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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JONATHAN F. MITCHELL
D. JOHN SAUER
JAMES OTIS LAW GROUP, LLC
12977 North Forty Drive
Suite 214
St. Louis, MO 63141
(314) 682-6067

DAVID P. CORRIGAN
JEREMY D. CAPPS
M. SCOTT FISHER JR.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
(804) 747-5200

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
KDuncan@Schaerr-Duncan.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

G.G.'s arguments opposing review are no more persuasive now than when G.G. unsuccessfully opposed the Board's earlier stay application. First, G.G. offers nothing to contradict the conclusion by several Justices that *Auer* v. *Robbins*, 519 U.S. 452 (1997), should be reconsidered. Second, G.G.'s attempt to avoid the circuit conflicts described in the petition mischaracterizes the decision below. Third, this case remains an excellent vehicle for resolving both the divisions over *Auer* and—if the Court chooses—the proper interpretation of Title IX and its implementing regulation.

G.G.'s suggestion that the Court should nevertheless "wait and see" how other courts address these issues ignores the fact that the merits of *Auer* have already been exhaustively discussed in judicial opinions and legal scholarship. More importantly, the suggestion also ignores the enormous costs *now* being inflicted nationwide on educational institutions, school boards, and States by the regulatory mischief on vivid display in this case. Just as those widespread and irreparable harms justified this Court's recall and stay of the Fourth Circuit's mandate, they likewise justify immediate review.

I. *AUER*'S VIABILITY RICHLY MERITS REVIEW, INDEPENDENT OF THE TITLE IX ISSUE.

G.G. disputes none of the Board's challenges to *Auer*. Thus, G.G. does not dispute that *Auer* deference to agency regulatory interpretations gives officials enormous

power over controversial policies, as dramatically illustrated by decision below. Nor does G.G. dispute that *Auer* deference in its current form violates the Administrative Procedure Act. Nor does G.G. dispute that, contrary to separation of powers, *Auer* empowers an agency to invade the law-making and law-interpreting provinces of Congress and the courts. Pet. 18–25.

1. Tellingly, G.G. also does not dispute that *Auer* is untenable after *Mead*, which substantially cabined *Chevron*'s application to agency interpretations of the statutes they administer. See Pet. 23–25; see also *United States* v. *Mead Corp.*, 533 U.S. 218, 229–34 (2001) (holding *Chevron* applies only when Congress affirmatively intends to delegate interpretive or gap-filling authority to an agency). And *Mead* itself is a complete answer to G.G's argument that overruling or limiting *Auer* would require "special justification." Opp. 17. Fundamental incompatibility with subsequent precedents *is* justification for overruling or limiting earlier ones. See, *e.g., Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2598–99 (2015); *Lawrence* v. *Texas*, 539 U.S. 538, 573–75 (2003).

2. G.G. attempts to buttress *Auer* by citing a forthcoming article by Professors Sunstein and Vermeule. See Opp. 17–18 (citing Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 83 U. Chi. L. Rev. (forthcoming 2016), available at http://ssrn.com/abstract=2716737). But G.G. ignores two decades of scholarly criticism of *Auer*. See Brief of Cato Institute at 5–8 (detailing academic criticism of *Auer*). In any event, Sunstein and Vermeule do not explain how *Auer* comports with *Mead*. Nor do they explain how extending

Auer to informal agency letters honors the APA requirement that "substantive" agency rules undergo notice and comment. See 5 U.S.C. § 553(b)(3). Nor do they address the most fundamental objection to applying *Auer* here: If the Ferg-Cadima interpretation binds the federal courts and Title IX recipients, then why is it not a "substantive" rule that must undergo notice and comment? See Pet. 24–25; see also *Texas* v. *United States*, No. 7:16-cv-00054 (N.D. Tex. Aug. 21, 2016) (App. 212a–217a) (holding May 13, 2016 "Dear Colleague" letter is a substantive rule triggering notice and comment).

Once agency pronouncements such as the Ferg-Cadima letter receive the *Auer* mantle, they carry the force of law—as illustrated by the fact that, if the decision below stands, any school in the Fourth Circuit that departs from the letter's "guidance" will be sued, face the loss of federal educational funds, or both. The propriety of that state of affairs—which is "a basic [issue] going to the heart of administrative law," *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring)—is squarely posed by this case and should be taken up by the Court.

II. AMONG OTHER ISSUES, THE CIRCUITS ARE DIVIDED OVER THE PROPER APPLICATION OF *AUER* TO INFORMAL AGENCY OPINION LETTERS.

G.G. is also mistaken in challenging the circuit divisions explained in the petition (at 25–29), and in suggesting that, regardless, this case "does not implicate" them. Opp. 18.

1. Taking the second point first: G.G.'s argument that the divisions outlined in the petition are not "implicated by this case" (Opp. 18) attempts to rewrite the Fourth Circuit's decision. G.G. is of course correct that the Department of Education (Department) asserted its position in this case, not just in the Ferg-Cadima letter, but also in a statement of interest and amicus brief. *Id.* But that is irrelevant: The only document to which the Fourth Circuit actually deferred was the Ferg-Cadima letter. See App. 18a (noting United States requested deference to "OCR's January 7, 2015 letter"); see also *id.* 41a (Niemeyer, J., dissenting) (noting "the majority relies entirely on [the] 2015 letter"). Thus, Fourth Circuit law now requires courts to defer to informal agency letters *regardless* of whether they are accompanied by statements of interest or amicus briefs.

2. G.G. also argues that the 4-3 circuit split on deference to informal agency pronouncements like the Ferg-Cadima letter is "questionable." Opp. 18. It is not.

For example, while *United States* v. *Lachman*, 387 F.3d 42, 54 (1st Cir. 2004), concerned informal statements at industry seminars rather than in an opinion letter (Opp. 19), the *reasons* the First Circuit gave for refusing to defer in that setting plainly apply here. The court explained that *Mead*'s "requirements of public accessibility and formality are *applicable in the context of agency interpretations of regulations*," and consequently held that "[t]he *non-public or informal understandings* of agency officials concerning the meaning of a regulation are thus not relevant." *Id.* at 54 (emphases added). In light of *Lachman*, G.G. cannot (and does not) deny that the First

Circuit would not have deferred to the Ferg-Cadima letter had this case arisen there.

The same is true of the Seventh Circuit. Although G.G. is correct that the analysis in *Keys* v. *Barnhart*, 347 F.3d 990 (7th Cir. 2003), of informal agency interpretations was arguably dicta, G.G. does not dispute that the discussion of that issue in *U.S. Freightways Corp.* v. *Commissioner*, 270 F.3d 1137 (7th Cir. 2001) (Wood, J.), was essential to the holding there. Thus, under the holding in *U.S. Freightways,* the Ferg-Cadima letter would not have received "full *Chevron* deference" had this case arisen in the Seventh Circuit. Cf. *id.* at 1141–42.

To be sure, as G.G. points out (at 19), *U.S. Freightways* did not expressly discuss *Auer*. But the opinion clearly assumes that *Mead* overtook *Auer* as to regulations, just as it cabined *Chevron* as to statutes: Judge Wood's opinion noted that the same considerations that under *Mead* preclude "full *Chevron* deference" to informal agency interpretations of statutes *also* preclude such deference to informal interpretations of regulations. *Id.* at 1142. And Judge Posner's subsequent opinion in *Keys* made that view explicit as to *Auer*—leaving no doubt on that point in the Seventh Circuit. See *Keys*, 347 F.3d at 993.

As to the Eleventh Circuit: G.G. does not dispute that the decision below conflicts with *Arriaga* v. *Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002), which applied *Skidmore* rather than *Auer* to opinion letters interpreting agency regulations. Nor does G.G. dispute that, under *Arriaga*, the Eleventh Circuit would *not*

have deferred to the Ferg-Cadima letter. Instead, G.G. suggests that Eleventh Circuit law is unclear because, three years before *Arriaga*, the Eleventh Circuit applied *Auer* to an informal opinion letter "without explanation." Opp. 20 (citing *Falken* v. *Glynn Cty.*, 197 F.3d 1341, 1350 (11th Cir. 1999)). But the "explanation" for the shift is obvious: *Mead* was decided in the interim and, as already explained, is incompatible with *Auer*.

There can thus be no doubt that this case would have come out differently if it had arisen in the First, Seventh, or Eleventh Circuits. In short, the 4-3 split identified in the petition concerning deference to informal agency opinions is real.[1]

---

[1] G.G. also mistakenly asserts that this case does not implicate the second division discussed in the petition — over whether *Auer* applies to positions first articulated in the dispute at issue. See Pet. 30–31. Contrary to G.G.'s assertion (at 20), the Department's "interpretation of § 106.33 dates back" only to 2015, not to "2013." See App. 18a (noting United States requested deference to "OCR's January 7, 2015 letter"); App. 23a (noting "the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015"). And that 2015 "interpretation" arose out of a request concerning the policy in *this* case. See Pet. 8–9.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING BOTH THE DIVISIONS OVER *AUER* AND THE PROPER INTERPRETATION OF TITLE IX AND ITS REGULATION.

G.G. incorrectly suggests that other concerns make this case a poor vehicle for resolving the divisions over *Auer* and the proper interpretation of Title IX.

A. This Case Presents No Finality Concerns.

G.G. first suggests that this case is a bad vehicle because the judgment below is nonfinal. Opp. 23–25. But the Court's general reluctance to review cases "in an interlocutory posture" is inapplicable here. *Mount Soledad Mem'l Ass'n* v. *Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring in denial of certiorari).

First, the Fourth Circuit's decision turned on a pure question of law—whether the Ferg-Cadima letter merits *Auer* deference. App. 71a–72a. The Board's petition therefore does not implicate the subsidiary factual matters alluded to by G.G. See Opp. 4 & nn. 2–3, 27 (discussing questions regarding transgender people). As Judge Niemeyer observed, "the facts of this case, in particular, are especially 'clean,' such as to enable the [Supreme] Court to address the [legal] issue without the distraction of subservient issues." App. 65a.

Second, there is no question about the ultimate impact of the decision below. Following the Fourth Circuit's decision, the district court *immediately* entered a preliminary injunction based entirely on that decision. Pet.

16. This case thus sharply contrasts with cases like *Mount Soledad*, in which at the time certiorari was sought, "it remain[ed] unclear precisely what action the . . . Government will be required to take" as a result of the court of appeals' decision. 132 S. Ct. at 2536 (Alito, J., concurring). Here there is no doubt about the ultimate outcome in the district court—the injunction has already been entered—or in the subsequent Fourth Circuit appeal.

Third, the Board has also sought certiorari before judgment in the *second* Fourth Circuit appeal (which challenges the district court's injunction) even as it seeks review of the Fourth Circuit's earlier decision. Pet. 17. Indeed, when seeking a stay the Board told this Court it would seek review in both cases—see Reply in Supp. of Stay at 4—and the Court consequently stayed both cases. *Gloucester Cty. Sch. Bd.* v. *G.G.*, 136 S. Ct. 2442 (2016) (per curiam). If the Court wishes to have the preliminary injunction before it as well as the Fourth Circuit's decision, the petition provides that option.

Moreover, this case meets Rule 11's standard for certiorari before judgment as well as the usual Rule 10 standards. Given that the Fourth Circuit's decision immediately spawned a nationwide transgender nondiscrimination policy imposed by mid-ranking officials at the Departments of Justice and Education, this is undoubtedly a case of "imperative public importance." Pet. 14–16. And this Court has not hesitated to review preliminary-injunction decisions that, like the decision below, involve pure questions of law and present issues of nationwide significance. See, *e.g.*, *United States* v. *Texas*,

136 S. Ct. 906 (2016) (granting certiorari); *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015); *Glossip* v. *Gross*, 135 S. Ct. 2726 (2015); *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Arizona* v. *United States*, 132 S. Ct. 2492 (2012); *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009); *Rumsfeld* v. *Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47 (2006); *Mazurek* v. *Armstrong*, 520 U.S. 968 (1997).

B. This Case Is A Superior Vehicle For Revisiting *Auer* In A Setting In Which It Is Having Nationwide Impact.

G.G. is also mistaken in suggesting that in various respects the Fourth Circuit's decision is too narrow to be a good vehicle for resolving the questions presented. Opp. 25, 27–28.

First, the precise question decided below makes this case an ideal vehicle for considering how best to curtail *Auer*. The Fourth Circuit held that *Auer* requires deference to an informal, unpublished letter, written by a low-level agency official, in the context of the very dispute in which deference was sought. Pet. 8. The decision thus puts *Auer*'s defects on maximum display. See, *e.g.*, *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment) (stating that *Auer* effects an unconstitutional "transfer of judicial power to the Executive Branch"); *Christensen* v. *Harris Cty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement

guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

Second, G.G.'s suggestion that the Fourth Circuit's decision "concern[s] access to restrooms only" is false. Opp. 25. The letter to which the court deferred extends beyond restrooms to facilities such as "locker rooms, shower facilities, [and] housing." App. 123a. The United States has already told a federal district court that "the reasoning of *Gloucester*'s holding applies to changing facilities with equal force." Mem. in Supp. of Prelim. Inj. at 15, in *United States* v. *North Carolina*, No. 1:16-cv-00425 (M.D.N.C. July 5, 2016), ECF No. 74. And G.G.'s counsel has taken the same position. See Mem. in Supp. of Prelim. Inj. at 14, *Carcaño* v. *McCrory*, No. 1:16-cv-00236 (M.D.N.C. May 16, 2016), ECF No. 23 (arguing "[t]he Fourth Circuit's controlling decision in *G.G.* applies with equal force to 'changing facilities,' such as locker rooms").

But even if the Fourth Circuit's decision were limited to restrooms, it would still merit this Court's review. See, *e.g.*, *Texas* v. *United States* (App. 219a–223a, 229a) (rejecting *G.G.* and issuing nationwide injunction against federal edicts regarding transgender access to school restrooms); Order at 4–5, *Carcaño v. McCrory*, No. 1:16-cv-00236 (M.D.N.C. Aug. 26, 2016), ECF No. 127 (following *G.G.* and issuing preliminary injunction against North Carolina law concerning restroom access). Even if so limited, the decision rests on an indefensible application of *Auer* that is already having nationwide impact. See Pet. 3, 14–16, 31–32. This case is therefore an ideal candidate for reconsidering *Auer*'s deference regime.

C. The Department's Interpretation Of Title IX And Its Implementing Regulation Is Not Entitled To Deference Under Any Standard.

G.G.'s attempt to defend the Department's interpretation of Title IX and its implementing regulation is also meritless. See Opp. 29–36. Although full exploration of that issue should await merits briefing, the Department's interpretation cannot bear scrutiny under *any* deference standard, save perhaps the Fourth Circuit's rubber-stamp regime.

First, the Ferg-Cadima letter interprets—not merely the regulation—but the term "sex" in the Title IX *statute*. See App. 121a ("*Title IX*" bans discrimination "on the basis of sex, including gender identity") (emphasis added). But *Auer* does not apply to an agency interpretation of the underlying statute, *Gonzales* v. *Oregon*, 546 U.S. 243, 256–57 (2006), and informal opinion letters do not receive *Chevron* deference under *Mead. Christensen*, 529 U.S. at 587. See also Pet. 8, 31 n.11; Jonathan H. Adler, *What "Sex" Has to Do with Seminole Rock*, Yale J. Reg.: Notice & Comment (Sept. 16, 2016), http://yalejreg.com/nc/what-sex-has-to-do-with-seminole-rock-by-jonathan-h-adler/ ("[T]he relevant ambiguity exists in the underlying statutory language as well. . . . In such cases, agency interpretations of their own regulations are, for all practical purposes, interpretations of the *statute*, and are therefore only eligible for deference under *Chevron*—and *Chevron* (as explicated in *Mead*) requires an agency to do more than issue a guidance letter or file a brief.").

Second, even assuming the regulation were sufficiently ambiguous to invoke *Auer*, cf. Pet. 11, 33–34, G.G.'s own argument shows that the Board's policy satisfies the regulation. G.G. concedes that "[t]he term 'sex' in 34 C.F.R. § 106.33, as in the underlying statute, encompasses *all* physiological, anatomical, and behavioral aspects of sex." Opp. 30 (emphasis added). But the Board's policy itself treats sex as a "physiological" and "anatomical" concept. See App. 144a (limiting restrooms and locker rooms to "biological" sexes). The policy would only violate the regulation if "sex" means *only* "gender identity," which, as the district court explained, would be absurd. App. 99a, 102a.

Third, G.G. candidly admits (at 1) that the Department's interpretation of "sex" would have been unfathomable when the regulation was adopted. But this is an admission that *Auer* cannot justify the Department's novel interpretation. See, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (noting that an agency interpretation is not entitled to deference if alternative reading is "compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation"). It is also an admission that the Congress that enacted Title IX never intended to delegate to the Department the prerogative to resolve complex issues of transgender access to restrooms. See *Mead*, 533 U.S. at 229–34 (noting that *Chevron* applies only when Congress affirmatively intends to delegate interpretive authority).

Finally, G.G. suggests that such a delegation is nevertheless found in 20 U.S.C. § 1682. Opp. 34. But that stat-

ute authorizes Federal agencies empowered to administer educational funding to effectuate Title IX *only* "by issuing rules, regulations, or orders of general applicability," which, moreover, must be "approved by the President." 20 U.S.C. § 1682. The Ferg-Cadima letter obviously does not qualify.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JONATHAN F. MITCHELL
D. JOHN SAUER
JAMES OTIS LAW GROUP, LLC
12977 North Forty Drive
Suite 214
St. Louis, MO 63141
(314) 682-6067

DAVID P. CORRIGAN
JEREMY D. CAPPS
M. SCOTT FISHER JR.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
(804) 747-5200

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
SCHAERR | DUNCAN LLP
1717 K Street NW
Suite 900
Washington, DC 20006
(202) 714-9492
KDuncan@Schaerr-Duncan.com

Counsel for Petitioner

September 26, 2016