No. 15-2056

In the United States Court of Appeals for the Fourth Circuit

G. G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM,
Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,
Defendant-Appellee.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NEWPORT NEWS, NO. 4:15-CV-0054, HON. ROBERT C. DOUMAR

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-2056 Caption: G.G. v. Gloucester County School Board

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I certify that on 5/10/2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund, a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[1] Since its founding in 1981, Eagle Forum has defended federalism and supported autonomy in areas of predominantly local concern. Eagle Forum has a longstanding interest in applying Title IX consistent with its anti-discrimination intent, without intruding any further into schools' educational missions. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

A high school student ("G.G.") diagnosed with gender dysphoria has begun the process of living 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 ("School Board") under Title IX's statutory prohibition against sex-based discrimination, 20 U.S.C. §1681(a), for denying access to the boys' restrooms at the school. Although the implementing regulations merely *allow* sex-segregated bathrooms (without *requiring* anything), 34 C.F.R. §106.33 ("recipient may provide separate toilet, locker room, and shower

[1] Consistent with FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

facilities on the basis of sex") (DOE); *accord* 7 C.F.R. §15a.33 (Department of Agriculture ("USDA")), and DOE lacks authority to expand Title IX's sex-based protections to include gender-identity issues, a fractured panel ruled for G.G. by giving DOE's sub-regulatory guidance "controlling weight" under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *See* Slip Op. at 26. The School Board petitions this Court for rehearing *en banc* to resolve the important issues presented here.

SUMMARY OF ARGUMENT

In addition to the constitutional privacy concerns cited by the School Board, this case presents important federalism and separation-of-powers issues where federal bureaucrats seek to intrude into state and local police powers by amending Title IX's statutory prohibition of sex-based discrimination to include gender-identity issues, without complying with Title IX's requirements for taking regulatory action, much less Article I's requirements for amending statutes. *See* Section I. In addition, for five independently fatal reasons, this Court should reject the claim that DOE guidance on transgender restroom policies warrants *any* deference.

First, under Spending Clause legislation, recipients are entitled to clear notice of the requirements that the federal government has attached to the federal funds that the recipients accept. No such notice on transgender restroom rights has ever been issued and taken effect in the manner authorized by Title IX, and this Court should therefore hold that no such rights exist under Title IX. *See* Section II.A.

Second, Title IX inserts federal authority into education, a field historically occupied by state and local government; in interpreting the statutory prohibition of sex-based discrimination, this Court should use the presumption against preemption to interpret the word "sex" narrowly to mean the objective biological characteristic, not broadly to include subjective gender-identity issues. *See* Section II.B.

Third, Title IX does not delegate unique interpretative authority to DOE any more than it delegates authority to other federal funding agencies. Because no single agency has unique Title IX authority, this Court should reject the claim that Congress intended DOE to have such authority. *See* Section II.C.

Fourth, *Auer* deference applies only when the regulatory language or test is "a creature of [an agency's] own regulations." *Auer*, 519 U.S. at 461. By contrast, *Auer* deference does not apply when the regulation "merely … paraphrase[s] the statutory language," *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), as DOE does here with the statutory term "sex." *See* Section II.D.

Fifth, working under the presumptions of Sections II.A-II.B and without deference pursuant to Sections II.C-II.D, DOE's interpretation of Title IX is plainly erroneous and inconsistent with Title IX's legislative history and the then-unanimous judicial understanding that "sex" did not include gender-identity issues when Congress enacted Title IX in 1972 and amended it in 1988. *See* Section II.E.

ARGUMENT

I. THE PETITION RAISES IMPORTANT ISSUES THAT THE PANEL DECISION IMPROPERLY IGNORED.

In focusing only on DOE's interpretation of the regulation with respect to G.G.'s use of bathrooms under *Auer*, Slip. Op. 26, the panel not only fails to resolve the merits but also ignores the broader implications raised here. The *en banc* court should squarely address the important issues raises by this appeal and DOE's action.

At the outset, the School Board does not discriminate on the basis of sex because its actions apply equally to biological females seeking to use the boys' restroom and to biological males seeking to use the girls' restroom. The discrimination, if any, is against individuals whose subjective gender identity differs from their biological sex. Differential treatment based on that sex-versus-gender-identity mismatch is not what Title IX prohibits. *See* 20 U.S.C. §1681(a).

Further, because the regulation merely *allows* segregating bathrooms by sex, the School Board cannot *violate* the regulation. 34 C.F.R. §106.33. Holding the safe harbor inapplicable does not equate to violating Title IX. Instead, for G.G. to state a Title IX claim, 20 U.S.C. §1681(a) must prohibit denying G.G. access to the boys' bathroom. To prohibit that statutorily, Title IX's use of "sex" would need to include gender identity. As used in Title IX, however, "sex" refers to immutable biological characteristics, not subjective gender identity. In addition to the privacy and policy issues that the School Board raises, the panel's contrary holding raises important

issues of federalism and separation of powers by allowing federal bureaucrats to purport to amend Title IX – and thereby to intrude into areas of traditional state and local concern – without complying with Title IX's or Article I's procedures for issuing regulations or enacting laws, respectively.

As enacted in 1972 and amended in 1988, "sex" in Title IX is binary. *See* 20 U.S.C. §1681(a)(2)(A)-(B) (distinguishing between "one sex" and "both sexes"). Moreover, the Supreme 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); *Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001) (same); *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). Even without the Spending Clause's clear-notice requirement and the presumption against preemption for federal enactments in predominantly state and local fields, Sections II.A-II.B, *infra*, the sex-versus-gender issue was settled by unanimous appellate decisions: "If a word or phrase has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015) (interior quotation and ellipses omitted). Sex means sex; it does not mean gender.

Congress enacted Title IX in 1972 and modeled it on Title VI of the Civil Rights Act of 1964, except that Title IX prohibits sex-based discrimination in federally funded education. 20 U.S.C. §1681(a). Like Title VI, Title IX authorizes funding agencies to issue rules, regulations, and orders of general applicability to effectuate the statutory prohibition against intentional discrimination. 20 U.S.C. §1682. Congress intended §902 to mirror §602, *compare* 20 U.S.C. §1682 *with* 42 U.S.C. §2000d-1, so §602's legislative history controls.[2]

That history makes clear that agencies must act via rules, regulations, and orders,[3] 42 U.S.C. §2000d-1, which do not take effect unless and until signed by the

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[2] *See* 118 CONG. REC. 5803 (Title IX has same procedural protections as Title VI) (Sen. Bayh). *id.* 5808 ("These provisions [including §902] parallel Title VI of the 1964 Civil Rights Act") (Sen. Bayh); *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 170 (1975) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI") (prepared statement of Sen. Bayh). *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) ("Bayh's remarks … are an authoritative guide to the statute's construction").

[3] 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); *see Bd. of Pub. Instr. of Taylor County v. Finch,* 414 F.2d 1068, 1075-77 & n.13 (5th Cir. 1969) (§602's procedural provisions are mandatory). "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." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted).

President in the *Federal Register*.[4] 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.[5] Allowing agencies to make rules outside the statutory procedures would violate Article I. U.S. CONST. art. I, §1.

II. THE PANEL ERRED IN ASSIGNING *AUER* DEFERENCE TO FEDERAL AGENCIES' INTERPRETATIONS OF "SEX" UNDER TITLE IX.

DOE's interpretation does not warrant *any* deference, *Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843-44 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), much less *Auer* deference.

A. Spending Clause legislation requires clear notice to recipients before obligations are imposed, and the federal government has not provided that notice.

Courts analogize Spending Clause programs like Title IX to contracts struck between the government and recipients, with the affected public as third-party

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[4] In 1980, the President delegated rule-approval and enforcement authority to the Attorney General, 45 Fed. Reg. 72,995 (1980) (Executive Order 12,250), who delegated enforcement authority to the Assistant Attorney General for Civil Rights. 46 Fed. Reg. 29,704 (1981).

[5] ` 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).

beneficiaries. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). To regulate recipients based on their accepting federal funds, however, Congress must express Spending Clause 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 School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981). The Supreme 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 the new rights for transgender students in Title IX claimed here.

Significantly, DOE did not actually amend its Title IX regulations under the procedures that Title IX itself requires for generally applicable agency action to take effect. 20 U.S.C. §1682; *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"). In *Sch. Dist. v. H.E.W.*, 431 F.Supp. 147, 151 (E.D. Mich. 1977), DOE's predecessor "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, would go to "defin[ing] what constitutes discriminatory practices." *Id.* Significantly, as indicated, the House bill for Title VI permissively authorized agencies to proceed by rule, regulation, or order, *see* note 3, *supra*, but Senator Dirksen's substitute bill amended the statute to its current form to address concerns about federal agencies' overreaching. *Id.* Because Senator Dirksen needed these concessions 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 §1682, the federal agency's action required approval in the *Federal Register* before taking effect and applying generally. Without the required procedures, the School Board lacked clear notice under the Spending Clause.[6]

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[6] Because an agency 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), DOE's actions qualify as "rules, regulations, or orders of general applicability" if they apply generally. There is no middle ground: issuing non-rule guidance *is an order*. 5 U.S.C. §551(6). Whether an unapproved *rule* or unapproved *order*, DOE's action never took effect.

B. 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 the panel'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).[7] This

[7] Alternate strands of federalism-related authorities 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*, 546

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). When statutes are amendable to a no-preemption reading, courts should adopt that interpretation. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). Thus, if "sex" could mean only sex, without gender identity, this Court should accept that.

While *amicus* Eagle Forum respectfully submits that it would be fanciful to imagine 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. Significantly, the presumption against preemption applies equally to federal agencies and federal courts[8] because it 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 judicial analysis resolves the issue,

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U.S. at 275 (same). For simplicity, *amicus* Eagle Forum refers to these federalism-based canons as the presumption against preemption.

[8] *Nat'l Ass'n of State Utility Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1252-53 (11th Cir. 2006) ("[a]lthough the presumption against preemption cannot trump our review … under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate"); *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 247-51 (3d Cir. 2008); *Massachusetts Ass'n of Health Maint. Organizations v. Ruthardt*, 194 F.3d 176, 182-83 (1st Cir. 1999); *see also 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); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting).

deference has no role: "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). Much like the Supreme Court's refusing to presume that Congress cavalierly overrides state sovereigns, this Court must reject the suggestion that federal agencies can override states by asking courts for deference.

C. Courts generally should not defer to federal agencies' interpretations of Title IX because multiple agencies hold the same authority.

First off, Title IX did not delegate interpretive authority to any 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 [20 U.S.C. §1681] 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). Instead, Title IX delegates the same authority to multiple agencies. Senator Bayh's failed 1971 amendment explicitly delegated rulemaking authority only to DOE's predecessor, 117 CONG. REC. 30,399, 30,404 (1971); *accord id.* 30,407 (Sen. Bayh), whereas his 1972 amendment (which, with the House bill, became Title IX) delegates regulatory authority to *all* federal agencies. 118 Cong. Reg. 5803 (1972); 20 U.S.C. §1682. Once again, "[f]ew

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.]" *Cardoza-Fonseca*, 480 U.S. at 442-43 (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 federal funds from DOE, the School Board also receives funds from other federal agencies, such as USDA under the National School Lunch Act. *See* 42 U.S.C. §1752. With more than one agency equally involved, *Chevron* deference does not apply. *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998); *U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001); *Bowen v. Am. Hospital 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 using its co-equal regulatory status to issue guidance directly contrary to DOE's guidance.[9]

[9] DOE's predecessor could claim only one narrow delegation (intercollegiate athletics) under PUB. L. NO. 93-380, §844, 88 Stat. 484, 612 (1974) (requiring *proposed* rules that "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports"), which courts

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

Unless an agency interpretation is "plainly erroneous or inconsistent with the regulation," *Auer* deference gives interpretations "controlling weight" where the regulatory language or "test is a creature of the [agency's] own regulations." *Auer*, 519 U.S. at 461 (interior quotations omitted). But that deference does not protect rules that merely repeat or paraphrase the statute:

> 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.* As a result, the agency's "effort to decide it now cannot be considered an interpretation of the regulation." *Id.* DOE's effort to inflate new meaning into the statutory and regulatory word "sex" falls even further short than in *Gonzales*.

E. The federal agencies' interpretations are inconsistent with Title IX and the implementing regulations.

This case hinges on whether discrimination on the basis of "sex" includes discrimination on the basis of "gender identity." As explained in Section I, *supra*, "sex" in Title IX refers to the immutable and objective biological fact of a person's

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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.

sex, not to that person's subjective gender identity. As such, DOE's interpretation is "plainly erroneous [and] inconsistent with the regulation" and ineligible for *Auer* deference. 519 U.S. at 461 (internal quotations omitted). Significantly, this Court reviews a regulation's ambiguity *de novo*. *Humanoids Grp. v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2004). In light of the presumption against preemption and the clear-notice rule, as well as the unanimous position of the federal courts when Congress enacted and amended Title IX, *see* Sections I, II.A-II.B, *supra*, neither Title IX nor the implementing regulations are ambiguous on "sex" versus "gender identity."

The words "sex" and "gender" mean different things now, and they meant different things in 1972 when Congress enacted Title IX.[10] Because G.G. does not challenge Title IX's implementing regulations, Appellant's Br. 31, and those regulations allow sex-segregated restrooms, 34 C.F.R. §106.33, G.G. cannot prevail unless the statutory term "sex" includes "gender identity." Because "sex" is a biological characteristic, and "gender" is not, G.G. cannot prevail under Title IX.

CONCLUSION

The petition for rehearing *en banc* should be granted.

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[10] Although a secondary definition of the word "gender" is "sex," the same is not true in reverse. *See* BLACK'S LAW DICTIONARY 1541 (4th ed. 1968) ("The sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female."); BLACK'S LAW DICTIONARY 1233 (5th ed. 1979) (same).

Dated: May 10, 2016

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains fifteen (15) pages, excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

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Dated: May 10, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2016, after electronically filing the accompanying motion for leave to file, I electronically lodged the foregoing brief with the Clerk of the Court for transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users. I further certify that, on the same day, I served the following counsel not registered as CM/ECF users with a copy of the foregoing motion and brief via Priority U.S. Mail, postage prepaid:

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