No. 16-273

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

v.

G.G., BY HIS NEXT FRIEND & MOTHER, DEIRDRE GRIMM,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a), while its implementing regulation permits "separate toilet, locker rooms, and shower facilities on the basis of sex," if the facilities are "comparable" for students of both sexes, 34 C.F.R. § 106.33. In this case, a Department of Education official opined in an unpublished letter that Title IX's prohibition of "sex" discrimination "include[s] gender identity," and that a funding recipient providing sex-separated facilities under the regulation "must generally treat transgender students consistent with their gender identity." App. 128a, 100a. The Fourth Circuit afforded this letter "controlling" deference under the doctrine of *Auer v. Robbins*, 519 U.S. 452 (1997). On remand the district court entered a preliminary injunction requiring the petitioner school board to allow respondent – who was born a girl but identifies as a boy – to use the boys' restrooms at school.

The questions presented are:

1. Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?

2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

3. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative History

Rules, Regulations and Orders

Other Authorities

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding in 1981, EFELDF has defended federalism and supported autonomy in areas of predominantly local concern. EFELDF has a longstanding interest in limiting Title IX to its anti-discrimination intent, without intruding further into local control over

[1] *Amicus* files this brief with all parties' consent, with 10 days' written notice; *amicus* has lodged respondent's written consent to the filing of this brief, and petitioner has lodged its blanket consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

schools. For these reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

A high school student ("G.G.") with gender dysphoria has begun to live as a male, but remains biologically female. Spurred on by sub-regulatory guidance documents from the federal Department of Education ("DOE"), G.G. sued the Gloucester County School Board ("Board") under Title IX's statutory prohibition against sex discrimination, 20 U.S.C. §1681(a), for denying access to boys' restrooms.

Although the implementing regulations merely *allow* sex-segregated restrooms – without *requiring* anything, 34 C.F.R. §106.33 ("recipient *may* provide separate toilet, locker room, and shower facilities on the basis of sex") (emphasis added) – and DOE lacks authority to expand Title IX's sex-based protections to include gender-identity issues, a fractured Fourth Circuit panel ruled for G.G. in No. 15-2056 by reversing the district court's dismissal of G.G.'s Title IX claim and giving DOE's guidance "controlling weight" under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Pet. App. 25a. On remand, the district court preliminarily enjoined the Board's denying G.G. access to boys' restrooms, which the Board appealed to the Fourth Circuit as No. 16-1733.

Statutory Background

Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, except that Title IX prohibits sex-based discrimination in federally funded education. *Compare* 42 U.S.C. §2000d *with* 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). Similarly, like Title VI, Title IX authorizes funding agencies to effectuate the statutory prohibition via rules, regulations, and orders of general applicability, which do not take effect until approved by the President or, now, the Attorney General. 20 U.S.C. §1682; 45 Fed. Reg. 72,995 (1980) (Executive Order 12,250, delegating President's authority to Attorney General).[2]

Regulatory Background

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 HEW's regulations, with DOE substituted for HEW as needed. 45 Fed. Reg. 30,802 (1980). The rest of HEW became the federal Department of Health & Human Services ("HHS"). Both agencies retain their own rules for the recipients of their funding, as do all federal funding agencies, such as the U.S. Department of Agriculture ("USDA"). 7 C.F.R. pt. 15a. These rules all 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

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[2] *See also* 46 Fed. Reg. 29,704 (1981) (partial sub-delegation by Attorney General); 28 C.F.R. §0.51(a) ("[t]his delegation does not include the function, vested in the Attorney General by sections 1-101 and 1-102 of the Executive order, of approving agency rules, regulations, and orders of general applicability issued under the Civil Rights Act of 1964 and section 902 of the Education Amendments of 1972").

the other sex." *See* 45 C.F.R. §86.33 (HHS); 34 C.F.R. §106.33 (DOE); 7 C.F.R. §15a.33 (USDA).

Factual Background

EFELDF adopts the facts as stated in the petition (at 5-17). In summary, neither the complaint nor G.G.'s litigation of this case challenges sex-segregated restrooms or seeks to enforce Title IX's regulations. Instead, G.G. claims the right to use boys' restrooms under 20 U.S.C. §1681(a).

SUMMARY OF ARGUMENT

This Court must revisit *Auer* because *Auer* deference incentivizes agencies to issue vague rules, interpreting the rules expansively only after the rulemaking becomes final, thus impinging on both congressional authority to make laws and judicial authority to interpret laws (Section I.A). As DOE's extreme example here shows, the increasing reliance on executive fiat – bypassing Congress – provides the impetus for this Court to revisit the *Auer* line of cases (Section I.B).

If it retains *Auer*, the Court should nonetheless refine it as applied here to ensure that courts cannot give greater deference to regulatory interpretation than *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984), would give the underlying regulation (Section II.A). As applied, that precludes deference to multi-agency delegations like Title IX, exceptionally deep political questions like the transgender issue here, and procedurally defective agency action (Sections II.A.1-II.A.3). *Auer* should also include a pre-deference "*Chevron* step one" in which courts evaluate regulations using traditional tools of construction before granting deference (Section II.B);

here, those canons include the clear-notice rule for Spending-Clause legislation and the presumption against preemption (Sections II.B.1-II.B.2).

On whether DOE's guidance is binding, the guidance warrants no *Auer* deference because it is procedurally defective without §902's presidential-approval requirement (Section III.A) and, in any event, the regulations merely repeat the statutory term "sex" (Section III.B). Contrary to the guidance's novel definition, the various interpretive tools here (Section II) and the unanimous contemporaneous judicial view that "sex" means biological sex – not subjective gender – all reinforce the Board's sex-only reading (Section III.C). Finally, G.G.'s asserting waiver of the clear-notice issue confuses *arguments* with *claims*, and the Board has claimed consistently that "sex" in Title IX does not mean subjective gender identity and thus can make any argument to support that claim (Section III.D).

ARGUMENT

I. THIS COURT SHOULD REJECT *AUER* AS CONTRARY TO SEPARATION-OF-POWERS PRINCIPLES.

The Board's first question presented is whether this Court should revisit *Auer*. EFELDF respectfully submits that DOE's unprecedented action in an era of increasing executive fiats requires revisiting *Auer*.

A. *Auer* is inconsistent with separation-of-powers principles.

As indicated, the Fourth Circuit decided this case by giving *Auer* deference to DOE guidance. Although interpretive rules may serve as precedents, they do not enjoy *Chevron* status as a class. *U.S. v. Mead*

Corp., 533 U.S. 218, 232 (2001). Unfortunately, the somewhat related *Seminole Rock* or *Auer* doctrine often leads courts to confer greater-than-*Chevron* deference to spurious, post-promulgation agency interpretations of vague agency regulations. *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945); *Auer*, 519 U.S. at 461. Whereas *Chevron* encourages legislators to "pass the buck" by enacting vague statutes for agencies to implement, *Seminole Rock* and *Auer* encourage agencies to "hide the ball" by promulgating vague regulations that they themselves authoritatively can interpret, post-promulgation.

It does not matter whether agency personnel intentionally promulgate vague regulations to work mischief (*e.g.,* to accomplish by post-promulgation fiat what they could not accomplish by rulemaking) or choose that course because of short resources or mere laziness. The point is that *Seminole Rock* and *Auer* create incentives inconsistent with transparent rulemaking in which the public has the notice that underlies notice-and-comment rulemaking under the Administrative Procedure Act ("APA"). *See* John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612, 655-57 (1996); *Smiley v. Citibank (South Dakota), N. A.,* 517 U.S. 735, 741 (1996) ("notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation"). Moreover, the "general[] expect[ation that] an administrative regulation [will] declare any intention to pre-empt state law with some specificity… serves to ensure that States will be able

to have a dialog with agencies regarding pre-emption decisions *ex ante* through the [APA's] normal notice-and-comment procedures." *Geier v. American Honda Motor Co., Inc.,* 529 U.S. 861, 908-10 (2000) (interior citations omitted).

Even worse, the "*Seminole Rock* presumption – that an agency's delegated rulemaking power implicitly authorizes the agency to construe its own handiwork – contradicts [separation of powers,] a core structural commitment of our constitutional scheme." Manning, 96 COLUM. L. REV. at 639-40; *id.* at 618 ("separation of powers doctrine includes the requirement of some minimum separation between lawmaking and law-exposition"); Pet. at 20 (collecting individual justices' recent statements). The laxness of having executive agencies serve in both lawmaking and law-exposition functions contrasts markedly with this Court's separation-of-powers jurisprudence. *Id.* at 651-53 (*citing INS v. Chadha,* 462 U.S. 919, 952-58 (1983), *Bowsher v. Synar,* 478 U.S. 714, 726 (1986), *and Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 276-77 (1991)). Like Professor Manning, *id.* at 686-88, EFELDF urges the Court to replace *Seminole Rock-Auer* deference with *Skidmore* deference, judging an agency's interpretation of its regulations by the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).

B. If applied here, *Auer* would fundamentally reorder our constitutional structure.

G.G. argues against revisiting *Auer* absent a "'special justification'" for "overturning a long-settled precedent." Opp'n at 17 (*quoting Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2407 (2014)). EFELDF respectfully submits, however, that "[t]he tendency of a principle to expand itself to the limit of its logic," *Washington v. Glucksberg,* 521 U.S. 702, 733 n.23 (1997) (interior quotations omitted), makes *Auer* due for revisiting. DOE's actions here would have been unimaginable to the agency actors and justices in *Seminole Rock*. The current President flouts Congress with executive action unprecedented in our history outside cataclysmic events like war. If executive fiat is the new normal, *Auer* is already past its sell-by date; if it wants to avert a fiat-as-normal future, this Court should pull *Auer* deference from the shelf now.

Under our federalist structure, the "States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1630 (2014) (interior quotations and alterations omitted). Absent greater evidence that Congress attached fealty to DOE staff as a condition of federal funds, the policy questions raised here are ones that the People and the States reserved to themselves. *Id.* at 1636-37. Americans do not have uniform views on these issues, primarily because many had not considered – *or needed to consider* –

these issues until DOE thrust this issue to the fore with its unprecedented guidance.

Under our democracy, however, it should be clear that we deserve the opportunity to study these issues and advocate policy solutions – preferably to school boards or state legislatures, but also to Congress – *before* government acts. While DOE lacks authority to decide this issue, DOE's action would require rulemaking assuming *arguendo* that DOE had that authority. Pet. at 24-25; Section III.A, *infra*. That process would have allowed the governed to inform themselves and, then, to inform DOE of alternatives. Significantly, gender dysphoria's persistence rate over time is as low as 2.2% for males and 12% for females. Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 455 (5th ed. 2013). Put differently, up to 88% of females and more than 98% of males with gender dysphoria might resolve to their biological sex. By intervening, DOE may retard these resolutions, thus exposing children to unnecessary "treatment" with dangerous hormonal and other therapies. Unfortunately, DOE's "progressive" impulse led to pressing civil-rights claims blindly, even over the intended beneficiaries' physical and mental well-being. While they are not before this Court on the merits, these issues should inform the inappropriateness of DOE staff's imposing their views on the nation without public input.

The foregoing factors constitute ample "special justification" for this Court to revisit *Auer*.

II. EVEN IF IT PRESERVES *AUER* IN SOME CONTEXTS, THIS COURT SHOULD REVISIT *AUER* AS APPLIED HERE.

The Board's second question presented asks, if this Court retains *Auer*, whether the doctrine should be narrowed. EFELDF respectfully submits that this case presents numerous areas in which this Court could trim *Auer* – especially for multi-agency, Spending Clause legislation like Title IX – without rejecting *Auer* outright.

A. Deference to an agency's interpretation can never exceed the deference due to the underlying regulation.

As the Board explains, this Court's deference decisions have created a *Chevron-Auer* mismatch, with *Auer* deference's exceeding the deference that would prevail under *Chevron*. Pet. at 23-24. A court's deference to regulatory interpretations should never exceed the deference owed to the underlying regulation.

1. Multi-agency delegations like Title IX do not implicate *Chevron*, which negates *Auer* for Title IX rules.

At the outset, *Chevron* deference does not apply to statutes like Title IX that delegate the same interpretive authority to more than one agency:

> *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 [§901] 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). Senator Bayh's failed 1971 amendment explicitly delegated rulemaking authority only to HEW, 117 CONG. REC. 30,399, 30,404, 30,407 (1971) (Sen. Bayh), whereas his 1972 amendment (which, with the House bill, became Title IX) delegates regulatory authority to *all* federal agencies. 118 CONG. REC. 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 [already rejected.]" *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 DOE funding, the Board also receives funds from other federal agencies, such as USDA under the National School Lunch Act. 42 U.S.C. §1752. With more than one agency equally involved, *Chevron* deference cannot apply. *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998); *Mead Corp.*, 533 U.S. at 227-28; *Bowen v. Am. Hosp. 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). How could it? Nothing precludes USDA's using its co-equal regulatory status to issue guidance directly contrary to DOE's guidance.[3]

2. <u>Title IX did not delegate authority for agencies to answer questions of deep economic and political significance under *Chevron*.</u>

Under *King v. Burwell*, 135 S.Ct. 2480, 2489 (2015) – which cites *Util. Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2444 (2014) ("*UARG*") – courts must "determine the correct reading" of statutes that raise "question[s] of deep economic and political significance" without regard to administrative deference. *King*, 135 S.Ct. at 2489 (interior quotations omitted). *King* involved a new statute where Congress failed to speak expressly of an expansive agency power, 135 S.Ct. at 2489, whereas *UARG* involved an old statute in which the agency purported to find vast new authority lurking. 134 S.Ct. at 2444. From a separation-of-powers perspective, each form of *sub silentio* agency self-

[3] HEW might claim one narrow delegation (intercollegiate athletics) under PUB. L. NO. 93-380, §844, 88 Stat. 484, 612 (1974) (requiring one-time *proposed* rules that "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports"), which courts have held to justify deference. *See, e.g., Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993). This litigation involves neither colleges nor athletics nor HEW.

aggrandizement is shocking in its own way, but here DOE follows the *UARG* model.

Novel arguments might plausibly have their place under novel statutes, but to invent in Title IX a protection for transgenderism is simply implausible, unless agencies can amend statutes to fit an agency's view of the post-enactment societal changes:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.

UARG, 134 S.Ct. at 2444 (interior quotations omitted). Indeed, while *UARG* concerned stationary-source emissions under the Clean Air Act, its cited authority concerned the far-more-trivial economic and political field of tobacco products. *Compare id. with FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("*B&WT*"). While the bathroom policies at issue here might not rise to the level of all stationary sources (*e.g.*, factories, refineries, etc.) nationwide, those policies are easily more politically significant than smoking.

While EFELDF hopes that this Court will reject this administrative power grab on the merits, the point of this Section – and the point of *King*, *UARG*, and *B&WT* – is that federal courts must evaluate these significant economic and political issues without resort to *Chevron*. EFELDF respectfully

submits that the same principle applies to agency interpretations that raise such economic and political issues, so that to courts must review those issues without resort to *Auer*.

3. Procedurally improper agency action does not warrant deference.

As this Court recently held, "*Chevron* deference is not warranted where the regulation is 'procedurally defective' – that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016). Thus, "where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation." *Id.* Here, the Board argues that DOE's interpretation would require rulemaking under the APA, Pet. at 24-25; *accord* Section III.A, *infra*, which should deny *Auer* deference. Indeed, as EFELDF argues, DOE also failed to follow §902's relatively unique presidential-approval requirement, which further renders DOE's interpretation void. *See* Section III.A, *infra*. EFELDF respectfully submits that, if it retains *Auer*, this Court should adopt an *Encino Motorcars* caveat that *Auer* deference cannot apply to agency actions that are "procedurally defective."

B. *Auer* deference should not apply to manufactured ambiguity.

DOE staff apparently issued their transgender guidance in the hope of coercing schools and helping plaintiffs like G.G., without a rulemaking's litigation risks or administrative burdens. DOE's legerdemain

of shoehorning a controversial, contemporary issue into a decades-old, uncontroversial rule does not warrant judicial deference.

In administrative-law terms, "*Chevron* step one" requires courts to employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." 467 U.S. at 843 n.9. Only if the *judicial* attempt to interpret the statute is inconclusive do federal courts go to "*Chevron* step two," where a court potentially would defer to a plausible agency interpretation of an ambiguous statute, *id.* at 844, assuming *arguendo* that *Chevron* applies. But even under *Chevron*, "[t]he interpretation of the laws is the proper and peculiar province of the courts." THE FEDERALIST No. 78, at 467 (Hamilton). Although DOE would invent ambiguity to secure judicial deference, separation-of-powers principles compel courts to evaluate the issue first.

Without conceding any real ambiguity, EFELDF notes that mere "linguistic ambiguity" is insufficient to invoke *Chevron*. *U.S. v. Home Concrete & Supply, LLC*, 132 S.Ct. 1836, 1844 (2012). Instead, a federal "court … *employ[s] traditional tools of statutory construction* … [to] ascertain[]" whether "Congress had an intention on the precise question at issue," and "that intention is the law and must be given effect." *Id.* (emphasis in original). EFEDLF respectfully submits that this Court should narrow *Auer* similarly: If a court can interpret a regulation using the same tools of statutory construction that allowed that regulation to come into being, the court cannot defer to agencies.

1. Spending Clause legislation requires clear notice to recipients before obligations are imposed.

In Section III.A, *infra*, EFELDF demonstrates that DOE's interpretation is void under Title IX's procedural requirements. Void guidance cannot give recipients the "clear notice" that Spending-Clause conditions require.

Courts analogize Spending Clause programs like Title IX to contracts struck between the government and recipients, with the affected public as third-party beneficiaries. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). To regulate recipients based on federal funding, however, Congress must express its 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 Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). This 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 DOE's recent invention of new rights for transgender students in Title IX.

2. The presumption against preemption counsels against an 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 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 governments exercise in this field compels this Court to reject G.G.'s expansive interpretation of Title IX.

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).[4] This presumption applies

[4] Alternate precedents 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.*

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

In doing so, courts must interpret Title IX to avoid preemption. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). While it is fanciful to think 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 the Board has not conceded that G.G.'s gender-identity reading *is* viable, that is not the test. Instead, G.G. must show that the Board's sex-only reading *is not* viable.

The presumption against preemption applies to federal agencies as well as federal courts, especially when agencies ask courts to defer to administrative interpretations. 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 deference: "deference is constrained by our obligation to honor the clear meaning of a statute, as revealed

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Bass, 404 U.S. 336, 349 (1971); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (same). For simplicity, EFELDF refers to these federalism-based canons as the presumption against preemption.

by its language, purpose, and history." *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 411-12 (1979) (internal quotations omitted). Like this Court's refusing to presume that Congress cavalierly overrides co-equal state sovereigns, this Court must reject the suggestion that federal agencies can override the states through deference. Quite 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, the *Watters* banking-law context is more preemptive than federal law generally. *Id.* at 12 (majority). Where they have addressed the issue, the circuits have adopted similar approaches against finding preemption in these circumstances.[5] Federal

[5] *Nat'l Ass'n of State Util. Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1252-53 (11th Cir. 2006); *Fellner v. Tri-Union*

agencies – which draw their delegated power from Congress – cannot have a freer hand than Congress itself.

III. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE BINDING NATURE OF AGENCIES' TITLE IX INTERPRETATIONS.

Without DOE's new guidance on transgenderism under Title IX, G.G.'s novel Title IX claims would be unprecedented. This litigation thus presents the opportunity to assess the binding nature of DOE's guidance.

A. DOE's failure to comply with statutory procedural prerequisites renders its administrative interpretations void.

Procedurally, when Congress delegates rule-making authority, the agencies must follow all applicable requirements or act *ultra vires* the delegated authority. *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986) (recognizing that "an agency literally has no power to act… unless and until Congress confers power upon it"). Accordingly, whether *Auer* or *Skidmore* applies to agency interpretations *generally,* this Court should grant no deference to agency interpretations that violate procedural requirements for agency action.

Seafoods, L.L.C., 539 F.3d 237, 247-51 (3d Cir. 2008); *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); *Massachusetts Ass'n of Health Maintenance Orgs. v. Ruthardt,* 194 F.3d 176, 182-83 (1st Cir. 1999).

With regard to notice-and-comment rulemaking, DOE appears to have violated the APA. *Texas v. U.S.*, 2016 U.S. Dist. LEXIS 113459, *41-47 (N.D. Tex. Aug. 21, 2016). Allowing agencies to make rules without the required rulemaking procedures would violate the requirement that only Congress makes law. U.S. CONST. art. I, §1.

Similarly, regarding generally applicable rules and orders, Title IX's §902 mirrors Title VI's §602, *compare* 20 U.S.C. §1682 *with* 42 U.S.C. §2000d-1, so §602's legislative history controls. That history makes clear that agencies must act via rules, regulations, and orders,[6] 42 U.S.C. §2000d-1, which do not take effect unless and until signed by the President in the *Federal Register*. 42 U.S.C. §2000d-1; 110 CONG. REC. 2499-00 (1964) (Rep. Lindsay). Title VI's proponents repeatedly cited presidential approval as a bulwark against bureaucratic overreach.[7]

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[6] 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 amended §602 to its current form. 110 CONG. REC. 11,926, 11,930 (1964). "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." *Cardoza-Fonseca*, 480 U.S. at 442-43.

[7] ` 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. 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

As indicated, the Title VI House bill permissively authorized agencies to proceed by rule, regulation, or order, *see* note 6, *supra*, but Senator Dirksen's substitute bill amended the bill to its current form to allay concerns about federal agencies' overreaching. *Id.* Because Senator Dirksen needed that concession against administrative overreaching to break a filibuster, the revised "language was clearly the result of a compromise" to which courts must "give effect … as enacted." *Mohasco Corp. v. Silver*, 447 U.S. 807, 818-20 (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"). Under §902, federal agencies' action required presidential approval in the *Federal Register* before taking effect.

Significantly, the circuits are split on the effect of this presidential-approval requirement. *Compare*, *e.g.*, *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") *with Equity in Athletics v. Dep't of Educ.*, 639 F.3d 91, 106 (4th Cir. 2011). In *Sch. Dist. v. H.E.W.*, 431 F.Supp. 147, 151 (E.D. Mich. 1977), HEW "assert[ed] that Title VI does not require Presidential approval of these regulations, as

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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).

they are procedural only and do not define what constitutes discriminatory practices prohibited by Title VI." Adding gender-identity protections to a sex-discrimination statute is not merely procedural and, instead, clearly would "define what constitutes discriminatory practices." *Id.* Without the required approval, DOE's guidance never took effect, and the Board lacked notice under the Spending Clause.

B. *Auer* deference does not apply when an agency regulation merely parrots a statutory term.

Auer deference applies only when the regulatory "test is a creature of the [agency's] own regulations." *Auer*, 519 U.S. at 461 (interior quotations omitted). As such, *Auer* does not protect rules that merely repeat or paraphrase statutes:

> An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.

Gonzales, 546 U.S. at 257. There, the rules "just repeat[ed] two statutory phrases and attempt[ed] to summarize the others," which "gives no indication how to decide this issue." *Id.* Consequently, the agency's "effort to decide it now cannot be considered an interpretation of the regulation." *Id.* DOE's effort to define the statutory and regulatory word "sex" falls even further short than in *Gonzales*.

C. On the merits, the Board's bathroom policies neither violate Title IX nor support a preliminary injunction.

Given the many bases for interpreting Title IX narrowly here, *see* Section II, *supra*, this Court must hold that Title IX prohibits what Congress enacted: discrimination "on the basis of sex." 20 U.S.C. §1681(a).[8] But the Board does not discriminate on the basis of sex when its bathroom policy applies equally to biological females seeking to use boys' restrooms and biological males seeking to use girls' restrooms. Because G.G. does not challenge sex-segregated restrooms *per se*, the discrimination, if any, is against students whose subjective gender identity differs from their sex. Differential treatment based on a sex-versus-gender-identity mismatch is not what Title IX prohibits. 20 U.S.C. §1681(a). Because sex is a biological characteristic, and gender identity is not, G.G. cannot prevail.

When Congress enacted Title IX in 1972 and extended the statutory reach in 1988, the judicial understanding of the word "sex" did not include G.G.'s proposed expansion to include gender identity. For example, this Court recognized that the term "sex" referred to "an immutable characteristic determined solely by the accident of birth" "like race and national origin." *Frontiero v. Richardson*, 411

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[8] Even it failed to meet the regulation's safe harbor *allowing* sex-segregated bathrooms, 34 C.F.R. §106.33, the Board cannot *violate* Title IX unless §901(a) prohibits denying G.G. access to boys' bathrooms (*i.e.*, "sex" statutorily includes gender identity).

U.S. 677, 686 (1973).[9] Even without the canons of construction favoring the Board, Section II, *supra*, courts should regard the sex-versus-gender issue as decided by the Congress that enacted Title IX, consistent with the then-controlling judicial constructions from this Court and the unanimous courts of appeals. *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015). As the Board notes, Pet. at 33, Congress's subsequently adding gender identity to other statutes and failing to add it here bolsters that conclusion. In short, sex means sex; it does not mean gender.[10]

G.G.'s reliance *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny is misplaced. Opp'n at 30. These "stereotype" cases concern females' exhibiting masculine traits or males' exhibiting feminine traits. For purposes of her doing her job, it did not matter whether Ms. Hopkins wore a dresses or men's suits. Whatever impact *Hopkins* has on employers' ability to require masculinity in men or femininity in women, male employees remain male,

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[9] *Accord Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980); *Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001); *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).

[10] Although *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999), uses "gender" loosely to argue that Title IX prohibits discrimination "on the basis of gender," the opinion uses "sex" and "gender" interchangeably and does not hinge on sex-versus-gender issues. *Davis* merely uses "gender" to mean "sex," without holding "sex" to mean "gender."

and female employees remain female. *Hopkins* says nothing about which bathroom someone uses.

D. The Board did not waive any arguments about the scope of Title IX's coverage or the deference due to DOE's views.

Although G.G. claims that the Board waived the clear-notice issue, Opp'n at 28, the "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim.'" *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 379 (1995) (*quoting Yee v. Escondido,* 503 U.S. 519, 534 (1992)); *PGA Tour, Inc. v. Martin,* 532 U.S. 661, 678 n.27 (2001). Thus, "parties are not limited to the precise arguments they made below." *Yee*, 503 U.S. at 534. In asserting waiver, G.G. confuses *claims* with *arguments*:

> Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim – that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.

Id. at 534-35 (emphasis in original). The Board has consistently claimed that its restroom policies comply with Title IX, notwithstanding G.G.'s novel claims, and the Board can defend itself with any argument that supports its position.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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