No.

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD, PETITIONER

v.

G.G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a), while its implementing regulation permits "separate toilet, locker rooms, and shower facilities on the basis of sex," if the facilities are "comparable" for students of both sexes, 34 C.F.R. § 106.33. In this case, a Department of Education official opined in an unpublished letter that Title IX's prohibition of "sex" discrimination "include[s] gender identity," and that a funding recipient providing sex-separated facilities under the regulation "must generally treat transgender students consistent with their gender identity." App. 128a, 100a. The Fourth Circuit afforded this letter "controlling" deference under the doctrine of *Auer* v. *Robbins*, 519 U.S. 452 (1997). On remand the district court entered a preliminary injunction requiring the petitioner school board to allow respondent—who was born a girl but identifies as a boy—to use the boys' restrooms at school.

The questions presented are:

1. Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?

2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

3. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

PARTIES TO THE PROCEEDING

Petitioner Gloucester County School Board was Defendant-Appellee in the court of appeals in No. 15-2056, and Defendant-Appellant in the court of appeals in No. 16-1733.

Respondent G.G., by his next friend and mother, Deirdre Grimm, was Plaintiff-Appellant in the court of appeals in No. 15-2056 and Plaintiff-Appellee in the court of appeals in No. 16-1733.

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INTRODUCTION

As petitioner Gloucester County School Board (the Board) pointed out in the stay application that the Court granted on August 3, 2016, this case presents an extreme example of judicial deference to an administrative agency's purported interpretation of its own regulation. For that and several other reasons, this case provides the perfect vehicle for revisiting the deference doctrine articulated in *Auer* v. *Robbins*, 519 U.S. 452 (1997), and subsequently criticized by several Justices of this Court.

The statute at the heart of the administrative interpretation here is Title IX of the Education Amendments of 1972. Enacted over forty years ago, Title IX and its implementing regulation have always allowed schools to provide "separate toilet, locker rooms, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. No one ever thought this was discriminatory or illegal. And for decades our Nation's schools have structured their facilities and programs around the idea that in certain intimate settings men and women may be separated "to afford members of each sex privacy from the other sex." *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996).

The Fourth Circuit's decision turns that longstanding expectation upside down. Deferring to the views of a relatively low-level official in the Department of Education (Department), the court reasoned that for purposes of Title IX the term "sex" does not simply mean physiological males and females, which is what Congress and the Department (and everyone else) thought the term meant when the regulation was promulgated. Instead, the Department and the Fourth Circuit now tell us that "sex" is ambiguous as applied to persons whose subjective gen-

der identity diverges from their physiological sex. App. 17a–20a. According to the Fourth Circuit, this means a physiologically female student who self-identifies as a male—as does the plaintiff here—must be allowed under Title IX to use the boys' restroom.

The Fourth Circuit reached this conclusion, not by interpreting the text of Title IX or its implementing regulation (neither of which refers to gender identity), but by deferring to an agency opinion letter written just last year by James Ferg-Cadima, the Acting Deputy Assistant Secretary for Policy for the Department of Education's Office of Civil Rights. App. 121a. The letter is unpublished; its advice has never been subject to notice and comment; and it was generated in direct response to an inquiry about the Board's restroom policy *in this very case*. Nonetheless, the Fourth Circuit concluded—over Judge Niemeyer's dissent—that the letter was due "controlling" deference under *Auer*. App. 25a. On that basis, the district court immediately entered a preliminary injunction allowing the plaintiff to use the boys' restroom.

Shortly after the Fourth Circuit's decision, the Department (along with the Department of Justice) issued a "Dear Colleague" letter seeking to impose that same requirement on every Title IX-covered educational institution in the Nation. But just last week, the Departments' effort was halted by a nationwide injunction issued by a federal district judge in Texas.

These recent developments highlight the urgent need for this Court to grant this petition and resolve the is-

sues presented by the Fourth Circuit's decision. As explained in more detail below, the Court should grant the petition for three reasons. First, this case provides an excellent vehicle for reconsidering—and abolishing or refining—the *Auer* doctrine. Second, if the Court decides to retain *Auer* in some form, this case provides an excellent vehicle for resolving important disagreements among the lower courts about *Auer*'s proper application. Third, this case provides an excellent vehicle for determining whether the Department's understanding of Title IX reflected in the Ferg-Cadima and "Dear Colleague" letters must be given effect—thereby resolving once and for all the current nationwide controversy generated by these directives.

OPINIONS BELOW

This petition seeks review of two related cases in the court of appeals, Nos. 15-2056 and 16-1733. No. 15-2056 is G.G's appeal of the district court's order denying his request for a preliminary injunction. The opinion of the court of appeals in that case is available at 822 F.3d 709 (4th Cir. 2016). App. 1a–60a. The district court's opinion in that case is available at 132 F.Supp.3d 736 (E.D. Va. 2015). App. 84a–117a.

No. 16-1733 is the Board's appeal of the district court's order granting a preliminary injunction after the remand in No. 15-2056. The district court's opinion in that case is available at 2016 U.S. Dist. LEXIS 93164. App. 71a–72a.

JURISDICTION

In No. 15-2056, the court of appeals entered its judgment on April 19, 2016. App. 3a. It denied the Board's petition for rehearing en banc on May 31, 2016. App. 61a. No. 16-1733 remains pending in the court of appeals. The Board timely filed this petition for a writ of certiorari on August 29, 2016. See 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 provides, in relevant part:

> No 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 . . .

20 U.S.C. § 1681(a).

34 C.F.R. § 106.33 provides:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

STATEMENT

A. Facts

G.G. is a 17-year-old student at Gloucester High School. G.G. is biologically female, meaning that G.G. was born a girl and recorded as a girl on the birth certificate. "However, at a very young age, G.G. did not feel like a girl," and around age twelve began identifying as a boy. App. 85a. In July 2014, between G.G.'s freshman and sophomore years, G.G. changed his first name to a boy's name and began referring to himself with male pronouns.[1] He has also started hormone therapy, but has not had a sex-change operation.

In August 2014, before the start of G.G.'s sophomore year, G.G. and his mother met with the principal and guidance counselor to discuss G.G.'s situation. The school officials were supportive of G.G. and promised a welcoming environment. School records were changed to reflect G.G.'s new name, and the guidance counselor helped G.G. e-mail his teachers asking them to address G.G. using his male name and male pronouns. App. 87a–88a. As G.G. admits, teachers and staff have honored these requests. *Id.* at 148a.

Neither G.G. nor school officials, however, thought that G.G. should start using the boys' restrooms, locker

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[1] This petition uses "he," "him," and "his" to respect G.G.'s desire to be referred to with male pronouns. That choice does not concede anything on the legal question of what G.G.'s "sex" is for purposes of Title IX and its implementing regulation.

rooms, or shower facilities. Instead, G.G. and his mother suggested G.G. use a separate restroom in the nurse's office rather than the boys' room, and the school agreed. App. 149a. G.G. claims he accepted this arrangement because he was "unsure how other students would react to [his] transition." *Id.* But four weeks into the school year G.G. changed his mind and sought permission to use the boys' restroom. The principal granted G.G.'s request on October 20, 2014. G.G. says he asked for access to the boys' restroom because he found it "stigmatizing" to use the restroom in the nurse's office. *Id.*

Immediately after G.G. started using the boys' restrooms, the Board began receiving complaints from parents and students who regarded G.G.'s presence in the boys' room as an invasion of student privacy. App. 144a. Parents also expressed general concerns that allowing students into restrooms and locker rooms of the opposite biological sex could enable voyeurism or sexual assault. The Board held public meetings on November 11 and December 9, 2014, to consider the issue, and citizens on both sides expressed their views in thoughtful and respectful terms.[2] At the December 9 meeting, the Board

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[2] The Fourth Circuit's opinion tries to depict the citizens who opposed G.G's presence in the boys' room as largely "hostil[e]" to G.G., selectively quoting the few intemperate statements and subtly implying they represented the whole. App. 10a. The video of the meetings, however, shows that the overwhelming majority of those expressing concern did so with courtesy and decency, not "hostility." *See* http://bit.ly/2bsVO6h (Dec. 9, 2014 meeting); http://www.gloucesterva.info/channels47and48 (containing link to Nov. 11, 2014 meeting video).

adopted a resolution recognizing "that some students question their gender identities," and encouraging "such students to seek support, advice, and guidance from parents, professionals and other trusted adults." The resolution then concluded:

> Whereas the [Board] seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the [Board] to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id. at 144a.

Before the Board adopted this resolution, the high school announced it would install three single-stall unisex bathrooms throughout the building—regardless of whether the Board approved the December 9 resolution. These unisex restrooms would be open to *all* students who, for whatever reason, desire greater privacy. They opened for use shortly after the Board adopted the resolution. G.G., however, refuses to use these unisex bathrooms because, he says, they "make me feel even more stigmatized and isolated than when I use the restroom in the nurse's office." App. 151a.

A few days after the Board's decision, a lawyer named Emily T. Prince[3] sent an e-mail about the Board's resolution to the Department, asking whether it had any "guidance or rules" relevant to the Board's decision. App. 118a–120a. In response, on January 7, 2015, James A. Ferg-Cadima, an Acting Deputy Assistant Secretary for Policy in the Department's Office of Civil Rights sent a letter stating that "Title IX . . . prohibits recipients of Federal financial assistance from discriminating on the basis of sex, *including gender identity*," and further opining that:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms locker rooms, shower facilities, housing, athletic teams, and single-sex classes *under certain circumstances*. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.

App. 121a, 123a (emphasis added).

The Ferg-Cadima letter cites no document requiring schools to treat transgender students "consistent with their gender identity" regarding restroom, locker room, or shower access. It instead cites a Q&A sheet on the

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[3] Ms. Prince describes herself as the "Sworn Knight of the Transsexual Empire." *See* https://twitter.com/emily_esque?lang=en. Her name appears in the signature of the e-mail that DOJ filed in the district court, when the file is opened in Preview for Mac.

Department website, which says only that schools must treat transgender students consistent with their gender identity *when holding single-sex classes*. See United States Department of Education, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (Dec. 1, 2014), http://bit.ly/1HRS6yI (emphasis added) (last visited Aug. 29, 2016) (Q&A #31) (opining "[h]ow . . . the Title IX requirements *on single-sex classes* apply to transgender students) (emphasis added).

B. District Court Proceedings

G.G. filed suit against the Board on June 11, 2015—two days after the end of the 2014–15 school year. His complaint alleged that the Board's resolution violated Title IX and the Equal Protection Clause, and sought declaratory and injunctive relief, damages, and attorneys fees.

On June 29, 2015, the Department of Justice ("DOJ") filed a "statement of interest" accusing the Board of violating Title IX. See App. 160a–183a. The statement did not even cite 34 C.F.R. § 106.33, let alone explain how the Board's policy could be unlawful under the regulation's text. Instead, DOJ trumpeted the Ferg-Cadima letter as the "controlling" interpretation of Title IX and the regulation, even though DOJ acknowledged that the letter had never been "publicly issued." See *id.* at 171.[4] DOJ

[4] DOJ cited two other documents issued by the Department of Education, but neither addresses whether schools must allow transgender students into restrooms or locker rooms that corre-
(continued…)

also asserted that "an individual's gender identity is one aspect of an individual's sex," *id.* at 169a, but failed to cite any statute or regulation adopting or supporting that view.

Without ruling on G.G.'s equal-protection claim, the district court dismissed G.G.'s Title IX claim and denied a preliminary injunction. See App. 82a–83a (order); 84a–117a (opinion). It held that G.G.'s Title IX claim was foreclosed by 34 C.F.R. § 106.33, the regulation allowing comparable separate restrooms and other facilities "on the basis of sex." App. 97a–98a.

The district court assumed, for the sake of argument, that the phrase "on the basis of sex" includes distinctions based on *both* gender identity as well as biological sex. App. 99a, 102a. Yet even under this broad reading of "sex," it would remain permissible under section 106.33 to separate restrooms by biological sex *or* gender identity. Consequently, as the district court pointed out, section 106.33 would forbid the Board's policy only if "sex" refers *solely* to distinctions based on gender identity, and excludes those based on biological sex. *Id.* at 99a. The district court held that this would be an absurd construction, however. Indeed, if applied to the Title IX *statute*, it would permit discrimination against men or women, so long as the recipient discriminates on account of gender identity rather than biological sex. *Id.* at 102a.

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spond with their gender identity. See ECF No. 28 at 9; see also, *supra*, at 7–8.

Consequently, the district court refused to give controlling weight to the interpretation of Title IX and 34 C.F.R. § 106.33 in the Ferg-Cadima letter. First, the district court observed that letters of this sort lack the force of law under *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000), and cannot receive *Chevron* deference when interpreting Title IX. App. 101a. The Court also held that the letter should not receive deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997), because it contradicts the unambiguous language of 34 C.F.R. § 106.33, which allows schools to establish separate restrooms "on the basis of sex"—even if one assumes that "on the basis of sex" refers to *both* gender identity *and* biological sex. Thus, the district court regarded the Ferg-Cadima letter as an attempted amendment to, rather than an interpretation of, 34 C.F.R. § 106.33, and held that to be binding any such amendment must go through notice-and-comment rulemaking. App. 102a–103a.

C. Appeal to the Fourth Circuit in No. 15-2056

Over Judge Niemeyer's dissent, the Fourth Circuit reversed the district court's dismissal of G.G.'s Title IX claim, and held that the district court should have enforced the Ferg-Cadima letter as the authoritative construction of Title IX and 34 C.F.R. § 106.33 under *Auer*. App. 13a–25a.

First, the panel held that section 106.33 was "ambiguous" as applied to "whether a transgender individual is a male or a female for the purpose of access to sex-segregated restrooms," and that the Ferg-Cadima letter

"resolve[d]" this ambiguity by determining sex solely by reference to "gender identity." *Id.* at 19a, 18a.

Second, the panel held that the letter's interpretation—"although perhaps not the intuitive one," *id.* at 23a—was not, in the words of *Auer*, "plainly erroneous or inconsistent with the regulation or the statute." *Id.* at 20a. In the panel's view, the term "sex" does not necessarily suggest "a hard-and-fast binary division [of males and females] on the basis of reproductive organs." *Id.* at 22a.

Third, the panel found that the letter's interpretation was a result of the agency's "fair and considered judgment," because the agency had consistently enforced this position "since 2014"—that is, for the previous several *months*—and it was "in line with" other federal agency guidance. *Id.* at 24a. While conceding that the Ferg-Cadima interpretation was "novel," given that "there was no interpretation of how section 106.33 applied to transgender individuals before January 2015," the panel nonetheless thought this novelty was no reason to deny *Auer* deference. *Id.* at 23a.

The panel, however, did not address the district court's reason for rejecting the agency interpretation—namely, that it would make the phrase "on the basis of sex" *exclude* biological sex and refer *only* to gender identity, a construction that would absurdly mean that Title IX no longer protects men or women from discrimination on the basis of biological sex. App. 99a, 102a. Nor did the panel acknowledge that the agency was expressly interpreting the Title IX *statute*, not merely the regula-

tion. See App. 121a (stating that "*Title IX* . . . prohibits [funding] recipients . . . from discriminating on the basis of sex, *including gender identity* . . . .") (emphases added). The panel thus did not address the district court's conclusion that giving the letter controlling deference would permit agencies to "avoid the process of formal rulemaking by announcing regulations through simple question and answer publications." App. 103a

Judge Niemeyer dissented from the panel's decision to give controlling effect to the Ferg-Cadima letter, for many of the reasons given by the district court. App. 40a–60a. Judge Niemeyer explained that the premise for applying *Auer* was absent, because "Title IX and its implementing regulations are not ambiguous" in allowing separate restrooms and other facilities on the basis of "sex." *Id.* at 43a. To the contrary, those provisions "employ[ ] the term 'sex' as was generally understood at the time of enactment," as referring to "the physiological distinctions between males and females, particularly with respect to their reproductive functions." *Id.* at 53a–55a. He also explained that the DOJ's conflation of "sex" in Title IX with "gender identity" would produce "unworkable and illogical result[s]," undermining the privacy and safety concerns that motivated the allowance of sex-separated facilities in the first place. *Id.* at 42a–43a.

Judge Niemeyer also noted that the Fourth Circuit's endorsement of the Ferg-Cadima letter will require schools to allow students with gender-identity issues not only into the restrooms but also into the locker rooms and showers reserved for the opposite biological sex. In Judge Niemeyer's view, this would violate other stu-

dents' "legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex." *Id.* at 50a.

The Board moved for rehearing en banc, which the panel denied on May 31, 2016. *Id.* at 61a–66a. Judge Niemeyer dissented but declined to call for an en banc poll, stating that "the momentous nature of the issue deserves an open road to the Supreme Court." *Id.* at 65a. The Board then asked for a stay of the Fourth Circuit's mandate pending the filing of a certiorari petition. This, too, was denied, again over Judge Niemeyer's dissent. *Id.* at 67a–70a. The mandate in No. 15-2056 issued on June 17, 2016.

D. The "Dear Colleague" Letter Of May 13, 2016

After the Fourth Circuit's ruling, two federal officials, the Department's Catherine E. Lhamon and DOJ's Vanita Gupta, quickly issued a "Dear Colleague" letter to every Title IX recipient in the country. *Id.* at 126a–142a. This document expands on the Ferg-Cadima letter by imposing detailed requirements on how schools must accommodate students with gender-identity issues, including the following edicts:

- Every student claiming to be transgender must be allowed to access restrooms, locker rooms, shower facilities, and athletic teams consistent with his or her gender identity. The Ferg-Cadima letter had hedged this requirement by including the word "generally." App.

123a. The "Dear Colleague" letter removes the hedge and allows for no exceptions. *Id.* at 134a.

- A school must allow a student access to the restrooms, locker rooms, and showers of the opposite biological sex after the "student *or* the student's parent or guardian, as appropriate" merely notifies the school that the student will *assert* a gender identity different from his or her biological sex. App. 130a (emphasis added). No medical or psychological diagnosis or evidence of professional treatment need be provided. *Id.*

- Non-transgender students who are unwilling to use restrooms, locker rooms, or showers at the same time as a classmate of the opposite biological sex may be relegated to a separate, individual-user facility. App. 134a. But a school cannot require the transgender student to use that separate, individual-user facility, no matter how many non-transgender students object to the presence of a student of the opposite biological sex in restrooms, locker rooms, or showers. *Id.*

The letter went out on May 13, 2016, only 24 days after the Fourth Circuit's decision. Needless to say, it did not go through notice-and-comment rulemaking.

The Dear Colleague letter has been challenged by over twenty States in two federal lawsuits. See *Texas* v. *United States of America*, No. 7:16-cv-00054 (N.D. Tex.

May 25, 2016); *Nebraska* v. *United States of America*, No. 4:16-cv-03117 (D. Neb. July 8, 2016). On August 21, 2016, a federal district court in Texas issued a nationwide preliminary injunction against enforcement of the regulatory interpretation contained in the Dear Colleague letter and in similar guidance documents. See *Texas, supra*, ECF No. 58; Pet. App. 183a–229a.

E. The Proceedings After Remand, Including No. 16-1733

Meanwhile, on remand from the Fourth Circuit, the district court promptly entered a preliminary injunction without giving the Board any notice or opportunity to submit additional briefing or evidence. App. 71–72a. The injunction orders the Board to permit G.G. to use the boys' restroom at Gloucester High School "until further order of this Court." *Id.* at 72a. It does not enjoin the Board from enforcing its policy with respect to locker rooms and showers — even though the Ferg-Cadima letter, which the Fourth Circuit endorsed as "controlling" authority, generally requires schools to allow transgender students to access locker rooms, shower facilities, housing, and athletic teams that accord with their gender identity. App. 123a.

The Board appealed this preliminary-injunction order, which created a second case in the Fourth Circuit, No. 16-1733. The district court denied the Board's request to stay its injunction pending appeal. App. 73a–75a. The Board's request that the Fourth Circuit stay the injunction pending appeal was also denied, again over Judge Niemeyer's dissent. App. 76a–81a.

Finally, the Board asked this Court to recall and stay the Fourth Circuit's mandate in No. 15-2056, and to stay the district court's preliminary injunction, pending this certiorari petition. This Court granted the Board's request on August 3, 2016. *Gloucester Cnty. Sch. Bd.* v. *G.G.*, 136 S. Ct. 2442 (2016) (per curiam). In this combined petition, the Board seeks a writ of certiorari as to No. 15-2056, and a writ of certiorari before judgment at to No. 16-1733. See S. Ct. R. 12.4.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for three reasons. First, this case provides an excellent vehicle for reconsidering—and abolishing or refining—the doctrine of *Auer* deference that has recently been questioned by several Justices. Second, if the Court decides to retain *Auer*, this case provides an excellent vehicle for resolving important disagreements among the lower courts about *Auer*'s proper application. Third, this case provides an excellent vehicle for determining whether the Department's understanding of Title IX and section 106.33—an understanding it has recently sought to impose upon educational institutions throughout the Nation—is controlling.

I. THE COURT SHOULD GRANT CERTIORARI TO RECONSIDER THE DOCTRINE OF *AUER* DEFERENCE.

As to the first reason: The Fourth Circuit did not even attempt to show that the Ferg-Cadima letter reflects the most plausible construction of 34 C.F.R. § 106.33. Instead, its ruling hinged entirely on *Auer* deference—a doctrine that requires courts to enforce an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (citation omitted); see also *Bowles* v. *Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945). Several members of this Court have expressed interest in revisiting the doctrine of *Auer* defer-

ence, which gives agencies enormous power over policy issues of interest across the political spectrum.[5] This case presents an ideal vehicle for doing so, because the issue is fully preserved and because the Fourth Circuit discussed the *Auer* framework extensively and regarded it as outcome-determinative. App. 15a–24a.[6]

The problems with *Auer* deference have been well rehearsed. See, *e.g.*, *Decker*, 133 S. Ct. at 1339–42 (Scalia, J., concurring in part and dissenting in part); *Perez*, 135 S. Ct. at 1213–25 (Thomas, J., concurring in the judgment); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 4–12 (1996). Four of the most important reasons for this Court to abandon or limit the scope of the *Auer*-deference regime are as follows:

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[5] See, *e.g.*, *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring); *id.* at 1339–42 (Scalia, J., concurring in part and dissenting in part); *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).

[6] By contrast, in *Foster* v. *Vilsack*, 820 F.3d 330 (8th Cir. 2016) (petition for certiorari pending), the Eighth Circuit's opinion does not cite or discuss *Auer* or any *Auer*-related rulings from this Court. It simply declares, without analysis, that the agency's "reasonable interpretation" is "owe[d] deference." *Id.* at 335.

First, as this case illustrates, *Auer* deference effectively gives an agency the power to invade the province of both Congress and the courts in determining federal law on all kinds of issues of interest to all kinds of constituencies. See, *e.g., Decker*, 133 S. Ct. at 1342 (Scalia, J., dissenting) (*Auer* "contravenes one of the great rules of separation of powers [that he] who writes a law must not adjudge its violation."); *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment) (*Auer* is an unconstitutional "transfer of judicial power to the Executive branch," and "an erosion of the judicial obligation to serve as a 'check' on the political branches."); *id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment) (noting that "the opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect").

Here, in purporting to interpret section 106.33, the Department effectively changed the meaning of the *statutory* term "sex" in Title IX. To be sure, it did so in a manner that furthered the views of the present Administration. But that same strategy could easily be adopted by a future administration with radically different views. Indeed, it could be deployed to effectively amend in a different direction, and without any meaningful judicial review, not only Title IX, but also other federal statutes dealing with matters such as health care, the environment, labor relations, and financial-services regulation. For those reasons, the type of *Auer* deference applied by the Fourth Circuit here raises serious separation-of-powers problems. See, *e.g.,* Manning, *supra,* at 631–54.

Second, the *Auer* doctrine is poorly formulated. It instructs courts to enforce an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous *or* inconsistent with the regulation." *Auer*, 519 U.S. at 461 (emphasis added). But that disjunctive formulation leaves substantial ambiguity: The phrase "inconsistent with the regulation" implies *de novo* rather than deferential review. And it is not apparent how the "plainly erroneous" prong of the *Auer* deference test will ever do any work: Every "plainly erroneous" interpretation of a regulation will also be "inconsistent with the regulation," and the disjunctive "or" means that a litigant challenging the interpretation need only show that the agency's interpretation fails under the less deferential half of this test. This petition presents a prime opportunity for the Court to resolve this ambiguity—even if a majority of the Court wishes to retain some form of *Auer* deference.

The third problem for the *Auer* doctrine is the text of the Administrative Procedure Act, which plainly states that:

> *[T]he reviewing court shall decide* all relevant questions of law, interpret constitutional and statutory provisions, and *determine the meaning or applicability of the terms of an agency action.*

5 U.S.C. § 706 (emphases added). How can this statutory command be reconciled with a regime that requires the judiciary to *defer* to an agency's interpretation of its regulations, rather than "determine the meaning" of

those agency rules for itself? No one thinks the APA's command to "interpret constitutional . . . provisions" requires courts to defer to an agency's beliefs on what the Constitution means. So why do matters suddenly become different when an agency purports to "determine the meaning" of one of its rules?

To be sure, some APA provisions require courts to defer to some forms of agency decisionmaking, but those provisions do so in unmistakable language. See, *e.g.*, 5 U.S.C. § 706(2)(E) (authorizing courts to set aside agency factfinding only when "unsupported by substantial evidence"); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951) (holding that section 706(2)(E) requires deferential judicial review of agency factfinding). In contrast to those provisions, the APA's straightforward instruction that courts "decide all relevant questions of law" and "determine the meaning . . . of an agency action" leaves the *Auer* doctrine in a precarious position. The APA tells the *courts* to "determine the meaning" of an agency's rules, but *Auer* tells the *agency* to "determine the meaning" of its rules so long as it stays within the boundaries of reasonableness.

The opinion in *Seminole Rock* said nothing about how its ostensible deference regime might be reconciled with the text of the APA, see 325 U.S. 410, but it had good reason for that omission: the APA had not been enacted yet. So the *Seminole Rock* Court can be forgiven for failing to explain how its deference concept can co-exist with section 706 of the APA. It is harder to justify the post-*Seminole Rock* decisions that reflexively followed this pre-APA decision without acknowledging the intervening

statute or attempting to explain how *Seminole Rock* could survive the APA.[7]

Nor can *Auer* be defended on the ground that *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), likewise ignored section 706 of the APA. This Court eventually supplied a rationale for *Chevron* that comports with the APA: Influenced heavily by Justice Breyer's scholarship,[8] the Court held in *United States* v. *Mead Corp.* that *Chevron* can apply only when Congress affirmatively intends to delegate interpretive or gap-filling authority to an agency. See 533 U.S. 218, 229–34 (2001). After *Mead*, a court that applies *Chevron* is not "deferring" to an agency's interpretation of a statute. Rather, it is interpreting the statute *de novo*, and asking whether Congress intended to authorize the agency to act within certain statutory boundaries. If the answer is "yes," the statute *means* that the agency gets to decide and that reviewing courts must respect the agency's decision. *Mead* enables *Chevron* to co-exist with

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[7] See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16–17 (1965); *Thorpe* v. *Hous. Auth. of City of Durham*, 393 U.S. 268, 276 (1969).

[8] See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986); *id.* at 373 (criticizing notion that *Chevron* should apply to all agency interpretations of law as "seriously overbroad, counterproductive and sometimes senseless."); Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006) (explaining how Justice Breyer's views influenced this Court's rulings in *Christensen*, *Mead* and *Barnhart* v. *Walton*, 535 U.S. 212 (2002)).

section 706 of the APA. No such rationale has ever been provided for *Auer*.

This leads to the fourth problem with *Auer* deference: It cannot be sustained in its current form after this Court's decisions in *Christensen*, *Mead*, and *Barnhart* v. *Walton*, 535 U.S. 212 (2002). In pre-*Mead* days, when the *Chevron* framework established a blanket presumption that agencies rather than courts would fill gaps and resolve ambiguities in statutory language, *Auer* deference could be defended as *Chevron*'s logical corollary. If an agency's interpretive rules or informal correspondence would receive *Chevron* deference when courts interpret federal statutes, it was reasonable to accord those documents equal weight when interpreting agency regulations—which, after all, have the same force and effect as a federal statute.

Auer became much harder to defend after *Mead*, which withholds *Chevron* deference from interpretive rules and other agency correspondence that never went through notice-and-comment rulemaking. For example, how can a document like the Ferg-Cadima letter receive nothing more than *Skidmore* deference when interpreting a statute,[9] but trigger much higher deference as soon as it purports to interpret an agency regulation? And if the Ferg-Cadima letter is entitled to *Chevron*-like deference when it purports to interpret 34 C.F.R. § 106.33, why doesn't that make it into a substantive rule that car-

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[9] See *Mead*, 533 U.S. at 229–34; *Christensen*, 529 U.S. at 587.

ries the force of law and therefore must go through notice and comment? See 5 U.S.C. § 553.

In short, *Mead* established symmetry between the *Chevron–Skidmore* divide and the distinction between substantive and interpretive rules. "Interpretive rules" need not go through notice and comment because they lack the force of law, but for this reason cannot receive *Chevron* deference. To confer *Chevron* deference upon such interpretive rules would give them the force of law, thereby triggering section 553's notice-and-comment requirements. But *Auer* deference throws a wrench into this perfectly crafted arrangement, by allowing such things as the Ferg-Cadima letter to receive the force of law even though they never went through notice and comment. If nothing else, the Court should grant certiorari to align the *Auer*-deference regime with the post-*Mead Chevron* regime. That alone would require reversing the Fourth Circuit's decision.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE DISAGREEMENTS AMONG THE LOWER COURTS OVER WHEN THE *AUER*-DEFERENCE FRAMEWORK, IF IT SURVIVES, SHOULD BE APPLIED.

Assuming *Auer* survives, this case also presents an opportunity for the Court to resolve serious disagreements among the lower courts on the proper application of *Auer* deference. As explained below, there currently exists a serious circuit conflict on the question whether *Auer* deference can apply at all to informal agency pronouncements. There is also deep disagreement among

the circuits about whether *Auer* deference can apply to agency positions that—like the Ferg-Cadima letter—are developed in the context of the very dispute in which deference is sought. And the Texas district court's recent decision to enjoin the Department's efforts to impose its interpretation on schools throughout the Nation both exacerbates the conflict and illustrates the urgent need for this Court to resolve the questions presented here.

A. The Fourth Circuit's Decision To Extend *Auer* Deference To The Ferg-Cadima Letter Conflicts With Rulings From The First, Seventh, And Eleventh Circuits.

As noted, the Ferg-Cadima letter did not go through notice and comment, and it is about as informal an agency document as one can imagine. The letter was not publicized; there is no evidence it was approved by the head of an agency; and it was signed only by a relatively low-level federal functionary, an Acting Deputy Assistant Secretary for Policy. The Fourth Circuit did not think any of this mattered; it was enough that the Department was willing to stand by the letter in the federal amicus brief. App. 16a–17a. But a letter such as this would not have received *Auer* deference in the First, Seventh or Eleventh Circuits.

For example, the First Circuit's ruling in *United States* v. *Lachman*, 387 F.3d 42, 54 (1st Cir. 2004), refused to extend *Auer* deference to non-public or informal agency interpretations—and it linked *Auer* deference to the same formality requirements that trigger *Chevron* deference under *Mead*:

> [A]gency interpretations are only relevant if they are reflected in public documents. . . . [U]nder *Chevron,* the Supreme Court has made clear that informal agency interpretations of statutes, even if public, are not entitled to deference. See generally *United States v. Mead Corp.,* 533 U.S. 218 (2001). While this is not a situation involving the interpretation of a statute, *the same requirements of public accessibility and formality are applicable in the context of agency interpretations of regulations.* . . . The non-public or informal understandings of agency officials concerning the meaning of a regulation are thus not relevant.

387 F.3d at 54 (emphasis added).

The Seventh Circuit has likewise held that it will not extend *Auer* deference to informal agency pronouncements such as the Ferg-Cadima letter. In *Keys* v. *Barnhart*, 347 F.3d 990 (7th Cir. 2003), that court explained that *Christensen* and *Mead* have curtailed the scope of *Auer* deference, limiting it to agency pronouncements that carry the "force of law" and that would qualify for deference under *Chevron* if they were purporting to interpret statutes:

> *Auer* . . . gave full *Chevron* deference to an agency's amicus curiae brief; yet in the *Christensen* case the Supreme Court stated flatly that "interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforce-

> ment guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." . . . Briefs certainly don't have "the force of law." . . .
>
> Probably there is little left of *Auer*. The theory of *Chevron* is that Congress delegates to agencies the power to make law to fill gaps in statutes. See, *e.g.*, *United States* v. *Mead Corp.*, *supra*, 533 U.S. at 226–27. . . . It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions.

347 F.3d at 993–94 (Posner, J.). And in *U.S. Freightways Corp.* v. *Commissioner*, 270 F.3d 1137 (7th Cir. 2001), the Seventh Circuit applied *Skidmore* rather than *Auer* to the IRS Commissioner's interpretation of his regulations, because "the interpretive methodologies he has used have been informal." *Id.* at 1141–42.

Likewise, the Eleventh Circuit's decision in *Arriaga* v. *Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002), applied *Skidmore* rather than *Auer* to agency opinion letters that purport to interpret the agency's regulations.

Against the First, Seventh, and Eleventh Circuits stand the Fourth Circuit as well as other courts of appeals that have found the lack of procedural formality

irrelevant to whether the *Auer*-deference framework should apply—even after this Court's decisions in *Christensen* and *Mead*. See, *e.g.*, *Cordiano* v. *Metacon Gun Club, Inc.*, 575 F.3d 199, 207–08 (2nd Cir. 2009) (holding that "agency interpretations that lack the force of law," while not warranting deference when interpreting ambiguous statutes, "do normally warrant deference when they interpret ambiguous *regulations*"); *Encarnacion ex. rel George* v. *Astrue*, 568 F.3d 72, 78 (2nd Cir. 2009) (holding agency's interpretation is entitled to *Auer* deference "regardless of the formality of the procedures used to formulate it") (quotation omitted); *Bassiri* v. *Xerox Corp.*, 463 F.3d 927, 930 (9th Cir. 2006) (granting *Auer* deference to agency interpretation "even if [adopted] through an informal process" that "is not reached through the normal notice-and-comment procedure" and that "does not have the force of law"); *Smith* v. *Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006) (affording *Seminole Rock* deference "even when [the agency's interpretation] is offered in informal rulings such as in a litigating document").

It appears the circuits are currently divided 4-3 on whether an agency's regulatory interpretation produced through informal processes can qualify for *Auer* deference after *Christensen* and *Mead*. The Fourth Circuit's decision here directly implicates this circuit split, and it is ripe for this Court's review.

B. The Fourth Circuit's Decision To Extend *Auer* Deference To The Ferg-Cadima Letter Is In Substantial Tension With Decisions In The Ninth And Federal Circuits.

Another relevant feature of the Ferg-Cadima letter is that it was issued solely in response to G.G.'s dispute with the Board. Days after the Board passed its resolution of December 9, 2014, a transgender activist e-mailed the Department and solicited the letter, specifically with respect to the Board's policy. App. 118a–120a. But this fact was of no moment to the Fourth Circuit, which held that *Auer* deference should apply even if the agency had never before expressed these views apart from G.G.'s dispute with Board. App. 17a. The Fourth Circuit had company in reaching this conclusion: At least four other courts of appeals agree that *Auer* deference should apply even when the agency adopts its interpretation solely in the context of the dispute before the court.[10]

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[10] *Intracomm, Inc.* v. *Bajaj,* 492 F.3d 285, 293 & n.6 (4th Cir. 2007) (deferring to Secretary's interpretation advanced in case under review); *Woudenberg* v. *U.S. Dep't of Agric.*, 794 F.3d 595, 599, 601 (6th Cir. 2015) (deferring to agency ruling in the case under review); *Bible ex rel. Proposed Class* v. *United Student Aid Funds, Inc.,* 799 F.3d 633, 639, 651 (7th Cir. 2015) (deferring to agency's interpretation advanced in amicus briefs), *cert. denied*, 136 S. Ct. 1607 (2016); *Biodiversity Conservation All.* v. *Jiron*, 762 F.3d 1036, 1062–68 (10th Cir. 2014) (deferring to agency interpretation advanced during administrative appeal); *Polycarpe* v. *E&S Landscaping Serv. Inc.*, 616 F.3d 1217, 1225 (11th Cir. 2010) (deferring to agency interpretation advanced in amicus brief).

But opinions from the Ninth Circuit and the Federal Circuit have refused to extend *Auer* deference in similar situations. In *Vietnam Veterans of America* v. *CIA*, 811 F.3d 1068 (9th Cir. 2015), the Ninth Circuit refused to apply *Auer* deference to an interpretation of agency rules that was "'developed . . . only in the context of this litigation.'" *Id.* at 1078. And in *Massachusetts Mutual Life Insurance Co.* v. *United States*, 782 F.3d 1354 (Fed. Cir. 2015), the Federal Circuit refused to apply the *Auer* framework to an IRS interpretation that was "advanced for the first time in litigation." *Id.* at 1369–70. So the Fourth Circuit's ruling implicates yet another division among the courts of appeals, and the Court should grant certiorari to resolve it.[11]

C. The Nationwide Federal Injunction Decision From Texas Also Conflicts With The Fourth Circuit's Approach.

The lower courts are also divided over whether *Auer* deference should extend to the specific agency interpretations at issue in this case. Eight days ago, on August 21, 2016, a federal district court in Texas refused to ex-

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[11] To be sure, the Fourth Circuit's decision to invoke *Auer* deference in the circumstances presented here was also wrong for a host of other reasons, see Application for Stay, No. 16A52, at 18–29, including this Court's reminder in *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), that *Auer* deference is inappropriate where that pronouncement "cannot be considered an interpretation of the regulation" as opposed to the underlying statute. *Id.* at 247. As discussed, the Ferg-Cadima letter offered an interpretation of Title IX itself, and not merely the regulation. See *supra* at 11.

tend *Auer* deference to the Department's bathroom, locker room and shower edicts, finding that 34 C.F.R. § 106.33 unambiguously allows Title IX recipients to establish separate facilities on the basis of biological sex. See *Texas* v. *United States of America*, Case No. 7:16-cv-00054, ECF No. 58; Pet. App. 183a–229a. That decision is significant here for two distinct reasons.

First, as a practical matter, it exacerbates the existing conflicts and disagreements over the proper application of *Auer* deference and Title IX to transgender individuals. Indeed, given that decision, and based on competing views of *Auer,* schools in one section of the Nation—states within the Fourth Circuit—are now bound by the Department's view of Title IX, while at the same time the Department is currently prohibited from even attempting to impose that same view on schools in the rest of the Nation.

Second, the Texas decision highlights the urgent, nationwide importance of the issues presented in this petition. Every recipient of Title IX funds throughout the Nation—ranging from universities to elementary schools—is now being substantially affected by the disagreement among the lower courts about the proper application of *Auer* deference. That is an additional reason for this court's review, especially given the deep disagreements that already exist over whether *Auer* deference should extend to agency documents such as the Ferg-Cadima letter.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DEPARTMENT'S INTERPRETATION OF TITLE IX AND 34 C.F.R. § 106.33 IS BINDING.

Finally, granting this petition will give the Court an excellent opportunity to determine whether the Department's specific interpretation of Title IX is binding. In fact, that interpretation is flatly wrong and therefore, under any reasonable view of *Auer*, is not legally binding on anyone.

1. Nothing in Title IX's text or structure supports the foundational premise of the Ferg-Cadima letter—namely, that the proscription of discrimination "on the basis of sex . . . includ[es] gender identity." App. 121a. The term "gender identity" is nowhere in Title IX. Congress knows how to legislate protection against gender identity discrimination: it has done so elsewhere, but not in Title IX.[12] Conversely, numerous bills have attempted to introduce the concept of gender identity into federal laws, but failed.[13] The interpretive alchemy of deeming

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[12] See, *e.g.*, 42 U.S.C. § 13925(b)(13)(A) (prohibiting discrimination based on "sex, gender identity …, sexual orientation, or disability"); 42 U.S.C. § 3796gg (assisting victims "whose ability to access traditional services and responses is affected by their … gender identity").

[13] See, *e.g.*, H.R. 2015 (110th Cong. 2007); H.R. 3017 (111th Cong. 2009); S. 1584 (111th Cong. 2009); H.R. 1397 (112th Cong. 2011); S. 811 (112th Cong. 2011); H.R. 1755 (113th Cong. 2013); S. 815 (113th Cong. 2013) (unenacted versions of Employment Non-

(continued…)

"sex" to include "gender identity" would revise those legislative defeats into victories. That is not how statutory interpretation works. See, *e.g.*, *Hively* v. *Ivy Tech Cmty. Coll.*, __ F.3d __, 2016 U.S. App. LEXIS 13746, at *7 & n.2 (7th Cir. July 28, 2016) (noting, "despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation").

To the contrary, when federal law deploys the term "sex" in anti-discrimination statutes, it prohibits discrimination based on "nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Johnston* v. *Univ. of Pittsburgh*, 97 F.Supp.3d 657, 676 (W.D. Pa. 2015) (citing *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007). As Judge Niemeyer's dissent explained, during the period when Title IX was enacted and its regulations promulgated, "virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females, particularly with respect to their reproductive functions." App. 54a (collecting definitions). In other words, the prohibition on "sex" discrimination in laws like Title IX and Title VII "do[es] not outlaw discrimination against . . . a person born with a male body who believes himself to be a female, or a person born with a female body who believes herself to be a male."

Discrimination Act, which would have prohibited gender identity discrimination).

Ulane v. *E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

2. Moreover, reading "sex" to include "gender identity" would make a hash of Title IX's scheme allowing facilities and programs to be separated by "sex."[14] If "sex" signifies, not biology, but rather one's "internal" sense of maleness or femaleness, the whole concept of permissible sex-separation collapses. What sense could there be in allowing "separate living facilities for the different sexes," 20 U.S.C. § 1686, if a biological male could legally qualify as a woman based merely on his *subjective* perception of being one? The answer is none. *Cf. United States* v. *Virginia*, 518 U.S. 515, 550 n. 19 (1996) (admitting women to VMI "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements").

3. Nor is the Ferg-Cadima interpretation supported by the theory of sex-stereotyping discrimination in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). *Cf.* App. 122a n.2 (relying on *Price Waterhouse*). A *Price Waterhouse* claim is "based on behaviors, mannerisms, and appearances," such as when a male employee is fired because he "wear[s] jewelry . . . considered too effeminate,

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[14] See, *e.g.*, 20 U.S.C. § 1686 (allowing "separate living facilities for the different sexes"); 34 C.F.R. § 106.32 (allowing "separate housing on the basis of sex," provided facilities are "[p]roportionate in quantity" and "comparable in quality and cost"); 34 C.F.R. § 106.34 (allowing "separation of students by sex" within physical education classes and certain sports "the purpose or major activity of which involves bodily contact").

carr[ies] a serving tray too gracefully, or tak[es] too active a role in child rearing." *Johnston*, 97 F.Supp.3d at 680 (internal quotations and citation omitted). But *Price Waterhouse* does not require "employers to allow biological males to use women's restrooms," because "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty*, 502 F.3d at 1224. If anything, the Board's policy is the *opposite* of sex stereotyping: it designates male and female restrooms based solely on biology, regardless of whether a man or a woman satisfies some stereotypical notion of masculinity or femininity. See, *e.g.*, *Johnston*, 97 F.Supp.3d at 680–81 (rejecting sex stereotyping claim on this basis).

4. Furthermore, an interpretation of Title IX according to the Ferg-Cadima view would render the statute unconstitutional, and must be avoided for that reason alone. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 190 (1991) (describing constitutional avoidance canon). For instance, it would cause Title IX to violate the Spending Clause by failing to give "clear notice" of conditions attached to federal funding.[15] No funding recipient could have had "clear notice" of the novel interpretation of Title IX in

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[15] *Arlington Cent. Sch. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 297 (2006) (clear notice absent where text "does not even hint" fees due to prevailing party); *NFIB* v. *Sebelius*, 132 S. Ct. 2566, 2606 (2012) (Congress's spending clause power "does not include surprising participating States with post-acceptance or retroactive conditions" (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 25 (1981)).

this case. Indeed, the *G.G.* majority confirmed as much by finding the Title IX regulation was ambiguous as applied to transgender individuals. App. 18a. *Cf. Bennett* v. *Ky. Dep't of Educ.*, 470 U.S. 656, 666 (1985) (no "clear notice" violation where there was "no ambiguity with respect to" funding condition).

5. Finally, taking the Ferg-Cadima letter's construction of "sex" seriously would turn Title IX against itself. As the district court pointed out, the relevant regulation would bar the Board's policy only if "sex" means *solely* "gender identity" and excludes any notion of "biological sex." App. 99a–102a. As applied to Title IX, that preposterous construction would legalize just the kind of biologically based discrimination against men and women that Title IX was enacted to prevent. For instance, schools could exclude biological women from taking science classes or joining the chess team, so long as they allowed biological men who identify as females to do so. Only transgendered people would be protected under this Title IX regime; men and women who identify with their biological sex would receive no protection at all.

Indeed, if "sex" means *only* "gender identity," the Board's policy would not implicate Title IX *at all* because it addresses only "biological sex" and *excludes* consideration of gender identity. But that is absurd: everyone agrees that the Title IX regulation squarely addresses—and expressly allows—sex-separated restrooms, exactly like the ones provided by the Board's policy.

CONCLUSION

Some regard transgender restroom access as one of the great civil-rights issues of our time. But that makes it all the more important to insist that federal officials follow the procedures for lawmaking prescribed in the Constitution and the Administrative Procedure Act. To condone the agency behavior displayed in this case is to condone future use of these maneuvers by other agency officials, and in support of other causes—without any way of ensuring that the Executive Branch will always be controlled by people who share one's most deeply held beliefs.

At bottom, then, this case is not really about whether G.G. should be allowed to access the boys' restrooms, nor even primarily about whether Title IX can be interpreted to require recipients to allow transgender students into the restrooms and locker rooms that accord with their gender identity. Fundamentally, this case is about whether an agency employee can impose that policy in a piece of private correspondence. If the Court looks the other way, then the agency officials in this case—and in a host of others to come—will have become a law unto themselves.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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