No. 16-273

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 Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONER

JONATHAN F. MITCHELL
559 Nathan Abbott Way
Stanford, CA 94305
jfmitche@stanford.edu

DAVID P. CORRIGAN
JEREMY D. CAPPS
M. SCOTT FISHER, JR.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
(804) 747-5200
dcorrigan@hccw.com

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
STEPHEN S. SCHWARTZ
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
KDuncan@Schaerr-Duncan.com

Counsel for Petitioner

QUESTIONS PRESENTED

Title IX of the Education Amendments of 1972 ("Title IX") prohibits discrimination "on the basis of sex," 20 U.S.C. §1681(a), while its implementing regulation permits "separate toilet, locker room, 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 In this case, a Department of Education official opined in an unpublished letter that Title IX's prohibition of "sex" discrimination "include[s] gender identity," and that a funding recipient providing sex-separated facilities under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 Should *Auer* deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

2. 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Legislative Materials

Other Authorities

No. 16-273

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD, PETITIONER

v.

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

INTRODUCTION

The Fourth Circuit has adopted an agency interpretation of Title IX that is plainly wrong and that would make this landmark law unrecognizable to the Congress that enacted it four decades ago.

Title IX forbids discrimination in educational programs "on the basis of *sex*," 20 U.S.C. §1681(a) (emphasis added), a straightforward prohibition intended to erase discrimination against women in classrooms, faculties, and athletics. No one imagined, however, that Title IX would erase all distinctions between men and women, nor dismantle expectations of privacy between the sexes. That is why Title IX permits "separate living facilities for the different sexes," 20 U.S.C. §1686, including "separate toilet, locker room, and shower facilities on the basis of sex[.]" 34 C.F.R. §106.33. For over forty years, our Nation's schools have structured facilities around that sensible idea—namely, that in 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 interpretation adopted by the Fourth Circuit turns that expectation upside down. Deferring to an unpublished letter written in January 2015 by a mid-level official in the Department of Education ("Department"), the court reasoned that the term "sex" in Title IX does not mean the physiological distinctions between males and females—which is what Congress (and everyone else) thought the term meant when Title IX was enacted and its regulations issued in the mid-1970s. Instead, we are now told that "sex" is ambiguous as applied to persons whose gender identity diverges from their physiology. According to the Fourth Circuit, this means a physiologically female student who identifies as a male must be allowed to use the boys' restroom, and vice versa. It also means that the policy of the petitioner Gloucester County School Board ("Board")—which separates restrooms by physiological sex, while also providing unisex restrooms for all students—is *prohibited* by Title IX.

That preposterous interpretation is foreclosed by the text, structure, and history of Title IX and its implementing regulation, and no amount of deference to an administrative agency can justify it.

OPINIONS BELOW

This Court has granted 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 dismissing the Title IX claim and denying 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 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 is available at 2016 WL 3581852 (E.D. Va. June 23, 2016). 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 petitioned for certiorari on August 29, 2016, see 28 U.S.C. §2101(c), and this Court granted the writ on October 28, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY 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).

> Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

20 U.S.C. §1686.

Department of Education Title IX regulations provide, in relevant part:

> 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.

34 C.F.R. §106.33.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

Marking Title IX's fortieth anniversary in 2012, the White House praised its "commonsense" prohibition on sex discrimination in education and observed that the law "marked a momentous shift for women's equality in classrooms, on playing fields, and in communities throughout our nation."[1] That is exactly

---

[1] *Obama Administration Commemorates 40 Years of Increasing Equality and Opportunity for Women in Education and Athletics*, White House, Office of the Press Sec'y (June 20, 2012).

right. In the words of its principal sponsor, Senator Birch Bayh of Indiana, Title IX aimed "a death blow" at "one of the great failings of the American educational system"—namely, "corrosive and unjustified discrimination against women." 118 Cong. Rec. 5809, 5803. At the same time, however, Title IX carefully preserved settled expectations of privacy by permitting "separate living facilities for the different sexes, 20 U.S.C. §1686, and "separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. §106.33 ("section 106.33"). That exception was "designed," as Senator Bayh explained, "to allow discrimination only in instances where personal privacy must be preserved." 121 Cong. Rec. 16060.

1. Title IX prohibited sex discrimination as a means of ending educational discrimination against women.

Title IX emerged from Congress's multifaceted efforts in the early 1970's to address discrimination against women. See generally Paul C. Sweeney, *Abuse Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. Rev. 41, 50–54 (1997). Frustrated with lack of progress on the Equal Rights Amendment ("ERA"), Senator Bayh decided to pursue its goals through other means. Birch Bayh, *Personal Insights and Experiences Regarding the Passage of Title IX*, 55 Clev. St. L. Rev. 463, 467 (2007). Believing that the worst discrimination against women was in "the educational area," *id.* at 468, Bayh focused on the Higher Education Act of

1965, which granted money to universities. Sweeney, *supra*, at 51. In 1972, while that Act was being amended, floor amendments added the text that is now Title IX. See 117 Cong. Rec. 39098; 118 Cong. Rec. 5802–03.

Those amendments were principally motivated to end discrimination against women in university admissions and appointments. See 117 Cong. Rec. 39250, 39253, 39258; 118 Cong. Rec. 5104–06. Title IX's architects viewed such discrimination as rooted in pernicious stereotypes about women. As Senator Bayh vividly put it, "[w]e are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again." 118 Cong. Rec. 5804. Title IX meant to extirpate such "myths about the 'weaker sex.'" *Id.*

Indeed, in the debates Senator Bayh used the term "sex discrimination" and "discrimination against women" as virtually interchangeable. See, *e.g.*, 118 Cong. Rec. 5803. House members did the same, explaining that the legislation would afford "[w]omen … [an] equal opportunity to start their careers on a sound basis," 117 Cong. Rec. 39253 (Rep. Sullivan), and that extending such protection to "women" would be "[a]ll that this title does[.]" 117 Cong. Rep. 39259 (Rep. Green).

2. Title IX allows certain facilities and programs to be separated by sex.

At the same time, Congress understood that not all distinctions between men and women are based on stereotypes. Foremost among those are distinctions needed to preserve privacy. As ERA proponents had grasped, "disrobing in front of the other sex is usually associated with sexual relationships," Barbara A. Brown, Thomas I. Emerson, Gail Falk, Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 901 (1971), and thus implicated the recently-recognized right to privacy. See *id.* at 900–01 (citing *Griswold* v. *Connecticut*, 381 U.S. 479 (1965)). That privacy right "would permit the separation of the sexes" in intimate facilities such as "public rest rooms[.]" *Id.*

Both the Senate and House grasped this commonsense principle. For instance, Senator Bayh noted sex separation would be justified where "absolutely necessary to the success of the program" such as "in classes for pregnant girls," and "in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5807.[2] Representative Thomp-

[2] When unsuccessfully introducing similar legislation the year before, Bayh observed that, by "provid[ing] equal [educational] access for women and men students … [w]e are not requiring that intercollegiate football be desegregated, *nor that the men's locker room be desegregated*." 117 Cong. Rec. 30407 (emphasis added).

son—"disturbed" by suggestions that banning sex discrimination would prohibit all sex-separated facilities—proposed an amendment stating that "nothing contained herein shall preclude any educational institution from maintaining separate living facilities because of sex." 117 Cong. Rec. 39260. The language was introduced that day and adopted by the House without debate. 117 Cong. Rec. 39263. Although Bayh's version lacked a similar proviso, the conference committee included Thompson's language without further discussion. H.R. Conf. Rep. No. 92-1085 at 222.

Subsequently, the Department of Health, Education, and Welfare ("HEW") proposed a Title IX regulation fleshing out the statute's reference to "living facilities." See Comment, *Implementing Title IX: The HEW Regulations*, 124 U. Pa. L. Rev. 806, 811 (1976) (noting "living facilities" was ambiguous). The HEW regulation provided that living facilities would include "toilet, locker room and shower facilities." HEW, 39 Fed. Reg. 22228, 22230 (June 20, 1974). The final regulations retained HEW's definition. HEW, 40 Fed. Reg. 24128, 24141 (June 4, 1975); 34 C.F.R. §106.33.[3]

---

[3] HEW's regulations were recodified in their present form after the reorganization that created the Department of Education in 1980. See United States Dep't of Educ., 45 Fed. Reg. 30802, 30960 (May 9, 1980). Additionally, because multiple agencies issue Title IX regulations, the section 106.33 exception appears verbatim in 25 other regulations. See, *e.g.*, 7 C.F.R. §15a.33 (Agriculture); 24 C.F.R. §3.410 (Housing & Urban Development); 29 C.F.R. §36.410 (Labor); 38 C.F.R. §23.410 (Veterans Affairs); 40 C.F.R. §5.410 (EPA).

HEW's regulations continued to use the statutory term "sex," without elaboration.

When Congress considered the HEW regulation on "living facilities," Senator Bayh again linked the issue to privacy. He introduced into the record a scholarly article explaining that Title IX "was designed to allow discrimination only in instances where personal privacy must be preserved. For example, the privacy exception lies behind the exemption from the Act of campus living facilities. The proposed regulations preserve this exception, as well as permit 'separate toilet, locker room, and shower facilities on the basis of sex.'" 121 Cong. Rec. 16060.

Title IX regulations contain another relevant provision for separation between male and female students, also based on physical differences. Funding recipients are prohibited from discriminating on the basis of sex in athletic activities and must provide "equal athletic opportunity for members of both sexes." 34 C.F.R. §106.41(a), (c); HEW, 40 Fed. Reg. 24128 (June 4, 1975). Nonetheless, they are permitted to establish "separate teams for members of each sex where selection … is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. §106.41(b).

3. Title IX is enforced by multiple agencies through formal rules and clear notice.

Title IX is authorized by the Spending Clause, see *Franklin* v. *Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74

(1992), and Congress has accordingly vested enforcement responsibility with "[e]ach Federal department and agency … empowered to extend Federal financial assistance to any education program or activity[.]" 20 U.S.C. §1682. Those agencies may "effectuate" Title IX by "issu[ing] rules, regulations, or orders of general applicability," and "[n]o such rule, regulation, or order shall become effective unless and until approved by the President." *Id.*; see also 20 U.S.C. §1232(f) (requiring that certain Department acts be transmitted to leaders of Congress).

Title IX may be enforced by terminating federal financial support to noncompliant institutions. 20 U.S.C. §1682. Agencies seeking to enforce Title IX in that way must comply with certain procedural requirements, including notice and opportunity for a hearing, and must provide written reports on the termination to Congress. *Id.*

B. Factual Background

G.G. is a 17-year-old student at Gloucester High School who was born female. JA61, 64.[4] According to G.G., however, "I was born in the wrong sex." App. 151a. In April 2014, a psychologist diagnosed G.G. with gender dysphoria, a condition involving "incongruence between a person's gender identity" and birth sex. JA64–65. G.G. defines "gender identity" as one's "innate sense of being male or female," in contrast to

[4] These factual allegations are taken from G.G.'s complaint and declaration. JA61–79; App. 146a–152a.

one's "sex … assigned at birth." JA64. G.G. was advised to "transition" to a male gender identity by adopting a male name and "us[ing] … the [boys'] restroom." JA66. G.G. has since legally adopted a male name, but has not undergone any genital surgery and is still anatomically female. JA89.[5]

In August 2014, before the 2014–15 school year began, G.G. and G.G.'s mother met with the Gloucester High School principal and guidance counselor. App. 148a. The officials "expressed support for [G.G.] and a willingness to ensure a welcoming environment." *Id.* Records were changed to reflect G.G.'s male name, and teachers were told that G.G. was to be addressed by a male name and pronouns. G.G. was also permitted to continue with a home-bound physical education program, which meant G.G. did not need to use the school's locker room. App. 149a.

G.G. initially agreed to use a separate restroom, being "unsure how other students would react to [G.G.'s] transition." *Id.* However, after two months G.G. "found it stigmatizing to use a separate restroom" and "determined that it was not necessary" to

---

[5] G.G.'s brief opposing certiorari claimed that, "in June 2016, G. had chest reconstruction surgery." Opp. 5–6 n.5. Since certiorari was granted, G.G.'s counsel has informed the Board's counsel that the sex designation on G.G.'s Virginia birth certificate has been changed from "female" to "male." These developments do not appear in the record before this Court, and thus are not proper grounds for decision. *Witters* v. *Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486 n. 3 (1986).

do so. *Id.* The principal allowed G.G. to use the boys' restroom beginning on October 20, 2014. *Id.*

The next day, the Board began receiving numerous complaints from parents and students who regarded G.G.'s presence in the boys' restroom as an invasion of student privacy. App. 144a; Pet. 6. The Board considered the problem and, after two public meetings on November 11 and December 9, 2014, adopted the following policy:

> Whereas the GCPS [Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS 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 GCPS 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.

Before the Board adopted this resolution, the high school announced it would install three single-stall unisex bathrooms, regardless of whether the Board approved the December 9 resolution. JA71–72, 73. These unisex restrooms—which were available on December 16—would be open to all students who, for whatever reason, desire greater privacy. App. 144a–145a. G.G. refuses to use them, however, claiming they make G.G. feel "stigmatized and isolated." App. 151a. G.G. acknowledges that male classmates may be "uncomfortable" using the restroom with G.G., but asserts that they should "avail [themselves] of the recently installed single stall bathrooms." JA75.

C. Procedural History

1. The Ferg-Cadima letter

On December 14, 2014, five days after the Board passed its resolution, a lawyer sent an e-mail to the Department asking whether it had any "guidance or rules" relevant to the Board's resolution. App. 119a. 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 in response. App. 121a ("Ferg-Cadima letter").

The Ferg-Cadima letter stated that "*Title IX* … prohibits recipients of Federal financial assistance from discriminating on the basis of sex, *including gender identity*." App. 121a (emphases added). The letter acknowledged that Title IX and its regulations "permit schools to provide sex-segregated restrooms locker

rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances," App. 123a, while providing the following guidance as to those 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.

Id.

The Ferg-Cadima letter cited no agency document requiring schools to treat transgender students "consistent with their gender identity" regarding restroom, locker room, or shower access. Instead it cited a Department Q&A sheet, 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) (Q&A #31) (opining "[h]ow ... the Title IX requirements *on single-sex classes* apply to transgender students) (emphasis added).

2. District Court proceedings

G.G. sued the Board on June 11, 2015, six months after the Board passed its resolution, claiming the Board's policy violates the Equal Protection Clause

and Title IX. JA75–78. G.G. sought declaratory and injunctive relief, damages, and attorneys' fees. JA78.

G.G. moved for a preliminary injunction on June 18, 2015. ECF 18. With respect to Title IX, G.G. argued that section 106.33 does not allow a school to "assign transgender boys to the girls' room," and that Title IX therefore requires giving G.G. access to the boys' restroom. *Id.* at 37. G.G. reiterated that "gender identity" means "one's sense of oneself as male or female," *id.* at 1, or "the conviction of belonging to a particular gender," *id.* at 2, and asserted further that "[f]rom a medical perspective, there is no distinction between an individual's gender identity and his or her 'biological' sex or gender." *Id.* at 17 n.13. G.G. also cited the Department's purported position that Title IX requires access to sex-separated facilities consistent with gender identity and urged the district court to defer to that position under *Auer*. *Id*. at 38.

On June 29, 2015, the United States filed a "statement of interest" in support of G.G., arguing that "prohibiting a student from accessing the restrooms that match his gender identity is prohibited sex discrimination under Title IX." App. 160a, 162a. The United States did not cite section 106.33, nor explain how the Board's policy could be unlawful under the regulation. Instead, it relied on the Ferg-Cadima letter as the

"controlling" interpretation of Title IX and section 106.33. See App. 172a.[6]

Without ruling on the equal protection claim, the district court dismissed G.G.'s Title IX claim and denied a preliminary injunction. App. 82a–83a (order); 84a–117a (opinion). First, the district court held that the Title IX claim was "precluded by Department of Education regulations"—specifically section 106.33. App. 97a–98a. The court reasoned that section 106.33 allows separation of restrooms by "sex" and, "[u]nder any fair reading, 'sex' in section 106.33 clearly includes biological sex." App. 99a. The court thus concluded that the Board's policy of "providing separate bathrooms on the basis of biological sex is permissible under the regulation," regardless of whether "sex" encompasses "gender identity," as G.G. urged. *Id.*

Second, the district court refused to give controlling weight to the Ferg-Cadima letter. 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

---

[6] The United States cited two other Department documents, but neither addresses whether schools must allow students into restrooms or locker rooms corresponding with their gender identity. See App. 170a–172a (citing United States Department of Education, *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014), and United States Department of Education, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*); see also *supra* at 15.

when interpreting Title IX. App. 101a; see *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The Court also held that the letter should not receive deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997), because it would prevent school districts from establishing separate restrooms "on the basis of sex," as section 106.33 "clearly allows." App. 102a.

3. Fourth Circuit appeal in No. 15-2056

The Fourth Circuit reversed the district court's dismissal of G.G.'s Title IX claim, holding that the district court should have accepted the Ferg-Cadima letter as the "controlling" construction of Title IX and section 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–20a, 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, 22a–23a. 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 constituted 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 agency guidance. *Id.* at 24a. While conceding the interpretation was "novel," given "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.[7]

The Board moved for rehearing en banc, which was denied on May 31, 2016. *Id.* at 61a–66a. The Board then asked for a stay of the Fourth Circuit's mandate pending its filing 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.[8]

---

[7] Judge Niemeyer dissented for many of the reasons given by the district court. App. 40a–60a.

[8] On May 13, 2016, the Departments of Education and Justice issued a "Dear Colleague" letter elaborating on the Ferg-Cadima letter. See Pet. 14–15. Challenges to the Dear Colleague letter by numerous States, see *id.* at 15–16, have resulted in a nationwide preliminary injunction against the Departments. See *Texas* v. *United States*, __ F.Supp.3d __, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016), on appeal, *Texas* v. *United States*, No. 16-11534 (5th Cir.). A similar lawsuit in Nebraska has been stayed pending this case. See *Nebraska* v. *United States*, No. 4:16-cv-03117, ECF No. 24 (D. Neb. Nov. 23, 2016).

(continued…)

4. Proceedings after remand

On remand, the district court entered a preliminary injunction without taking additional briefing or evidence. App. 71a–72a. The injunction ordered the Board to permit G.G. to use the boys' restroom at Gloucester High School. *Id.* at 72a. The Board appealed this order, creating a second case in the Fourth Circuit, No. 16-1733. The Board's request to stay the injunction pending appeal was denied by the district court, App. 73a–75a, and the Fourth Circuit, 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. That request was granted on August 3, 2016. *Gloucester Cnty. Sch. Bd.* v. *G.G.*, 136 S. Ct. 2442 (2016) (per curiam). The Board timely petitioned for a writ of certiorari on three questions, which this Court granted as to questions two and three. Order, Oct. 28, 2016. In this brief, these questions have been renumbered as questions one and two, respectively.

Separately, the Department of Health & Human Services issued Affordable Care Act regulations interpreting Title IX in the same way as the Ferg-Cadima letter. Those regulations were preliminarily enjoined last week. See *Franciscan Alliance, Inc.* v. *Burwell*, No. 7:16-cv-00108, ECF No. 62 (N.D. Tex. Dec. 31, 2016) (enjoining aspects of 45 C.F.R. pt. 92).

SUMMARY OF ARGUMENT

The interpretation of Title IX and its implementing regulation adopted by the Fourth Circuit would upend the ingrained practices of nearly every school in the Nation on a matter of basic privacy and dignity—whether separate restrooms, locker rooms, and showers may be provided for boys and girls, as defined by their physical sexual attributes.

The majority deemed "controlling" an agency's view that "sex" in Title IX turns, not on physiological distinctions between males and females, but on "gender identity"—meaning one's internal perception of being male or female. That profoundly mistaken view would outlaw the (until now) universally accepted practice of separating restrooms, locker rooms, showers, athletic teams, and dormitory rooms based on physiological differences between the sexes. It would also transform Title IX's straightforward prohibition on "sex" discrimination into a different prohibition on "gender identity" discrimination which Congress never contemplated or enacted. The Fourth Circuit's decision cannot stand. This Court should reverse on either of two distinct grounds.

I. Most fundamentally, the Court should reverse because no matter what level of deference is given to the agency, the interpretation of Title IX and its regulation adopted by the Fourth Circuit is wrong.

A. The Board's policy is plainly valid under the Title IX regulation at issue—section 106.33—which has

long permitted separation of restrooms by "sex." Indeed, the Board went above and beyond the accommodation section 106.33 contemplates by providing additional unisex restrooms for *any* student who desires greater privacy for whatever reason.

To invalidate the Board's policy under Title IX, the Fourth Circuit adopted a view that equates the term "sex" *entirely* with "gender identity," effectively compelling schools to disregard the very physiological differences that justify separation in the first place. That cannot be right as a matter of Title IX's text, history, and structure.

All indicators of statutory meaning show that when Title IX was enacted, Congress understood "sex" to refer to physiological distinctions between men and women. Title IX-era dictionaries unanimously defined sex based on those physical characteristics, and modern dictionaries overwhelmingly do the same. None treats gender identity as determinative of sex.

Neither does Title IX's legislative history. While seeking to end discrimination against women, Title IX's architects deliberately allowed separation of the sexes to protect privacy—an interest rooted in physical differences between the sexes that would be nullified by equating sex with gender identity.

B. The Fourth Circuit's interpretation would also undermine Title IX's structure and purposes. Requiring schools to evaluate access to intimate facilities based on gender identity rather than physiological differences would lead them either to (1) abandon sex-

separated facilities altogether, or (2) undertake case-by-case evaluations of a student's gender presentation.

The first approach would nullify the privacy safeguards envisioned by Title IX's proponents and expressly provided in the statute and implementing regulation. The second approach would be impossible to administer and, in any event, would ironically incentivize sex-stereotyping discrimination outlawed by the Constitution and federal anti-discrimination law. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 250–51 (1989) (plurality opinion). Making sex turn on gender identity, furthermore, poses a threat to female-only athletic teams, one of Title IX's signal achievements.

C. Even assuming Title IX theoretically *permitted* the interpretation adopted by the Fourth Circuit, it would surely come as a surprise to four decades of Title IX recipients. That has constitutional significance: as a Spending Clause statute, Title IX must give fair notice of its conditions. *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006); *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). The latent possibility that schools would be required to treat sex as equivalent to gender identity, on pain of losing federal funding, would offend that clear-notice requirement. This Court should interpret Title IX to avoid this constitutional problem.

II. Alternatively, the Court may reverse because the Fourth Circuit should not have extended *Auer* deference to the agency interpretation.

A. *Auer* deference applies only when an agency interprets its own regulations. The Ferg-Cadima letter, however, turns on what the agency thinks Title IX *itself* requires, not merely on what the regulatory language means. But even indulging the assumption that the letter interprets the regulatory language, that language merely parrots Title IX by importing the term "sex" directly from the statute. This Court has held that agencies cannot claim *Auer* deference when they interpret regulatory terms that come directly from statutes. *Gonzales* v. *Oregon*, 546 U.S. 243, 247 (2006).

B. Assuming *Auer* deference applies, it only aids agencies when regulatory language is ambiguous and the agency clarifies it in a permissible way. *Christensen*, 529 U.S. at 588. But for many of the same reasons that Title IX forecloses the agency's interpretation, the regulations do as well. "Sex" is not an ambiguous term: as used in Title IX, it plainly refers to physiological differences between men and women. And reading "sex" as depending on gender identity is not a permissible interpretive choice in any event.

C. Finally, *Auer* deference is inapplicable because the Department ignored procedural requirements for acting with the force of law. This Court has held that agency interpretations of statutes merit *Chevron* deference only when agencies act with the force of law by employing relatively formal procedures. *United States* v. *Mead Corp.*, 533 U.S. 218 (2001); *Christensen*, 529 U.S. at 588. That rule ensures agencies can only bind

courts and regulated parties through methods Congress provided. This Court has implied that *Auer* should be limited in a similar way, and should now so hold.

Even if *Auer* might apply to some informal agency acts, it should not apply here. Congress has required specific processes, including but not limited to those in the Administrative Procedure Act, that the Department must follow if it seeks to act with the force of law. See 20 U.S.C. §1682. The Ferg-Cadima letter was not issued pursuant to those procedures and should therefore not control in court.

ARGUMENT

In agreeing to review the Fourth Circuit's decision, this Court granted certiorari on two questions: (1) whether the Fourth Circuit properly deferred to the agency's interpretation under *Auer* v. *Robbins*, 519 U.S. 452 (1997), Pet. 25–32, and (2) whether—regardless of *Auer*—that interpretation was correct. Pet. 33–38; see also *id.* at 33 (arguing the agency's "interpretation is flatly wrong"). This brief addresses these questions in reverse order for two reasons.

First, understanding how Title IX addresses sex-separated facilities illuminates why *Auer* never should have applied. For instance, it is not ambiguous whether Title IX and section 106.33 permit separate restrooms based on physiological differences between the sexes—they plainly do—which removes the premise for applying *Auer*.

Second, a new administration will take office on January 20, 2017. This raises the possibility that the guidance on which the Fourth Circuit relied will be altered or rescinded. Even that development, however, would leave the question of whether the underlying interpretation was correct. See, *e.g.*, Pet. Reply 1 (asking Court to resolve "the proper interpretation of Title IX and its implementing regulation"). This Court can—and should—resolve that distinct question, apart from whether *Auer* should have applied. That is because the meaning of Title IX and section 106.33 on this issue is plain and may be resolved as a matter of straightforward interpretation, instead of remanding for needless additional litigation in the lower courts.

I. The Board's Policy Separating Restrooms By Physiological Sex Is Plainly Valid Under Title IX And Section 106.33.

The Fourth Circuit accepted an interpretation of Title IX and its implementing regulation that conclusively determines "sex" according to "gender identity," meaning the internal perception of oneself as male or female. App. 15a–16a, 20a. That interpretation is unambiguously precluded by the text, history, and structure of Title IX and its implementing regulation and should be rejected by this Court.

A. The Text And History Of Title IX And Section 106.33 Refute The Notion That "Sex" Can Be Equated With "Gender Identity."

The most straightforward way to resolve the interpretive question in this case is the one taken by the district court. See App. 97a–100a. As that court correctly explained, the Title IX regulation at issue—section 106.33—"specifically allows schools to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable." App. 99a. That regulation confirms the legality of the Board's policy under Title IX, *regardless* of whether the term "sex" may include some notion of a person's "gender identity." See *id.* (concluding that, because Board's policy is permitted by the regulation, "the Court need not decide whether 'sex' in … [s]ection 106.33 also includes 'gender identity'").

As the district court explained, it is beyond dispute that the agency that adopted section 106.33 in the mid-1970s understood "sex," at a minimum, to *include* physiological distinctions between men and women. See App. 99a (observing, "[u]nder any fair reading, 'sex' in [s]ection 106.33 clearly includes biological sex"). Indeed, as discussed below, all relevant indicia of meaning show that the understanding of "sex" shared by Title IX's architects was *wholly* determined by those physiological distinctions. Yet the position accepted by the Fourth Circuit majority implies the opposite: that one's internal, perceived sense of gender identity is *determinative* when it diverges from

physiological sex. See App. 20a (accepting as a "plausible" reading one that "determin[es] maleness or femaleness with reference to gender identity"). Practically speaking, this means that physiological sex is not only irrelevant but invalid under Title IX as a general basis for classification. To put the matter most starkly, the interpretation accepted by the Fourth Circuit *forbids* something the statute and regulation *permit*: using physiological sex to separate boys and girls in restrooms.

1. The linguistic evidence found in dictionary definitions confirms that the term "sex" in Title IX and section 106.33 turns overwhelmingly on the physiological differences between men and women. Those sources provide *no* support for the notion adopted by the Fourth Circuit that "sex" *equates* with "gender identity," to the exclusion of physiology.

The panel majority and Judge Niemeyer's dissent cited nine dictionaries between them, covering a period from before the enactment of Title IX to the present day. Every single one referred to physiological characteristics as a criterion for distinguishing men from women. App. 21a–22a (majority) (citing *American College Dictionary* 1109 (1970), *Webster's Third New International Dictionary* 2081 (1971), *Black's Law Dictionary* 1583 (10th ed. 2014), and *American Heritage Dictionary* 1605 (5th ed. 2011)); App. 54a–55a (dissent) (citing *The Random House College Dictionary* 1206 (rev. ed. 1980), *Webster's New Collegiate Dictionary* 1054 (1979), *American Heritage Dictionary*

1187 (1976), *Webster's Third New International Dictionary* 2081 (1971), *The American College Dictionary* 1109 (1970), *Webster's New World College Dictionary* 1331 (5th ed. 2014); *The American Heritage Dictionary* 1605 (5th ed. 2011), and *Merriam-Webster's Collegiate Dictionary* 1140 (11th ed. 2011)).

For instance, the majority's dictionary definitions include concepts such as "anatomical," "physiological," and "morphological" differences; "biparental reproduction"; and "sex chromosomes." App. 21a. Similarly, the dissent's definitions include concepts such as "structural" differences, "reproductive functions," and "reproductive organs." App. 54a–55a. The fact that "*even today*, the term 'sex' continues to be defined based on the physiological distinctions between males and females" strongly suggests that is what the term meant in the 1970s-era statute and regulation. App. 55a (Niemeyer, J., dissenting).

Nevertheless, the majority found ambiguity in certain definitions of "sex," observing that the definitions in two dictionaries contemporary with Title IX "used qualifiers such as references to the '*sum* of' various factors, '*typical* dichotomous occurrence,' and '*typically* manifested as maleness and femaleness.'" App. 22a. The majority failed to read those supposed "qualifiers" in context.

For instance, the majority pointed out that the *American College Dictionary* (1970) and *Webster's Third New International Dictionary* (1971) referenced

the "'*sum of*' various factors" bearing on sex. *Id.* (emphasis in maj. op.). But the panel overlooked that the "factors" to be "sum[med]" up consist of "anatomical and physiological differences" (in the former dictionary) and "'the morphological, physiological, and behavioral peculiarities of living beings *that subserve[ ] biparental reproduction*'" (in the latter). App. 21a (emphasis added). The reference in *Webster's* to "typical" sex characteristics, meanwhile, appears to refer to the usual range of expression of those characteristics, rather than acknowledging the existence of alternative definitions of sex. App. 21a–22a. In other words, whatever "factors" might be relevant and whatever variation from the "typical" case might exist, both dictionaries confirm that physiological characteristics—and those related to "reproduction" in particular—are the overriding consideration.

The majority nonetheless argued that where "the various indicators of sex … diverge," these dictionary definitions "shed little light on how exactly to determine" whether a person is male or female. App. 22a. But that is false: as discussed above, the 1970s-era definitions relied on by the majority distinguish men from women based on physical characteristics. More importantly, for the majority's point to have any relevance to this case, a person's perceived gender identity would have to have been considered an "indicator[ ] of sex" that can contradict other "indicators"—

and no dictionary definition contemporary with Title IX suggested that it was.[9]

To be sure, the majority cited three dictionaries that referred to non-physiological factors in defining sex: two that included "behavioral peculiarities" or "gender" as an aspect of sex, *see* App. 21a–22a (quoting *Webster's Third New International Dictionary* 2081, and *Black's Law Dictionary* 1583), and one that "includes in the definition of 'sex' '[o]ne's identity as either female or male,'" App. 22a (quoting *American Heritage Dictionary* 1605). However, the majority's editions of *Black's* and *American Heritage* were published in 2014 and 2011, respectively, and have little probative value as applied to Congress's understanding of language enacted in the mid-1970s. See, *e.g.*, *MCI Telecomms. Corp.* v. *Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) (rejecting reliance on a dictionary "not yet even contemplated" when statute was enacted); *St. Francis Coll.* v. *Al-Khazraji*, 481 U.S. 604, 610–13 (1987) (defining "race" according to dictionaries and

---

[9] The majority cited various circumstances where physiological sex is supposedly more difficult to settle, such as someone who had "sex-reassignment surgery," an "intersex individual," someone "born with X-X-Y sex chromosomes," or someone "who lost external genitalia in an accident." App. 20a. Regardless of how these particular cases would be settled under Title IX, none involves the situation where a person's perceived gender identity is determinative of sex, regardless of physiology.

(continued…)

encyclopedias existing "when [42 U.S.C.] §1981 became law in the 19th century").[10] Even if modern dictionaries were probative, not even the 2011 *American Heritage Dictionary* went as far as G.G.'s position that one's perceived "identity" overrides physiological sex. And if it did, that dictionary would have exactly the same problem that the Fourth Circuit and the Ferg-Cadima letter created, namely, a gender identity-based definition of "sex" that swallows up all other definitions. This Court has rejected proposed interpretations derived from a "meaning set forth in a single dictionary … which not only *supplement*s the meaning contained in all other dictionaries, but *contradicts* one of the meanings contained in virtually all other dictionaries." *MCI Telecomms.*, 512 U.S. at 227.

Of those three dictionaries, only *Webster's Third New International Dictionary*, published in 1971, was contemporary with Title IX. App. 21a–22a. But its definition of "sex"—based on a combination of "morphological, physiological, and behavioral peculiarities"—does not include gender identity at all.[11] Nor could it:

---

[10] Furthermore, even *Black*'s primary definition of "sex" turns on physiology. See App. 22a (noting *Black*'s first definition as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism").

[11] Moreover, even assuming the dictionary suggests that purely "behavioral peculiarities" are an aspect of "sex" in a linguistic sense, incorporating those "peculiarities" into Title IX would *violate* the law. This Court's decision in *Price Waterhouse* v. *Hopkins* recognizes that discrimination on the basis of conformity (continued…)

as already explained, the various factors identified in the definition are limited to those that "subserve[ ] biparental reproduction," and so could hardly refer to the internal perception of oneself as male or female.

In short, the majority had no linguistic basis for holding that the term "sex" in Title IX could have been understood to refer to gender identity rather than the objective physiological characteristics distinguishing men from women—much less make gender identity override those physiological characteristics. See also Brief of *Amici* Members of Congress.

2. Title IX's legislative history, which the panel majority did not address, confirms the dictionary definitions. See, *e.g.*, *St. Francis Coll.*, 481 U.S. at 612–13 (confirming textual meaning through legislative history). Congress's manifest purpose in Title IX was to fix the pervasive problem of discrimination against women in educational programs. Title IX's proponents were consequently focused on prohibiting "sex" discrimination, see 118 Cong. Rec. 5803; 117 Cong. Rep. 39251, but at the same time sought to preserve schools' ability to separate males and females to preserve "personal privacy," see 118 Cong. Rec. 5807

---

with sex stereotypes is a form of sex discrimination. 490 U.S. at 250. Schools thus *cannot* consider "behavioral peculiarities" in determining whether someone is male or female.

(continued…)

(Sen. Bayh).[12] See *supra* at 6–10. Not a shred of legislative history suggests that Congress considered "gender identity" at all, much less that the concept could supplant physiology. Nor is there any evidence that HEW considered "sex" to include gender identity when section 106.33 was promulgated. Even G.G. has indicated that the Congress that enacted Title IX and the agency that adopted section 106.33 were focused on physiological sex and never conceived of gender identity. Opp. 1. That effectively concedes that the position adopted by the Fourth Circuit transforms the statutory prohibition from one that protects women against discrimination vis-à-vis men (and vice versa), into one concerned with the quite different issue of "gender identity" discrimination. See also Brief of *Amici* William Bennett et al.

3. Other indications of congressional purpose point in the same direction. For example, the subsequently enacted Violence Against Women Act ("VAWA")—a Spending Clause statute, like Title IX—prohibits funded programs or activities from discriminating based on *either* "sex" or "gender identity." 42 U.S.C. §13925(b)(13)(A). "Sex" and "gender identity" must have meant distinct things to the Congress that enacted VAWA, for equating sex with gender identity would create surplusage. See, *e.g.*, *National Credit*

---

[12] This Court has considered "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted" as Title IX, to be "an authoritative guide to the statute's construction." *N. Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 526–27 (1982).

Union Admin. v. *First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998) (rejecting agency interpretation under *Chevron* for this reason).

Other statutes enacted after Title IX relate to discriminatory acts based on "gender" and "gender identity," implying Congress distinguished outward manifestations of sexual identity—akin to sex—from inward, perceived ones. 18 U.S.C. §249 (federal hate crimes); 42 U.S.C. §3716(a)(1)(C) (Attorney General authority to assist with State and local investigations and prosecutions); 20 U.S.C. §1092(f)(1)(F)(ii) (crime reporting by universities).

Not only is a separate provision for gender identity absent from the text of Title IX, but in other contexts Congress has repeatedly *declined* to enact statutes forbidding gender identity discrimination in education. The Student Non-Discrimination Act, introduced in 2010, 2011, 2013, and 2015 in both the Senate and the House,[13] would condition school funding on prohibiting gender identity discrimination. Another measure, the "Equality Act," would amend the Civil Rights Act of 1964 to prohibit gender identity discrimination in various contexts, including employment and education.[14] Neither bill has ever left committee.

---

[13] H.R. 4530 (111th Cong. 2010); S. 3390 (111th Cong. 2010); H.R. 998 (112th Cong. 2011); S. 555 (112th Cong. 2011); H.R. 1652 (113th Cong. 2013); S. 1088 (113th Cong. 2013); H.R. 846 (114th Cong. 2015); S. 439 (114th Cong. 2015).

[14] S. 1858 (114th Cong. 2015); H.R. 3185 (114th Cong. 2015).

4. When determining the nature and limits of sex discrimination law, this Court has always focused on physiological differences, especially in contexts involving the lawful separation of males and females. For example, in *Virginia*, this Court determined that male-only admission to the Virginia Military Institute violated equal protection, but noted that the required co-educational integration "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." 518 U.S. at 550 n.19. Similarly, as Justice Kennedy wrote for the Court in *Tuan Anh Nguyen* v. *INS*, a more rigorous standard for proving paternity as opposed to maternity did not violate equal protection because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." 533 U.S. 53, 62–63 (2001). Justice Stevens captured the essence of this point in *City of Los Angeles, Department of Water & Power* v. *Manhart*, when he wrote for the Court that "[t]here are both real and fictional differences between women and men." 435 U.S. 702, 707 (1978). Physiological differences between men and women—especially when it comes to privacy—are real ones. Nowhere is that more true than in the educational settings of bathrooms, showers, and sports teams.

Those cases support interpreting Title IX and its regulations to allow the privacy-based separation of

men and women on the basis of physiological differences.[15] As this Court has observed, "[t]o fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen*, 533 U.S. at 73. The same commonsense principle applies to Title IX.

B. Equating "Sex" With Gender Identity Would Undermine Title IX's Structure.

In addition to violating Title IX's text and history, the interpretation accepted by the Fourth Circuit—requiring access to sex-separated facilities based on gender identity—would undermine Title IX's structure and make the statute impossible to administer. Gender identity, as G.G. explained below, means individuals' "innate sense of being male or female," which may differ from "the sex they were assigned at birth." JA64. Making access to sex-separated facilities turn on this elusive concept would lead to obvious and intractable problems of administration. Because "[i]t is implausible that Congress meant [Title IX] to operate in this manner," *King* v. *Burwell*, 135 S. Ct. 2480, 2494 (2015), this is yet another reason to reject the interpretation accepted by the Fourth Circuit.

---

[15] Lower courts have similarly concluded that federal prohibitions on "sex" discrimination concern physiological distinctions between men and women. See, *e.g.*, *Johnston* v. *Univ. of Pittsburgh of the Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 670, 676 (W.D. Pa. 2015), appeal dismissed (Mar. 30, 2016) (collecting decisions).

To put it plainly: how is a school to determine a student's gender identity for purposes of managing access to sex-separated restrooms, locker rooms, or showers? The Fourth Circuit's opinion does not say, and no standard suggested below provides any plausible answer.

1. The standard suggested by G.G.'s definition of "gender identity"—one's "innate sense of being male or female," JA64—implies that a student's mere assertion of his or her gender identity settles the matter.[16] But if members of one physiological sex could obtain access to facilities reserved for the other sex simply by announcing their gender identity, the sex separation contemplated by Title IX and its regulations would cease to exist. A school might wish to keep boys and girls in separate facilities, but in practice any given facility would be open to members of both sexes. Some may use the opposite sex's facilities to express their gender identity, but others will do so for less worthy reasons. A "pure assertion" standard gives no way to distinguish them.

That outcome would come as a shock to Title IX's congressional advocates, who authorized separate "living facilities" to ensure that members of different

---

[16] While the Ferg-Cadima letter does not address this issue, the Department's Dear Colleague letter would also establish a "pure assertion" standard: a student must be treated according to his or her gender identity once "the student … notifies the school" of that gender identity, and without any requirement of a "medical diagnosis or treatment." App. 130a–131a.

sexes *would* be separable in certain intimate settings. *Supra* at 7–10. If Title IX's proponents had contemplated that members of one sex could use the opposite sex's facilities, based on their perception of having been "born in the wrong sex," App. 151a, there would have been no reason for permitting separation of sexes in intimate settings. See App. 57a (Niemeyer, J. dissenting). The interpretation accepted by the Fourth Circuit thus nullifies what the framers of Title IX and its regulations plainly sought to preserve: spaces available to members of one physiological sex and off-limits to the other.

2. Some of G.G.'s pleadings below may imply an alternative approach, but it fits Title IX no better. This approach appears to turn on gender presentation (*i.e.*, whether someone appears to be relatively more masculine or feminine) and corresponding feelings of discomfort on being required to use a facility consistent with physiological sex. In other words, because G.G. "presents" as a boy, JA65, 67, 73, and feels more at home in a boys' restroom, JA73–74, G.G. should have access to boys' restrooms. But that standard would create even more serious problems than the first one. It suggests that schools must evaluate access claims based on how consistently or comprehensively a student presents his or her gender identity. The Department appears to have joined that approach initially—App. 181a (supporting preliminary injunction because G.G.'s "gender identity is male and [he] presents as male in all aspects of his life")—but has since

disavowed it. See App. 57a–58a (Niemeyer, J. dissenting); App. 130a.

That is for good reason, because such an approach would require schools to engage in sex-stereotyping discrimination. Administrators would inevitably have to evaluate students' access to facilities based on relative masculine or feminine traits—which is classic sex-stereotyping. See *Price Waterhouse*, 490 U.S. at 250–51 (forbidding adverse actions against women under Title VII based on stereotypical views of women's appearance or mannerisms). The only way out of this trap is to understand "sex" as the Board's policy does—namely, as referring to objective physiological criteria. That standard *rejects* classifying students based on whether they meet any stereotypical notion of maleness or femaleness, and in that sense is the *opposite* of sex-stereotyping.

3. Even if the problem of standards were resolved, other contradictions would arise. For instance, making access turn on gender identity would perpetuate discrimination in a different form. Persons whose gender identities align with physiological sex would have access only to one facility, but individuals such as G.G. could opt in to the opposite sex's facilities depending on their gender presentation or the status of their transition to the opposite sex. There would thus be different degrees of access depending on divergence of gender identity from physiology: another classic case of discrimination.

This standard would also create new legal risks for regulated schools. For instance, below the United States urged denying "any recognition" to the "discomfort" expressed by "parents and community members … to students sharing a common use restroom with transgender students[.]" App. 180a. Doing so would "'cater to … perceived biases[.]'" *Id.* 181a (quoting United States Dep't of Labor, Directive: Job Corps Program Instruction Notice No. 14-31 3–4 (May 1, 2015)). As callous as that position sounds on paper, it also has likely legal consequences—for example, if a sexual assault victim felt that the presence of the opposite sex in restrooms, lockers, or showers created a hostile environment. See Jeannie Suk Gersen, *The Transgender Bathroom Debate and the Looming Title IX Crisis*, The New Yorker (May 24, 2016).

Yet another problem arises in the context of athletics, where regulations provide a similar safe harbor for sex separation. As mentioned *supra*, Title IX regulations prohibit discriminating on the basis of sex in athletic activities and require recipients to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. §106.41(a), (c). But the regulations also provide for "separate teams for members of each sex where selection … is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. §106.41(b). That separation is plainly grounded in physiology: Even beyond privacy interests in contact sports, providing separate teams for female students creates more opportunities for participation and protects them from injury.

Sex separation in athletics only works, however, if "sex" means physiological sex; if it means "gender identity," nothing prevents athletes who were born male from opting onto female teams, obtaining competitive advantages and displacing girls and women. See, *e.g.*, *Transgender Track Star Stirs Controversy Competing in Alaska's Girls' State Meet Championships*, CBS New York, June 8, 2016 (noting an "18-year old runner … [who] was born male and identifies as female" competed in "Class 3A girls' sprints"). Given the Fourth Circuit majority's position that "'sex' should be construed uniformly throughout Title IX and its implementing regulations," App. 25a, such an outcome appears inevitable.

These and other serious practical problems[17] counsel strongly against the Fourth Circuit's attempt to transform the statutory prohibition on sex discrimination into the distinctly different prohibition on gender identity discrimination.

C. If "Sex" Were Equated With "Gender Identity," Title IX And Its Regulations Would Be Invalid For Lack Of Clear Notice.

Even if Title IX and its regulations did not unambiguously *forbid* the interpretation advanced by the

---

[17] See, *e.g.*, Brief of *Amici* McHugh and Mayer; Brief of *Amicus Curiae* Alliance Defending Freedom; Brief of *Amicus Curiae* Safe Spaces for Women; Brief of *Amici* Religious Colleges, Schools, and Educators; Brief of *Amici* Major Religious Organizations.

Department and accepted by the Fourth Circuit, they certainly did not foreshadow it. Again, as G.G. admits, that interpretation was unimaginable at the time Title IX and its regulations were first adopted. Opp. 1. If that is true—and it is—the Fourth Circuit's holding would make Title IX violate the Spending Clause for failure to afford funding recipients clear notice of the conditions of funding.

Title IX was enacted under the Spending Clause, and the threat of withdrawing federal funding is the main enforcement mechanism. See 20 U.S.C. §1682. "Legislation enacted pursuant to the spending power is much in the nature of a contract, and therefore, to be bound by federally imposed conditions, recipients of federal funds must accept them voluntarily and knowingly." *Murphy*, 548 U.S. at 296 (quotes and alteration omitted) (quoting *Pennhurst*, 451 U.S. at 17). For that reason, "when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out unambiguously," for "States cannot knowingly accept conditions of which they are unaware or which they are unable to ascertain." *Id.* (quotes and citation omitted).

For over four decades, States have accepted Title IX funding with the understanding that they could maintain separate facilities based on men and women's different physiologies; nothing in the text of Title IX or its implementing regulations "even hint[s]" that they would ever have to do anything else. *Id.* at 297. If the Fourth Circuit's position is plausible, then

it sets the stage for a funding condition that States never could have anticipated. See Brief of *Amici* States of West Virginia et al.

That position must be rejected under the rule of constitutional avoidance. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). That rule supports interpreting Title IX in a way that does not permit the Fourth Circuit—or the Department—to "surpris[e] participating States with post-acceptance or retroactive conditions." *NFIB* v. *Sebelius*, 132 S. Ct. 2566, 2606 (2012) (quoting *Pennhurst*, 451 U.S. at 25). This is yet another reason to reject the interpretation embraced by the Fourth Circuit.

II. The Fourth Circuit Erred In Extending *Auer* Deference To The Ferg-Cadima Letter.

Alternatively, this Court can reverse the Fourth Circuit on the ground that the panel erred in extending *Auer* deference to the interpretation in the Ferg-Cadima letter.

A. *Auer* Deference Is Inapplicable Because The Ferg-Cadima Letter Interprets Title IX, Rather Than Department Regulations.

The simplest reason why *Auer* deference should not extend to the Ferg-Cadima letter is that the letter does not interpret the Department's Title IX *regulations*. Instead, the letter interprets the term "sex" in *Title IX itself*. That distinction is critical to the letter's legal effect, for this Court has held that *Auer* deference is inappropriate where an agency's view "cannot be considered an interpretation of the regulation" as opposed to the underlying statute. See *Gonzales*, 546 U.S. at 247.

1. Identifying the interpretive object of the Ferg-Cadima letter begins with reading the letter on its own terms. When the letter states its key conclusion—that "sex" includes "gender identity"—it says it is interpreting Title IX, not a regulation: "*Title IX* … prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity." App. 121a. That language can only mean that Title IX *itself*—at least in the Department's view—incorporates a prohibition on gender identity discrimination.

The rest of the letter points in the same direction. It opens by referring to guidance documents concerning "application of *Title IX* … to gender identity discrimination." App. 121a (emphasis added). The Q&A sheet the letter cites as precedent also interpreted the

statute: it posed the hypothetical question, "How do the *Title IX* requirements on single-sex classes apply to transgender students?" It answered that "*[u]nder Title IX*, a recipient generally must treat transgender students consistent with their gender identity[.]" App. 16a (quoting Q&A #31) (emphasis added). This reasoning is plainly driven by an interpretation of Title IX itself and not the Department's regulations, which means that the basic premise for applying *Auer* is absent.

To be sure, the Ferg-Cadima letter notes that Department "regulations" permit certain sex-separated facilities. App. 123a. But nothing suggests that the Department's position—that schools "must treat transgender students consistent with their gender identity"—turns on an interpretation of that regulatory language. *Id.* at 123a. To the contrary, the letter refers to the regulation merely to note the situations in which recipients may "treat students differently on the basis of sex," and then peremptorily states that in those situations schools must treat transgender students according to "gender identity." *Id.* Every indication, then, is that the Department's position turns on the letter's major premise that "*Title IX*" prohibits discrimination "on the basis of sex, including gender identity." App. 121a.

Limiting *Auer* deference to interpretations of regulations rather than statutes follows from the justifications this Court has provided for *Auer*—namely,

agencies' "historical familiarity and policymaking expertise" with regulatory regimes under their supervision and their supposed insight into the regulations they promulgated. See *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1991); *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). Whatever force those justifications may have as to regulations, they have none when an agency interprets *Congress's* words. Just so here: the Department was interpreting the *statutory* term "sex," and its interpretation is therefore not entitled to *Auer* deference.

2. Even assuming *arguendo* that the Ferg-Cadima letter interpreted the regulatory language rather than Title IX, *Auer* does not apply when—as here—the regulation only "restate[s] the terms of the statute itself." *Gonzales*, 546 U.S. at 257. The point of *Auer*, as *Gonzales* explained, is that agencies have authority to interpret their own words, at least in some circumstances. But "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Id.*

The *Gonzales* exception to *Auer* applies not only when an agency imports entire statutory provisions into the Code of Federal Regulations *verbatim*, but also when a regulation's key terms of art derive from the statute. In *Gonzales*, the regulation "repeat[ed]

two statutory phrases"—specifically, "legitimate medical purpose" and "the course of professional practice"—"and attempt[ed] to summarize" others. *Id.* Because nothing "turn[ed] on any difference between the statutory and regulatory language," the Court held that "the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." *Id.*; see also *Kentucky Retirement System* v. *EEOC*, 554 U.S. 135, 149 (2008) ("*KRS*") (applying *Gonzales* when agency paraphrased statutory language without clarifying its substance); *Fed. Exp. Corp.* v. *Holowecki*, 552 U.S. 389, 398 (2008) (noting *Auer* may not apply to interpretation of regulatory term "change" because "[i]t is a term Congress used in the underlying statute that has been incorporated in the regulations by the agency").[18]

That reasoning forecloses *Auer* deference here, for as in *Gonzales*, the Department's regulations merely "parrot" the relevant statutory term. Title IX provides that its anti-discrimination rule shall not be "construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for *the different sexes*." 20 U.S.C. §1686

---

[18] Lower courts have applied *Gonzales* in the same way. See *Fogo De Chao (Holdings) Inc.* v. *United States Dep't of Homeland Sec.*, 769 F.3d 1127, 1136 (D.C. Cir. 2014); *Sun Capital Partners III, LP* v. *New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 139–41 (1st Cir. 2013); *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 345–46 & n.12 (3d Cir. 2006).

(emphasis added). The Department's regulations address that exemption by providing that a funding 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*." 34 C.F.R. §106.33 (emphasis added).

In the regulation, HEW applied its interpretive authority and expertise not to elaborate on the definition of "sex," but to flesh out the statute's reference to "living facilities." *Implementing Title IX*, *supra*, at 826; App. 98a. The regulation builds on the statute by describing which facilities count and by adding the proviso that when separate facilities are established, they must be "comparable." But this litigation does not turn on any of that. Instead, it turns on the meaning of "sex"—a term Congress used in the statute and which the regulations reuse without elaboration. The Department cannot claim that its interpretation of that term "turns on any difference between the statutory and regulatory language." *Gonzales*, 546 U.S. at 257. To the contrary, the term "sex" "comes from Congress, not the [agency]," and the agency has no "special authority" to interpret it. *Id.*

This Court's decision in *KRS* confirms this conclusion. See 554 U.S. 135. That case involved the Age Discrimination in Employment Act ("ADEA"), which forbids discriminating against workers "because of ... age." 29 U.S.C. §623(a)(1). As in this case, an agency

had promulgated a regulation setting out what a regulated party *could* do: specifically, that giving "'the same level of benefits to older workers as to younger workers' does not violate the [ADEA]." See *KRS*, 554 U.S. at 149 (quoting 29 C.F.R. §1625.10(a)(2)) (emphasis omitted). And as here, the agency interpreted the regulation's key criterion (age differences) to include other unenumerated factors (factors correlated with age, such as receipt of pension benefits). *Id.* But this Court refused to defer to that interpretation, reasoning that "the regulation 'does little more than restate the terms of the statute itself.'" *Id.* (quoting *Gonzales*, 546 U.S. at 257). This case is even easier than *KRS*, because the regulatory language there was further removed from the statutory language than section 106.33 is from Title IX.

Of course, the Department could attempt to invoke its interpretive authority as to the statutory term "sex," in which case it could argue that whatever interpretation it reaches is entitled to *Chevron* deference. As discussed below, the Department has never done so. See *Gonzales*, 546 U.S. at 258. And as discussed above, the statutory text forecloses its interpretation. *Supra* at 26–32.

B. *Auer* Deference Is Inapplicable Because The Governing Regulation, Like Title IX, Is Unambiguous.

Assuming that *Auer* could extend to the Department's interpretation of "sex," *Auer* applies only when regulatory language is ambiguous. *See Christensen*,

529 U.S. at 588. When the regulation is unambiguous, *Auer* does not aid the agency; courts instead apply the regulation as written. *Id.* Any other rule "would … permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* With respect to the term "sex," the regulation is not ambiguous, however, and certainly not in the way implied by the Ferg-Cadima letter.

1. As this Court has held, "ambiguity" in the context of interpreting statutes and regulations means more than room for semantic disagreement: "[a]mbiguity is a creature not of definitional possibilities but of statutory context[.]" *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); see also also *MCI Telecomms*, 512 U.S. at 226 (explaining courts should not merely "defer to the agency's choice among available dictionary definitions"). An analogy to identifying ambiguity under *Chevron* is illustrative: under *Chevron*, a court can determine a statute is ambiguous "only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." See *Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 600 (2004); *Chevron*, 467 U.S. at 843 n.9. Those tools include canons of construction, *Nat'l Credit Union Admin.*, 522 U.S. at 501, awareness of how statutory structures work as a whole, *Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), and "common sense," *id.* at 133.

Here, the standard tools of statutory construction show that the term "sex" in the Department's regulations does not extend to gender identity—and certainly does not permit gender identity to *determine* a person's sex. 34 C.F.R. §106.33. As explained above, Congress understood the term "sex" in Title IX to refer to the physiological differences between men and women, and the same considerations apply with equal force to the term as it appears in the regulations promulgated by HEW. The practical concerns that would arise if "sex" meant something other than physiology are essentially identical. Just as with the interpretation of Title IX, these considerations show that "sex" in the Department regulations unambiguously refers to physiology.[19]

2. The Department's decision to introduce gender identity into the regulatory scheme in the teeth of this history raises two related concerns. First, agency acts are arbitrary and capricious when an agency "relie[s] on factors which Congress has not intended it to consider[.]" *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That

---

[19] As already discussed, the Fourth Circuit found ambiguity in the term "sex" by misreading two 1970s-era dictionaries. App. 21a–22a; *supra* at 26–32. But even assuming those sources showed "sex" could have various shades of meaning, they do not show the ambiguity the Fourth Circuit discerned: *i.e.*, as applied to persons whose perceived gender "diverge[s]" from their physiological sex. App. 21a–23a. *None* of those definitions suggests that a person's perception of being male or female is a component of "sex." See *supra* at 26–32 (discussing definitions).

is, insofar as "sex" is ambiguous, the Department can only clarify it with reference to the factors that Congress authorized. See *Michigan* v. *EPA*, 135 S. Ct. 2699, 2706–07 (2015) (citing, *inter alia*, *Motor Vehicle Mfrs.*, 463 U.S. at 43). That includes the factors Congress would have thought relevant to the definition of sex —*i.e.*, "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished," App. 21a (quoting *American College Dictionary* 1109)—but not a factor like gender identity, which no one would have thought included in the term "sex," much less determinative of its meaning.

Second, even when resolving ambiguities, "agencies must operate within the bounds of reasonable interpretation." *UARG* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) (quotes omitted). A term "that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.* (quotes and alteration omitted). Likewise, "an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference." *Id.* (quotes, citation, and alteration omitted). Those principles foreclose the approach the Ferg-Cadima letter takes. The letter purports to resolve a putative ambiguity of "sex" as related to gender identity that ends up undermining Congress's purposes and sets up potentially intractable problems of administration. *Supra* at 32–44. In short, what the Department *cannot*

do under the guise of resolving "ambiguities" is introduce extraneous factors that would render a forty-year-old anti-discrimination rule "unrecognizable to the Congress that designed it." *Id.* at 2444 (quotes omitted).

3. At a minimum, *Auer* deference can extend only to interpretations that would have been foreseeable at the time the regulation was promulgated. Extending *Auer* to *un*foreseeable interpretations would offend the requirement of the Administrative Procedure Act that members of the public have the opportunity to comment on regulations affecting them, see *Mission Group Kansas, Inc.* v. *Riley*, 146 F.3d 775, 782 (10th Cir. 1998), and potentially the fair notice requirement of federal due process, see *Upton* v. *SEC*, 75 F.3d 92, 98 (2d Cir. 1996); *Gen. Elec. Co.* v. *EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). This Court has already declined to apply *Auer* in an analogous context, where an agency first announced its position in amicus briefs filed after "a very lengthy period of conspicuous inaction[.]" *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

The notion that Title IX's anti-discrimination rule requires that members of different physiological sexes be allowed to share restrooms, lockers, and showers would have been inconceivable until the Ferg-Cadima letter was issued. Not only did that letter cite no precedent relevant to restroom, locker, and shower facilities, *supra* at 14–15, but the Fourth Circuit itself conceded that the "interpretation is novel because there

was no interpretation as to how §106.33 applied to transgender individuals *before January 2015*[.]" App. 23a (emphasis added). Doubtless members of the public would have wanted to comment on this "novel" question. *Mission Group Kansas*, 146 F.3d at 782. The regulations should be interpreted to avoid springing such a surprise on affected parties.

C. *Auer* Deference Is Inapplicable Because The Department Failed To Follow The Necessary Formal Procedures.

Finally, the Ferg-Cadima letter does not merit deference because the Department ignored the formal procedures required to act with the force of law. The Fourth Circuit held, in essence, that an agency can "control[ ]" a court's interpretation of a regulation merely by issuing an informal opinion letter signed by an intermediate agency official. App. 25a. Whatever *Auer*'s proper scope should be, it should not extend so far.

1. The Ferg-Cadima letter does not carry the force of law under Mead *and* Christensen.

Extending *Auer* to an informal document like the Ferg-Cadima letter creates conflict between *Auer* and the related doctrine of deference to agency statutory interpretations embodied in *Chevron*. As several courts of appeals have held, *Auer* doctrine should be tailored to avoid that tension.

1. This Court's decisions in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), and *Christensen* v. *Harris County*, 529 U.S. 576 (2000), establish the scope and theoretical foundations of the modern *Chevron* doctrine. *Mead* holds that deference to agency interpretations of statutes rests on the assumption that Congress sometimes implicitly delegates to agencies the authority to create law by filling the gaps in statutes. 533 U.S. at 226–27, 229. For an agency act to carry the force of law, the agency has to act within the scope of that delegation, *i.e.*, there must have been a substantive delegation of lawmaking power to the agency from Congress, and the agency must have exercised that delegation through the procedural channels Congress created. *Id.*

Only acts carrying the force of law are entitled to *Chevron* deference. *Id.*; see also *id.* at 243 (Scalia, J., dissenting). For example, as indicated in *Christensen*, even where an agency has authority to act with the force of law, it typically needs to employ formal procedures such as "formal adjudication or notice-and-comment rulemaking"—or at least close equivalents—to ensure that a particular act compels deference in court. See 529 U.S. at 587. When an agency act does not carry the force of law, it does not bind a court, but instead carries weight proportionate only to its "'power to persuade.'" *Mead*, 533 U.S. at 234–35 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)).

The *Mead*/*Christensen* rule resolves a legal puzzle. Under the APA, an agency must follow formal, public

procedures when it creates law—as opposed to engaging in informal adjudications or issuing nonbinding guidelines or interpretations. See 5 U.S.C. §552(a)(1)(D) (requiring that "interpretations of general applicability" be published in the Federal Register); *id.* §553(b) (providing procedures for notice-and-comment rulemaking). Lower federal courts have often worked to prevent agencies from circumventing procedural requirements by issuing purportedly nonbinding guidance documents. See *Gen. Elec. Co.* v. *EPA*, 290 F.3d 377 (D.C. Cir. 2002); *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *Chamber of Commerce* v. *Dep't of Labor*, 174 F.3d 206 (D.C. Cir. 1999). Yet without *Mead* and *Christensen*, such informal documents *would* have binding legal force in the sense that they bind courts. This Court's *Mead*/*Christensen* rule thus prevents agencies from creating law without observing mandatory procedures.

2. Under the Fourth Circuit's approach, however, the puzzle that *Mead* and *Christensen* resolved for *Chevron* purposes persists under *Auer*, where agencies interpret their own regulations. This Court held in *Christensen* that an informal "opinion letter"—much like the Ferg-Cadima letter—"lack[s] the force of law" and so "do[es] not warrant *Chevron*-style deference" when it purports to interpret a statute. 529 U.S. at 587. Yet because the majority in this case thought the Ferg-Cadima letter interpreted Department regulations, it gave the letter "controlling" deference under *Auer*. That creates a paradox under

which agency actions that do not carry the force of law nonetheless bind courts—and thereby end up carrying the force of law at least as to the parties.

It is difficult to square that paradox with any plausible account of congressional intent. Only Congress could have delegated the Department the ability to authoritatively fill gaps in its own regulations by informal means. See *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374–75 (1986) (explaining that agencies cannot create new powers for themselves). But Title IX and the APA give no reason to conclude that Congress intended to allow the Department to do so. Even if Congress's delegation of lawmaking power to agencies does implicitly entail an authoritative gap-filling power applicable to regulations, it is "odd" to think that Congress would delegate that power to informal acts by mid-level officers like Mr. Ferg-Cadima. See *Keys* v. *Barnhart*, 347 F.3d 990, 994 (7th Cir. 2003) (Posner, J.).

The principal justifications for *Auer* deference do not require courts to defer to informal agency interpretations. This Court has customarily explained *Auer* in terms of agencies' "historical familiarity and policymaking expertise" with regulatory regimes under their supervision. See *Martin*, 499 U.S. at 153; *Thomas Jefferson Univ.*, 512 U.S. at 512. But while expertise-based factors justify the persuasive weight given to agency interpretations of statutes under *Skidmore*, see *Mead*, 533 U.S. at 228, they do not jus-

tify *Chevron* deference, which requires a congressional delegation, see *id.* at 229. The rationales underlying *Auer*, in other words, justify giving informal agency interpretations of regulations due weight, but not letting them control in court. See also Brief of *Amici* Cato Institute, Michael W. McConnell, Richard A. Epstein et al.

3. Applying *Auer* deference to the Ferg-Cadima letter would also be inconsistent with doctrines governing the reviewability of agency actions. Final agency acts with binding legal effect are typically subject to immediate judicial review under the APA by parties with standing to challenge them. *See Bennett* v. *Spear*, 520 U.S. 154, 177–78 (1997) (setting out standards for APA reviewability). But courts have consistently ruled that informal opinion letters and guidance documents are *not* immediately reviewable, reasoning that they do not carry binding legal effect. See, *e.g.*, *Indep. Equip. Dealers Ass'n* v. *EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004). If opinion letters carry only persuasive weight, that rule makes sense. But the Fourth Circuit's application of *Auer* deference implies that countless opinion letters bearing on agency regulations *do* have legal effect; they revise the meaning of ambiguous regulations, "controlling" judicial resolution of cases and binding private parties. App. 25a. The implication is that agencies are creating law every day without risk of being held to immediate account in court, a circumstance this Court has repeatedly sought to avoid. See *United States Army Corps of*

Eng'rs v. *Hawkes Co.*, 136 S. Ct. 1807 (2016); *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012).

4. The most plausible solution that preserves *Auer* is to maintain the symmetry and consistency of the *Chevron* and *Auer* deference doctrines. If the Department wants documents like the Ferg-Cadima letter to have controlling effect in court, it should follow procedures sufficient to give them the force of law. If the Department does not want to follow those procedures, it should not expect its positions to merit controlling deference. See Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449, 1464 (2011).

Some circuit courts have already indicated that *Chevron*-like formality considerations should apply in cases governed by *Auer*.[20] And this Court has implied the same thing. In *Central Laborers' Pension Fund* v. *Heinz*, the Court addressed an IRS regulation where two agency interpretations were contrary to the regulation's plain meaning: a provision of the Internal Revenue Manual, and the United States' amicus brief before the Court. 541 U.S. 739, 748 (2004). The Court rejected reliance on both: "neither an unreasoned statement in the manual nor allegedly longstanding agency practice can trump a formal regulation with the procedural history necessary to take on the force

---

[20] See Pet. 26–28 (collecting decisions). However, as noted in the petition, there is a circuit split on this issue. See *id.* at 29 (collecting contrary decisions).

of law." *Id.* Although the Court did not mention *Auer*, the import of the Court's language is that informal agency positions, because they lack the force of law, cannot command the kind of deference that makes them binding on courts. The principle alone requires reversal of the Fourth Circuit's decision here.

5. Deference to informal agency interpretations is particularly inappropriate where, as here, the interpretation is issued for the first time in an effort to affect the outcome of a specific judicial proceeding. See Pet. 26–27. For example, 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. Both of these decisions correctly recognize that deferring to an informal agency interpretation that is developed solely to influence the judicial proceeding in which deference is sought creates enormous incentives for gamesmanship. According *Auer* deference in such circumstances also denies the public—or other affected parties—any effective ability to ensure that their views are adequately heard and considered before the agency acts. This too is a sufficient basis for reversing the Fourth Circuit's decision to invoke *Auer* deference.

6. Even under this modest approach to *Auer* deference, that doctrine would still retain vitality in certain circumstances. For example, *Auer* deference might apply when agencies resolve legal issues in the course of formal agency adjudications, or when they issue official guidance after notice and comment. However, it no longer makes sense for *Auer* to extend to *ad hoc*, informal agency acts such as the Ferg-Cadima letter—especially when such acts are taken in the context of the very proceeding in which deference is sought.

2. The Ferg-Cadima letter issued without observance of procedures required by Title IX.

Even if *Auer* deference remains theoretically applicable to agency actions that would not deserve deference under *Chevron*, it at least should not apply to agency actions taken in excess of the lawmaking powers Congress has delegated.

Congress enumerated in Title IX the circumstances under which the Department can bind regulated entities with the force of law. See 20 U.S.C. §1682. The Department can initiate formal administrative adjudications to enforce Title IX by terminating federal funding. *Id.* DOE may also "effectuate" Title IX's anti-discrimination policy by issuing "rules, regulations, or orders of general applicability[.]" *Id.* To issue such rules, regulations, and orders, the Department must follow statutory procedures beyond those prescribed by the APA. Specifically, section 1682

states that "[n]o such rule, regulation, or order shall become effective unless and until approved by the President." *Id.* In addition, Congress has imposed certain requirements when the Department issues a "regulation," defined as "any generally applicable rule, regulation, guideline, interpretation, or other requirement that—(1) is prescribed by the Secretary or the Department; and (2) has legally binding effect in connection with, or affecting, the provision of financial assistance under any applicable program." 20 U.S.C. §1232(a). Such regulations must, for example, be transmitted to the Speaker of the House of Representatives and the President pro tempore of the Senate "[c]oncurrently" with their publication. *Id.* §1232(f).

If the Department intended the Ferg-Cadima letter to have binding legal effect, it breached its procedural obligations. No formal adjudication has taken place, so if the letter had legally binding effect it must be a "regulation" within the meaning of section 1232(a). But nothing in the record indicates that the Ferg-Cadima letter was directly approved by the President, *id.* §1682, or transmitted to the leaders of Congress, *id.* §1232(f). As noted above, the Department did not follow the publication, notice, and public comment procedures necessary for binding "rules," "regulations," or "interpretations of general applicability" under the APA. *See* 5 U.S.C. §§552, 553

The Department cannot claim binding legal effect for agency acts while failing to observe procedural re-

quirements imposed by Congress. In the *Chevron* context, this Court has made clear that "deference is not warranted where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." See *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016). Moreover, Congress's provision of particular means for an agency to act with the force of law implies that the agency lacks the force of law when it acts in other ways. See *Mead*, 533 U.S. at 231–32; *Gonzales*, 546 U.S. at 260.

To be sure, the Department can avoid many of Title IX's procedural obligations by issuing *nonbinding* documents. For example, the Department does not need presidential approval when issuing nonbinding "interpretive guidelines." See *Equity in Athletics, Inc.* v. *Dep't of Educ.*, 639 F.3d 91, 106 (4th Cir. 2011). But in the *Chevron* context, the Department would sacrifice judicial deference by doing so. Applying *Auer* deference in circumstances like these would once again go beyond *Chevron* by allowing the Department to bind private parties without following procedural prerequisites.

That, in essence, would make the agency a law unto itself, thereby raising all the concerns that have led several members of this Court to consider overruling *Auer* altogether. See Pet. 18–20. If *Auer* is to remain in force, it should be applied in a way that respects the boundaries Congress has set.

CONCLUSION

The decisions below should be reversed and the preliminary injunction vacated.

Respectfully submitted,

JONATHAN F. MITCHELL
559 Nathan Abbott Way
Stanford, CA 94305
jfmitche@stanford.edu

DAVID P. CORRIGAN
JEREMY D. CAPPS
M. SCOTT FISHER JR.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
(804) 747-5200
dcorrigan@hccw.com

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
STEPHEN S. SCHWARTZ
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
KDuncan@Schaerr-Duncan.com

Counsel for Petitioner

January 3, 2017