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 a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

BRIEF FOR THE CATO INSTITUTE, PROFESSORS JONATHAN H. ADLER, JAMES F. BLUMSTEIN, RICHARD A. EPSTEIN, AND MICHAEL W. MCCONNELL, AND CAUSE OF ACTION INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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January 10, 2016

QUESTION PRESENTED

This brief addresses the first question accepted for review by the Court:

Should courts extend deference to an unpublished agency letter that, among other things, does not carry the force of law?

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INTEREST OF THE *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Jonathan H. Adler is the inaugural Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, where he teaches and writes on administrative and constitutional law, among other subjects.

James F. Blumstein is one of 13 University Professors at Vanderbilt; he was the first awarded that title in the law school and the first to receive a second tenured appointment in the medical school. The director of Vanderbilt's Health Policy Center, Blumstein has served as former Tennessee Governor Phil Bredesen's counsel on TennCare reform and has participated in a number of Supreme Court cases, arguing three. He has been an active teacher/scholar in health law and regulatory policy for over 40 years.

Richard A. Epstein is the Laurence A. Tisch Professor of Law at NYU School of Law. He also

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[1] Rule 37 statement: All parties received timely notice of amicus's intent to file this brief; Petitioners filed a blanket consent, while Respondent's consent letter has been lodged with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

serves as the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law Emeritus and senior lecturer at the University of Chicago. He has written numerous books and articles on a wide range of legal and interdisciplinary subjects.

Michael W. McConnell is the Richard and Frances Mallery Professor and director of the Constitutional Law Center at Stanford Law School, and Senior Fellow at the Hoover Institution. He is a leading authority on the relation of individual rights to government structure, as well as constitutional law and history. Before joining Stanford, he served as a judge on the U.S. Court of Appeals for the Tenth Circuit. He has also argued 15 cases in this Court.

Cause of Action Institute ("CoA Institute") is a nonprofit, nonpartisan oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law work together to protect liberty and economic opportunity. As part of this mission, CoA Institute works to expose and prevent government misuse of power by appearing as *amicus curiae* in federal courts. *See*, *e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

This case interests *amici* because it concerns courts' ability to check the power of the administrative state through meaningful judicial review.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title IX, part of the United States Education Amendments of 1972, was passed to ensure that schools and universities did not discriminate on the

basis of sex. It states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 USC § 1681. The statute itself allows for certain exceptions to this prohibition, and its implementing regulations have always allowed schools to provide "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. This regulation has been uncontroversial for most of its history, and the traditional reading of the exception—interpreting "sex" to refer to the biological difference (particularly with regard to reproductive organs) between males and females—was never altered or challenged by the Department of Education (DOE) prior to the events surrounding the present litigation.

G.G., at the time the events relevant to this litigation occurred, was a student at Gloucester High School. G.G. was born biologically female but has identified as a boy from around the age of 12. He remains biologically female, though he has started hormone therapy. This case arose out of G.G.'s opposition to the school board's policy of not allowing him to use the boys' restroom and locker room (although he was provided access to private unisex bathrooms open to all students). Hearing of the controversy from a transgender rights activist, a Department of Education Office of Civil Rights (OCR) employee named James A. Ferg-Cadima sent a letter to that third party stating that "Title IX . . . prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity."

G.G. then filed suit against the school board, alleging that the board's policy violated Title IX and the Equal Protection Clause of the United States Constitution. The Department of Justice (DOJ) filed a "statement of interest" in the case, holding the Ferg-Cadima letter out as the controlling interpretation of Title IX and its implementing regulations. The district court refused to give controlling deference to the letter and G.G. appealed to the Fourth Circuit. The Fourth Circuit reversed the district court's dismissal, affording the OCR's interpretation of the regulation *Auer* deference. Indeed, the Fourth Circuit's deference to the Ferg-Cadima letter was outcome-determinative. Without such deference, the court acknowledged, the interpretation was "perhaps not the intuitive one." Pet. 23a.

Following the Fourth Circuit's ruling, federal officials in the DOE and DOJ issued a "Dear Colleague" letter to every Title IX recipient in the country, affirming and expanding on the contents of the Ferg-Cadima letter. The Gloucester County School Board then sought Supreme Court review, which was granted on October 28, 2016.

While advocates on both sides of this contentious cultural issue may wish to draw the Court into their debates over the nature of sexuality, *amici* believe that the more straightforward legal path is simply to reverse the Fourth Circuit's deference to the Ferg-Cadima letter and leave the arguments over privacy and nondiscrimination to other forums. We believe that judicial deference to informal agency statements of this sort—statements that have not been tested through notice-and-comment rulemaking—undermine the separation of powers, defeat the pur-

poses of notice-and-comment as set forth in the Administrative Procedure Act, thwart the protections of judicial review of agency rulemaking, and encourage regulatory brinkmanship without full consideration of congressional will or practical consequences. Notice-and-comment rulemaking has a purpose. *Auer* deference to informal agency statements of opinion is antithetical to that purpose.

Amici take no position here on Title IX's definition of "discrimination on the basis of sex," the meaning of the statute's exception for "separate living facilities for the different sexes," or the meaning of OCR regulations extending that exception to bathrooms, locker rooms, showers, or sports teams.[2] Congressional and administrative hearings—and public discourse more generally—are the best ways for our society to ruminate on such novel questions. A letter written by a low-level bureaucrat is not. Acting Deputy Assistant Secretary of Policy Ferg-Cadima may be the wisest man since Solomon—or not—but our system of legislation and regulation is not dependent on the Solomonic wisdom of acting deputy assistant secretaries.

This case is important because *process matters*. Those who hold the reins of political power will not always be benevolent, self-restrained public servants, and the procedural safeguards that seem frustrating and counterproductive in one instance may very well be necessary bulwarks against arbitrariness or oppression in another. As anyone who has lived in a

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[2] Prof. Blumstein has separately argued that the enforcement guidance is inconsistent with the sex-segregation regime that characterizes Title IX. *See* James F. Blumstein, *New Wine in Old Bottles: Title IX and Transgender Identity Issues*, Vanderbilt Pub. L. Research Paper No.16-51, http://bit.ly/2jbBEkL.

hurricane-prone area can attest, the right time to board up your windows is before the storm hits, not after they've already been shattered.

We urge the Court to limit the scope of its rule from *Auer v. Robbins*, 519 U.S. 452 (1997). Under the *Auer* doctrine, courts afford agency interpretations of their own regulations controlling deference. This deference, we submit, must not be afforded to informal, non-binding agency pronouncements that have not been subjected to either of the paths for giving agency action the force of law: adjudication or rulemaking.

ARGUMENT

I. THE COURT SHOULD CONFORM *AUER* DEFERENCE TO THE RULES OF *CHEVRON* DEFERENCE

Once largely considered uncontroversial, *Auer* deference has come under increasing scrutiny. Various judges—including members of this Court—have recently voiced concerns with the doctrine's effects on due process and the separation of powers, with some going as far as calling for *Auer* to be overruled. *See, e.g., Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1208 (2015) (Sotomayor, J.); *id.* at 1211 (Scalia, J. concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment); *Decker v. N.W. Env. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring); *id.* at 1339–42 (Scalia, J., dissenting); *Talk America, Inc. v. Mich. Bell Telephone Co.*, 131 S. Ct. 2254, 2265 (2011) (Scalia, J., concurring); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

There is also serious debate among the circuit courts on several questions concerning *Auer*'s scope,

particularly on the question of whether *Auer* deference should apply to informal agency pronouncements. Compare *United States v. Lachman*, 387 F.3d 42, 54 (1st Cir. 2004) (holding that *Auer* deference is inappropriate for interpretations contained in informal pronouncements); *Keys v. Barnhart*, 347 F.3d 990, 993–95 (7th Cir. 2003) (same); *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002) (same); with *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 207–08 (2d Cir. 2009) (holding that *Auer* deference is warranted even in informal contexts); *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930 (9th Cir. 2006) (same); *Smith v. Nicholson*, 451 F.3d 1344, 1349–50 (Fed. Cir. 2006) (same).

In *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, the Court held that courts must give "effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute." 467 U.S. 837, 842–44 (1984). In a series of cases almost 20 years old, the Court then limited *Chevron* deference to ensure that agencies not circumvent notice-and-comment rulemaking when they interpret Congress's statutes. *Christensen v. Harris County* held that "[i]nterpretations 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." 529 U.S. 576, 587 (2000). A year later, the Court reaffirmed that only interpretations carrying the force of law warrant *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218 (2001). Since agency discretion to interpret broad statutory directives is derived only from Congress's delegation of such authority, there must be an indication that Congress intended the mechanism by which a ruling

acquired the force of law. *Id.* at 221. That congressional-intent requirement is generally (but not necessarily) satisfied by notice-and-comment rulemaking. *Id.* at 227–31. Agency statutory interpretations not promulgated through notice-and-comment, formal adjudication, or some other method that legally binds the agency to its decision are entitled to deference only as far as their reasoning is persuasive, under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Until now, the Court has not had occasion to extend these *Chevron* principles to *Auer*. Under *Auer*, an agency pronouncement interpreting one of its regulations, regardless whether it has the force of law—or whether anyone outside the agency is even aware of the interpretation before enforcement—is treated as entitled to controlling deference. This incongruence between the two deference doctrines creates unnecessary confusion and uncertainty, and muddies the core justifications for providing deference.

Precisely the same reasons that lead this Court to insist that *Chevron* deference attaches only to agency action with the effect of law apply to *Auer* deference. Indeed, the failure to harmonize these two types of deference has created an absurd situation in which an informal letter from a low-level bureaucrat redefining a word in a regulation may be afforded more deference than the regulation itself (which had actually gone through public notice-and-comment rulemaking). This bizarre circumstance provides agencies—already loath to undertake the expensive and time-consuming notice-and-comment process—an additional incentive not to engage the public when making policy decisions. And that goes double for cases like this one, where the agency is attempting to

promulgate a controversial policy that is likely to provoke legal challenges. Why go through all that trouble if it's just going to put you in a less advantageous litigating position anyway?

This case illustrates a further aspect of the *Chevron-Auer* divergence. If deference regarding *statutory* interpretation requires certain safeguards and procedures but deference regarding *regulatory* interpretation does not, agencies have the incentive to manipulate the legal form—statute or regulation—they purport to interpret. The present case is a classic example. Title IX itself contains the operative language at issue: whether an institution's statutory right to maintain "separate living facilities for the different sexes" refers to biological sex. 20 U.S.C. §1681(a). Yet because the immediate factual context involves bathrooms rather than living facilities, the parties have looked further to OCR regulation 34 C.F.R. § 106.33, which provides that institutions may provide separate "toilet, locker room, and shower facilities on the basis of sex." Is the operative language of the separate-facilities exception statutory or regulatory? The answer could be either or both. The court below treated it as regulatory and thus applied *Auer* deference. Had the court treated it as statutory, *Chevron* would have applied and the case would have come out the opposite way. Because in many cases statutes and regulations cover (much of) the same ground, the choice between *Auer* and *Chevron* will often be arbitrary. All the more reason to bring the prerequisites for the two kinds of deference into harmony.

II. CURRENT *AUER* DOCTRINE UNDERMINES DUE PROCESS, THE RULE OF LAW, AND SEPARATION OF POWERS

A. *Auer* Undermines Due Process and the Rule of Law

It is a fundamental maxim of American law that, in order to be legitimate, the law must be reasonably knowable to an ordinary person. A properly formulated law must provide fair warning of the conduct proscribed and be publicly promulgated. These are not merely guidelines for good public administration; they are bedrock characteristics of law *qua* law. See Lon L. Fuller, The Morality of Law 33–38 (1964) (arguing that lack of public promulgation and reasonable intelligibility are two of the "eight ways to fail to make law"). *Auer* deference, at least as formulated in the current doctrine, violates this maxim by making it possible for administrative agencies to make changes to their regulations that have significant impacts on regulated persons without ever even publishing the changes to the public, let alone allowing the public to participate through notice-and-comment rulemaking. It allows "[a]ny government lawyer with a laptop [to] create a new federal crime by adding a footnote to a friend-of-the-court brief." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring).

When surveyed, two in five agency officials whose job duties include rule-drafting confirmed that "*Auer* deference plays a role in drafting" their regulations. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1066 (2015). Allowing agencies to reinterpret their ambiguous rules at will, with no need for formal processes, incentivizes

them to write vague regulations—to ensure the widest range of plausible potential meanings. In the words of Justice Scalia, "giving [informal agency interpretations] deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

Auer's fair-notice-related defects are not endemic to the rest of the Court's administrative-deference jurisprudence, and limiting *Auer* need not also doom *Chevron*. The difference is that, unlike *Auer*, C*hevron* has *Mead* and, as discussed above, the changes *amici* support would just extend *Mead*'s reasoning to agency interpretations of their own regulations, bringing the two doctrines into closer alignment. The distinction between published rules and nonbinding interpretations found in letters or circulars—heretofore unrecognized in the regulatory-interpretation jurisprudence—ensures that only interpretations that have been given public scrutiny receive controlling deference. Agencies are free to issue informal interpretations to quickly and efficiently provide guidance to employees and regulated parties, but those interpretations lack the force of law and are not given deference by the courts. Major policy changes, however, require notice-and-comment rulemaking. This system ensures that someone, whether the courts through careful review or the public through the notice-and-comment process, is able to keep watch over what the agency is doing. *Mead* forced agency interpretations of statutes into the light, while agency interpretations of their own regulations remain in the shadows.

B. *Auer* Undermines Separation of Powers

Auer deference for informal interpretive letters "contravenes one of the great rules of separation of powers [that he] who writes a law must not adjudge its violation." *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment). Affording controlling deference to agency interpretations of their own regulations gives executive agencies the power both to write the regulations they are charged with enforcing and later declare just what the ambiguous words of those regulations say—a task traditionally left to courts. Even Congress is not provided this honor. If Congress wants to change the meaning of one of its statutes, it has to pass a new law, and then courts engage in their own independent review of what the statute actually means. Regardless of the persuasiveness of evidence regarding legislative intent, at no point do courts simply accept Congress's interpretation sight unseen.

Auer thus provides us with the absurd result that, when Congress delegates rulemaking authority to an agency, it effectively delegates greater authority than Congress itself possesses. Equally absurd is the fact that—at least since *Christensen* and *Mead* forced agency interpretations of statutes into the light—an agency receives greater deference when it changes policy by reinterpreting a footnote in an *amicus* brief or via an informal guidance letter than when it engages in formal reinterpretation of a statute. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 5 (1996) (noting how *Seminole Rock* [and *Auer*]'s "plainly erroneous" standard "has produced the bizarre anomaly that a nonlegislative or ad hoc docu-

ment interpreting a regulation garners greater judicial deference (and thus potentially greater legal force) than does a legislative rule, such as the one involved in *Chevron*, in which an agency interprets a statute."). The collection, in effect, of legislative and judicial authority into the hands of relatively unaccountable administrative agencies that *Auer* deference allows undermines the separation of powers at the center of the country's constitutional structure.

C. This Case Shows *Auer* at Its Worst

This case is an egregious, yet typical, example of the absurd results *Auer* deference can lead to when a federal agency decides to act aggressively. The Ferg-Cadima letter asserting OCR's new interpretation of the bathroom exception to Title IX in 34 C.F.R. § 106.33 represented an abrupt change in longstanding agency and public understanding of the regulation—one that stood in direct conflict with Congress's repeatedly expressed policy choices. The interpretation contained in the letter did not go through notice-and-comment rulemaking. Indeed, it was not published to the general public at all. It was an informal letter written by a relatively low-level employee and was not considered binding on the agency itself. Under *Auer*, the Fourth Circuit has given this unpublished, non-binding letter from a minor bureaucrat the full force of a federal statute.

Nor did the "Dear Colleague" letter go through any sort of rulemaking when it was written in response to the current litigation. The lack of public comment is abundantly clear in that it shows no regard for any of the various legitimate concerns individuals have raised about transgender restroom and locker room access. The letter shows an OCR that has

let its own policy preferences take it above and beyond its delegated authority, concerning itself with neither the express will of Congress nor the good faith opinions of regulated parties, let alone the procedures required by constitutional structure and the Administrative Procedure Act. The APA's notice-and-comment procedures exist specifically to counter aggressive agency behavior of this sort. But this Court's *Auer* jurisprudence, as currently applied, allows (if not encourages) agencies to do an end run around the statutory requirements simply by promulgating vague rules and cloaking sweeping policy pronouncements as merely informal interpretations.

III. *AUER* DEFERENCE SHOULD BE LIMITED TO INTERPRETATIONS THAT HAVE GONE THROUGH NOTICE-AND-COMMENT

An adjustment to the *Auer* doctrine to reconcile it with modern *Chevron* jurisprudence would mitigate most of *Auer*'s largest defects. As noted in Part I, *supra*, *Chevron* held that courts must give "effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute." 467 U.S. at 842–44. Then *Christensen* explained that "[i]nterpretations 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." 529 U.S. at 587. Then *Mead* reaffirmed *Christensen*'s central holding that informal interpretative statements lacking the force of law should be afforded only the lesser *Skidmore* deference. 533 U.S. at 229–34.

Similarly, in *Auer*, the Court held that an agency's interpretation of its own regulation is controlling un-

less "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Court should follow *Christensen* and *Mead*'s limitation on *Chevron* by placing a similar restriction on *Auer*, especially when an agency's interpretative actions are nonbinding on the agency itself. If agencies want their interpretations to have the force of law—and to have courts defer to them—they should have to go through the trouble of notice-and-comment rulemaking. If they instead want flexibility and efficiency, they shouldn't enjoy judicial deference. There's a tradeoff—such that agencies remain accountable to either the public or the courts—but if the decision below stands, agencies will get the best of both worlds and the regulated person will get neither an opportunity to participate in rulemaking nor a proper day in court with real judicial review.

CONCLUSION

For the foregoing reasons, and those stated by the petitioners, the Court should reverse the decision of the Fourth Circuit and limit *Auer* deference to agency pronouncements having the force of law.

Respectfully submitted,

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