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 OF *AMICI CURIAE* GAIL HERIOT AND PETER N. KIRSANOW, MEMBERS OF THE U.S. COMMISSION ON CIVIL RIGHTS, IN THEIR CAPACITIES AS PRIVATE CITIZENS, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

To what degree, if any, should courts defer to the argument of the Department of Education's Office for Civil Rights that Title IX of the Education Amendments Act of 1972, Pub. L. No. 92-318, 20 U.S.C. § 1681 et seq., and/or its implementing regulations require federally-funded schools to allow anatomical females who psychologically identify as males to use the toilets, locker rooms and showers set aside for male students (and vice versa)?

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INTEREST OF AMICI CURIAE[1]

Gail Heriot and Peter N. Kirsanow ("Amici") are two members of the eight-member U.S. Commission on Civil Rights ("the Commission"). Members are part-time appointees of the President or Congress. This brief is being filed in Amici's individual capacities as private citizens.

The Commission was established pursuant to the Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634 (1957). One of the Commission's core duties is to gather evidence on issues and make recommendations to Congress, the President and the American people. As then-Senate Majority Leader Lyndon Johnson put it, the Commission's task is to "gather facts instead of charges"; "it can sift out the truth from the fancies; and it can return with recommendations which will be of assistance to reasonable men." 103 Cong. Record 13,897 (1957)(statement of Sen. Johnson).

As Commissioners, Amici have researched various issues relating to transgenderism. The Commission's recent report, *Peaceful Co-Existence: Reconciling Nondiscrimination Principles with Religious Liberties*

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to this brief's filing. A letter evidencing Petitioner's consent has been filed with the Clerk of the Court; Respondent consented via e-mail. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amici Curiae*'s intention to file in support of certiorari. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

(2016), deals in part with those issues. The Commission's recent briefing, entitled *Examining Workplace Discrimination Against Lesbian, Gay, Bisexual and Transgender Americans*, which was held on March 16, 2015, but which has not yet been made into a written report, also dealt in part with those issues.

Amici believe that, as a result of their Commission work as well as their experience as a law professor (Heriot) and as a practicing lawyer and adjunct law professor (Kirsanow), which gave rise to their respective appointments, they are in a special position to inform the Court about the issues in this case.

SUMMARY OF ARGUMENT

This case concerns an administrative agency run amok. Up until very recently, there was a strong, consensus-driven, American custom that public toilets, locker rooms and showers were separated on the basis of sex. No law required this; it was simply accepted as a reasonable privacy protection. Very few special cases arose where exemptions were requested, but when they did, they were dealt with on the basis of ad hoc decisions by local property owners or their agents (or, more specifically, in the case of schools, by local school administrators). No doubt there were also a few cases of under-the-radar individual "self help" both for good reason and bad. Such "self help" will occur no matter what the applicable law or custom (although some laws or customs will produce more cases of badly-motivated flouting the law or custom than others).

Enter the Department of Education's Office for Civil Rights ("OCR") to uproot that longstanding custom and replace it with a one-size-fits-all mandate of its own devising. Henceforth, federally-funded

schools must separate students based on "gender identity" rather than sex. Intimate facilities set aside for women and girls must be available for use by anatomical men and boys who psychologically identify as female, despite their obviously male anatomy. Facilities set aside for men and boys must be available for use by Respondent and other anatomical women and girls who psychologically identify as male. OCR purports to be simply "interpreting" 34 C.F.R. § 106.33 (the "1975 Regulation"), which was fashioned by its agency predecessor, the Department of Health, Education and Welfare ("HEW"), and signed into law by President Gerald Ford. But that regulation simply authorizes federally-funded schools to have "separate toilet, locker room, and shower facilities" based on "sex." OCR's interpretation would thus have surprised President Ford, HEW bureaucrats and practically everyone else alive during the 1970s. Even if it could be demonstrated that OCR's interpretation is exactly what President Ford and HEW had in mind, that would only mean that the 1975 Regulation was ultra vires. Title IX of the Education Amendments Act of 1972, Pub. L. No. 92-318, 20 U.S.C. § 1681 et seq. ("Title IX"), which authorized HEW (and now the Department of Education) to issue rules, prohibits only sex discrimination and not gender identity discrimination. The Members of Congress who passed Title IX and the American public who applauded its passage would have astonished at OCR's bold, new interpretation.

Nevertheless, schools must obey OCR. Those that do not risk a funding cut-off. OCR wields great power. The authority of local school administrators, on the other hand, is dwindling at an alarming rate.

Under ordinary circumstances, one would expect the courts to check OCR's power (although, alas, when OCR operates through guidances rather than more easily challenged rules, a large percentage of its most controversial actions go unchecked). In this case, however, the U.S. Court of Appeals for the Fourth Circuit (the "Fourth Circuit"), citing *Auer v. Robbins*, 519 U.S. 452 (1997), declined to examine the 1975 Regulation or Title IX directly and instead held that it must defer to OCR.

This was error. For the following reasons (as well as reasons addressed elsewhere), this Court should grant the Petition and address that error:

1. The largely-discredited *Auer* decision does not even apply in a case in which an agency's interpretation of its own (or in this case its predecessor's) regulation effectively interprets the underlying statute itself. See *Gonzales v. Oregon*, 546 U.S. 243 (2006). To rule otherwise would circumvent *United States v. Mead Corp.*, 533 U.S. 218 (2001), and do serious damage to democratic processes. *See infra* at Section I.

2. Under any possible level of deference to OCR, its transgender policy is implausible as an interpretation of either the 1975 Regulation or Title IX itself. Indeed, OCR does not even claim that its policy was the contemporary understanding of what those measures do. *See infra* at Section II.

3. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), are inapplicable to a case like this in which a duly-promulgated

rule (the 1975 Regulation) explicitly authorizes the separation of toilets, locker rooms and showers by sex. It is thus not true that, despite contemporary understandings of Title IX's text and the 1975 Regulation, OCR's transgender policy was implicit in those enactments from the start. Title IX may indeed offer some yet-to-be-determined measure of protection to transgendered individuals. But it does not mandate special treatment in intimate facilities, since sex-separated intimate facilities are explicitly authorized. *See infra* at Section III.

4. OCR's transgender policy destroys the flexibility of local school administrators to deal with transgendered students on a case-by-case basis. Straightjacketing principals and teachers in this manner is exceedingly unwise. In some cases, OCR's notion that transgendered students should use the toilets, locker rooms and showers set aside for the sex they identify with rather than the sex they are may work fine. In other cases, it may be a disaster. Individual students—both transgender and cisgender—differ in their sensitivity when asked to undress or shower with someone of the opposite sex and/or gender. Sometimes the best solution is to assign a transgender student to remain with members of his sex; on other occasions, assigning him to a faculty facility may be best. OCR's policy forecloses all but one option. *See infra* at Section IV.

5. Because this case is so prominent in the public mind and strikes at a deeply rooted custom of the American people, it is important for the

Court to grant the petition and vindicate the rule of law. Even those who favor OCR's policy often understand that it is taking an extraordinarily aggressive stance here. Large numbers of Americans both oppose the policy and believe it to be an egregious overreach by OCR. If the policy is not reversed, thus re-channeling the impulse that led to it back into the democratic process, it will further erode the public's confidence in the rule of law. Without public confidence in the rule of law, the rule of law itself withers and dies. Americans of all ideological stripes will learn to miss it when it is gone. *See infra* at Section V.

REASONS FOR GRANTING THE WRIT

I. Under *Gonzales v. Oregon*, OCR is Not Entitled to *Auer v. Robbins* Deference, Because the 1975 Regulation Simply Parrots the Key Language of Title IX; at Best One Could Argue for *Skidmore v. Swift & Co.* "Deference."

The core provision of Title IX of the Education Amendments Act of 1972, Pub. L. No. 92-318, 20 U.S.C. § 1681 et seq. ("Title IX") is as follows:

> *No 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 U.S.C. § 1681(a) (emphasis added).

That core prohibition is subject to a number of exceptions, including this one:

> *[N]othing contained herein shall be construed to prohibit any educational institution … from maintaining separate living facilities for the different* ***sexes****.*

20 U.S.C. § 1686 (emphasis added).

Based on this, the Department of Health, Education and Welfare created rules clarifying Title IX. Among them was the 1975 Regulation, which was signed into law by President Gerald Ford, pursuant to 20 U.S.C. § 1682, which requires Presidential approval for Title IX rules. Congress understood in 1972 that political accountability was particularly important in potentially controversial areas of the law. It wanted to ensure that with Title IX the President could be held accountable for the actions of the bureaucracy charged with implementing it.

The 1975 Regulation reads:

> *A recipient may provide separate toilet, locker room, and shower facilities on the basis of* ***sex,*** *but such facilities provided for students of one* ***sex*** *shall be comparable to such facilities provided for students of the other* ***sex****.*

34 C.F.R. § 106.33 (emphasis added).

The key word is "sex." The power to interpret the word "sex" in the 1975 Regulation carries with it the power to interpret "sex" in Title IX. That is why *Gonzales v. Oregon*, 546 U.S. 243 (2006), held that deference under *Auer v. Robbins*, 519 U.S. 452 (1997), is inappropriate when an agency's interpretation of its own regulation effectively interprets the underlying statute. To hold otherwise would allow an agency to do an end run around *United States v. Mead Corp.*,

533 U.S. 218 (2001), which holds that deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), should not be accorded to interpretations, policy statements, advisory letters, or amicus briefs. As the Court stated in *Mead*, "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27.

The May 13, 2016 Dear Colleague Letter from Catherine E. Llamon and Vanita Gupta as well as the January 5, 2015 Letter from James A. Ferg-Cadima (collectively, the "Transgender Guidances"), which set out OCR's transgender policy, are thus not entitled to *Auer* deference. Conferring *Auer* deference on the Transgender Guidances would essentially confer *Chevron* deference in a context where *Mead* explicitly held *Chevron* deference does not belong. The Transgender Guidances are really interpreting Title IX. *Chevron* deference applies when OCR acts to promulgate Title IX rules subject to notice and comment and the President signs the rule. That has not happened.

If OCR's opinion is entitled to any consideration, it would have to be under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). But *Skidmore* deference is nothing more than the deference one gives to policy experts generally: Hear them out, and *if* their views are persuasive, follow them.

All this, however, is over-determined. OCR's interpretation of Title IX is so unpersuasive that it would

fail under any deference rule. The Transgender Guidances simply do not reflect what any legislator intended or any member of the public should have understood by either Title IX or the 1975 Regulation.

II. No Matter What Level of Deference Is Employed, OCR's Interpretation of Title IX and the 1975 Regulation Is Implausible.

Amici understand and appreciate OCR's concern for transgendered students. But Amici also understand and appreciate the concept of representative democracy. OCR has badly overreached here.

Title IX prohibits only sex discrimination. Consequently, if it is not sex discrimination, it is not prohibited. All questions concerning what is prohibited under the Act thus must begin with "Is this activity sex discrimination?"

Amici do not claim that the answer to that question is never ambiguous or that there are no cases in which an individual's sex is difficult to categorize. While the number of difficult-to-categorize cases is extremely small, they do exist.[2] Nevertheless, any as-

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[2] Perhaps transsexuals—individuals who have undergone what was called a "sex-change operation" by having their genitals modified so as to appear like those of their preferred sex—are the best example of a difficult-to-classify case. One could define "sex" biologically in a way that looks first at one's chromosomes in which case, sex cannot be changed by surgery. Alternatively, one could use anatomy as the primary indicator of sex, in which case those who have undergone sex-change operations would be held to have changed their sex, just as the term indicates. In the context of intimate facilities, an argument for the anatomical definition is especially persuasive. But the term "*sex-change operation*" helps prove Amici's earlier point: In the 1970s, one's sex

sertion in 1972 that one day Title IX would be interpreted to require schools to group anatomically male students who psychologically "identify" as female with actual female students for the purposes of intimate facilities would have been greeted with derision. That would not have been considered a difficult-to-categorize case. If such an assertion had somehow been considered plausible and thus taken seriously, it might well have scuttled the bill.

In the 1970s, nobody would have thought that an anatomical boy who identifies himself as a girl and a girl were members of the same "sex." This is not to say that they would not have cared about the understandable sensitivities of a student with what is now known as "gender dysphoria," see Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013).[3] Members of Congress might have recognized that such a student may sometimes require special accommodations. But they never would have said that if a school failed to group an anatomical boy with the actual girls for the purposes of "separate toilet, locker room, and shower facilities" organized "on the basis of sex" that it was engaging in sex discrimination. Title IX was not designed to deal with transgenderism.[4]

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was not a matter of one's psychological identification. If it had been, the operation would have been called a "sex-confirmation operation." The term instead confirms that psychological identification is insufficient to determine sex.

[3] Earlier, it was called "gender identity disorder." See Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000).

[4] Title IX's legislative history is scanty. Insofar as it exists, it shows that sex was seen as anatomical. See, e.g., Testimony of Wilma Scott Heide, Discrimination Against Women: Hearings Before the Special Subcommittee on Education of the Committee

In its Transgender Guidances, OCR did not point to a single case in which *anyone* during the 1970s used the statutory terms "sex" or "discrimination," in a manner consistent with its policy. Amici have searched to no avail for such a usage in a newspaper, magazine or legal source. They do not believe any such usage existed at the time, but if it did, it would have been very rare.

Instead, Amici found that the term "transgender" was coined specifically to contrast with "transsexual" and was intended to describe individuals who had adopted the traits of the opposite sex *without having actually attempted to cross over into "becoming" a member of the opposite sex* (through the body's surgical alteration). In 1969, Virginia Prince, an anatomical male who lived as a woman, wrote in the underground magazine *Transvestia*:

> *"I, at least, know the difference between sex and gender and have simply elected to change the latter and not the former. If a word is necessary, I should be termed a 'transgenderal.'"*

Virginia Prince, *Change of Sex or Gender*, 10 Transvestia 53, 60 (1969), quoted in Richard Elkins & Dave King, The Transgender Phenomenon 82 (2006).

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on Education and Labor, U.S. House of Representatives, on H.R. 16098, 91st Cong., 2d Sess. at 134 (June 17, 1970) ("the only job for which no woman can or could be qualified is sperm donor"); Statement of Lucy Komisar, Discrimination Against Women: Hearings Before the Special Subcommittee on Education of the Committee on Education and Labor, U.S. House of Representatives, on H.R. 16098, 91st Cong., 2d Sess. at 423 (June 26, 1970) ("Where is it written that a uterus uniquely qualifies a woman to wield dust mops …?").

Prince's term did not catch on quickly. Neither the *Washington Post* nor the *New York Times* used the term "transgender" or "transgenderal" from 1960 through 1979. The Compact Oxford English Dictionary (2d ed. 1991) does not contain any form of the term.

Over the years, the concept of "gender" has been used, particularly in the LGBT community, specifically as a contrast with "sex." While "sex" is seen as a biological term, "gender" is seen as a term that refers to various cultural traits associated with sex, but separate from sex itself. See Susan Scutti, *What Is the Difference Between Transsexual and Transgender?: Facebook's New Version of "It's Complicated*, Medical Daily (March 17, 2014), available at http://www.medicaldaily.com/what-difference-between-transsexual-and-transgender-facebooks-new-version-its-complicated-271389 ("It is often said sex is a matter of the body, while gender occurs in the mind."). Nothing highlights the fact that the two concepts are different better than the term "cisgender," which was coined in the 1990s to describe those individuals whose gender and sex match.[5]

This is one of the increasingly rare controversies where fair-minded, knowledgeable individuals on the left and right often agree: The Transgender Guidances cannot be justified as an exercise of authority under Title IX. See Ron Grossman, *Commentary: Transgender Ruling and "Deeply Troubling" Executive*

[5] Google defines "cisgender" as "denoting or relating to a person whose self-identity conforms with the gender that corresponds to their biological sex; not transgender."

Action, Chicago Tribune (Aug, 26, 2016) (self described "liberal" expressing deep misgivings over the Transgender Guidances); Complaint in *Women's Liberation Front v. U.S. Department of Justice*, No. 1:16-cv-00915 (D.N.M. filed Aug., 11, 2016) (self-described "radical feminists" bringing a lawsuit based on the Transgender Guidances).

For OCR suddenly to claim that when Congress used the word "sex" in Title IX, it was understood or intended to mean "gender" would thus be far-fetched—*so far-fetched that the Transgender Guidances do not claim it*. Instead, its argument is constructed on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

III. *Price Waterhouse* and *Oncale* Are Inapplicable to Cases Where Separation By Sex Is Explicitly Authorized By Regulation; Thus, It Cannot Be Said that the OCR's Policy Was Implicit in the Logic of Title IX in a Way Congress Originally Failed to Recognize.

OCR placed great reliance on *Price Waterhouse* and *Oncale* in explaining the Transgender Guidances. Indeed, this is an additional reason that *Auer* or even *Skidmore* deference is inappropriate here. The courts are in a better position to interpret judicial opinions than is OCR.

OCR argues that the logic of *Price Waterhouse* and *Oncale* requires anatomical boys who identify as girls to be grouped with actual girls (and vice versa) for intimate facilities. But that is incorrect. Start with *Price Waterhouse*: It concerned a woman who alleg-

edly had not been promoted because she was perceived to be too aggressive. The court reasoned that if a male employee with the same aggressive personality would have been promoted, then she was discriminated against on account of her *sex* within the meaning of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 42 U.S.C. § 2000e et seq. ("Title VII").

That much makes some logical sense. But let us try that same reasoning in connection with the Transgender Guidances: Suppose a school has an anatomically male student who identifies psychologically as female. Would a female student with the same identification have been permitted to use the girls' shower? Yes, of course. But that's very different from *Price Waterhouse*, because Title IX and the 1975 Regulation specifically authorize schools to "provide separate toilet, locker room, and shower facilities on the basis of sex." Indeed, applying the *Price Waterhouse* reasoning ends up proving too much. ***Consider instead an anatomically male student who identifies as male. It is still true that his female counterpart—an anatomical female, no matter what her gender identity—would have been permitted to use the girls' shower. Yet we know that schools are explicitly authorized to have separate showers for each sex.*** *Price Waterhouse* simply has nothing to do with this case. The 1975 Regulation gives schools a dispensation from Title IX's ban on sex discrimination for the purposes of separating the sexes for intimate facilities.

Oncale is just more of the same. The plaintiff there was a male roustabout on a Gulf of Mexico oil platform. He alleged that he had been severely sexually

harassed by his fellow male crew members. A unanimous Court held that he could sue for sexual harassment under Title VII and that the crucial factual issue was "whether members of one sex are exposed to disadvantageous terms or conditions … to which members of the other sex are not." 523 U.S. at 80 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring). Hence plaintiff Oncale needed only to prove that a similarly-situated female would not have been harassed as he was.

If one tries to apply *Oncale* to the Transgender Guidances, it provides no support. It is true that an anatomically female student who identifies as female is permitted to use the girls' shower, while an anatomically male student who identifies as female may not be—or at least it was true prior to the Transgender Guidances. But that's because separate showers for each sex are explicitly authorized by the 1975 Regulation.

Attempting to cram the *Price-Waterhouse/Oncale* reasoning into these cases results in a dead end: If the boys were girls, they, too, would have been allowed to use the girls' showers. That may suggest that separate showers are a Title IX violation—until we shake ourselves and remember that separate showers for each sex are explicitly authorized by law.

Note that *Price Waterhouse* and *Oncale* may well have some bearing on other cases involving transgendered individuals. One could argue based on those cases, for example, that sex-specific dress codes—such as rules forbidding boys from wearing dresses—are prohibited. Such a hypothetical would be distinguishable from *Price Waterhouse* and *Oncale*, and there is no need for Amici to express an opinion

on its proper outcome. But at least one can follow the logic.[6]

IV. OCR's One-Size-Fits-All Diktat Ties the Hands of School Administrators Who Otherwise Would Have Options in Ensuring that Transgendered Students As Well as Other Students Are Treated Fairly and Compassionately.

The 1975 Regulation was necessary for just one reason: Title IX might otherwise have been interpreted to forbid separate toilets, locker rooms, and showers on the ground that "separate but equal" facilities are a form of sex discrimination. *Cf. Brown v. Board of Education*, 347 U.S. 483 (1954) (holding separate schools to be inherently unequal in the race context). The 1975 Regulation is not a mandate at all, but rather a dispensation. It allows schools to engage in activity that might otherwise be considered sex discrimination.

Such a dispensation would be unnecessary in cases that do not involve sex discrimination. For example,

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[6] See Jesperson v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006)(en banc)(holding a sex-specific grooming code to be permissible). Also see, e.g., Hively v. Ivy Tech Community College, No. 15-1720 (7th Cir. July 28, 2016)(holding that Title VII does not cover sexual orientation, even though it might arguably fit the logic of *Price Waterhouse* /*Oncale*). For support, *Hively* cites the numerous Congressional bills that would have prohibited sexual orientation discrimination as proof that Congress does not perceive "sexual orientation" discrimination to be already covered by Title VII's ban on sex discrimination. Slip op. at 6-7 n.2. The same argument can be made here. See, e.g., Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013)(showing that when Congress wants to prohibit gender identity discrimination, it knows how).

there may be no reason for a school to want to divide students into groups based on their surname's first letter. But no law forbids alphabetical discrimination, so no regulation would be necessary to authorize separate facilities on that basis.

Under Title IX, properly interpreted, schools are free to separate students by gender identity for toilet, locker room and shower assignment *if that is what the schools choose*. Since gender identity isn't covered under the Act, no regulation granting special permission to assign facilities on that basis is necessary.[7] Schools have flexibility.

This is not a trivial point. Dealing with a transgender student can be a delicate matter. For example, sometimes, in a local school administrator's judgment, the best thing may be to do exactly what OCR now insists upon: Let him use the intimate facilities assigned to the sex he identifies with. Sometimes the students who must share these facilities with a member of the opposite sex do not mind.

But in many cases, this solution will cause serious problems. The affected students may be traumatized, and their trauma matters, too. If the transgender student himself is relatively indifferent and the members of his actual sex are supportive, the best thing may be

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[7] If a school were merely using gender identity as a proxy for sex where sex differentiation would have been a violation then its actions would also be a violation. For example, if a school had excluded all individuals of the feminine gender from chemistry class, because they wanted to exclude as many girls as possible, that would be a violation. But in this case, separating by sex for toilets, locker rooms and showers is perfectly legal under the 1975 Regulation. Hence, even if (contrary to fact) gender identity were being used as a proxy for sex, it would be legal.

to have him remain with them. In yet other cases, if members of his same sex (but opposite gender) are not accepting or if, despite their good will, he feels embarrassed by having to undress or shower in their presence, having him use an individualized facility or a facility set aside for faculty may be the best solution. ***Every case is different.***

The difficulties are compounded by the fact that unlike sex, gender is multi-faceted and variable. With precious few exceptions, one's sex is either male or female. Gender, on the other hand, is more complex. It will be difficult to contain it in binary toilet, locker room and shower facilities. In the National Transgender Discrimination Survey conducted by UCLA's Williams Institute, 31% of transgender respondents identified either strongly or somewhat with the identity "Third Gender," while 38% identified with "Two Spirit." See Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey* 6 (January 2014). See also Sam Escobar, *I'm Not Male I'm Not Female: Please Don't Ask Me About My Junk*, Esquire (March 31, 2016). If gender rather than sex is to control intimate facility use, we eventually may need more than just two sets of facilities.

In addition, because anyone can claim to be transgender, separating by gender encourages pranksters. Maintaining classroom decorum is difficult enough without forcing teachers and principals to worry about whether their school will come under OCR investigation for their handling of what they size up as a prank.

Note also that even without the Transgender Guidances mandating only one solution to the problem, the notion that Title IX covers both sex and gender identity ends up tying school administrators in knots. Those knots will not always work to transgender students' benefit. Suppose a student who is anatomically female, but who identifies as male feels uncomfortable using the girls' restroom at school. The school therefore arranges for that student to use the faculty's restroom, which accommodates only a single person at a time, and this is a satisfactory arrangement from the student's standpoint. But now the other anatomical females are envious. They want a private restroom too. Each of them can make the claim that if she were of the opposite gender identity, she would be permitted to use a private restroom. And they will be right. Yet the school administrators were just trying to accommodate the needs of this lone transgender student as best they could. Not all differential treatment is bad.

V. This Case Has Captured the Public's Attention as a Symbol of the Rule of Law's Decline; Vindicating the Rule of Law in this Case Is Thus Vital to the Health of the American System of Laws.

For a variety of reasons, many abuses of the administrative state slip by the public unnoticed. Similarly, legitimate governmental actions are sometimes unfairly called abusive. This case is different: It is correctly viewed by many as an egregious overreach. When the preliminary injunctions in both this case and its opposite, *Texas v. United States*, Civil Action No. 7:16-cv-00054-O (N.D. Tex. Aug. 21, 2016), were issued, they made the news across the country.

It is not hard to see why. First, the statutory interpretation issue can be readily grasped. Few would argue that Title IX's sex discrimination ban was originally understood to require OCR's conclusions. Indeed, OCR made no such claim. *See supra* at Section II. As for *Price Waterhouse* and *Oncale*, few have ever heard of them, and if they did hear of them they would be unlikely to believe that such decisions could change a statute's clear meaning.

Second, fairly or unfairly, the underlying social issue tends to provoke a strong response from many members of the public. When Target Corporation announced on April 19, 2016, that it would begin inviting transgendered individuals to use the store restroom that corresponds to their gender identity rather than to their sex (as was clearly Target's legal right), an online petition began to be circulated. As of this writing (September 4th), it has garnered the signatures of 1,417,548 individuals, all of whom have pledged to boycott Target (as was clearly the legal right of the signatories).[8] Google reports that Target's stock plummeted over 15.7% between April 19th and September 2nd (market closing as of the time of this writing), while its chief competitor, Wal-Mart, saw its stock increase 3.9%.

Similarly, the issue of toilet, locker room, and shower assignment was thought by some (perhaps correctly in retrospect) to be embedded in a Houston initiative that prohibited gender identity discrimination. As a result, Houston voters (a group that voted

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[8] See American Family Association Petition, available at https://www.afa.net/action-alerts/sign-the-boycott-target-pledge/.

heavily for President Obama in 2012) voted it down by a 3 to 1 margin.

Supporters of the Transgender Guidances have argued that male-to-female transgendered persons are no threat to the safety of females.[9] Opponents have argued that OCR's (and Target's) policy requires no proof that one psychologically identifies with the opposite sex. The effect is that ill-motivated individuals can use the intimate facility of their choice without fear of being turned away. In some instances, this has led to tragic results. See, e.g., Sam Pazzano, *Predator Who Claimed to be Transgender Declared Dangerous Offender*, Toronto Sun, Feb. 26, 2014.

Even if one regards these cases to be too rare to be significant in setting public policy, they will be discussed in lurid detail on the radio, television, newspapers, magazines, and blogs and circulated over Facebook and Twitter.

Polls indicate that strong majorities of Americans oppose OCR's policies.[10] Of course, polls should not

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[9] Note that this is not because transgendered individuals necessarily have the sexual orientation ordinarily associated with the sex with which they psychologically identify. Gender and sexual orientation are different things. See Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey* 5 (January 2014).

[10] When the issue is put in terms of who should decide, the majorities are extremely strong. Approximately 70% agreed that, "Decisions about how to reasonably accommodate transgender students should be made by parents, teachers, and local districts, not federal bureaucrats." See Mark Schreiber & Elizabeth Fender, *Placing Gender Politics over Privacy: How President Obama's Transgender Policy for Schools Makes Matters Worse*

drive this Court's deliberations. But under some circumstances they should have an indirect bearing on which cases receive priority. The judiciary has the primary responsibility—both real and symbolic—as the guardian of the rule of law. When an administrative action brings the rule of law into disrepute, the courts should be mindful of the threat it poses to the legal system.

Some advocates of the Transgender Guidances may lament the "backwardness" of the American people and prefer a legal system that allows enlightened elites more leeway. Amici agree instead with Justice Sandra Day O'Connor, who once wrote:

> *[R]eal change, when it comes, stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus.*

Sandra Day O'Connor, The Majesty of the Law 166 (2003).

Maybe that change will come. What is important is that it has not come yet—as the Houston vote amply demonstrates. OCR does not have the authority to coerce that change. The Court's responsibility is thus to maintain the rule of law and to ensure that this issue

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(May 2016), available at http://thf-reports.s3.amazonaws.com/2016/SOGIGovOnePager.pdf. See also Bradford Richardson, *Two-Thirds of Americans Oppose Obama's Transgender Bathroom Order: Poll*, Washington Times (July 12, 2016). Amici suspect the opposition might be even greater if the difference between "transgenders" (those who simply psychologically identify with the opposite sex) and "transsexuals" (those who have surgically altered their bodies) were explained.

is dealt with through democratic processes and is not the subject of diktats.

CONCLUSION

The brakes need to be applied here. But for the Fourth Circuit's misapplication of *Auer* (a largely discredited case anyway), those brakes probably would have been applied by the lower courts.

This case presents the best opportunity to apply those brakes gently, because it does not require the Court to take on the Transgender Guidances directly. Rather, it may remand the case based either on a thorough rethinking of *Auer* or on narrower *Gonzales v. Oregon* reasoning.

Such a decision could give the issue of the Transgender Guidances a "soft landing," since it is not at all clear that the Fourth Circuit would have come to the same conclusion in *Auer*'s absence. It would also have the virtue of taking the first tiny step in the long-needed process of bringing administrative guidances—now one of the greatest threats to democratic processes and ordered liberty—under control.

Alternatively, the Court could take a big step in the direction of vindicating the rule of law by taking on the Transgender Guidances directly. But no matter which of these alternatives the Court chooses, the first step is to grant the Petition. Amici urge the Court to do so.

Respectfully submitted,

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