IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Defendants; EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., Movant.	)	Civil Action No. 7:16-cv-00054-O

EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Local Rule 7, Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") respectfully requests this Court's leave to file the accompanying *amicus curiae* brief in support of the motion for a preliminary injunction filed by plaintiffs Texas *et al.* (collectively, the "States"). As set forth in the accompanying certificate of conference, the States consent to this motion, but the federal defendants take no position on the motion, other than to request that Eagle Forum ELDF file its proposed *amicus* filing with the motion and file the motion by July 17, 2016.

In support of this motion for leave to file an *amicus curiae* brief, pursuant to Local Rule 7.1(h), Eagle Forum ELDF attaches the accompanying brief in support of this motion, Consistent with appellate practice and the federal defendants' request, Eagle Forum ELDF also attaches the accompanying *amicus* brief itself.

WHEREFORE, for the reasons set forth in the accompanying brief in support of this motion, Eagle Forum ELDF respectfully requests this Court's leave to file the accompanying *amicus* brief in support of the States' motion for a preliminary injunction. A proposed order is

attached to this motion and also will be emailed to chambers in word-processing format.

Dated: July 13, 2016

Respectfully submitted,

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BRIEF IN SUPPORT OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

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CORPORATE DISCLOSURE STATEMENT

I, the undersigned counsel of record for movant Eagle Forum Education & Legal Defense Fund, certify that, to the best of my knowledge and belief, movant is a nonprofit corporation with no parent companies, subsidiaries, or affiliates that have outstanding securities in the hands of the public.

Dated: July 13, 2016

Respectfully submitted,

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INTRODUCTION

Various state and local entities (collectively, the "States") challenge policy statements issued by various federal agencies (collectively, the "Administration") purporting to establish the right of transgender persons to use sex-segregated restrooms and locker rooms consistent with their subjective gender identity, but contrary to their objective biological sex. Pursuant to Local Rule 7, Eagle Forum Education & Legal Defense Fund ("Movant" or "*Amicus*" as the context requires) respectfully requests this Court's leave to file the accompanying *amicus curiae* brief in support of the States' motion for a preliminary injunction. The States consent to this motion, but the federal defendants (collectively, the "Administration") take no position on the motion, other than to request that Movant file its proposed *amicus* filing with the motion for leave to file and file the motion by July 17, 2016.

ARGUMENT

Appellate motions for leave to file *amicus* briefs under Rule 29(b) must explain the movant's interest and "the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case." FED. R. APP. P. 29(b). The Advisory Committee Note to the 1998 amendments to Rule 29 explain that "[t]he amended rule [Rule 29(b)] … requires that the motion state the relevance of the matters asserted to the disposition of the case." The Advisory Committee Note then quotes Sup. Ct. R. 37.1 to emphasize the value of *amicus* briefs that bring a court's attention to relevant matter not raised by the parties:

> An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.

Id. (*quoting* Sup. Ct. R. 37.1). By analogy to these appellate principles, Movants set forth below their identity and interests in this litigation and the value that their *amicus* brief would add.

1. Eagle Forum Education & Legal Defense Fund is a nonprofit organization founded

in 1981 and headquartered in St. Louis, Missouri. Since its founding, Movant has consistently defended federalism and supported autonomy in areas (like education) of predominantly local concern. In connection with Title IX specifically and federalism generally, Movant has sought to protect the ability of States (and local governments) to set their own course, free from federal control of areas that the Constitution reserves to the People and the States.

2. With respect to the deference due to the challenged policies on transgender access to sex-segregated bathrooms, the proffered *amicus* brief discusses the contours of "*Chevron*" and "*Skidmore*" deference as applied to the agency actions challenged here, *compare Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843-44 (1984) *with Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944), and the deference – or lack of deference – that courts owe to agency actions that violate the notice-and-comment requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. §553(b). *See Amicus* Br. at 3-5.

3. Specifically with respect to this Court's deference to administrative interpretations of Title IX and its implementing regulations, the *amicus* brief emphasizes that statutes such as Title IX that delegate the same authority to multiple agencies (here, every agency that issues federal funds) are not eligible for deference under *Chevron* and instead warrant deference only when the actions are "consistent with achievement of the objectives of the statute authorizing the financial assistance," as indicated in 20 U.S.C. §1682. *See Amicus* Br. 4-5.

4. The *amicus* brief emphasizes the "clear-notice" requirement for burdens imposed on recipients in Spending Clause legislation like Title IX, which precludes deferring to federal agency actions that fail to provide such notice, either substantively or through the specific procedures required by 20 U.S.C. §1682 and the APA. *See Amicus* Br. 6-7.

5. The *amicus* brief also argues that federal intrusions into spheres such as education

that are historically the ambit of state and local governments must be evaluated under a presumption against displacing that state and local power without the clear and manifest assent of Congress; applying that presumption here would require this Court to interpret the key statutory term "sex" to mean the objective biological criterion, not subjective gender identity, thereby obviating deference to federal agency constructions. *See Amicus* Br. 7-9.

6. With regard to deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the *amicus* brief argues that this type of deference applies only when the regulatory language or test is "a creature of [an agency's] own regulations." *Id.* 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 the Administration does with the statutory term "sex." *See Amicus* Br. 9-10.

7. On the substance of the recent administrative interpretations, the *amicus* brief argues that, on top of the clear-notice rule and the presumption against preemption and deference issues, the Administration's interpretation here is inconsistent with the statute and thus warrants no deference. *See Amicus* Br. 10-13. In addition, *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015), requires this Court to defer to the uniform judicial construction of the statutory term "sex" not today but at the time that Congress enacted Title IX in 1972 and amended it in 1988. *See Amicus* Br. 12-13. The brief also rebuts several arguments that the Administration has made in support of reading gender-identity status into Title IX in extra-circuit proceedings. *Id.* at 13-15.

8. Even assuming *arguendo* that the Administration's new policies were consistent with the governing statutes, the *amicus* brief demonstrates that the States could reject this new requirement – while maintaining their prior funding – under the undue-influence doctrine of *Nat'l*

Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2602 (2012), for Spending-Clause programs. *See Amicus* Br. 15-16.

9. Although the States do not press constitutional equal-protection principles in their motion for a preliminary injunction, the *amicus* brief demonstrates that transgender people do not have a constitutional right to use the bathrooms or locker rooms of the opposite biological sex, see *Amicus* Br. 16-18, which arguably is relevant to the States' standing. If the Constitution indeed already required what the Administration's new policies purport to require, a court order against the Administration's new policies would not redress the States' injuries (*i.e.*, the States would need to comply with the Constitution, even if this Court enjoined enforcement of the new policies).

10. With respect to the United States' sovereign immunity and the availability of judicial review, the *amicus* brief argues that the States' alternate remedies (namely, defending against the Administration's policies either in a fund-termination proceeding or a private enforcement action) do not displace otherwise-available judicial review under the APA's "adequate remedy bar," 5 U.S.C. §704, because Title IX makes agency action reviewable *by statute*, 20 U.S.C. §1683, and the adequate-remedy bar does not apply to statutorily available review. *Amicus* Br. at 18-21. Even assuming *arguendo* that the bar did apply, however, the brief demonstrates that the *alternate* remedies would not be *adequate* remedies, thus allowing review here. *Id.* at 21-24. Finally, again assuming *arguendo* that the bar applied, the States nonetheless could proceed against the federal officer defendants under *Ex parte Young*, 209 U.S. 123, 160 (1908), and its progeny because the officers lack sovereign immunity for their *ultra vires* actions. *Id.* at 24-25.

11. Consistent with FED. R. APP. P. 29(c)(5), counsel for Movants authored the accompanying brief in whole; no counsel for a party authored the brief in any respect; and no

person or entity – other than Movants and their counsel – contributed monetarily to its preparation or submission.

12. Consistent with FED. R. APP. P. 29(e), Movants have sought this Court's leave within the seven-day period provided for appellate *amicus* briefs and well before the July 17, 2016, deadline within which the Administration requested that Movants act.

13. Movants respectfully submit that these issues addressed by their proffered brief will aid the Court in resolving the issues presented by this litigation and will not prejudice the parties.

CONCLUSION

For the foregoing reasons, the motion for leave to file should be granted.

Dated: July 13, 2016

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Movants' counsel conferred via e-mail on July 12-13, 2016, with Austin Nimocks of the Texas Office of the Attorney General and Megan Crowley of the U.S. Department of Justice, copying the United States Attorney for the Northern District of Texas, John Parker, and the Chief of the Civil Division for the Northern District of Texas, Steve P. Fahey, on the email. Mr. Nimocks indicated that the plaintiffs consent to the motion for leave to file, and Ms. Crowley indicated that the defendants take no position on the motion, except that defendants ask that the proffered amicus brief be attached to the motion for leave to file and that the motion be filed by July 17: "[Defendants] take no position on your request but if you want to file a brief, we believe that you should attach it to your amici request. Moreover, we would object if you file the brief later than the 17th (so that we could address it in our brief on the 27th, if necessary and if the court grants permission)."

Karen B. Tripp, Texas Bar #03420850

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July 2016, I electronically filed the foregoing motion and its accompanying brief – as well as the proffered *amicus* brief – with the Clerk of the Court using the CM/ECF system, which I understand to have caused service of the counsel for the plaintiffs. In addition, because counsel for the federal defendants have not yet filed an appearance, I also served one copy of the foregoing documents on the following designee of the U.S. Attorney for the Northern District of Texas via U.S. Priority Mail:

Marti Cherry
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1100 Commerce Street
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Karen B. Tripp, Texas Bar #03420850

IN THE UNITED STATES DISTRICT COURT
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[PROPOSED] ORDER

On considering motion for leave to file an *amicus curiae brief* in support of the plaintiffs' motion for a preliminary injunction, the brief filed with that motion, the positions of the parties, and the entire record herein, the Court finds that the motion is well taken. For the foregoing reasons, it is hereby

ORDERED pursuant to the motion for leave to file is GRANTED; and it is

FURTHER ORDERED that the Clerk shall docket the proffered brief and appendix of exhibits and shall revise the movants' designation in this case to "*amicus curiae*."

Dated: _____, 2016

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Defendants; EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., *Amicus Curiae*.	)	Civil Action No. 7:16-cv-00054-O

<u>*AMICUS CURIAE* BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION</u>

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund submits this brief with the accompanying motion for leave to file. As set forth in more detail in the motion, those interests include federalism and preserving sovereignty and autonomy in areas of predominant state and local concern, as well as application of federal law consistent with congressional intent, without administrative expansion via non-legislative means that violate separation-of-powers principles. For these reasons, *Amicus* hasdirect and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Various state and local entities (collectively, the "States") challenge policy statements issued by various federal agencies (collectively, the "Administration") purporting to establish the right of transgender persons to use sex-segregated restrooms and locker rooms consistent with their subjective gender identity, but contrary to their objective biological sex.[1] As the States have plead it, this litigation concerns more *who decides* transgender policies (*e.g.*, States, school boards, Congress, or federal agencies) and *how they decide* (*e.g.*, by statute, notice-and-comment rulemaking, or sub-regulatory policy statements), than it concerns *what they decide* as a question of wise policy. *Compare* 5 U.S.C. §706(B)-(C) (agency authority) *and* §706(D) (procedure) *with* §706(A) (arbitrary and capricious policy). Nonetheless, the ill-considered nature of DOE policy is central to this litigation because it goes to the egregiousness of the violations of the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), for withholding notice-and-comment rulemaking that might have surfaced a wiser policy for intended beneficiaries, to say nothing of the formation of that policy by government actors with the actual authority over these important issues.

[1] As relevant here, the States challenge Department of Education ("DOE") policies under Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-1688, as amended to reach beyond specifically funded programs and activities. PUB. L. NO. 100-259, 102 Stat. 28 (1988).

The institutions and individuals affiliated with *Amicus* do not have uniform views on these issues, primarily because many had not considered – *or needed to consider* – these issues until the Administration's sudden action. *Amicus* and its affiliates are uniform, however, in viewing our democracy to allow the opportunity to study such issues and advocate policy solutions – preferably to school boards or state legislatures, but also to Congress – *before* government acts. While *Amicus* rejects DOE as having authority to decide this issue, DOE's action would require notice-and-comment rulemaking if DOE had authority. *See* Pls.' Br. 12-16. That process would have allowed the governed to inform themselves and, in turn, to inform DOE of alternate solutions. For example, the persistence of gender dysphoria – the mismatch between gender identity and sex – 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 another way, up to 88% of females and more than 98% of males with gender dysphoria might resolve to their biological sex. By intervening, DOE may retard these resolutions, thereby exposing children to unnecessary "treatment" with dangerous hormonal and other therapies. Unfortunately, DOE's "progressive" impulse has led DOE to press its civil-rights views blindly, even over the physical and mental well-being of the intended beneficiaries. While they likely are not before the Court, these merits issues inform the absurdity of mere federal bureaucrats' seeking to impose their views on the nation without public input.

By way of 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 issue rules, regulations, and orders of general applicability to effectuate the

statutory prohibition against intentional discrimination. 20 U.S.C. §1682. According to the Senate sponsor, that authority "permit[s] differential treatment by sex" such as the need for privacy in locker rooms and classes for pregnant women. 118 CONG. REC. 5807 (1972).

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 the HEW regulations, with DOE substituted for HEW in the relevant places. 45 Fed. Reg. 30,802 (1980). The rest of HEW became the federal Department of Health & Human Services ("HHS"). Both agencies retain their own regulations for the recipients of their funding, as do all federal funding agencies, such as the U.S. Department of Agriculture ("USDA"). *See, e.g.*, 7 C.F.R. pt. 15a. These regulations 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).

Amicus adopts the States' factual statement. Pls.' Br. at 2-11 (docket #11). In sum, DOE adopted – without notice-and-comment rulemaking – a policy threatening to terminate federal funding to schools that fail to treat biological males as females (and biological females as males), based only on an individual's subjective gender identity, not his or her objective biological sex.

ARGUMENT

I. THIS COURT SHOULD DEFER TO CONGRESS – NOT TO FEDERAL AGENCIES – FOR THE LEGAL STANDARDS HERE.

In interpreting the Title IX regulations, the Administration presumably will claim that this Court owes "controlling deference" to federal agencies' interpretations of their own regulations under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), as well as other forms of deference for the statutes and regulations at issue here. While federal courts owe no deference whatsoever to federal

agencies' interpretations of the Equal Protection Clause, *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (the "power to interpret the Constitution … remains in the Judiciary"), courts sometimes defer to agency constructions of both statutes and regulations. *Compare Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843-44 (1984) *with Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *cf. Auer*, 519 U.S. at 461. In particular, when a legal "test is a creature of [an agency's] own regulations, [the agency's] interpretation of it is … controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotations omitted). Here, the federal agencies' views are not entitled to any judicial deference for several reasons.

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

At the outset, Congress did not delegate authority to any single agency for Title IX:

> *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. 30,404 (1971); *accord id.* 30,407 (Sen. Bayh), whereas his 1972 amendment (which, with the House bill, became Title IX) delegates regulatory authority equally to *all* federal agencies. 118 CONG. REG. 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.

While they may well receive federal funds from DOE, the States also receive 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 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); *cf.* Pls.' Br. 5 n.4 (no deference to procedurally infirm rules). As to *Auer* and the lesser *Skidmore* standards, deference is inappropriate for the reasons below.[2]

B. Courts should not defer to federal agencies' interpretations of Title IX on the specific issues of transgender rights and sex-segregated bathrooms.

In addition to denying deference to federal agencies under multi-agency delegations like Title IX, this Court also should decline to extend any deference to the federal agencies' substantive claims that Title IX's statutory prohibition against discrimination based on "sex" somehow also includes discrimination based on "gender identity." 20 U.S.C. §1681(a). As explained below, in addition to being "plainly erroneous [and] inconsistent with the regulation," *Auer*, 519 U.S. at 461 (internal quotations omitted), the agencies' interpretation violates the clear-notice requirement for Spending-Clause legislation and the presumption against preemption.

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[2] HEW 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 have held to justify deference to HEW's original regulations. *See Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993). This case involves neither colleges nor athletics.

1. 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 public as third-party 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 Sch. & Hosp. 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*, 563 U.S. 277, 290 (2011) (emphasis added). This clear-notice rule requires this Court to reject the Administration's novel –and procedurally dubious – invention of the transgender rights claimed here under Title IX.

DOE's concern for transgender students under Title IX is of relatively recent vintage and did not involve actually amending the Title IX regulations, including the procedures that Title IX itself requires for generally applicable agency action to take effect: "No such rule, regulation, or order shall become effective unless and until approved by the President." 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 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 by no means merely procedural and instead – as relevant here – would go to "defin[ing] what constitutes discriminatory practices." *Id.* As such, the States were entitled to notice of the new gender-identity requirements before those requirements took effect.

2. The presumption against preemption counsels against this Court's accepting the federal agencies' expansive interpretation of "sex."

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"). The police power that state and local government exercises in these fields compel this Court to reject the expansive interpretation of Title IX pressed by the Administration.

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).[3] 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 – and reject the suggestion that – Congress intended to

[3] 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 v. Oregon*, 546 U.S. 243, 275 (2006) (same). For simplicity, *Amicus* refers to these federalism-based canons as the presumption against preemption.

prohibit discrimination based on gender identity along with the clear and manifest congressional intent to prohibit discrimination based on sex.

Unlike the statutes at issue in the decisions on which the Administration has relied, Title IX is subject to the presumption against preemption. Unlike with those other statutes, therefore, one must interpret Title IX to avoid preemption. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). While *Amicus* respectfully submits that it would be fanciful to argue that Congress in 1972 intended "sex" to include "gender identity," that is what the Administration must establish as clear and manifest in order for Title IX to regulate gender identity. Although the States have not conceded that the Administration's gender-identity interpretation is viable, that is not the test. The burden is on the Administration to show that the States' sex-only interpretation *is not* viable.

Significantly, the presumption against preemption applies to federal agencies as well as federal courts, at least when the agencies ask a court to defer to an administrative interpretation. 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). Much like the Supreme Court's refusing to presume that Congress cavalierly overrides co-equal state sovereigns, this Court must reject the suggestion that federal agencies can override them by asking for deference. To 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, *Watters* arose under banking law that is more preemptive than federal law generally. *Id.* at 12 (majority). Although the Fifth Circuit does not appear to have addressed the issue, other circuits have adopted approaches against finding preemption in these circumstances.[4] Federal agencies – which draw their delegated power from Congress – cannot have a freer hand than Congress itself.

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

As indicated, *Auer* deference applies only when regulatory language is "a creature of [an agency's] own regulations." 519 U.S. at 461. In that situation, unless an agency interpretation is "plainly erroneous or inconsistent with the regulation," *Auer* deference gives interpretations "controlling weight." *Id.* Here, the relevant language – namely, the statutory and regulatory word "sex" – is not a regulatory creature, and the Administration's interpretation is plainly erroneous and inconsistent with Title IX and the implementing regulations. The latter is discussed in Section I.B.4, *infra*; the former is discussed in this Section.

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[4] *See 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 Maintenance 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).

Auer deference does not apply when the regulation "merely … paraphrase[s] the statutory language," *Gonzales*, 546 U.S. at 257, as DOE does here with the term "sex." Rules that merely repeat or paraphrase the statute are not "creature[s] of the [agency's] own regulations" under *Auer*:

> 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.* Thus, the agency's "effort to decide it now cannot be considered an interpretation of the regulation." *Id.* DOE's reinterpretation of the word "sex" falls even further short than in *Gonzales*.

4. The federal agencies' interpretations are inconsistent with Title IX and the implementing regulations because "gender identity" is not the same as "sex."

The resolution of this case hinges on whether discrimination on the basis of "sex" includes discrimination on the basis of "gender identity." As explained in Section II.A.1, *infra*, "sex" in Title IX refers to the immutable and objective biological fact of a person's sex, not to that person's subjective gender identity. As such, the federal agencies' interpretations are "plainly erroneous [and] inconsistent with the regulation" and ineligible for deference under *Auer*, 519 U.S. at 461 (internal quotations omitted). But this latter-day attempt to redefine Title IX's key term more than forty years after enactment also counsels against deference because, although consistency of interpretation can increase deference, *Skidmore*, 323 U.S. at 140, inconsistency can decrease or nullify it. *Id.; Morton v. Ruiz*, 415 U.S. 199, 237 (1974). Here, the federal agencies' interpretations are inconsistent with the history of Title IX and its implementation across seven presidencies.

Significantly, this Court decides *de novo* whether a regulation is ambiguous: *i.e.*, courts do not defer to the parties' views on ambiguity). *Austin v. Decker Coal Co.*, 701 F.2d 420, 425-26

(5th Cir. 1983); *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* Section II.A.1, *infra*, neither Title IX nor the implementing regulations are ambiguous on sex-versus-gender-identity questions.

II. REGARDLESS OF GENDER IDENTITY, THERE IS NO FEDERAL RIGHT FOR PEOPLE OF ONE BIOLOGICAL SEX TO USE SEX-SEGREGATED FACILITIES DESIGNATED FOR THE OPPOSITE BIOLOGICAL SEX.

Neither Title IX nor constitutional equal-protection analysis protects subjective gender-identity issues to the point of allowing biological males or females to use sex-segregated restrooms or locker rooms intended for the opposite biological sex. The Administration cannot credibly contend that the Congress and States that enacted and ratified those provisions intended that sea change: "Congress … does not … hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). Instead, *Amicus* views the Administration as relying on its authority to interpret existing statutes and regulations, without relying on equal-protection issues. Whatever the Administration argues, this Court should decline to expand federal law coercively – at the expense of state and local sovereignty – merely because federal agencies have so opined.

A. Title IX does not provide transgender people the right to use sex-segregated restrooms designated for the opposite biological sex.

Given the presumption against preemption and the clear notice required for Spending-Clause legislation, *see* Sections I.B.1-I.B.2, *supra*, this Court must hold that Title IX prohibits what Congress enacted: discrimination "on the basis of sex." 20 U.S.C. §1681(a). The words "sex" and "gender" mean different things now, and they meant different things when Congress enacted Title IX. Because the Administration has not reopened and amended the Title IX regulations, and those regulations *allow* sex-segregated restrooms, 45 C.F.R. §86.33; 34 C.F.R. §106.33, the Administration cannot prevail unless the statutory term "sex" includes gender identity. Because

sex is a biological characteristic, and gender is not, the Administration cannot prevail.[5]

1. Title IX regulates discrimination based on objective sex, not based on subjective gender identity.

When Congress enacted Title IX in 1972 and extended the statutory reach in 1988, the judicial understanding of the word "sex" did not include the Administration's new expansion of that word to include gender identity. For example, the U.S. 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); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (listing sex among immutable statutorily protected characteristics, as opposed to "the language a person who is multi-lingual elects to speak at a particular time," which "is by definition a matter of choice"); *see, e.g.*, *Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001) (listing sex as immutable); *accord 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 clear-notice requirement for Spending-Clause legislation and the presumption against preemption for federal intrusion into predominantly state and local spheres, a reviewing court should regard the sex-versus-gender issue as decided by the Congress that enacted Title IX, consistent with the then-controlling judicial construction by the Supreme Court and the unanimous courts of appeals: "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

[5] 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). Black's Law Dictionary did not even define "gender" at the relevant times.

interpretation." *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015) (interior quotation and ellipses omitted). As the States explain, Pls.' Br. 3-4, the fact that Congress has added gender-identity to other statutes and failed to add it here bolsters that conclusion. Accordingly, sex means sex; it does not mean gender.[6] Although the foregoing suffices to reject the Administration's position, *Amicus* preemptively counters four additional prior arguments that the Administration has made.

First, stereotype-based decisions – such as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny – are wholly irrelevant.[7] These "stereotype" cases concern whether a female exhibits masculine traits or dress or whether a male exhibits feminine traits or dress. In *Hopkins,* an accounting firm denied partnership to a female accountant who did not wear makeup or jewelry and instead was what one partner called "macho." *Id.* For purposes of Title VII and her actually doing her job, it did not matter whether a female accountant wore a dress or a man's suit. Whatever impact these stereotype decisions have on employers' ability to require masculinity in men or femininity in women, the male employees remain male, and the female employees remain female. These decisions have no bearing on which bathroom or locker room the employees use.

Second, while *Amicus* agrees with the States that the States should prevail under both Title IX and Title VII, one cannot conflate Title IX and Title VII for all purposes. The Supreme Court's

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[6] One Supreme Court decision uses "gender" loosely to argue that Title IX prohibits denying educational access "on the basis of gender." *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999), but that opinion uses "sex" and "gender" interchangeably and does not hinge on sex-versus-gender issues. As such, the *Davis* opinion merely represents the usage of "gender" to mean "sex." It does not hold "sex" to mean "gender."

[7] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998), is even less relevant. *Oncale* modestly holds that sex-based discrimination includes male-on-male harassment just as much as male-on-female harassment, provided that it is based on sex. *Id.* That is wholly irrelevant to allowing transgender students to use sex-segregated restrooms for the opposite sex.

use of Title VII standards in sexual-harassment cases under Title IX does not go that far. *See Davis*, 526 U.S. at 651; *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992). Quite the contrary, where there are differences between the two statutes, the Supreme Court has held precisely the opposite: the Spending-Clause legislation and Title VII "*cannot* be read in *pari materia*." *United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979) (first emphasis added). Sensibly enough, like things are alike, except where they are different. For example, Title IX must be read to require clear notice under the Spending Clause, which may not apply to Title VII. In any event, the States are likely to prevail under both Title VII and Title IX for the reasons stated elsewhere.

Third, the analogy in *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008), between a hypothetical law that impermissibly discriminates against religious converts and the discrimination against transgender males and females is wholly inapposite. The analogy fails because Title IX *allows* schools to discriminate on the basis of sex in restrooms and transgender people generally do not actually *convert* to the opposite sex via surgery. Here, permissible sex-segregation yields a different result than impermissible religious discrimination in *Schroer*.

Fourth, the Administration will, of necessity, cite extra-circuit appellate and district court decisions, which cannot bind this Court. Even the Fourth Circuit would acknowledge that its recent split decision is not binding here: "a federal court of appeals's decision is only binding within its circuit." *Virginia Soc'y for Human Life, Inc. v. F.E.C.*, 263 F.3d 379, 393 (4th Cir. 2001), *abrogated in part on other grounds*, *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 550 n.2 (4th Cir. 2012); *accord U.S. v. Dawson*, 576 F.2d 656, 659 (5th Cir. 1978). Similarly, "federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011). "A contrary policy would substantially thwart the development of important

questions of law by freezing the first final decision rendered on a particular legal issue." *Virginia Soc'y for Human Life*, 263 F.3d at 393 (internal quotations omitted).

2. Even if the federal government had permissibly added transgender protections to Title IX, the States could decline to accept the new overlay to the Title IX regime.

As indicated, Title IX does not provide transgender students the right to use sex-segregated restrooms of the sex to which they aspire. But even if Congress – or *a fortiori* federal agencies – had successfully amended Title IX to provide that right, schools nationwide could decline to accept the amended Title IX regime because federal courts "scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a power akin to undue influence." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2602 (2012) ("*NFIB*") (interior quotation omitted). Consequently, in order to prevail here, the Administration must argue that similarly situated students could have asserted the same right immediately after Title IX's enactment in 1972 or possibly immediately after the initial regulations' promulgation in 1975. Otherwise, the federal agencies are trying to coerce schools to adopt a new requirement based on the threat of terminating a school's federal funding. 20 U.S.C. §1682(1). As *NFIB* explained, the federal government cannot add new requirements to existing Spending-Clause regimes on threat of losing all federal funding.

On a blank slate with new Spending Clause legislation, federal courts would "look to the States to defend their prerogatives by adopting the simple expedient of not yielding to federal blandishments when they do not want to embrace the federal policies as their own." *NFIB*, 132 S.Ct. at 2603 (interior quotation omitted). If Congress enacted a hypothetical Transgender Restroom Act ("TRA") under the Spending Clause, schools could simply decline to participate and thus avoid a federal policy of allowing transgender people to use the sex-segregated restrooms reserved for the opposite sex. Here, however, the federal agencies have purported to do via informal memoranda what *NFIB* held that Congress itself cannot do by statute: tie not only new

TRA funds but also all pre-existing federal educational funding to a school's or State's accepting the new TRA conditions.

> The legitimacy of Congress's exercise of the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system.

NFIB, 132 S.Ct. at 2602 (interior quotation omitted). Under *NFIB*, 132 S.Ct. at 2605, the federal agencies' overlay onto Title IX is impermissible as "economic dragooning that leaves the States with no real option but to acquiesce in the [statutory] expansion."

Indeed, the federal agencies' attempt to protect transgender students is an even greater expansion of Title IX than the expansion rejected in *NFIB* as an impermissible "shift in kind, not merely degree." *NFIB*, 132 S.Ct. at 2605. There, Congress expanded a statute "designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children" to one designed "to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level." *NFIB*, 132 S.Ct. at 2605-06. The federal agencies here attempt to change a statute designed to prevent discrimination based on an immutable, biological characteristic – sex – into a statute championing the more controversial question of subjective gender identity. While *NFIB* holds that Congress itself could not impose those new conditions *by statute*, *Amicus* respectfully submits that this Court must reject the attempt by mere federal agencies to do so *by fiat*.

B. Constitutional equal-protection rights do not authorize transgender people to use sex-segregated restrooms designated for the opposite biological sex.

Under the Equal Protection Clause, a state and local government actor like the plaintiffs here cannot lawfully "deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, §1, cl. 4, and the same protections apply against the federal government

under the Due Process Clause of the Fifth Amendment. *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974). Although the States' motion does not press constitutional claims, the equal-protection issue is arguably relevant to the States' standing: if the Equal Protection Clause already independently required what the Administration now demands *vis-à-vis* transgender people, the States' requested relief might not redress their injury. Fortunately, the Constitution requires no such thing.

Provided that it concedes that society lawfully may segregate restrooms by sex, the Administration would not be claiming that its policy is necessary to prevent sex-based discrimination. Instead, the constitutional equal-protection question is whether society may exclude females with male gender identity from male restrooms, and vice versa. Insofar as the Administration's challenged restroom policies apply in the same way to transgender males and transgender females, the discrimination – if any – is on the basis of a misalignment between a person's gender identity and that person's sex. But "an individual's right to equal protection of the laws does not deny … the power to treat different classes of persons in different ways." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original); *cf. Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (to state an equal-protection claim *vis-à-vis* the government's treatment of another class, the two classes must be "in all relevant respects alike"). Put another way, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366-67 (2001) (interior quotations omitted).[8] Here, the Administration attempts to compare a class of biological males versus a class of biological females with male gender

[8] "[A] legislative choice [like a local school's restroom policy or a comparable state law] is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

identities, and vice versa, but those classes are not comparable for equal-protection purposes.

In any event, because gender dysphoria is not a protected class, plaintiffs claiming an equal-protection violation on the basis of such a misalignment must establish that the government action does not "further[] a legitimate state interest" and lacks any "plausible policy reason for the classification." *Nordlinger*, 505 U.S. at 11-12. The privacy interest of other students easily satisfies this test. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *U.S. v. Virginia*, 518 U.S. 515, 550 n.19 (1996). Moreover, unlike heightened scrutiny, rational-basis review does not require narrowly tailoring policies to legitimate purposes: "[rational basis review] is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *Beach*, 508 U.S. at 313, and a policy "does not offend the Constitution simply because the classification is not made with mathematical nicety or because *in practice it results in some inequality.*" *Id.* at 316 n.7 (interior quotations omitted, emphasis added). Indeed, courts give economic and social legislation a presumption of rationality, and "the Equal Protection Clause is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 462-63 (1988) (interior quotations omitted). Here, the public's privacy interests are incontestable, thus denying the Administration support under the Constitution's equal-protection provisions.

III. THE UNITED STATES' SOVEREIGN IMMUNITY POSES NO BARRIER TO THE STATES' SUING TO OVERTURN THE ADMINISTRATION'S POLICY.

Sovereign immunity poses no barrier to this suit because the 1976 amendments to the Administrative Procedure Act ("APA") "'*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity.'" *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976),

U.S. Code Cong. & Admin. News 1976, p. 6121, 6129) (emphasis added); 5 U.S.C. §702. Under the APA, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. §704. As explained below, this "adequate-remedy bar" does not preclude judicial review here because Title IX makes review available by statute, to which the adequate-remedy bar does not apply. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). Moreover, the ability to challenge fund-termination actions in the future is not an adequate remedy. Finally, even if §704 barred *APA review*, it would not bar an action under *Ex parte Young*, 209 U.S. 123, 160 (1908), and its progeny for declaratory or equitable relief against the *ultra vires* actions of federal officers.

A. Agency action under Title IX is reviewable by statute, rendering the APA's adequate-remedy bar inapposite.

Title IX subjects action taken pursuant to its rulemaking authority, 20 U.S.C. §1682, to the same judicial review as the agency's other rulemakings. 20 U.S.C. §1683; *accord* H.R. Rep. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2401 (Title VI). By *statutorily* adopting judicial review generally, Title IX (like Title VI) makes rules, regulations, and orders reviewable *by statute*, outside the adequate-remedy bar. *Schlafly v. Volpe*, 495 F.2d 273, 282 (7th Cir. 1974) (Title VI waives federal sovereign immunity); *Selden Apartments v. U.S. Dept. of Housing & Urban Dev.*, 785 F.2d 152, 157-58 (6th Cir. 1986); [9] Louis L. Jaffee, *The Right to Judicial Review I*, 71 HARV.

[9] *Dicta* in *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, *reh'g denied*, 383 F.3d 1047 (D.C. Cir. 2004) ("*NWCA*"), is to the contrary, but as DOE acknowledged "[b]ecause petitioners lack standing…, [judicial review] is not properly presented here." Brief for the Respondent in Opp'n, at 11, *NWCA*, No. 04-922 (U.S.), 2005 WL 997132; *accord Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1156 (D.C. Cir. 2005) ("[a]ny statements… on the question of the judicial review bar would be unnecessary *dicta*"); *compare Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (*en banc*) (policies are reviewable) *with Women's Equity Action League v. Cavazos*, 906 F.2d 742, 746 n.2, 751 n.13 (D.C. Cir. 1990) (mere non-enforcement is not reviewable).

L. REV. 401, 432 (1958) ("If a statute provides for judicial review the consent has, of course, been given"). Thus, the adequate-remedy bar does not apply.

The legislative history of this provision clarifies not only that Congress intended judicial review, but also that there likely *would not have been a Civil Rights Act* of 1964 (and thus no Title IX) without judicial review. 110 CONG. REC. 2492 (1964) ("If we pick up this old provision which does not provide for judicial review I regret to say that my individual support of the legislation will come to an end") (Rep. McCulloch); C. & B. Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act,* 115-16 (1985);[10] 110 CONG. REC. 16,001 ("A person aggrieved (including a State or political subdivision thereof) is authorized to obtain judicial review of the action taken by a Federal department or agency either according to judicial review authority contained in the statute authorizing financial assistance or pursuant to the authority contained in the Administrative Procedure Act") (Rep. McCulloch's analysis, submitted by Sen. Dirksen).[11]

As with most federal agencies, judicial review of DOE's rulemakings falls under the APA and begins in the district courts. *See, e.g., Ass'n of Accredited Cosmetology Sch. v. Alexander,* 774 F.Supp. 655 (D.D.C. 1991), *aff'd* 979 F.2d 859 (D.C. Cir. 1992). Further, DOE's enabling

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[10] Federal courts have relied on the Whalen book for legislative history of the Civil Rights Act of 1964. *See, e.g., Price Waterhouse,* 490 U.S. at 244.

[11] *See also* 110 CONG. REC. 6566 ("In enacting title VI, however, the House inserted many safeguards and limitations, including judicial review, in order to make certain that Federal power is not misused") (analysis by Republican members of House Judiciary Committee, inserted by Sen. Kuchel); 110 CONG. REC. 7066 ("section 603 makes clear, in addition to the specific judicial review of any fund cutoff action, that all other agency action taken under section 602 would be subject to the same type of judicial review provided by law for similar action taken on other grounds") (Sen. Ribicoff); 110 CONG. REC. 6987 ("A person aggrieved (including a State or local governmental authority) is authorized to obtain judicial review of the action taken by the Federal department either according to the judicial review authority contained in the statute authorizing financial assistance or pursuant to authority contained in the Administrative Procedure Act") (analysis by Rep. McCulloch, ranking member, House Judiciary Comm., inserted by Sen. Scott).

legislation made DOE actions reviewable to the same extent as HEW actions immediately prior to DOE's creation as a separate agency. 20 U.S.C. §3505(f). Before DOE was created, HEW regulations also were subject to judicial review under the APA. *See, e.g.*, *Sch. Bd. v. Dep't of Health, Educ. & Welfare*, 525 F.2d 900, 904 (5th Cir. 1976); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (Title IX regulations). Under both Title IX generally and DOE's enabling legislation specifically, then, DOE action is subject to judicial review. 20 U.S.C. §§1683, 3505(f).

B. Even if the APA's adequate-remedy bar applied, defending against a fund-termination or enforcement proceeding would not be an adequate remedy.

Even if §704's adequate-remedy bar applied to Title IX rules, it would not preclude review here because the alternate remedies – *e.g.*, defending a fund-termination or other enforcement proceeding – is not an adequate remedy. Fund-termination proceedings do not redress the threat that DOE's policy poses, and private enforcement actions do not provide a rescission remedy.

The APA's adequate-remedy bar merely states that the general APA grant of judicial review does not apply in addition to statutory procedures for review of agency action that Congress provided under statutes enacted before the APA. *Bowen v. Massachusetts*, 487 U.S. 879, 902 (1988). The adequate-remedy bar was "intended to avoid such duplication [and] should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." 487 U.S. at 903 (government's restrictive interpretation "would unquestionably … run counter" to the APA's purpose of removing obstacles to judicial review of final agency actions"). It is "axiomatic" that the "general 'presumption that Congress intends judicial review of administrative action'" can be overcome "only by 'clear and convincing evidence' that Congress intended to restrict access to judicial review." *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 671-72, 680-81 (1986). No such Congressional intent can be discerned. "[W]here substantial doubt about the congressional intent exists, the general presumption favoring judicial

review of administrative action is controlling." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 350-51 (1984). Nothing requires States to wait for an enforcement action to challenge DOE.

Indeed, although the original APA did not override any pre-APA statute that *expressly or impliedly* denied review, 5 U.S.C. §702, post-APA statutes must deny review *expressly*. 5 U.S.C. §559 ("[s]ubsequent statute may not be held to supersede or modify this subchapter …, except to the extent that it does so expressly"); *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999).[12] Decisions finding implied preclusion for pre-APA statutes are inapposite to post-APA statutes. *Compare* 5 U.S.C. §702 *with id.* §559.[13] Consequently, as *post-APA* statutes, for Title IX (as amended) to preclude APA review, Congress had to preclude review *expressly*, which Title IX does not do.

The legislative history makes clear that §704 merely stated the "present general state of the law" and "involve[d] no departure from the usual and well-understood rules of procedure." Administrative Procedure Act, Legislative History, 79th Cong., S.Doc. No. 248, 79th Cong., 2d Sess., 38, 369 (1946) ("APA Leg. Hist."). Those rules did not preclude suing the government when injured or threatened by third-party action that the government required or authorized. *Truax v. Raich*, 239 U.S. 33, 36-38 (1915); *Columbia Broad. Sys., Inc. v. U.S.*, 316 U.S. 407, 422-23 (1942). As with standing, those threatened by future injury need not await an alternate legal remedy, and subsequent legal remedies do not displace equity review. *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) ("settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter"). Because

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[12] The leading *implied-preclusion* authorities concern *pre-APA* statutes. *See, e.g.*, *Block*, 467 U.S. at 352 (Agricultural Marketing Agreement Act of 1937); *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984) (Communications Act of 1934). These decisions have no bearing on the preclusion of review under post-APA statutes like Title IX.

[13] The APA's 1976 amendments did not expand preclusion of review. *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (*citing* 5 U.S.C. §559 and *Zurko*).

review would have been available *before* the APA's enactment, §704 does not require otherwise.

The risk of private enforcement against the States for violating DOE's policies provides another reason that the States lack an adequate remedy outside this action. If DOE were not a party, the States as defendants could not seek a rescission remedy against the DOE policy. *See, e.g.*, *Transohio Savings Bank v. Director, Office of Thrift Supervision,* 967 F.2d 598, 608 (D.C. Cir. 1992) (absence of rescission remedy renders alternate remedy inadequate). Similarly, §704 cannot preclude judicial review of the guidelines under which those enforcement actions proceed. *Int'l Union v. Brock,* 477 U.S. 274, 285 (1986) ("although review of individual eligibility determinations in certain benefit programs may be confined [to other venues], claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court") (collecting cases); *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 890 n.2 (1990) ("If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations,... it can of course be challenged under the APA... and the entire [regulatory program] insofar as the content of that particular action is concerned, would thereby be affected"). The APA allows systemic review.

Indeed, for the risk of both future fund-termination and private-enforcement proceedings, direct judicial review like this case is the only adequate remedy. *Int'l Ladies' Garment Workers' Union v. Donovan,* 722 F.2d 795, 807 (D.C. Cir. 1983); *Nat'l Automatic Laundry & Cleaning Council v. Schultz,* 443 F.2d 689, 697 (D.C. Cir. 1971) ("*NALCC*"). In *NALCC,* an alternate enforcement-based remedy was inadequate to remedy a ruling's remaining in effect:

> [T]he ruling of the Administrator cannot be treated as a null, adding nothing to the Act. The authoritative interpretation of an executive official has the legal consequence, if it is reasonable and not inconsistent with ascertainable legislative intent, of commanding deference from a court that itself might have reached a different view if it had been free to consider the issue as on a blank slate.

443 F.2d at 697; *accord Ciba-Geigy Corp. v. U.S. E.P.A.*, 801 F.2d 430, 437 (D.C. Cir. 1986). Even if the prospect of a future enforcement action appeared unlikely – it does not – the immediacy that Article III requires is easily met here by the Administration's procedural violations. *See* Pls.' Br. 12-16; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-72 & n.7 (1992) (immediacy relaxed for procedural violation); *cf. Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (states accorded special solicitude on standing).

The canon against repeals by implication provides another basis to reject any suggestion that Title IX impliedly eliminated judicial review predating Title IX's enactment: "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (alteration in original, interior quotations and citations omitted). Indeed, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975) (internal quotations omitted). Under the clear-and-manifest standard, "[w]hen the text of [a statute] is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group*, 555 U.S. at 77 (interior quotations omitted). The relevant Title IX provision – 20 U.S.C. §1683 – is readily amenable to a no-preclusion interpretation. *See* Section III.A, *supra*. Under *Home Builders*, this Court should adopt the no-preclusion interpretation.

C. Even if the APA's adequate-remedy bar applied, neither the APA nor sovereign immunity would preclude equitable or declaratory relief against the officer defendants under *Ex parte Young*.

As indicated in the prior section, §704's adequate remedy bar does not preclude APA review. But even if APA review were precluded, review would still lie under pre-APA equity review. Even before the original APA provided a cause of action or the APA's 1976 amendments waived federal sovereign immunity, judicial review was available in equity suits against federal

officers: "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Young*, 209 U.S. at 160. Unlike their agencies, the individual Administration *officer* defendants lack sovereign immunity.

Under our common-law heritage, "[t]he acts of all [federal] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). Significantly, the availability of declaratory relief against federal officers predates the APA, WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace that relief. *See* APA Leg. Hist. 37, 212, 276. "Nothing in the [APA's] enactment … altered the *McAnnulty* doctrine of review …. It does not repeal the review of *ultra vires* actions recognized long before, in *McAnnulty*." *Dart v. U.S.*, 848 F.2d 217, 224 (D.C. Cir. 1988); *accord Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) (relying on *McAnnulty* to find "judicial review … available to one who has been injured by an act of a government official which is in excess of his express or implied powers"). Thus, provided that a plaintiff alleges an ongoing violation of federal law, longstanding equity practice allows suing federal officers who act beyond their lawful authority.[14]

CONCLUSION

For the foregoing reasons and those argued by the States, this Court should grant a preliminary injunction against the challenged federal policies.

[14] The Supreme Court recently clarified that there are no sliding scales of *ultra vires* conduct: "Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires.*" *City of Arlington v. FCC*, 133 S.Ct. 1863, 1869 (2013) (emphasis added).

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