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,
RESPONDENT.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

BRIEF FOR THE CATO INSTITUTE AND PROFESSORS JONATHAN H. ADLER, RICHARD A. EPSTEIN, AND MICHAEL W. MCCONNELL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Ilya Shapiro
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

September 27, 2016

QUESTION PRESENTED

This brief addresses the first and second questions presented by the cert. petition:

1. Should this Court retain the doctrine espoused in *Auer v. Robbins*, 519 U.S. 452 (1997), that federal courts should defer to agency interpretations of their own regulations?

2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law?

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INTEREST OF *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Jonathan H. Adler is the inaugural Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, where he teaches and writes on administrative and constitutional law, among other subjects.

Richard A. Epstein is the Laurence A. Tisch Professor of Law at NYU School of Law. He also serves as the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law Emeritus and senior lecturer at the University of Chicago. He has written numerous books and articles on a wide range of legal and interdisciplinary subjects.

Michael W. McConnell is the Richard and Frances Mallery Professor and director of the Constitutional Law Center at Stanford Law School, and Senior Fellow at the Hoover Institution. He is a leading authority on the relation of individual rights to government structure, as well as constitutional law

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[1] Rule 37 statement: All parties received timely notice of our intent to file; Petitioner filed a blanket consent and Respondent also consented. Further, no counsel for any party authored any of this brief and *amici* alone funded its preparation/submission.

and history. Before joining Stanford, he served as a judge on the U.S. Court of Appeals for the Tenth Circuit. He has also argued 14 cases in this Court.

This case interests *amici* because it concerns courts' ability to check the power of the administrative state through meaningful judicial review.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title IX, part of the U.S. Education Amendments of 1972, was passed to ensure that schools and universities did not discriminate on the basis of sex. It states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681. The statute itself allows for certain exceptions to this prohibition, and its implementing regulations have always allowed schools to provide "separate toilet, locker rooms, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. This regulation has been non-controversial for most of its history, and the traditional reading of the exception—interpreting "sex" to refer to the biological difference (particularly in reproductive organs) between males and females—was never questioned by the Department of Education (DOE) before the events leading to this litigation.

G.G. is a student at Gloucester High School. G.G. was born biologically female but has identified as a boy from around the age of 12. He remains biologically female, though he has started hormone therapy. This case arose out of G.G.'s opposition to the school board's policy of not allowing him to use the boys' re-

stroom and locker room (although he was given access to private unisex bathrooms open to all students). Hearing of the controversy from a third party, a DOE Office of Civil Rights (OCR) employee named James A. Ferg-Cadima sent a letter to that third party stating that "Title IX regulations permit schools to provide sex-segregated restrooms locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity."

G.G. then filed suit against the school board, alleging that the board's policy violated Title IX and the Equal Protection Clause of the Fourteenth Amendment. The Department of Justice (DOJ) filed a "statement of interest," holding out the Ferg-Cadima letter as the controlling interpretation of Title IX and its implementing regulations. The district court refused to give controlling deference to the letter and G.G. appealed to the Fourth Circuit. The Fourth Circuit reversed the district court's dismissal, affording the OCR's interpretation *Auer* deference. Following that ruling, DOE and DOJ officials issued a "Dear Colleague" letter to every Title IX recipient in the country, affirming and expanding on the contents of the Ferg-Cadima letter. Now the Gloucester County School Board seeks this Court's review.

Amici take no stance on the substance of the underlying regulation. The debate over gender-identity discrimination should consider many facts and viewpoints, and it is time for the country to have that debate. Congressional hearings, public discourse, and

personal reflection are the best ways for our society to ruminate on such a novel question and, if warranted, enact a significant and unprecedented change. A letter written by a low-level civil servant is not how this should happen. Unilateral executive actions do not resolve culture wars; they only exacerbate them.

We urge the Court to grant certiorari to take this opportunity to overrule *Auer v. Robbins*, 519 U.S. 452 (1997). The *Auer* doctrine states that courts should afford agency interpretations of their own regulations controlling deference. This deference, particularly when afforded to informal, non-binding agency pronouncements that have not been published to the public or gone through notice-and-comment rulemaking, undermines due process, the separation of powers, and the rule of law. *Auer* deference allows agencies to effectively rewrite federal law without involving Congress, engaging in informal rulemaking, or even providing notice of any kind to the general public—merely by reinterpreting a purported ambiguity in their regulations. *Auer* incentivizes agencies to purposely promulgate vague regulations, so as to keep the range of plausible interpretations as wide as possible. It allows agencies to change their interpretations on a dime, upsetting longstanding expectations. And it allows agencies to actively subvert the will of Congress by reinterpreting regulations in ways that Congress never foresaw or approved.

Should this Court be reluctant to overrule *Auer*, it can instead take this opportunity to limit the doctrine's scope and resolve a split among several circuits regarding when *Auer* can apply. The Court should hold that only interpretations that have properly gone through the notice-and-comment pro-

cess warrant *Auer* deference, which would put *Auer* more in line with the Court's *Chevron* jurisprudence and mitigate the due-process and separation-of-powers deficiencies currently plaguing the doctrine.

ARGUMENT

I. THIS IS AN IDEAL TIME FOR THE COURT TO ADDRESS LONGSTANDING CONCERNS WITH *AUER* THAT HAVE BEEN PERCOLATING IN THE JUDICIARY AND LEGAL ACADEMY FOR 20 YEARS

A. The Debate in the Academy

It has been 20 years since Professor John F. Manning ignited the modern academic debate over what would soon become known as *Auer* deference with his seminal article *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*. 96 Colum. L. Rev. 612 (1996). Since then, a veritable treasure trove of administrative-law experts have weighed in on the topic, approaching *Auer*, *Chevron*, and their companion cases from practically every angle. *See, e.g.*, Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49 (2000) (finding unpersuasive Manning's argument that deference to agency interpretations of their own regulations creates a perverse incentive to promulgate vague regulations); Robert A. Anthony & Michael Asimow, *The Court's Deferences—A Foolish Inconsistency*, 26 Admin. Reg. L. News 1 (2000) (arguing that agency interpretations of regulations should only receive deference if they have the force of law); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 900 (2001) ("*Seminole Rock*

deference should at a minimum be subject to the same limitations that apply to the scope of *Chevron* deference."); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235 (2007) (proffering a version of *Skidmore* review that balances the value of agency expertise with the value of reducing regulatory arbitrariness as an alternative to *Auer* deference); Kevin O. Leske, *Between Seminole Rock and a Hard Place: A New Approach to Agency Deference*, 46 Conn. L. Rev. 227 (2013) (proposing a new four-factor test to determine the level of deference to afford an agency interpretation of a regulation that has already been determined to be ambiguous); Daniel Mensher, *With Friends Like These: The Trouble with Auer Deference*, 43 Envtl. L. 849, 871 (2013) (arguing that courts should afford deference on a sliding scale depending on "the level of guidance the interpretation provides to the public and the level of public participation involved in creating the agency's interpretation"); Kevin M. Stack, *The Interpretive Dimension of* Seminole Rock, 22 Geo. Mason L. Rev. 669 (2015) (advocating for a type of regulatory interpretation that places greater weight on "basis and purpose" statements found in regulations' preambles, which results in a narrower range of acceptable interpretations and offers greater notice of the regulation's meaning than looking to the regulatory text alone); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449 (2011) (evaluating several ways to limit *Auer*'s scope, tentatively advocating for, *inter alia*, placing a *Mead*-like limitation on the doctrine); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev.

803, 807–09 (2001) (cautioning against the "increasing formalization of publication rulemaking," arguing that it actually incentivizes agencies to rely more heavily on even more informal interpretative decisions, and undercuts the goals of transparency and regulatory certainty); *Reflections on* Seminole Rock*: The Past, Present, and Future of Deference to Agency Regulatory Interpretations*, Online Symposium, Notice & Comment (Yale J. on Reg.) (Sept.12–23, 2016), https://goo.gl/Mgn2PY (collecting short essays from 30 contributors); Cass Sunstein & Adrian Vermeule, *the Unbearable Rightness of Auer*, forthcoming U. Chi. L. Rev. (2016), available at goo.gl/e9Isuy (defending *Auer* against recent academic challenge).[2]

One can find both enemies and apologists of *Auer* among law professors—as well as many critics and reformers somewhere in the middle. The debate is a mature, well-researched one that has been percolating throughout the legal academy since before the doctrine's eponymous case was even heard by this Court. *Auer*'s deficiencies and strengths have been thoroughly explicated and its implications carefully explored. What one sees in looking through the literature discussing judicial deference to agency interpretations of regulations is a controversy calling out for a definitive statement by this Court.

B. The Debate in the Courts

Meanwhile, a parallel debate has been ongoing in the courts. Once largely non-controversial, *Auer* deference has come under increasing scrutiny of late.

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[2] This string cite, while long, is intended only to call attention to the wide variety of scholarship this topic has generated over the past 20 years, and is by no means an exhaustive collection of relevant or even key articles.

Various judges—including members of the Court—have voiced concerns with the doctrine's effects on due process and the separation of powers, with some going as far as calling for *Auer* to be overruled. See, e.g., *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1208 (2015) (9-0, per Sotomayor, J.); *id.* at 1211 (Scalia, J. concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment); *Decker v. N.W. Env. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring); *id.* at 1339–42 (Scalia, J., dissenting); *Talk America, Inc. v. Mich. Bell Telephone Co.*, 131 S. Ct. 2254, 2265 (2011) (Scalia, J., concurring); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

There is also serious debate among the circuit courts on several questions concerning *Auer*'s scope, particularly the issue of whether *Auer* deference should apply to informal agency statements. *Compare United States v. Lachman*, 387 F.3d 42, 54 (1st Cir. 2004); *Keys v. Barnhart*, 347 F.3d 990 (7th Cir. 2003); *U.S. Freightways Corp. v. Commissioner*, 270 F.3d 1137 (7th Cir. 2001); *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002) (holding that *Auer* deference is inappropriate for informal agency pronouncements); *with Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 207–08 (2nd Cir. 2009); *Encarnacion ex. rel George v. Astrue*, 568 F.3d 72, 78 (2nd Cir. 2009); *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930 (9th Cir. 2006); *Smith v. Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006) (holding that *Auer* deference is warranted even in informal contexts).

The time has come for the Court to resolve the conflict among the circuits and provide much-needed guidance for lower-court judges, litigants, agency em-

ployees, and the public regarding how much—if any—deference should be shown to agency interpretations of their own regulations, particularly when those interpretations are contained in informal pronouncements rather than rulemaking.

II. *AUER* SHOULD BE OVERRULED BECAUSE IT UNDERMINES DUE PROCESS, THE RULE OF LAW, AND THE SEPARATION OF POWERS

The doctrine of judicial deference to agency interpretation of regulations espoused in *Auer* (and *Seminole Rock* before it) is untenable. Since the Court's decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *Christensen v. Harris County*, 529 U.S. 576 (2000), it has become clear that *Auer*'s regulatory deference can no longer be reconciled with the Court's statutory-deference jurisprudence. And the splits below indicate that it has also failed to adequately guide lower-court decision-making. *Auer*'s problems run even deeper; the doctrine's core constitutional defects most call out for its rejection.

A. *Auer* Undermines Due Process and the Rule of Law

It is a fundamental maxim of American law that, in order to be legitimate, the law must be reasonably knowable to an ordinary person. A properly formulated law must provide fair warning of the conduct proscribed and be publicly promulgated. These are not merely guidelines for good public administration, but bedrock characteristics of law *qua* law. See Lon L. Fuller, *The Morality of Law* 33-38 (1964) (arguing that lack of public promulgation and reasonable intelligibility are two of the "eight ways to fail to make

law"). *Auer* deference, at least as currently conceived, violates this maxim by making it possible for administrative agencies to change their regulations in ways that have significant impacts on regulated persons without ever even publishing them to the public—let alone allowing the public to participate through notice-and-comment rulemaking. It allows "[a]ny government lawyer with a laptop [to] create a new federal crime by adding a footnote to a friend-of-the-court brief." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring).

When surveyed, two in five agency employees whose duties include rule-drafting confirmed that "*Auer* deference plays a role in drafting" their regulations. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1066 (2015). Allowing agencies to reinterpret their regulations at will with no need for formal processes incentivizes them to write those regulations vaguely, so the range of plausible meanings is as wide as possible. In Justice Scalia's words, "giving [informal agency interpretations] deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

Auer's fair-notice-related defects are not endemic to the rest of the Court's administrative deference jurisprudence, and overruling or limiting *Auer* need not also doom *Chevron*. The difference is that, unlike *Auer*, *Chevron* has *Mead*. *Mead* held that only interpretations promulgated through notice-and-comment

rulemaking and carrying the force of law warrant *Chevron* deference. 533 U.S. at 231–34. The distinction between formally published rules and nonbinding interpretations found in letters or circulars—heretofore unrecognized in the regulatory interpretation jurisprudence—ensures that only agency interpretations that have been brought into the light of public scrutiny receive controlling deference. Agencies are free to issue informal pronouncements in order to quickly and efficiently provide guidance to employees and regulated parties, but these lack the force of law and are not given judicial deference, while major policy changes seeking to bind the public require notice-and-comment rulemaking. This system ensures that *someone*, whether it's the courts through careful review or the public through notice-and-comment, is able to keep watch over what the agency is doing. *Mead* has forced agency interpretations of statutes into the light, while agency interpretations of their own regulations remain in the shadows.

B. *Auer* Undermines Separation of Powers

Auer deference "contravenes one of the great rules of separation of powers [that he] who writes a law must not adjudge its violation." *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment). Affording controlling deference to agency interpretations of their own regulations gives executive agencies the power to both write the regulations they are charged with enforcing and later declare just what the ambiguous words of those regulations say, with little-to-no oversight by the courts. Even Congress is not provided this honor. If Congress wants to change the meaning of one of its statutes, it has to go through the process of passing a new law, and the

courts engage in their own independent review of what the statute actually means. Congressional opinion on this matter can of course be quite persuasive, but at no point do the courts simply accept its interpretation sight unseen.

Auer thus provides us with the absurd result that, when Congress delegates rulemaking authority to an agency, it in at least one way effectively delegates greater authority than Congress itself possesses. *Cf. INS v. Chadha*, 462 U.S. 919, 951–59 (1983) (Congress may not grant itself a legislative veto over executive-branch actions because inconsistent with bicameralism and the Presentment Clause). Equally absurd is the fact that—at least since *Christensen* and *Mead* forced agency interpretations of statutes into the light—an agency receives greater deference when it changes policy by reinterpreting a footnote in an *amicus* brief via an informal guidance letter than when it engages in notice-and-comment reinterpretation of a statute. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 5 (1996) (noting how *Seminole Rock* [and *Auer*]'s "plainly erroneous" standard "has produced the bizarre anomaly that a nonlegislative or ad hoc document interpreting a regulation garners greater judicial deference (and thus potentially greater legal force) than does a legislative rule, such as the one involved in *Chevron*, in which an agency interprets a statute"). The collection of effectively legislative and judicial authority into the hands of relatively unaccountable administrative agencies that *Auer* deference allows undermines the separation of powers at the center of our constitutional structure. *See also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev.

673 (1997) (arguing that textualism promotes non-delegation principles by stopping agents of Congress from dictating the interpretation of vague and ambiguous statutes).

III. THIS CASE IS A PRIME VEHICLE FOR RECONSIDERING *AUER*'S SCOPE BECAUSE IT SHOWS *AUER* AT ITS WORST

This Court should take up the present case because it is a prototypical example of the absurd results *Auer* deference can lead to when a federal agency decides to act aggressively. The Ferg-Cadima letter first asserting OCR's new interpretation of the bathroom exception to Title IX in 34 C.F.R. § 106.33 represented an abrupt change in longstanding agency and public understanding of the regulation, one that stood in direct conflict with Congress's repeatedly expressed policy choices. The letter's interpretation did not go through notice-and-comment rulemaking, and was not published at all. It was an informal letter written by a relatively low-level OCR employee, and was not considered binding on the agency itself. Under *Auer*, the Fourth Circuit has given this unpublished, non-binding letter from a junior civil servant the full force of a federal statute.[3]

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[3] Nor did the "Dear Colleague" letter go through any sort of rulemaking when it was written in response to the current litigation. The lack of public comment is abundantly clear in that it shows no regard for any of the various legitimate concerns individuals have raised about transgender restroom and locker-room access. The letter shows an OCR that has let its own policy preferences take it beyond its delegated authority, concerning itself with neither the express will of Congress, the good-faith opinions of regulated parties, nor the procedures required by constitutional structure and the APA.

The Administrative Procedure Act's notice-and-comment procedures exist specifically to counter aggressive agency behavior of this sort, but this Court's *Auer* jurisprudence, as currently applied, allows (if not encourages) agencies to do an end-run around the statutory requirements simply by promulgating vague rules and cloaking sweeping policy pronouncements as merely informal interpretations.

A. OCR's Reinterpretation of Its Regulation Constitutes an Abrupt Change to Decades of Agency Practice and Public Expectations

The view that the word "sex" in Title IX and its regulations refers to biological sex rather than preferred gender identity has held sway since Title IX was first passed in 1972. This all changed, abruptly and with little warning, on January 7, 2015, when a letter by James A. Ferg-Cadima, an OCR acting deputy assistant secretary, informed the Gloucester County School Board that "[w]hen a school elects to separate or treat students differently on the basis of sex [in permitted situations such as segregated bathrooms], a school generally must treat transgender students consistent with their gender identity." This letter cited no statute or regulation as a source of this significant reinterpretation. OCR then doubled down on this new interpretation in a "Dear Colleague" letter prepared in response to G.G.'s litigation against the school board. Such an abrupt and unexpected departure from longstanding positions does not merit deference, much less "controlling deference."

Even under *Auer*, this abrupt change of interpretation would not be entitled to deference. Although the *Auer* Court deferred to an agency's *amicus* brief

"in the circumstances of [that] case," 519 U.S. at 462, it did not create a blanket rule requiring deference to every such document purporting to interpret a regulation. Instead, *Auer* deferred to the agency only after first determining that there was sufficient reason to believe that the views expressed in the agency's brief were reliable—in other words, that the brief gave "no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Id*. That is not the case here.

An agency cannot properly claim to be "interpreting" a regulation when it is in effect *changing* that regulation. Where, as here, an agency's interpretive letter drastically deviates from that agency's own longstanding views, that letter cannot be said to be a "fair and considered judgment." It is instead a substantive amendment to the regulation based on the current administration's changing policy preferences and the ever-shifting political winds.[4]

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[4] That is why, when deciding deference questions, the Court looks to (among other things) whether an agency's interpretation accords with that agency's own earlier pronouncements. *See*, *e.g.*, *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."); *Pauley v. BethEnergy Mines*, 501 U.S. 680, 698 (1991) ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–213 (1988) (refusing to defer to an agency interpretation that was "contrary to [its] narrow view . . . advocated in past cases"); *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 n.30 (1987) (stating that an "agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held view") (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

B. OCR's Reinterpretation Goes Against the Repeatedly Expressed Will of Congress

OCR's reinterpretation of Title IX and its regulations contained in the Ferg-Cadima and "Dear Colleague" letters not only goes against the agency's own longstanding practice, but stands in direct opposition to the expressed will of Congress. Even a cursory examination of this issue will show that Congress never intended Title IX's proscription of discrimination on the basis of sex to include gender identity. As discussed in the petition, Congress has chosen to include gender identity as a protected class in other legislation, just not in Title IX. *See, e.g.*, 42 U.S.C. § 13925(b)(13)(A) (prohibiting discrimination based on "sex, gender identity . . . , sexual orientation, or disability"). It has repeatedly failed to pass bills aimed at producing similar results as those required in the letters in this case. *See, e.g.*, H.R. 2015 (110th Cong. 2007); H.R. 3017 (111th Cong. 2009); S. 1584 (111th Cong. 2009); H.R. 1397 (112th Cong. 2011); S. 811 (112th Cong. 2011); H.R. 1755 (113th Cong. 2013); S. 815 (113th Cong. 2013) (unenacted versions of the Employment Non-Discrimination Act, which would have prohibited gender-identity discrimination).

Affording *Auer* deference to the agency interpretation here would allow the OCR to effectively write a particular policy position into federal law that Congress has repeatedly rejected, severely undermining the primary justification for judicial deference to agency interpretations in the first place. *Cf. FDA v. Brown & Williamson Corp.*, 529 U.S. 120, 159–61 (2000) (concluding that an agency may not regulate an area where Congress repeatedly denies it the power to regulate and develops a comprehensive regula-

tory scheme outside that agency's control). If *Auer* deference is ultimately, through *Chevron*, predicated on the theory that statutory ambiguities imply that Congress has delegated to the agency authority to use its discretion within the bounds laid out in the statute, deferring here leads to the absurd result that Congress somehow delegated to the DOE the authority to act in direct opposition to its own will.

IV. AT MINIMUM, *AUER* SHOULD BE LIMITED TO ONLY AFFORD DEFERENCE TO AGENCY INTERPRETATIONS OF REGULATIONS THAT ARE PROMULGATED THROUGH NOTICE-AND-COMMENT RULEMAKING

While we urge the Court to take this opportunity to overrule *Auer*, should the Court choose to keep *Auer* in place, an adjustment to the doctrine to reconcile it with modern *Chevron* jurisprudence would mitigate most of *Auer*'s largest defects. *Chevron* held that courts must give "effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984). Then in *Christensen*, this Court held that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." 529 U.S. at 587. The Court followed up *Christensen* with *Mead*, which reaffirmed *Christensen*'s central holding that informal interpretative statements lacking the force of law should only be afforded the less-deferential *Skidmore* deference. 533 U.S. at 229–34.

Similarly, in *Auer*, this Court held that an agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Court should follow *Christensen* and *Mead*'s limitation on *Chevron* by placing a similar restriction on *Auer*, especially when an agency's interpretative actions are nonbinding on the agency itself. If agencies want their interpretations to have the force of law—and to have courts defer to them—they should have to go through the trouble of notice-and-comment rulemaking. If they instead want flexibility and efficiency, they shouldn't enjoy judicial deference. There's a tradeoff, such that agencies remain accountable to either the public or the courts. But if the decision below stands, agencies will get the best of both worlds and the regulated person will get neither an opportunity to participate in rulemaking nor a proper day in court with real judicial review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

September 27, 2016