No. 16-273

In the

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

G. G., BY HER NEXT FRIEND AND MOTHER, DEIRDRE GRIMM,
Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL ORGANIZATION FOR MARRIAGE AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether *Auer* deference should extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?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. Whether, with or without deference to the agency, the Department of Education's specific interpretation of Title IX and 34 C.F.R. § 106.33, which provides that a funding recipient providing sex-separated facilities must "generally treat transgender students consistent with their gender identity," should be given effect?

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INTEREST OF AMICI CURIAE[1]

The National Organization for Marriage ("NOM") is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. NOM's leading role in those efforts has necessarily meant that the organization has been involved in many public debates about what constitutes being male and being female. NOM has been involved in a variety of efforts to overturn regulatory and legislative actions seeking to substitute "gender identity" for biological sex in determining who may access gender-specific facilities such as restrooms, showers and locker rooms. For example, NOM urged its members to support a referendum in California and a ballot initiative in Washington State on these very matters. Because of its advocacy and public education activities surrounding gender-identity issues, NOM has been the recipient of scientific reports on sexuality and gender, as well as scores of anecdotal examples of threats to privacy and safety that have occurred in the wake of the adoption of policies that eliminate gender-specific access to intimate facilities such as restrooms, showers, and locker rooms. NOM believes that such evidence should be of concern to this Court.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent

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[1] Pursuant to this Court's Rule 37.3(a), this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief, and no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

authority in our national life, including the fundamental separation of powers principles implicated by this case. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing similar separation of powers issues, including *United States v. Texas*, 136 S.Ct. 2271 (2016); *Zubik v. Burwell*, 136 S.Ct. 1557 (2016); *U.S. Dep't of Trans. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225 (2015); and *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1213 (2015).

SUMMARY OF ARGUMENT

The doctrine of deference to an agency's interpretation of its own regulations, first announced in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and solidified in *Auer v. Robbins*, 519 U.S. 452 (1997), has proved to be a violation of core separation of powers principles. It exacerbates the problem of unconstitutionally delegating lawmaking powers to unelected executive officials, already at the constitutional breaking point under step two of the *Chevron* doctrine, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). It also deprives the judiciary of its authority to interpret the laws, an authority that has been recognized for over two hundred years. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). Although the order granting the petition for a writ of certiorari in this case declined to consider whether *Auer* should be overruled at this time, the serious constitutional problems with the doctrine that several members of this Court have acknowledged in recent years counsels that the doctrine at least be limited, and that its own "plainly erroneous" caveat be more vigorously enforced.

The interpretation at issue in this case, to which the lower courts deferred, is "plainly erroneous" if that phrase is to have any meaning. It has turned a specific statutory and regulatory exemption allowing for single-sex intimate facilities into a mandate that prohibits such facilities. Even under *Auer* deference, such an interpretation should not stand.

Much more is at stake than just some hypertechnical point of administrative law. The change in policy at issue in this case—unilaterally imposed by a low-level executive official to which the court below gave "controlling weight"—has triggered significant threats to privacy and safety in school districts across the country. The privacy implications themselves highlight the separation of powers problems with *Auer* deference, as it is unimaginable that a politically accountable body such as Congress (as opposed to an unelected and unaccountable low-level bureaucrat) would dare enact a law with the privacy concerns of their constituents that are implicated here. Mr. Ferg-Cadima's "plainly erroneous" interpretation should be rejected; *Auer*'s "plainly erroneous" caveat should be given teeth; and the complete reconsideration of the *Auer* deference doctrine should not be foreclosed.

ARGUMENT

I. Even With *Auer* Deference, the Interpretation Advanced by the Acting Deputy Assistant Secretary for Policy Should Not Be Adopted Because it is Plainly Erroneous.

Title IX of the Education Amendments of 1972 (Title IX) provides that "[n]o person . . . shall, *on the basis of sex*, be excluded from participation in, be denied the

benefits of, or be subjected to discrimination under an education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). At the time and for nearly forty years since Title IX was adopted, no one understood the law to prohibit single-sex bathrooms, showers, locker rooms and other intimate facilities. Indeed, the statute expressly provided that "nothing contained [in it] shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The Department of Education's implementing regulations confirmed this common-sense understanding of what the statute and its express exception required and did not require: "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 for students of the other sex." 34 C.F.R. §106.33 (emphasis added).

That long-standing understanding of Title IX was turned on its head last year—not by an amendment to the statute adopted by Congress, or by an amendment to the statute's implementing regulations adopted by the Department of Education pursuant to the notice and comment rulemaking process required by the Administrative Procedures Act. Rather, it was turned on its head by an opinion letter issued from deep within the bowels of the Department's bureaucracy. Letter from James A. Ferg-Cadima (Jan. 7, 2015), Pet.App. 121a.[2] The letter defined "sex" to include "gender

[2] The opinion letter was followed by a second one a week later advancing the same interpretation in response to a request by the plaintiff in this case. See Pet.App. 45a.

identity," *id.*, thereby rendering the statutory authority for separate-sex living quarters (and the implementing regulatory authority for separate-sex toilet and shower facilities) meaningless. Worse, the letter was signed, not by the Secretary of Education himself, or by the Assistant Secretary in charge of the Department's Office for Civil Rights, or even by the Principal Deputy Assistant Secretary. It was signed by James Ferg-Cadima, the *Acting* Deputy Assistant Secretary for Policy. Pet.App. 125a. In other words, this fundamental shift in policy and rejection of "common sense [and] decency," *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992), directly contrary to a statutory exemption and express language in the statute's implementing regulation, was manufactured out of whole cloth by a single, relatively low-level, unelected, and unconfirmed bureaucrat at the Department of Education's Office of Civil Rights.[3]

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[3] Acting Deputy Assistant Secretary Ferg-Cadima implies in his letter that his extraordinary re-interpretation of Title IX and its specific exemption for intimate sex-specific facilities is simply reflective of the Government's interpretation of "sex discrimination" as including "gender identity" more broadly. Pet.App. 121a-122a. EEOC and the Department of Justice had recently interpreted "sex discrimination" in Title VII to include "gender identity," for example, Pet.App. 122a n.3, but nothing in those decisions addressed the Title IX exemption for intimate single-sex facilities. Similarly, the "Questions and Answers" posted on the Department of Education's Office of Civil Rights website in 2014 asserted that Title IX's ban on "sex" discrimination extended to gender identity for purposes of single-sex classroom assignments, Pet.App. 121a n.1, 16a n.5, but it did not address intimate facilities covered by the explicit exemption contained in the statute and its implementing regulation. The other source of "authority" cited in Ferg-Cadima's letter—a couple of non-precedential settlement agreements, Pet.App. 124a nn. 4, 5—simply serve to highlight how *ultra vires* this radical change in policy was.

The Fourth Circuit's contention that the district court was required to give "controlling weight" to that unauthoritative letter because of *Auer*, demonstrates just how significantly *Auer* permits unelected bureaucrats in executive agencies to deviate from the Constitution's core separation of powers principles. Allowing *one individual*—an Acting Deputy Assistant Secretary for Policy, no less—to alter the meaning of an unambiguous term used throughout Title IX and its implementing regulations is wholly inconsistent with the structure of our Constitution. This individual not only lacks legislative authority to alter the clear meaning of the statute, but also lacks interpretive authority, which is a function of the judiciary. U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . . ."); *Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is"); *Perez*, 135 S.Ct. at 1213 (Thomas, J., concurring in the judgment) ("Because [the *Auer* deference] doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns"); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part) ("He who writes a law must not adjudge its violation").

That is why, in our brief in support of the petition for a writ of certiorari, we urged this Court to accept

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Those settlement agreements did not involve notice and comment rule-making, and certainly did not involve a change in the statutory language meeting the bicameralism and presentment requirements of Article I, Section 7 of the Constitution.

this case as a vehicle for overruling *Auer* and repealing the *Auer* deference doctrine. But even under *Auer*, the decision below cannot stand.

Auer deference is derived from the statement in *Seminole Rock* that "the administrative interpretation . . . becomes of controlling weight *unless it is plainly erroneous or inconsistent with the regulation*." *Seminole Rock*, 325 U.S. at 413-14 (emphasis added); *Auer*, 519 U.S. at 461. An interpretation *by the agency itself* that rendered null and void an important exemption contained not just in the regulation but in the statute would have to be deemed "plainly erroneous" if that caveat is to have any meaning. Necessarily, then, such an interpretation proffered by a low-level, *acting* deputy assistant secretary for policy must be deemed "plainly erroneous" as well.

To be sure, this Court has only rarely found an agency interpretation to be so "plainly erroneous" that deference was improper. As Justice Thomas recently noted, "[o]n [its] steady march toward deference, the Court only once expressly declined to apply *Seminole Rock* deference on the ground that the agency's interpretation was plainly erroneous," and only twice more "expressly found *Seminole Rock* deference inapplicable for other reasons." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1214 and n.2 (2015) (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2168 (2012); *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006)).

Christensen should be the model, not the rare exception, if *Auer* deference is to be retained at all. As this Court held in that case, *"Auer* deference is warranted only when the language of the regulation is

ambiguous. . . . To defer to the agency's position [when the regulation is not ambiguous] would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588.

This Court rejected the interpretation at issue in *Christensen* because it treated "plainly permissive" language in a regulation as though it were mandatory. *Id*. The interpretation here is even more at odds with the regulatory language that it purports to interpret, because it turns plainly permissive language in the regulation into a prohibition. The regulation provides, quite unambiguously, that "A recipient *may* provide separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. §106.33 (emphasis added). The guidance letter, on the other hand, states that when it provides single-sex intimate facilities, "a school generally *must* treat transgender students consistent with their gender identity," thereby *prohibiting* schools from providing the single-sex intimate facilities that the regulation expressly allows them to provide. Letter from James A. Ferg-Cadima (Jan. 7, 2015), Pet.App. 121a, 123a.

That an unelected bureaucrat deep in the bowels of the Department of Education "felt sufficiently emboldened" by this Court's *Auer* deference precedent to issue an interpretation 180 degrees at odds with the regulation (not to mention the statute itself) is grounds enough to revisit and overrule *Auer*. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring). But such an interpretation should at the very least be rejected as "plainly erroneous." And it should be rejected even if it reflects the "fair and

considered judgment on the matter in question" by the agency itself. *Auer*, 519 U.S. at 461-62.

II. This Case Demonstrates How Deference Doctrines Undermine the Political Accountability Built Into the Constitution's Separation-of-Powers Design.

In its decision below, the Fourth Circuit stated:

> In a case such as this, where there is no constitutional challenge to the regulation or agency interpretation, the weighing of privacy interests or safety concerns—fundamentally questions of policy—is a task committed to the agency, not to the courts.

Pet.App. 26a-27a. While the Fourth Circuit was certainly correct in noting that such fundamental questions of policy as are at issue here are not tasks committed to the courts, it was only half right. Neither are they committed to the Chief Executive, much less to an executive agency (or, more precisely for this case, to an unelected acting official of that agency working several layers down in the executive bureaucracy). After all, the President's constitutional duty is to "take care that the laws"—the policy judgments of Congress—"be faithfully executed," Art. II, § 3, not to re-write those policy judgments to pursue their opposite.

This case is a perfect example of why our nation's Founders determined to vest the legislative power in Congress, not in unaccountable executive agencies. It is *Congress*, not an unelected *acting* deputy assistant secretary for policy in the office of civil rights at the

Department of Education, which is directly accountable to the people, and it is members of Congress who have to face the people's wrath at the next election if they enact a policy that fails to give due regard to the significant privacy and safety concerns triggered by Mr. Ferg-Cadima's "interpretation" of Title IX. Those concerns are real, not imaginary, and they are already playing out in schools and public facilities across the country.

Last year in Seattle, for example, a man citing transgender bathroom laws was able to gain access to the women's locker room at a public swimming pool where little girls were changing for swim practice. Mariana Barillas, *Man Allowed to Use Women's Locker Room at Swimming Pool Without Citing Gender Identity*, The Daily Signal (Feb. 26, 2016).[4] Not only did the man begin to undress in front of the girls, but when asked to leave by staff, he replied: "the law has changed and I have a right to be here." *Id.*

In November of 2015, a Virginia man was arrested and charged with three counts of peeping after filming two women and a minor. *Man Dressed as Woman Arrested for Spying into Mall Bathroom Stall, Police Say*, NBC Washington (Nov. 18, 2015).[5] The man had dressed as woman to gain access to the women's restroom within the mall. *Id.*

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[4] Available at http://dailysignal.com/2016/02/23/man-allowed-to-use-womens-locker-room-at-swimming-pool-without-citing-gender-identity/.

[5] Available at http://www.nbcwashington.com/news/local/Man-Dressed-as-Woman-Arrested-for-Spying-Into-Mall-Bathroom-Stall-Police-Say-351232041.html.

These are not isolated incidents, but are indicative of similar incidents happening across the country wherever transgender policies are put in place that allow men claiming to be women to access women's restrooms and showers. In Washington State, a woman who had suffered sexual abuse as a child was fired from her job for declining to go along with the YMCA's recent policy mandating that women's locker rooms and showers be open to men. The fact that the policy re-awakened her old trauma was of no moment. C. Mitchell Shaw, *Rape Victim: Transgender Agenda Creates "Rape Culture,"* The New American (July 1, 2016);[6] *see also, e.g.,* Warner T. Huston, *Top Twenty-Five Stories Proving Target's Pro-Transgender Bathroom Policy is Dangerous to Women and Children*, Breitbart News Networks (Apr. 23, 20116)[7] (illustrating a multitude of instances confirming the privacy and safety concerns of many individuals are valid). Similar incidents are also happening in parts of neighboring Canada that have reinterpreted "sex" to include "gender identity." Shortly after Ontario, Canada passed its "gender identity" bill, for example, a man claiming to be transgender gained access to women's shelters where he sexually assaulted several women.

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[6] Available at http://www.thenewamerican.com/culture/faith-and-morals/item/23541-rape-victim-transgender-agenda-creates-rape-culture.

[7] Available at http://www. breitbart.com/big-government/2016/04/23/twenty-stories-proving-targets-pro-transgender-bathroom-policy-danger-women-children/.

Peter Baklinski, *Sexual Predator Jailed After Claiming to be 'Transgender' to Assault Women in Shelter*, Life Site (Mar. 4, 2014).[8]

As noted above, members of Congress, as the directly-elected representatives of the people, are undoubtedly much more sensitive to these privacy and safety concerns than was Mr. Ferg-Cadima and his colleagues in the unelected office of civil rights. Legislative proposals to expand Title IX's ban on sex discrimination to encompass "sexual orientation" and/or "gender identity" issues have been introduced with some regularity over the past several decades, *see e.g.* Equality Act of 1974, H.R. 14752, 93rd Cong. (1974); Equality Act, S. 1858, 114th Cong. (1st Sess. 2015); Real Education for Healthy Youth Act of 2015, H.R. 1706 114th Cong.(1st Sess. 2015); Tyler Clementi Higher Education Anti-Harassment Act of 2015, S. 773, 1114th Cong. (1st Sess. 2015), but rarely have such proposals even made it to a hearing, much less to a floor vote. *See* Employment Non-Discrimination Act of 1994, S. 2238, 103rd Cong. (1994); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong., (2013). Not one has been enacted, and even those bills which were introduced did not dare to revoke the statutory and regulatory exemption for same-sex living quarters and intimate facilities that Mr. Ferg-Cadima's opinion letter has accomplished by diktat.

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[8] Available at http://linkis.com/ www.lifesitenews.com/12D80.

The radical policy proposal at issue here, advanced by a mere opinion letter that contravenes the express terms of the statute and its implementing regulations, poses such a significant threat to privacy that it simply should not be allowed to stand.

CONCLUSION

The radical re-writing, by a relatively low-level, unelected bureaucrat, of the statutory and regulatory exemption for same-sex intimate facilities from the general Title IX prohibition of sex discrimination that gave rise to this case, contravenes the Constitution's Article I requirement that the legislative powers are vested in Congress, as well as the Article III mandate that the judicial power, including the authority to interpret the laws, is vested in the courts. That the *Auer* deference doctrine relied on by the court below can even plausibly sanction such a breach of core separation of powers principles demonstrates the need to revisit, and ultimately overrule, that doctrine. But at the very least, by mandating that schools *must* allow boys who identify as girls (and girls who identify as boys) into the intimate single-sex facilities reserved for members of the opposite sex, the guidance letter at issue here is a "plainly erroneous" interpretation of the regulatory and statutory language that expressly permits schools to provide single-sex intimate facilities. The decision of the court below deferring to such a "plainly erroneous" interpretation should be reversed.

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Respectfully submitted,

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