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

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

Pursuant to Rules 21, 28.4 and 28.7 of the Rules of this Court, *Amici Curiae* State of West Virginia, 20 Other States, and the Governors of Kentucky and Maine respectfully move for leave to participate in the oral argument in this case.

Specifically, *amici* States respectfully request that *amici* be allowed ten minutes of argument time or that this Court allocate to *amici* whatever portion of Petitioner's argument time that the Court believes would materially assist it in its consideration of this case. Petitioner consents to the States' participation at oral argument, and the States' participation would not expand the time allotted for argument. Petitioner proposes to cede ten minutes of its time to *amici* States,

during which counsel for the State of West Virginia would speak for all State *amici*. Respondent opposes this request.

ARGUMENT

1. This case concerns the meaning of the term "sex" in Title IX, a statute enacted by Congress pursuant to its power under the Spending Clause. The statute prohibits discrimination "on the basis of sex" "under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). But Title IX further provides that schools may "maintain separate living facilities for the different sexes," 20 U.S.C. § 1686, and a regulation clarifies that this includes maintaining "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. Because Title IX is a Spending Clause statute, grant recipients are only responsible for conditions unambiguously expressed in the "clear terms" of the statute itself. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640–642 (1999).

At issue here is whether "sex" includes gender identity. For more than forty years, States have accepted federal education funding on the understanding that Title IX left to them and local school boards the discretion to determine that the physical differences between males and females warrant separate restroom facilities. But in early 2015, the U.S. Department of Education issued an unpublished opinion letter that sought to change that understanding. The Department claimed that Title IX makes it discriminatory for a school to separate male and female bathrooms, unless each student is allowed access to a bathroom based on gender identity. This novel interpretation of Title IX—advanced by both Respondent and the Department—makes billions of dollars of annual federal

education funding contingent on a new condition that is not clearly stated in the law.

This Court has granted review of two questions. First, whether deference is due under *Auer v. Robbins*, 519 U.S. 452 (1997), to the Department's informal view that Title IX requires schools to open their restrooms to students on the basis of gender identity. Second, regardless of deference, whether Respondent and the Department have correctly interpreted Title IX and its regulations.

2. The States' participation in oral argument in this case will benefit this Court's consideration. Petitioner Gloucester County School Board and *amici* States have focused on different, but complementary, approaches to the questions under review. Divided argument will ensure a full exploration of these points of view, even though they urge the same result. *See, e.g.*, *McDonald v. City of Chicago*, 130 S. Ct. 1317 (2010).

In its brief, Petitioner focuses primarily on why generally applicable principles of statutory construction require this Court to interpret Title IX as allowing States to provide separate restroom facilities to students based on physiological sex, Pet. Br. 24–41, as well as several reasons why *Auer* deference should not be extended to the Department's informal letter, *id.* at 43–63. Petitioner also argues that because Title IX is indisputably a Spending Clause statute, the law must be read narrowly in order to avoid an unconstitutional application of the statute, *id.* at 41–43, but Petitioner cites to the States' brief for further explication of this and related points.

In their brief, *amici* States focus primarily on the implications that this Court's Spending Clause jurisprudence have on the questions under review. *Amici* agree with Petitioner's textual analysis of the statute but mainly argue that even if there were textual ambiguity, States could not be required to comply with the new condition advanced by Respondent and the Department. State *Amici* Br. 6–25. The Spending Clause precludes the federal government from imposing grant conditions on States that Congress did not make unequivocally clear in the statutory language. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Indeed, were this Court to expansively interpret Title IX, States would be unconstitutionally coerced into accepting new grant conditions long after the receipt of funds. State *Amici* Br. 26–28. Moreover, *Auer* deference, which is premised on a court not inquiring into congressional intent, has no application in the Spending Clause context, where the Constitution requires Congress to speak explicitly. State *Amici* Br. 28–32.

3. Divided argument is also proper because it is critical that the sovereign States have the opportunity to be heard on the Spending Clause implications of this case.

The States have wider interests in the relationship between the States and the federal government. This Court's decision in this case will likely address the broader question whether the federal government may change States' obligations under a Spending Clause regime decades after States first agree to receive funds. *Amici* States are uniquely positioned to speak to that question.

Moreover, *amici* States have direct institutional and economic interests in enforcing the Spending Clause's structural limits on the federal government's power in this case. Under the Fourth Circuit decision below, States are to be forced either to relinquish control over policies designed to protect student privacy and safety in an area of traditional state authority or else forfeit their entire share of $55.8 billion in annual federal school funds. State *Amici* Br. 27–28.

4. Finally, this Court regularly permits States to divide oral argument with other parties when a case concerns the lawfulness of State laws and practices. *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 266 (2016); *Wittman v. Personhuballah*, 136 S. Ct. 1241 (2016); *Nebraska v. Parker*, 136 S. Ct. 791 (2016); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 566 (2015). This is true even when States appear before this Court as *amici curiae*. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (Texas, et al., presented argument as *amici curiae* on the constitutionality of the state death penalty for rape); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (Texas, et al., presented argument as *amici curiae* on whether the Establishment Clause prohibits prayer before public schools' football games).

In particular, States have regularly presented oral argument as *amici* in cases, like this one, that concern an "important question of federal-state relationship." *Pennsylvania v. Nelson*, 350 U.S. 497, 499 (1956) (New Hampshire, et al., presented argument as *amici*). For example, in the Title IX context, this Court allowed Alabama to present argument as *amicus curiae* on the question whether Title IX encompasses claims of retaliation. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). States have also presented argument as *amici* in civil rights cases

that implicate the line between federal power and state sovereignty. *See, e.g.*, *United States v. Georgia*, 546 U.S. 151, 152 (2006) (Tennessee, et al., presented argument as *amici curiae* on whether a State is liable for money damages under Title II of the Americans with Disabilities Act of 1990); *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 615 (2002) (Texas, et al., presented argument as *amici curiae* on implied waiver of State sovereign immunity to suits under 42 U.S.C. § 1983); *City of Boerne v. Flores*, 519 U.S. 1088 (1997) (Ohio, et al., presented argument as *amici curiae* on whether States are bound under the federal Religious Freedom Restoration Act). As this Court explained in *Mining Co. v. Consolidated Mining Co.*, 102 U.S. (12 Otto) 167 (1880), where the United States and a State "entertain and act upon conflicting views of the rights of the State and the general government," both the State and the United States should be "permitted to take part in the argument." *Id.* at 168.

CONCLUSION

The motion for leave to participate in oral argument in this case should be granted.

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 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 24th day of January, 2017.

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