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 *AMICUS CURIAE* WISCONSIN INSTITUTE FOR LAW & LIBERTY IN SUPPORT OF PETITIONER

MARIO LOYOLA
Counsel of Record
RICHARD M. ESENBERG
JACOB CURTIS
Wisconsin Institute for
Law & Liberty
1139 East Knapp Street
Milwaukee, WI 53202
(414) 727-9455
mario@will-law.org

Counsel for Amicus Curiae

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 If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Through education, litigation, and participation in public discourse, the Wisconsin Institute for Law & Liberty (WILL) seeks to advance the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society. Because these goals are undermined by the dissolving separation of powers among the branches of the federal government and among the federal and state governments, WILL established a Center for Competitive Federalism, which seeks to advance a federalism that respects the separate spheres of the federal and state governments and the limits imposed by our constitutional structure on both of them. WILL and its new Center, therefore, have an interest in this Court's determination of the validity of the *Auer* doctrine and of executive branch guidance documents that seek to coerce the states into enacting policies outside the federal government's constitutional powers.

SUMMARY OF ARGUMENT

One of the first and most crucial issues faced by the delegates to the Constitutional Convention in Philadelphia was whether the powers of the new federal government should operate on state govern-

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in any manner, and no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

ments or on individual citizens. The experience of the Articles of Confederation compelled the Convention to reject the former, embodied in the New Jersey Plan, in favor of a federal government that would operate directly on individuals, as embodied in the Virginia Plan. "One frequently expressed objection to the New Jersey Plan was that it might require the Federal Government to coerce the States into implementing legislation." *New York v. United States*, 505 U.S. 144, 164 (1992).

This guarantee of the autonomy of the states not only respected the institutional integrity of state governments, but operated as a further protection of individual liberty and robust democratic decision-making. By creating what Madison called a "compound republic," our federalism allowed the federal and state governments to function as restraints on each other. By empowering states to serve as "laboratories of democracy," it facilitated a multiplicity of approaches that could be expected to serve a large and diverse nation and yield, over time, the best public policy.

In the centuries since the Convention, America's system of government has changed profoundly. "Yet today state and federal governance and interests are more integrated than separate." Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 Yale L.J. 1920 (2014). This is due, in substantial part, to "cooperative federalism," the panoply of conditional federal programs, generally under either the Spending Clause or Commerce Clause, that provide inducements and penalties designed to

conscript the states into the federal policymaking apparatus.

While the Court has generally permitted such programs, it has continued to insist that the states must "remain independent and autonomous within their proper sphere of authority." *Printz v. United States*, 521 U.S. 898, 928 (1997). It has warned that the federal government can neither compel state governments to regulate, nor compel state officials to perform any particular function. *Printz*, 521 U.S. at 935. In the context of conditional federal grants to the states, such as the federal education funds at the core of the case at bar, the Court has warned that conditions may not "be so coercive as to the pass the point at which pressure turns into compulsion." *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). However, Title IX guarantees recipients' right to maintain "separate living facilities for the different sexes," 20 U.S.C. § 1686, while 34 C.F.R. § 106.33 further guarantees recipients' right to maintain "separate toilet, locker room, and shower facilities on the basis of sex."

Every application for federal education assistance to which Title IX applies must provide an assurance that the education program or activity to which the federal assistance applies will be operated in compliance with Title IX and the regulations adopted pursuant thereto. 34 C.F.R. §106.4. Title IX provides that every federal department or agency empowered to extend education assistance is authorized to

effectuate the provisions of Title IX "by issuing rules, regulations or orders of general applicability," but "[n]o such rule, regulation or order shall become effective unless and until approved by the President." 20 U.S.C. § 1682.

At issue in this case is the legal effect, if any, to be given a letter written by James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy in the Department of Education's Office of Civil Rights, dated January 7, 2015, in response to an email request for any "guidance or rules" relevant to the Gloucester County School Board's resolution of December 9, 2014, which triggered the current litigation.

The Ferg-Cadima letter states that "Title IX ... prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity," and that when maintaining separate facilities for the different sexes as permitted by the statute and its regulations, "a school generally must treat transgender students consistent with their gender identity." It is crucial to note that the Ferg-Cadima letter mentions both separate bathroom facilities, which are covered by 34 C.F.R. § 106.33, and separate "housing" facilities, which fall under the "living facilities" provision in the statute itself, 20 U.S.C. § 1686. The Ferg-Cadima letter is therefore an interpretation of *both* regulation *and* statute.

Applying the doctrine of deference to agency interpretations of their own regulations articulated by the Court in *Auer v. Robbins*, 519 U.S. 452 (1997), the Fourth Circuit in the decision below gave the Ferg-Cadima letter controlling weight as an inter-

pretation of Title IX and 34 C.F.R. § 106.33. *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016).

As a result of the Fourth Circuit's decision, Petitioner faces the loss of federal education assistance, if it does not comply with the Ferg-Cadima letter. Federal education assistance comprises more than five percent of Petitioner's operating fund revenue for FY 2017. *Gloucester County Public Schools FY '17 School Board's Approved Budget: Operating Fund Revenue.*

The situation into which the Ferg-Cadima letter has thrown Petitioner raises a number of grave constitutional problems for federalism, one set that is substantive and the other, procedural.

The substantive problems concern the coercive nature of the transgender-related conditions that now attach to federal education funds as a result of the Fourth Circuit's ruling. First, the Fourth Circuit has demonstrated that *Dole*'s distinction between "encouragement" and "compulsion" of state governments offers little protection from the coercive manipulation of conditions attached to federal funds. Second, under *NFIB v Sebelius*, 132 S.Ct. 2566 (2012), there is now a serious factual question as to whether the threatened loss of federal education funds for failing to comply with the Ferg-Cadima letter, in this case amounting to more than five percent of Petitioner's entire operating budget, is "relatively mild encouragement" or a "gun to the head." *See*, 132 S.Ct. at 2604. Third, Petitioner had no reason to imagine that the conditions described in the Ferg-Cadima letter might be attached to the federal funds it applied for and agreed to accept, and

certainly had no adequate notice of such conditions, as this Court has required. *See, NFIB*, 132 S. Ct. at 2606.

The set of procedural problems concern *Auer* deference. As noted below, the integrity of the states and the interest of citizens in the proper allocation of authority between the federal and state governments, *see Bond v. United States*, 131 S.Ct. 2355 (2011), is respected not only by substantive limits on the exercise of federal authority but procedural restrictions that give states a vital stake in the separation of powers among the branches of the federal government. Put simply, Congress makes the laws and the executive branch enforces them. This division of labor serves federalism. While the theory is not without its problems, this Court has remained loyal to the theory of "process federalism" that was fully embraced in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). As Justice Breyer has pointed out, Congressional decision-making can serve federalism because its members represent the states and may be attuned to their particular interests. *U.S. v. Morrison*, 529 U.S. 598, 660 (2000) (Breyer, J., dissenting).

Other theories of process federalism stress political parties or the administrative rulemaking process. But all the variants of process federalism contemplate some process – one in which Congress has, at some point acted – through which the interests of the states might be protected. But here there has been no process. *Auer* deference to informal agency actions that impact federalism is contrary to the Court's federalism cannons, and is categorically inappropriate.

States are best protected in Congress, and Congress simply did not act here. Whatever the merits of the underlying issue, it is preposterous to suggest that, in enacting Title IX in 1972, it "really" intended to create rights for transgendered persons to use the bath and locker facilities reserved for the other biological gender or even adopted a general principle that could be bent to that purpose. If given authoritative weight under *Auer*, the very informality inherent in guidance letters such as the Ferg-Cadima letter vitiates what little protections the states enjoy in the federal political process. Not only did Congress not act, there was no formal process at all by which the interests of the states or their citizens could be represented. Moreover, that same informality has allowed the Department to essentially enact a new rule of law, while escaping the boundaries that Congress has carefully imposed as a predicate of its delegation of rulemaking authority under Title IX and the Administrative Procedure Act.

ARGUMENT

I. THE DEPARTMENT'S INTERPRETATION OF TITLE IX AND 34 C.F.R. § 106.33 IS UNCONSTITUTIONALLY COERCIVE OF STATE GOVERNMENTS.

A. Conditional Federal Funding Programs Are Inherently Coercive.

The Court has long recognized that conditional federal spending programs have the potential to coerce states into implementing federal policy, in violation of the Constitution's structural guarantees of federalism. Unfortunately, the Court has embraced a doctrine which seeks to elucidate whether

the threatened penalty of losing federal funds is "mere encouragement" or "passes the point at which pressure turns into compulsion." *Dole*, 483 U.S. at 211. Experience has shown that this distinction is unworkable in practice, and, at least until *NFIB v. Sebelius*, provided states essentially no protection from federal coercion.

The distinction between encouragement and compulsion at the root of *Dole* is a logical fallacy. The Court has often noted that "legislation enacted pursuant to the spending power is much in the nature of a contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). But in the private contract setting, offer and acceptance cannot create a binding contract where one party uses its dominant economic position to extract unfair concessions that it could never obtain in a truly arms-length negotiation. This is particularly so where a party enters into the negotiation essentially offering to return to an agent property taken from the agent's principal. That is simply coercion, whether the amount in question is one dollar or a million.

Taxing isn't the same as stealing, of course, but it is coercive and that undermines the contract analogy. One party – the federal government – has the power to make the citizens of the states pay for what is being offered whether or not they decide to accept the offer itself. Any state legislator would be reluctant to let the state's residents be taxed and receive nothing in return. Yet conditional federal grants force state legislators to choose between receiving nothing or taking the federal money and complying with whatever conditions may be attached to it.

This explains why, until very recently, it was virtually unheard of for state legislators in any state to turn down conditional federal grants. Meanwhile, the logical fallacy at the root of *Dole* explains why, until very recently, no federal court applying the *Dole* standard had ever found a federal conditional grant program unconstitutionally coercive. Given the failure to recognize that the project of taxing a state's residents and then offering to return the money with strings attached is intrinsically coercive, federal courts have been reluctant to assess the degree of federal compulsion. But there has been one exception.

B. Enforcing the Ferg-Cadima Letter Would Be a "Gun to the Head" of School Districts.

That exception was, of course, *NFIB v. Sebelius*, in which the Court held that conditioning the continued receipt of all Medicaid on the states' compliance with the Affordable Care Act's Medicaid-expansion requirements was a "gun to the head." 132 S.Ct. at 2604. *NFIB* took *Dole* at its word, and asked whether, as a practical matter, the scale of the penalty involved in the threatened loss of federal funds "passe[d] the point at which pressure turns into compulsion." *Id.*

In *Dole*, the Court held that the threatened loss of five percent of a state's federal transportation funding did not "pass the point at which pressure turns into compulsion." 483 U.S. at 212. The threatened penalty in *Dole* amounted to "less than half of one percent of South Dakota's budget at the time." *NFIB*, 132 S.Ct. at 2604 (2012). By contrast, the threatened loss of all federal Medicaid funding in *NFIB* amount-

ed to at least 10 percent of the average state's total budget. *Id.* For the Court in *NFIB*, that was much more than the "relatively mild encouragement" upheld in *Dole*, it was a "gun to the head." *Id.* In an opinion joined by Justices Breyer and Kagan, Chief Justice John Roberts wrote that the threatened loss of all Medicaid funding as a penalty for refusing to comply with what amounted to a new program was unconstitutionally coercive.

NFIB, at minimum, requires a careful examination of the degree of federal compulsion. There are few, if any, public schools in the U.S. that could suffer the loss of five percent or more of their entire operating budgets without catastrophic consequences for students, which in many cases could include running afoul of adequate funding requirements imposed by the federal courts themselves. The threatened loss of all federal funding as a result of noncompliance with the Ferg-Cadima letter is, like the threatened loss of all federal funding in *NFIB*, "a gun to the head."

C. The Ferg-Cadima Letter Violates the Requirement of Adequate Notice of Conditions Attached to Federal Funds.

The Ferg-Cadima letter is analogous to the Medicaid-expansion provision struck down in *NFIB* in another way: at the time it applied for and accepted federal assistance, Petitioner could not possibly have known that it would be subject to the requirements set forth in the letter. If the Ferg-Cadima letter is an authoritative interpretation of Title IX, then Title IX violates the "clear notice" that this Court has repeatedly required of conditions attached to federal funds. *See*, *NFIB*, 132 S. Ct. at 2606; *Arlington Cent. Sch.*

Bd. of Educ. v. Murphy, 548 U.S. 291, 296-97 (2006); and *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981).

In *Arlington*, the Court insisted, "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" 548 U.S. at 296 (quoting *Pennhurst*, 451 U.S. at 17). In dissent, Justice Breyer wrote, "[T]he basic objective of *Pennhurst's* clear-statement requirement does not demand textual clarity in respect to every detail." 548 U.S. at 317. Rather, the "basic question" was, "[w]ould the States have accepted the Federal Government's funds *had they only known* the nature of the accompanying conditions." *Id.* (emphasis in original).

As *NFIB* makes clear, this "basic question," is not the "only" question. Whether the states would have accepted the funds anyway will often depend not on the onerousness of the condition merely, but on whether the penalty involved passes the point "at which pressure turns into compulsion." Given a high enough penalty, a State might agree to a great many things against its will.

But here, the Petitioner could not have known that reliance on federal funds would one day force it to abandon boys' and girls' rooms.

II. *AUER* DEFERENCE VIOLATES BOTH FEDERALISM AND SEPARATION OF POWERS.

The federalism problems presented by the coercive impact and lack of notice of the conditions

applicable to federal funds under Title IX as a result of the Fourth Circuit's decision are compounded by the application of *Auer* deference to the Ferg-Cadima letter. Applying *Auer* in this case would both vitiate the political and procedural safeguards of federalism, and violate the core legislative prerogative of Congress.

A. Applying *Auer* Deference to Informal Agency Guidance is Incompatible with the Protections States Are Supposed to Be Afforded in the Federal Political Process.

The practice of promulgating what amounts to a significant new rule through an informal (indeed, private) communication both vitiates the protections that states are said to enjoy under the federal political process, and violates the prerogatives of Congress. Any protection the states may enjoy in the federal political process when Congress exercises federal power are completely absent when federal power is exercised pursuant to totally informal administrative procedures in which nobody is afforded the slightest notice or opportunity to comment. This problem is further compounded when federal agencies seek to shape national policy indirectly, through informal pronouncements designed to manipulate state policy, when the same goal could not be accomplished by direct agency action except through APA rulemaking. While states may be able to assert their interests in Congress and perhaps even in a formal rulemaking procedures, they are unable to do so when an agency simply announces new law without any process at all.

The idea that states are protected in the federal political process has its genesis in the immediate aftermath of the New Deal. In 1950, professor Edward Corwin of Princeton University published "The Passing of Dual Federalism." 36 Va. L. Rev. 1. Corwin noted the federal structure of the Constitution had been "overwhelmed and submerged" by the New Deal. *Id*. He was skeptical of the Supreme Court's continuing affirmation of dual sovereignty, and asked whether, given the new federal powers, the states could yet be "saved for any useful purpose." *Id*.

In his famous 1954 article, "The Political Safeguards of Federalism," Herbert Wechsler answered the question in the affirmative. 54 Columbia L. Rev. 543. Wechsler conceded the loss of a judicially enforced boundary between state and federal authority, but argued that the dual sovereignty of the states was duly protected by the political process itself. Thanks to the states' participation in congressional and presidential elections, Wechsler argued, the states' interests were adequately represented when the federal government acted to trench on state prerogatives.

More than 30 years later, the Supreme Court embraced Wechsler's theory of process federalism in *Garcia*. 469 U.S. at 552. This was at least somewhat surprising, given that Wechsler's theory seemed to be proving inadequate to the task for which it was summoned. State governments were no longer instrumental in elections for Congress. Therefore, state governments were "represented" in the federal political process, if at all, only through the proxy of representatives in Congress. Members of Congress, however, represent the people of their districts and

states, not the states' governments. This conceptual infirmity continued to bedevil the doctrine of process federalism even after its adoption in *Garcia*. As Jessica Bulman-Pozen writes, "By the end of the twentieth century, notwithstanding its star turn before the Supreme Court, Wechsler's formal process federalism had lost some of its luster. […] The hunt was on for new safeguards." 123 Yale L.J. at 1925.

The major "new safeguards" that have been proposed by academics are variations on Wechsler's theme. Two major variations are, first, the idea that political parties themselves represent state interests, and, second, that the administrative rulemaking process offers states the best protections from federal power. These theories were plagued by the same problem: The states were not actually represented *as states*. All the variations on the theme of process federalism have looked to processes in which states *as states* are either formally represented only by proxy, or, represented only in their status as one more interest group among others.

Because states themselves have no formal representation in any of these variants of process federalism, the key question becomes the degree to which any particular process provides an opportunity for the views of state governments to be heard. Hence, the extent to which states are protected in the federal political process depends crucially on the extent to which the process is formal, transparent, and accountable. A closer look at the two major variations on Wechsler's original theory bears this out.

Larry D. Kramer has argued that the best protection of state sovereignty is to be found in the national political parties. Larry D. Kramer, *Putting the Poli-*

tics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000). Federal politicians depend on their state co-partisans to get elected, reasons Kramer, and will therefore look out for their interests. "The political dependency of state and federal officials on each other remains among the most notable facts of American government." *Id.* at 282. Yet in the same breath Kramer acknowledges, "Candidates may need the parties somewhat less than they used to" and "state parties may be somewhat less powerful than they were formerly." *Id.* Even if true, Kramer argues, there are other sources of protection. "[W]hile the parties' effectiveness in safeguarding state government may have been compromised to some degree by twentieth-century developments, these same developments have yielded new 'political' safeguards that assure and in some respects may even strengthen the states' voice in national politics." *Id.* at 283. Those new safeguards include the states as a special-interest lobby, the states as training grounds for federal officials, and the administrative federal-state interactions of what are commonly known as cooperative federalism programs.

That states have lobbyists and can therefore influence legislation is a particularly flimsy justification for process federalism, because even the most marginal special interest groups have lobbyists. As for training grounds, perhaps President Obama's experience as a senator did attune him to the particular needs of Illinois; but to the extent he kept Illinois's interests in mind as president, those are the interests of a deep blue state in the context of a national political landscape in which federalism issues are deeply polarized at the state level.

Representing the states as a category of governments is not the same as protecting the minority rights of states in disputes that are often polarized at state level and pit states against each other on questions of federal versus state power, a key reason that states need protection from federal power. It is not enough for the federal political process to represent some states, or even a majority of states, because a majority of states routinely uses voting power in Congress to expand federal power as a bludgeon against states on the other side of a partisan divide. To the extent that national politics have intruded on interstate relations, they have, particularly since the New Deal, proven ruinous to the independent and autonomous existence of the states, and a boon for those who would have everything decided by national majority rule.

The New Deal, writes Kramer, "spawned a bureaucratic structure that plays a prominent role in supporting federalism. […] Because the federal government depends on state administrators to oversee or implement so many of its programs, states have been able to use their position in the administrative system to protect state institutional interest in Congress." *Id.* The evidence for this proposition is thin, to say the least. It is true that the federal government depends on the states for implementation of federal programs, because even with the largest budget in the known universe, the federal government doesn't have enough money or bureaucrats to regulate everything it seeks to regulate. But the federal government depends on the states in the same way the president depends on the executive branch agencies, and the latter arrangement hardly gives agencies control over the president.

The other major variation on Wechsler's theory, namely the idea that administrative agencies offer the best process protections for federalism. Catherine Sharkey highlights "Congress's and federal agencies' respective ability to serve as loci of meaningful debate with state governmental entities about the impact of federal regulatory schemes on state regulatory interests." *Federal Accountability: "Agency-Forcing" Measures*, 58 Duke L.J. 2125, 2129 (2008). But in the context of FDA labeling and preemption of state tort law, Sharkey herself describes "a lack of transparency, procedural irregularities, and utter indifference toward state governmental entities." She argues that federal agencies are "uniquely positioned to evaluate the impact of state regulation and common law liability upon federal regulatory schemes…." *Id.* at 2128. But while federal agencies may be uniquely positioned to evaluate the impact of state law on federal regulatory schemes, that doesn't mean that they are in any position to assess federal impacts on states, and they certainly have no reason to, other than those the executive branch imposes on itself through executive orders.

As professors Heather Gerken and Jessica Bulman-Pozen have written, in the context of cooperative federal-state fiscal and regulatory programs, states have "the power of the servant." Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256, 1259 (2009). Gerken contends that states are more important now as subordinate actors within the national government than as autonomous actors within their independent spheres of authority. *Federalism as the New Nationalism: An Overview,* 123 Yale L.J. 1889 (2014). Bulman-Pozen agrees that "it is a mistake to believe

that national political parties and the administrative state preserve autonomous state governance." 123 Yale L.J. 1920, 1932 (2014). Process federalism yields "ever-more thoroughgoing state-federal integration as states become sites of national policymaking and partisan conflict." States are "component parts of the national administrative apparatus." *Id.*

In practice, therefore, cooperative federalism programs invariably impose on states a choice between a rock and hard place, except of course that if your state wants even more regulation and taxation on top of the federal baseline, the feds are delighted to oblige.

From the dual-sovereignty point of view, plenary federal power is bad, but keeping it cabined in Congress is much better than letting it escape to the executive branch, where even Congress has trouble reining it in. In Congress, it takes only a minority of states to block legislation, but once rulemaking power is delegated to an executive-branch agency, only a supermajority in Congress can block the unwanted rule.

In any event, all variants of process federalism presuppose some degree of formal process within which states can make their voices heard and their influence felt. *Garcia*'s process federalism should still command more influence than the political party or administrative theories, because, unlike the other theories, states are actually formally represented in the process whereby Congress makes a law, even though state *as states* are not. By the same token, political parties and administrative proceedings can provide protections for federalism, if at all, only to the extent that they constitute actual proceedings.

And only courts can ensure that they *do* constitute actual proceedings. This argues for a heightened level of scrutiny in federalism cases, not the loose standard of *Auer*.

Garcia insisted that states are protected by "procedural safeguards inherent in the structure of the federal system." It went on to say:

> [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

469 U.S. at 554.

In *U.S. v. Morrison*, Justice Breyer argued that it is for Congress, not the courts, to "strik[e] the appropriate federal/state balance." 529 U.S. 598, 660 (2000) (Breyer, J., dissenting). "Congress is institutionally motivated to do so. Its Members represent state and local district interests. They consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place." 529 U.S. at 661. Justice Breyer's argument against letting courts strike the appropriate federal state balance applies just as well to agencies, and applies even more strongly to agencies when those agencies have

no institutional motivation to consider state views at any point in the process.

Whatever the merits of the various theories advanced for the structural safeguards of federalism, none of those merits obtain in the case of informal agency guidance. In other words, the process federalism of *Garcia* and Justice Breyer's dissent in *Morrison* argues overwhelmingly against applying *Auer* deference to informal agency guidance letters that emerge from essentially no process at all.

B. Applying *Auer* Deference to the Ferg-Cadima Letter Violates the Prerogatives of Congress.

When given the force of law under *Auer* deference, the same lack of formality that engenders serious federalism problems also allows agencies to escape the boundaries that Congress has carefully placed on delegated legislative authority through both their enabling statutes and the Administrative Procedure Act. As noted by Petitioner, the Ferg-Cadima letter was not publicized, does not appear to have been approved by an agency head, and was ultimately signed by a relatively low-level "Acting" Deputy Assistant Secretary. Not surprisingly, the Ferg-Cadima letter runs afoul of Title IX, the regulations enacted pursuant thereto, and the APA.

As argued by Petitioners, there is simply nothing in Title IX's text or structure to support the Department's interpretation that forbidding discrimination "on the basis of sex" can be read as forbidding discrimination on the basis of "gender identity". By all tools of conventional interpretation, "sex" as used in

Title IX refers to biological sex assigned at birth. All of the contemporaneous definitions of "sex" included reference to biological or physiological characteristics. None referred to gender identity, whatever its etiology. Whether or not it makes sense to treat someone with gender dysphoria as possessing the gender with which they identify, Congress certainly has not done so.

Additionally, treating gender identity as synonymous with "sex" creates a number of anomalies. A person who identifies with a gender other than the one to which he or she is "assigned" at birth, i.e., the one that is reflected in his or her physiology, biology and genes, has an identity that even the Respondents concede is at variance with his or her sex as that term was used in 1972 and is still generally used today. As the Respondents put it, for such a person, sex is not "binary." Unless one concludes that sex is nothing but gender identify, then determining how to react to that variance is not a simple matter of nondiscrimination. It raises questions regarding the determination of who is and is not transgender and how the interests of transgendered persons are to be balanced against those who see sex as something more than gender identity. How to handle that variance is not something that Congress has ever addressed.

Addressing that issue is not much helped by the concept of nondiscrimination on the basis of either sex or gender identity. Respondent argues that G.G. is a male and that Title IX's definition of sex requires that he be recognized as such. If so, then by Respondent's own admission, he cannot have been excluded from the boy's room on the basis of sex, but

rather on the basis of some other factor. In other words, if Respondent's argument is taken to its logical conclusion, Title IX's prohibition of "sex discrimination" might not even apply to these facts.

Nor is Respondent's position helped by the notion of nondiscrimination on the basis of transgender status. As one commentator recently noted, discrimination normally requires treating someone differently on account of the characteristics said to be the basis for discrimination. For example, a person discriminates on the basis of race when race factors into the relevant decision, religion when it factors into the relevant decision, and nationality when it factors into the relevant decision, just to name a few. It follows that when these factors are not relied on during the decision making process, there is no discrimination on the basis of the protected status.

In the same way, a person discriminates on the basis of gender identity when that factor is determinative in the relevant decision. But the Petitioner is not discriminating against persons on the basis of gender identity. It is simply refusing to take gender identity into account. Indeed, as Petitioners point out, a prohibition against transgender status would more readily – or at least just as easily – prevent a school district from prohibiting a transgender male from using the girls room. He would, after all, be a physiological female who is being excluded simply because he identifies as a male.

Of course, it would be possible to pass a law that provides the protections that Respondent wants. But Congress has not done so. These anomalies arise because Congress has not addressed the matter and, therefore, Respondent and the Department of Educa-

tion's Office of Civil Rights are trying to shoehorn the issue of how to treat transgender students into a statutory framework that does not address it. Because of this perversion of Title IX and the sensitivities surrounding school policy for transgender students, it is imperative that *Congress*, and not the judicial branch or informal agency pronouncements, provide a framework that educational leaders and boards may follow to both comply with Title IX while also protecting the interests of *all* students involved. Instead of twisting itself into knots to make "gender identity" fit within the definition of "sex" in Title IX, something the original drafters of the statute never intended, and maybe never even considered, this court should respect the role of Congress in making any necessary revisions to Title IX.

The Department argues that its interpretation is compelled because the policy issue at stake is novel. If that is true, it is a particularly damning admission, because *Auer* deference is supposed to be accorded in cases where the regulation is *ambiguous*, not where the regulation simply does not address a new issue, or clashes with an old one that has suddenly become politically controversial or fashionable.

Despite the Department's protestations to the contrary, the Ferg-Cadima letter does indeed seek, in effect, to amend existing regulations. As such, it triggered the requirements of the APA, and not having observed those requirements, must be accorded no weight.

CONCLUSION

This case demonstrates that the erosion of "dual federalism" and the erosion of separation of powers among the branches of the federal government are mutually reinforcing processes, tending to the very consolidation of government powers at the federal level in the hands of an increasingly unaccountable and uncontrollable executive branch. Arresting this trend will require more than the intervention of this Court, but cannot happen without that intervention. For this and the foregoing reasons, this Court should reverse the Fourth Circuit Court of Appeals.

Respectfully submitted,

MARIO LOYOLA
Counsel of Record
RICHARD M. ESENBERG
JACOB CURTIS
Wisconsin Institute for
Law & Liberty
1139 East Knapp Street
Milwaukee, WI 53202
(414) 727-9455
mario@will-law.org

January 10, 2017