No. 16-273

In the

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

v.

G.G., by and through his mother, DEIRDRE GRIMM,

Respondent.

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

RESPONDENT'S OPPOSITION TO *AMICI*'S MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR DIVIDED ARGUMENT

G.G., by and through his mother, Deirdre Grimm, submits the following Response in Opposition to the Motion for Leave to Participate in Oral Argument and for Divided Argument filed by *Amici Curiae*, West Virginia, 20 other States, and the Governors of Kentucky and Maine.

INTRODUCTION

The motion for leave to participate in oral argument and for divided argument should be denied. *Amici* seek to raise arguments based on *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and *Nat'l Federation of Independent Businesses (NFIB) v. Sebelius*, 132 S. Ct. 2566 (2012), that petitioner

did not raise below and that the Fourth Circuit did not address. Moreover, although petitioner now invokes *Pennhurst* in its merits brief through the doctrine of constitutional avoidance, Pet. Br. 41-43, it still does not raise any argument based on *NFIB*. [1]

Allowing *amici* to inject these new issues into oral argument would not "provide assistance to the Court," S. Ct. R. 28.7; it would divert attention from the central questions that have been presented in the courts below and that are ripe for this Court's review. Petitioner and *amici* will have the opportunity to pursue any questions related to *Pennhurst* or *NFIB* on remand, but this appeal is neither the time nor the place to do so.

ARGUMENT

1. An *amicus* seeking leave to participate in oral argument bears a "heavy burden." *See* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb,

[1] The issues that *amici* seek to raise here have also not been addressed in other lower-court decisions regarding Title IX's protections for transgender students. *See Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *18 (N.D. Ill. Oct. 18, 2016) (report and recommendation); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV 524, 2016 WL 5372349, at *2-*3 (S.D. Ohio Sept. 26, 2016), *appeal docketed*, No. 16-4107 (6th Cir. Sept. 28, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *1 (E.D. Wis. Sept. 22, 2016), *appeal docketed*, No. 16-3522 (7th Cir. Sept. 26, 2016); *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016), *appeal docketed*, No. 16-11534 (5th Cir. Oct. 21, 2016). The only lower-court case even to mention one the issues is *Carcaño v. McCrory*, which noted that *Pennhurst* had been raised for the first time at the preliminary injunction hearing, but the argument had not been sufficiently developed to be considered. No. 1:16CV236, 2016 WL 4508192, at *15 n.27 (M.D.N.C. Aug. 26, 2016).

Supreme Court Practice § 14.7(k), p. 782 (10th ed. 2013). This Court routinely denies such requests even when the *amicus* is a sovereign State. *See id.* at § 14.7(k), p. 782 n.32 (collecting cases).

Although *amici* cite examples of cases in which this Court granted *amici* States' permission to participate in oral argument, Mot. 4-5, the *amici* in those cases all addressed the same basic arguments that had been briefed by the parties and considered by the courts below. In this case, by contrast, *amici* seek to interject new arguments that have never previously been addressed and that are not yet ready for this Court's review.

2. Petitioner and *amici*'s arguments based on *Pennhurst* are not central to this appeal and should first be fully briefed and addressed in the lower courts. "It is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance." *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016).

Even if this Court were to consider petitioner and *amici*'s *Pennhurst* arguments, those arguments are not central to this appeal because this case arrives on review of a motion to dismiss and motion for preliminary injunction. *Pennhurst* does not affect "the scope of the behavior Title IX proscribes," but only the available remedy for a violation. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 639 (1999); *accord Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) ("Our central concern . . . is with ensuring that the receiving entity of federal funds has notice that it will be liable for a monetary award." (internal quotation marks and

brackets omitted)). "[A] court may identify the violation and enjoin its continuance or order recipients of federal funds prospectively to perform their duties incident to the receipt of federal money," and then "the recipient has the option of withdrawing and hence terminating the prospective force of the injunction." *Guardians Ass'n v. Civil Serv. Comm'n of City of N.Y.*, 463 U.S. 582, 596 (1983) (White, J.); *see also Gebser*, 524 U.S. at 287 (citing Justice White's opinion in *Guardians*). *Pennhurst* thus provides no defense to respondent's claim for injunctive relief. [2]

Amici will suffer no prejudice if their motion is denied because this is not *amici*'s only "opportunity to be heard on the Spending Clause implications of this case." Mot. 4. If this Court affirms the decisions below, petitioner and *amici* will have the opportunity to raise *Pennhurst* arguments on remand. Although petitioner did not raise *Pennhurst* in support of its motion to dismiss or in opposition to a preliminary injunction, it did raise *Pennhurst* as a defense in its Answer to the Complaint. *See* JA 22; ECF No. 77 at 12. Those arguments (and any arguments based on *NFIB*) can be fully considered on a motion for summary judgment.

3. Although petitioner raises *Pennhurst* for the first time in this Court, even petitioner does not advance a*mici*'s argument based on *NFIB*. This Court has repeatedly noted that it does not usually consider arguments that are raised only by *amici* and that were not considered below. *See Burwell v. Hobby Lobby Stores, Inc.*,

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[2] Respondent's claims for injunctive relief will not become moot when he graduates in June 2017 because he will remain subject to the Board's policy when attending alumni events or school football games.

134 S. Ct. 2751, 2776 (2014); *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1010-11, n.4 (2013).

This Court's general reluctance is especially warranted here. *Amici*'s coercion argument based on *NFIB* raises "intensely empirical" questions that cannot be resolved on a motion to dismiss without any factual record. *Hobby Lobby Stores*, 134 S. Ct. at 2776. *Cf. NFIB*, 132 S. Ct. at 2566 (reviewing summary judgment record). For example, *amici* fail to account for Title IX's "pinpoint" provision, which limits termination of funding "to the particular program, or part thereof" where "noncompliance is found." 20 U.S.C. § 1682. The assertion that States are threatened with "loss of 100% of a State's federal education funding" is incorrect. *See* Emily Martin, *Title IX and the New Spending Clause*, American Constitution Soc'y Issue Brief (Dec. 2012), https://goo.gl/8UOQw5. The record contains no information about what specific programs or funding streams at Gloucester High School are implicated here.

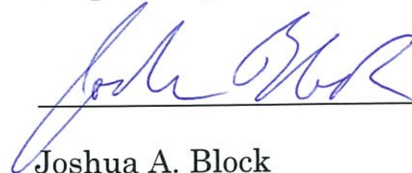
4. *Amici*'s arguments also implicate ancillary legal questions that should be fully briefed and considered. For example, this Court has not resolved whether Section 5 of the Fourteenth Amendment provides an independent basis of authority for Title IX. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75, n.8 (1992) (reserving this question). Many lower courts have already held that Title IX is valid Section 5 legislation. *See, e.g.*, *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1152 (10th Cir. 2006); *Franks v. Ky. Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997). These, and other, questions deserve full

consideration and should not be shoehorned into this case through oral argument by *amici*.

CONCLUSION

Amici's motion for leave to participate in oral argument and for divided argument should be denied.

Respectfully submitted,



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