with loss of *all* education funding under Title IX unless every public school in the country allowed students to select restrooms, showers and dormitories based on their expressed gender identity. App. 126a. The Department thus seeks to bootstrap the Fourth Circuit's decision, which rested in turn on the agency's own informal opinion letter, to rewrite a federal statute and dictate national policy.

If the Fourth Circuit's decision stands, States that do not wish to comply must either 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] Many States have thus challenged this extraordinary intrusion into their schools, and a federal district court in Texas recently entered a nationwide preliminary injunction against it.[3]

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[2] 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. Nat'l Ctr. For Educ. Statistics, U.S. Dep't of Educ. & Inst. of Educ. Scis., Digest of Education Statistics, Table 235.20, available at https://nces.ed.gov/programs/digest/d15/tables/dt15_235.20.asp?current=yes. For instance, 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 revenue for public elementary and secondary schools. *Ibid.* Texas likewise stands to lose more than 19 percent of its primary and secondary public education budget under the Department's new directive. States' Reply Br., *Texas v. United States*, No. 7:16-cv-054, 2016 WL 4501323 (N.D. Tex. Aug. 3, 2016).

[3] App. 183a–184a (brought by a 13-state coalition of the States of Alabama, Arizona, Georgia, Kentucky, Louisiana, Maine, Mississippi, Oklahoma, Tennessee, Texas, Utah, West Virginia, and Wisconsin); *McCrory v. United States,* 5:16-cv-238 (E.D.N.C.) (filed May 9, 2016) (brought by North Carolina); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-cv-524 (S.D. Ohio) (filed June 10, 2016) (brought by an Ohio school district); *Nebraska v. United States*, No. 4:16-cv-3117 (D. Neb.) (filed July 8, 2016) (brought by a 10-state coalition of the States of Arkansas, Kansas, Michigan, Montana, Nebraska; North Dakota, Ohio, South Carolina, South Dakota, and Wyoming); *see also* Idaho Amicus Br, *Texas v. United States*, No. 7:16-CV-00054 (N.D. Tex. July 17, 2016) (supporting the 13-State Texas suit). This injunction applies nationally, including to "the government's activities in jurisdictions within the Fourth Circuit," such as West Virginia and South Carolina. BIO at 23; see also Pet. 32.

As sovereign States, *amici* have a strong interest in the review and reversal of the Fourth Circuit's decision. If upheld, the Fourth Circuit's unprecedented application of *Auer* will not end with school buildings, but will have ramifications far beyond Title IX, empowering agencies to make unilateral changes to States' obligations relating to health care, transportation, energy, and a host of other contexts.

REASONS FOR GRANTING THE PETITION

The time has come for this Court to revisit the doctrine of *Auer v. Robbins*, 519 U.S. 452 (1997)—a judge-made theory of deference that has been criticized by several Justices of this Court; that perpetually bedevils and divides the lower courts; and that improperly concentrates an extraordinary amount of power in federal agencies to the detriment of the States and the public. Pet. at 18–25.

While there are many reasons to reconsider or cabin *Auer*, this case presents an ideal opportunity to explore the fundamental conflict between this doctrine, which affords controlling deference to an agency's interpretation of an ambiguous regulation, and federalism canons designed to ensure that Congress speaks explicitly when it alters the traditional balance of power between the federal government and the States. Pet. at 36–37.

In particular, when Congress places conditions on the States' receipt of federal funds under the Spending Clause, this Court has long required that Congress provide clear notice of the States' obligations at the time they accept the funds. This Court has similarly required a clear statement whenever Congress makes a State liable for suit and whenever it displaces an area of traditional state authority, such as local control over school policy.

Auer deference, by contrast, presupposes the ambiguity of both a federal statute and federal rule and binds the States to whatever novel interpretation of the rule the agency devises at whatever time it chooses to do so. Armed with this doctrine, agencies can impose controlling obligations

on the States in policy areas ranging from education to telecommunications to labor and employment.

The circumstances of this case illustrate dramatically the ways in which *Auer* deference can deprive the States of control over local policy by eroding constitutional checks on legislative power, cutting States out of the federal rulemaking process, and coercing them to comply with federal directives on pain of losing federal funding. Title IX expressly permits schools to separate living facilities based on "sex," which courts and the Department have long understood to refer to biological males and females. But the Department now invokes *Auer* to impose a new obligation on the States to permit students to use the bathroom consistent with their professed gender identity. It does this by purporting to find ambiguity in, and newly interpret, the same word in its implementing regulation—"sex"—that has appeared in Title IX for forty years.

Worse, the Department bases its interpretation on an unpublished, informal opinion letter issued in response to an inquiry made at the onset of this very dispute. In so doing, the Department deprived the States and the public of notice and an opportunity to comment—the fundamental safeguards that Congress placed in the Administrative Procedure Act ("APA") to invest agency rulemaking with legitimacy. This Court's cases make clear that, absent those procedural protections, an agency interpretation appearing in an opinion letter receives no deference under *Chevron*. See *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). Under the Fourth Circuit's reasoning, however, the same letter would receive

controlling deference when an agency purports to interpret the same word in an implementing rule.

Worst of all, the Department now relies on the Fourth Circuit's decision to seek to impose a nationwide policy governing access to school restrooms, locker rooms, and dormitories. To threaten the States with loss of *all* of their billions of dollars of federal education funding if they fail to adhere to the Department's command is, plain and simply, coercion—and this Court's federalism jurisprudence does not permit it.

Part I of this brief describes how federal courts have historically applied clear-statement rules in order to preserve the federal-state balance and how *Auer* deference is inconsistent with these rules. Part II explains why this clear-statement approach must take precedence over *Auer* deference in the Spending Clause context. Part III explains why it would be particularly inappropriate to defer to the Department's self-serving opinion letter in this case. Finally, Part IV responds to arguments raised in the BIO, none of which negates the conclusion that this Court should grant certiorari to overrule *Auer* or at minimum make clear that the doctrine does not apply in the Spending Clause context.

I. *Auer* Deference Erodes The Judicial Role In Protecting The Interests Of The States Through Application Of Clear-Statement Rules

Auer deference represents an abdication of the judicial role in policing the separation of powers, which exists to protect the interests of the States and ultimately the liberties of the people.

A. "[T]he 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)). As "James Wilson observed[,] . . . '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. 1836)).

For example, Article I of the Constitution protects state control over local matters by limiting Congress's authority to specified, enumerated powers. *Id.* at 550. Each bill, moreover, must win the approval of the Senate, "where each State received equal representation and each Senator was to be selected by the legislature of his State." *Id.* at 551. And, of course, each law must win the approval of both houses of Congress and secure the President's approval (or override a Presidential veto), which makes it inherently difficult for the federal government to displace state law. U.S. Const. art. I, § 7, cl. 3.

Far from protecting state sovereignty for its own sake, however, "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). By protecting the interests of the States, the separation of powers ultimately 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). "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.

Courts also play a critical role in preserving the structural safeguards of federalism by interpreting laws in a manner that protects the role of the States in Congress. *See Gregory*, 501 U.S. at 464. Specifically, when this Court interprets a statute, it recognizes that "'Congress legislates against the backdrop' of certain unexpressed presumptions" that are "grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (citation omitted). Under these presumptions, absent a plain statement by Congress to the contrary, this Court will read a statute to be "consistent with principles of federalism inherent in our constitutional structure." *Ibid.* These "background principles of construction" make it "'incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Id.* at 2088–89 (citing *Gregory*, 501 U.S. at 460).

For example, under the Tenth Amendment and broader constitutional principles of federalism, for Congress to displace traditional spheres of state authority or preempt state law, it "must make its

intention to do so 'unmistakably clear in the language of the statute.'" *Gregory*, 501 U.S. at 452. Without a "clear and manifest" statement, this Court will not read a statute to preempt "the historic police powers of the States," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or to permit an agency to regulate a matter in "areas of traditional state responsibility," *Bond*, 134 S. Ct. at 2089; see also *Sheriff v. Gillie*, 136 S. Ct. 1594, 1602 (2016) (finding "no cause" for construing federal law "in a manner that interferes with States' arrangements for conducting their own governments") (internal quotations omitted).

B. The *Auer* doctrine, under which a court affords controlling deference to an agency's interpretation of an ambiguous regulation, cannot be squared with judicial enforcement of these clear-statement rules, which require that *Congress* speak clearly in statutory text if it intends to disrupt the normal balance of power between the federal government and the States.

To be sure, courts at times defer under *Chevron* to formal agency rules and decisions that purport to interpret ambiguous statutory terms. But in such cases, a court must first assure itself that Congress explicitly intended to delegate interpretive authority to an agency, and that the agency acted with the degree of formality required by Congress under the APA—which in the case of rules requires notice and an opportunity to comment. *See* Pet. at 23 (citing *United States v. Mead Corp.*, 533 U.S. 218, 229–34 (2001)). These protections help ensure that States have a meaningful role in both the legislative and

rulemaking processes before courts defer to a regulatory interpretation.

Moreover, *Chevron* itself commands courts to apply any clear-statement rules *before* deferring to an agency's interpretation. Under *Chevron*, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Therefore, this Court has applied clear-statement rules, rather than defer to a contrary agency position, when necessary "to avoid the significant constitutional and federalism questions raised by [an agency's] interpretation." *Solid Waste Agency of N. Cook Cnty. (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–74 (2001).

There is, if anything, even more reason to give interpretive priority to clear-statement rules over deference when confronted with an agency's purported interpretation of its own rule. Under *Auer*, a court provides controlling deference to an agency's preferred interpretation of a rule without first discerning *either* whether that interpretation accords with Congress's intent *or* whether the States had an opportunity to participate in the rulemaking process. This is an "abandonment of judicial office," Philip Hamburger, Is Administrative Law Unlawful? 316 & n.25 (2014), which allows agencies to simultaneously make, execute, and interpret rules without any of the structural checks imposed by the Constitution, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*,

96 Colum. L. Rev. 612, 654 (1996). The combination of all three powers of government into one unaccountable agency dissolves the limits on federal power that were designed to protect the States and, ultimately, the people. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) ("Unlike Congress, administrative agencies are clearly not designed to represent the interests of States.").

Amici are not aware of any case in which this Court has ever applied *Auer* deference when interpreting a statute subject to a clear-statement rule. This should not be the first. Rather, this Court should grant certiorari to resolve the tension between *Auer* deference and the judiciary's historic role in protecting the interests of the States through clear-statement rules. *Auer* should be overruled, or if it is retained in some fashion, cabined to the extent necessary to honor the federal-state balance in our constitutional system.

II. *Auer* Deference Particularly Has No Place In Interpreting Statutes Enacted Under The Spending Clause

It is, moreover, particularly inappropriate for a court to abandon a clear-statement approach in favor of *Auer* deference when construing laws enacted under the Spending Clause, where States must decide whether or not to accept certain costly obligations in exchange for receipt of federal funds.

Under the Spending Clause, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). That is

because spending statutes are "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Ibid.* And Congress's power to make these contracts "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'"; that is, "[t]here can . . . be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Ibid.* Congress, accordingly, may not "surpris[e] participating States with post acceptance or 'retroactive' conditions." *Id.* at 25.

The "crucial inquiry" for a court interpreting a spending statute, therefore, is "whether Congress spoke so clearly that [the court] can fairly say that the State could make an informed choice." *Id.* at 24–25. Simply put, 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).

This requirement of congressional clarity is heightened where, as under Title IX, Congress asks the States to relinquish their historic immunity from suit as one condition of receiving federal funds. In the Eleventh Amendment context, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985). While Congress may choose either to abrogate sovereign immunity directly or (as in Title IX) make waiver of sovereign immunity a

condition to receipt of federal funds, the test in either case is the same: Congress's intent must be "expressly and unequivocally stated in the text of the relevant statute." *Sossamon v. Texas*, 563 U.S. 277, 290–91 (2011). This clear-statement rule recognizes "the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99–100 (1984).

Because these clear-statement rules require Congress to speak directly to whether States are bound to a particular obligation, there is no room for courts to afford binding deference to an agency under *Auer* when a Spending Clause statute "is susceptible of multiple plausible interpretations." *Sossamon*, 563 U.S. at 287. As the Fourth Circuit recognized in an earlier case, "in the event of ambiguity," the clear-statement rule prevents a court from "defer[ring] to a reasonable interpretation by the agency, as if we were interpreting a statute which has no implications for the balance of power between the Federal Government and the States." *Com. of Va., Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc).[4] Rather, "[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." *Ibid.*

A related problem with applying *Auer* to Spending Clause legislation arises because *Auer*

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[4] The Fourth Circuit panel below completely ignored this federalism limit on spending statutes, raising a serious question about whether the court disregarded its own en banc precedent.

presumes that the same deference is owed to agency interpretations regardless of when the interpretation is made. But the *Pennhurst* canon, as Respondent acknowledges, requires that Congress provide notice "'at t[he] time' the funds are received." BIO at 28–29 (citing *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669–70 (1985)). The clear-statement rule, therefore, prevents the federal government from "modify[ing] past agreements with recipients by unilaterally issuing guidelines through the Department of Education" at any later time. *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997). Indeed, retroactive regulatory power does not exist in *any* circumstances absent a clear statement from Congress. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).

In short, because *Auer* deference would routinely expose sovereign States to lawsuits and other obligations based on novel interpretations of rules imposed by agencies many years after the States first receive federal funds, it cannot apply in the Spending Clause context. Certiorari is warranted to cabin the doctrine or abandon it altogether.

III. The Particularly Egregious Application Of *Auer* In This Case Requires This Court's Intervention

This case vividly illustrates the prejudice that States can suffer if a court fails to apply clear-statement rules in Spending Clause cases and instead uncritically defers to agency interpretations under *Auer*. Indeed, for several reasons, the extraordinary deference that the Fourth Circuit afforded the Department's novel interpretation here

makes this an ideal vehicle to reconsider or cabin *Auer*'s scope.

First, as explained above, the *Pennhurst* canon and other clear-statement rules should apply to prevent the Department from imposing novel obligations on the States even if Title IX were ambiguous on the point in dispute. That is because Congress must speak clearly when intruding on an "area[] of traditional state responsibility," *Bond*, 134 S. Ct. at 2089, such as control of schools, "perhaps the most important function of state and local governments," *Honig v. Doe*, 484 U.S. 305, 309 (1988) (internal quotation marks omitted). Therefore, even if it were true, as the Department has claimed, that Title IX's reference to "sex" were somehow ambiguous, that ambiguity should be resolved in favor of the States, not in favor of the Department's preferred and newfound construction of the law.

But as it happens, Title IX is *not* ambiguous on the key interpretive question, namely, whether it requires schools to permit students to choose whichever public restroom is consistent with their gender identity.[5] Rather, Title IX promised the States that they may decide at the local level whether to "maintain[] separate living facilities for the different sexes." 20 U.S.C. § 1686. At the time of Title IX's passage, dictionaries defined "sex" as a biological category based principally on physical anatomy, App. at 53a–55a; Pet. at 34–35, and this

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[5] App. 126a. Under the Department's "Dear Colleague" letter, no medical diagnosis or treatment would be required before a student could self-identify as another gender and gain admission to the restroom of the other sex. App. 130a.

biological understanding prevailed in every prior case to consider the question of restrooms, State Amicus Br., *G.G. v. Gloucester County School Board*, No. 15-2056, 2015 WL 7749913 at *7–8, 14 & n.1 (4th Cir. Nov. 30, 2015) (surveying cases). To extend *Auer* deference to an agency interpretation that prohibits States from doing what Congress has clearly authorized turns federalism on its head. As a result, States will be subject to conditions that they could not possibly have voluntarily or knowingly accepted at the time they first opted into the Title IX regime. Cf. *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006).

Second, the application of *Auer* deference here is particularly troubling because the Department's interpretation was adopted for the first time in an informal, unpublished opinion letter that was sent by a relatively low-level official at the outset of this very dispute. Because agencies are not subject to structural checks that provide "adequate protection against agency failure to take federalism concerns seriously," the only way in which States can influence regulatory action is through the APA's "opportunities for state notification and participation created by notice-and-comment rulemaking procedures and amplified by substantive requirements of agency explanation and reasoned decisionmaking." Gillian E. Metzger, *Administrative Law As the New Federalism*, 57 Duke L.J. 2023, 2083–84 (2008). Uncritical deference to informal opinion letters thus robs the States of any role in the rulemaking process. And it deprives the States of any semblance of notice to guide their future actions. While *Pennhurst* requires clear statutory notice at the time States accept federal funds, the Department

adopted its interpretation in this case only after the school board *had allegedly violated the statute*. It is fundamentally unfair, and indeed, impermissibly retroactive, to impose regulatory obligations on the States in this manner. Cf. *Bowen*, 488 U.S. at 208.

Third, and related, the principal justification for *Auer*—that agencies are in a better position to interpret ambiguous terms in their own regulations—has no purchase here. The Department purported to interpret the term "sex"—a plain English word that appears both in Title IX and in the implementing rule. There is no indication that Congress considered the term "sex" ambiguous or intended to delegate to the Department the authority to interpret it; nor is there any reason to believe the Department has any special expertise in elucidating the meaning of that word. Where "the underlying regulation does little more than restate the terms of the statute itself," any rationale for *Auer* deference disappears. *Gonzales*, 546 U.S. at 257.

Moreover, to defer to an agency's interpretation of a rule that merely parrots the statute would lead to inconsistent and absurd results under this Court's case law. This Court has held that no deference is owed to an agency's interpretation of a statute when that interpretation is "contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law." *Christensen*, 529 U.S. at 587. But under the Fourth Circuit's approach, an agency's opinion letter would be entitled to *controlling* deference so long as the agency had also issued a rule that mirrored the statutory text. That is not the law.

If it were, agencies would have no incentive to make difficult policy choices and to submit those choices to the public for comment. Rather, the Fourth Circuit's approach encourages agencies to issue vague regulations (perhaps doing no more than restating the statutory standard) and fill in the gaps later through informal pronouncements. *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part). This form of rulemaking would insulate agencies even further from political accountability to the detriment of the States and the general public.

Fourth, and finally, to impose new conditions on the receipt of federal funds on which the States rely to supply basic services such as education raises serious constitutional concerns about whether the federal government is improperly coercing the States to make policy changes that the federal government could not otherwise impose through ordinary political channels.

Only four years ago, this Court warned 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) (internal citation omitted). These concerns about improper coercion are heightened where, as here, the regulatory obligation originates with the Department, rather than the States' representatives in Congress. With minimal political accountability, the Department has

threatened States that do not comply with its guidance letters with the loss of all their schools' federal funding. App. 99a. This "financial 'inducement'" is "much more than 'relatively mild encouragement.'" *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2604. Rather, the threatened loss of 100% of a State's federal education funding—almost as much as 20% of a State's entire school budget—"is economic dragooning that leaves [States] with no real option but to acquiesce." *Id.* at 2605.

School districts throughout the country share nearly $56 billion in annual funding that the federal government directs to education. 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. In some States, however, like Arizona, Kentucky, Tennessee, and Texas, the numbers reach higher and comprise nearly 20% of the total school budget. State PI Mot., *Texas v. United States*, No. 7:16-cv-054, 2016 WL 3877027 (N.D. Tex. July 6, 2016).

It is unconscionable to use this money, much of which goes to poor and special-needs children, as a cudgel to make the States relinquish their authority to decide at the local level how best to manage their facilities. Under such circumstances, this case presents a "Tenth Amendment claim of the highest order." *Riley*, 106 F.3d at 570 (en banc) (Luttig, J.).

And if this intrusion into state sovereignty were permitted, nothing would stop federal agencies from imposing similar conditions on the States in a host of other regulatory contexts. This Court's intervention

is required to overrule or cabin *Auer* and reduce the incentives for federal agencies to dictate national policies through opinion letters at the expense of the States and their citizens.

IV. Respondent In The BIO Shows No Reason For This Court Not To Rely On Federalism Principles To Overrule Or Limit *Auer*

Respondent advances various arguments in the BIO as to why this Court should decline to examine the conflict between *Auer* and the principles of federalism inherent in this Court's clear-statement rules. None is persuasive.

First, Respondent argues that any consideration of the Spending Clause clear-statement rule has been waived. BIO at 28. That is incorrect. As long as the particular question presented is preserved, this Court will not deem waived any "particular legal theories advanced by the parties." *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)).

Here, the Board has continuously raised and litigated the propriety of applying *Auer* deference to Title IX and its implementing regulations. A party cannot waive a particular argument as to why *Auer* should not apply in this case. That is especially true where, as here, this Court is the first tribunal with the authority to overrule or cabin its prior decision in

Auer. Cf. *Agostini v. Felton*, 521 U.S. 203, 239–40 (1997). And in any event, the States raised this specific argument in depth in their briefs before the Fourth Circuit at both the panel and petition for en banc stages—so Respondent can hardly argue inadequate notice.[6]

Second, Respondent claims that "Title IX puts recipients on notice of liability for all forms of intentional discrimination for purposes of *Pennhurst*." BIO at 28–29. That too is wrong. In the cases Respondent cites, this Court was careful to narrowly circumscribe liability to "deliberate indifference" to "known" violations of the statute. *Davis v. Monrone Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). This rigorous standard was adopted to ensure that States would only be held liable in cases where Title IX had "long provided funding recipients with notice that they may be liable." *Id.* at 643–44. Here, there can be no argument that the States were deliberately indifferent to their known obligations, when Title IX contained an express provision *authorizing* the States to provide separate restrooms based on sex and where the interpretation on which the Department now relies did not appear until decades after the States first accepted federal funds.

And if Respondent is suggesting that a statute places the States on notice so long as it identifies *the States* as bound by its prohibitions, however vaguely-worded *the obligations* on the States might be, that

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

argument is squarely inconsistent with governing precedent. A clear statement is necessary both to make a statute apply to the States and to show if the statute applies in the particular manner claimed. *E.g.*, *Arlington Cent. Sch. Dist. Bd. of Edu. v. Murphy*, 548 U.S. 291, 296 (2006); *Gregory* 501 U.S. at 460–70.

Third, Respondent argues that the *Pennhurst* clear-statement rule does not apply to "requests for injunctive relief," but rather "merely [to] the availability of 'money damages.'" BIO at 28–29. But in *Davis*, this Court applied the same heightened standard—deliberate indifference to *known* obligations—to claims for money damages and claims for other "particular remedial demands" under Title IX. 526 U.S. at 648; see also *Pennhurst State Sch. & Hosp.*, 465 U.S. at 99–02 (holding that an "unequivocal expression of congressional intent" is required to waive sovereign immunity, which applies both to claims for damages and injunctive relief). And, in any event, Respondent seeks money damages in this case, and therefore, cannot escape application of the clear-statement rule. BIO at 11, n.10.

In short, the Fourth Circuit's decision laid waste to this Court's longstanding federalism decisions by deferring to the Department's novel interpretation of its rule. Certiorari is therefore warranted to resolve the conflict between *Auer* and this Court's federalism jurisprudence and affirm that agencies cannot impose new obligations on States, on pain of losing millions in federal funding, under statutes enacted by Congress under the Spending Clause.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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