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

BRIEF OF CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL AND DR. DOUGLAS R. JACKSON, THE PRESIDENT OF BOTH THE GREAT LAKES EDUCATORS' CONVENTION AND THE MICHIGAN ASSOCIATION OF CHRISTIAN SCHOOLS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ERIN ELIZABETH MERSINO
Counsel of Record
WILLIAM WAGNER
JOHN KANE
GREAT LAKES JUSTICE CENTER
5600 W. Mount Hope Hwy.
Lansing, Michigan 48917
(517) 322-3207
Contact@GreatLakesJC.org

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

This case presents two questions concerning a letter issued by the Department of Education and the agency's opinion and interpretation of Title IX, 20 U.S.C § 1681(a), (prohibiting discrimination based on sex), and of 34 C.F.R. § 106.33, (allowing schools to designate "separate toilet, locker rooms, and shower facilities" based on the sex of the students, faculty, and parents).

The questions presented are:

1. Should the deference applied in *Auer v. Robbins*, 519 U.S. 452 (1997) extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES, AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, the Christian Educators Association International and Dr. Douglas R. Jackson, the President of both the Great Lakes Educators' Convention and the Michigan Association of Christian Schools, respectfully submit this brief. *Amici Curiae* urge the Court to protect the rights and privacy of students, school faculty, parents, and Christians nationwide and to uphold the concept of subsidiarity, as required by the U.S. Constitution, Federal law, and State law.[1]

The Christian Educators Association International has a significant interest in the protection of the constitutional rights, privacy rights, and religious freedom of students, teachers, school faculty, and parents nationwide. The Christian Educators Association International is an international organization that encourages, equips, and empowers educators to be faithful to their Christian beliefs in all aspects of their lives, including their professions. The Christian Educators Association International promotes educational excellence committed to Biblical principles and the values of the Judeo-Christian heritage. It also promotes the protection of all

[1] Petitioner and Respondents have granted blanket consent for the filing of *amicus curiae* briefs in this matter. Pursuant to Rule 37(a), *Amici* gave 10-days' notice of its intent to file this *amicus curiae* brief to all counsel. *Amici* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this *amicus* brief.

Christians' legal rights in the public schools. The Christian Educators Association International is the only professional association that specifically serves Christians within the public schools. The organization has 18 formal chapters throughout the United States.

Dr. Douglas R. Jackson, the President of both the Great Lakes Educators' Convention and the Michigan Association of Christian Schools, also has a significant interest in the protection of the constitutional rights, privacy rights, and religious freedom of students, teachers, school faculty, and parents in the public schools. Dr. Douglas R. Jackson has been a leader in education since the late 1970s and has established traditional educational programs for grades K-12. As the president of the Great Lakes Christian Educators' Convention, Dr. Jackson leads a regional, multi-state convention that serves over 900 teachers and administrators. The convention equips Christian educators to make positive differences in the lives of their students and co-workers by fully living out their Christian faith and imitating the image and likeness of Jesus Christ in their work.

As the president of the Michigan Association of Christian Schools, Dr. Jackson promotes, defends, and assists Christian educators and educational institutions in the state of Michigan. In this role, Dr. Jackson advocates for legislation that preserves the First Amendment free speech rights and religious freedom of all educators and students both at Christian institutions and in the public schools. Dr. Jackson believes that there are two things eternal in this world: the Bible and the souls of men; and education touches both. Therefore, Dr. Jackson fights against educational

policies and regulations that call for individuals to act in contravention of their Christian faith.

Amici Curiae oppose the letter issued by the Department of Education because it unlawfully arrogates congressional power to promote an immoral political agenda and infringes on the constitutionally protected rights of administrators, educators, and students to act, speak, and live out their faith as free Americans. The Department of Education letter ignores the true meaning of sex, substituting the scientific and Biblical definition with its own arbitrary and unsupportable meaning. And in the process the Department of Education tramples on the rights of the United States Congress, state governments, local school districts, and school administrators, teachers, parents, and students throughout the country. Refusing to kneel at the altar of the Department of Education and opposing the overreach of the executive branch of the Federal government, *Amici Curiae* file this brief to support the arguments of the Petitioner.

BACKGROUND

In 1979 the United States Congress enacted and President Carter signed the Department of Education Organization Act, establishing the Department of Education. 20 U.S.C. § 3401, *et seq*. Seven years earlier in 1972, the Congress passed and President Nixon signed Title IX of the 1972 Education Amendments into law. 20 U.S.C. § 1681*, et seq*. Title IX sought to rectify the inequity women faced in the workforce and to address the earnings gap between the sexes by enabling the progress of women and girls in education. *See, e.g*., U.S. Dep't of Justice, Civil Rights Division, "Title IX Legal Manual," *available at*

https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/ixlegal.pdf, last visited Jan. 4, 2017. As legislative history reveals, the law focused on combating the economic disadvantages women faced in the workplace by addressing differential treatment on the basis of sex in education. *See, e.g.*, 118 Cong. Rec. 5803-07 (1972).

Title IX provides:

> 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).

Notably, Title IX recognizes the biological and physiological differences between men and women. Title IX also importantly provides that,

> 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.

Likewise, Title IX's implementing regulation, 34 C.F.R. § 106.33, expressly allows for schools to designate separate facilities based upon sex:

> 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.

Id. The terms or concept of "gender identity," "transgenderism," and "transsexuality" appear nowhere in Title IX, its enacting regulations, or its legislative history.[2] In sum, Title IX: 1) requires that schools not discriminate on the basis of sex in order to receive Federal funding; 2) clearly states that separate "toilet, locker room, and shower facilities" on the basis sex are permissible; and 3) includes *no* provisions, legal or otherwise, pertaining to the special treatment of "gender identity," "transgenderism," or "transsexuality."

For over 40 years, Title IX permitted schools to provide separate bathrooms, changing rooms, and showering facilities on the basis of sex, with discretion resting at the state and local school levels. The clear meaning of the legislation was never questioned.

---

[2] *Amici* reject the legitimacy of these recently coined terms as unfounded in science or reason. Instead, the terminology is the self-serving political rhetoric of a small group of activists. *See, e.g.,* R. Reilly, *Making Gay Okay – How Rationalizing Homosexual Behavior Is Changing Everything*, pp. 11, 47-48, 64, 117-29 (Ignatius Press, 2014) (acceptance and promotion of homosexual behavior is based on politics rather than science). *Amici* believe—along with practically all of humanity throughout all of human history—that if a boy says he is a girl, he is not "transgender"; he is denying biology and pretending to be a sex other than his own. We will not participate in adding to such confusion. *See id.* at 131 (scientific research suggests that at least to some extent "differences in sexual behavior cause (rather than are caused by) differences in the brain").

The Petitioner in the present case initially allowed the Respondent, a biological female, to use the boys' room in the high school per Respondent's request. App. 144a, 149a. Such action invaded the privacy of teenaged male students using the boys' room and resulted in an outpouring of complaints and concerns from students and parents alike. App. 144a. Petitioner carefully considered the matter at public board meetings on November 11 and December 9, 2014. *See* Gloucester County School Board Meeting 11/11/2014, *available at* http://www.gloucesterva.info/channels47and48, last visited Jan. 4, 2017; Gloucester County School Board Meeting 12/9/2014, *available at* http://bit.ly/2bsVO6h, last visited Jan. 4, 2017. Additionally, the administrators at Respondent's high school determined, based on firsthand knowledge and information concerning the dynamics, behaviors, and safety of all the students and facility at the high school, that it should continue the practice of separate bathroom facilities based on sex. App. 144a-151a.

These decisions generated national publicity from "transgender" activists, including an attorney who requested that the Federal government review Petitioner's informed and considered determination. App. 118a-120a. In response to the attorney's inquiry, Petitioner received a letter on January 7, 2015. In the letter, the Department of Education opined: "Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate, or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity." App.

121a, 123a. In other words, the Department said that a school must allow a biological girl to use the boy's restroom and shower if the girl says she's a boy.

School officials rightly discerned that the Department's new "transgender" exception swallowed the express rule that permits a school to provide separate restrooms based on sex.

On May 13, 2016, during the pendency of the appeal in this case, the Department of Education sent a letter to every Title IX recipient in the county. App. 126a-142a. The letter essentially replicates the Department's first letter to Petitioner and adds a detailed mandate of compliance:

1. A school may no longer require a student to use the bathroom, locker room, or shower of the opposite sex if the student or his/her parent or guardian asserts a "gender identity" different from his/her sex. App. 130a.

2. The assertion by the student or his/her parent or guardian does not need to be supported by a psychological diagnosis, a medical diagnosis, or any evidence of treatment. App. 130a.

3. Students who, as a consequence of this new policy, no longer feels comfortable using the bathroom, locker room, or shower of their own sex for reasons of privacy, modesty, sincerely held religious beliefs, or safety concerns, may be relegated to a separate facility. App. 134a.

4. Yet, no school can require that a student whose "gender identity" does not match his/her biological sex use a separate facility. App. 134a.

> Only non-transgendered students will be required to use a separate facility. App. 134a.

Respondents argue that Petitioner's action violates Title IX, in part, because the Department of Education letters provide the "controlling interpretation" of Title IX. It is undisputed that the agency's letters fail to address Title IX's implementing regulations, including 34 C.F.R. § 106.33, which allows for the separation of toilets, locker rooms, and showers based on sex. App. 121a, 123a, 126a-142a. It is also undisputed that the Department of Education never published the letters and has never issued notice of rulemaking regarding its radical new "interpretation" of Title IX. App. 103a, 126a-142a.

SUMMARY OF THE ARGUMENT

The Department of Education's re-writing of Title IX deserves no deference under either the *Auer* or *Chevron* doctrines. *Auer v. Robbins*, 519 U.S. 452 (1997); *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In 2006, this Court clarified the narrow application of the *Auer* doctrine in *Gonzalez v. Oregon*, 546 U.S. 243 (2006). Pursuant to *Gonzalez*, an opinion letter issued by an executive agency that 1) fails to interpret an ambiguity in the agency's own regulations and 2) merely parrots the language of a statute, fails to invoke *Auer*'s controlling deference standard.

Title IX allows educational institutions to provide separate facilities on the basis of sex, recognizing the biological and physiological differences between men and women. 20 U.S.C. § 1681(a); 20 U.S.C. § 1686. Title IX's implementing regulation also clearly permits

the designation of "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. The Department of Education failed to interpret agency regulations in its letters. Instead, the Department of Education's letters aim to create new policy for students, educators, and administrators on the basis of "gender identity"—not sex. App. 121a, 123a. The Department of Education's letters redefine "sex" as "including" the term "gender identity." The agency's alleged interpretation is wholly unpersuasive, as Title IX does not mention, and never contemplated, the newly coined and politically motivated concept of "gender identity."

Congress passed Title IX to specifically provide women with greater opportunities in education. This did not mean female students obtained equal access to men's bathrooms, showers, or locker rooms. On the contrary, Title IX allowed for the separation of such facilities for privacy and decency purposes for the last forty years. The Department of Education's assertion that Title IX's definition of sex requires schools to open these separate facilities to students, teachers, and administrators of the opposite sex, who deny their biology and assert a "gender identity" differing from their biological sex, patently conflicts with Title IX. "Sex" and "gender identity" hold separate meanings in genetics, in biology, in anatomy, and in our legal precedent, including Title IX.

Moreover, implementation of the Department of Education's revision of Title IX: ignores the fundamental right of parents to control and direct the upbringing of their children; ignores the procedural due process requirements of the 14th Amendment; and

ignores the First Amendment freedoms of students, faculty, and staff whose valid religious, moral, political, and cultural views necessarily conflict with a political agenda that denies biology, ignores Biblical teaching and diminishes student privacy and safety. The interpretation also ignores the fundamental constitutional liberty and equal protection interests of students, teachers, and administrators who define their personal identity by their religious beliefs. The agency's interpretation of Title IX endangers the freedoms of Christian Americans who cannot support or promote "transgenderism" based upon their sincerely held religious beliefs.

Lastly, no legitimate source of constitutional authority exists for the creation of the Department of Education. Since the Department of Education is illegitimate, the agency possesses no power or authority to re-write statutes or regulations, or to craft federalized educational policy. The Department of Education ignores the proper constitutional role of state and local governments and the importance of subsidiarity. The Department of Education's letters are an attempted overreach from an executive agency to usurp control of educational policy throughout the nation. This Court should give the Department of Education's legal opinion, contained in its letters, no effect.

ARGUMENT

I. THE COURT SHOULD NOT APPLY THE *AUER v. ROBBINS* "CONTROLLING DEFERENCE" STANDARD TO THE DEPARTMENT OF EDUCATION'S UNPUBLISHED LETTER.

Under the *Auer* doctrine, an agency's controlling deference extends only to interpreting its own ambiguous regulations. The *Auer* doctrine does not permit an agency, as the Department of Education did here, to usurp the role of either Congress or the Federal Judiciary. *Auer*, 519 U.S. 452, 461-63 (1997).

This Court explained *Auer*'s limited scope in *Gonzalez v. Oregon*, 546 U.S. 243 (2006). *Gonzalez* examined whether a Federal statute, the Controlled Substances Act, implicitly gave the Department of Justice the power to prohibit doctors from issuing controlled substance prescriptions used to perform physician-assisted suicide. *Id*. at 248-50. As here, without consulting state or local authorities and without promulgating statutorily authorized rulemaking, the Department unilaterally issued its own interpretation of a Federal statute. *Id*. at 253-55. The Department in *Gonzalez* contended *Auer*'s controlling deference standard included the power to unilaterally interpret statutory provisions. *Id*. at 257. This Court rejected the Department's argument. *Id*.

In *Gonzalez*, the Department of Justice did not interpret an ambiguous discrepancy between the language in the Controlled Substances Act and the Department's regulatory language. *Id*. at 257, 269-75. Instead, the executive agency's interpretation merely

parroted the language of the duly enacted statute. Thus, the agency's legal interpretation of the statute resulted in a unilateral creation of a new regulation beyond the authority of an executive agency. *Id*. at 275.

The same is true here. Title IX's clear language and its implementing regulation present no conflict. Recognizing the biological difference between men and women, both expressly permit schools to provide separate facilities on the basis of sex. For example, Title IX and the implementing regulation both would allow schools to separate toilet, locker room, and shower facilities by sex. App. 121a, 123a, 126a-142a. The Department of Education's letter simply parrots Title IX's provision for separate facilities on the basis of sex. The letter states:

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

App. 121a, 123a.

Thus, under the guise of interpreting its own implementing regulation, the Department of Education improperly interpreted a duly enacted congressional statute, Title IX. Because the agency interpreted a statute rather than its own implementing regulation, the deference allowed under *Auer* does not apply. Review of statutory interpretation is instead governed

by *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Chevron, however, only allows deference for agency rulemaking accomplished in accordance with the authority delegated by Congress that carries the force of law. *Id.* at 842-45; *see also United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). The Department of Education's legal interpretation contained in an unpublished letter carries no force of law and was not promulgated in accordance with notice-and-comment rulemaking or under any other authority granted to the Department of Education by Congress. Because the Fourth Circuit applied the incorrect legal standard, this Court must vacate and remand the appellate court's decision for this reason alone.

Because the Department of Education's legal interpretation is ineligible for deference under both *Auer* and *Chevron*, controlling precedent dictates that the lower court should defer to the letter only to the extent that it is persuasive. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The agency's interpretation of Title IX is wholly unpersuasive for at least three reasons. First, the agency's interpretation of Title IX does nothing more than conflate the terms "sex" and "gender identity," the latter of which is not even a term or classification Congress ever contemplated.

Second, the terms "sex" and "gender identity" or "transgenderism" are not synonymous, and have never been synonymous. Throughout the ages, the courts and Congress have traditionally interpreted "sex" truthfully as an immutable characteristic dependent on one's

chromosomal make-up and anatomical characteristics. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Craig v. Boren*, 429 U.S. 190 (1976); *Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981); *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993); *Holloway v. Arthur Andersen & Co.*, 566 F. 2d 659, 662 (9th Cir. 1977); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Underwood v. Archer Management Services, Inc.*, 857 F. Supp. 96 (D.D.C. 1994). Indeed, the terms "gender identity" and "transgender" are merely recent fabrications of a small group of unelected activists designed to legitimize and promote a political agenda.

Third, the Department of Education's redefinition of the term "sex" in the context of Title IX is internally inconsistent and asserts an illogical argument. Title IX and its implementing regulations permit a school to provide separate restrooms and showers by biological sex. Yet, the Department now requires that the school must allow a biological girl to use the boys' facilities (if the girl simply says she's a boy), and that the school must allow a biological boy to use the girls' facilities (if the boy just says he's a girl).

The agency's interpretation of Title IX is the exact opposite of what Congress stated is the law, as Title IX unambiguously permits schools to restrict access to facilities like bathrooms and showers based solely on sex.[3] Instead, the agency demands that "When a school

[3] When Congress passes legislation, it is assumed to know what it was passing. Parties cannot subsequently change the meaning or add to the plain language of a statute. *Maine v. Thiboutot*, 448 U.S. 1, 8 (1980).

elects to separate, or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity" (and not their true and biological sex). App. 121a, 123a.

Title IX and its implementing regulations clearly allow a Title IX recipient to provide separate toilet, locker room, and shower facilities on the basis of sex. 20 U.S.C. § 1686; 34 C.F.R. § 106.33. Here, Respondents do not seek to treat "sex" and "gender identity" in the same manner, but seek to insert special, additional rights on the basis of "gender identity"—a concept never contemplated by or allowed under Title IX. Respondents' attempt to "interpret" the unequivocal term Congress used, "sex," to encompass the recently created and politically motivated term "gender identity" is not only ill-advised, it is patently unlawful.

In summary, the Department of Education's statutory interpretation of Title IX deserves no controlling deference and is not persuasive in the least.

II. ADOPTING THE DEPARTMENT OF EDUCATION'S UNLAWFUL INTERPRETATION OF TITLE IX WOULD CREATE A HOSTILE AND DISCRIMINATORY ENVIRONMENT FOR RELIGIOUS ADMINISTRATORS, TEACHERS, PARENTS AND STUDENTS THROUGHOUT OUR NATION.

The Department of Education's proposed revision of Title IX fails to uphold the Department's commitment to meet the needs of *all* students. Instead, the agency advances a political agenda creating special considerations for school administrators, faculty, and children who seek to deny their biological sex and create a different "gender identity."[4]

The Department of Education's interpretation violates: 1) the fundamental right of parents to control and direct the upbringing of their children; 2) the procedural due process requirements of the 14th Amendment; 3) the First Amendment constitutional freedoms of students, faculty, and staff (whose valid religious, moral, political, and cultural views necessarily conflict with a political agenda that denies biology, ignores Biblical teaching, and diminishes student privacy); 4) the fundamental constitutional

[4] The agency's statutory interpretation of Title IX seeks to add a new classification, not otherwise recognized in Title IX, of "gender identity" that extends the statute's umbrella to children who wish to deny their biological make-up and assert themselves pursuant to a selected "gender identity" and to students who question which gender to which they might switch or question which gender with which they may wish to engage in sexual intercourse or extend romantic feelings.

liberty and equal protection interests judicially recognized by this Court in the recent decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (i.e., the personal identity rights of students, faculty, and staff who find their personal identity not in their sexuality but in Jesus Christ or other faith orientation); and 5) the principle of subsidiarity and the proper constitutional role of state and local governments.

A. The Agency's Proposed Interpretation of Title IX Unconstitutionally Infringes on the Fundamental Right of Parents to Direct and Control the Upbringing of Their Children.

The Department of Education's "interpretation" of Title IX substantially infringes upon the parents' right to participate in the education and upbringing of their children. The interpretation imposes immorality into schools by promoting conduct (selecting a "gender identity") contrary to biological and Biblical teachings. The interpretation fails to even allow parents to be notified if their child requests to enter, or if their child will be forced to use a bathroom, shower, or changing room with a child or adult of the opposite sex.

This Court recognizes parental rights to be fundamental rights. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Such liberty serves as a powerful limitation on exercises of government authority, including those exercises of authority that impact the parental role in educational matters.

Courts strictly scrutinize government actions that substantially interfere with a citizen's fundamental rights:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of [a fundamental right].

Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Church of the Lukumi Babalu Aye, Inc., v. Hialeah*, 508 U.S. 520 (1993).

The fundamental rights standard preserves fit parents' fundamental liberty to control and direct the upbringing of their children. The historical underpinnings of the fundamental right of parents to direct and control the upbringing of their children, and the case law in support of it, compels the conclusion that the agency's imposition here violates constitutionally protected fundamental liberty, especially when it infringes upon parental choices grounded in religious conscience. Certainly, no compelling governmental interest exists which would allow a governmental regime to impose immorality into schools by promoting conduct (selecting a "gender identity") contrary to Biblical, biological and other scientific teachings. None. And even if a compelling interest did exist, the least restrictive means of accomplishing this interest surely must not be the promulgation of a sexual facility policy that threatens both the privacy and safety of other students using the facilities.

The Department of Education's expansion of Title IX also conflicts with controlling state laws protecting parents' fundamental right to control the upbringing of their children in contexts outside of exercising their freedom of religious conscience. For example, in Michigan, MCL § 380.10 (Rights of parents and legal guardians; duties of public schools) expressly provides that parents *do have a fundamental right* to direct and control the upbringing of their children. MCL § 380.10 provides:

> It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children. The public schools of this state serve the needs of the pupils by cooperating with the pupil's parents and legal guardians to develop the pupil's intellectual capabilities and vocational skills in a safe and positive environment.

MCL § 380.10; *see also In re A.P.*, 770 N.W.2d 403, 412 (Mich. Ct. App. 2009) ("[D]ue process precludes a government from interfering with parents' fundamental liberty interest in making decisions regarding the care, custody, and control of their children"). The Department of Education's letter ignores such protections that states have enacted to safeguard parents' rights and unlawfully pushes parents to the sidelines.

Both the Constitution and state law protect the fundamental right of parents to control and direct the upbringing of their children, including in the sensitive and private matters relevant here. Because the agency's interpretation of Title IX infringes on the

rights of parents, it would be inappropriate to defer to the agency's interpretation of the statute.

B. The Proposed Policy Violates 5th Amendment Procedural Due Process Requirements by Unconscionably Failing to Provide Fair Notice of the Conduct it Proposes to Prohibit.

The agency's new Title IX mandate is the unlawful adoption, implementation, and enforcement of a statute creating new rights for individuals who deny science and their own biology to adopt a "gender identity" differing from their biological sex. It is unclear who is entitled to this new set of rights that will now be protected by force of law, or what the extent of that protection might be.

The Fifth Amendment to the U.S. Constitution provides that the Federal government must not "deprive any person of life, liberty, or property without the due process of law." U.S. Const. amend. V. This constitutional rule of law provides predictability for individuals in the conduct of their affairs. Unambiguously drafted laws and policies afford prior notice to the citizenry of the conduct proscribed.

The vague and ambiguous language the agency seeks to add to Title IX by its unpublished letters fails to provide the public with adequate notice. This failure creates an impossibly precarious proposition for students, faculty, and administrators attempting to discern what constitutes prohibited conduct.

For example, the phrase "gender identity" could mean "transgender," "questioning," "transsexual," "transvestite," "cross dresser," *inter alia*. When, as

here, vague language prevents notice of what constitutes prohibited conduct, accusers (and sympathetic authorities) arbitrarily define the prohibited conduct *after* the commission of the act. Thus, the conduct the agency seeks to prohibit through its letters wholly depends on the whim of subjective and mutable feelings of schoolchildren and confused adults—rather than on a clearly expressed rule of law or natural truths articulated in the language of the provision.

C. The Agency's Interpretation Unconstitutionally Infringes Fundamental First Amendment Rights of Conscience and Expression.

The agency's interpretation of Title IX will lead to censorship and punishment for students, faculty, and administrators whose valid religious, moral, political, and cultural views necessarily conflict with the radical new "gender identity" political agenda. For these students, faculty, and administrators, the Department of Education's interpretation of Title IX unconstitutionally interferes with and discriminates against their sincerely held religious beliefs and identity, as well as their freedom of speech (by disallowing any dissent to the federally-mandated promotion and acceptance of allowing students, faculty, and administrators into the showers, bathrooms, and locker rooms of the opposite sex and by promoting gender-confused behavior).

Under the Constitution, no Federal agency can dictate what is acceptable and not acceptable on matters of religion and politics. The government cannot silence and punish all objecting discourse to promote

one political or religious viewpoint. Yet, this is exactly what the Department of Education seeks to do.

For over the last half-century the United States Supreme Court has repeatedly upheld the First Amendment rights of students. Indeed, it is axiomatic that students do not "shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive and often disputatious society.
>
> In order for the [government] to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly, where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline

> in the operation of the school," the prohibition cannot be sustained.

Id. at 508-09.

Here, the effect of the agency's expansion of Title IX will inhibit, if not ban, the expression of a particular viewpoint and religious belief without any evidence that the belief materially and substantially interferes with the operation of all the schools within the United States. The agency's interpretation creates "the ironic, and unfortunate, paradox of . . . celebrating 'diversity' by refusing to permit the presentation to students of an 'unwelcomed' viewpoint on the topic of homosexuality and religion, while actively promoting the competing view." *Hansen v. Ann Arbor Pub. Schools*, 293 F. Supp. 2d 780, 782 (E.D. Mich. 2003). This re-writing of Title IX requires that everyone get on board with the politically correct "gender identity" or "transsexual" agenda or lose all Federal funding.

This unlawful policy limits the viewpoint of allowable student speech and compels school faculty to politically normalize LGBTQ behavior.

The agency's unauthorized action here is reminiscent of the broad "anti-harassment" policy struck down as facially unconstitutional in *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001). The plaintiffs in *Saxe* sincerely identified as Christians. *Id*. at 203. The plaintiffs, therefore, believed that homosexual behavior is sinful and that their religion required them to speak about homosexuality's negative consequences. *Id*. Plaintiffs feared punishment under the school's policy for discussing and sharing their religious beliefs. *Id*. The Court held that the policy

violated the rights of students guaranteed by the First Amendment. *Id*. at 210. The Court found that the "anti-harassment" policy's very existence inhibited free expression because it failed to follow the standard articulated in *Tinker*. *Id*. at 214-15.

Students, faculty, and administrators have a right to articulate their disapproval or concerns with "gender identity" or "transgenderism" on religious grounds. *See, e.g., Zamecnik v. Indian Prairie School Dist. # 204*, 636 F.3d 874, 875 (7th Cir. 2011). Students have a constitutional right to advocate their religious, political, and moral beliefs about homosexuality "provided the statements are not inflammatory—that is, are not 'fighting words,' which means speech likely to provoke a violent response amounting to a breach of the peace." *Id*.

Indeed, "a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality . . . people in our society do not have a legal right to prevent criticism of their beliefs or even their way of life." *Id.* at 876. A statutory interpretation that punishes a dissenting opinion by promoting another is unconstitutional. *Id*.; *see also Hansen*, 293 F. Supp. 2d at 792-807 (holding a School District's censorship of student speech due to its perceived negative message about homosexuality violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment); *Glowacki v. Howell Public School Dist.,* No.2:11-cv-15481, 2013 U.S. Dist. LEXIS 131760 (Sept. 16, 2013) (holding that a teacher's snap suspension of a student for making a perceived anti-gay comment in class was

an unconstitutional infringement on the student's First Amendment freedoms).

Further, the policy fails to adequately respect the First Amendment freedoms of school faculty. It requires school administrators, teachers, and support staff to adopt, implement, and enforce policies that promote the LGBTQ lifestyle. The federally mandated support, encouragement, and affirmation of LGBTQ behaviors necessarily coerces school faculty members who believe this lifestyle to be sinful to either violate their religious conscience and endorse a pro-LGBTQ message under the compulsion of governmental power or face punishment. Nowhere in the agency's revision of Title IX does the Department of Education protect dissenting opinions or sincerely held religious conscience. It must be remembered that "[t]olerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

As this Court has emphasized, government officials are not thought police: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). The Department's new directive patently violates this critical principle.

The Department of Education claims to promote non-discrimination, by discriminating against, silencing, and punishing those who cannot and do not support the LGBTQ lifestyle. This is still a free country, however, and such censorship is still

unconstitutional. The Federal government cannot and should not create an environment that will undoubtedly chill the First Amendment freedoms of those students and faculty who disagree with the LGBTQ political agenda for valid religious, moral, political, and cultural reasons.

D. The Agency's Interpretation Unconstitutionally Infringes on the Constitutional Liberty and Equal Protection Interests Recognized by the Supreme Court in *Obergefell*.

This Court's recent ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), created a new constitutional right of personal identity for all citizens. This Court held that one's right of personal identity precluded any state from proscribing same-sex marriage. In *Obergefell*, the justices in the majority held that "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Id.* at 2593.

Because this Court defined a fundamental liberty right as including "most of the rights enumerated in the Bill of Rights," and "liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," this new right of personal identity must also comprehend factual contexts well beyond same-sex marriage. Clearly, this newly created right of personal identity applies not just to those who find their identity in their sexuality and sexual preferences—but also to citizens who define their identity by their religious beliefs.

Many Christian people, for example, find their identity in Jesus Christ and the ageless, sacred tenets of His word in the Holy Bible. For followers of Jesus, adhering to his commands is *the* most personal choice central to their individual dignity and autonomy. A Christian whose identity inheres in their religious faith orientation, is entitled to at least as much constitutional protection as those who find their identity in their sexual preference orientation. There can be no doubt that this newly created right of personal identity protects against government authorities who use public policy to persecute, oppress, and discriminate against Christian people.

The agency's revision of Title IX unconstitutionally infringes on the personal identity, liberty, and equal protection this Court established in *Obergefell*. *Id.* at 2607 ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

According to *Obergefell,* then, beyond the First Amendment religious liberty protections expressly enshrined in the Bill of Rights, the new judicially-created substantive due process right to personal identity now provides Christian and other religious people additional constitutional protection. Henceforth, government action not only must avoid compelling a religious citizen to facilitate or participate in policies that are contrary to their freedoms of expression and religious conscience protected by the First Amendment, but it must also refrain from

violating their personal identity rights secured by substantive due process.

The Department of Education's statutory interpretation imposed against Christian or other religious people will violate their First Amendment rights, and also the new constitutional "identity" rights that this Court created in *Obergefell*.

E. The Federal Government Undermined Constitutional Good Governance Under the Rule of Law When it Promulgated State and Local Education Policy without Constitutional Authority.

The Department of Education lacked authority to exercise power in this case because the Congressional enactment that created the Department of Education is unconstitutional. No enumerated power in the Constitution authorized Congress to enact PL 96-88, the law that established the Department of Education. Congress acted, therefore, without constitutional authority when it enacted the law. Because Congress lacked constitutional authority to enact the law, the law is unconstitutional. Because the law creating the Department of Education is unconstitutional, the Department itself lacks any constitutional authority to exercise power—especially power over matters reserved to the states by the Constitution (e.g., education policy).

> The Federal Government "is acknowledged by all, to be one of enumerated powers." That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers.

> Congress may, for example, "coin Money," "establish Post Offices," and "raise and support Armies." The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it."

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (internal citations omitted) (quoting *McCulloch v. Maryland,* 17 U.S. 316, 404, 405 (1819); Const. art. I § 8, cls. 5, 7, 12; *Gibbons v. Ogden,* 9 Wheat. 1, 194-95, 6 L.Ed. 23 (1824)).[5]

Congress conspicuously failed to identify any legitimate source of constitutional authority on which it relied when enacting PL 96-88, the Department of Education Organization Act (the "Act"). *See, e.g.*, H.R. CONF. REP. 96-459, H.R. Conf. Rep. No. 459, 96TH Cong., 1ST Sess. 1979, 1979 U.S.C.C.A.N. 1612, 1979 WL 10272 (Leg.Hist.). The simple reason Congress failed to do so is that no enumerated congressional power exists for the Federal Government to exert power over the education of children. Powers not granted to the Federal Government are reserved to the states and to the people. U.S. Const. amend. X.

---

[5] *See also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten the constitution is written."); *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

Nowhere enumerated among the Federal powers in the Constitution is the power over educational activities. Educating children, therefore, falls *outside* the constitutional authority of the Federal Government. Nonetheless, Congress, when articulating its purposes for the Act, declared "that the establishment of a Department of Education … will help ensure that education issues receive proper treatment at the Federal level, and will enable the Federal Government to coordinate its education activities more effectively." *See* PL 96-88 § 102; 20 U.S.C. § 3402. Yet, nowhere enumerated among the Federal powers in the Constitution is the power over educational activities. Educating children, therefore, falls *outside* the constitutional authority of the Federal Government. Congress simply cannot create its own authority by fiat.

Thus, it is clear that Federal bureaucrats abuse their power by mandating policy for local school districts. Our Constitutional Framers sought to curtail such abuse by limiting Federal power to only those powers enumerated in the Constitution.

State sovereignty is not just an end in itself:

> Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally

> administered by smaller governments closer to the governed.

Sebilius, 132 S. Ct. at 2578 (internal citations and quotation marks omitted).

Indeed, the Federal government's failure to recognize the limitations of its power here undermines the Rule of Law—and not just any Rule of Law, but the Rule of Law enshrined in the Constitution. "The Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." *Id.* at 2578 (quoting The Federalist No. 45, at 293 (J. Madison)).

Thus, even when government properly promulgates policy (as opposed to unlawfully "interpreting" it into existence) an essential element of good governance under the Rule of Law is the principle of subsidiarity. Dictionaries define the principle of subsidiarity as:

> the principle that decisions should always be taken at the lowest possible level or closest to where they will have their effect, for example in a local area rather than for a whole country.[6]

Education policy issues ought, therefore, be addressed at the least centralized level of government, closest to where the policy will have its effect—simply because such organizational governance is more likely to result in better and more effective educational policy. Moreover, such an approach increases the

---

[6] *See, e.g.,* Cambridge University Press, Cambridge Advanced Learner's Dictionary & Thesaurus (4th ed. 2017).

likelihood of transparency and accountability in policy-making because the citizen affected is so close in proximity to the government policy-maker. It is much easier for government to illegitimately exercise power without transparency when it can do so without facing an informed citizenry.

When policy is promulgated into law without transparency, the government quickly loses the trust of the citizenry because such tactics give citizens a reason to believe that the government is hiding something and not acting in their best interests.

Here, the Department of Education has failed to adequately notify either the public or the legislature about its re-writing of Title IX. Therefore, for this reason and others, the Court ought to carefully evaluate the agency's process by which: 1) the agency unilaterally promulgates special rights for the LGBTQ political community under the guise of education policy; and 2) the legitimacy of a process vesting authority with higher levels of governance far away from where the policies will have their effect, which is at the state and local levels.

CONCLUSION

This Honorable Court should vacate and reverse the decisions of the appellate court to prevent the unauthorized governmental overreach of an executive agency and to protect the privacy and constitutional rights of all Americans.

Respectfully submitted,

ERIN ELIZABETH MERSINO
Counsel of Record
WILLIAM WAGNER
JOHN KANE
GREAT LAKES JUSTICE CENTER
5600 W. Mount Hope Hwy
Lansing, MI 48917
(517) 322-3207
Contact@GreatLakesJC.org

Counsel for Amici Curiae