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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ARLEN FOSTER, AND CINDY FOSTER IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Should *Auer* deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

Should the Department of Education's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

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INTEREST OF AMICI CURIAE

Pursuant to Rule 37.3(a), Pacific Legal Foundation and Arlen and Cindy Foster submit this brief amicus curiae in support of the Petitioner, following the written consent of all parties to its filing.[1] Letters evidencing such consent have been filed with the Clerk of the Court.

PLF is a non-profit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating matters affecting the public interest. PLF has participated as amicus curiae and as counsel for parties in this Court in numerous cases in the areas of federal anti-discrimination law and interpretation of federal statutes and regulations. *See, e.g.*, *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (Voting Rights Act); *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (Fair Housing Act); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (Equal Protection Clause); *Rapanos v. United States*, 547 U.S. 715 (2006) (interpretation of Clean Water Act and implementing regulations); *Sackett v. E.P.A.*, 132 S. Ct. 1367 (2012) (interpretation of APA and Clean Water Act); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (APA, Clean Water Act, and regulations).

Arlen and Cindy Foster were Petitioners before the Court in *Foster v. Vilsack*, Docket No. 16-186 (U.S.

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici or their counsel made such a monetary contribution (Amicus Pacific Legal Foundation does not have members; Amici Arlen and Cindy Foster are natural persons).

filed Aug. 8, 2016), *cert. denied*, 580 U.S. ___ (U.S. Jan. 9, 2016). The Fosters have an interest in the extent and scope of *Auer* deference as property owners, federally regulated farmers, and litigants against the federal government. The Fosters' petition presented the related but separate question of whether agency staff testimony is entitled to *Auer* deference. They are also interested in the scope of deference to agency opinion letters that interpret regulations.

This case raises important questions of federal administrative and discrimination law. Amici consider this case to be of special significance in that it concerns the fundamental issue of the level of review courts should give to agency interpretations of their own regulations. Amici believe this brief will be helpful to the Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

Auer deference requires federal courts to defer to an agency's interpretation of its own regulations. *See Auer v. Robbins*, 519 U.S. 452, 462 (1997). Thus, unlike *Chevron* deference, *Auer* does not follow from formal rulemaking, and allows agencies to adopt new regulatory interpretations at their leisure. *See Bigelow v. Dep't of Def.*, 217 F.3d 875, 878 (D.C. Cir. 2000). The requirement that courts defer to unvetted agency interpretations significantly upends the structural protections required by the Constitution, by ceding a core judicial function to the executive. As a result, both this Court and numerous appellate judges have questioned *Auer*'s constitutionality and continuing validity. *See, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring);

United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting); *Berlin v. Renaissance Rental Partners, LLC*, 723 F.3d 119 (2d Cir. 2013).

The agency interpretation at issue here is all-too typical. A low-level employee of the Department of Education issued an opinion letter that purports to "interpret" Title IX in a manner that prohibits institutions receiving federal funds from discrimination on the basis of gender identity. Neither Title IX nor its implementing regulations mention gender identity, yet as a result of *Auer* deference, the lower court deferred to this employee's interpretation and upheld the prohibition. This is not the first time that the Department of Education has undertaken societal change without the input of Congress or the regulated public. *See, e.g.*, *A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413, *et seq.* (Dec. 11, 1979); U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014).

There are good reasons to prohibit discrimination on the basis of gender identity, but the scope and contours of such an important change is for Congress to decide, not a low-level employee within the Department of Education. Yet, as a result of *Auer* deference, that decision is often left to unaccountable bureaucrats who may adopt positions solely as the result of a litigation prompt. This Court should hold that agency opinion letters like the one issued here are not entitled to *Auer* deference. The decision below should be reversed.

ARGUMENT

I

AGENCY OPINION LETTERS ARE NOT ENTITLED TO *AUER* DEFERENCE

This Court has held that when an agency adopts ambiguous regulations and then issues interpretative manuals and other statements based on those regulations, the federal courts are to defer to the agency's interpretation of its regulations. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *Seminole Rock* deference is not supported by any of this Court's prior precedents. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring) ("In setting out the approach it would apply to the case, the Court [in *Seminole Rock*] announced—without citation or explanation—that an administrative interpretation of an ambiguous regulation was entitled to 'controlling weight.'"). Under this Court's subsequent decisions, deference may be owed both to formally adopted publications such as agency manuals, and to litigation-prompted positions taken by the agency in an amicus brief. *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Hence, *Seminole Rock* or *Auer* deference has been described by lower federal courts as more expansive than *Chevron* deference, which generally follows only from rulemaking or similar formal interpretive procedures. *Bigelow v. Dep't of Def.*, 217 F.3d 875, 878 (D.C. Cir. 2000).

Members of this Court and the Circuit Courts of Appeals have expressed significant skepticism about the continuing validity of *Auer* deference, because, *inter alia*, it significantly alters the constitutional

separation of powers between the branches of government. While this case does not present the question whether the Court should reconsider *Auer* itself, it does ask the Court to hold that agency opinion letters, issued in the course of ongoing controversies, do not warrant deference under *Seminole Rock* and *Auer*. Because of the significant constitutional questions arising from extension of *Auer* deference in any context, this Court should hold that agency opinion letters are not entitled to it.

A. *Auer* Unconstitutionally Cedes the Judicial Function to the Executive Branch

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Chief Justice Marshall's foundational statement of the nature of the judicial power is consonant with the view of the Framers. "The interpretation of the laws is the proper and *peculiar* province of the courts. . . . It therefore belongs to them to ascertain . . . the meaning of any particular act proceeding from the legislative body. . . . The courts must declare the sense of the law." The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossitor ed., 1961) (emphasis added).

The separation of the judicial power from the legislative and executive powers is one of the key elements of our Constitution, and it functions as an

important safeguard to the protection of individual liberty. *Bond v. United States*, 564 U.S. 211, 222 (2011) ("[T]he dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by separation of powers protect the individual as well."). This constitutional structure reflects the intent of the Framers that the federal courts are independent of the executive's influence, and that no other branch has the authority to exercise the judicial power. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (James Madison). "It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments." The Federalist No. 48, at 308 (James Madison).

Whatever it's merits, *Auer* deference unquestionably allows the executive branch to "ascertain the meaning of particular acts proceeding from the legislative body." This transfer of power to "declare the sense of the law" does more than share the legislative power with the executive. When the federal courts defer to executive interpretations of the law under *Seminole Rock* and *Auer*, the judicial power is handed entirely over to the executive. *Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.*, 718 F.3d 488, 493 (5th Cir. 2013). As a result, the executive tells the judiciary in a binding manner what the law is and means, instead of the other, constitutional, way around. *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring) ("*Seminole Rock* raises two related constitutional concerns. It represents a transfer of judicial power to the Executive Branch, and it

amounts to an erosion of the judicial obligation to serve as a "check" on the political branches.").

In this case, the Court should begin reigning in the "judicial-executive" by holding that non-binding agency opinion letters that interpret regulations are not entitled to deference.

B. Judicial Skepticism of *Auer* Is Abundant

Auer deference has come under increasing scrutiny and skepticism from this Court. *See, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Auer* deference] in an appropriate case."); *id.* at 1339 (Scalia, J., concurring in part and dissenting in part) ("I believe that it is time to [reconsider *Auer*]."); *Perez*, 135 S. Ct. at 1210-11 (Alito, J., concurring in part) (judicial deference to agency interpretation of regulations is ripe for Supreme Court review), *id.* at 1211-13 (Scalia, J., concurring in judgment) (judicial interpretation of regulations should be free of deference to agency interpretation), *id.* at 1213-25 (Thomas, J., concurring in judgment) (judicial deference to agency interpretation of regulations violates separation of powers and should be revisited in an appropriate case). *See also United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) (doubts over future scope of *Auer* well founded).

Judges on the Second, Fifth, Sixth, and Seventh Circuit Courts of Appeals have also expressed significant concerns regarding the role and scope of *Auer* deference.

In *Berlin v. Renaissance Rental Partners, LLC*, 723 F.3d 119 (2d Cir. 2013), the Second Circuit granted *Auer* deference to a Department of Housing and Urban Development interpretation of its regulation, defining "lot" as an interest in land that "includes the right to the exclusive use of a specific portion of the land," as including a condominium in a multi-story building. 723 F.3d at 124-25. Judge Jacobs, in dissent, refused to defer to HUD's interpretation of its regulation. 723 F.3d at 130 (Jacobs, C.J., dissenting) (quoting *Decker*, 133 S. Ct. at 1339 (Scalia, J., dissenting)). Judge Jacobs read the regulatory definition of "lot" as involving "exclusive use of a specific portion of the land" and concluded that the natural reading of this definition excluded high-rise condominiums, because each condominium owner shares the use of a specific portion of the land. *Id*.; s*ee also Berlin v. Renaissance Rental Partners, LLC*, 748 F.3d 98, 98 (2d Cir. 2014) (Jacobs, J., dissenting from denial of rehearing *en banc*) (calling to address scope of *Auer* deference where federal agency had interpreted "exclusive use of a specific portion of the land" to mean "any interest in real estate").

In *Elgin Nursing*, the Fifth Circuit raised multiple concerns in refusing to afford *Auer* deference to agency constructions of their interpretative manuals. 718 F.3d 488. *Elgin Nursing* involved how the agency construed an interpretative procedural manual based on regulations for the safe cooking of eggs for service to elderly residents of nursing homes. An HHS interpretative procedural manual stated both that eggs should be cooked for at least 15 seconds at 145 degrees, and that the yolk should not be runny. *Id.* at 491-92. The procedural manual's syntax left unclear whether

these requirements were conjunctive or disjunctive, and HHS construed then as conjunctive. Accordingly, the agency charged the nursing home for violating the regulation because it had not cooked eggs both for 15 seconds at 145 degrees and until the yolks were not runny. *Id.* HHS asked for *Auer* deference to this construction of its interpretative manual. *Id.* at 492.

The Fifth Circuit gave three reasons against what it described as "*Auer* squared" deference. First, it would encourage agencies to write ambiguous interpretative manuals based on ambiguous regulations, and enhance their ability to do so. 718 F.3d at 493. Second, such deference would leave no role for the courts, entirely ceding the judicial function of interpreting the law to the executive branch. *Id.* Third, such deference would allow punishment of violations for which no person would have fair warning. *Id.* The court instead construed the interpretative manual using "traditional tools of textual interpretation," without any deference to the agency, and read the criteria to be disjunctive. *Id.* at 494.

In *Elgin*, even before this Court's decision in *Perez*, the Fifth Circuit supported its rejection of extended *Auer* deference with citations to this Court's other recent decisions and critical opinions on the subject. 718 F.3d at 493 n.6 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting, joined by Stevens, O'Connor, and Ginsburg, JJ.)); *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part); *id.* at 1338 (Roberts, C.J., joined by Alito, J., concurring)). *Elgin* also cites this Court's caution that such deference empowers agencies to regulate vaguely and then interpret to taste later. *Christopher v. SmithKline Beecham Corp.*,

132 S. Ct. 2156, 2168 (2012). Clearly, the Fifth Circuit reads this Court's recent *Auer* jurisprudence as a warning against extending the doctrine.

The Sixth Circuit declined to apply *Auer* deference in *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 732-33 (6th Cir. 2013) (Sutton, J., concurring). *Carter* dealt with a HUD interpretation of a statutory safe harbor for related business entities referring clients to each other in real estate transactions, within the overall statutory prohibition on referral fees. 736 F.3d at 724; *see* 12 U.S.C. § 2607(a) (referral fee prohibition); *id*. § 2607(c)(4) (three part safe harbor test for affiliated business arrangements). The plaintiffs in the case argued that the defendants violated the safe harbor even though all three statutory requirements were satisfied. 736 F.3d at 724. To prove liability, plaintiffs relied on a HUD policy that added a fourth requirement, which defendants had not satisfied. *Id*. The district court ruled for defendants. On appeal, the United States intervened to defend the enforceability of HUD's policy statement. *Id*. at 725. The Sixth Circuit declined to afford *Chevron* or *Skidmore* deference to the HUD policy statement, agreed that the three statutory safe harbor factors were established, and affirmed the district court judgment in favor of defendants. *Id*. at 726.

Judge Sutton wrote a separate concurrence in *Carter*, addressing the interaction of the rule of lenity with various standards of deference to agency interpretations. *Id*. at 729 (Sutton, J., concurring). He explained:

> *Auer v. Robbins* . . . adds another complication. It says that, when a regulation

> interpreting an ambiguous statute itself contains an ambiguity, the agency's interpretation of the regulation receives essentially complete deference. Unless the rule of lenity applies to agencies, *Auer* would give each agency two ways of construing criminal laws against the defendant—by resolving ambiguities in the criminal statute and by resolving ambiguities in any regulation. What's more, the range of documents eligible for deference under *Auer* is broader than under *Chevron*. Even an interpretation contained in a brief may receive deference.

Carter, 736 F.3d at 732-33 (Sutton, J., concurring) (citations omitted).

In *Bible v. United Student Aid Funds, Inc.*, the Seventh Circuit declined en banc rehearing in a case examining how different types of student loan repayment agreements should be interpreted. 807 F.3d 839, 840 (7th Cir. 2015). The rehearing petition asked the en banc court to address whether a Department of Education interpretation of its regulations was entitled to *Auer* deference. *Id*. at 841. Concurring in the denial of rehearing, Judge Easterbrook cited the three concurrences in *Perez*, and agreed that an en banc decision of the specific application of *Auer* "would [not] be a prudent use of [the] court's resources . . . when *Auer* may not be long for this world." *Id*. And dissenting from denial of certiorari in *United Student Aid Funds*, Justice Thomas wrote that "[a]ny reader of this Court's opinions should think that [*Auer*] is on its last gasp." *United Student Aid Funds*, 136 S. Ct. at 1608 (Thomas, J., dissenting from denial of certiorari).

Judicial skepticism of *Auer* counsels against extending the doctrine to agency opinion letters here. Agency opinion letters exhibit many of the concerns expressed by the Fifth Circuit in *Elgin Nursing*. First, opinion letters are useful tools for turning an ambiguity in an agency regulation to the agency's benefit in particular cases, especially enforcement cases and in cases involving unusual facts. And, extending *Auer* deference to such letters would only encourage agencies to make more robust use of them. Second, deferring to opinion letters, particularly non-binding ones, allows agencies to dictate to the courts what the law is and what it means, with no room for the courts to exercise their proper judicial function. Third, deferring to an agency opinion letter that post-dates the origin of a particular dispute allows the agency to impose penalties and other remedies against parties who had no notice of the agency's unknowable future position or policy. *See generally Elgin Nursing*, 718 F.3d at 492-94.

Agency opinion letters also raise the lenity concerns expressed by Judge Sutton in *Carter*, 736 F.3d at 729. While Title IX does not impose criminal penalties, many agencies administer statutes that do, and a general rule granting deference to opinion letters issued by the staff of those agencies would directly raise the question of whether *Auer* deference vitiates the Rule of Lenity.

C. The Application of *Auer* Deference to Agency Opinion Letters Will Have Ramifications Well Beyond This Case

Federal agencies regulate aspects of nearly all Americans' lives in one form or another. The all-encompassing breadth of the regulatory state would be

compounded by affording deference to agency opinion letters. For example, under the Clean Water Act, the United States Army Corps of Engineers has promulgated regulations to define waters of the United States, including wetlands. 33 C.F.R. § 328.3(a) (stayed by *In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015)).[2] In addition to its regulations interpreting the statute, the Army Corps routinely issues what are essentially opinion letters to individual landowners on the subject of whether their property contains "waters of the United States" as that term is used in the Clean Water Act. *See generally Hawkes*, 136 S. Ct. 1807, 1811-12 (generally describing jurisdictional determinations). In *Hawkes*, this Court held that approved jurisdictional determinations are subject to judicial review under the Administrative Procedure Act. *Id.* at 1813, 1816.

A holding that agency opinion letters are entitled to *Auer* deference may turn the judicial review that was hard won in *Hawkes*, into a deferential rubber stamp of the Corps' jurisdictional determinations. Jurisdictional determinations are essentially written opinions, interpreting the regulations defining the term "waters of the United States." *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 290 n.10 (4th Cir. 2011), *see also id*. at 296 (citing *Rapanos*, 547 U.S. at 779-80). If agency opinion letters, such as jurisdictional determinations, are accorded *Auer*

[2] This Court has observed on numerous occasions that both the statute and regulations defining waters of the United States are ambiguous. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos*, 547 U.S. 715; *Sackett*, 132 S. Ct. 1367; *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring, noting persistence of troubling questions regarding Clean Water Act).

deference, then judicial review becomes a mere formality.

II

THE DEPARTMENT OF EDUCATION HAS A PRACTICE OF USING GUIDANCE DOCUMENTS TO REGULATE WITHOUT INPUT FROM CONGRESS OR THE PUBLIC

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (Title IX), was designed to eliminate intentional sex-based discrimination in federally funded education programs. Its operative provision reads: "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). To that end, it has largely been successful. Women attend college at numbers greater than men, women have equal opportunity to participate in education programs, and intentional sex-based discrimination is condemned and rooted out as it appears. However, as occurs too frequently with statutes that are successful at achieving their intended purposes, bureaucrats find new and creative ways to regulate the public. *See, e.g.*, *Shelby Cnty., Ala.*, 133 S. Ct. at 2631 (holding that the coverage formula for Section 5 of the Voting Rights Act "no longer speaks to current conditions"); Richard A. Epstein, *Modern Environmentalists Overreach: A Plea for Understanding Background Common Law Principles*, 37 Harv. J.L. & Pub. Pol'y 23, 25 (2014) (explaining the modern environmental laws "invent[] problems that need no solution").

Title IX is no different. The Department of Education has, through opinion letters like the one issued here, significantly changed the scope and purpose of Title IX. Perhaps the most egregious example of the Department's overreach is with respect to intercollegiate athletics. In 1974, Congress amended Title IX (Javits Amendment) directing the Secretary of the United States Department of Education (formerly the Secretary of Health, Education, and Welfare (HEW)) to "prepare and publish . . . regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). Pursuant to the Javits Amendment, the Secretary published regulations requiring institutions receiving federal assistance "to take the interests of both sexes into account in determining what sports to offer." 40 Fed. Reg. 24,128, 24,134 (June 4, 1975).

In 1979, HEW issued an interpretive rule titled, *A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413, *et seq.* (Dec. 11, 1979) (1979 Interpretation). The 1979 Interpretation narrowed the methods that collegiate institutions could use to demonstrate compliance with Title IX (the Three-Part Test). The Three-Part Test dramatically altered how collegiate institutions proved compliance with Title IX, and did so without giving the regulated public an opportunity to comment. The Three-Part Test allowed colleges to avoid Title IX liability by ensuring that "participation opportunities for male and

female students are provided in numbers substantially proportionate to their respective enrollment." *Id.*

As a result of the 1979 Interpretation and the Three-Part Test, athletic opportunities for males plummeted and female opportunity only moderately increased.[3] *See* U.S. Comm'n on Civil Rights, *Title IX Athletics: Accommodating Interests and Abilities*, at 2[4] (explaining that the Three-Part Test causes an "unnecessary reduction of men's athletic opportunities"); College Sports Council, *Total Change in Division I Sports Sponsorships Since 1988*.[5] Faced with normal budgetary realities, colleges achieve "substantial proportionality" through reduction in men's athletic opportunities, as opposed to increased opportunity for women.

Even more egregious—and further attenuated from Title IX statutes and regulations—the Department of Education has begun applying the Three-Part Test to *high school* athletics. *See Am. Sports Council v. U.S. Dep't of Educ.*, 850 F. Supp. 2d 288 (D.D.C. 2012). On their own terms, both the 1979 Policy Interpretation and the Javits Amendment only apply to intercollegiate athletics. Nevertheless, the Department of Education has selectively mandated that high schools enforce the Three-Part Test in scholastic athletics. *See Ollier v. Sweetwater Union*

[3] Moreover, to the extent that female opportunity did increase, it was likely an effect of Title IX itself and not its interpretation through the Three-Part Test. *See* Gregg Easterbrook, *No 'Cheers' for Latest Title IX Decision*, ESPN, July 27, 2010, http://www.espn.com/espn/commentary/news/story?page=easterbrook/100727.

[4] http://www.usccr.gov/pubs/TitleIX-2010-rev100610.pdf

[5] http://collegesportscouncil.org/presentation/pages/Net.html

High Sch. Dist., 768 F.3d 843, 855 (9th Cir. 2014) ("We agree with the Government that the three-part test applies to a high school.").

Application of the Three-Part test to high schools requires accepting (or deferring to) an agency's strained interpretation of its own regulation and then further deferring to the agency's application of that strained interpretation in a context that the original interpretation never intended. Given the significant change in collegiate athletics occasioned by the Three-Part Test, the effect of universally applying the Three-Part Test to high schools would be monumental. *See* National Center for Education Statistics, *Fast Facts* (comparing the raw number of high schools to colleges and universities in the United States).[6]

Of course, the Three-Part Test has its proponents, and this is not the time to debate its legality or utility, but it is beyond dispute that it has had a significant effect on intercollegiate athletics. This radical shift was done through an agency interpretation of its own regulation, with no comment from the outside public, no comment from Congress, and with little opportunity for future change. *See Neal v. Bd. of Trustees of California State Universities*, 198 F.3d 763, 770 (9th Cir. 1999) (Courts must defer to the Department's interpretation of Title IX because it is "an agency's interpretation of its own regulations."). The Department of Education should not be able to effect such profound social and structural change through agency interpretation letters.

The Department of Education's Title IX policy of regulation by interpretation is not limited to athletics.

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[6] https://nces.ed.gov/fastfacts/display.asp?id=84

For example, the Department recently issued an interpretive guidance letter on "sexual violence." *See* U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014).[7] This "guidance document" radically changes the way colleges are required to address claims of sexual harassment on campuses. It shifts the burden of proof, discourages cross-examination, and raises serious First Amendment and Due Process concerns. *See* Gail Heriot, House Judiciary Committee, *Testimony of Gail Heriot* (May 24, 2016).[8] This guidance document, issued without comment from the regulated public, has received significant criticism from liberals and conservatives alike. *See, e.g.*, *Rethink Harvard's Sexual Harassment Policy*, Boston Globe, Oct. 15, 2015[9] (open letter signed by 28 members of Harvard Law School faculty); George Will, *The Legislative and Judicial Branches Strike Back Against Obama's Overreach*, Washington Post, Feb. 19, 2016 (describing the guidance as "discordant with constitutional values").[10]

The Department's transgender guidance at issue in this litigation is just the latest in its long history of

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[7] http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

[8] https://judiciary.house.gov/wp-content/uploads/2016/05/HHRG-114-JU00-Wstate-HeriotG-20160524.pdf

[9] https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html

[10] https://www.washingtonpost.com/opinions/the-legislative-and-judicial-branches-strike-back-against-obamas-overreach/2016/02/19/15f403b8-d672-11e5-be55-2cc3c1e4b76b_story.html?utm_term=.3b283b1b1493

regulation by fiat. Although "gender," "gender identity," and "transgender" are absent from both Title IX and its vetted implementing rules, the Department has unilaterally decided, without comment from Congress or the regulated public, that these terms are covered by Title IX's prohibition against discrimination on the basis of sex.

Over the years, the Department of Education has used Title IX to undertake profound social change. From the Three-Part Test to sexual violence on campuses to its transgender guidance, the Department has undertaken these changes without any input from Congress or the regulated public. This practice must stop. There may indeed be good reasons why discrimination based on gender identity should be prohibited by institutions receiving federal funds, but such a profound change must come from Congress. It cannot be mandated by an opinion letter issued by a relatively low-level employee in the Department's Office for Civil Rights.

CONCLUSION

For the foregoing reasons, Amici respectfully request the Court reverse the decision below.

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Respectfully submitted,

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