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,

Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

BRIEF OF *AMICUS CURIAE* SAFE SPACES FOR WOMEN SUPPORTING NEITHER PARTY

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QUESTIONS PRESENTED

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 If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

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

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INTEREST OF *AMICUS CURIAE*[1]

Safe Spaces for Women provides survivors of sexual assault with care, support, understanding and advice. In addition to recovering from physical injury, women who survive a sexual assault invariably must learn to cope with deep psychological and emotional scars. Safe Spac-

[1] Petitioner's counsel of record consented to the filing of this brief by filing a blanket consent with the Clerk. Respondents' counsel of record consented to the filing of this brief by email dated December 7, 2016. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, has made a monetary contribution to the preparation or submission of this brief.

es for Women counsels these women to adopt safeguards that will enable them to avoid future physical abuse, and to avoid reopening or aggravating emotional wounds caused by past abuse. Women are encouraged to be cognizant of their surroundings, and to minimize instances where they are both isolated and vulnerable to potential attackers, particularly in intimate settings such as showers, locker rooms, and restrooms.

Safe Spaces for Women has a strong interest in ensuring that the voices of women who have suffered sexual abuse are heeded when policies are made that may directly affect their physical, emotional, and psychological well-being. This includes policies that require educational institutions covered by Title IX to admit to female showers, locker rooms, and restrooms biological males who identify as female. While Safe Spaces for Women bears no animus toward the transgendered community, it is deeply concerned that true sexual predators may take advantage of such policies to victimize women. Moreover, survivors of sexual assault are likely to suffer psychological trauma as a result of encountering biological males—even those with entirely innocent intentions—in the traditional safe spaces of women's showers, locker rooms, and bathrooms.

The Ferg-Cadima Letter announced an *ad hoc* rule that invites biological males into those safe spaces. And it did so without giving those affected a voice in the process. Such pronouncements should not be afforded binding deference, and the Fourth Circuit erred by doing so.

SUMMARY OF ARGUMENT

An agency that wishes to issue a substantive rule affecting citizens' rights and obligations must afford those affected notice and an opportunity to participate in the rulemaking process. This safeguard ensures that the agency gathers and weighs information not only from its own internal experts, but also from members of the pub-

lic who will be directly impacted by the rulemaking, and who frequently possess information not readily available to agency personnel. This information-forcing mechanism results in better decision making. It also promotes greater public acceptance of rules that otherwise would not be subject to the refining fire of public debate.

By affording the Ferg-Cadima Letter binding *Chevron*-style deference, the Fourth Circuit allowed the Department of Education to improperly circumvent the notice and comment process when that process was needed most. The Ferg-Cadima Letter did not interpret an ambiguous regulation—it has long been understood that schools may assign students to showers, locker rooms, and restrooms based on their biological sex—but rather made new policy that upends the settled expectations of millions. And it did so by diktat. That is a stark abuse of power, facilitated here by the Fourth Circuit's misapplication of the *Auer* doctrine.

Amicus wishes to be clear: it bears no animus toward members of the transgendered community, many of whom have suffered much pain, exclusion, and isolation. Rather, *amicus* seeks only to open a civil discourse about the shortfalls of the policy announced in the Ferg-Cadima letter by giving voice to members of a vulnerable population uniquely impacted by that policy. Women who have suffered sexual assault are especially sensitized to the risks posed to their physical and emotional well-being by allowing biological males to enter the traditional safe spaces of women's showers, locker rooms, and restrooms. Moreover, these women are vulnerable to suffering emotional trauma as a result of encountering biological males in those spaces—including those with entirely innocent intentions. The Fourth Circuit erred when it gave binding deference to the Ferg-Cadima Letter despite the lack of procedural formalities that would have afforded all interested parties a voice in the process.

ARGUMENT

I. THE APA GIVES THOSE AFFECTED BY SUBSTANTIVE RULEMAKING A VOICE IN THE RULEMAKING PROCESS.

Public participation in the substantive rulemaking process is essential to the modern scheme of administrative governance. The APA's insistence upon public participation reflects Congress' "judgment that . . . informed administrative decisionmaking require[s] that agency decisions be made only after affording interested persons" an opportunity to communicate their views to the agency. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 316 (1979). By mandating "openness, explanation, and participatory democracy" in the rulemaking process, the APA assures the legitimacy of administrative norms. *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978).

Public participation in agency rulemaking typically occurs through the notice and comment process. Rulemaking begins with "[g]eneral notice of proposed rulemaking," ensuring that interested persons know about the proposal. 5 U.S.C. § 553(b). After the required notice is given, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." See 5 U.S.C. § 553(c).

This requires more than an opportunity for self-expression. "An agency must consider and respond to significant comments received during the period for public comment." *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Finally, an agency must explain itself to the public, "incorporat[ing] in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c).

These procedures—the "statutory *minima*" for legitimate rulemaking, *Vt. Yankee Nuclear Power Corp.* v.

NRDC, 435 U.S. 519, 548 (1978)—are not "arbitrary hoops through which federal agencies must jump without reason." *Sprint Corp.* v. *FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003). Rather, they "improve[] the quality of agency rulemaking" by exposing regulations to "diverse public comment." *Small Refiner Lead Task Force* v. *EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (quotation marks omitted). They also ensure "fairness to affected parties" and provide a well-developed record that "enhances the quality of judicial review." *Id.*

This is by design. The architects of Section 553 sought "to guarantee to the public an opportunity to participate" in rulemaking. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 27 (1947).[2] An influential 1941 report identified lack of public participation as a key problem in administrative law. ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT, S. DOC. NO. 77-8, at 102 (1st Sess. 1941); see also Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 224-226 (1986) (recounting this report's role in the APA's history). The remedy it proposed was to create procedures "adapted to giving adequate opportunity to all persons affected to present their views." S. DOC. NO. 77-8, *supra*, at 102. The agency engaged in rulemaking "must always learn the frequently clashing viewpoints of those whom its regulations will affect." *Ibid.*

Congress shared this concern. See, *e.g.*, S. JUDICIARY COMM., 79TH CONG., ADMINISTRATIVE PROCEDURE ACT (Comm. Print 1945), *reprinted in* S. JUDICIARY COMM., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 20 (1946) ("Public participa-

[2] The Attorney General's Manual is "a contemporaneous interpretation" of the APA that is "given some deference by this Court because of the role played by the Department of Justice in drafting the legislation." *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 546.

tion in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests." (alterations omitted) (quotation marks omitted)). Describing the bill that would become the APA, the chairman of the Subcommittee on Administrative Law assured the House that the "the legislative functions in administrative agencies shall, so far as possible, be exercised only upon some form of public participation after notice." 92 CONG. REC. 5650 (1946) (statement of Rep. Walter); see *ibid.* ("Day by day Congress takes account of the interests and desires of the people in framing legislation, and there is no reason why administrative agencies should not do so when they exercise legislative functions which the Congress has delegated to them."). From its genesis, Section 553 promised public participation in rulemaking.

This Court has recognized the democratic impulse underlining the need for public participation in the rulemaking process. In *NLRB* v. *Wyman-Gordan Co.*, 394 U.S. 759, 764 (1969), the Court observed that the APA's notice and comment provisions "were designed to assure fairness and mature consideration of rules of general application." Writing in dissent, Justice Douglas expounded on this point: "The Multiplication of agencies and their growing power" (a problem only amplified since 1969) make agencies ever "more remote from the people affected by what they do." *Id.* at 778 (Douglas, J., dissenting). This situation intensifies the need for public participation in rulemaking—to "give[] an opportunity for persons affected to be heard" and to teach agencies "they are not always repositories of ultimate wisdom." *Id.* at 777-778 (citations omitted). Public participation keeps rulemaking "a healthy process that helps make a society viable." *Id.* at 778.

The lower federal courts have echoed that view: "[A]dvance notice and opportunity for public participa-

tion are vital if a semblance of democracy is to survive in this regulatory era." *Chamber of Commerce* v. *OSHA*, 636 F.2d 464, 472 (D.C. Cir. 1980) (Bazelon, J., concurring in the result only).[3] Any attempt to issue a new rule without following Section 553's requirements amounts to a "denial of process to the public at large." *Herr* v. *U.S. Forest Serv.*, 803 F.3d 809, 820 (6th Cir. 2015). The text of Section 553, its history, and its subsequent application all forbid such attempts.

Finally, Section 553 promotes public accountability. Indeed, it was the "unrepresentative nature of . . . administrative agenc[ies]" that led Congress to deem "public participation . . . in the rulemaking process . . . essential." *Batterton* v. *Marshall*, 648 F.2d 694, 704 n.47 (D.C. Cir. 1980) (quotation marks omitted). Recognizing that "the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure," *Am. Bus Ass'n* v. *United States*, 627 F.2d 525 (D.C. Cir. 1980) (quotation marks omitted), Congress enacted Section 553 "to provide that the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation on notice . . . ." *Id.* at 528 (quotation marks omitted).

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[3] See also, *e.g.*, *Dismas Charities, Inc.* v. *U.S. Dep't of Justice*, 401 F.3d 666, 678 (6th Cir. 2005) ("[O]ne of the central purposes of the requirement of notice and comment is to give those with interests affected by rules the chance to participate in the promulgation of the rules."); *Batterton* v. *Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) ("The essential purpose of according § 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies."); *U.S. Steel Corp.* v. *EPA*, 595 F.2d 207, 214 (5th Cir. 1979) ("Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas.").

II. Affording Binding Deference To The Ferg-Cadima Letter Silences The Voices Of Those Affected By Its Sweeping Social Innovation.

Section 553 is not without exceptions, of course. Its procedures—and their insistence on public participation—do not apply to interpretive rules. 5 U.S.C. § 553(b)(A). But such interpretations "come[] at a price": They "'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Perez*, 135 S. Ct. at 1204 (quoting *Shalala* v. *Guernsey Mem'l Hosp.* 514 U.S. 87, 99 (1995)).

Whether the rule is interpretive depends on whether it is "one 'affecting individual rights and obligations.'" *Chrysler Corp.*, 441 U.S. at 302. A rule that will "have the 'force and effect of law'" is substantive and thus must go through the notice and comment process. *Perez*, 135 S. Ct. at 1203 (quoting *Chrysler Corp.*, 441 U.S. at 303). Likewise, an agency rule is subject to notice and comment if it "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Mendoza* v. *Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

The Ferg-Cadima Letter could hardly be more substantive. It "reads like a ukase," *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). With no more support than an online Q&A document, "[i]t commands, it requires, it orders, it dictates," *ibid.*; see Pet. App. 123a. (purporting to create both rights and obligations that previously did not exist).

Moreover, it marks a radical departure from the Department's otherwise-consistent interpretation of Title IX and its implementing regulations. For the last forty years, the Department has consistently interpreted those texts to "employ[] the term 'sex' as was generally understood at the time of enactment," as referring to "the physiological distinctions between males and females,

particularly with respect to their reproductive functions." Pet. App. 53a-55a. Likewise, schools across the Nation have structured their facilities and programs in reliance on the Department's longstanding policy that in certain intimate settings, men and women may be separated "to afford members of each sex privacy from the other sex." *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996). Not until the Ferg-Cadima letter did the agency give the slightest indication that this uniform and longstanding practice would render schools across the country subject to losing federal funding.[4] For these reasons, the Ferg-Cadima Letter is a substantive rule subject to the notice and comment requirements mandated by 5 U.S.C. § 553(b)-(c). Because the Department failed to subject the letter to those requirements, it is illegitimate and not entitled to any deference.

This failure to invoke the notice and comment process is especially important because the rule at issue purports to sidestep the ongoing, heated political debate regarding the rights of transgender children in the Nation's schools. The stakes could hardly be higher. The issue affects students, parents, teachers, and schools across

[4] An agency's interpretation of a statute or regulation that "conflicts with a prior interpretation" is entitled to considerably less deference than a consistently held agency view." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 515 (1994). While an agency is generally free to revisit its prior policies, it must at least "display awareness that it is changing position." *FCC* v. *Fox Television Stations*, 129 S. Ct. 1800, 1811 (2009). The Ferg-Cadima letter did not acknowledge any change in agency position, let alone proffer a persuasive justification for the change. Its reinterpretation of 34 C.F.R. section 106.33 thus results in a quintessential example of "unfair surprise" for regulated parties. *Long Island Care at Home* v. *Coke*, 551 U.S. 158, 170-71 (2007); *Arkema* v. *EPA*, 618 F.3d 1, 7 (D.C. Cir. 2010) (finding agency action impermissibly retroactive where it was "substantively inconsistent with [the] prior agency practice and attache[d] new legal consequences to events completed before its enactment").

the country. Longstanding social norms, and millions of dollars of federal funding, hang in the balance.

Issues of such manifest importance should be decided by the people themselves through public debate and, ultimately, the legislative process. By inviting the Court to afford binding deference to the Ferg-Cadima letter, however, the Department seeks to silence that debate, each and every voice in it, and the political process, preferring instead to leave these momentous questions in the hands of an unelected, unaccountable, mid-level agency official answering a case-specific inquiry without the benefit of input from interested stakeholders.

"[I]f a semblance of democracy is to survive in this regulatory era," the Court must hold that *Chevron*-style deference is inappropriate here. *Chamber of Commerce*, 636 F.2d at 472 (Bazelon, J., concurring in the result). Instead, it should hold that the Ferg-Cadima letter should be considered based solely on the "validity of its reasoning, its consistency with earlier and later pronouncements," and any other factors that have the "power to persuade." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

III. HAD THE POLICIES AT ISSUE UNDERGONE NOTICE AND COMMENT RULEMAKING, SEXUALLY ABUSED WOMEN DIRECTLY IMPACTED BY THE POLICIES MIGHT HAVE PERSUADED THE AGENCY TO FORBEAR.

Had the Department of Education correctly engaged the rulemaking process, persons affected by the Department's new policy to allow persons to access intimate facilities consonant with their gender identity would have received notice and an opportunity to participate, just as the APA requires. Women who have suffered sexual assault are a group uniquely impacted by that policy. Had their voices been heard, the Department may well have

chosen a different path that better accommodates the needs of all.

Amicus works with sexually abused women on a daily basis, and regularly hears their tales of harrowing pain and courageous survival. Six of those women volunteered to share their stories and views with this Court to demonstrate why public participation in the administrative process is not an empty formality, particularly when dramatic social change is being enacted. The following is what these women would have said had they been afforded the opportunity to comment on the Ferg-Cadima Letter:

1. P.I.'s Comment: I suffered sexual abuse as a child, but eventually overcame that abuse and the trauma it created to establish a happy and fulfilling marriage. Later, while working, I was sexually assaulted by a coworker. As a result of this incident, I was hospitalized for ten days and suffered deep psychological trauma. Recently, while exiting a stall in a public women's restroom, I encountered a biological male. While the man was polite and left without incident, I suffered extreme fear, embarrassment, and anxiety as a result of the encounter. My history of past abuse has sensitized me to the need to avoid potentially dangerous situations, and the possibility that biological men—including bad-faith actors who do not gender identify as female—may freely enter such intimate facilities as women's restrooms, locker rooms, and showers has caused me substantial emotional and psychological distress. I am deeply concerned that others like myself, including students who are survivors of campus rape, may experience similar trauma as a result of the policies at issue in this case.

2. A.C.'s Comment: I work with women who have suffered domestic violence. I often counsel them to use public women's restrooms as an escape route from violent men who may be pursuing them. I once did so my-

self, ducking into a women's restroom located near a hotel lobby to escape a stalker who was pursuing me. One significant reason why women's restrooms provide a means of escape is the continued existence of social mores disapproving of men entering women's facilities. I am concerned that the policies announced by the Department of Education and the Department of Justice will undermine those mores and render women like me and those I counsel less safe.

My fear is well-founded, as I was nearly attacked in a shower facility where those mores were nearly absent. I attended the University of Washington. One Friday night during my freshman year, I was up studying in my dorm room until well after midnight. While my dormitory was reserved for females, the doors to the dorm were unlocked, men were allowed to visit, and—it being a Friday evening—drunken parties were raging all around me.

Around 2 a.m., I decided to take a shower and then go to bed. As I was shampooing my hair, I noticed through a small opening in the shower curtain that the door to the shower room was open, and I saw a pair of boots walking toward me. Men's boots. I was immediately overcome with unimaginable terror. Letting the shower run, I wrapped myself in my towel and gripped my Suave shampoo bottle as if it were a baseball bat. I held my breath and prayed the boots would disappear. Instead, the man approached my stall and yanked back the curtain—he in his dark garb, and me in my towel, hair dripping. He was young and at least a foot and a half taller than me. There was no way I could fight him off.

Nearly overcome with fear, I instinctively braced myself and screamed: "Get the f--- out of here!" I am a soft-spoken women and typically very reserved. I don't know what summoned my bravado, but it worked. He turned around and left. Shaking, I returned to my dorm room,

locked the door, and called the campus police. I later learned my near-assailant later attacked a female student in an elevator, only to be fought off by her boyfriend when the elevator reached its destination.

My experiences have taught me that, while women's restrooms and shower facilities can be places of safety for women seeking to escape attackers, they are also places where women are particularly vulnerable to attack, especially when social mores change to allow anatomical men to freely access them. I am deeply concerned that my terrifying experience in my dormitory shower may become more commonplace if we are no longer allowed to question situations when men enter those facilities.

3. K.S.'s Comment: I was raised by a single mother who suffered from drug addiction, and I was frequently abandoned as a child or forced to live with strangers. Left unprotected, and without a safe place to call home, I was repeatedly abused. In one instance, I was pinned under a sleeping bag while neighborhood boys took turns sexually exploiting me. In another instance, I was left by my mother at her best friend's house, only to be abused by her friend's father. When I complained to her mother, I was told the abuse was her fault, and was later left at that house again when my mother went on another drug binge. I suffered deep psychological trauma as a result of this lengthy pattern of abuse. Today, as an adult, I am committed to protecting my own children from the abuse I suffered. One way I do that is by avoiding potentially compromising situations. I am deeply concerned that sexual predators, such as the ones who preyed on me during my youth, may take advantage of the policies stated by the Department of Education and the Department of Justice in this case to enter women's restrooms, showers, and locker rooms at schools and universities and threaten my children and the children of others.

4. C.P.'s Comment: Shortly after I graduated from college, I was sexually assaulted by a male friend who invited me to his apartment for lunch, and then drugged me. I reported the assault to the police, and my assailant was taken into custody for a time, but was then released pending trial. He continued to stalk me, but the police told me nothing could be done unless he assaulted me again. The jury failed to convict him, and he continued to stalk me for a period of time afterward. Thirty years later, I remain hyper-vigilant about my surroundings, always cognizant of potential threats to my safety.

When I learned that my local gym had adopted new policies that opened the locker room showers to anyone who claimed to identify as female, I was devastated. My daily exercise routine includes an hour of swimming, which means I use the facility's locker room on a regular basis. My traumatic memories of powerlessness I felt thirty years ago came flooding back at full force. I was forced to cancel my gym membership for several months while I processed my feelings and worked to decide what to do next.

To make matters worse, the law in my home state of Washington prohibits any unwelcome questions related to gender identity, so I am not legally allowed to complain or say anything if I see someone I believe to be a male in the women's showers.[5] Just like the message I received from police when my attacker followed me home, I am once again being told that nothing can be done to protect me unless and until it is too late.

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[5] The Dear Colleague Letter issued by the Department of Education and the Department of Justice shortly after the Ferg-Cadima Letter requires schools to allow biologically male students to access women's restrooms on mere "notice" by the student (or parent thereof) of the student's professed transgender status, and thus effectively a "Washington" standard on girls in their public school bathrooms and locker rooms across the entire country.

I don't feel safe using public restrooms anymore, and, unless my husband is with me to stand right outside the door, I won't do it. Even that requires really exhausting emotional mental exercise. How can I ever feel safe again? How can I tell the difference between a true transgender person who bears no malicious intent, and a man who merely wishes to exploit women in their most vulnerable spaces? If someone I thought was my friend could harm me this way, what could a complete stranger do?

5. J.S.'s Comment: In Washington state the Human Rights Commission passed a Washington Administrative Code allowing men who gender identify as female to enter women's locker rooms, spas, and restrooms. As a survivor of childhood molestation and rape, the passage of this law left me feeling vulnerable and exposed in areas I should be protected. I worked for many years to heal from the emotional, physical, and spiritual effects of the trauma inflicted by my childhood attacker. Depression, panic attacks, suicidal thoughts, Post Traumatic Stress Disorder, and physical phantom pains are a legacy of my past abuse.

I had been panic-attack free for over a decade when Washington's law went into effect. Now, using a public bathroom is very difficult and has led to many panic attacks. I have not entered a public women's locker room in over a year. Before Washington's law was passed, if I encountered a man in the woman's bathroom or locker room, management, staff, police and the general public would all have been there to protect my privacy and safety. This is no longer the case. To be in a position where I am left exposed, separate from others and no longer have a voice is the same position I was in as a child of eight.

6. N.M.'s Comment: Twenty-two years ago, I was raped by a friend who was also a firefighter. Although I should have reported it to the police, I was simply too

traumatized to do so. Afterwards, it became very difficult for me to go back to work. It also became very difficult for me to use the women's restroom at work. I felt incredibly vulnerable being alone in the restroom. Every time I heard the door open, I feared it may be my rapist. In fact, about six months after I was assaulted, I did encounter him in the store after I exited the women's restroom. I immediately ran to the locked employee area where he could not follow and cried hysterically. Fortunately, after that day, I never saw him again.

Twenty-two years later, I still feel vulnerable to attack, and suffer extreme stress any time I have to use a public restroom. When I learned that laws were being passed in Washington, where I live, that would enable biological men who identify as female to use women's showers, locker rooms, and restrooms, my anxiety went through the roof. When away from home, I now look for locking single-stall restrooms. Unfortunately, I now suffer from a neuro-muscular disease that makes it difficult for me to control my bladder. As a result, I am often forced to use public facilities that are now open to biological men, causing me tremendous anxiety.

I believe that everyone should be treated fairly. But when it comes to allowing access to women's showers, locker rooms, and restrooms, the interests of women who have suffered sexual abuse, and who are still dealing with the emotional trauma caused by that experience, are not being taken into account. That's not fair, and it's not right.

CONCLUSION

The foregoing stories are painful, pragmatic reminders of why agencies must solicit and respond to public comments before substantively changing the law that governs public schools across the country. Fundamental principles of administrative law, the APA, and basic fairness require the Department to hear these women's sto-

ries and respond to them *before* imposing this sweeping, controversial policy change under Title IX.

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