No. 99-596

In the Supreme Court of the United States

GEORGE MASON UNIVERSITY, PETITIONER

v.

ANNETTE GRECO LITMAN AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, which is a state university that receives federal financial assistance, is subject to suit for sex discrimination, either because petitioner waived its Eleventh Amendment immunity when it applied for and accepted the federal financial assistance or because Congress has validly abrogated petitioner's immunity from such suits under Section 5 of the Fourteenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 186 F.3d 544. The opinion of the district court (Pet. App. 27-55) is reported at 5 F. Supp. 2d 366.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1999. The petition for a writ of certiorari was filed on October 5, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title IX of the Education Amendments of 1972 prohibits any "education program or activity receiving Federal financial assistance" from "subject[ing any

person] to discrimination" on the basis of sex. 20 U.S.C. 1681(a). Individuals have a private right of action for damages against entities receiving federal funds that violate this prohibition. See *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992); *Cannon* v. *University of Chicago*, 441 U.S. 677, 705-706 (1979). In the context of sexual harassment by an employee of the recipient, a plaintiff can recover money damages if she can show actual knowledge of the alleged discrimination by an official with authority to take corrective action and deliberate indifference to that discrimination. See *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

In 1984, this Court held that only the "program or activity" that actually received federal funds was governed by Title IX's nondiscrimination requirement. See *Grove City College* v. *Bell*, 465 U.S. 555, 573-574 (1984). In response to *Grove City*, Congress engaged in extensive hearings and deliberations that culminated in the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28. That statute defined the term "program or activity" in Title IX to mean, in relevant part,

> all of the operations of —
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or
>
> (B) a local educational agency (as defined in section 8801 of this title), system of vocational education, or other school system;
>
> * * * * *
>
> any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operations would not be consistent with the religious tenets of such organization.

20 U.S.C. 1687. Similar definitions were added to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-4a, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), which prohibit discrimination by programs or activities that receive federal financial assistance on the basis of race and disability, respectively.

In 1985, this Court held that an analogous statutory provision that prohibited discrimination on the basis of disability by programs receiving federal funds (Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a)) was not clear enough to evidence Congress's intent to authorize private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003,

100 Stat. 1845. Section 2000d-7 provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 *et seq.*], the Age Discrimination Act of 1975 [42 U.S.C. 6101 *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

2. Because of the procedural posture of this case, which arises from petitioner's appeal of a refusal to grant its motion to dismiss respondent's complaint, the facts alleged in the complaint must be taken as true. Petitioner is a state-operated university that accepts federal financial assistance. Pet. App. 3. Respondent Litman, a student, was sexually harassed and stalked by her computer science professor. *Id.* at 3-4. In February 1996, she filed a complaint with petitioner's Equity Office. *Id.* at 4. The office ordered the professor to avoid contact with respondent, but it refused to investigate the complaint further. *Ibid.* Finding this response inadequate, respondent sought intervention of higher officials, but petitioner failed to undertake any further investigation. *Ibid.* Other professors refused to interact with her once it had become known that she had filed a sexual harassment complaint against one of the faculty members. *Ibid.* Respondent alleges that in retaliation for her complaint two professors charged her with sexually harassing them. *Ibid.* Based on the professors' complaints, petitioner expelled respondent,

and then held a hearing on her charges against the professor. *Ibid.* Petitioner found that the professor had not violated its sexual harassment policy, but had failed to live up to the "standards" related to that policy. *Id.* at 30.

Respondent filed a complaint alleging, *inter alia*, that petitioner had violated Title IX. Petitioner moved to dismiss the claims on the ground that the Eleventh Amendment barred the claims. The United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the abrogation of Eleventh Amendment immunity. The district court denied the motion to dismiss the Title IX claims, concluding that petitioner had waived its Eleventh Amendment immunity when it continued to accept federal funds after the effective date of 42 U.S.C. 2000d-7. Pet. App. 43-50.

3. Petitioner took an interlocutory appeal of the denial of Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The court of appeals affirmed. Pet. App. 1-26. It held that Title IX is a valid exercise of Congress's power under the Spending Clause to attach conditions to the grant of federal funds. *Id.* at 13. The court articulated five conditions that must be met for a statute to be valid Spending Clause legislation: (1) the exercise of the spending power must be for the general welfare; (2) it must be "unambiguously" clear that conditions are attached to the federal funds; (3) the conditions must have "some relationship" to the federal spending; (4) the money and the conditions may not violate any independent constitutional prohibition; and (5) the financial inducement must not be "so coercive as to pass to the point at which pressure turns into compulsion." *Id.* at 15-16.

Because petitioner did not contend that Title IX failed to meet the "general welfare," "some relationship," and "coercion" requirements, the court of appeals did not address them. Pet. App. 16. The court rejected petitioner's claim that the statute is ambiguous, holding that "any state reading § 2000d-7(a)(1) in conjunction with 20 U.S.C. § 1681(a) would clearly understand the following consequences of accepting Title IX funding: (1) the state must comply with Title IX's antidiscrimination provisions, and (2) it consents to resolve disputes regarding alleged violations of those provision in federal court." *Id.* at 19. The court stated that petitioner's argument that Congress cannot condition the receipt of federal funds on the waiver of Eleventh Amendment is "without merit under current Supreme Court jurisprudence," because "conditioning federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is as permissible as a state's direct waiver of such immunity." *Id.* at 20 (citing *Alden* v. *Maine*, 119 S. Ct. 2240, 2267 (1999) ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits.")).

ARGUMENT

The court of appeals' ruling that petitioner was not immune under the Eleventh Amendment to private suits alleging violations of Title IX of the Education Amendment of 1972, 20 U.S.C. 1681 *et seq.*, is correct and consistent with the decisions of this Court and every other court of appeals that has addressed the question. Accordingly, further review is unwarranted.

1. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that the question whether Congress has removed Eleventh Amendment immunity in particular

legislation contains two elements: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' * * * and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Id.* at 55 (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)).

The petition for certiorari does not argue that Congress did not clearly express its intention in 42 U.S.C. 2000d-7 to condition the receipt of federal funds on the recipient's waiver of its Eleventh Amendment immunity to Title IX suits.[1] Instead, petitioner contends (Pet. 11-25) that principles of federalism prohibit Congress from conditioning the disbursement of federal funds on a State's agreement to waive its Eleventh Amendment immunity to suits brought to secure compliance with the nondiscrimination promise it made when it accepted the funds.

As petitioner concedes (Pet. 23), States are free to waive their Eleventh Amendment immunity. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2226 (1999); *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883). Petitioner nonetheless argues (Pet. 19-20 n.15) that requiring States to

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[1] The courts of appeals that have addressed the issue agree with the panel in this case (Pet. App. 17-19) that the language of 42 U.S.C. 2000d-7 is sufficient to put recipients on notice that acceptance of federal funds constitutes a waiver of Eleventh Amendment immunity. See *Sandoval* v. *Hagan*, 197 F.3d 484 (11th Cir. 1999); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (addressing same language in 20 U.S.C. 1403); *In re Innes*, 184 F.3d 1275, 1282-1283 (10th Cir. 1999) (dictum). But see *Amos* v. *Maryland Dep't of Pub. Safety & Correctional Servs.*, 178 F.3d 212, 230-231 (1999) (Williams, J., dissenting), vacated for rehearing en banc, No. 96-7091(4th Cir. Dec. 28, 1999).

waive their Eleventh Amendment immunity as a condition of receiving federal funds is "never" constitutional because immunity is a "fundamental aspect of sovereignty." But petitioner does not dispute that in electing to whom it disburses federal funds, Congress may place conditions on recipients that it could not impose unilaterally. See *College Savs. Bank*, 119 S. Ct. at 2231; *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987). And this Court has consistently upheld Congress's power to condition the receipt of federal funds on the recipient State's taking actions that affect its "sovereign interests" in enacting legislation. "Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices." *New York* v. *United States*, 505 U.S. 144, 167 (1992). Thus, in *New York*, this Court held that a statute in which Congress conditioned grants to the States upon the States' "regulating pursuant to federal standards" was "well within the authority of Congress" under the Spending Clause. *Id.* at 169, 173; see also *South Dakota* v. *Dole*, 483 U.S. at 210 (assuming that Constitution vested authority over drinking age solely in the States, Congress could condition the receipt of federal money on State's enacting legislation setting drinking age); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) (Congress could condition the receipt of federal money on appointment by State of non-partisan disbursement officials).

Nor is there anything unique about the Eleventh Amendment that would bar Congress from conditioning its largesse on a waiver of Eleventh Amendment immunity. Indeed, in *Alden* v. *Maine*, 119 S. Ct. 2240, 2267 (1999), this Court specifically noted that "the Federal Government [does not] lack the authority or means to

seek the States' voluntary consent to private suits. Cf. *South Dakota* v. *Dole*, 483 U.S. 203 (1987)." Similarly, in *College Savings Bank*, this Court reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), that Congress could condition the exercise of one of its Article I powers (the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 119 S. Ct. at 2231. At the same time, the Court suggested that Congress had the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Id.* at 2231; see also *id.* at 2227 n.2. This Court explained that unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to authorize interstate compacts and spend money constitutes the granting of a "gift" on which Congress may place reasonable conditions that a State is free to accept or reject. *Id.* at 2231.

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden*, 119 S. Ct. at 2264, it is perfectly appropriate to permit each State to make its own cost-benefit analysis and determine whether to accept the federal money with the condition that it can be sued in federal court, or forgo the federal funds. See *New York*, 505 U.S. at 168; *Metropolitan Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271 (1991). But once that choice is made, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983). All the courts of appeals that have addressed the issue, both before and after *College Savings Bank*, have held that so long as

Congress has made its intentions clear, Congress has the power to condition the receipt of federal funds on a state recipient's waiver of Eleventh Amendment immunity.[2] Further review of this issue is not warranted.

2. Petitioner also argues (Pet. 15-25) that even if Congress may condition the receipt of federal funds on a waiver of immunity in some instances, Congress exceeded its authority under the Spending Clause by requiring the entire State to waive its Eleventh Amendment immunity to suits under Title IX if the State elected to receive any federal funds. That argument is not properly presented because it was not pressed or passed on below, because it relies on a mistaken construction of the statutory provisions at issue, and because it is contrary to this Court's settled

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[2] See *Sandoval* v. *Hagan*, 197 F.3d 484 (11th Cir. 1999) (Title VI of the Civil Rights Act of 1964); *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 757 (8th Cir. 1999) (Individuals with Disabilities Education Act); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (same); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504 of the Rehabilitation Act), cert. denied, 118 S. Ct. 2340 (1998); *Department of Educ.* v. *Katherine D.*, 727 F.2d 809, 818-819 (9th Cir. 1983) (Education for All Handicapped Children Act of 1975), cert. denied, 471 U.S. 1117 (1985); *Scanlon* v. *Atascadero State Hosp.*, 735 F.2d 359, 361-362 (9th Cir.) (Section 504 of the Rehabilitation Act), rev'd due to the absence of a clear statement, 469 U.S. 1032 (1984); *Florida Nursing Home Ass'n* v. *Page*, 616 F.2d 1355, 1363 (5th Cir. 1980) (Medicaid), rev'd due to the absence of a clear statement *sub nom. Florida Dep't of Health & Rehabilitative Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); see also *Premo* v. *Martin*, 119 F.3d 764, 770-771 (9th Cir. 1997) (State's participation in Randolph-Sheppard Vending Stand Act constitutes a waiver of Eleventh Amendment immunity), cert. denied, 522 U.S. 1147 (1998); *Delaware Dep't of Health & Soc. Servs.* v. *Department of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (same).

precedent upholding Title IX as valid Spending Clause legislation.

First, petitioner did not argue below that the breadth of the waiver required by Title IX exceeded Congress's authority. As the court of appeals noted, petitioner did "not contend * * * that the prohibition of discrimination and the accompanying waiver of Eleventh Amendment immunity are not reasonably related to grants of education funds; or that the attachment of conditions to the funding arrangement is coercive." Pet. App. 16; see also *id.* at 47, 49 (district court notes that "Title IX and § 2000d-7 easily satisfy [the relatedness] requirement, and Defendant does not argue otherwise" and "Defendant does not argue that the financial inducement[s] provided by federal monies offered under Title IX funding are so great as to be coercive"). Thus, the court of appeals did not address the contours of the "relatedness" or "coercion" doctrines, or apply them to the circumstances of this case.

This Court's general rule is that it will not grant certiorari to address arguments not pressed in, or decided by, the lower courts. See *United States* v. *Williams*, 504 U.S. 36, 42 (1992); *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 237 (1990). Since this is a court of "review, not one of first view," *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 457 (1995), the failure of petitioner to press these arguments below denies this Court "the benefit of a well-developed record and a reasoned opinion on the merits." *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 80 (1988). Petitioner suggests (Pet. 15 n.13) that because Eleventh Amendment immunity can be raised at any stage of the proceedings, this Court should ignore this rule. But this Court's rule is based not on the power of the Court to hear a case and address arguments not previously raised, but on

practical grounds concerning which cases present appropriate vehicles to address such arguments. This Court has applied this prudential rule even when the question involves the Eleventh Amendment. See *Blessing* v. *Freestone*, 520 U.S. 329, 340 n.3 (1997) (declining to address Eleventh Amendment argument "which w[as] neither raised nor decided below, and w[as] not presented in the petition for certiorari"); see also *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 8 n.12 (1981) (petition raised Eleventh Amendment issue; Court would not address it because it was not "within the scope of the questions on which review was granted"); cf. *Torres* v. *Puerto Rico Tourism Co.*, 175 F.3d 1, 4-5 (1st Cir. 1999) (that appeal involves Eleventh Amendment claims does not allow State to ignore rules of appellate procedure).

The value of having the lower courts address questions in the first instance is evidenced in this case, where petitioner's arguments are premised on a particular interpretation of a statutory provision that the lower courts were not given an opportunity to accept or reject. Petitioner asserts (Pet. 15-16, 19) that 20 U.S.C. 1687(1)(A), which provides that the Title IX's nondiscrimination prohibition applies to "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government * * * any part of which is extended Federal financial assistance," means that the entire State must comply with Title IX if any agency of the State accepted any federal funds. But the language of the statute cannot support such a reading. As the text makes clear, the operations of the "department, agency * * * or other instrumentality of a State" are covered if "any part" of that department or agency "is extended Federal financial assistance"; the text does not state or

imply that the entire state government is covered if any part of any state entity accepts federal funds.

Petitioner does not explain how the statutory language can be read to require it to make the all-or-nothing choice it describes. Instead, petitioner relies (Pet. 13-14) on the Eighth Circuit's interpretation of similar language in *Bradley* v. *Arkansas Department of Education*, 189 F.3d 745 (1999). After the petition for certiorari was filed in this case, however, the Eighth Circuit vacated the portion of the *Bradley* decision addressing the Spending Clause issue—the portion on which petitioner relies—and granted our petition for rehearing en banc with respect to that issue.[3] *Jim C.* v. *Arkansas Dep't of Educ.*, No. 98-1830EALR, 1999 WL 1209784 (Dec. 14, 1999). One of the bases for our petition for rehearing en banc in *Bradley* was our contention that the panel's discussion of the scope of the waiver required of recipients of federal funds was simply a misreading of the statute's plain language.[4]

Petitioner's proposed reading of the statute is contrary to the interpretation of every other court of appeals that has addressed the issue, each of which has concluded that coverage under this subsection extends only to the "agency" or "department" that accepted the federal funds. See, *e.g.*, *Association of Mexican-American Educators* v. *California*, 195 F.3d 465, 474-475 (9th

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[3] The United States intervened in *Bradley* to defend the constitutionality of Section 2000d-7.

[4] *Bradley* involved Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. The substantive nondiscrimination obligations of Section 504, like those of Title IX, apply only to a "program or activity receiving Federal financial assistance." The term "program or activity" is similarly defined in both statutes. Compare 29 U.S.C. 794(b) with 20 U.S.C. 1687; see also 42 U.S.C. 2000d-4a (same for Title VI of the Civil Rights Act of 1964).

Cir. 1999); *Nelson* v. *Miller*, 170 F.3d 641, 653 n.8 (6th Cir. 1999); *O'Connor* v. *Davis*, 126 F.3d 112, 117 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998); *Lightbourn* v. *County of El Paso*, 118 F.3d 421, 426-427 (5th Cir. 1997), cert. denied, 522 U.S. 1052 (1998); *Schroeder* v. *City of Chicago*, 927 F.2d 957, 962 (7th Cir. 1991).[5] Thus, the premise of petitioner's argument regarding the meaning of this provision of the statute is simply erroneous.

Petitioner's failure to present its argument earlier also deprived the parties and the lower courts of the opportunity to identify which provision of 20 U.S.C. 1687 triggered coverage of petitioner. In our view, this case does not involve subsection (1)(A) at all, because petitioner is clearly covered under subsection (2)(A). That subsection provides that "all the operations" of "a college, university, or other postsecondary institution, or a public system of higher education" are covered by Title IX if "any part" is extended federal financial assistance. 20 U.S.C. 1687(2)(A). In this case, it is uncontested that petitioner is a "university" that receives federal financial assistance. See Pet. App. 3 ("[T]he parties agree that GMU is a recipient of federal education funding within the meaning of Title IX."), 17 ("GMU acknowledges that it voluntarily accepts Title

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[5] Prior to the now-vacated panel opinion in *Bradley*, the Eighth Circuit itself had recognized that "[f]or State and local governments, only the department or agency which receives the aid is covered." *Klinger* v. *Department of Corrections*, 107 F.3d 609, 615 (8th Cir. 1997) (quoting S. Rep. No. 64, 100th Cong., 2d Sess. 4 (1987)); accord *Thomlison* v. *City of Omaha*, 63 F.3d 786, 789 (8th Cir. 1995) ("Because the definition of program or activity covers all the operations of a department, here the Public Safety Department, and part of the Department received federal assistance, the entire Department is subject to the Rehabilitation Act.").

IX funding."). Thus, petitioner's complaint about the alleged breadth of another subsection of the definition of "program or activity" is irrelevant, because petitioner is covered under this alternative provision. Cf. *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (declining to address facial validity of Spending Clause provision when it was clear that it was valid as applied).

There can be no doubt that Congress, under the Spending Clause, can require a university that elects to receive federal financial assistance to promise not to discriminate on the basis of sex in any of its operations. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Court interpreted Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, to prohibit a school district from ignoring the disparate impact its policies had on limited-English proficiency students. It held that Title VI, as interpreted, was a valid exercise of the Spending Power. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." *Id.* at 569 (citations omitted). The Court reached a similar conclusion in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX infringed on the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.* at 575; cf. *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991) (Congress may constitutionally require that an entity that receives federal funds not engage in conduct Congress does not wish to subsidize so long as recipient may restructure

its operations to separate its federally-supported activities from other activities).[6]

More recently, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 *et seq.*, which prohibits any public secondary schools that receive federal financial assistance and maintain a "limited open forum" from denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (citation omitted). Similarly, compliance with Title IX and waiver of its sovereign immunity is the price a university must pay if it elects to remain federally funded.

3. Even if petitioner's arguments concerning waiver were correct, Congress validly abrogated petitioner's Eleventh Amendment immunity pursuant to its power under Section 5 of the Fourteenth Amendment to

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[6] Contrary to petitioner's suggestion (Pet. 16), the Constitution does not require that Congress must provide funds for the "enforcement of federal anti-discrimination law" if it wishes to impose a nondiscrimination requirement. In neither *Lau* nor *Grove City* was there any suggestion that the federal funds received were targeted towards alleviating discrimination. In fact, it is clear that the financial assistance at issue in *Grove City* was simply general financial aid, and had no relationship to programs to combat sex discrimination. 465 U.S. at 559, 565 n.13.

enforce the Equal Protection Clause. See *College Sav. Bank*, 119 S. Ct. at 2206 ("'[A]ppropriate' legislation pursuant to the Enforcement Clause of the Fourteenth Amendment could abrogate state sovereignty."); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976).

As petitioner concedes (Pet. 27-28), every court of appeals that has addressed Congress's power to abrogate state sovereign immunity from suits under Title IX has upheld Section 2000d-7 as a valid exercise of Congress's Section 5 authority. See *Franks* v. *Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998); *Doe* v. *University of Ill.*, 138 F.3d 653, 660 (7th Cir. 1998), vacated and remanded, 119 S. Ct. 2016 (1999), reinstated in pertinent part, No. 96-3511, 1999 WL 1257383 (7th Cir. Dec. 23, 1999); *Crawford* v. *Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); see also *Lesage* v. *Texas*, 158 F.3d 213, 217 (5th Cir. 1998) (same holding for Title VI), rev'd and remanded on other grounds, 120 S. Ct. 467 (1999).

Nonetheless, petitioner claims (Pet. 26-28) that these decisions have all been undermined by this Court's decision in *College Savings Bank* because (petitioner asserts) that case requires a pattern of constitutional violations by States before Congress can abrogate Eleventh Amendment immunity. But, unlike the statute at issue in *College Savings Bank*, which was directed at unremedied patent infringements, the nondiscrimination prohibition of Title IX is based on a long history of unconstitutional sex discrimination by States. In *J.E.B.* v. *Alabama*, 511 U.S. 127 (1994), this Court concluded that "'our Nation has had a long and unfortunate history of sex discrimination,' a history which warrants the heightened scrutiny we afford all gender-based classifications today." *Id.* at 136 (citation omitted); see also *United States* v. *Virginia*, 518 U.S. 515,

531-532 (1996). This Court itself has determined that women "have suffered * * * at the hands of discriminatory state actors during the decades of our Nation's history." *J.E.B.*, 511 U.S. at 136. No additional legislative inquiry on the scope of the problem is necessary for statutes involving sex discrimination. See also *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 n.10 (1982) ("History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function."). A statute that prohibits sex discrimination, a form of discrimination that this Court has found to be widespread, invidious, and often unconstitutional,[7] clearly falls within Congress's "wide latitude in determining" whether a statute is appropriate remedial legislation. *College Savings Bank*, 119 S. Ct. at 2206 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)).

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[7] The courts of appeals are in agreement that sexual harassment is a kind of sex discrimination that can violate the Equal Protection Clause. See, *e.g.*, *Pontarelli* v. *Stone*, 930 F.2d 104, 114 (1st Cir. 1991); *Gierlinger* v. *New York State Police*, 15 F.3d 32, 34 (2d Cir. 1994); *Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990); *Beardsley* v. *Webb*, 30 F.3d 524, 529 (4th Cir. 1994); *Southard* v. *Texas Bd. of Criminal Justice*, 114 F.3d 539, 550 (5th Cir. 1997); *Poe* v. *Haydon*, 853 F.2d 418, 429 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989); *Bohen* v. *City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986); *Headley* v. *Bacon*, 828 F.2d 1272, 1274-1275 (8th Cir. 1987); *Bator* v. *Hawaii*, 39 F.3d 1021, 1027-1028 (9th Cir. 1994); *Johnson* v. *Martin*, 195 F.3d 1208, 1216-1217 (10th Cir. 1999); *Cross* v. *Alabama*, 49 F.3d 1490, 1503 (11th Cir. 1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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