Transgender Bathroom Rights

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"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

- Fourteenth Amendment to the United States Constitution, Section 1

"No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance."

- Title IX of the Education Amendments of 1972

"A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex . . . ."

- Implementing regulation of Title IX of the Education Amendments of 1972 at 34 C.F.R. § 106.33

After winning the right to same-sex marriage in all 50 states in June, 2015, the LGBT community is once again battling in court for its rights, this time for the right of transgender people to use bathrooms and locker rooms that match their gender identity. In its "Dear Colleague Letter on Transgender Students," the Federal Government has recently interpreted federal law as requiring that transgender students be permitted to use bathroom and locker rooms that correspond with their gender identity in schools receiving federal funding. In two separate lawsuits, 20 states have challenged the legitimacy of this interpretation.

This Article examines the current court battles over transgender bathroom and locker room rights and discusses possible outcomes of the most contentious legal issues in dispute. These issues include: the procedures used by the Federal Government in issuing its interpretation; the substantial legitimacy of the interpretation; and the Constitutional authority of the Federal Government to issue its interpretation. The Article concludes that courts should uphold the Federal Government's recent interpretation of federal civil rights law because the Federal Government's interpretation is a reasonable interpretation, lawfully issued, that mirrors the best medical and psychiatric practices for the protection and inclusion of a vulnerable group.

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INTRODUCTION

Title IX forbids sex discrimination in schools that receive federal funding.[1] However, Title IX allows sex segregated "living quarters,"[2] and the regulations enforcing Title IX allow sex segregated bathrooms, locker rooms, and changing facilities.[3] The Federal Government's recent interpretation of Title IX and its implementing regulations as it applies to transgender individuals is that people with a male gender identity must be allowed to use the male facilities, and that people with a female gender identity must be allowed to use the female facilities.[4] This interpretation is consistent with the most current medical and psychiatric recommendations for the treatment of transgender individuals,[5] and accommodates those transgender individuals who clearly and consistently identify with being either male or female.[6]

This Article examines the current court battles over transgender bathroom and locker room rights[7] and discusses possible outcomes of some of the most contentious legal issues in dispute in these cases. Part I of this Article discusses the current legal landscape regarding bathroom and locker room use by transgender individuals. Part II discusses the most contentious legal challenges to the Federal Government's recent interpretation of Title IX and its regulations, contained in its "Dear Colleague Letter on Transgender Students" (Dear Colleague Letter). The Article concludes that courts should uphold the Federal Government's recent interpretation of Title IX because the Federal Government's interpretation is a reasonable and lawful interpretation that followed all required procedures.

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1. 20 U.S.C. § 1681 (2012).

2. *Id.* § 1686.

3. 34 C.F.R. § 106.33 (2016).

4. Letter from U.S. Dep't of Justice & Dep't of Educ., *Dear Colleague Letter on Transgender Students* 3–4 (May 13, 2016), www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/G5BH-LNYW] [hereinafter Dear Colleague Letter].

5. *See, e.g.*, WORLD PROF'L ASSOC. FOR TRANSGENDER HEALTH (WPATH), STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE (2016), http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351 [https://perma.cc/RG6X-DTLT] (transgender individuals should be supported and affirmed in their gender identities).

6. There are many transgender individuals who are non-binary and either do not identify as being either male or female, or who identify as being both male and female. *See, e.g.*, Catherine Jean Archibald, *Transgender Student in Maine May Use Bathroom that Matches Gender Identity - Are Co-ed Bathrooms Next?* 83 UMKC L. REV. 57, 68–69 (2014) (discussing individuals who do not identify with the gender binary). About 1/3 of transgender individuals are non-binary. *See* James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016), *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality, at 45, at http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF [https://perma.cc/4CPS-ZYK5].

7. The interpretation as it applies to sports athletic teams is outside the scope of this article. Note that there are no current challenges to the Dear Colleague Letter as it specifically applies to sports or athletic teams. For an in-depth discussion of sex discrimination in sports, *see* Catherine Jean Archibald, *De-Clothing Sex-Based Classifications - Same-Sex Marriage Is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1, 18–19, 25, 33–38 (2009).

I. THE CURRENT LEGAL AND POLITICAL LANDSCAPE ON TRANSGENDER BATHROOM RIGHTS AND THE LEAD UP TO THE DEAR COLLEAGUE LETTER

Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[8] Title IX does, however, allow separate living facilities: "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes."[9] Additionally, Title IX regulations allow regulated entities to "provide separate toilet, locker room, and shower facilities on the basis of sex," so long as the facilities provided for "students of one sex" are "comparable" to the facilities provided for "students of the other sex."[10]

In recent years and months, there has been a torrent of legal activity surrounding the right of transgender individuals[11] to access bathrooms and locker rooms that align with their gender identity. In courts, legislation, and agency interpretation of statutory and regulatory law, transgender individuals are gaining the right to use bathrooms and locker rooms that match their gender identity.

In 2013, the Colorado Civil Rights Division, the agency charged with enforcing that state's anti-discrimination laws,[12] became the first government body in the country to rule that a six-year-old transgender girl, born a boy, must be allowed to use the girls' bathroom at her school.[13] In 2014, California passed a law allowing transgender youth to participate in sex-segregated sports, and use sex-segregated locker rooms and bathrooms in accordance with their gender identity, "irrespective of the gender listed on the pupil's records."[14] Also in 2014, the high court in Maine became the first state court in the country to rule that a transgender

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8. 20 U.S.C. § 1681(a).

9. *Id.* § 1686.

10. 34 C.F.R. § 106.33.

11. Transgender people are "people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth." NAT'L GAY AND LESBIAN TASK FORCE, VALUING TRANSGENDER APPLICANTS & EMPLOYEES: A BEST PRACTICES GUIDE FOR EMPLOYERS 5 (2016), http://www.thetaskforce.org/static_html/downloads/reports/reports/valuing_trans_employees_060316.pdf [https://perma.cc/7PQA-EKDU].

12. *See* Colo. Dep't of Regulatory Agencies Div. of Civil Rights, *About the Civil Rights Division*, https://www.colorado.gov/dora/civil-rights [https://perma.cc/6W57-3ZEH] (last visited October 2, 2016).

13. *See* Colo. Dep't of Regulatory Agencies Div. of Civil Rights, *In re Coy Mathis* (2013), http://www.transgenderlegal.org/media/uploads/doc_529.pdf [https://perma.cc/FST9-XQME].

14. *See* Sch. Success and Opportunity Act, Assemb. B. 1266 (Cal. 2013), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1266 [https://perma.cc/QH36-TG59]. This bill became law on January 1, 2014. *See* CAL. EDUC. CODE § 221.5(f) (Deering 2014) ("A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.").

student who was born a boy but identifies as a girl had the right to use the girls' bathroom at school.[15]

The Federal Government has been keeping pace with these transgender-friendly developments in its enforcement and interpretation of federal law. In 2013, the United States Department of Education (DOE) and the United States Department of Justice (DOJ) jointly investigated a transgender boy's complaint that his school was violating federal law by not allowing him access to the boys' restrooms, locker rooms, and overnight sleeping accommodations.[16] The resolution reached with the school district required that the district treat the student as a boy in all respects, including requiring the district to give him access to the boys' restrooms, changing rooms, and sleeping areas for overnight trips.[17]

In 2014, the DOE investigated a complaint by a transgender girl that she was harassed and reprimanded by the school for acting as a girl.[18] The resolution reached with the school required the school to treat her as a girl in all respects, including allowing her to use the girls' bathrooms and locker rooms.[19] In January 2015, the DOE issued an opinion letter stating that when a school has sex-segregated facilities such as bathrooms and locker rooms, students should have access to the sex-segregated facilities based on their gender identity.[20] This letter was the basis of the Fourth Circuit's April 2016 decision finding that a transgender boy must be allowed to use the boys' bathrooms at his Virginia public school.[21] In November 2015, the DOE issued a letter to an Illinois high school, finding that the school had violated Title IX because the school did not allow a transgender girl access to the girls' locker rooms.[22] Under threat of legal action, in December 2015,

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15. *See* Doe v. Reg'l Sch. Unit 26, 86 A.3d 600 (Me. 2014) (interpreting Maine human rights law). For an in-depth discussion of this case, see Archibald, *supra* note 6, at 59–63.

16. *See* Resolution Letter from Anurima Bhargava, U.S. Dep't of Justice, and Arthur Zeidman, U.S. Dep't of Educ., to Dr. Joel Shawn, Superintendent for Arcadia Unified Sch. Dist. (July 24, 2013), http://www.justice.gov/crt/about/edu/documents/arcadialetter.pdf (addressing DOJ Case No. DJ 169-12C-70 and OCR Case No. 09-12-1020) [https://perma.cc/STA7-K797].

17. *See* RESOLUTION AGREEMENT BETWEEN ARCADIA UNIFIED SCH. DIST., U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, AND U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. (July 24, 2013), http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf (addressing OCR Case No. 09-12-1020 and DOJ Case No. 169-12C-70) [https://perma.cc/6K7F-SQ4R].

18. *See* Resolution Letter from Arthur Zeidman, Office for Civil Rights, to Dr. John A. Garcia, Superintendent for Downey Unified Sch. Dist. (Oct. 14, 2014), www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf (addressing OCR Case No. 09-12-1095) [https://perma.cc/266F-DTXC].

19. *See* RESOLUTION AGREEMENT BETWEEN DOWNEY UNIFIED SCH. DIST. AND U.S. DEP'T OF EDUC. (Oct. 14, 2014), www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf [https://perma.cc/QU2J-QVAF] (addressing OCR Case No. 09-12-1095).

20. *See* Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Policy, Office for Civil Rights, U.S. Dep't of Educ., to Emily T. Prince (Jan. 7, 2015), http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf [https://perma.cc/TL2B-53D3].

21. *See* G. G. v. Gloucester Cnty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016)), *cert. granted in part*, 196 L. Ed. 2d 283 (Oct. 28, 2016).

22. *See* Resolution Letter from Office of Civil Rights to Dr. Daniel E. Cates, Superintendent of Township High Sch. Dist. 211 (Nov. 2, 2015), https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf [https://perma.cc/2M6N-Y23E] (addressing OCR Case No. 05-14-1055).

the school district agreed to give the student full access to the girls' locker rooms.[23] The school district's change in policy prompted a lawsuit, currently pending, by parents of other students at the school.[24] In June 2016, DOE found that an elementary school in South Carolina had violated Title IX when it refused to allow a transgender girl to use the girls' restrooms.[25]

In the face of these steps forward for the transgender community, a political and legal backlash began in earnest in 2015. On November 3, 2015, voters in Houston, Texas voted to repeal a local antidiscrimination ordinance that forbade discrimination based on gender identity after vigorous campaigning warned voters that the law would allow male sexual predators to follow little girls into girls' bathrooms to assault them.[26]

Then, on March 23, 2016, North Carolina introduced and passed a law, the North Carolina Public Facilities Privacy and Security Act, commonly known as "HB2" (house bill 2), requiring bathroom use according to biological sex, as stated on a person's birth certificate.[27] HB2 was passed in order to invalidate an antidiscrimination ordinance protecting transgender individuals from discrimination that had passed in Charlotte, North Carolina a month earlier.[28] As a result of HB2, five separate lawsuits have been filed in federal court in North Carolina—one brought by the American Civil Liberties Union (ACLU) challenging HB2,[29] one brought by the U.S. government challenging HB2,[30] one brought by North Carolina's governor Pat McCrory,[31] challenging the U.S. government's request for the repudiation of HB2, one by members of the North Carolina legislature challenging the U.S. government's request for the repudiation of HB2,[32] and one by a nonprofit group called North Carolinians for Privacy challenging the U.S. government's request for the repudiation of HB2.[33]

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23. *See* AGREEMENT TO RESOLVE BETWEEN TOWNSHIP HIGH SCH. DIST. 211 AND THE U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS (Dec. 2, 2015), http://adc.d211.org/wp-content/uploads/2015/12/D211-OCR-Agreement.pdf [https://perma.cc/YH9P-XNCK] (addressing OCR Case No. 05-14-1055).

24. *See* Students and Parents for Privacy v. U.S. Dep't of Educ., No. 1:16-cv-04945, 2016 WL 2591322 (N.D. Ill. May 4, 2016).

25. *See* Letter of Findings from Alessandro Terenzoni, Office for Civil Rights, to Joseph R. Pye, Superintendent for Dorchester County Sch. Dist. Two (June 21, 2016), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11151348-a.pdf [https://perma.cc/LS98-BWN4] (addressing OCR Complaint No. 11-15-1348).

26. *See, e.g.*, Russell Berman, *How Bathroom Fears Conquered Transgender Rights in Houston*, THE ATLANTIC (Nov. 3, 2015), http://www.theatlantic.com/politics/archive/2015/11/how-bathroom-fears-conquered-transgender-rights-in-houston/414016/ [https://perma.cc/H2SV-RGXZ].

27. Public Facilities Privacy & Security Act of 2016, § G.S. 115C-47 [hereinafter HB2].

28. Complaint at ¶¶13–19, United States v. North Carolina, No. 1:16-cv-00425 (M.D.N.C. May 9, 2016).

29. Carcaño v. McCrory, No. 1:16-cv-00236 (M.D.N.C. Mar 28, 2016).

30. United States v. North Carolina, No. 1:16-cv-00425 (M.D.N.C. May 9, 2016).

31. McCrory v. United States, No. 5:16-cv-00238 (E.D.N.C. May 9, 2016).

32. Berger v. United States, No. 5:16-cv-00240 (E.D.N.C. May 9, 2016).

33. North Carolinians for Privacy v. United States, No. 5:16-cv-00245 (E.D.N.C. May 10, 2016). Several of these lawsuits have been consolidated, and all are currently making their way through the court system.

On May 13, 2016, the DOJ and DOE together released joint guidance entitled "Dear Colleague Letter on Transgender Students" (Dear Colleague Letter) stating that in order to be in compliance with Title IX and its implementing regulations, schools receiving federal funding should treat transgender students in all respects as the gender that they identify with.[34] Twenty states have challenged the validity of the Dear Colleague Letter in two separate federal lawsuits.

First, on May 25, 2016, Texas filed a lawsuit in the United States District Court for the Northern District of Texas, challenging the interpretation of Title IX found in the Dear Colleague Letter.[35] Ten other states have since joined Texas in its challenge to the United States.[36] Notably, twelve different states and the District of Columbia have since filed an amicus brief in the case supporting the United States' position.[37]

A few months after Texas filed its challenge, the state of Nebraska and eight other states filed a similar lawsuit against the United States' government in the United States District Court for the District of Nebraska.[38] The next section will discuss the main legal challenges raised by the *Texas* and *Nebraska* state plaintiffs and how courts are likely to decide on those legal challenges.

II. THE LEGAL CHALLENGES TO THE DEAR COLLEAGUE LETTER

The Supreme Court will rule on the issue of transgender bathroom and locker room rights, possibly in a consolidated case involving two or more of the abovementioned cases involving transgender bathroom rights that are currently making their way through the courts.[39] In determining the outcome of this case, the Supreme Court is tasked with answering the question: Is the federal government's interpretation of federal law legally valid, and thus, must sex-segregated bathrooms, changing rooms, locker rooms in federally funded schools be accessible to students based on gender identity? The two challenges to the Dear Colleague Letter make three main arguments: 1) they state that the federal government's Dear Colleague Letter is invalid because it was not issued through

34. *See* Dear Colleague Letter, *supra* note 4, at 2.

35. Texas v. United States, No. 7:16-cv-00054-O (N.D. Tex. May 25, 2016). The United States District Court for the Northern District of Texas granted the Plaintiffs a preliminary injunction, enjoining the United States from "enforcing" the Dear Colleague Letter on August 21, 2016. *See* Texas v. United States, No. 7:16-cv-00054-O, 2016 U.S. Dist. LEXIS 113459, at *62 (Aug. 21, 2016). This case is currently on appeal in the Fifth Circuit. *See* Texas v. United States, No. 16-11534 (5th Cir. Oct 21, 2016).

36. The other states that have joined Texas in suing the United States are: Alabama, Georgia, Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee, Utah, West Virginia, and Wisconsin. *See* Texas v. United States, No. 7:16-cv-00054-O (N.D. Tex. May 25, 2016). The Arizona Department of Education and the Governor of Maine are also listed as plaintiffs. *See id*.

37. *See* States' *Amicus Curiae* Brief in Opposition to Plaintiffs' Application for Preliminary Injunction, Texas v. United States, No. 7:16-cv-00054-O (N.D. Tex. July 27, 2016) (filed by Washington, New York, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Vermont, and the District of Columbia).

38. Nebraska v. United States, No. 4:16-cv-03117 (D. Neb. July 8, 2016) (plaintiffs are listed as: Nebraska, South Carolina, Arkansas, Kansas, Montana, North Dakota, South Dakota, Wyoming, Bill Schuette – Attorney General for the People of the State of Michigan).

39. *See* G. G. v. Gloucester Cnty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 196 L. Ed. 2d 283 (Oct. 28, 2016).

a notice-and-comment procedure; 2) they state that the Dear Colleague Letter is invalid because it is not an allowable interpretation of Title IX and its regulations; and 3) they state that the Dear Colleague Letter is invalid because it violates the Spending Clause of the United States Constitution. As will be shown below, none of these arguments should persuade the Supreme Court.

A. The Procedural Challenges to the Dear Colleague Letter

The *Texas* and *Nebraska* plaintiffs argue that the Dear Colleague Letter violates the Administrative Procedures Act (APA) because it was made without going through the proper procedures, namely, the notice-and-comment procedures.[40] However, this argument is flawed because interpretative rules, or rules that interpret statutes and/or regulations, are explicitly exempted from notice-and-comment procedures by the APA.[41]

Under the APA, there are two types of rules that agencies can promulgate. First, so-called legislative rules have the "force and effect of law,"[42] and they are made through a three-part-procedure known as "notice-and-comment" rulemaking that the APA lays out in 5 U.S.C. § 553.[43] Under notice-and-comment rulemaking, the agency must first provide the public with notice of the proposed rule.[44] Next, members of the public must have the opportunity to comment on the proposed rule, and the agency must consider and respond to "significant" comments received during the comment period.[45] Finally, when the agency publishes the legislative rule, it must include a statement of the rule's "basis and purpose."[46]

In contrast to legislative rules, interpretative rules are also authorized under the APA in 5 U.S.C. §§ 551(4) and 553(b)(A). Interpretative rules are issued by an agency in order to help the public and regulated entities understand how the agency is interpreting the statutes and rules that it administers.[47] Under the APA, these rules are explicitly exempted from the "notice-and-comment" requirement.[48] Interpretative rules are not considered to have the same force of law that a

40. Plaintiffs' First Amended Complaint at ¶¶60–64, Texas v. United States, No. 7:16-cv-00054-O (N.D. Tex. June 15, 2016); Plaintiffs' Complaint at ¶¶62–72, Nebraska v. United States, No. 4:16-cv-03117-JMG-CRZ (D. Neb. July 8, 2016).

41. 5 U.S.C. § 553(b)(A) (2012).

42. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).

43. 5 U.S.C. § 553.

44. *Id.* at § 553(b).

45. *Id.* at § 553(c); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U. S. 402, 416 (1971).

46. 5 U.S.C. § 553(c).

47. *See* Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995) ("The [Medicare Provider Reimbursement Manual] also provides a forum for the promulgation of interpretive rules and general statements of policy, types of agency action that describe what the agency believes the statute and existing regulations require but that do not alter the substantive obligations created thereby.").

48. *See* 5 U.S.C. § 553(b)(A); *see also Shalala*, 514 U.S. at 99 ("Interpretive rules do not require notice and comment.").

legislative rule has,[49] although it is a subject of debate whether they in fact have the same force of law as legislative rules.[50]

A court will find an agency rule is interpretative, and therefore does not have to follow notice-and-comment procedures, if it does not change the substance of the statute or regulation that it interprets, but instead, merely serves to inform the public how the government intends to enforce the statute or regulations.[51] In *Shalala v. Guernsey Memorial Hospital*,[52] a Hospital challenged a Secretary of Health and Human Services guidance document that explained how Medicare reimbursement to a provider would be calculated and paid for a loss resulting from refinanced debt.[53] The guidelines in the document were not issued pursuant to notice-and-comment procedure, and instructed that payment to the provider should be in a different manner than was customary under generally accepted accounting principles (GAAP).[54] The Hospital argued that the applicable statute and regulations required that GAAP should be followed, and that the guidance document thus changed the law contained within the statute and the regulations.[55] The Supreme Court examined the statute and regulations and found that they did not require that GAAP be followed, but instead allowed for either GAAP or some other system of calculation, such as the one adopted in the Secretary's guidance.[56] The Court noted that "APA rulemaking would . . . be required if [the guidance document] adopted a new position inconsistent with any of the Secretary's existing regulations."[57] However, the Court found that because the guidance document was consistent with the Statute and regulations and was issued to advise providers how the Secretary would interpret the Statute and regulations in certain specific circumstances, it was a valid interpretative rule that did not require the notice-and-comment procedure.[58]

Additionally, if the rule in question does not change the enforcement ability of the agency because the agency already had the enforcement right at issue before the rule's issuance, then the rule should be judged an interpretative rule and not a legislative rule.[59] In *American Mining Congress v. Mine Safety and Health*

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49. *Id*.; *see also* Perales v. Sullivan, 948 F.2d 1348, 1354 (2d Cir. 1991) (A legislative rule "grants rights, imposes obligations, or produces other significant effects on private interests;" an interpretative rule lets the public know an agency's "intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activity").

50. *See, e.g*., Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) (under the current practice of deference to agency interpretations of their own regulations, "[i]nterpretive rules that command deference *do* have the force of law.") (emphasis in original).

51. *See id*.; *see also* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000) (discussing generally the difference between legislative and interpretative rules).

52. 514 U.S. 87 (1995).

53. *Id*. at 89–90.

54. *Id*. at 90.

55. *Id*. at 95.

56. *See id*. at 92–96.

57. *Id*. at 100.

58. *Shalala*, 514 U.S. at 100–02.

59. *See* Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1110 (D.C. Cir. 1993).

Administration, the court found that a rule stating that a certain type of x-ray reading qualified as a "diagnosis" of lung disease under agency regulations was a valid interpretative rule under the APA.[60] The mining regulations required mining operators to report "diagnoses" of occupational diseases.[61] The court found that the interpretative rule was a valid interpretative rule because it simply clarified the already-existing obligation to report "diagnoses."[62] As the court put it "the legislative or interpretive status of the agency rules turns on . . . the prior existence or non-existence of legal duties and rights."[63] The court reasoned that prior to the issuance of the challenged rule, the agency already had the power, to bring an enforcement action when a miner's condition was not reported after the minor had the x-ray reading addressed in the challenged rule.[64] Therefore, the court ruled that the challenged rule was interpretative, not legislative.[65]

For an example of when an agency must issue a legislative rule, consider the case of a statute that authorizes the EPA to create and then enforce air quality standards.[66] Without issuing a rule setting air quality standards, there is nothing for the EPA to enforce, and there is no way for the EPA to bring an enforcement action under the statute. Therefore, when the EPA makes a rule setting air quality standards, the rule must necessarily be a legislative rule, issued through notice-and-comment rulemaking.[67]

Similar to the guidance document at issue in *Shalala*, which did not change what was required in the applicable statutes and regulations but merely advised regulated entities how the Secretary would interpret the law in certain specific situations, the Dear Colleague Letter also does not change what is required by Title IX and its regulations, but instead informs regulated entities how the DOE and DOJ are interpreting and intend to continue interpreting Title IX and its regulations. Title IX forbids sex discrimination in education, but allows schools to provide separate restrooms, showers, changing rooms, and sleeping areas designated for males and females if schools wish. This has not changed after the Dear Colleague Letter. What the Dear Colleague Letter does is let schools know that the DOE and DOJ consider it sex discrimination under Title IX not to treat transgender individuals according to the sex that they identify with.[68] Additionally, the DOE and the DOJ define a student's "sex" as a student's "gender identity" for purposes of Title IX and its implementing regulations."[69] Finally, the DOE and the DOJ state that the sex discrimination prohibited by Title IX and its implementing regulations include gender identity discrimination and

60. *Id*. at 1112–13.

61. *Id*. at 1107–08.

62. *Id*. at 1112.

63. *Id*. at 1110.

64. *Id*. at 1112.

65. *Am. Mining Congress*, 995 F.2d at 1112.

66. *See* 42 U.S.C. § 7414 (1977).

67. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 551–52 (2000) (citing 42 U.S.C. §§ 7410, 7414, 7604).

68. Dear Colleague Letter, *supra* note 4, at 3.

69. *Id*. at 2.

discrimination against transgender students.[70] The Dear Colleague Letter simply lets regulated entities know how the DOE and DOJ are interpreting the terms "sex" and "sex discrimination" contained within Title IX and its implementing regulations, as applied to the specific circumstances of transgender individuals. Since the letter does not conflict with the language of Title IX or its regulations,[71] this letter fairly comes within the interpretative rule exception to the notice-and-comment procedures contained within the APA.[72]

In *American Mining*, the D.C. Circuit Court of Appeals found that because the agency had the ability to bring an enforcement action in the event a miner's condition was not reported after receiving a certain x-ray reading, even before the rule in question was issued, then the rule in question was interpretative.[73] Similarly here, the DOE and DOJ had the ability to bring enforcement actions, and in fact did bring enforcement actions, when transgender students were excluded from bathrooms and locker rooms that matched their gender identities, even before the Dear Colleague Letter was issued.[74] Thus, the Dear Colleague Letter should be characterized as an interpretative rule under the APA. Therefore, the procedural arguments made by the *Texas* and *Nebraska* plaintiffs should fail in court.[75]

B. Challenges to the Dear Colleague Letter's Interpretations of "Sex" and "Sex Discrimination"

The *Texas* and *Nebraska* plaintiffs argue that The Dear Colleague letter is invalid because: 1) the terms "sex" and "sex discrimination" are not ambiguous and so should not be interpreted; 2) the Dear Colleague Letter is arbitrary and capricious; 3) when Congress passed Title IX, it did not intend for it to be interpreted as it has now been interpreted; and 4) the DOE and DOJ's interpretation of "sex discrimination" and "sex" is inconsistent with prior interpretations made by those agencies. Although the level of deference that the courts should give the Dear Colleague Letter is not mentioned by the *Texas* or *Nebraska* plaintiffs, the issue is also addressed below because it has been raised in

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70. *Id*. at 1.

71. *See infra* Part II.B.1.

72. *See* 5 U.S.C. §553(b)(A) (1996) (notice and comment procedures do not apply to "interpretative rules"); *cf.* Pierce, *supra* note 67 (noting that under the Americans with Disabilities Act, the applicable agency could choose to "use either legislative rules or interpretative rules to particularize statutory terms like 'discrimination' and 'disability.'").

73. *Am. Mining Congress*, 995 F.2d at 1116.

74. *See supra* notes 16–25 and accompanying text.

75. Because the Dear Colleague Letter is properly characterized as an interpretative rule, the requirements of the Regulatory Flexibility Analysis do not apply to it. *See* 5 U.S.C. § 603 (1980) (initial regulatory flexibility analysis only required when "an agency is required . . . to publish general notice of proposed rulemaking for any proposed rule"). Thus, the *Texas* and *Nebraska* plaintiffs' arguments based on the regulatory flexibility analysis are unavailing. *See* Plaintiff's First Amended Complaint at ¶¶ 111–13, Texas v. United States, No. 7:16-cv-00054-O, (N.D. Tex. June 15, 2016); Plaintiff's Complaint at ¶¶ 129–31, Nebraska v. United States, No. 4:16-cv-03117-JMG-CRZ (D. Neb. July 8, 2016).

a different lawsuit involving transgender bathroom rights under Title IX,[76] and so may be raised in the *Texas* and *Nebraska* suits at some point.

1. The Question of Ambiguity

The *Texas* and *Nebraska* plaintiffs argue that the Dear Colleague Letter is invalid because the terms "sex" and "sex discrimination" are not ambiguous, and the DOE and DOJ do not have the authority to interpret unambiguous terms.[77] The *Texas* and *Nebraska* plaintiffs argue that "sex" can only mean "biological sex," and that "sex discrimination" cannot include discrimination based on gender identity.[78] However, because the terms "sex" and "sex discrimination" are ambiguous when applied to transgender individuals, the DOE and DOJ are authorized to interpret them in a reasonable manner.

Agencies have the authority to interpret ambiguous statutes and regulations; agencies do not have the authority to interpret unambiguous statutes and regulations.[79] The Supreme Court has held that the question of whether statutory language is ambiguous should be determined by examining three factors: 1) "the language itself," 2) "the specific context in which that language is used;" and 3) "the broader context of the statute as a whole."[80] The same analysis applies in determining whether agency regulations are ambiguous.[81]

Even though a statutory or regulatory term may appear unambiguous on its face, a term's ambiguity should be determined by looking at the specific context in which it is applied.[82] In *Robinson v. Shell Oil Co.*,[83] the Supreme Court considered whether the statutory term "employee" was ambiguous as applied to former employees.[84] The Court noted that "[a]t first blush, the term 'employees' . . . would seem to refer to those having an existing employment relationship with the employer in question."[85] However, after looking at the specific context of the statute, the Court found that former employees should be included in the statutory term "employee" because the statute allows "employees" to bring action against employers in certain circumstances and prohibits retaliation against employees for

76. *See* Petitioners Application for Recall and Stay of the U.S. Fourth Circuit's Mandate Pending Petition for Certiorari at 18, Gloucester County Sch. Bd. v. G.G., No. A16 - ___ (U.S. July 13, 2016) (arguing that the Supreme Court should not give *Auer* deference to the Federal Government's interpretation of Title IX and its regulations).

77. Plaintiff's First Amended Complaint at ¶ 93, Texas v. United States, No. 7:16-cv-00054-O, (N.D. Tex. June 15, 2016); Plaintiff's Complaint at ¶¶ 77–92, 108, Nebraska v. United States, No. 4:16-cv-03117-JMG-CRZ, (D. Neb. July 8, 2016).

78. *Id.*

79. *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); G. G. v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 720 (4th Cir. 2016), *cert. granted in part*, 196 L. Ed. 2d 283 (Oct. 28, 2016).

80. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); McCarthy v. Bronson, 500 U.S. 136, 139 (1991)).

81. *See, e.g.*, *Gloucester Cnty. Sch. Bd.*, 822 F.3d at 720 (applying the *Robinson* three factors to the Title IX regulations at issue here).

82. *Robinson*, 519 U.S. at 341.

83. 519 U.S. 337 (1997).

84. *Id.* at 341.

85. *Id.*

bring civil rights complaints.[86] The Court reasoned that if the statutory term "employees" did not include former employees, employers would have an incentive to fire people they suspected might bring a civil rights complaint so that the former employees would not be able to bring a complaint, which would be contrary to the purpose of the statute.[87]

Similar to *Robinson*, where the term "employee" might seem to mean something different than what the Court found it did mean in the context of the statute as a whole and the litigation before it, here, the term "sex" should not mean only "biological sex" in the context of transgender individuals and in the context of Title IX's statutory prohibition on discrimination "based on sex." In the very context of examining the question of whether the terms "sex" and "sex discrimination" in Title IX and its regulations are ambiguous as applied to transgender individuals, the Fourth Circuit Court of Appeals found that they were. In the case of *G. G. v. Gloucester County School Board*,[88] the court noted that even in dictionary definitions in 1972, the definitions implicitly acknowledged that not every animal (including humans) fit within the "typical" male or female definition.[89] For example, one dictionary definition of "sex" defined sex as "the sum of the . . . peculiarities of living beings that . . . in its typical dichotomous occurrence is . . . typically manifested as maleness and femaleness."[90] This use of the word "typical" suggested to the court that even in 1972 when Title IX was enacted, there was acknowledgement that the "hard-and-fast binary division [into male and female] on the basis of reproductive organs . . . was not universally descriptive."[91]

Next, the court noted that as applied to transgender individuals, the term "sex" was ambiguous, as "the regulation [allowing the separation of bathrooms according to sex] is susceptible to more than one plausible reading."[92] The court noted that the regulation itself could "permit[] both the [school's] reading—determining maleness or femaleness with reference exclusively to genitalia—and the [Federal Government's] interpretation—determining maleness or femaleness with reference to gender identity."[93]

Another indication that the terms "sex" and "sex discrimination" are ambiguous when applied to transgender individuals is the fact that in the past courts did interpret those provisions to solely mean "biological sex" and "discrimination based on biological sex,"[94] but now many courts have interpreted those terms as including "gender identity" and "discrimination based on gender identity."[95]

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86. *Id.*

87. *Id.* at 345–46.

88. 822 F.3d 709 (4th Cir. 2016).

89. *Id.* at 721.

90. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1971)).

91. *Id.*

92. *Id.* at 720.

93. *Id.*

94. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215 (l0th Cir. 2007) (finding no sex discrimination when an employee was fired for being transgender).

95. *See, e.g.*, Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (finding sex discrimination

Hence, courts should find that because the terms "sex" and "sex discrimination" contained in Title IX and its regulations are ambiguous, the Federal Government has the authority to reasonably interpret them.

2. The Arbitrary and Capricious Standard

The *Texas* and *Nebraska* plaintiffs argue that the Dear Colleague Letter is invalid because it is "arbitrary and capricious," and thus in violation of the APA.[96] The APA authorizes courts to set aside an agency decision if the decision is "arbitrary and capricious."[97] An agency's decision is "arbitrary and capricious" if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[98]

When an agency issues a rule that is entirely contrary to its mandate under the law, a court may strike down the rule as being arbitrary and capricious.[99] In *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*,[100] the Supreme Court struck down a rule issued by the National Highway Traffic Safety Administration (a federal agency) that removed the requirements on automobile manufacturers to put either seatbelts or airbags in new cars.[101] The Court found the rule was arbitrary and capricious because it went against the statutory mandate requiring the agency to make rules that increased automobile safety.[102] The Court reasoned that since airbags were proven to save lives, there could be no logical reason for the agency not requiring them.[103]

Here, a court is likely to find that the Dear Colleague Letter is a reasonable interpretation of Title IX and its regulations, and therefore not arbitrary and capricious. First, there is no indication that the DOE or the DOJ relied on factors that Congress did not intend for it to consider, since it is unlikely that Congress considered the application of Title IX to transgender individuals in 1972.[104] Second, although opponents of the Dear Colleague letter argue that allowing transgender individuals to access bathrooms and locker rooms that match their gender identities would increase safety risks and decrease privacy risks, there is no

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when an employee was fired for being transgender); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (finding that sex discrimination includes gender identity discrimination).

96. Plaintiff's First Amended Complaint at ¶¶ 90–93, Texas v. United States, No. 7:16-cv-00054-O (N.D. Tex. June 15, 2016); Plaintiff's Complaint at ¶¶ 95–103, Nebraska v. United States, No. 4:16-cv-03117-JMG-CRZ (D. Neb. July 8, 2016).

97. 5 U.S.C. § 706(2)(A) (2012).

98. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (finding agency responsible for motor vehicle safety had acted arbitrarily and capriciously when it rescinded a rule requiring passive restraint seatbelts and airbags in new cars without adequate factual basis or explanation).

99. *Id.*

100. 463 U.S. 29 (1983).

101. *Id.* at 48.

102. *Id.* at 49.

103. *Id.*

104. *See infra* Part II.B.3 for a further discussion on this point.

evidence to support these concerns. Instead, there is plenty of evidence from states and schools that already permit transgender individuals to use the bathrooms and locker rooms that match their identity, that the requirements outlined in the Dear Colleague Letter will not increase safety risks or result in privacy invasions.[105] Third, there is ample evidence that treating transgender individuals in accordance with the gender that they identify with, including permitting them to access bathrooms and locker rooms that match the gender they identify with, increases health outcomes, and decreases discrimination against transgender individuals.[106] Finally, many courts have already interpreted the terms "sex" and "sex discrimination" in the same way that the Dear Colleague Letter does.

Recent court decisions recognize that discrimination based on gender stereotypes, gender identity, gender transition, or transgender status are a form of sex discrimination. In *Price Waterhouse v. Hopkins*,[107] the Supreme Court in 1989 recognized that discrimination based on failure to conform to sex stereotypes was a form of sex discrimination.[108] In this case, the Court found impermissible sex discrimination when an accounting firm decided not promote a female accountant at least in part because of the sex stereotype that she was too masculine and aggressive for a woman.[109] In the course of her interviews regarding the potential promotion, she was told to take "a course at charm school," try a "soft-hued suit or a new shade of lipstick,"[110] and to "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry."[111]

Transgender individuals do not conform to gender stereotypes because they do not conform to the gender stereotype that people identified-at-birth as male should grow up identifying as men, and that people identified-at-birth as female should grow up identifying as female. They often do not conform to sex stereotypes in terms of what names and pronouns they want to be called, and their dress and appearance.[112] Thus, after *Price Waterhouse*, it is not surprising that courts have found that sex discrimination includes gender identity discrimination, gender expression discrimination, and discrimination based on transgender status. For example, in *Schwenk v. Hartford*,[113] in 2000, the Ninth Circuit found that after *Price Waterhouse*, discrimination based on sex includes discrimination based on gender and discrimination based on failure to conform to "gender expectations." Furthermore, the court found that a prohibition on sex

105. *See* State's *Amicus Curiae* Brief in Opposition to Plaintiff's Application for Preliminary Injunction, Texas v. United States, No. 7:16-cv-00054-O (N.D. Tex. July 27, 2016) (filed by Washington, New York, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Vermont, and the District of Columbia) (noting that these states already allow transgender individuals to access bathrooms and locker rooms in accordance with their gender identity, and have not experienced an increase in violence or a decrease in privacy as a result).

106. *See, e.g.*, WORLD PROF'L ASSOC. FOR TRANSGENDER HEALTH, *supra* note 5 (transgender individuals should be supported affirmed in their gender identities).

107. 490 U.S. 228 (1989).

108. *Id*. at 250.

109. *Id*. at 255.

110. *Id*.

111. *See id*. at 272 (O'Connor, concurring).

112. *See, e.g.*, WORLD PROF'L ASSOC. FOR TRANSGENDER HEALTH, *supra* note 5.

113. 204 F.3d 1187, 1202 (9th Cir. 2000).

discrimination "encompasses both sex—that is, the biological differences between men and women—*and* gender."[114] Therefore, the court found that an attack motivated by the attacker's knowledge of the victim's transgender status was "discrimination related to the sex of the victim" because the "perpetrator's actions stem[ed] from the fact that he believed that the victim was a man who 'failed to act like' one."[115] "Discrimination because one fails to act in the way expected of a man or woman is forbidden."[116]

As one court put it in explaining why discrimination against a transgender individual is discrimination based on sex:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.[117]

Sensitive to the court decisions, the Federal Government (including the DOE and DOJ) has been consistent in recent years in the interpretation that sex discrimination includes gender identity and expression discrimination, and that transgender individuals should be treated in accordance with the gender that they identify with.[118]

This interpretation also accords with the latest medical recommendations as to the treatment of transgender individuals, many whom suffer from gender dysphoria, a condition characterized by a clinically significant distress over the

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114. *Id*. (emphasis in original).

115. *Id*.

116. *Id*.; *see also* Macy v. Holder, 2012 WL 1435995, at *6 (EEOC Apr. 20, 2012) ("Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex"); Lusardi v. McHugh, 2015 WL 1607756, at * 7–8 (EEOC Apr. 1, 2015) (finding sex discrimination when complainant was barred from using the women's restroom because she was transgender); Kastl v. Maricopa Cty. Cmty. Coll. Dist., No. CIV.02-1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege . . . by reason of that nonconforming trait."). Note that decisions made pursuant to the sex discrimination prohibition in Title VII are relevant to the sex discrimination prohibition in Title IX. *See, e.g*., Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992) (using Supreme Court's analysis of sex discrimination under Title VII in title IX case); Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) (same); Preston v. Virginia *ex rel* New River Comm. Coll., 31 F.3d 203, 207–08 (4th Cir. 1994) (sex discrimination under Title IX should be interpreted in the same manner as sex discrimination under Title VII).

117. Schroer v. Billington, 577 F. Supp. 2d 293, 306 (D.D.C. 2008) (finding that discrimination against an applicant because she was transitioning from male to female was prohibited sex discrimination under Title VII).

118. *See, e.g*., DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (April 29, 2014) (guidance stating that Title IX's prohibition on sex discrimination includes a prohibition on gender identity discrimination); DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES (Dec. 1, 2014) (schools must treat students in accordance with their gender identity for purposes of school programs).

discord between the gender assigned at birth and the gender the individual identifies with.[119] Discrimination can exacerbate this condition.[120]

Transgender students routinely worry about, face harassment in, and avoid using the restroom at school because they are not welcome to use the restroom that they are most comfortable in.[121] This leads to behaviors such as: 1) going without using the bathroom all day at school, which leads to urinary tract infections, kidney infections, and constipation; 2) self-imposed dehydration and not eating, in order to avoid going to the bathroom, which leads to faintness and lack of ability to concentrate and engage in classroom and other learning opportunities; 3) not participating in after-school activities to limit time away from a home bathroom, which leads to increased stress, depression, and isolation, among other things.[122]

The appropriate treatment for gender dysphoria is "medical and social support for gender transition and, thus, the affirmation of the individual's gender identity."[123] This includes permitting transgender individuals to access bathroom and locker room facilities that accord with their gender identity.[124]

Thus, the Dear Colleague Letter is likely to be found to be a reasonable and non-arbitrary and non-capricious interpretation of Title IX and its regulations. The interpretation is logical, is in accordance with the most recent court rulings on what constitutes sex discrimination, and it is in accordance with the most recent medical and psychiatric recommendations for the protection and inclusion of a vulnerable group.

3. Congressional Intent in Enacting Title IX

The *Texas* and *Nebraska* plaintiffs argue that Congress did not intend that Title IX would permit transgender individuals to access bathrooms and locker rooms that match their gender identity, and therefore Title IX should not be interpreted in that way now.[125] However, this argument is faulty because: 1) the public is not bound by what Congress intends when it writes a statute, but is instead bound by what the words of the statute are; 2) even if the public were bound by Congressional intent at the time of statute enactment, there is no indication that

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119. *See, e.g.*, AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013).

120. *Id.* at 455.

121. *See* WORLD PROF'L ASSOC. FOR TRANSGENDER HEALTH, *supra* note 5.

122. *See, e.g.*, Jodi L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, The Williams Institute, UCLA School of Law, at 75–76 (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf; [https://perma.cc/5XWM-RQBT]; *The Report of the 2015 U.S. Transgender Survey*, *supra* note 6, at 16–17.

123. Brief of the World Professional Association for Transgender Health, Pediatric Endocrine Society, et al. as Amici Curiae Supporting Appellant at 17, G.G. v. Gloucester County School Board, 824 F.3d 450 (4th Cir. 2015) (No. 15-2056).

124. *See id.* at 30 ("Providing appropriate support to transgender students requires affirming their gender identity in all aspects of school life, including their use of restrooms.").

125. Plaintiffs' First Amended Complaint at ¶¶ 22–117, Texas v. United States, No. 7:16-cv-00054-O, 2016 WL 4426495 (N.D. Tex. June 15, 2016); Plaintiffs' Complaint at ¶¶ 27, 34, Nebraska v. United States, No. 4:16-cv-03117-JMG-CRZ, (D. Neb. July 8, 2016).

Congress considered the question of how transgender individuals should be classified or treated under the statute.

Congressional intent does not determine how a statute may be applied after enactment.[126] In *Oncale v. Sundowner Offshore Services*,[127] the Supreme Court considered whether same-sex sexual harassment could violate Title VII's prohibition of "discrimination . . . because of . . . sex."[128] In determining that it could, the Court recognized that "male-on-male sexual harassment in the workplace was . . . not the principal evil Congress was concerned with when it enacted Title VII." However, because the Court concluded that the statute covered the "reasonably comparable evil" of male-on-female sexual harassment, and it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed," the Court held that same-sex sexual harassment could constitute a violation of Title VII.[129]

Similarly here, although Congress at the time of enacting Title IX in 1972 probably never considered the application of the statute it was passing on transgender individuals, the words of Title IX are what they are and must be interpreted in situations involving transgender individuals, as transgender individuals are also protected under Title IX from discrimination "on the basis of sex."[130] Thus, Congressional intent at the time of enactment of Title IX does not invalidate the Dear Colleague Letter.

4. Prior Inconsistent Agency Interpretation

The *Nebraska* plaintiffs argue that the Dear Colleague Letter is invalid because the DOE and the DOJ did not always interpret Title IX and its regulations as they do now, and in fact, a prior interpretation of Title VII's prohibition on sex discrimination in 2005 by the DOJ conflicts with the interpretation now found in the Dear Colleague Letter. [131] However, the fact that prior agency interpretations may conflict with the interpretation now made does not invalidate the agency interpretation.[132] In fact, part of the value of interpretative rules is that they can be easily changed if the agency determines that its prior interpretations were incorrect or misguided.[133]

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126. Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998).

127. 523 U.S. 75 (1998).

128. *Id.* at 77.

129. *Id.* at 79; *see also* Decker v. Northwest Envtl. Def. Ctr., 133 S. Ct. 1326, 1340 (2013) (Scalia, J., dissenting) ("We do not inquire what the legislature meant; we ask only what the statute means.") (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899)).

130. *See* 20 U.S.C. § 1681.

131. Plaintiffs' Complaint at ¶ 35, Nebraska v. United States, No. 4:16-cv-03117-JMG-CRZ (D. Neb. July 8, 2016) (citing Defendant's Motion to Dismiss at 6, Schroer v. Billington, No. 05-1090 (August 1, 2005) (D.D.C.)). In this case, the DOJ argued that Title VII's prohibition on sex discrimination did not protect transgender individuals from discrimination based on gender transition.

132. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1209 (2015).

133. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 554 (2000) (noting that an agency "can correct its errors quickly if its experience with an interpretative rule persuades it that the rule was a mistake").

In the case of *Perez v. Mortgage Bankers Association*,[134] the Supreme Court clarified that an agency can change its interpretation of a statute or regulation, multiple times even, in its interpretative rules, and this does not render the last interpretation invalid.[135] In *Perez*, the United States Department of Labor changed its mind in interpretative documents multiple times on the question of whether mortgage loan officers qualified as "administrative employees" under the Fair Labor Standards Act of 1938, which impacted whether they were entitled to overtime pay or not.[136] The Mortgage Bankers Association sued, arguing the most recent interpretation was invalid because it conflicted with prior interpretations.[137] The Supreme Court disagreed, finding that because under the clear language of the APA, an agency could issue an interpretative rule without notice-and-comment procedures, the agency could therefore issue a new interpretative rule which overturned the old rule, also without notice-and-comment procedures.[138]

Here, the *Nebraska* plaintiffs point to a conflicting interpretation by the DOE and DOJ dating back to 2005.[139] However, this prior conflicting determination does not preclude the issuance of the Dear Colleague Letter now. In fact, for the past four years, the agencies of the federal government have been consistent in their findings under different laws prohibiting sex discrimination that transgender individuals should be treated as the gender they identify with for purposes of bathroom and locker room usage.[140] Additionally, the Federal Government has been consistent since at least 2011 that discrimination based on gender non-conformity is prohibited sex discrimination under Title IX.[141] Thus, the fact that the DOE and DOJ have not always interpreted Title IX as they now do does not invalidate the Dear Colleague Letter.

5. The Level of Deference the Courts Should Give the Dear Colleague Letter

As discussed above, courts should find that the Dear Colleague Letter contains a reasonable interpretation of the ambiguous terms "sex" and "sex discrimination" contained in Title IX and its regulations. The next question is whether courts should defer to the agency interpretation or substitute their own interpretation of Title IX and its regulations in place of the agency interpretation. The *Texas* and *Nebraska* plaintiffs do not raise this issue in their briefs. However,

134. 135 S. Ct. 1199, 1209 (2015).

135. *Id.*

136. *Id.* at 1201.

137. *Id.*

138. *Id.*

139. *See supra* note 131.

140. *See supra* notes 16–25 and accompanying text.

141. *See, e.g.*, Brief of United States as Amicus Curiae Supporting Plaintiffs-Appellants and Urging Reversal at 17, Carmichael v. Galbraith, No. 12-11074 (5th Cir. Apr. 1, 2013) (arguing that harassment based on sex stereotypes was prohibited sex discrimination under Title IX); Brief of United States' Mem. as *Amicus Curiae* in Response to Defs. Mot. To Dismiss/Mot. for Summary Judgment at 12, Pratt v. Indian River Cent. Sch. Dist., No. 7:09-cv-00411 (N.D.N.Y. Jan. 3, 2011) (arguing that harassment based on gender non-conformity is a type of sex discrimination prohibited by Title IX and the Equal Protection Clause).

the United States will undoubtedly argue that its reasonable interpretation of ambiguous statutes and regulations should control.[142] It will be correct.

Courts should give deference to and uphold reasonable agency interpretations of ambiguous statutes and regulations both so that the public and regulated entities can rely on those interpretations and so that agency expertise can be brought to bear on issues of statutory and regulatory interpretation.[143] However, the level of deference that courts should give to the Dear Colleague Letter is unclear. Under the *Chevron* Deference doctrine, courts should defer to agency interpretations of statutes so long as: 1) the statute is ambiguous; and 2) the agency interpretation is reasonable.[144] However, the Supreme Court in *United States v. Mead Corp*.[145] limited this level of deference to only applying where the agency interpretation is contained in a legislative rule.[146] The *Mead* Court did indicate that *Skidmore* deference should apply to agency interpretations if Chevron deference does not apply.[147] Under the *Skidmore* deference doctrine, the Court looks at the agency interpretation's "ability to persuade" by examining the following factors: "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[148]

However, another deference regime, *Auer* deference, applies to agency interpretations of their own regulations. *Auer* deference requires a court to defer to an agency interpretation of its own regulation "unless that interpretation is 'plainly erroneous or inconsistent with the regulation,'" even if the agency interpretation is neither the only nor the best possible interpretation.[149] The *Auer* deference doctrine has been questioned by three of the eight current Justices sitting on the Supreme Court, two of whom have indicated that they believe that no deference to the agency interpretations of their own regulations should apply.[150]

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142. *See* G.G. v. Gloucester County School Board, No. 4:15-cv-00054, at 15 (E.D. Va. Jun 11, 2015) (United States Statement of Interest) (arguing that Auer deference should apply to its interpretation of federal law).

143. *See, e.g.*, Nicholas R. Bednar, *Defying Auer Deference:* Skidmore *as a Solution to Conservative Concerns in* Perez v. Mortgage Bankers Association, MINN. L. REV. (2015) (arguing deference to agency interpretations is important for stability interests).

144. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

145. 533 U.S. 218 (2001).

146. *Id*. at 238.

147. *Id*. at 221.

148. *Id*. at 219.

149. Decker v. Northwest Envtl. Def. Ctr., 133 S. Ct. 1326, 1329 (2013) (quoting Chase Bank USA, N. A. v. McCoy, 562 U.S. 195, 207 (2011)) (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

150. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring) (noting that the Auer doctrine may be incorrect); *id.* at 1221 ((Thomas, J., concurring) (noting that the Auer deference doctrine should be overruled); *see also* Talk America v. Michigan Bell Telephone, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) (admitting that he had in the past accepted the *Auer* deference doctrine, but stating that he was becoming "increasingly doubtful of its validity"). Numerous scholars have also criticized the doctrine, raising many of the same concerns as the Justices. *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654 (1996) (arguing that allowing a single agency to both make a rule and interpret the rule violates

It is unclear whether a court would find that the Dear Colleague Letter interprets Title IX, Title IX's regulations, or both. Title IX itself prohibits sex discrimination.[151] The Dear Colleague Letter interprets the meaning of "sex" and "sex discrimination," suggesting that the Dear Colleague Letter is interpreting Title IX itself. On the other hand, Title IX regulations permit schools to have separate bathrooms and locker rooms based on sex,[152] and the Dear Colleague Letter interprets how this provision applies to transgender students. Furthermore, Title IX regulations also prohibit "[s]ubjecting any person to separate or different rules of behavior, sanctions, or other treatment; . . . [or] [o]therwise limiting any person in the enjoyment of any right, privilege, advantage, or opportunity."[153] The Dear Colleague Letter also arguably interprets these provisions. If the Dear Colleague Letter interprets Title IX, it should receive *Skidmore* deference.[154] If it interprets Title IX's regulations, it should receive *Auer* deference,[155] assuming that the Supreme Court decides to continue the *Auer* deference doctrine. If the Supreme Court decides to abandon the *Auer* doctrine, it is likely that *Skidmore* would apply.[156]

So, at the very least, it is likely a court will apply *Skidmore* deference to the Dear Colleague Letter. For the reasons articulated in Part II.B.2, it is likely that a court would find the DOE and DOJ's interpretations of Title IX and its regulations persuasive, well-thought-out, and consistently applied, and thus uphold the Dear Colleague Letter under the *Skidmore* deference doctrine.

C. The Constitutional Challenges to the Dear Colleague Letter

The Federal Government has limited and enumerated powers, given to it by the United States Constitution, and may not exercise power outside of the powers granted by the Constitution.[157] Title IX can be justified as a legitimate exercise of Federal power pursuant to two separate Constitutional provisions: The Spending Clause, and the Fourteenth Amendment. Opponents of the Dear Colleague Letter attack the letter as an invalid exercise of Federal power under the Spending Clause, but do not address whether the letter would be valid under the Fourteenth

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the constitutional principle of separation of powers); Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN L. REV. 787, 832 (2014) (arguing that the Auer deference doctrine is unclear in its contours, and is therefore applied differently by different Courts of Appeals); Bednar, *supra* note 143 (arguing that *Auer* deference should be replaced with *Skidmore* deference); *see also* Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1461–62 (2011).

151. 20 U.S.C. § 1681 (2012).

152. 34 C.F.R. § 106.33 (2016).

153. 34 C.F.R. § 106.31(b) (2013); 28 C.F.R. § 54.400(b) (2016). Under Title IX it is clear that a school's restroom and locker room policies must comply with Title IX. *See* 20 U.S.C. § 1687(2)(b) (2012) (a "program or activity" includes "all the operations" of a "local education agency . . . any part of which is extended Federal financial assistance").

154. *See supra* note 150 and accompanying text.

155. *See supra* note 149 and accompanying text.

156. *See, e.g.*, Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168-69 (2012) (after finding *Auer* deference did not apply to the agency interpretation in question, applying the *Skidmore* factors).

157. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) (Roberts, J., plurality).

Amendment.[158] The following sections will show why courts are likely to find the Federal Government's interpretation of Title IX is a valid exercise of power under both the Spending Clause and the Fourteenth Amendment.

1. The Dear Colleague Letter and the Spending Clause

Pursuant to Article 1 of the Constitution, Congress has the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the . . . general Welfare of the United States.[159] This gives the Federal Government the power to tax and spend, and thus influence areas of life that it could not otherwise directly control.[160] However, although the Federal Government may, in using its Spending Power, influence and encourage States to act in certain ways or accept certain programs, the Supreme Court has likened the exercise of the Spending Power to the creation of a contract, and found that a State must voluntarily and knowingly accept the terms of the contract.[161] Indeed, the Supreme Court has noted that the federal government may not use "undue influence" or compel a state into action by using the Spending Power.[162] In other words, State actors must have a choice in whether to accept or reject the conditions and the funding offered by the Federal Government, and may not be coerced into doing so.[163] Additionally, exercise of the Spending Power must: 1) promote the "general welfare," 2) "unambiguously" let States know what is required of them in order to receive funds, 3) be related "to the federal interest in particular national projects or programs," and 4) not be unconstitutional under other provisions of the Constitution.[164]

Opponents of the Dear Colleague Letter argue that it violates the Spending Clause of the United States Constitution.[165] They make two main arguments: 1) that the Dear Colleague Letter is invalid because it coerces the states into accepting its rules by threatening the removal of all Title IX funds to a State if it does not comply, and 2) that the Dear Colleague Letter is invalid because it imposes a new condition on the states that was not clearly articulated at the time the States agreed to accept Title IX. As this Part will show, both of these arguments are flawed, because the interpretation of Title IX in the Dear Colleague Letter is not a new program imposed on States, but is instead a valid interpretation of Title IX, a

158. Plaintiffs' First Amended Complaint at ¶¶ 101, 109–10, Texas v. United States, No. 7:16-cv-00054-O, 2016 WL 4426495; Plaintiffs' Complaint at ¶¶ 118–20, 125, 127, Nebraska v. United States, No. 4:16-cv-03117-JMG-CRZ, (D. Neb. July 8, 2016).

159. U.S. CONST. art. I, § 8, cl. 1.

160. United States v. Butler, 297 U.S. 1, 66 (1936) ("[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution"); Nat'l Fed'n of Indep. Bus., 132 S. Ct. 2566, 2578 (2012) (Roberts, J., plurality).

161. *Sebelius*, 132 S. Ct. at 2578 (citing Pennhurst State Sch. and Hosp'l v. Halderman, 451 U.S. 1, 17 (1981)).

162. *Id.* at 2602 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

163. *Id.*

164. South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) (citations omitted).

165. Plaintiffs' First Amended Complaint at ¶¶ 101–10, Texas v. United States, No. 7:16-cv-00054-O, 2016 WL 4426495 (N.D. Tex. June 15, 2016); Plaintiffs' Complaint at ¶¶ 118–28, Nebraska v. United States, No. 4:16-cv-03117-JMG-CRZ, (D. Neb. July 8, 2016).

current program. Additionally, at the time of agreeing to Title IX, the States also knowingly agreed to allow the Federal Government to interpret the prohibition on sex discrimination contained within Title IX.[166]

a. Coercion and the Spending Clause

Plaintiff States were not coerced into accepting the Federal Government's interpretation of Title IX and its regulations because they knowingly accepted Title IX's prohibition on sex discrimination and the Federal Government's authority to interpret Title IX's prohibition on sex discrimination.[167] Additionally, the Federal Government's interpretation is not a new Act that the States must be free to reject, but is rather a binding interpretation of an agreement they already accepted.

The Spending Clause does not allow the Federal Government to coerce states into accepting new conditions or new programs by threatening the withdrawal of significant funds from existing programs.[168] When Congress makes a law using its Spending Power, Congress may influence States' choice to accept or reject the offer in the law by using either carrots or sticks, but may not coerce the States into accepting the offer by effectively giving the States no power to refuse the offer.[169] However, this rule applies to new laws made by Congress, not to regulations and agency interpretations of law or regulations validly issued under a law *already validly in existence*.[170]

Under the Spending Clause, Congress may threaten the removal of funds in order to encourage a state to do something, so long as the amount of the funds at issue would not effectively leave the state no choice but to accept the federal offer.[171] In *South Dakota v. Dole*,[172] the Supreme Court found a federal law did not violate the Spending Clause when it required states to raise their legal drinking age to 21, or else lose 5% of their federal highway funding. The *Dole* Court asked whether "the financial inducement offered by Congress" was "so coercive as to pass the point at which 'pressure turns into compulsion.'"[173] The *Dole* Court found that the pressure to raise the legal drinking age was only "mild encouragement" considering the relatively small amount of money at stake.[174] Thus, the Court found no Spending Clause violation because the states retained the power to make their own decision regarding the legal drinking age "not merely in theory but in fact."[175]

166. *See* 20 U.S.C. §§ 1681–82 (2012).

167. *See id.*

168. *See, e.g.*, *Sebelius*, 132 S. Ct. at 2601.

169. *See id*.

170. *See* Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 252 (2014) (agency actions pursuant to a statute are "not the right subject of a coercion challenge, even though an action challenging the constitutionality of the underlying statute might be").

171. *Sebelius*, 132 S. Ct. at 2599.

172. 483 U.S. 203 (1987).

173. *Id.* at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

174. *Id.*

175. *Id.* at 211–12.

A law enacted pursuant to the Spending Clause that requires States to do something or else lose significant funds if they do not, is a violation of the Spending Clause if it leaves the States with no real choice but to do as the Federal Government asks.[176] In *National Federation of Independent Business v. Sebelius*,[177] the Supreme Court found for the first time that a Congressional Act violated the Spending Clause of the Constitution.[178] Before that, in the face of every Spending Clause challenge raised, the Court had found that the federal government's action did not violate the Spending Clause, and had even expressed doubt that a request that a state do something with a monetary carrot attached could ever violate the Spending Clause, under the rationale that a state always had the option to reject federal money.[179] In *Sebelius*, the Court considered a Spending Clause challenge to the Medicaid expansion provision in the Patient Protection and Affordable Care Act of 2010 ("ACA") brought by 26 states against the federal government.[180]

The decision was a split decision. Chief Justice Roberts wrote the plurality decision on behalf of three Justices and found that the Medicaid expansion provision violated the Spending Clause and the proper remedy was to strike the penalty provision in the ACA.[181] Justice Ginsburg wrote a concurring and dissenting opinion on behalf of two justices, and found the Medicaid expansion valid but agreed that the proper remedy in case of a violation was to uphold the ACA but strike the penalty.[182] Justices Scalia wrote a dissent for four justices, finding the Medicaid expansion provision of the ACA violated the Spending Clause and that the entire ACA should be struck down.[183] The overall result was that the Court found that the Medicaid expansion penalty provision in the ACA was a violation of the Spending Clause, and the proper remedy was a striking of that penalty from the ACA.

The Medicaid expansion provision at issue in *Sebelius* required states to greatly expand the number of people covered by Medicaid, or else risk losing all Medicaid funding, including for those people covered under the Medicaid law as

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176. *Sebelius*, 132 S. Ct. at 2661 (Scalia, J., dissenting) ("[T]he legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States' choice to accept or decline the offered package.").

177. 132 S. Ct. 2566 (2012).

178. *See id.* at 2630 (Ginsburg, J., concurring and dissenting) (noting that "[t]he Chief Justice therefore—*for the first time ever*—finds an exercise of Congress' spending power unconstitutionally coercive") (emphasis in original); *id.* at 2643 (Scalia, J., dissenting) ("Several of our opinions have suggested that the power to tax and spend cannot be used to coerce state administration of a federal program, but we have never [before] found a law enacted under the spending power to be coercive.").

179. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937) (finding an unemployment scheme created by states but encouraged by the federal government using its spending power did not violate the Spending clause, and noting that "[n]othing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation."); *see also* South Dakota v. Dole, 483 U.S. 203 (1987) (finding that the federal act requiring that states raise their legal drinking age to 21 or else lose 5% of federal highway funding did not violate the Spending Clause).

180. *Sebelius*, 132 S. Ct. at 2580 (Roberts, J., plurality).

181. *Id.*

182. *Id.* at 2629–42 (Ginsburg, J., concurring and dissenting).

183. *Id.* at 2643 (Scalia, J., dissenting).

it was prior to the ACA.[184] The Medicaid expansion greatly increased the number of people eligible for Medicaid, as most States did not extend Medicaid to childless adults, and limited coverage to those parents that had incomes well below the federal poverty level, whereas the Medicaid expansion required coverage for all adults, with or without children, with incomes below 133% of the federal poverty level.[185]

Although the federal government would fully pay the initial costs of the program through 2016, after that, states' contributions would gradually increase until the federal government was paying a minimum of 90% of the costs.[186] The Court found that by threatening to take away the Medicaid funding for existing programs if a state did not opt in to the Medicaid expansion, the Federal Government violated the Spending Clause and unconstitutionally coerced the States into accepting the Medicaid expansion program.[187] The Roberts plurality contrasted the case with the prior Supreme Court decision in *South Dakota v. Dole*, where the 5% of federal highway funds at issue amounted to "less than half of one percent of South Dakota's budget at the time."[188] The Roberts plurality noted that in contrast to *Dole*, here, the threatened loss to the state was "over 10 percent of a State's overall budget," and that therefore the threatened removal of funding was "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."[189] The Roberts plurality concluded that Congress had no constitutional right to force the states to accept the Medicaid expansion: "Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer."[190]

Justice Scalia's dissent,[191] which provided the additional justices needed for the Court to find a violation of the Spending Clause, also noted the drastic amount of money that was at stake if a state dared to refuse the Medicaid expansion: "more than one-fifth of the State's expenditures,"[192] state expenditures being defined as "annual expenditures from the States' own funding sources, and it excludes federal grants."[193] Justice Scalia's dissent called this a "severe sanction" if a state "refuses to go along."[194] He noted that "spending-power legislation cannot coerce state participation," and that "if States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under

184. *Id.* at 2582.

185. *Sebelius*, 132 S. Ct. at 2601.

186. *Id.*

187. *Id.* at 2603–04 (Roberts, J., plurality) (writing for three Justices); *id.* at 2666 (Scalia, J., dissenting) (writing for four Justices).

188. *Id.*

189. *Id.* at 2604.

190. *Id.* at 2608.

191. *Sebelius*, 132 S. Ct. at 2657 (Scalia, J., dissenting). This opinion is labeled a "dissent" even though it concurs with the plurality in finding a violation of the Spending Clause.

192. *Id.* (Scalia, J., dissenting).

193. *Id.* at 2657 n.7 (Scalia, J., dissenting).

194. *Id.*

the spending power."[195] Thus, because the amount threatened to be removed was so large, Justice Scalia's dissent found the ACA unconstitutionally coercive under the Spending Clause.[196]

Examining prior cases, it is clear that in order for an Act to be found invalidly coercive under the Spending Clause, it must purport to encourage the States to do something and contain a threat of removal of federal funds that is so significant that no State could refuse to comply. In *Dole*, the challenged Act asked the States to increase their legal drinking age to 21 or else lose 5% of federal highway funding. In *Sebelius*, the challenged Act asked the states to expand Medicaid coverage to additional individuals or else lose all their federal Medicaid funding.

By contrast, the Dear Colleague Letter is not an Act that asks a state to do something or else lose federal funding. Rather, it is the Federal Government's clarification of terms found in Title IX and its regulations, as the Federal Government is authorized to do by Title IX itself and the APA.[197] The Act that asked the states to do something or else lose federal funding was Title IX, which was signed into law on June 23, 1972.[198] Thus, if the *Nebraska* or *Texas* plaintiffs wanted to allege a violation of the Spending Clause, they should have challenged Title IX itself. Neither set of plaintiffs have done so. An interpretative rule is not an offer for a contract with the states. Rather, it is an interpretation of terms of a contract already made between the states and the federal government, an interpretation validly made under the terms of the contract and applicable law.[199] Most states have chosen to accept the conditions against sex discrimination that Title IX requires in order to receive federal funding for education.[200] Thus, courts are likely to find that the Dear Colleague Letter does not violate the Spending Clause because of coercion.

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195. *Id.* at 2661.

196. *Id.* at 2666.

197. *See* Title IX, 20 U.S.C. § 1682 (2012) ("Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title [prohibiting sex discrimination in 'education program[s] or activit[ies] receiving Federal financial assistance'] 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.") (emphasis added); Administrative Procedures Act (APA), 5 U.S.C. § 553(b)(A) (2012) (recognizing that agencies issue "interpretative rules"); APA, 5 U.S.C. § 551(4) (defining "rule" as including "an agency statement . . . designed to . . . interpret . . . law").

198. *See* U.S. Dep't of Justice, *Overview of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et. seq.* (Aug. 7, 2015), https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq [https://perma.cc/FDL3-QAD5].

199. *See supra* note 133.

200. U.S. Dep't of Educ., *10 Facts About K-12 Education Funding* (June 2005), http://www2.ed.gov/about/overview/fed/10facts/index.html?exp [https://perma.cc/8U3D-LNXP] ("While most states choose to accept and use federal program funds, in the past, a few states have forgone funds for various reasons").

b. Unfair Surprise and the Spending Clause

Next, the *Texas* and *Nebraska* plaintiffs argue that the Dear Colleague Letter violates the Spending Clause because it is an unfair surprise that they did not sign up for at the time they agreed to accept the Federal Government's offer of continued federal money for education in return for following Title IX's prohibition on sex discrimination.[201] However, this argument is faulty because, in accepting the offer inherent in Title IX, the States knowingly and voluntarily agreed to prohibit sex discrimination in education,[202] and also knowingly and voluntarily agreed that the Federal Government would issue rules and regulations interpreting this prohibition.[203]

When exercising its Spending Power, Congress must "unambiguously" let States know what is required of them in order to receive funds, so that "States [can] exercise their choice knowingly, cognizant of the consequences of their participation."[204] Congress may not "surpris[e] participating States with postacceptance or 'retroactive' conditions."[205]

States are bound by the language of the Spending Clause Act that they sign up for, and may not be surprised by additional obligations not contained within the Act they agreed to.[206] In *Pennhurst State School & Hospital v. Halderman*,[207] the Supreme Court examined the Developmentally Disabled Assistance and Bill of Rights Act of 1975, which provided federal funds to help States care for the disabled so long as the States submitted plans found satisfactory to the federal agency responsible for administering the Act.[208] In *Pennhurst*, disabled patrons sued a state-run institution for the disabled, alleging that the institution was in violation of the Act because of dangerous and inhumane conditions at the institution.[209] The Supreme Court considered whether the Act created a legally-binding obligation on states that accepted the Act's funding to treat the disabled with a certain level of care.[210] The Court found that it did not.[211] The Act stated in its "Bill of Rights" section that Congress found that "[p]ersons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities," and that "[t]he treatment, services, and habilitation for a person with developmental disabilities should be . . . provided in the setting that is least restrictive of the person's personal liberty."[212]

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201. Plaintiffs' First Amended Complaint at ¶¶ 101, 109–10, Texas v. United States, No. 7:16-cv-00054-O (N.D. Tex. June 15, 2016); Plaintiffs' Complaint at ¶¶ 118–20, 125, 127, Nebraska v. United States, No. 4:16-cv-03117-JMG-CRZ (D. Neb. July 8, 2016).

202. *See* 20 U.S.C. § 1681.

203. *See* 20 U.S.C. § 1682.

204. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

205. *Id*. at 25.

206. *Id*.

207. 451 U.S. 1 (1981).

208. *Id*. at 11, 14.

209. *Id*. at 6.

210. *Id*. at 15.

211. *Id*. at 31–32.

212. *Id*. at 13 (quoting the Developmentally Disabled Assistance and Bill of Rights Act of 1975).

The Court found that these provisions of the Act stating the rights of the disabled were "intended to be hortatory, not mandatory," as evidenced by the fact that there was no termination of funding provision if the state failed to meet the standards,[213] and there was no language indicating that the "finding" of Congress was meant to be binding on the states accepting the federal funds.[214] The Court reasoned that, especially when "a State's potential obligations under the Act are largely indeterminate" as they were here because "[i]t is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting," Congress must "sp[eak] clearly that we can fairly say that the State could make an informed choice."[215] The Court concluded that "[i]n this case, Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with [the hortatory language in the Bill of Rights section of the Act]."[216] Thus, the Court found that the Act did not create an obligation to treat the disabled with a certain standard of care because nowhere in the Act was accepting such an obligation made a condition of receiving funds.[217]

In *Pennhurst*, the Court found that the Act did not require States accepting funding to provide a certain level of care to the disabled. In contrast, Title IX very clearly and explicitly does require States accepting funding to not discriminate on the basis of sex.[218] Title IX requires that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[219] This clearly puts a burden on education programs or activities not to discriminate on the basis of sex if they want to continue receiving Federal financial assistance. If that Act in *Pennhurst* had stated something like "no disabled person shall be denied appropriate treatment in the least restrictive setting under any care or treatment facility receiving Federal financial assistance" it would have been clear from the Act that treatment facilities receiving Federal financial assistance had an obligation to provide appropriate treatment in the least restrictive setting. Because what was required of States under the *Pennhurst* Act was different than what is required of States under Title IX, the obligations of States are different under each act.

The Court in *Pennhurst* noted that the obligation to provide "appropriate treatment" in the "least restrictive setting" was "indeterminate," so that it was especially important that the States know they were agreeing to meet this indeterminate standard.[220] In the case of Title IX, the prohibition on sex discrimination could be seen to be indeterminate—people are likely to disagree

213. *Pennhurst State Sch. & Hosp.*, 451 U.S. at 24.
214. *Id.*
215. *Id.* at 24–25.
216. *Id.*
217. *Id.* at 13.
218. 20 U.S.C. § 1681 (2012).
219. *Id.*
220. *Pennhurst State Sch. & Hosp.*, 451 U.S. at 24.

about what constitutes sex discrimination.[221] However, in the case of Title IX, States did clearly agree to prohibit sex discrimination, and they clearly agreed to allow the Federal Government to determine what constitutes sex discrimination under the Act.[222] Title IX provides that "[e]ach 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 [prohibition on sex discrimination] with respect to such program or activity by issuing rules, regulations, or orders of general applicability."[223] Thus, unlike the state in *Pennhurst*, which had not agreed to treat the disabled with a certain standard of care, States that accept federal funding for education programs have agreed to prohibit sex discrimination and to allow the Federal Government to make interpretations about what prohibiting sex discrimination requires.

Furthermore, it should have come as no surprise to the States that the prohibition on sex discrimination would require continuing and ongoing affirmative changes in educational programs, given the vast and obvious disparities in opportunities for men and women in educational settings. For example, when Title IX was signed, about 170,000 men participated in college athletics, but only 30,000 women.[224] Additionally, only 7% of high school athletes were female.[225] The interpretation of what constitutes sex discrimination has changed to encompass things that likely would not have been imagined at the time Title IX was implemented, for example, to include same-sex sexual harassment.[226]

2. The Dear Colleague Letter and the Fourteenth Amendment

The *Texas* and *Nebraska* plaintiffs do not acknowledge that Title IX and its rules and regulations, including the Dear Colleague Letter, are authorized by the Fourteenth Amendment of the United States Constitution.[227] However, the Fourteenth Amendment is a separate basis of authority for Title IX and its rules and regulations.[228] Therefore, even if the *Texas* and *Nebraska* arguments that the Dear Colleague Letter violates the Spending Clause were correct,[229] courts should still find that Title IX and Dear Colleague Letter are valid exercises of power under the Fourteenth Amendment.

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221. *See supra* notes 76–95 and accompanying text.

222. 20 U.S.C. § 1682.

223. *Id.*

224. *See, e.g.*, Christine I. Hepler, *Symposium: A Bibliography of Title IX of The Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441, 442–43 (2013).

225. *See, e.g.*, Deborah Brake & Elizabeth Catlin, *Gender & Sports: Setting a Course for College Athletics: The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 52–53 (1996).

226. *See* Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998) (finding sex discrimination includes same-sex sexual harassment).

227. *See* Plaintiffs' First Amended Complaint, Texas v. United States, No. 7:16-cv-00054-O (N.D. Tex. June 15, 2016) (nowhere mentioning the Fourteenth Amendment); Plaintiffs' Complaint at ¶¶ 121–22 Nebraska v. United States, No. 4:16-cv-03117-JMG-CRZ, (D. Neb. July 8, 2016) (only mentioning the Fourteenth Amendment in relation to alleged violations of Title VII).

228. *See infra* notes 230–35 and accompanying text.

229. Part II.C.1, *supra*, shows why the Spending Clause arguments made by the *Texas* and *Nebraska* plaintiffs are not correct.

The Fourteen Amendment to the United States Constitution contains the Equal Protection Clause, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[230] The Supreme Court has interpreted this Equal Protection Clause as forbidding sex discrimination by states unless the discrimination is substantially related to an important government interest.[231] The Fourteenth Amendment also provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[232] Congress's power to legislate pursuant to the Fourteenth Amendment is not limited to those instances where it intends to legislate under, or states that it is legislating under, the Fourteenth Amendment.[233] Rather, so long as an Act objectively enforces the Fourteenth Amendment, the Act is authorized by the Fourteenth Amendment.[234] Additionally, an Act enforcing the Fourteenth Amendment must be "congruen[t] and proportional[]" to the Fourteenth Amendment violation it is meant to remedy.[235] To be congruent and proportional, the Act must have been passed by Congress to correct widespread

230. U.S. CONST. amend. XIV § 1.

231. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1973); United States v. Virginia, 518 U.S. 515, 533 (1996).

232. U.S. CONST. amend. XIV § 5.

233. *See, e.g.*, *Sebelius*, 132 S. Ct. at 2598 (Roberts, J., plurality) (finding the individual mandate penalty in the ACA valid under taxing power of Congress, even though Congress did purport to use its taxing power because the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise") (quoting Woods v. Miller, 333 U.S. 138, 144 (1948)); *Sebelius*, 132 S. Ct. at 2609, 2626 (Ginsburg, J., concurring and dissenting) (also finding the individual mandate penalty in the ACA valid under Congress's taxing power and noting that the penalty was "collectible as a tax"); Franks v. Ky. Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998) ("The question is whether Congress actually had the authority to adopt the legislation pursuant to [Section 5 of the Fourteenth Amendment], not whether Congress correctly guessed the source of its authority."); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997) (noting that the relevant inquiry is "whether Congress could have enacted the legislation at issue pursuant to a constitutional provision granting it the power to abrogate. As long as Congress had such authority as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant.").

234. *See supra* note 232.

235. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519, 534 (1997) (finding the federal *Religious Freedom Restoration Act* invalid under Section 5 of the Fourteenth Amendment because: 1) there was no Congressional record of widespread intentional State discrimination on the basis of religion, and 2) the broad reach of the law's application would mean that any state law could be found invalid if it burdened an individual's exercise of religion with no compelling interest or least restrictive means applied).

Fourteenth Amendment violations by the States,[236] and the Act must not expand too greatly the conduct prohibited by the Fourteenth Amendment.[237]

Since Title IX prohibits sex discrimination in education, and the Equal Protection Clause also prohibits sex discrimination in education, Title IX is "appropriate legislation" that enforces the Equal Protection Clause, and is therefore valid legislation authorized by the Fourteenth Amendment.[238] Furthermore, Title IX is "congruent" and "proportional" to the harm that it is meant to remedy because at the time Title IX was passed, sex discrimination in state-run education programs was widespread and pervasive,[239] and sex

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236. *See City of Boerne*, 521 U.S. at 519, 530 (finding that RFRA was not authorized by Section 5 of the Fourteenth Amendment in part because there was no Congressional record finding that State laws passed due to religious bigotry was a significant problem at the time RFRA was passed); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 90 (2000) (finding that ADEA was not authorized by Section 5 of the Fourteenth Amendment in part because there was no Congressional record finding that unconstitutional age discrimination was a significant problem at the time ADEA was passed); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (finding that Title I of the ADA was not authorized by Section 5 of the Fourteenth Amendment in part because there was no Congressional record showing that discrimination against the disabled by States was a widespread problem); Coleman v. Court of Appeals, 132 S. Ct. 1327, 1334 (2012) (noting that in order to be upheld as valid under Section 5 of the Fourteenth Amendment, a challenged provision should be supported by "evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations").

237. *See, e.g.*, *Kimel*, 528 U.S. at 80–81 (finding federal age discrimination law not authorized by Section 5 the Fourteenth Amendment because the Fourteenth Amendment does not prohibit States from discriminating based on age as distinctions based on age are subject to rational basis review, and noting that "Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text" (quoting Flores, 521 U.S. at 536)).

238. *See, e.g.*, Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997) (finding that Title IX is authorized by Section 5 of the Fourteenth Amendment because Title IX was "enacted specifically to combat" gender discrimination in education that is also prohibited by the Equal Protection Clause); Franks v. Ky. Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998) (finding Title IX's provisions valid under Section 5 of the Fourteenth Amendment); Doe v. Univ. of Ill., 138 F.3d 653, 660 (7th Cir. 1998) (finding that "Congress enacted Title IX and extended it to the States, at least in part, as a valid exercise of its powers under Section 5 of the Fourteenth Amendment"); Thorpe v. Va. State Univ., 6 F. Supp. 2d 507, 516 (E.D. Va. 1998) (finding that Title IX "may be regarded as an 'enactment to enforce the Equal Protection Clause'" because Congress "could have enacted Title IX under Section 5 of the Fourteenth Amendment") (citations omitted); *see also* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 234 (2005) (discussing Title IX's constitutional basis); *but see* Litman v. George Mason Univ., 5 F. Supp. 2d 366, 374 (E.D. Va. 1998) (finding that because "the substantive provisions of Title IX go beyond the Fourteenth Amendment's prohibitions against gender discrimination . . . Title IX was properly enacted pursuant to Congress' spending-power, and its spending-power alone").

239. *See, e.g.*, Committee on Labor and Public Welfare Report on the Education Amendments of 1974 (March 29, 1974) at 77–79 (noting "extensive evidence of sex discrimination in . . . education"); Brake & Catlin, *supra* note 225, at 52–53 (1996) (noting great disparities between men and women in athletic opportunities in sports at the time Title IX was enacted); *cf.* Tenn. v. Lane, 541 U.S. 509, 525–26 (2004) (upholding Title II of the ADA as authorized by Section 5 of the Fourteenth Amendment in part due to substantial evidence of unconstitutional barriers to the disabled receiving public services and programs at time of the ADA's passage); *City of Boerne*, 521 U.S. at 519, 530 (finding no evidence that State laws passed due to religious bigotry was a significant problem at the time RFRA was passed);

discrimination is already prohibited by the Fourteenth Amendment.[240] Thus, even if the *Texas* and *Nebraska* plaintiffs' Spending Clause challenges were to prevail in court, any court presented with the question should find that Title IX and its rules and regulations, including the Dear Colleague Letter, are valid exercises of power under the Fourteenth Amendment.

CONCLUSION

The Federal Government has recently interpreted federal law as requiring that transgender students be permitted to use bathroom and locker rooms that correspond with their gender identity in schools receiving federal funding. The Article has shown that courts should uphold the Federal Government's recent interpretation of federal civil rights law, as stated in its Dear Colleague Letter on Transgender Students, because the Federal Government's interpretation is a reasonable interpretation, lawfully issued, that mirrors the best practices medical recommendations for the protection and inclusion of a vulnerable group.

Kimel, 528 U.S. at 90 (finding no evidence that unconstitutional age discrimination was a significant problem at the time ADEA was passed).

240. *See, e.g.*, *Craig*, 429 U.S. at 197 (sex discrimination subject to heightened scrutiny under the Fourteenth Amendment); United States v. Virginia, 518 U.S. 515, 533 (1996) (same); *cf. Kimel*, 528 U.S. at 90 (ADEA not authorized by Section 5 of the Fourteenth Amendment because age discrimination is not prohibited by the Fourteenth Amendment as it is subject only to rational basis review); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (Title I of the ADA not authorized by Section 5 of the Fourteenth Amendment because disability discrimination is not prohibited by the Fourteenth Amendment as it is subject only to rational basis review). While the Supreme Court has not yet considered whether prohibiting transgender individuals from using the bathroom that matches their gender identity is unconstitutional sex discrimination under the Fourteenth Amendment, the Court should find that it is when it considers the question. *See, e.g.*, *supra* notes 107–18 and accompanying text; *see also* Archibald, *supra* note 6, at 63–70 (arguing that sex-segregated bathrooms should be found unconstitutional under the Fourteenth Amendment).