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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the absence of any "special justification," this Court should depart from stare decisis and overturn long-standing principles of administrative law embodied in *Auer v. Robbins*, 519 U.S. 452 (1997), and similar precedent dating back to 1945?

2. Whether *Auer* deference applies to an agency's interpretation of its own regulation when (a) that interpretation is articulated in an opinion letter, a statement of interest and an amicus brief, and (b) the interpretation is not a post hoc justification to defend an agency decision under attack?

3. Whether a school board policy that categorically prohibits transgender students from using restrooms consistent with their gender identity, effectively excluding them from using the common restrooms used by other students, violates Title IX and its implementing regulations?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION & STATUTES

RULES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

This case involves a 17-year-old boy who is transgender. Although he was designated female at birth, G. has a male gender identity. He has a state ID identifying him as male, and, as a result of hormone therapy, has facial hair, a deep voice, and other male secondary sex characteristics. In every aspect of life outside school, G. is recognized as a boy. At school, however, G. is singled out from every other student and forced to use separate restrooms because his school board has concluded that G.'s mere presence in a restroom used by other boys is unacceptable.

Title IX protects everyone—including transgender students—from being "excluded from participation in" or "denied the benefits of" any education program or activity "on the basis of sex." 20 U.S.C. § 1681(a). The central question in this case is whether 34 C.F.R. § 106.33, a regulation allowing schools to "provide separate toilet . . . facilities on the basis of sex," implicitly authorizes schools to prohibit transgender boys and girls from using restrooms consistent with their gender identity, effectively excluding them from using the common restrooms used by other students.

When the regulation was drafted in 1975, few would have conceived that, as result of advances in treatment and support for transgender youth, a student like G. would be assigned a female sex at birth and yet have facial hair and other male secondary sex characteristics, have a male designation on his government ID card, and be able to live all aspects of life in accordance with his male gender identity. Faced with this reality, the

Department of Education (the "Department") concluded that the only way to "provide separate toilet . . . facilities on the basis of sex" in a manner that does not deprive students of equal educational opportunity—and the only way to make common restrooms truly accessible—is to allow transgender students to use restrooms consistent with their gender identity.

In the decision below, the Fourth Circuit determined that the Department's interpretation was neither clearly erroneous nor inconsistent with the statutory text, and therefore deferred to the Department's reasonable interpretation of its own regulation under *Auer v. Robbins*, 519 U.S. 452 (1997). Petitioner now seeks a writ of certiorari to review three questions:

First, Petitioner asks this Court to overrule *Auer*. For decades this Court has adhered to the principle that an agency's interpretation of its own regulations should generally be "controlling unless plainly erroneous or inconsistent with the regulation." *Id.* at 461 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (internal quotation marks omitted)). In the past five years, three sitting Justices have called for *Auer* to be overruled or reconsidered, but a majority of this Court has not expressed interest in doing so. There is no special justification for overturning this settled principle of administrative law now.

Second, Petitioner asks this Court to resolve a purported circuit split regarding whether *Auer* applies to unpublished opinion letters or interpretations announced in the context of an ongoing dispute. The first purported split is

questionable; the second one is nonexistent; and neither one is implicated by this case because the Department's interpretation pre-dated the litigation and was articulated, not just in an opinion letter, but also in a statement of interest and amicus brief.

Third, Petitioner asks this Court to resolve the underlying question of whether Title IX and its regulations allow schools to effectively exclude transgender students from the common restrooms by prohibiting them from using restrooms consistent with their gender identity. That question may ultimately warrant this Court's attention, but this is the wrong case at the wrong time. There is no circuit split and no final judgment; there are no claims involving locker rooms or the detailed guidance subsequently issued by the Department; and Petitioner has waived any argument based on *Pennhurst State Sch. & Hospital v. Halderman*, 451 U.S. 1 (1981). The Court should allow the issue to continue percolating in the lower courts until a more appropriate vehicle arrives.

Moreover, the decision below was correctly decided and does not call for the Court's immediate review. The Department's interpretation of its own regulation is the correct interpretation, and it is the interpretation that should prevail regardless of whether it receives *Auer* deference, *Skidmore* deference, or no deference at all. For all these reasons, the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Factual background.[1]

"Gender identity" is an established medical concept, referring to one's sense of oneself as belonging to a particular gender. C.A. App. 36. It is an innate and immutable aspect of personality, with biological roots. *See id.*; Aruna Saraswat, M.D., *et. al.*, Evidence Supporting the Biologic Nature of Gender Identity, 21 Endocrine Practice 199, 199-202 (2015).[2] Everyone has a gender identity. Transgender individuals, however, have a gender identity that is different than the sex assigned to them at birth, which is usually based on an examination of external anatomy.[3]

G. came out to his parents as a transgender boy during his freshman year of high school when the

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[1] On a motion to dismiss and motion for preliminary injunction, the facts alleged in the Complaint and uncontroverted declarations must be taken as true. *See Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 404 n.2 (2011); *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976).

[2] Petitioner mischaracterizes gender identity as something "subjective" and impossible to verify or define. Pet. 1. There is no dispute that G. is a transgender boy and, as a result of hormone therapy, has objective physiological characteristics that differ from those of typical non-transgender girls.

[3] Guidelines from the American Psychological Association no longer use the term "biological sex" when referring to sex assigned at birth. *See* Am. Psychological Ass'n, Guidelines for Psychological Practice with Transgender and Gender Nonconforming People, App. A (December 2015), http://www.apa.org/practice/guidelines/transgender.pdf. "Biological sex" is an inaccurate description of a person's sex assigned at birth because gender identity also has biological roots.

stress of concealing his gender identity became so great he was unable to attend class. C.A. App. 12. G. began seeing a psychologist with experience counseling transgender youth, who diagnosed G. with gender dysphoria.[4] G.'s psychologist gave him a "Treatment Documentation Letter" confirming that he was receiving treatment for gender dysphoria and stating that he should be treated as a boy in all respects, including when using the restroom. *Id.* at 13. Consistent with that medical advice, G. uses the boys' restrooms in all public venues, such as restaurants, libraries, and shopping centers. *Id.* at 13-14.[5]

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[4] Gender dysphoria is the diagnostic term for the feeling of incongruence between an individual's gender identity and an individual's sex assigned at birth, and the resulting distress caused by that incongruence. *Id.* at 11-12. It is a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders and International Classification of Diseases. *Id.* at 37. "[G]ender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition." Am. Psychiatric Ass'n, Gender Dysphoria Fact Sheet, at 1 (2013), http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf. Treatment for gender dysphoria is thus designed to help transgender individuals live congruently with their gender identity and eliminate clinically significant distress. C.A. App. 37. The World Professional Association for Transgender Health ("WPATH") has established international standards of care for gender dysphoria, which are recognized as authoritative by the leading medical and mental health organizations, including the American Medical Association, the Endocrine Society, and the American Psychological Association. *Id.*

[5] G. continues to receive transition-related care in accordance with WPATH standards. In December 2014, G. began hormone therapy. *Id.* The WPATH standards do not permit genital

In August 2014, before beginning his sophomore year, G. and his mother met with the principal and guidance counselor to explain that G. is a transgender boy and would be attending school as a male student. *Id.* at 14. G. initially chose to use a restroom in the nurse's office, but after a few weeks G. found that using a separate restroom was stigmatizing and that the inconvenient location interfered with his ability to attend class on time. *Id.* at 15.[6]

With the principal's permission, G. began using the boys' restroom on October 20, 2014, and continued doing so for seven weeks without incident. C.A. App. 15.[7] Nevertheless, some adults in the community were upset to learn a transgender boy was using the boys' restrooms at school. *Id.* Those adults contacted the Gloucester County School Board (the "Board") demanding that the transgender student (who was not publicly identified until later) be barred from the boys' restrooms. *Id.*

The Board took no action for several weeks until Board member Carla Hooks proposed a policy for public debate at the Board's meeting on

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surgery for minors, Pet. App. 9a, but in June 2016, G. had chest reconstruction surgery. Petitioner's statement that G. has not "had a sex change operation," Pet. 5, is no longer correct.

[6] Petitioner's assertion that "school officials" did not initially think G. should use the boys' restroom, Pet. 5, lacks foundation in the Complaint or the preliminary injunction record.

[7] G. asked to continue using a home-bound program for physical education. He therefore does not use the school locker rooms. Pet. App. 9a n.2.

November 11, 2014. Its operative language stated that:

> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id. at 15-16. G. and his parents attended the meeting to speak against the policy. *Id.* at 16.

When G. spoke, he told the Board:

> I use the restroom, the men's public restroom, in every public space in Gloucester County and others. I have never once had any sort of confrontation of any kind.
>
> . . .
>
> All I want to do is be a normal child and use the restroom in peace, and I have had no problems from students to do that—only from adults. The adults are the only people who have been trying to restrict my rights.
>
> . . .
>
> No one has given me any problem, and I have never been happier exercising my right to be who I am. I did not ask to be this way, and it's one of the most difficult things anyone can face.

. . .

> I deserve the rights of every other human being. I am just a human. I am just a boy.

Gloucester County School Board Video Tr., Nov. 11, 2014, at 25:00 – 27:22.[8] The Board deferred voting on the policy until its meeting on December 9, 2014. C.A. App. 17.

A week before the next meeting, the Board announced plans to increase privacy protections for all students by "adding or expanding partitions between urinals in male restrooms, and adding privacy strips to the doors of stalls in all restrooms." *Id.* The Board also announced "plans to designate single stall, unisex restrooms . . . to give all students the option for even greater privacy." *Id.*

Speakers at the December Board meeting nonetheless demanded that the Board exclude G. from the boys' restroom without waiting for the privacy protections to be installed, and they threatened to vote Board members out of office if they refused. *Id.* at 18. One speaker called G. a "freak" and compared him to a person who thinks he is a dog and wants to urinate on fire hydrants. *Id.*

The Board voted 6-1 to pass the policy introduced the previous month prohibiting transgender students from using restrooms consistent with their gender identity. *Id.* It is a categorical rule prohibiting administrators from ever allowing transgender students to use facilities

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[8] *Available at* http://gloucester.granicus.com/MediaPlayer.php?view_id=10&clip_id=1065.

consistent with their gender identity regardless of the configuration of the bathroom or the individual circumstances of any student.

No one contends G. should use the girls' restrooms. Even before G. transitioned, girls objected to his presence in the girls' restrooms because they perceived him to be male. *Id.* at 18. The necessary and foreseen consequence of excluding G. from the boys' restrooms is that he, and only he, will have to use an "alternative appropriate private facility." *Id.* at 16.

The public debate about which restrooms he should use has been humiliating for G., who feels that the Board's actions have turned him into "a public spectacle" before the entire community, "like a walking freak show." *Id.* at 31. Being forced to use separate restrooms physically and symbolically marks G. as different, isolates G. from his peers, and brands him as unfit to share the same restrooms as others. *Id.* at 19. The policy is an official decree that G.'s mere presence in a restroom is unacceptable and that he should be treated differently than everyone else.

The Board subsequently converted a faculty restroom and two utility closets into single-stall restrooms. Although any student is allowed to use those restrooms, no one actually does so. *Id.* For G., the prospect of using the converted single-stall restrooms, which were created for the specific purpose of isolating him from his peers, is humiliating. Instead he tries to avoid using school restrooms entirely. *Id.* If that is not possible, he uses the nurse's restroom, which still makes G. feel embarrassed and humiliated, knowing that

everyone who sees him enter the nurse's office knows he is there because he is transgender and has been barred from the restrooms other boys use. *Id.* at 33.

To avoid using the restroom, G. avoids drinking liquids and tries not to urinate during the school day. *Id.* at 19. As a result, G. has repeatedly developed painful urinary tract infections and felt distracted and uncomfortable in class. *Id.* A nationally recognized expert in the treatment of gender dysphoria in adolescents evaluated G. and concluded that the stigma he experiences every time he needs to use the restroom "is a devastating blow to [G.] and places him at extreme risk for immediate and long-term psychological harm." *Id.* at 42.

B. Proceedings Below.

The day after the 2014-15 school year ended, G. filed a complaint and motion for preliminary injunction against the Board, arguing that the new policy discriminates against him on the basis of sex, in violation of Title IX and the Equal Protection Clause. C.A. App. 20-22. The Complaint seeks injunctive relief and damages for both claims. *Id.* at 23.

An implementing regulation for Title IX, 34 C.F.R. § 106.33, authorizes schools to provide separate restrooms for boys and girls, but does not specifically address which restrooms transgender boys and transgender girls should use. Since 2013, the Department of Education has advised schools that "[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." C.A. App. 55. On

January 7, 2015, The Department issued an opinion letter confirming that this principle applies in the context of restrooms. *Id.* at 54-56.[9] The Department further elaborated on its interpretation with a statement of interest filed with the district court and an amicus brief submitted to the Fourth Circuit. Pet. App. 13a

The district court granted the Board's cross-motion to dismiss the Title IX claim and denied G.'s motion for a preliminary injunction. Pet. App. 84a-117a. G. appealed the denial of a preliminary injunction and asked the Fourth Circuit to exercise pendant appellate jurisdiction over the dismissal of his Title IX claim. Pl's C.A. Br. at 1.[10]

On April 19, 2016, the Fourth Circuit reversed the dismissal of the Title IX claim and vacated the denial of a preliminary injunction. Pet. App. 1-60a. With respect to G.'s Title IX claim, the Fourth Circuit held that the Department's "interpretation of its own regulation, [34 C.F.R.] § 106.33, as it relates to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case." Pet. App. 25a.

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[9] The record does not reflect the identity of the individual who requested the opinion letter because it was redacted in public filings. No. 4:15-cv-00054-RGD-TEM, ECF Nos. 28-1, 28-2 (E.D. Va. June 29, 2015). Despite the redaction, Petitioner states that it has identified the individual by opening the redacted document "in Preview for Mac." Pet. 8 n.3.

[10] Because the Fourth Circuit exercised jurisdiction over the motion to dismiss the Title IX claim, which includes a claim for damages, its decision would not be vacated under *United States v. Munsingwear*, 340 U.S. 36 (1950), even if the claims for injunctive relief were to become moot upon G.'s graduation.

The court methodically considered all the conditions for applying *Auer*. First, the court examined the text of the regulation to determine whether it unambiguously indicated which restroom a transgender student should use. Pet. App. 19-20a. It concluded that "[a]lthough the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms." *Id.*

The court then examined whether the Department's interpretation of 34 C.F.R. § 106.33 was plainly erroneous or inconsistent with the regulation's text. Pet. App. 20-23a. Once again, the court independently reviewed the text and determined that dictionaries contemporaneous to the passage of Title VII and Title IX defined "sex" as "the character of being male or female" or "the sum of the morphological, physiological, and behavioral peculiarities . . . that is typically manifested as maleness or femaleness." Pet. App. 21a. These dictionary definitions thus "shed[] little light on how exactly to determine the 'character of being either male or female' where those indicators diverge." Pet. App. 22a. The court concluded that ED's interpretation of the regulation was therefore consistent with the regulation's text and not clearly erroneous. Pet. App. 21-23a.

Finally, the court determined that the Department's interpretation reflected its fair and reasoned judgment and not a post-hoc litigating position. Pet. App. 23-24a. As the Fourth Circuit pointed out, the Department's interpretation dated back to 2013 and was consistent with "the existing

guidance[] and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities." Pet. App. 24a.

In response to arguments that G.'s use of the boy's restroom would infringe the constitutional privacy rights of other students, the court noted that the cases cited by the Board involved students who were videotaped naked in a locker room or indiscriminately strip searched. "G.G.'s use—or for that matter any individual's appropriate use—of a restroom [does] not involve the [same] type of intrusion." Pet. App. 25-26a n.10. That is especially true here because of the partitions between urinals and privacy strips for stall doors. All students who want greater privacy for any reason may also use one of the new single-stall restrooms. Pet App. 11a; *accord* Pet. App. 37-38a (Davis, J., concurring).

Senior Judge Davis concurred and emphasized that "[t]he uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, G.G. experiences daily psychological harm that puts him at risk for long-term psychological harm." Pet. App. 37a. Judge Davis urged the district court on remand to take "prompt action" because "[b]y the time the district court issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year." Pet. App. 39a.

Judge Niemeyer dissented. Pet. App. 40-60a. He did not identify any privacy concerns raised by the facts of this case and acknowledged that "the risks to privacy and safety are far reduced" in

the context of restrooms. Pet. App. 53a. Judge Niemeyer instead focused on transgender students' use of locker rooms and potential exposure to "private body parts." Pet. App. 52a. The dissent did not contend it would be appropriate for G. to use the girls' restrooms. Pet. App. 59a.

After the Fourth Circuit's ruling, the Department of Education issued comprehensive guidance to school districts on how to provide transgender students equal access to school resources consistent with Title IX. Pet. App. 126-142a. The Department also provided examples of school policies from across the country.[11]

On May 31, 2016, the Fourth Circuit denied rehearing en banc. Pet. App. 60-61a. Judge Niemeyer dissented from denial of panel rehearing. Pet. App. 61-66a. The court subsequently denied the Board's motion to stay the mandate pending disposition of a petition for certiorari, with Judge Niemeyer again dissenting. Pet. App. 67-70a.

On remand, the district court entered a preliminary injunction allowing G. to use the boys' restroom at school. Pet. App. 71-72a. The court emphasized that the injunction applies only to G. and only to restrooms at the high school. Pet. App. 72a. The district court and the Fourth Circuit, over Judge Niemeyer's dissent, denied the Board's motions to stay the preliminary injunction pending

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[11] U.S. Dep't of Educ. Office of Elementary & Secondary Educ., *Examples of Policies and Emerging Practices for Supporting Transgender Students* ("*Examples of Policies*") at 1-2, 7-8 (May 2016), http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf.

appeal. Pet. App. 73-75a, 76-81a. Judge Davis concurred, responding to the dissent's assertion that the *G.G.* opinion was "unprecedented." Pet. App. 79a. He noted that "[t]he First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution." Pet. App. 78a. Judge Davis explained that the panel's decision rested on "this long-settled jurisprudential foundation." *Id.*

On August 3, 2016, this Court granted the Board's application to stay and recall the mandate and stay the preliminary injunction pending disposition of the Board's petition for certiorari. *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16A52, 2016 WL 4131636 (U.S. Aug. 3, 2016).

On August 29, 2016, the Board filed a combined petition for (a) an interlocutory writ of certiorari from the Fourth Circuit's ruling on the motion to dismiss, and (b) a writ of certiorari before judgment from the district court's preliminary injunction order. Pet 17.

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS ADHERED TO *AUER* FOR DECADES, AND THERE IS NO SPECIAL JUSTIFICATION FOR REVISITING THAT LONGSTANDING PRECEDENT NOW.

Auer deference is a longstanding principle of administrative law, dating back to this Court's decision in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). For decades this Court has adhered to the principle that an agency's interpretation of its own regulations should generally be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414. "Occasionally, Members of this Court have argued in separate writings that the Court failed appropriately to apply *Seminole Rock* deference, but in none of those cases did the majority opinions of the Court expressly refuse to do so." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1214 n.2 (2015) (Thomas, J., dissenting).

The first time any member of the Court called *Auer* deference into question was Justice Scalia's concurring opinion in *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 67 (2011) (Scalia, J., concurring). Over the next five years, three other Justices have called for *Auer* to be overruled or reconsidered, but a majority of this Court has not expressed interest in doing so. *See United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) (collecting cases). Just last term, the Court declined to grant certiorari in a case calling for *Auer* to be

reconsidered and overruled. *See* Petition for Writ of Certiorari, *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607 (No. 15-861).

In asking this Court to overturn longstanding precedent that has been woven into the fabric of administrative law, Petitioner bears a heavy burden. "Before overturning a long-settled precedent" this Court requires "'special justification,' not just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014). As this Court has further recognized, "the principle of stare decisis has special force in respect to statutory interpretation because Congress remains free to alter what [the Court] ha[s] done." *Id.* at 2411 (internal quotation marks omitted).

Here, Congress has not acted and Petitioner offers no special justification for overruling *Auer* other than disagreement with its holding. By contrast, the reliance interests of regulated communities that depend on agency guidance to reduce uncertainty about their legal obligations, and the clarity provided by a stable "background rule," reinforce the appropriateness of adhering to stare decisis in this context. *See* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, Forthcoming U. Chi. L. Rev., at 22-34 (2016), http://ssrn.com/abstract=2716737; Conor Clarke, *The Uneasy Case Against Auer & Seminole Rock*, 33 Yale L. & Pol'y Rev. 175, 193 (2014).

Abandoning *Auer* would "have radical implications for delegation, the combination of functions in agencies, and other fundamental features of the modern administrative state."

Sunstein & Vermeule, *supra*, at 2. When an agency oversteps, this Court has tools at its disposal to withhold *Auer* deference. *Perez*, 135 S. Ct. at 1208 n.4. Dramatically altering foundational principles of administrative law is neither necessary nor appropriate.

II. THIS CASE DOES NOT IMPLICATE ANY ALLEGED CIRCUIT SPLIT REGARDING DEFERENCE TO INFORMAL AGENCY ACTION OR INTERPRETATIONS ANNOUNCED DURING LITIGATION.

Petitioner argues that this case provides a vehicle for resolving two purported circuit splits regarding the application of *Auer*. The first purported split is questionable; the second one is nonexistent; and neither one is implicated by this case.

First, Petitioner claims the circuits are split regarding the level of deference owed to unpublished agency opinion letters. Pet. 26-29. But if such a split exists, it is not relevant to this case. By focusing exclusively on the "Ferg-Cadima letter," Petitioner attempts to portray the Fourth Circuit's decision as an example of deference to "a piece of private correspondence" from "an agency employee." Pet. 38. Even if that characterization were accurate, the Department's interpretation of 34 C.F.R. § 106.33 was not limited to a single opinion letter. It was thoroughly explained in the statement of interest filed at the district court and in the amicus brief filed in the court of appeals. As this Court unanimously reaffirmed in *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 209 (2011), these briefs independently qualify for *Auer* deference. Whatever dispute exists

among the courts of appeals regarding deference to an opinion letter from a low-ranking bureaucrat, that dispute has no bearing on this case.

Moreover, no circuit subscribes to Petitioner's broad proposition that agency interpretations must appear in a format carrying the force of law to receive *Auer* deference. Pet. 27. Petitioner derives such a requirement from Judge Posner's 13-year-old dicta in *Keys v. Barnhart*, 347 F.3d 990 (7th Cir. 2003). *Auer*, however, contains no such requirement, and the dicta cited by Petitioner reflects Judge Posner's prediction at the time that "[p]robably there is little left of *Auer*." *Id.* at 993. The past 13 years have proven that prediction wrong. *Compare id.* ("Briefs certainly don't have 'the force of law.'"), *with Chase Bank*, 562 U.S. at 209 (reaffirming that *Auer* applies to statements in amicus briefs).

If there is any split regarding the narrow issue of deference to informal opinion letters, the evidence of such disagreement is stale and inconclusive:

- The First Circuit decision cited by Petitioner concerned informal statements at a seminar, not an agency opinion letter. *See United States v. Lachman*, 387 F.3d 42, 54 (1st Cir. 2004).
- The other Seventh Circuit authority cited by Petitioner is a 15-year-old decision that applied *Skidmore* to an opinion letter without mentioning *Auer* at all, *U.S. Freightways Corp. v. Commissioner*, 270 F.3d 1137 (7th Cir. 2001).

- The Eleventh Circuit has without explanation applied *Skidmore* deference to such letters, *see Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002), but it has also without explanation applied *Auer*, *see Falken v. Glynn Cty., Ga.*, 197 F.3d 1341, 1350 (11th Cir. 1999).

Even if the decision below had deferred only to an unpublished agency opinion, this haphazard collection of stale cases hardly constitutes a split ready for this Court's review.

Second, Petitioner also alleges the circuits are split regarding deference to agency positions announced during litigation. Pet. 29-31. Once again, even if a split existed, it would not be implicated by this case because the Department's interpretation of § 106.33 dates back to 2013, before this litigation arose. C.A. App. 55.

If Petitioner's first purported split was questionable, the second one is nonexistent. In support of a split, Petitioner relies on decisions in which the government *itself* was a party defending its own actions. *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068 (9th Cir. 2015); *Mass. Mutual Life Ins. Co. v. United States*, 782 F.3d 1354 (Fed. Cir. 2015). Every circuit, including the Fourth Circuit, agrees that *Auer* deference is inappropriate when an interpretation is "a convenient litigating position." Pet. App. 17a. That principle, however, applies to post hoc rationalizations "advanced by an agency seeking to defend past agency action against attack." *Auer*, 519 U.S. at 462.

When an agency is not itself a party, the fact that its interpretation is announced for the first time in an amicus brief does not "make it unworthy of deference." *Id.* The Department of Education is not a party to this case, and the fact that the agency issued an opinion letter (which was consistent with prior agency guidance) in the context of this dispute is neither unusual nor inappropriate.

III. THIS CASE IS A POOR VEHICLE FOR RESOLVING TITLE IX'S APPLICATION TO TRANSGENDER STUDENTS' USE OF RESTROOMS.

Petitioner's third question presented asks this Court to decide the underlying question of whether Title IX and its implementing regulations allow schools to exclude transgender boys and girls from using restrooms consistent with their gender identity, effectively excluding them from the common restrooms entirely. That question may ultimately warrant this Court's attention, but this is the wrong case at the wrong time. Consistent with its usual practices, the Court should allow the issue to continue percolating in the lower courts until a more appropriate vehicle arrives.

A. No Other Court of Appeals Has Considered the Question Presented.

The decision below is the first and only circuit court opinion to consider how Title IX applies to transgender students' use of restrooms. There are other cases in the pipeline that will soon give other circuits a chance to consider the issue and give the Fourth Circuit opportunities to further refine its

analysis.[12] As other courts of appeals consider these cases, they will produce a consensus or a circuit split. In either event, the issue would benefit from further exploration in the lower courts.

This Court's usual practice is to wait until a circuit split emerges before granting review to resolve important legal questions. *See* Sup. Ct. R. 10(a). Before this Court resolves a new legal question "[i]t often will be preferable to allow several courts to pass on a given . . . claim in order to gain the benefit of adjudication by different courts in different factual contexts." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). "[W]hen frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

There is no reason for this Court to grant certiorari now, without "the benefit it receives from permitting several courts of appeals to explore a difficult question." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). Petitioner argues that certiorari

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[12] *See Carcaño v. McCrory*, No. 1:16CV236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016); *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 4269080 (S.D. Ohio Aug. 15, 2016); *Students & Parents for Privacy v. United States Dep't of Educ.*, No. 16 C 4945, 2016 WL 3269001 (N.D. Ill. June 15, 2016); *Whitaker v. Kenosha Unified Sch. Dist.*, 2:16-cv-00943 (E.D. Wis. filed July 19, 2016); *M.A.B. ex rel. L.A.B. & L.F.B. v. Bd. Of Educ.*, 1:16-cv-02622-GLR (D. Md. filed July 19, 2016); *Nebraska v. United States*, 4:16-cv-03117-JMG-CRZ (D. Ne. filed July 8, 2016).

is necessary to resolve the tension created between the Fourth Circuit's decision and the nation-wide injunction issued by the district court in *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016), which also covers the government's activities in jurisdictions within the Fourth Circuit. Pet. 31-32. Courts in the Fourth Circuit, however, have continued to adhere to their own circuit precedent without difficulty. *See Carcaño v. McCrory*, No. 1:16CV236, 2016 WL 4508192, at *13 (M.D.N.C. Aug. 26, 2016). To the extent that the injunction from the Northern District of Texas interferes with other circuits' control of precedent in their geographic jurisdictions, that is a reason for the injunction to be narrowed or overturned on appeal as an abuse of the district court's discretion. *See Califano,* 442 U.S. at 702. It is not a reason to allow a single district court to "foreclos[e] adjudication by a number of different courts and judges," and increase "the pressures on this Court's docket." *Id.*[13]

B. The Petition Seeks Interlocutory Review Without a Final Judgment.

Petitioners seek a writ of certiorari on an interlocutory basis from the Fourth Circuit's denial of a motion to dismiss and a writ of certiorari before judgment from the district court's preliminary injunction order. This Court, however, usually waits to review final judgments instead of granting certiorari in an interlocutory posture. *See Mount*

[13] Moreover, there are jurisdictional obstacles in the *Texas* case that may well result in dismissal without reaching the merits of the Title IX question. Pet. App. 192-209a.

Soledad Mem'l Ass'n v. Trunk, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring in denial of petition for certiorari); *DTD Enters., Inc. v. Wells*, 130 S. Ct. 7, 8 (2009) (Kennedy, J., joined by Roberts, C.J., and Sotomayor, J., concurring in denial of petition for certiorari); *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of petition for certiorari). And this Court exercises its discretion to grant certiorari before judgment even more sparingly. Such a petition will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11; *see Aaron v. Cooper*, 357 U.S. 566, 567 (1958).

The Court should follow its normal practice and wait for final judgment in this case too. The basic facts of this dispute have not yet been settled. If the Board had petitioned for certiorari after final judgment, the Court would know the actual content and sources of the complaints the Board allegedly received; the Court would have testimony from administrators at Gloucester High School who opposed the Board's unnecessary and humiliating policy; the Court would have evidence about the Board's actual motivations for passing the new policy; and the Court would know the full extent of harm the Board's policy has inflicted on G. during his junior year.

Title IX "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). Before granting certiorari, the Court should

ensure it has all the facts necessary to make that assessment.

C. This Case Involves Only Restrooms, Not Locker Rooms.

Although Petitioner and the dissent below argue that the Department's interpretation of its own regulation would infringe upon privacy rights in the context of locker rooms, *see* Pet. 14, the facts of this case concern access to restrooms only. As the Fourth Circuit explained, "G.G.'s use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present" in cases involving nudity. Pet. App. 25a n.10. Even the dissent acknowledged that "the risks to privacy and safety are far reduced" in the context of restrooms. *Id.* at 53a (Niemeyer, J., dissenting). *Cf. Cruzan v. Special Sch. Dist, No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing transgender woman to use women's restroom created hostile work environment for non-transgender woman in the absence of an allegation of "any inappropriate conduct other than merely being present").

The proper vehicle for addressing speculation about locker rooms is an actual case and controversy involving locker rooms. Without any factual context, Petitioners ask this Court to adopt the dissent's assertion—apparently as a matter of law—that single-sex locker rooms and dormitories would "function nonsensically" if transgender students are not excluded from those spaces. *See* Pet. 35; Pet. App. 53a (Niemeyer, J., dissenting). But that is an empirical claim, not a legal one, which should be informed by the facts from an actual dispute.

A concrete factual context would dispel many of the untested assumptions underlying the dissent below.[14] Most transgender students, who may feel deeply embarrassed about parts of their anatomy that are different, take great pains to ensure that anatomy is not exposed. With privacy curtains and other partitions, school districts across the country have addressed the privacy needs of all students in locker rooms in a non-stigmatizing manner based on the particular needs of the situation. *See Carcaño*, 2016 WL 4508192. at *15 (summarizing information from school administrators that public school changing rooms "today often contain partitions, dividers, and other mechanisms to protect privacy similar to bathrooms"); *accord* ED, *Examples of Policies and Emerging Practices* at 7-8. There are many ways to address privacy concerns on an individualized basis without a "blanket ban." *Carcaño*, 2016 WL 4508192, at *15.[15]

When the government facially classifies students on the basis of sex, it is especially important for courts to base decisions on a factual record to ensure those classifications are evaluated "through reasoned analysis rather than through the

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[14] For example, despite the dissent's repeated reference to showers, there are no functional showers in the Gloucester High School building. *See* Pl.'s C.A. Br. 41 n.13.

[15] Guidelines from the Virginia Department of Education already require "private showers with enclosed dressing rooms" at public schools. Va. Dep't of Educ. Guidelines for Sch. Facilities in Va. Pub. Schs. 20 (2013), http://www.doe.virginia.gov/support/facility_construction/school_construction/regs_guidelines/guidelines.pdf.

mechanical application of traditional, often inaccurate, assumptions." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982). This is not the first time this Court has been asked to make sweeping conclusions about lesbian, gay, bisexual, and transgender people based on bare assertions about what is "inherent in human nature" or "universally accepted" "across societies and history." Pet. App. 42a, 50a (Niemeyer, J., dissenting). Thirty years ago, the majority and concurring opinions in *Bowers v. Hardwick*, 478 U.S. 186 (1986), rested on similarly sweeping statements that, upon closer examination, proved to be "more complex" or "at the very least . . . overstated." *Lawrence v. Texas*, 539 U.S. 557, 571 (2003). Faced with similar assertions about transgender individuals, this Court should wait for an actual case involving locker rooms to test those assertions appropriately.[16]

D. This Case Is Not a Vehicle for Evaluating the Detailed Guidance Issued by the Department of Education.

The only question before the Court is whether the Board's categorical rule excluding transgender students from using restrooms consistent with their gender identity is authorized by Title IX and 34 C.F.R. § 106.33. This petition does not provide a vehicle to decide whether the detailed guidance issued by the Department of Education after the

[16] As the panel majority noted, the dissent's assertion about what "sexual responses" are "inherent in human nature" conspicuously ignores the existence of lesbian, gay, and bisexual students. Pet. App. 26a-27a n.11.

Fourth Circuit's decision is entitled to deference or should have been issued through notice-and-comment rulemaking. *Cf. Texas*, 2016 WL 4426495, at *11-*13.

Similarly, this case is not a vehicle for addressing Petitioner's criticisms about various aspects of the guidance. Pet. 14-15. The only question is whether Title IX permits school boards to enact categorical rules prohibiting administrators from allowing any transgender student to use facilities consistent with their gender identity regardless of the facts of any particular situation.

E. This Case Is Not a Vehicle for Addressing *Pennhurst* Challenges.

Petitioner asserts that deference to ED's interpretation would deprive the Board of the "clear notice" required by *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). Pet. 36-37. The Board has already waived that argument, however, by failing to raise it at any stage of this case. *See* Pl.'s C.A. Reply Br. at 14 n.9 (noting waiver).

Moreover, even if notice were inadequate, the lack of notice would have no bearing on G.'s requests for injunctive relief. *Pennhurst* does not affect "the scope of the behavior Title IX proscribes," but merely the availability of "money damages." *Davis ex rel. LaShonda D., v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998).

On the merits, Petitioner's *Pennhurst* argument is also foreclosed by *Davis* and *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175

(2005), which held that Title IX puts recipients on notice of liability for all forms of intentional discrimination for purposes of *Pennhurst*. Congress and administrative agencies need not "prospectively resolve every possible ambiguity concerning particular applications" of the statute and regulations. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985). Notice is provided "by the statutory provisions, regulations, and other guidelines provided by the Department at t[he] time" the funds are received. *Id.* at 670.

IV. THE JUDGMENT BELOW IS CORRECT.

Finally, certiorari should be denied because the Board's policy is not authorized by the regulation on which it purportedly relies, regardless of whether the Department's interpretation of that regulation receives *Auer* deference, *Skidmore* deference, or no deference at all.

A. The Interpretation of 34 C.F.R. § 106.33 Adopted Below Is Correct, With or Without *Auer* Deference.

Under Title IX, students are "specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving [f]ederal financial assistance.'" *Davis*, 526 U.S. at 650 (quoting 20 U.S.C. § 1681(a)). "The most obvious example" of a Title IX violation is "the overt, physical deprivation of access to school resources." *Id.* The question in this case is whether there is an exception to this general principle that allows schools to deprive transgender students of access to school resources by prohibiting them from using the common restrooms used by other students.

Instead of adopting such an interpretation, the Department properly concluded that when a school provides separate restrooms for boys and girls, it must allow all boys and girls—including boys and girls who are transgender—to use those restrooms. And the only way transgender students can do so is if they are allowed to use restrooms consistent with their gender identity.

The term "sex" in 34 C.F.R. § 106.33, as in the underlying statute, encompasses all physiological, anatomical, and behavioral aspects of sex. That interpretation is consistent with dictionary definitions, *see* Pet. App. 20-23a, it is consistent with *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989), *see* Pet. App. 78-79a (Davis, J., concurring), and it is consistent with this Court's repeated instructions to construe Title IX broadly to encompass "a wide range of intentional unequal treatment," *Jackson*, 544 U.S. at 175.[17]

In the context of a transgender student, however, it is impossible to assign a restroom that corresponds with all those components of sex. As Judge Niemeyer conceded:

> If the term 'sex' as used in the statute and regulations refers to both [sex

[17] This Court's own contemporaneous decisions from the early 1970s refute Petitioner's anachronistic assertion that Title IX and its implementing regulations reflect a terminological distinction between "sex" and "gender." This Court's equal protection cases exclusively referred to "sex" discrimination until *Kahn v. Shevin*, 416 U.S. 351 (1974), when the petitioner's brief and the Court's opinion first used "gender" as a synonym. *See also* Catherine Crocker, *Ginsburg Explains Origins of Sex, Gender*, Associated Press (Nov. 21, 1993).

> assigned at birth] and gender identity, then, while the School Board's policy is in compliance with respect to most students, whose [sex assigned at birth] aligns with their gender identity, for students whose [sex assigned at birth] and gender identity do not align, no restroom or locker room separation could ever . . . satisfy the conjunctive criteria.

Pet. App. 56-57a (Niemeyer, J., dissenting) (emphasis omitted). From that simple fact, Judge Niemeyer concluded that the regulation must allow schools to assign students to restrooms based on their sex assigned at birth instead of their gender identity. *Id.* But that is a policy argument, not an inexorable command from the regulation's plain text.

When the regulation was drafted, few would have conceived that students like G. would have been assigned a female sex at birth and yet, as a result of hormone therapy, have facial hair and other male secondary sex characteristics, have a male designation on his government ID card, and live all aspects of life in accordance with his male gender identity. An interpretation of the regulation allowing G. to use the boys' restroom is no more "novel," Pet. 12, than an interpretation placing him in the girls' restroom. What is "novel" is the existence of transgender students who are finally able to live consistently with their gender identity.

But G. and other transgender students do exist and they must use the restroom, just like any other human being. The regulation does not authorize schools simply to banish transgender

students from the boys' and girls' restrooms entirely. When a school has separate restrooms for boys and girls, all boys and girls, including those who are transgender, must be able to use those restrooms. Absent a regulation specifically addressing which restroom a transgender student should use, the interpretation that actually enables transgender students to use the common restrooms is one that allows transgender students to use restrooms consistent with their gender identity.

Instead of asking which interpretation of 34 C.F.R. § 106.33 provides an equal education to transgender students, Petitioner and the dissent below argue that excluding transgender students from restrooms consistent with their gender identity is the only interpretation of 34 C.F.R. § 106.33 that adequately protects other students' privacy. Even if that were the right question, no one disputes that separating restrooms on the basis of sex reflects traditions of modesty between men and women, but, as the panel explained, "the truth of these propositions" does not answer the question of which restroom a transgender boy like G. should use. Pet. App. 26a.

The Board assumes social customs regarding privacy are built entirely around a person's genitals even in contexts such as restrooms, where there is no exposure to nudity. Pet. 35; Pet. App. 53a (Niemeyer, J., dissenting). But that assertion is hardly self-evident. For many people, the presence of a transgender man (who may look indistinguishable from a non-transgender man) in the women's restroom would be more discomfiting than the presence of a transgender woman (who may look

indistinguishable from a non-transgender woman). Pet. App. 24a n.8. Indeed, in G.'s own experience, his use of the women's restroom was far more disruptive than his current use of the men's restroom has been. C.A. App. 18.

Schools can and do protect all students' privacy without excluding transgender students from the same facilities as everyone else. *See* ED, *Examples of Policies and Emerging Practices* at 7-8. But at the very least, if Petitioner's arguments are driven by concerns about potential exposure to nudity, then the result must be tailored to that concern. There is no rational reason to bar all transgender students from all restrooms regardless of whether students get undressed in front of one another. Title IX does not permit school boards to enact categorical rules prohibiting administrators from allowing any transgender student to use facilities consistent with their gender identity regardless of the facts of any particular situation. *Cf. Carcaño*, 2016 WL 4508192, at *15 (issuing preliminary injunction against "blanket ban that forecloses any form of accommodation for transgender students other than separate facilities").

A categorical rule excluding transgender students from the common restrooms is an "overt, physical deprivation of access to school resources" that violates Title IX and its implementing regulation, fairly construed. *Davis*, 526 U.S. at 650. "The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender." *Id.* That simple principle is enough to resolve this case.

B. The Department's Reasonable Interpretation of its Own Regulation Is Worthy of Deference Under Any Standard.

The Fourth Circuit resolved the appeal on the narrowest available grounds by properly deferring to the Department's reasonable interpretation of 34 C.F.R. § 106.33. In doing so, the Fourth Circuit did not allow the Department to define the meaning of sex. It independently interpreted the term "sex" to include all physiological, anatomical, and behavioral aspects of a person's sex, and then deferred to the Department's judgment of how to "provide separate toilet . . . facilities on the basis of sex" when different aspects of a student's sex diverge. 34 C.F.R. § 106.33. The Department concluded that allowing transgender students to use restrooms consistent with their gender identity is the only way to "provide separate toilet . . . facilities on the basis of sex" in a manner consistent with the regulation's premise that separate restrooms for boys and girls do not deprive students of equal educational opportunity. *Id.* The Fourth Circuit properly deferred to that policy judgment, but the definition of "sex" remains unchanged.

Such deference is particularly appropriate in light of Title IX's structure and the role of the Department in administering the statute pursuant to an express delegation of authority. *See* 20 U.S.C. § 1682. Title IX prohibits all forms of disparate treatment on the basis of sex unless specifically authorized by one of the "narrow exceptions to that broad prohibition" in the statutory text or implementing regulations. *Jackson*, 544 U.S. at 175.

Congress included an exception in the text of Title IX allowing schools to "maintain[] separate living facilities for the different sexes." 20 U.S.C. § 1686. But the authority to provide separate restrooms—and other sex-segregated activities—was created through regulations. 34 C.F.R. § 106.33. Without the regulatory exception, separate restrooms would "fall[] within Title IX's general prohibition against sex discrimination." *Carcaño*, 2016 WL 4508192, at *13.[18]

Congress was well aware that the statute delegated policy questions about restrooms to the administrative agency. During congressional debate, Title IX's sponsor, Senator Bayh, opposed a statutory exception analogous to the "bona fide occupational qualification" exception in Title VII "because all too often this is the hook on which discrimination can be hung." 117 Cong. Rec. 30407 (1971). Instead, he noted that "the rulemaking powers . . . give the Secretary discretion to take care of this particular policy problem." *Id.*; *accord* 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) ("[R]egulations would allow enforcing agencies to permit differential treatment by sex . . . where personal privacy must be preserved."). The decision to permit sex-segregated restrooms is thus "a creature of the Secretary's own regulations." *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006). The Department exercised discretion by

[18] The Department has for decades provided interpretative guidance for its regulations, and that guidance has consistently received deference in light of Title IX's broad delegation of power. *See, e.g.*, *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 96 (2d Cir. 2012) (discussing longstanding deference to policy interpretation from 1979).

permitting differential treatment in the context of restrooms in the first place, and it makes sense to defer to the Department's determination of what practices are consistent with that policy decision. *Cf. City of Arlington, Tex. v. FCC,* 133 S. Ct. 1863, 1876 (2013) (The question is "whether Congress would have intended the agency to resolve the resulting ambiguity. If so, deference is warranted.").

As the agency charged with enforcing Title IX, the Department of Education has "a body of experience and informed judgment," that would merit deference even under the less deferential standard of *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). *See Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 403 (2008). From its nation-wide vantage, the Department has rested its judgment on the collective experiences of students, school districts, and school administrators across the country. *See* Department of Education, *Examples of Policies and Emerging Practices*. As part of the Executive Branch, the Department of Education is also politically accountable for its decisions, and Congress retains the power to overrule the Department's policies if it wishes to do so. *Cf. Holowecki*, 552 U.S. at 403.

Title IX entrusts the administrative agency with responsibility for making policy judgments about when to permit differential treatment on the basis of sex. The Department of Education's reasonable interpretation of its own regulation falls squarely within that delegation of authority and is worthy of deference. If Petitioner disagrees with the Department's judgment, its remedy lies with the political branches, not this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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