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 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

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 202-355-9452
lj@larryjoseph.com

Counsel for Amicus Curiae

QUESTIONS PRESENTED

Title IX of the Education Amendments of 1972 ("Title IX") prohibits discrimination "on the basis of sex," 20 U.S.C. §1681(a), while its implementing regulation permits "separate toilet, locker room, 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 In this case, a Department of Education official opined in an unpublished letter that Title IX's prohibition of "sex" discrimination "include[s] gender identity," and that a funding recipient providing sex-separated facilities under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 Should *Auer* deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

2. 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

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

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation headquartered in Saint Louis. Since its 1981 founding, EFELDF has defended federalism and supported autonomy in areas of predominantly local concern. EFELDF has longstanding interests 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; *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, 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.

In our democracy, it should be clear that the People 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 at all, *see* Board Br. at 25-43, DOE's action would require rulemaking assuming *arguendo*

that DOE had that authority. The rulemaking process would have allowed the governed first 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 97% 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.

While EFELDF supports the Board's brief in most respects, there are several areas where the Board's brief warrants comment.

- ***The optional nature of complying with §902***: In two places, the Board suggests that agencies "may" issue rules, regulations, and orders of general applicability under 20 U.S.C. §1682. Board Br. at 10, 61. That permissive formulation was in the pertinent House bill, but was replaced with the mandatory "shall" to break a filibuster. *See* Section I.F.1, *infra*. Compliance is not optional.
- ***§902's allowance for "guidance" that falls short of "rule" status***: Similarly, the Board

suggests that §902 exempts "nonbinding interpretive guidelines," Board Br. at 63, unaware that issuing non-rule guidance is an "order of general applicability" in administrative law: there is no excluded middle between rules and orders. *See* Section I.F.1, *infra.*

- ***Crediting Sen. Bayh with authoring Title IX***: The Board identifies former Sen. Birch Bayh as Title IX's "principal sponsor," Board Br. at 5, but Rep. Edith Green deserves the credit. *See*, *e.g.*, David E. Rosenbaum, *Bill Would Erase Admission Quotas*, N.Y. TIMES, Aug. 13, 1971, at 7. On April 6, 1971, on behalf of herself and Rep. Perkins, Rep. Green introduced the legislation that became Title IX as part of an education bill. 117 CONG. REC. 9821 (1971). *Four months later,* on August 6, 1971, Sen. Bayh attempted to introduce it as a floor amendment, 117 CONG. REC. 30,399 (1971), which was ruled non-germane to a parallel bill then pending in the Senate. 117 CONG. REC. 30,415.[2] In the first sentence of his prepared statement to the 1975 hearings on the Title IX regulations, Sen. Bayh identified himself – correctly – as "Senate sponsor of Title IX." Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., at 168 (1975).
- ***Confusing Title IX and the Higher Education Act of 1965***: The Board blurs the boundaries of

[2] On February 28, 1972, Sen. Bayh re-introduced Title IX as a floor amendment to a different Senate bill. 118 CONG. REC. 5802 (1972).

Title IX and the Higher Education Act of 1965, *see* Board Br. at 5-6, perhaps because the Education Amendments of 1972 enacted Title IX and amended the Higher Education Act. The House's section-by-section analysis lists more than 60 amendments to the Higher Education Act of 1965, H.R. Rep. No. 92-554, *reprinted at* 1972 U.S.C.C.A.N. 2462, 2548-80, but does not include Title IX among those amendments, *id.* at 2566-67; *compare*, *e.g.*, PUB. L. NO. 92-318, §§901-907, 86 Stat. 235, 373-75 (1972) (Title IX does not mention Higher Education Act of 1965) *with id.* at §1001, 86 Stat. at 375 ("Part A of the Higher Education Act of 1965 is amended …"). Title IX is not part of Higher Education Act of 1965.[3]

Where further relevant to this brief, EFELDF revisits these issues below.

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.

[3] This issue impacts how (and *which of*) HEW's Title IX authority transferred to DOE. *See* 20 U.S.C. §3441(a)(2)(C).

72,995 (1980) (Executive Order 12,250, delegating President's authority to Attorney General).[4]

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).[5] 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 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).

---

[4] *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").

[5] In issuing its initial regulations, DOE invoked the APA exemption to avoid "unnecessary" notice-and-comment rule-making, 5 U.S.C. §553(b)(B), without complying with §902. 45 Fed. Reg. at 30,802 (signed only by Secretary of Education). Because §902 lacks a parallel exemption, DOE's regulations never actually took effect.

Factual Background

Except as stated above, EFELDF adopts the facts as stated in the Board's brief (at 4-19). 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 should reject the sea change that DOE and G.G. propose to make to Title IX – and to state and local control over education – via sub-regulatory memoranda and private litigation. While EFELDF would prefer to avoid expanding Title IX, leaving these issues for state and local resolution, Congress has the power to amend its Spending Clause statutes or to enact new ones via the Fourteenth Amendment, if Congress considers that course sound. The job that falls to this Court is to reign in federal agencies and lower courts to avoid trammeling constitutional norms for enacting statutes and promulgating rules. The substantive question of what schools should do with regard to transgender students is important, but the liberty interest that resides in our republican form of government, with separated powers and dual sovereigns is infinitely more important.

This Court should clarify *Auer* 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), warrants for the underlying regulation (Section I.A). For both *Auer* and *Chevron*, courts should first evaluate rules or statutes to determine any legislatively defined limits, using all traditional tools of statutory construction. As applied

here, the applicable canons include (1) requiring clear notice of Spending-Clause conditions (Section I.B), (2) presuming against preemption and significant alterations in the state-federal balance for traditional areas of traditional state and local concern (Section I.C) because Congress would not cavalierly overturn the state-federal balance or displace state sovereigns, (3) reserving to Congress and the courts issues of exceptional economic and political significance (Section I.D) for the same reasons, (4) precluding deference to multi-agency delegations like Title IX (Section I.E) because Congress has shown no single delegation to one specially designated agency, and (5) requiring agencies to comply with procedural limits on their powers (Section I.F) because agencies operate under express exemptions from Article I's requirement that Congress makes the laws and agencies must thus comply scrupulously with the constitutional exceptions under which they operate.

In particular, DOE faced two procedural barriers: (1) notice-and-comment rulemaking requirements in the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"); and (2) §902's presidential-approval requirement – delegated to the Department of Justice – before any rule, regulation, or order of general applicability takes effect. 20 U.S.C. §1682. DOE's ignoring these barriers renders its guidance either void under the APA or not yet effective under §902 (Section I.F.1-I.F.2).

On the statutory merits, privacy requires sex-segregated bathrooms and lockers, and Title IX in no way displaced privacy rights: in any event, Title IX concerns objective biological sex, not subjective gender

identity (Section II.A). To the extent that G.G.'s claim relies on the regulations, nothing in the permissive regulatory safe harbor imposes any restrictions on the Board, *see* 45 C.F.R. §86.33; 34 C.F.R. §106.33 (*allowing* sex-segregated bathrooms), and – in any event – the regulatory conditions precedent to regulatory enforcement remain unmet here, 45 C.F.R. §80.8(d); 34 C.F.R. §100.8(d), thus requiring dismissal (Section II.B). Finally, G.G.'s asserting waiver of the clear-notice issue at the petition stage confused *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 II.C).

ARGUMENT

I. DOE'S GUIDANCE DOES NOT WARRANT ANY DEFERENCE.

The first question presented asks whether DOE's transgender guidance warrants deference. 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 impacting the *Auer* doctrine in administrative law generally.

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

This Court's deference decisions have created a *Chevron-Auer* mismatch, with *Auer* deference's exceeding the deference that would prevail under *Chevron*. For example, if multi-agency delegation statutes like Title IX or the Freedom of Information Act do not warrant any deference, *see* Section I.E,

infra, then courts should not provide controlling *Auer* deference to those agencies' regulations. A court's deference to regulatory interpretations should never exceed the deference owed to the underlying regulation.

To avoid expanding *Auer* deference for regulatory interpretations beyond the deference warranted for the underlying regulation, this Court should require a "step one" analogous to "*Chevron* step one," which requires courts to use "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." 467 U.S. at 843 n.9; *accord U.S. v. Home Concrete & Supply, LLC*, 132 S.Ct. 1836, 1844 (2012) (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"). Only if the *judicial* attempt to interpret the statute (or regulation for *Auer*) 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 (or regulation for *Auer*), 467 U.S. at 844. But even under *Chevron* and *Auer*, "[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.

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

As the Board explains, Congress enacted Title IX under the Spending Clause, which courts analogize to contracts struck between the government and recipients, with the affected public as third-party beneficiaries. Board Br. at 41-43. Because it remains unclear if Title IX covers subjective gender identity, notwithstanding a DOE guidance document that has been preliminarily enjoined for apparently violating APA rulemaking requirements, *Texas v. U.S.*, 2016 U.S. Dist. LEXIS 113459, at *41-47 (N.D. Tex. Aug. 21, 2016), and appears never to have taken effect, *see* Sections F.1, F.3, *infra*, in any event, there is not much of an argument that the Board was – or is – on notice of its liability to G.G. on sex-discrimination grounds.

During the petition phase, G.G. made two notice-related arguments that bear refuting: (1) clear-notice restrictions apply only to money damages, and (2) any intentional discrimination puts recipients on notice of their liability for that conduct. Br. in Opp'n at 28-29 (*citing Davis ex rel. LaShonda D., v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999) *and Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005)). Neither argument has any merit.

First, although the *Davis* holding that G.G. cited concerned money damages, the legal issue did not hinge on damages versus equitable relief or any other liability. The school disputed liability for third-party, student-on-student harassment, and this Court held the school liable "for its *own* decision to remain idle in

the face of known student-on-student harassment in its schools." *Davis*, 526 U.S. at 639-42 (emphasis in original). Moreover, this Court has recognized that the clear-notice rule can cover any type of new obligation or liability, not only damages. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 534 (2007).

Second, *Jackson* retaliation-because-of-advocacy issue and the *Davis* third-party harassment were tied to "sex" as understood in this Court's decisions. Here there is no such linkage, unless DOE's guidance is both upheld – notwithstanding the *Texas* preliminary injunction and impending new administration – and also allowed to take effect *retroactively* for §902 purposes. That is an apparently insurmountable list of conditions for G.G.'s success on notice grounds. *See Georgetown Univ. Hosp. v. Bowen,* 821 F.2d 750, 758-60, (D.C. Cir. 1987), *aff'd,* 488 U.S. 204, 215-16 (1988) (agencies cannot act retroactively in making rules). While the Board may have been on notice that DOE was *trying* to expand Title IX's coverage, there is still no notice that DOE has *succeeded* via the procedures that Title IX provides. Thus, G.G.'s argument that "[n]otice is provided 'by the statutory provisions, regulations, and other guidelines provided by the Department at [the] time' the funds are received," Br. in Opp'n at 29 (*citing Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 670 (1985)), is misplaced. In *Bennett*, there was no uncertainty in the new conditions; uncertainty abounds here.

As this Court recently clarified, the 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 transgender rights in Title IX.

C. Federalism and the presumption against preemption counsels against an expansive interpretation of "sex" under Title IX.

In addition to the clear-notice rule for Spending Clause legislation, the traditional tools of statutory construction also include federalism-related canons that are relevant to DOE's and Congress's acting here in an area of traditional state and local concern. While 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).[6] This presumption applies "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.

---

[6] 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. 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.

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

D. Title IX did not delegate authority for agencies to answer questions of deep economic and political significance under *Chevron*.

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

---

[7] *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 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).

new authority lurking. 134 S.Ct. at 2444. From a separation-of-powers perspective, each form of *sub silentio* agency self-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 legerdemain 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*. Absent 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. *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1636-37 (2014). EFELDF respectfully submits that these same principles apply to agency interpretations that raise such economic and political issues, so that courts review those issues without resort to *Auer*.

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

Because Title IX – like Title VI – delegates the same authority to each federal funding agency, no one agency can claim the special delegation from Congress that forms the basis for courts' deferring to agencies under *Chevron*:

> *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). 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.

1. Title IX did not delegate unique authority to HEW.

Sen. 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.

2. **The Javits Amendment did not delegate unique authority to HEW, especially not unique authority *vis-à-vis* high school bathrooms.**

In 1974, Sen. Tower introduced an amendment to exempt revenue-producing intercollegiate athletics from §901(a) and to require the Commissioner of Education to publish proposed Title IX regulations within 30 days. 120 CONG. REC. 15,322-23 (1974). Although his review of the legislative history indicated Title IX's inapplicability to athletics, his amendment clarified that – *if a court found Title IX to apply to athletics* – it nonetheless would exempt revenue-producing sports. *Id.* 15,323. Accordingly, the requirement to publish proposed rules was "not intended to confer on HEW any authority it does not already have under the act." *Id.*

The Tower Amendment passed the Senate, but was amended in conference (becoming known as the "Javits Amendment") to require HEW's Secretary – not the Commissioner of Education – to publish the proposed regulations and to replace the revenue-sport exemption by requiring the proposed regulations to "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." *Compare* H.R. 69, §536 (Tower), *reprinted in* 120 Cong. Reg. 15,444, 15,477 (1974) *with* PUB. L. NO. 93-380, §844, 88 Stat. 484, 612 (1974) (Javits). The conference committee did not indicate any other changes to the Senate bill. CONF. REP. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4206, 4271. Because agencies axiomatically lack any authority not expressly delegated to them, *Bowen v.*

Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988), and judicial deference applies only to actions within such delegations, *Chevron,* 467 U.S. at 865, the Javits Amendment cannot justify deference.

First, the Javits Amendment directs HEW's Secretary to issue merely a *proposed* regulation, which commands no deference. *Matter of Appletree Markets,* 19 F.3d 969, 973 (5th Cir. 1994); *Public Citizen v. Shalala,* 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (*citing Public Citizen Health Research Group v. Commissioner, F.D.A.,* 740 F.2d 21, 32-33 (D.C. Cir. 1984)) (same); *Utah Wilderness Alliance v. Dabney,* 222 F.3d 819, 829 (10th Cir. 2000). By requiring only proposed regulations, the Tower-Javits Amendment met the stated objective of "not … confer[ring] on HEW any authority it does not already have." 120 CONG. REC. 15,323; CONF. REP. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4271 (adopting Senate's rulemaking provision).

Second, assuming *arguendo* that it confers authority, the Javits Amendment confers only the one-time authority to issue a proposed rule within 30 days of the enactment of the Education Amendments of 1974. As such, courts would owe deference only to HEW's 1974 proposal, not to HEW's 1975 final rule, much less to agencies' subsequent actions, proposed or final. Unlike the broad delegation in *Chevron,* such temporary, special-circumstance delegations cannot elevate the delegate. *Cf. U.S. v. Eaton,* 169 U.S. 331, 343 (1898) ("Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and

temporary conditions he is not thereby transformed into the superior and permanent official").

Third, assuming *arguendo* that the Javits Amendment conferred any authority under Title IX, the Javits Amendment's exclusive focus on *intercollegiate* athletics would leave HEW without deference for *interscholastic* athletics, much less non-athletic issues such as bathrooms. Similarly, and again assuming *arguendo* that the Javits Amendment conferred *any* authority on HEW, DOE still could not claim that authority: DEOA left any Javits Amendment delegation with HHS, not with DOE. *See* Section I.E.3, *infra.* Because Congress likely did not intend either to create an intercollegiate-interscholastic dichotomy or to crown HHS as the nation's Title IX czar, this Court should read the Javits Amendment not to confer any authority, just as Sen. Tower stated when introducing it.

3. <u>DEOA did not transfer any relevant HEW authority to DOE.</u>

In splitting HEW into DOE and HHS, the Department of Education Organization Act, PUB. L. NO. 96-88, 93 Stat. 668 (1979) ("DEOA"), reserved to HHS all functions not transferred to DOE. 20 U.S.C. §3508(b). DEOA §301 transferred "functions" from HEW and its officers to DOE and its officers. 20 U.S.C. §3441(a)(1)-(6), (b). Specifically, §301(a)(1), (a)(5)-(6), and (b) transfer functions of education-related subordinate HEW officers and offices, which do not address HEW authority under either Title IX or the Javits Amendment. Likewise, §301(a)(4) transferred HEW functions under the Rehabilitation Act and administered by the Commissioner of Rehabilitation

Services. And §301(a)(2) transferred all HEW functions under seventeen enumerated statutes, which do not include Title IX or the Javits Amendment. 20 U.S.C. §3441(a)(2). Last, §301(a)(3) transferred "all [HEW] functions with respect to or being administered by the [HEW] Office of Civil Rights *which relate to functions transferred by this section*." 20 U.S.C. §3441(a)(3) (emphasis added).[8] In any event, HEW's *rulemaking* authority was administered by the *HEW Secretary,* and thus was not "being administered by the Office of Civil Rights," as required by §301(a)(3)'s terms.

Thus, like any other agency, DOE draws its rulemaking authority from Title IX itself, which authorizes and directs *each* federal agency to issue Title IX regulations. 20 U.S.C. §1682. Under this authority, DOE issued regulations upon its formation in 1980, 34 C.F.R. pt. 106, while HHS retained the original HEW regulations, 45 C.F.R. pt. 86. One of two situations applies: (1) as inheritor of all non-transferred HEW authority, HHS is the nation's Title IX czar, 20 U.S.C. §3508(b), or (2) consistent with their plain language and legislative histories, neither Title IX nor the Javits Amendment delegated special authority to HEW, HHS, or DOE.

---

[8] Had DEOA transferred HEW's Office of Civil Rights ("OCR") to DOE, as the Senate Bill proposed, one could make a strained argument that §301(a)(3)'s "relates-to" clause includes any "function" related to any authority wielded by OCR. But the Senate receded to the House in Conference, and DEOA created a new OCR within DOE instead of transferring HEW's OCR. H.R. CONF REP. 96-459, 46-47, *reprinted in* 1979 U.S.C.C.A.N. 1612, 1626; 20 U.S.C. §3413.

While this Court has noted that "HEW's functions under Title IX were transferred to [DOE]," *North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 517 n.4 (1982), that footnote merely explains why DOE defended that litigation on *certiorari.* The *North Haven* schools challenging Title IX's application to employment received DOE (not HHS) funding under statutes listed in §301(a)(2), so HHS could not redress their injuries.

Because nothing of substance hinged on whether HEW, HHS, or DOE defended the Title IX regulations in *North Haven*, this Court now should disregard its "fleeting footnote." *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 512-13 & n.9 (2006) (disregarding remarks made "*[e]n passant*" and in "fleeting footnote[s]" when "our decision did not turn on that characterization, and the parties did not cross swords over it"). As explained above, and as the fleeting footnote does not refute, DEOA's savings clause transferred substantive authority under various education-related statutes, 20 U.S.C. §3441(a)(2), without transferring HEW's Title IX or Javits Amendment rulemaking authority.

F. The DOE guidance's procedural stature denies the guidance any deference.

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"). Regardless of whether *Auer* could apply to agency interpretations *generally,* courts should grant no such deference to

agency interpretations that violate procedural requirements for agency action: "*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.* This Court should adopt an *Encino Motorcars* caveat that *Auer* deference cannot apply to agency actions that are "procedurally defective."

1. DOE's guidance failed to take effect under §902's presidential-approval requirement.

The Board argues that DOE failed to comply with §902's presidential-approval requirement for rules, regulations, and orders to take effect under Title IX, *see* Board Br. at 10, 62-63, and that argument bears supplementing not only with §902's history but also its current state of delegation to the Department of Justice. But the Board's bottom line is correct: DOE's Title IX guidance never took effect because DOE did not comply with §902.

With regard to 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,[9] 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.[10]

As indicated, the Title VI House bill permissively authorized agencies to proceed by rule, regulation, or order, *see* note 9, *supra*, but Sen. Dirksen's substitute bill amended the bill to its current form to allay concerns about federal agencies' overreaching. *Id.* Because Sen. 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

---

[9] 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 Sen. 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.

[10] ` 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 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).

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) ("*EIA*"). 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 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.

Citing a single district-court Title IX decision and one *APA* decision (to which §902 did not even apply), *EIA* exempted a Title IX policy from §902 as a mere guideline, distinct from a rule or order. That is an administrative-law *non sequitur*: agencies can act

only by rule or by order. 5 U.S.C. §551(4), (6); *FTC v. Standard Oil Co.,* 449 U.S. 232, 238 n.7 (1980). Issuing non-rule guidelines *is an order*. 5 U.S.C. §551(6). There is no middle ground. Whether an unapproved *rule* or unapproved *order,* Title IX guidance does not take effect until the agency complies with §902.

2. General statements of policy have no claim to guidance in private suits.

Although compelling arguments suggest that DOE's new guidance triggered APA notice-and-comment requirements, *see Texas*, 2016 U.S. Dist. LEXIS 113459, at *41-47 (finding states likely to prevail on that very issue), DOE has argued that APA exceptions for interpretative rules and general statements of policy, 5 U.S.C. §553(b)(A), should apply. Even accepting *arguendo* that DOE ultimately could prevail on the APA issue does not save G.G., however, because undermining the guidance's APA status to avoid judicial review simultaneously undermines the guidance's claim to judicial deference.

An "agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy." *Pacific Gas & Elec. Co. v. F.P.C.,* 506 F.2d 33, 38-39 (D.C. Cir. 1974). Accordingly, such statements are not entitled to deference when an agency relies on them to resolve a future substantive question because, logically, the future action (not the initial statement) is the final agency action. *Id.*; *accord Texaco, Inc. v. F.P.C.,* 412 F.2d 740, 744 (3d Cir. 1969); *Amrep Corp. v. FTC,* 768 F.2d 1171, 1178 (10th Cir. 1985); *Mada-Luna v.*

Fitzpatrick, 813 F.2d 1006, 1013-14 (9th Cir. 1987). Thus, as an alternative to considering the APA notice-and-comment issue, this Court could simply find that DOE's guidance is a mere "general statement of policy" not entitled to deference. Either way, the guidance would not warrant deference, either because it came into existence in violation of APA and Title IX procedural requirements or because it would not sufficiently come into existence until such time as DOE – not G.G. – attempts to apply the guidance in a final agency action.

If the new administration voids DOE's guidance, that would pull the proverbial rug out from under G.G.'s Title IX claim, but it would not *moot* the Title IX claim. Indeed, the change – again, if it happens – simply would demonstrate why courts should not defer to general statements of policy, which an agency can withdraw at any time[11] and which the agency does not actually adopt until the agency formally applies the policy in a final agency action.

DOE's failure to comply with GEPA, *see* note 11, *supra*, provides another reason to withhold deference here. When an agency evades procedural protections by considering its handiwork "non-binding," courts

---

[11] The Board notes that DOE did not submit the guidance to Congress under the General Education Provisions Act ("GEPA"). *See* Board Br. at 10, 62 (*citing* 20 U.S.C. §1232). Although GEPA defines "regulation" broadly to include "any generally applicable rule, regulation, *guideline, interpretation,* or other requirement," 20 U.S.C. §1232(a) (emphasis added), it also limits that definition to "regulations" with "legally binding effect." *Id.* §1232(a)(2). Consistent with its view that notice-and-comment rulemaking was unnecessary, DOE presumably would argue that the guidance was non-binding and thus outside GEPA.

should not make that handiwork essentially binding by giving it controlling *Auer* deference. Because the "history of liberty has largely been the history of observance of procedural safeguards," *McNabb v. U.S.*, 318 U.S. 332, 347 (1943), deference here would deny due-process rights in the opportunity both to comment on the agency's guidance and to have one's day in court. Agencies should not have it both ways: if they want deference, they must undergo APA rulemakings.

3. DOE's guidance failed to take effect under FVRA.

Under the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§3445-3449 ("FVRA"), Congress placed a 210-day limit on how long an "acting" officer can fill an Executive-Branch office that requires Senate confirmation. 5 U.S.C. §3346(a)(1) (FVRA extends that window during the pendency of any appointee's confirmation proceedings). To enforce that limit, FVRA provides that, when an acting officer exceeds FVRA's window, "[a]n action taken by any person who is not acting under [pertinent parts of FVRA] in the performance of any function or duty of a vacant office to which [pertinent parts of FVRA] apply shall have no force or effect." *Id.* §3448(d)(1). FVRA is relevant here because it has been more than 210 days since the White House withdrew the nomination of Debo P. Adegbile to be Assistant Attorney General for Civil Rights, White House Office of the Press Secretary, Presidential Nominations and Withdrawal Sent to the

Senate (Sept. 15, 2014),[12] and the Acting Assistant Attorney General has worked with DOE on the transgender guidance in her acting capacity under Executive Order 12,250.

II. TITLE IX'S STATUTORY AND REGULATORY PROTECTIONS DO NOT EXTEND TO ACTIONS TAKEN ON THE BASIS OF TRANSGENDER STATUS.

Although DOE's new transgender guidance under Title IX provided the only substantive support for G.G.'s novel Title IX claim, this Court will need to resolve that claim without DOE's guidance, either because the guidance warrants no deference, *see* Section I, *supra*, or potentially because DOE – under a new administration – may withdraw the guidance. In whatever manner this Court considers these issues, however, the Court must dismiss G.G.'s Title IX claim.

A. To the extent that G.G. relies on the Title IX itself, the suit fails to state a claim because the Board has not "discriminated" on the basis of "sex."

Given the many bases for interpreting Title IX narrowly here and the lack of deference due to the DOE guidance on which the panel majority based its ruling, *see* Section I, *supra*, this Court must hold that Title IX prohibits only what Congress enacted: discrimination "on the basis of sex." 20 U.S.C. §1681(a).[13] But the Board does not discriminate on the

---

[12] Available at https://www.whitehouse.gov/the-press-office/2014/09/15/presidential-nominations-and-withdrawal-sent-senate (last visited Jan. 10, 2017).

[13] Even it failed to meet the regulation's safe harbor *allowing* sex-segregated bathrooms, 34 C.F.R. §106.33, the Board cannot

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 objective sex. Differential treatment based on a sex-versus-gender-identity mismatch is not what Title IX prohibits. *See* 20 U.S.C. §1681(a). Because sex is a biological characteristic, and gender identity is not, G.G. cannot prevail on a statutory claim.

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 U.S. 677, 686 (1973).[14] Even without the canons of construction favoring the Board, Section I, *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*

---

violate Title IX unless §901(a) prohibits denying access to boys' bathrooms (*i.e.*, unless "sex" *statutorily* includes gender identity).

[14] *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).

Housing & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S.Ct. 2507, 2520 (2015). As the Board notes, Board Br. at 33-34. 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.[15]

G.G.'s reliance *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny is misplaced. *See*, *e.g.*, Br. in 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 dresses or men's suits. However she dressed, she still used the women's restroom. Regulating how boys and girls dress (*e.g.*, clothing, jewelry, hair length) differs fundamentally from segregating restrooms by sex. Whatever the respective merits of dress codes versus sex-segregated restrooms, the *Hopkins* line of cases concerns only the former, not the latter. Whatever impact *Hopkins* has on employers' ability to require masculinity in men or femininity in women, male employees remain male, and female employees remain female. The *Hopkins* line of sex-stereotype cases says nothing about which bathroom we use.

---

[15] Although *Davis*, 526 U.S. at 650, 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."

B. To the extent that G.G. relies on the Title IX regulations, the suit is barred by the regulations.

To the extent that G.G.'s Title IX claim seeks to enforce the implementing regulations, rather than the statute, G.G. has two independently insurmountable problems: (1) the regulations do not *prohibit* anything *vis-à-vis* sex-segregated bathrooms, and (2) the regulations require DOE's pre-litigation notice, which is absent here.

First, the regulations merely *allow* sex-segregated bathrooms: "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 the other sex." 45 C.F.R. §86.33; 34 C.F.R. §106.33 (emphasis added). Even accepting *arguendo* that this is not exactly what the Board has done, that would only mean that the Board missed a regulatory safe harbor. That is not the same thing as violating the statute. So, if G.G. wanted to pursue the regulations separately from the statute, the statute nonetheless would remain the only viable path.

Second, the Title IX regulations incorporate the Title VI procedural regulations, 45 C.F.R. §86.71; 34 C.F.R. §106.71, which authorize securing compliance either by terminating federal funds "or by any other means authorized by law," 45 C.F.R. §80.8(a); 34 C.F.R. §100.8(a), but prohibit taking the other-means route until three conditions precedent are met:

> *No action to effect compliance* by any other means authorized by law *shall be taken until* (1) the responsible Department official has

> determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person.

45 C.F.R. §80.8(d) (emphasis added); 34 C.F.R. §100.8(d) (same). None of that happened here, and recipient schools never agreed to anyone's enforcing the regulations apart from the statute. Indeed, the regulations to which recipients did agree prohibit any litigation based on the regulations until the conditions precedent have been met.

Under *Sandoval*, 532 U.S. at 284, there is no private right of action to enforce the regulations unless the challenged conduct violates the statute, which "is emphasized where the promisee is a governmental entity." *Astra USA, Inc. v. Santa Clara County, Cal.,* 131 S.Ct. 1342, 1348 (2011) (*quoting* 9 J. Murray, Corbin on Contracts §45.6, p. 92 (rev. ed. 2007)). Here, because "[t]he legitimacy of Congress' power to legislate under the Spending Clause 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), regulation-based Title IX litigation is *illegitimate*. Indeed, this Court recently clarified that the 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,* 131 S.Ct. at 1661 (emphasis added).

When a regulation under Spending Clause legislation defines recipients' obligations, the *entire* regulation constitutes the bargain that third-party beneficiaries would enforce. *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (courts must "interpret the statute [and its implementing regulation] as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into [a] harmonious whole") (interior citations omitted). Accepting the regulations as implementing the statute would nonetheless limit any regulation-based Title IX claims.

Under "traditional principles of contract interpretation," third-party beneficiaries such as G.G. cannot cherry-pick the specific regulatory provisions that they wish to enforce because they "generally have no greater rights in a contract than does the promise[e]." *United Steelworkers of America v. Rawson,* 495 U.S. 362, 375 (1990) (citations omitted). Here, no federal agency can enforce its regulations in court without meeting the regulatory prerequisites to court enforcement. *What agencies cannot do directly, plaintiffs cannot do as third-party-beneficiaries.*

Under Title VII, pre-litigation notice is a procedural prerequisite to suing. *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 398 (1982). Under the environmental statutes' notice requirements for citizen suits, the "purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance … and thus ... render [private enforcement] unnecessary." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.,* 528 U.S. 167, 174-75 (2000) (interior quotations omitted). "Accordingly,

… citizens lack statutory standing … to sue for violations that have ceased by the time the complaint is filed." *Id.* at 175. Regardless of "whether the notice provision is jurisdictional or procedural," regulation-based claims are "barred" and "must be dismissed," *Hallstrom v. Tillamook County,* 493 U.S. 20, 32-33 (1989), if filed before the agency meets the conditions precedent to litigation.

C. 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. has claimed that the Board waived clear-notice issues, Br. in 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 satisfy Title IX, notwithstanding G.G.'s novel claims, and the Board can defend itself with any argument that supports that claim.

CONCLUSION

The Title IX claims should be dismissed.

January 10, 2017

Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for *Amicus Curiae*