No. 16-273

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,
v.

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

Respondent.

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

**Reply in Support of
Motion of the State of West Virginia, 20 Other States,
and the Governors of Kentucky and Maine
For Leave To Participate In Oral Argument As *Amici Curiae*
And For Divided Argument**

As *amici* States explained in their motion, participation by *amici* in oral argument (which is supported by Petitioner) will aid and is critical to this Court's consideration of the implications that *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and its progeny have on the questions under review. *First*, though Petitioner has argued that "the Fourth Circuit's holding would make Title IX violate the Spending Clause," Pet. Br. 42, *amici* States have more fully explored the issue. *Second*, as shown in the filing in opposition, Respondent intends to raise arguments concerning the scope of the *Pennhurst* doctrine generally,

arguments with consequences for all Spending Clause statutes and to which *amici* States are uniquely positioned to respond.

For the reasons set forth below, none of Respondent's arguments against permitting *amici* States argument time regarding *Pennhurst* is persuasive.

1. Respondent primarily contends that *amici* States "seek to interject new arguments" regarding the *Pennhurst* clear-statement rule that should not be considered by this Court. Resp. Opp. 3. But these arguments are not new. As Respondent admits, Petitioner raised *Pennhurst* as a defense in its Answer to the Complaint. *Id.* at 4; *see* ECF No. 77 at 12. Petitioner also argued in its Petition for Certiorari and in its opening merits brief that the interpretation of Title IX urged by Respondent and the Department of Education (and to which the Fourth Circuit deferred) violates the Spending Clause for lack of clear notice. Pet. 36 (arguing that the interpretation "would cause Title IX to violate the Spending Clause by failing to give 'clear notice' of conditions attached to federal funding"); Pet. Br. 42 ("[T]he Fourth Circuit's holding would make Title IX violate the Spending Clause for failure to afford funding recipients clear notice of the conditions of funding."); *cf.* BIO 28 (contending that *Pennhurst* arguments have been "waived").

Nor would it make sense, in any event, for this Court not to consider the *Pennhurst* clear-statement rule. *Amici* States are not offering new claims or new readings of Title IX that differ from those advanced by Petitioner. Rather, the *Pennhurst* rule is simply "a rule of statutory construction" that *amici* States put forth as further support for the arguments advocated by Petitioner. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). To consider the *Pennhurst* rule is no different

from considering any number of other ordinary tools of statutory construction—such as legislative history, *ejusdem generis*, or *noscitur a sociis*—that might bolster a statutory interpretation preserved and advanced by a party.

Indeed, consideration of the *Pennhurst* rule is "predicate to an intelligent resolution" of the questions presented. *Ohio v. Robinette*, 519 U.S. 33, 38 (1996). This Court has granted review to answer whether an interpretation of Title IX and its regulations is correct or due deference. To reach that answer (and, in particular, to affirm), this Court will need to determine whether the relevant legal texts are ambiguous and, if so, what deference or interpretation that ambiguity permits. But because Title IX is indisputably a Spending Clause statute, these questions cannot be answered without consideration of the *Pennhurst* rule, since that rule, if applicable, prohibits the federal government from speaking ambiguously. At a minimum, this Court cannot affirm the decisions below without addressing the *Pennhurst* rule and determining that it somehow does not apply.

2. Respondent's remaining argument regarding the *Pennhurst* rule concerns the scope of that rule, *see* Resp. Opp. 3–4, and thus actually supports participation by *amici* States in oral argument. Respondent contends that the *Pennhurst* rule does not apply to actions seeking injunctive relief. But that is a limitation on *Pennhurst* that this Court has never before adopted and that would have broad consequences if adopted in this case. Respondent's intention to seek such a doctrinal change bolsters the need for *amici* States, which have broader interests in the applicability of the *Pennhurst* rule to Spending Clause statutes, to be present at oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elbert Lin, counsel of record for *Amicus Curiae* State of West Virginia, hereby declare that one copy of the foregoing Reply in Support of Motion of the State of West Virginia, 20 Other States, and the Governors of Kentucky and Maine For Leave To Participate In Oral Argument As *Amici Curiae* And For Divided Argument was served on the following via Federal Express:

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The foregoing document was mailed to the Court by Federal Express on this 6th day of February, 2017.

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