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 NORTH CAROLINA VALUES COALITION AND THE FAMILY RESEARCH COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


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## INTEREST OF AMICI[1]

North Carolina Values Coalition and The Family Research Council, as *amici curiae*, respectfully urge this Court to reverse the Fourth Circuit decision.

The North Carolina Values Coalition ("NCVC") is a nonprofit educational and lobbying organization based in Raleigh, NC and located within the jurisdiction of the Fourth Circuit Court of Appeals that exists to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. Consequently, NCVC has an interest in ensuring that North Carolina communities are free to enact policies that advance these values and preserve privacy. *See* www.ncvalues.org.

The Family Research Council is a non-profit organization located in Washington, D.C., that exists to advance faith, family and freedom in public policy and the culture from a Christian worldview. Consequently, FRC has an interest in ensuring that local communities are free to enact policies consistent with this worldview. *See* www.frc.org.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case implicates sensitive privacy issues involving some of the youngest members of American society. But "[t]he resolution of this difficult policy

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

issue is not" the business of this Court. *Texas v. United States*, No. 7:16-CV-00054-O, 2016 U.S. Dist. LEXIS 113459, *3-4 (N.D. Tex. Aug. 21, 2016). "Instead, the Constitution assigns those policy choices to the appropriate elected and appointed officials, who must follow the proper legal procedure." *Id*. at *4. The Fourth Circuit decision, and decrees[2] from two executive agencies, the Departments of Justice and Education (collectively "the Departments"), pose

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[2] The following federal decrees are relevant: The opinion letter dated January 5, 2015 from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy in the Department of Education ("DOE") Office of Civil Rights (the "Ferg-Cadima Letter"), and the "Dear Colleague" letter dated May 13, 2016 from the Departments of Education and Justice to every Title IX-covered educational institution in America (the "Dear Colleague Letter") (collectively, the "Letters"). Additionally, the DOE has attempted to decree a redefinition of "sex" for schools nationwide in several guidance documents published over the last few years, including the following: U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, 5 (Apr. 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities,* 25 (Dec. 2014) http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf; U.S. Department of Education, Office for Civil Rights, *Title IX Resource Guide,* 1, 15, 16, 19, 21-22 (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf. The DOE and DOJ have also previously pursued litigation under this interpretive theory which has resulted in settlements. *See* United States Reaches Agreement with Arcadia, California, School District to Resolve Sex Discrimination Allegations, U.S. Dep't of Justice, July 24, 2013, https://www.justice.gov/opa/pr/united-states-reaches-agreement-arcadia-california-school-district-resolve-sex-discrimination.

ominous threats to representative democracy and individual liberty on both vertical and horizontal levels.

Vertically, the Fourth Circuit affirms federal decrees that remove public education—a matter entrusted primarily to state and local governments—from the elected representatives closest to the people and most responsive to their concerns. Individuals are deprived of the liberty to participate in a matter of national importance in the public schools that educate their children. The ultimatums hold a "gun to the head" of local authorities using an unconstitutional threat to withdraw federal funding from those who fail to comply. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012). The states have not explicitly consented to the Departments' policy as a condition of funding. Public school students, subject to compulsory education laws, are compelled to sacrifice their liberty and reasonable expectation of privacy on a daily basis. At the same time, the Gloucester School Board has not denied G.G. the right to receive an education or the liberty to assume a male identity. On the contrary, the Board supported and facilitated the transition in every reasonable manner.

Horizontally, the Fourth Circuit affirms executive actions that jeopardize the Constitution's separation of powers, not only by issuing mandates that conflict with unambiguous statutory language but also by usurping judicial authority to interpret the law. Even under the most generous construction of *Auer v. Robbins*, 519 U.S. 452, 462 (1997), the Fourth Circuit's extreme deference to the Departments is untenable.

## ARGUMENT

### I. THE FOURTH CIRCUIT RULING WOULD ALLOW THE FEDERAL GOVERNMENT TO USURP STATE AND LOCAL AUTHORITY TO CRAFT PUBLIC POLICY.

The executive branch attempted to impose a draconian solution that robs the people of the power to govern themselves and violates the individual liberty of millions of school children. The Departments would place state and local authorities in a straight-jacket, disabling their ability to craft workable policies that address the rights and concerns of local citizens. "The United States is a nation built upon principles of liberty. That liberty means not only freedom from government coercion but also the freedom to participate in the government itself." Stephen Breyer, Active Liberty (Vintage Books 2006), at 3. The ultimatum jeopardizes both types of liberty, coercing nationwide conformity to a controversial policy and denying individual liberty—the liberty of adults to participate in shaping public policy, and the liberty of young children to maintain bodily privacy. The mandate upends the federalist principles that preserve broad state and local decision-making authority, "secur[ing] decisions that rest on knowledge of local circumstances, [and] help[ing] to develop a sense of shared purposes and commitments among local citizens." Active Liberty, at 57.

The architects of the Constitution created a federal government "powerful enough to function effectively yet limited enough to preserve the hard-earned liberty fought for in the War of Independence." *Shelby v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012). "[A] group

of formerly independent states bound themselves together under one national government," delegating some of their powers—but not all—to the newly formed federal administration. *Reynolds v. Sims*, 377 U.S. 533, 574 (1964). Power is divided, not only horizontally among the three co-equal branches (Section III), but also vertically between federal and state governments. This Court has long recognized the critical need to preserve that structure. The Letters not only encroach on legislative and judicial territory, but also invade a matter of intense state and local concern that is not among the federal government's enumerated powers.

### A. Education Is Primarily A State And Local Concern.

Education is among the many powers reserved to the states and the people, absent a constitutional restriction such as equal protection:

> [S]tate governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, *running public schools*, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so.

*NFIB*, 132 S. Ct. at 2578 (emphasis added).

Local control over public education is "deeply rooted" in American tradition. Indeed, "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-742

(1974). Judicial restraint should characterize any federal attempt to intervene in public education:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities.

*Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). "We see no reason to intrude on that historic control in this case." *Bd. of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 91 (1978) (citing *Epperson* and declining to formalize the academic dismissal process by requiring a hearing); *see also United States v. Lopez*, 514 U.S. 549, 581 (1995) (declining to uphold federal firearms restriction based on proximity to public school). Even where the volatile issue of desegregation is implicated, "local authorities have the primary responsibility for elucidating, assessing, and solving the problems." *Missouri v. Jenkins*, 495 U.S. 33, 51-52 (1990) (internal quotation marks and citations omitted). The same is true here. There is no reason for the federal judiciary to interfere in local school privacy policies and shut citizens out of the process.

### B. The Fourth Circuit Ruling Would Jeopardize The Liberty Of The People To Participate In The Political Process.

This case implicates the most sensitive privacy concerns of young school children. Accommodation of those concerns—both for transgender students and all others—requires compassion and skillful crafting of a workable policy for each school district. It may require

construction or remodeling of facilities to implement accommodations. The federal government has attempted to dictate a one-size-fits-all "cookie cutter" solution for the entire nation. It is impossible, at the federal level, to consider the multitude of factors that may differ from one school district to another.

Federalism safeguards individual liberty, allowing states and local communities to "respond to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States,* 564 U.S. 211, 221 (2011). Public school boards illustrate the outworking of this fundamental principle. Board members are typically selected, often by popular election, from among local citizens. Parents, teachers, and even students have the opportunity to participate in meetings and express their concerns. If the Fourth Circuit decision stands, these voices will be silenced all across America.

This Court recently reinforced the importance of maintaining "the status of the States as independent sovereigns in our federal system . . . [o]therwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer." *NFIB*, 132 S. Ct. at 2602. In short, "federalism protects the liberty of the individual from arbitrary power." *Id*. at 2578 (internal quotation marks and citation omitted). It is hard to imagine a more striking instance of arbitrary power than this case presents.

The "double security" of American federalism is deeply rooted in the nation's history:

> "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people." The Federalist No. 51, p. 323.

*Gregory v. Ashcroft,* 501 U.S. 452, 458-459 (1991) (quoting James Madison). The "federalist structure of joint sovereigns . . . increases opportunity for citizen involvement in democratic processes" (*id.* at 458) and "frees citizens from restraints that a more distant central government might otherwise impose" (Active Liberty, 56). The Fourth Circuit forecloses that opportunity for every citizen, student, and local school board in America.

## II. THE FOURTH CIRCUIT RULING ENDORSES COERCIVE ACTIONS THAT THREATEN THE LIBERTY OF LOCAL SCHOOL DISTRICTS AND STUDENTS.

The Departments exhibited an unacceptable level of coercion toward both local school districts and their young students, cutting off opportunities to voice disagreement with the federal ultimatum. "Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against." *Hill v. Colorado*, 530 U.S. 703, 769 (2000) (Kennedy, J., dissenting). This is not a case that punishes speech per se. But the result is virtually identical. The decrees would crush the ability to meaningfully disagree with or protest the federal government's coercive policy. The sensitive issues

raised by this case should be debated and addressed in local communities—but if the mandate stands, discussion will be chilled or at least irrelevant. The Departments use the power of the purse, imposing conditions the states neither knew about nor agreed to when accepting federal funds. The coercive impact on school children is even more troubling—young citizens, who have no direct voice in the political arena yet subject to compulsory education laws—are compelled to sacrifice their bodily privacy on a daily basis.

### A. The Ruling Would Allow The Federal Government To Coerce School District Compliance By Threatening Withdrawal Of Federal Funds.

This Court has "repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). But that power, "if wielded without concern for the federal balance . . . permit[s] the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Id*. at 654-655 (Kennedy, J., dissenting). In light of that danger, this Court has consistently held that Congress must "speak with a clear voice." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Any funding conditions Congress imposes must be set forth "unambiguously," and states must "voluntarily and knowingly accept[] the terms." *Id*.; *see also NFIB*, 132 S. Ct. at 2602. In *NFIB*, Congress threatened to withhold *existing* Medicaid funds from those states that declined to sign up for "the dramatic expansion in health care coverage effected by the [Affordable Care]

Act." *Id*. at 2603. This Court, reiterating earlier precedents, rejected this attempt to impose retroactive conditions on the states. *Id*. at 2606.

The same principles apply here. The Ferg-Cadima Letter and the "Dear Colleague" Letter both presume the term "sex" embraces gender identity. But when Title IX was enacted over four decades ago, no state had explicit notice that it must accept the Departments' newly minted definition of "sex" as a condition of receiving funds.

### B. The Ruling Would Allow The Federal Government To Coerce Students In An Environment Where Their Attendance Is Mandatory.

The public school is a unique environment. First, it is the place where minor children spend most of their waking hours. Second, education is compulsory and many families have little choice but to place their children in public schools rather than some alternative educational setting. Some parents are able to afford private school tuition—in addition to the taxes they must pay to support public education—but many cannot.

As this Court has observed in a different context, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). This case does not involve a religious exercise, but it does involve the coercive environment of the public school system. The coercion in this case is even greater. *Lee v. Weisman* involved a one-time event. This case involves daily

school activities. *Lee v. Weisman* required students to stand respectfully for a few minutes. This case demands that children routinely sacrifice their bodily privacy, even exposing their unclothed bodies to students of the opposite sex, e.g., when changing clothes for physical education. *Lee v. Weisman* was about high school seniors ready to graduate and become adults. This case encompasses all elementary and secondary students—many of them much too young to understand the concept of transgenderism. The coercion is extreme and pervasive. The Fourth Circuit's demands intrude on the basic rights of children:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). In other contexts, perhaps there is an "emerging awareness that liberty gives substantial protection to *adult* persons in deciding how to conduct their *private* lives in matters pertaining to sex." *Lawrence v. Texas*, 539 U.S. 558, 571-572 (2003) (emphasis added). But here, the federal government demands that *children* sacrifice bodily privacy in a *public* place among other students—including those of the opposite biological sex.

Other than citing the very case under consideration by this court, the Letters reference cases involving

adults—discrimination in employment, credit, and other settings that do not involve minor children. *See* App. 122a, n. 2; App. 130a, n. 5. "Courts . . . must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults." *Davis*, 526 U.S. at 651. *Davis* was about student-on-student sexual harassment, which can be difficult to distinguish from typically immature student behavior. This Court noted the unique qualities of the school setting, where "students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *Id.* at 651-652. In this environment, it is a formula for disaster to add a federal mandate that children regularly expose their unclothed bodies to students of the opposite sex. Not only does this endanger the students who are not transgendered—it potentially subjects students like G.G. to "insults, banter, teasing, shoving, pushing" beyond what might otherwise occur. There is no compelling reason for the federal government to jeopardize the liberty and privacy of young schoolchildren—rights long recognized by this Court and many others.[3]

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[3] *See, e.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374-375 (2009); *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1168 (11th Cir. 2001), *vacated on other grounds by* 122 S. Ct. 2653 (2002); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992); *Beard v. Whitmore Lack Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005); *Doe v. Renfrow*, 631 F.2d 91, 92–93 (7th Cir. 1980). *See* Brief of Amicus Curiae Students, Parents, Grandparents, and Community Members, et al., in Support of Petitioner (urging this Court to grant certiorari) for further discussion of these and other citations concerning students' rights to bodily privacy.

### C. The School District Has Not Denied G.G.'s Liberty To Assume A Male Identity.

The school board's conduct falls far short of denying G.G. either the opportunity to receive an education or the liberty to assume a male identity. In *Davis*, this Court had to consider whether a fifth grade girl was the victim of sexual harassment by a classmate and whether the school district could be liable under Title IX as a recipient of federal funds. The Court held that liability was possible, but "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633. Here, the school affirmed G.G.'s transition to a male identity and even acquiesced in G.G.'s request to use the boys' restroom. Pet. Op. Br. 11-12. There is no evidence that G.G. was effectively denied "access to an educational opportunity or benefit," or the liberty to continue transitioning to a male identity, merely because the school board ultimately had to address and accommodate the privacy needs of other students. The Fourth Circuit's position places the school in a Catch-22 where it must either grant the transgender student's demands, regardless of the impact on other students, or face the loss of federal funding. This case demonstrates the dilemma: The school acquiesced to G.G.'s request to use the boys' bathroom, but that action created acute discomfort for both the boys and girls, and parental complaints ensued.

## III. DEFERENCE TO THE FERG-CADIMA LETTER WOULD VIOLATE THE SEPARATION OF POWERS.

Power is of an "encroaching nature" and "ought to be effectually restrained from passing the limits assigned to it." Federalist No. 48, at 305 (James Madison) (Clinton Rossiter ed., 1961). In order to preserve liberty and guard against tyranny, the founders structured the Constitution to allocate power among three branches of government. Indeed, "the Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *Nat'l Labor Relations Bd. v. Noel Canning, et al.,* 134 S. Ct. 2550, 2592-2593 (2014).

The *legislative* branch—not the *executive* branch—is charged with making the law. U.S. Const., Art. I, § 1. The executive branch has limited rulemaking authority in the course of executing the law but lacks authority to alter the statutory scheme. Yet this branch is perhaps "the most powerful branch of government." Robert J. Reinstein, *The Limits of Executive Power*, 59 Am U. L. Rev. 259, 265 (2009). Agencies "routinely establish policy and even issue binding regulations pursuant to statutes that provide only vague and highly general guidance regarding Congress's desired policy." Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 683 (2014). But the limits woven into the constitutional fabric must be preserved:

> An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise

> discretion only in the interstices created by statutory silence or ambiguity; they must always "give effect to the unambiguously expressed intent of Congress." *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007) (quoting *Chevron*, 467 U.S. at 843).

*Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014) ("*UARG*"). The Fourth Circuit affirms the Departments' attempt to do exactly what they are constitutionally powerless to do—"tailor" Title IX, contrary to "the unambiguously expressed intent of Congress," to impose radical social engineering on the American people without their consent.

### A. The Fourth Circuit Ruling Would Allow The Executive Branch To Invade Legislative Territory Because Their Recent Interpretation Conflicts With Unambiguous Language In Both Title IX And Its Implementing Regulation.

Over the years, this Court has developed basic principles of judicial deference to executive agencies. The Fourth Circuit disregards those principles by giving extreme deference to an interpretation that conflicts with Title IX, C.F.R. § 106.33, and basic logic. Deference to the opinion of a single executive branch official on a question of this magnitude flies in the face of our nation's constitutional principles.

If a statute is at issue, judicial review first inquires as to "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). An agency interpretation "inconsisten[t] with the design

and structure of the statute as a whole" does not merit deference. *Univ. of Tex. Southwestern Medical Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013). Where Congress expressly or implicitly leaves gaps for an agency to fill, the agency's "reasonable interpretation" is entitled to deference. *Chevron*, 467 U.S. at 844. As this Court later explained, *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp*., 533 U.S. 218, 226-227 (2001). Courts also defer to an agency's "reasonable interpretation" of an ambiguous statute. *Christensen v. Harris Cnty.*, 529 U.S. 576, 586-587 (2000). But here, the word "sex" in Title IX is *unambiguous*. Title IX was designed to ensure that women had educational opportunities equal to those provided to men. That purpose presupposes *two* sexes—male and female. Moreover, the school has not denied G.G. the opportunity to receive an education but rather has made every reasonable effort to accommodate G.G.'s liberty to make the female-to-male transition.

The Fourth Circuit, while purporting not to set policy because that task is entrusted to the political branches, cemented into law a radically novel policy dictated by non-binding agency documents reinterpreting the unambiguous term "sex" in Title IX and C.F.R. § 106.33:

> We conclude that the Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender

> individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case.

*G. G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016). This case highlights *Auer*'s potential for abuse. Extreme deference grants an agency permission, "under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588. Addressing issues similar to *G. G.*, a district court in Texas understood this point: "Permitting the definition of sex to be defined in this way would allow Defendants to 'create [a] de facto new regulation' by agency action without complying with the proper procedures." *Texas v. United States*, 2016 U.S. Dist. LEXIS 113459, *46-47 (citing *Christensen*). Several years ago, this Court declined to defer to the U.S. Attorney General's interpretive rule that the use of controlled substances to assist suicide—though lawful under Oregon state law—was not a "legitimate medical practice." *Gonzales v. Oregon*, 546 U.S. 243, 248 (2006). Even though the interpretation was admittedly reasonable, it exceeded the powers the Controlled Substance Act granted. *Id.* at 260. The Attorney General's argument would have "delegate[d] to a single executive official the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality." *Id.* at 275. Similarly, deference to the Ferg-Cadima Letter would effect "a radical shift of authority."

### B. The Fourth Circuit Ruling Would Allow The Executive Branch To Usurp Judicial Power To "Say What The Law Is."

"It is emphatically the province and duty of the *judicial* department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (emphasis added). As Justice Thomas warned, *Seminal Rock-Auer* deference has generated executive encroachment on judicial territory:

> Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.

*Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring). *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) ("*Seminole Rock*") opened the door to "a doctrine of deference that has taken on a life of its own." *Id*. The executive intrusion on judicial power erodes the ability of judges to exercise "independent judgment . . . to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them through either internal or external sources." *Perez*, 135 S. Ct. at 1218 (Thomas, J., concurring). It is ultimately the judiciary's responsibility to determine whether a particular agency interpretation is correct. "*Auer* deference is not an inexorable command in all cases." *Id*. at 1208 n. 4.

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

5 U.S.C.S. § 706. The Fourth Circuit treated *Auer* as "an inexorable command" by granting extreme deference to an executive agency's illogical and unworkable interpretation of a straightforward statute and regulation.

An agency regulation duly adopted according to statutory authority has the effect of law, and courts grant the agency's interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413-414; *Auer*, 519 U.S. at 462. But "[a]gencies do not receive deference where a new interpretation conflicts with a prior interpretation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994). Moreover, "[it] seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

> While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands.

*Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., dissenting). If an agency has carte blanche to interpret—and later reinterpret—its own regulations, that agency has arrogated judicial authority to itself. That is exactly what happened here, in contrast to *Auer* itself. In *Auer*, the Fair Labor Standards Act of 1938 (FLSA) granted the executive agency "broad authority" to define the relevant exemption from overtime pay requirements. *Auer*, 519 U.S. at 456. Congress granted no comparable authority to define—let alone *redefine*—the unambiguous term "sex" in Title IX.

The longevity of an agency's interpretation is a relevant factor though not necessarily conclusive. "Courts will normally accord particular deference to an agency interpretation of longstanding duration. *North Haven Bd. of Ed. v. Bell,* 456 U.S. 512, 522 n. 12 (1982)." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002). Such an interpretation is "more likely to reflect the single correct meaning." *Id*. at 226 (Scalia, J., concurring), citing *Watt v. Alaska,* 451 U.S. 259, 272-273 (1981). The corollary is also true: "[A]n agency's interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view." *Thomas Jefferson Univ.*, 512 U.S. at 515 (internal quotation marks and citation omitted). Reading Title IX together with the regulation expressly permitting sex-segregation in private facilities, it is crystal clear that both presuppose the objective, biological reality of a binary system (male and female) in contrast to the asserted interpretation at issue.

Title IX and its implementing regulation date back over four decades. The Departments' recent interpretation conflicts with both. The Fourth Circuit admitted that "[r]ead plainly . . . § 106.33 permits schools to provide separate toilet, locker room, and shower facilities for its male and female students." *G. G.*, 822 F.3d at 720. It requires verbal somersaults to construe the government's position as "a permissible construction of the statute." *Auer*, 519 U.S. at 457, quoting *Chevron,* 467 U.S. at 843. Its logical incoherence reveals it is "plainly erroneous" and "inconsistent with the [implementing] regulation" originally issued. As Judge Niemeyer explains, the term "sex" must logically mean one of the following now that the government has rejected "biological sex" as the sole definition: (1) biological sex *and* "gender identity" (conjunctive); (2) biological sex *or* "gender identity" (disjunctive); (3) *only* "gender identity." *G. G.*, 822 F.3d at 737 (Niemeyer, J., dissenting). The results expose the Departments' flawed reasoning:

> (1) "[A] transgender student's use of a boys' or girls' restroom or locker room could not satisfy the conjunctive criteria . . . such an interpretation would deny G.G. the right to use either the boys' or girls' restrooms." *Id*. The boys' restroom is not consistent with G.G.'s biological sex, and the girls' restroom does not conform to G.G.'s gender identity.
>
> (2) "[T]he School Board's policy is in compliance because it segregates the facilities on the basis of biological sex, a satisfactory component of the disjunctive." *Id*.

> (3) Under this option, "privacy concerns would be left unaddressed." *Id*. at 738. Yet it was exactly those concerns that led to the provision of sex-segregated facilities in the first place. Indeed, "the whole concept of permissible sex-segregation collapses" (Pet. 35) in view of the extremely subjective standard advanced in the "Dear Colleague Letter." A student's mere notice to the school—with or without parental consent (or even knowledge) or *any* supporting evidence—obligates the school to allow that student to use the facilities of his or her choice.

According to the Fourth Circuit, the Department of Education chose the third option, "determining maleness or femaleness with reference to gender identity." *G. G.*, 822 F.3d at 720. The implications are astounding. If a transgender person elects to use facilities corresponding to biological sex rather than "gender identity," is that permissible? If so, transgender students have the privilege of using the restrooms for either sex—a privilege not granted to non-transgender persons. Would the school then be discriminating against non-transgender students? The Department's interpretation of "sex" is not coherent—let alone persuasive. Instead of resolving an ambiguity in either the statute or regulation, it has created one.

One rationale asserted for *Seminole Rock* (or *Auer*) deference is that "Congress has delegated to agencies the authority to interpret their own regulations." *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring). Congress cannot delegate power it does not possess. In an analogous context, this Court held that Congress

cannot grant *executive* power to itself: "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). Similarly, "the Constitution does not empower Congress to issue a judicially binding interpretation of the Constitution or its laws. Lacking the power itself, it cannot delegate that power to an agency." *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring).

Both *Chevron* and *Auer* presuppose that—under our constitutional structure separating legislative, executive, and judicial powers—Congress could lawfully delegate discretion to executive agencies to resolve statutory ambiguities or fill gaps in the process of executing a statutory scheme. This discretion must be exercised within reasonable limits. It is not a license to usurp legislative power by using "interpretation" to do an end-run around Congress and turn existing law on its head. Nor is it a license to encroach on judicial power by seizing authority to reinterpret its own regulation, decades later, transforming its meaning so the original becomes incomprehensible—as the Letters did here by redefining "sex" and destroying the privacy rationale underlying the law.

*Auer* deference invites executive agencies to be "vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures." Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 11-12 (1996). If the Fourth Circuit decision stands, agencies have a powerful incentive to frame

imprecise regulations they can later revise according to the exigencies and political winds of the day. This is a formula for arbitrary government and tyranny.

Expansive executive discretion also impairs political accountability. By obscuring the lines between the three branches, executive "lawmaking" and interpretation generate confusion as to who is responsible for existing laws and policies. This in turn disrupts the political process at state and local levels, removing matters of local concern from the communities most directly impacted and denying the people the opportunity to participate in government. This strikes at the heart of representative government.

### C. No Reasonable Legislator Would Have Defined "Sex" As "Gender Identity."

It is possible—indeed, probable—that no legislator considered how Title IX would apply to transgender students. If Congress had addressed the issue, how would a "reasonable member of Congress" approached it? Active Liberty, at 88. The statute was designed to ensure equal educational opportunities for men and women. That essentially means all persons. Perhaps a "reasonable legislator" would have agreed that transgender students have the right to receive an education. Even so, it surely would have been *unreasonable* to disregard the privacy rights of all other students. Here, no transgender student has been threatened with expulsion, denied the right to an education, or denied access to a bathroom. Moreover, the government's "solution"—allowing *any* student to use *any* bathroom by mere notice to the school of his or her subjective "gender identity"—fails to honor even the transgender student's own privacy. Here, the school

offered G.G. an accommodation providing a level of privacy beyond what most other students experience. Moreover, no matter what private facilities a transgender student uses, it is difficult to imagine the student's transgender status is invisible to others unless the transition has been completed and the student is enrolling in a new school. In this highly sensitive area, the people must have the flexibility to craft policies and solutions that fit local circumstances and protect the liberty of all students.

In *Auer*, this Court extended deference to an agency's interpretation of its own regulation. But such deference is due "only when the language of the regulation is ambiguous." *Christensen*, 529 U.S. at 588. Other documents have a weaker claim to deference. Opinion letters such as the Ferg-Cadima Letter "lack the force of law" and "do not warrant *Chevron* deference." *Christensen,* 529 U.S. at 587. Interpretive rules, exempt from notice-and-comment requirements (5 U.S.C. § 553(b)(A)), "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez*, 135 S. Ct. at 1204 (internal quotation marks and citation omitted). At most these are "entitled to respect" provided they have the "power to persuade." *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). But—*if courts allow an agency opinion letter to command deference and bind the public*—that letter essentially has the "force and effect of law." The people are ruled by a distant central government without even the benefit of notice-and-comment procedures. That is precisely what the Fourth Circuit allowed, creating the opportunity for encroachment on both legislative *and* judicial power.

It is highly improbable that a hypothetical "reasonable legislator" would have wanted deference to the Ferg-Cadima Letter, "given the statutory aims and circumstances" and the importance of the question. Active Liberty, at 106-107. Agencies might reasonably fill gaps that occur due to unforeseen circumstances. But this case involves setting aside the time-honored understanding of the word "sex" for a novel definition that essentially erases the line between male and female. This is an issue of paramount importance that Congress would have wanted to decide for itself rather than defer to a sole executive official's letter. Deference makes no sense here and would deny local communities the liberty to craft practical solutions to important social problems.

## CONCLUSION

*Amici* urge this Court to reverse the Fourth Circuit decision.

Respectfully submitted,

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