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 *AMICI CURIAE* RELIGIOUS COLLEGES, SCHOOLS AND EDUCATORS IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

2. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are elementary schools, middle schools, high schools, colleges, professors, and religious organizations representing institutions that either receive Title IX funds from the United States Department of Education or participate in higher education programs affected by the same. Consequently, *Amici* have a First Amendment Free Speech and Free Exercise interest in the Department of Education's misuse of unilateral letters to evade the notice and comment procedures set forth in the Administrative Procedure Act.

RELIGIOUS ORGANIZATIONS

**Association of Christian Schools International** — Founded in 1978, the Association of Christian Schools International (ACSI) is the largest Protestant educational organization in the world, representing nearly 24,000 member schools in 100 countries, with 3,000 member schools in the United States and more than 5.5 million students worldwide. ACSI has advanced excellence in Christian schools by enhancing the professional and personal development of Christian educators and providing support functions for Christian schools. Those functions include a host of services, including school accreditation, teacher and administrator certification, textbook publishing, student testing, student activities, legal assistance and legislative help.

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[1] Pursuant to this Court's Rule 37, *Amici* state that no attorney for any party authored any part of this brief, and no one apart from *Amici* or their counsel made any financial contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief.

**The Cardinal Newman Society** — Founded in 1993, the mission of The Cardinal Newman Society is to promote and defend faithful Catholic education. The Society seeks to fulfill its mission in numerous ways, including supporting education that is faithful to the teaching and tradition of the Catholic Church; producing and disseminating research and publications on developments and best practices in Catholic education; and keeping Catholic leaders and families informed. The Cardinal Newman Society is dedicated to the vision of Catholic education exemplified in the life of Blessed John Henry Cardinal Newman and espoused in the Apostolic Constitution for Catholic Universities, *Ex corde Ecclesiae*.

**Ignatius Angelicum Liberal Studies Program** — Headquartered in San Francisco, California, the Ignatius Angelicum Liberal Studies Program (LSP) coordinates with home and distance-learning programs to provide college-level liberal arts courses from a Catholic perspective. LSP has degree-completion agreements with Holy Apostles College and Seminary, Benedictine College, Campion College in Australia, Catholic Distance University, Bethel University and Harrison Middleton University.

COLLEGES

**Aquinas College** — Founded in 1961, Aquinas College is a liberal arts Catholic college in Nashville, Tennessee, that is governed by the Dominican Sisters of the Congregation of Saint Cecilia, a Catholic religious congregation of sisters in the order of St. Dominic.

**Benedictine College** — Founded in 1971, Benedictine College is sponsored by the monks of St. Benedict's Abbey and the sisters of Mount St. Scholastica Monastery in Atchison, Kansas, and ordered to the Benedictine goal of wisdom lived out in responsible awareness of oneself, God and nature, family and society. Its mission as a Catholic, Benedictine, liberal arts, and residential college is the education of men and women within a community of faith and scholarship.

**John Paul the Great Catholic University** — Founded in 2003 and headquartered in Escondido, California, John Paul the Great Catholic University seeks to impact culture for Christ by forming students as creators and innovators, leaders and entrepreneurs at the intersections of media, business and theology, guided by the teachings of Jesus Christ as preserved by His Catholic Church.

**The Thomas More College of Liberal Arts** — Founded in 1978 and headquartered in Merrimack, New Hampshire, The Thomas More College of Liberal Arts (1) publicly professes an institutional commitment to the Catholic Faith; (2) promotes reflection upon the "growing treasury of human knowledge" in light of the Catholic Faith; (3) promises fidelity to the Gospel as taught by the living Magisterium of the Roman Catholic Church; and (4) seeks to instill in its students the desire to serve the common good through works of justice and charity, to answer the Church's universal call to holiness, and to serve the Church's mission of the evangelization of the world.

**Thomas Aquinas College** — Founded in 1971 and headquartered in Santa Paula, California, Thomas Aquinas College is explicitly defined by the Christian Faith, and the College strives in all things to remain faithful to the Magisterium of the Catholic Church. Every member of the teaching faculty who teaches theology must request the *mandatum* from the local ordinary, and all tutors must make a Profession of Faith and an Oath of Fidelity.

**Wyoming Catholic College** — Inspired by Bishop David L. Ricken's 2003 speech and opened to students on September 4, 2007, Wyoming Catholic College seeks to educate the whole person in mind, spirit, and body through a classical liberal arts curriculum, aided by a rich Catholic environment and an exciting outdoor leadership program. This environment, fostered through the College's community of students, faculty, and staff, is promoted through carefully-chosen student life norms, fostered by a faculty dedicated to Catholic principles, and achieved with the assistance of an administrative staff committed to governing the College in accordance with Catholic morals and norms.

SCHOOLS

**Catholic Memorial High School** — Founded in 1949 as a living memorial to twenty-three young men from a small parish in Waukesha, Wisconsin, who made the ultimate sacrifice during World War II, Catholic Memorial High School (CMHS) is a school of the Archdiocese of Milwaukee and prides itself on fidelity to the Catholic Church and charity to community.

**Holy Rosary Academy** — Founded in 1987, Holy Rosary Academy is an independent Catholic school recognized as a member of the Catholic school system of the Archdiocese of Anchorage. Founded by parents, this school exists to assist and complement the primary educators: the parents. Students learn to live a vibrant Catholic life through attendance at Mass, prayer, study, camaraderie, and apostolic work.

**Notre Dame Academy** — Founded in 1904, Notre Dame Academy (NDA) is a Catholic college preparatory school in Toledo, Ohio, sponsored by the Sisters of Notre Dame. NDA promotes the holistic development and empowerment of young women for leadership and service by providing an exceptional educational experience permeated with Gospel values.

**Notre Dame Regional High School** — Founded in 1925 as a parish Catholic high school, Notre Dame Regional High School (NDRHS) soon became a diocesan high school of the Diocese of Springfield-Cape Girardeau. NDRHS's mission is simply to make apostles in the spirit of Saint Alphonsus Ligouri and Saint Francis of Assisi, in these words, "Give us your Child and we shall return you an Apostle." NDRHS strives to make students live out the Catholic faith in thought, word, and action.

**Pius X Catholic High School** — Founded in 1956 in Lincoln, Nebraska, its Articles of Incorporation state that "Pius X Catholic High School has one Member, the Catholic Bishop of Lincoln…" In its curriculum, learning environment, and liturgical life, Pius X High School strives to build and maintain a Catholic culture conducive to the development of personal sanctity. It seeks "to enrich the mind, heart and soul of each

student through a Christ-centered, Catholic environment that provides academic excellence and preparation to achieve a meaningful, faith-filled life."

**St. Joseph Academy** — Founded in 1995, St. Joseph Academy (SJA) is a classical, independent, Catholic school serving grades K–12 in San Marcos, California. Teaching in accordance with the Magisterium of the Roman Catholic Church, our mission is to form young men and women who, committed to live by Catholic principles, will transform and advance human culture.

**Seton School** — Founded in 1975 as a coeducational, independent Catholic junior-senior high school, Seton School is affiliated with and approved by the Diocese of Arlington, Virginia. Seton School strives to form students as committed Catholics who can bring Christ to the world, guided by the principle of St. Elizabeth Ann Seton: "Let God's will of the present moment be the first rule of our daily life and work, with no other desire but for its most full and complete accomplishment."

**St. Theodore Guerin High School** — Founded in 2003, St. Theodore Guerin High School (STGHS) is located in Noblesville, Indiana. STGHS is a Roman Catholic, college preparatory school serving 760 students in grades nine through twelve through authentic faith formation, academic excellence, and student life opportunities.

PROFESSORS

**Francis J. Beckwith, Ph.D.** — Dr. Beckwith is Baylor University's Professor of Philosophy & Church-State Studies and the 2016–17 Visiting Professor of

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U.S. Catholic Bishops and teaches at the Foreign Service Institute. Farr's first book, *World of Faith and Freedom: Why International Religious Liberty is Vital to American National Security*, was published by Oxford University Press. He is contributing editor for the *Review of Faith and International Affairs* and *Providence*, and has published widely.

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**Byron R. Johnson, Ph.D.** — Dr. Johnson is Baylor University's Distinguished Professor of the Social Sciences, founding director of the Institute for Studies

of Religion, and director of the Program on Prosocial Behavior. Dr. Johnson has completed a series of empirical studies for the Department of Justice on the role of religion in prosocial youth behavior, and has served as a Presidential appointment to the Coordinating Council for Juvenile Justice and Delinquency Prevention. He has been project director / principal investigator on many grants from private foundations as well as federal agencies including the Department of Justice, Department of Defense, U.S. Institute of Peace, Department of Labor, and the National Institutes of Health. Before joining the faculty at Baylor University, Dr. Johnson also directed research centers at Vanderbilt University and the University of Pennsylvania.

**Edward A. Morse, J.D.** — Professor Morse is the McGrath, North, Mullin & Kratz Endowed Chair in Business Law at Creighton University School of Law and a Senior Affiliated Scholar at Creighton University's Institute for Economic Inquiry. He previously served as the Associate Dean for Academic Affairs for the School of Law and was a law clerk for the Honorable Deanell R. Tacha of the United States Court of Appeals for the Tenth Circuit. He is admitted to the bars of Nebraska and Georgia (now inactive), holds a CPA certificate in Iowa, and is the author of numerous books and articles on taxation, technology, and regulation. He has recently served as editor for the American Bar Association's Annual Survey of Important Developments in Cyberspace Law, and he currently serves as co-chair of the Committee on Electronic Payments and Consumer Financial Services of the American Bar Association's Cyberspace Law Committee.

## SUMMARY OF ARGUMENT

The First Amendment guarantees that all Americans have an opportunity to voice their concerns regarding matters of public interest. Many venerable faiths have longstanding beliefs on sex, marriage, gender identity, and family structure, and the Constitution protects expressing these beliefs. Government actions that restrict such expressions must be consistent with free-speech rights. Given that this rule applies to statutes that have satisfied the requirements of bicameralism and presentment, it applies *a fortiori* to an informal letter issued by a low-level presidential appointee, one who was not even subject to Senate confirmation. Moreover, if even false statements can receive First Amendment protection, then faith-based expressions rooted in millennia-old moral traditions cannot be denied at least that same recognition by those charged with carrying out Acts of Congress.

The Court has famously held that free speech is essential to democracy, because by it the American people hold their leaders accountable. Speech is indispensible to governmental decision-making, and can be expressed both by citizens and by the organizations they comprise. More speech, not less, is the general principle of the Free Speech Clause. Therefore such speech must prevail against government actions that would curtail or deny it, whether the infringement is intentional or not. Faith-based voices on traditional issues of sex, marriage, gender identity, and family structure may not be eagerly welcomed in what some regard as refined circles in the corridors of power, but the First

Amendment requires the government to respectfully listen nonetheless. And not just the Free Speech Clause; the First Amendment Religion Clauses similarly support the desire of faith-driven citizens and organizations to be heard in public policy debates.

Recognizing that these First Amendment concerns are every bit as present when rules are being contemplated as when legislation is being proposed, Congress wrote notice and comment provisions into the Administrative Procedure Act (APA) to confer a statutory right to safeguard First Amendment interests during rulemaking. The APA's requirements are not inherently difficult, but they do require time, patience, and responsiveness. Citizens and groups are guaranteed an opportunity to thereby participate in rulemaking before the legal landscape changes around them, and the APA requires policymakers to carefully consider this input before promulgating final rules. All such public participation becomes part of the public record, ensuring that concerned participants can hold Executive Branch officials accountable in the court of public opinion and—if necessary—in federal court. The APA's notice and comment process results in better rules, and—importantly—is a matter of fundamental fairness to those who will be governed by those rules.

The judiciary has repeatedly taken note of these truths, and as a result has been reluctant to allow exceptions to the APA's notice and comment provisions found in 5 U.S.C. § 553. Legislative history reveals that Congress was very concerned about these matters, and designed § 553 to effectively address them. These provisions ensure both that speakers are heard and that adversaries are given an opportunity to

reconsider, or at least to respect, the thoughtful contributions of those who differ, resulting in a more durable end product. While government officials might find this process cumbersome or perhaps even tedious, and be tempted to short-circuit the requirements of notice and comment, the APA does not allow such circumvention.

The Ferg-Cadima letter was never subjected to § 553's notice and comment procedures and therefore stands in stark contrast to the patient, deliberative, and responsive rulemaking process that culminated in prior, more balanced Title IX rules. The Executive Branch should engage the lawful APA process and thereby engage the First Amendment issues relevant thereto.

Should the Court not find any of these aforementioned issues problematic, the doctrine of avoidance forecloses the interpretation of Title IX that the Ferg-Cadima letter—and subsequent similar administrative actions—placed upon it. When a statute is subject to more than one reasonable interpretation, one of which raises the troubling possibility of constitutional infirmity, courts are to eschew such potentially problematic constructions approaching constitutional shoals in favor of those that would instead ensure clear sailing. This canon is mandatory, so long as the non-problematic interpretation is fairly reasonable, unless Congress expresses a contrary intent by a clear statement. Under this doctrine, the term "sex" in Title IX must not be read to include gender identity. Congress has rejected attempts to modify civil rights statutes to include gender identity, and could reverse course at any time to provide a clear

statement that lawmakers intend to press what would be the consequent constitutional issues. Congress has not done so as yet.

The Court should reverse the opinion below.

## ARGUMENT

*Amici* agree with Petitioner Gloucester County School Board that the Court should reverse the opinion below. This case arises from the "Ferg-Cadima letter" issued by Acting Deputy Assistant Secretary for Policy James Ferg-Cadima in the U.S. Department of Education's Office of Civil Rights (OCR), prepared as an informal response to an inquiry from the respondent here in the specific context of this litigation in the district court. *See* Pet. at i, 2–3; Pet. App. at 121a–25a. *Amici* offer supplemental arguments pertaining to their First Amendment interests in participating in public policymaking on this subject matter. Congress conferred a statutory right at 5 U.S.C. § 553 to protect these interests, and the doctrine of avoidance would preclude interpreting Title IX—or its implementing rules, including 34 C.F.R. § 106.33—as the Ferg-Cadima letter has done in any event.

### I. American citizens and organizations have a First Amendment right to participate in public debate on issues that impact them.

The Free Speech Clause of the First Amendment ensures that every citizen in this Nation has an opportunity to voice their concerns regarding matters of public interest. *See* U.S. Const. amend. I, cl. 3. Citizens exercise this right either as individuals or as groups or entities sharing common opinions or interests. *See Citizens United v. FEC*, 558 U.S. 310, 342

(2010). Public participation such as this is essential in our democratic republic, which is why the First Congress and the States enshrined free speech in the Supreme Law of the Land.

Most religious denominations in the United States—including Catholic, Evangelical, Hindu, Jewish, Mormon, and Muslim—have millennia-old beliefs, doctrines, and principles relevant to "gender identity" that are integral to their faith and the mission of their affiliated religious organizations. The Constitution ensures broad and robust protections for such beliefs:

> 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.

*Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). For example, ACSI and The Cardinal Newman Society represent myriad colleges, schools, and educators that seek to adhere to traditional Christian doctrine on sex, marriage, gender identity, and family structure, as these sincere religious beliefs are deeply fulfilling and central to the lives of countless Christians. The First Amendment protects the right of these and numerous other religious-mission organizations of Protestant, Catholic, Evangelical, and multitudinous other denominational faiths to share their beliefs regarding sex and the family structure predicated upon these beliefs.

Society is deeply divided on various matters of sex, marriage, gender identity, and family structure; and all Americans are constitutionally entitled to a voice as government actors make policy concerning these issues. "The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014) (opinion of Kennedy, J.).[2] Although *Amici* do not believe that most Americans agree with the Ferg-Cadima letter,[3] the fact that the Fourth Circuit regarded the letter as controlling authority here gives it de facto majoritarian status for purposes of First Amendment analysis, because such public policy is normatively made at the federal level by a majority of the American people's elected Representatives and Senators in Congress. So *Amici*'s opinions and beliefs here are a de facto minority view requiring judicial protection from the majority.

"Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the

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[2] It is of no moment that *Town of Greece* was an Establishment Clause case, because Justice Kennedy made clear that he and a plurality of Justices were explicating an "elemental First Amendment principle," *Town of Greece*, 134 S. Ct. at 1825, and therefore a principle that spans multiple clauses of the First Amendment, including the Free Speech Clause.

[3] *See, e.g.*, Bradford Richardson, *Two-thirds of Americans oppose Obama's transgender bathroom order: Poll*, WASH. TIMES (July 12, 2016), *available at* http://www.washingtontimes.com/news/2016/jul/12/two-thirds-oppose-obama-transgender-bathroom-order/; Nick Gass, *Poll: Transgender bathroom laws split Americans*, POLITICO (May 19, 2016), http://www.politico.com/story/2016/05/poll-transgender-bathroom-laws-223356.

First Amendment." *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (opinion of Kennedy, J.). If that is true for statutes—enacted pursuant to the Constitution's bicameralism and presentment requirements, U.S. Const. art. I, § 7, cl. 2—then those "inconvenient" First Amendment principles must apply *a fortiori* to the dictates of a singular officer in the Executive Branch. That should especially be the case with the Ferg-Cadima letter, which was the product of a mere Acting Deputy Assistant Secretary, Pet. at 8, who, even if he were not "Acting," is still an Inferior Officer in the Executive Branch, unilaterally appointed by the President (usually with minimal presidential involvement), rather than even a Principal Officer who ascends to office only after Senate confirmation. *See* U.S. Const. art. II, § 2, cl. 2; *Morrison v. Olson*, 487 U.S. 654, 670–73 (1988); *id.* at 697–99, 715–22 (Scalia, J., dissenting). If First Amendment principles would apply even to an Act of Congress making this significant change to federal law—which some have attempted to do, though Congress has refused to make such a change, *see* Pet. at 33 & n.13 (discussing the non-passage of the proposed Employment Non-Discrimination Act)—then First Amendment interests are entailed all the more by the Ferg-Cadima letter.

The Court has held that even *false* statements are entitled to First Amendment protection. *Alvarez*, 132 S. Ct. at 2545 (plurality opinion). "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Id.* at 2550. If the First Amendment is implicated even when a candidate for public office lies to the voters about

having received the Nation's highest award, the Congressional Medal of Honor, *id.* at 2542–43, how much more is free speech implicated by respected faith-based organizations seeking to discuss forthrightly the impact that a proposed policy would have on their ability to express and exercise their millennia-old beliefs.

"Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United*, 558 U.S. at 339. Though the Court set forth that rule in the context of citizens and groups attempting to persuade each other in the weeks preceding Election Day, it also applies to publicized communication with the government, as that public communication attracts public attention, which in turn carries a significant measure of accountability. The ability of citizens to engage with each other and their public officials is the beating heart of government of, by, and for the people. "Political speech is 'indispensible to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" *Id.* at 339 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)). Whether an individual or an organization, *Amici* are guaranteed the opportunity to express their views on matters of public concern, such as the intersection of gender identity issues and education.

This Court makes unmistakable that "it is our law and our tradition that more speech, not less, is the governing rule." *Id.* at 361. When those wielding government power—whether legislators or administrators—enact public policy that confers rights or imposes obligations upon the public, the

Constitution ensures that those who are impacted have a meaningful opportunity for their voices to be heard before the law governing them changes.

"For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.* at 340. Whether an Acting Deputy Assistant Secretary of Education—on behalf of the Federal Government—intended to deny affected parties an opportunity to share their thoughts and concerns does not matter for purposes of the law in this case. What matters is that *Amici* are representative of myriad stakeholders on this sensitive and controversial issue, all of which have a First Amendment right to express their views before the Federal Government declares public policy that is adverse to *Amici*'s interests.

"The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002). That is all *Amici* seek here. They wish to speak to government officials and reach their fellow citizens through public hearings on this matter, and help regulators think through the consequences of such a policy. *Amici* believe that in doing so they will ultimately protect their religious freedoms.

Traditional faith-based voices such as *Amici*'s may not be welcome in some circles, but this Court has repeatedly held that "government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). The American people deserve a full and free debate on this subject. Denying *Amici* and similarly situated

parties the opportunity for public discussion on this matter would deny the public information that may impact the course of this national discussion. The Federal Government may not "suppress unpopular ideas or information or manipulate the public debate." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

Indeed, *Amici*'s First Amendment interests here are guaranteed by First Amendment provisions beyond the Free Speech Clause. "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). Transmitting and preserving religious expression and practices protected by the Establishment and Free Exercise Clauses is a mission these religious institutions advance in the private sphere. *Id.* But when those faith-based organizations or schools cannot share their political beliefs or policy positions with regulators, those religious institutions lose a vital part of their "promised freedom to pursue that mission." *Id.* The Religion Clauses "exist to protect religion from government interference," *id.*, which here includes at bare minimum the right to have opportunities to explain to lawmakers and regulators alike the impact policies like the one underlying this case could have on these well-meaning institutions and their venerable faiths. Free exercise of religion includes "the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring).

## II. Congress conferred a statutory right in 5 U.S.C. § 553 in part to safeguard the First Amendment interests of those affected by administrative rulemaking.

Congress recognized that public participation is *essential* when national policy is formulated by administrative rulemaking rather than legislation. Lawmakers deliberately crafted the Administrative Procedure Act of 1946, 5 U.S.C. § 551 *et seq.* (APA), in a manner that protects the First Amendment rights of the American people. The House and Senate codified these protections at 5 U.S.C. §§ 553(b) and (c), ensuring that the public receives appropriate notice of proposed rulemaking and an opportunity to offer public comment before such rules become final.

The APA's requirements are minimal. Notice requires merely (1) a statement of the time, place, and nature of the rulemaking, (2) citation to the predicate statutory authority, and (3) "either the terms or substance of the proposed rule or a description of the subjects and issued involved." 5 U.S.C. § 553(b).

After this notice is given to the American people, "the agency shall give interested persons *an opportunity to participate* in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id.* § 553(c) (emphasis added). Congress thereby conferred a statutory right in the APA to safeguard the First Amendment interests of citizens and groups who are stakeholders in any given subject to be able to

democratically participate in policymaking.[4] This democratic process also ensures transparency, providing a measure of public accountability for overreaching administrators who might otherwise go beyond Congress' mandate in whichever statute purportedly provides the underlying predicate for the administrators' assertion of regulatory power.

Once these stakeholders have participated in the rulemaking process by providing input in the form of comments, the agency must carefully consider all meaningful input before proceeding to promulgate final rules. "*After* consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.* (emphasis added). The sequential nature of this process ensures that citizens and organizations that may be impacted by changes in the law have an opportunity to publicize and press those concerns *before* the law is changed, modifying their rights or subjecting them to new obligations.

All of this input becomes part of the public record, as is any reaction—or lack of reaction—by the agency to concerns raised during the rulemaking process. The APA facilitates transparency and accountability, as "modern courts require agencies to beef up the information that they put in the public record before making a decision." Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for De Novo Review*, 8 J. Legal Analysis 47, 56–57 (Spring 2016). It is in fact necessary for an agency to

[4] There is an exception to the general rule requiring an opportunity for public comment. *See* 5 U.S.C. § 553(b)(3). But that exception is irrelevant here.

"literally disclose all the sources on which it has relied." *Id.*

This comprehensive approach enables the public to hold regulators accountable for faithfully carrying out their statutory mandate in a manner supported by the record, and facilitates judicial review if administrative efforts are wanting. "The justification for this onerous practice is that full information allows first all the interested commenting parties, and then the reviewing court, to develop a sufficient basis on which to evaluate the soundness of the rule." *Id.*

Federal courts have long recognized this method of democratic participation and statutory safeguarding of First Amendment interests, and consistently written approvingly of the APA's notice-and-comment scheme. "The essential purpose of according Section 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980); *see also Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3d Cir. 1969).

Section 553 also generates salutary benefits for the government, as well as the public. "The purpose of the notice and comment provision is so that agencies will receive public input, enabling them to craft a better rule than they otherwise could." *United States v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009). Regulators thus benefit from the expertise of organizations intimately familiar with various subjects, as well as the insights of thoughtful citizens, through the APA's public exchange.

But free expression and public exchange do not form the sole purpose of § 553(c); it is merely "the *primary* purpose of Congress in imposing notice and comment requirements for rulemaking." *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 680 (6th Cir. 2005). "In addition" to free-speech concerns, "requir[ing] public participation helps 'ensure fair treatment for persons to be affected by' regulation." *Cain*, 583 F.3d at 420 (quoting *Dismas Charities*, 401 F.3d at 678). There is a due-process principle of fairness in providing a meaningful opportunity for concerned citizens and groups to be heard prior to imposing the coercive power of government or curtailing public benefits. That basic fairness is denied when, as here, a government official takes such a disruptive step without consulting first with the public as the APA requires.

That is why courts interpreting the APA are skeptical of exertions of rulemaking authority that do not entail notice and comment. "Exceptions to the notice and comment provisions of section 553 are to be recognized 'only reluctantly.' Otherwise, the salut[a]ry purposes behind the provisions would be defeated." *Nat'l Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982) (footnote omitted). The D.C. Circuit elsewhere elucidated those purposes in terms consistent with *Amici*'s argument here, adding that "the exemption [for rules of procedure] cannot apply [] where the agency action trenches on substantive rights and interests." *Batterton*, 648 F.2d at 708 (D.C. Cir. 1980), *quoted in Schweiker*, 690 F.2d at 949.

The D.C. Circuit has also noted that the APA's legislative history further buttresses these points. This legislative history incorporates content from a major government report, *Administrative Procedure in Government Agencies*, precisely on this issue of why notice and comment are needed, explaining:

> An administrative agency . . . is not ordinarily a representative body. . . . Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators. . . . Its knowledge is rarely complete, and it must always learn the . . . viewpoints of those whom its regulations will affect. . . . [Public] participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests.

S. DOC. NO. 248, 79th Cong., 2d Sess. 19–20 (1946) (quoting Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies* 108 (1941)) (internal quotation marks omitted) (alternations in the original), *quoted in Batterton*, 648 F.2d at 703 n.47.

The APA codified this understanding with good reason, recognizing the power of speech that militated its incorporation into the First Amendment. "Speech can produce tangible consequences: It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech." *City of L.A. v. Alameda Books*, 535 U.S. 425, 444 (2002) (Kennedy, J., concurring).

Such a deliberative process with the public takes time, sometimes frustrating those who seek to enact change rapidly. "The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech." *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 701 (1992) (Kennedy, J., concurring).

Justices of the Court have explained why it is particularly important to give a platform to voices seeking to make a moral argument, as *Amici* seek to do here. "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, 787 (2000) (Kennedy, J., dissenting). The opportunity to dissent and make one's case facilitates a more durable outcome in our democratic system, as stakeholders can find a measure of peace and satisfaction in knowing that their voices were heard, and their concerns were weighed as policymakers were striking their balance. On the other side of the debate, this process encourages opponents to respect those of differing opinions, since having to patiently and thoughtfully consider words one disagrees with in an exercise that by its very nature reminds the hearer that is speaker is entitled to his opinions and worthy of respect, tends to engender exactly that. "In a free society protest serves to produce stability, not to undermine it." *Id.*

While inculcating respect is important, it is the consolation prize derived when speech does not lead to change. Many times the speech finds its mark and

results in moderation or accommodation of the speaker, or even possibly wins the day and leads to a reversal in outcome. "The point here is simply that speech makes a difference, as it must when acts of lasting significance and profound moral consequence are being contemplated." *Id.* at 790.

Congress provided precisely such an opportunity when it wrote § 553. "In the realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse . . . 'in the hope that the use of such freedom will ultimately produce a . . . more perfect polity.'" *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 782–83 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

Overzealous administrators may resort to approaches that transgress the APA's notice and comment provisions "when they want to short-circuit the formal processes in order to gain some tactical advantage to implement some policy scheme." Epstein, *supra*, at 69. Administrators in executive agencies sometimes attempt "to set up shop outside the notice and comment framework," such as is typically done "through interpretive rules and policy statements that let agencies operate free of judicial oversight." *Id.* at 57–58. It can also be done by sending an informal letter that was never subject to the APA's strictures, then arguing to a court that the letter should be given all the deference the judiciary affords to the result produced by notice and comment.

Though it purported to implement national policy on contentious gender identity issues directly affecting

religious persons and religious organizations, the Ferg-Cadima letter was never subjected to § 553's notice and comment procedures. This unilateral letter stands in stark contrast to the deliberative process that culminated in the Title IX regulations exempting religious organizations. 20 U.S.C. § 1681(a)(3); 34 C.F.R. 106.12(a)–(b); Kif Augustine-Adams, *Religious Exemptions to Title IX*, Brigham Young Univ., SSRN Abstract 2735173 (February 19, 2016), *available at* http://ssrn.com/abstract_id=2735173 ("During the 120-day notice and comment period, nearly 10,000 individuals and institutions formally responded to the proposed regulations.") Not surprisingly, the former lacks the balance and symmetry of the latter.

It may be coincidence that many faith-based beliefs on matters of sex, marriage, gender identity, and family structure might be inconsistent with the current political leadership of the Department of Education. But the First Amendment looks intently and skeptically at policymakers who overlook statutory requirements that would give dissenting voices a platform. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340. Denying *Amici* the opportunity to offer their views through § 553's notice and comment provisions raises significant concerns, and the APA does not countenance such a denial in any event.

## III. If the Court reaches the text of Title IX, the doctrine of avoidance forecloses the interpretation pressed by the Federal Government here.

Finally, regarding the second question before the Court, *Amici* add that the doctrine of avoidance further supports the School Board's argument that Title IX cannot be read to say what the Ferg-Cadima letter says. Reading "sex" to include gender identity raises significant constitutional concerns when applied to religious persons, religious organizations, or religious colleges that receive Title IX funds. The doctrine of avoidance requires courts to disfavor such interpretations.

"It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). As a consequence, "where an alternative interpretation of the statute is 'fairly possible,' we are *obligated* to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (emphasis added).

The Court has consistently articulated this rule in similar ways, all leading to the same result. When "an otherwise acceptable construction of a statute would raise serious constitutional problems," federal courts must prefer other reasonable constructions of the statutory text. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

This canon is only overcome when Congress clearly states a contrary intent. "Where an administrative interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to Congress' intent." *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001); *accord New York v. United States*, 505 U.S. 144, 170 (1992). This clear-statement rule requires that "when a particular interpretation of a statute invokes the outer limit of Congress' power, we expect a clear indication that Congress intended that result." *St. Cyr*, 533 U.S. at 299. Absent statutory text to that effect, this canon "pushes [courts] away" from interpreting a law in a manner that leads into troubled constitutional waters. *New York*, 505 U.S. at 170.

Avoidance does not apply to every statute subject to multiple interpretations. "This canon of construction, however, only applies when the constitutional difficulty can be avoided by a reasonable construction." *Burns v. United States*, 501 U.S. 129, 138 (1991) (internal quotation marks omitted). A court will not torture a statute's text to avoid constitutional questions that are unavoidable within reason.

Here, however, even the Fourth Circuit admitted that the most natural reading of the word "sex" in Title IX does not mean "gender identity." *See* Pet. App. at 21a–22a. The doctrine of avoidance thus precludes the interpretation adopted in the Ferg-Cadima letter and similar subsequent administrative interpretations.

## CONCLUSION

For these reasons, the Court should reverse the opinion below.

Respectfully submitted,

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