

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 LIBERTY, LIFE, AND LAW FOUNDATION,
WETHEPEOPLEINORDER.COM, AND THE
NATIONAL LEGAL FOUNDATION AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI¹

Liberty, Life, and Law Foundation, wethepeopleinorder.com, and The National Legal Foundation, as *amici curiae*, respectfully urge this Court to grant the Gloucester School Board's Petition for a Writ of Certiorari and reverse the Fourth Circuit decision.

Liberty, Life, and Law Foundation ("LLLF") is a North Carolina nonprofit corporation established to promote the legal defense of religious liberty, sanctity of human life, liberty of conscience, and other time-honored values. LLLF is gravely concerned about the growing threats to liberty in America, including the erosion of both federalism and the separation of powers. LLLF has participated in this Court and many of the federal circuits as *amicus curiae* in past cases.

Co-amicus, wethepeopleinorder.com, is an unincorporated online discussion forum that reaches thousands of readers, providing information and inviting commentary from all viewpoints on a variety of current issues involving the government and the Constitution. The forum carefully collects articles that present both sides of the argument, so that readers are equipped with the knowledge they need to participate meaningfully in the political process. Many forum

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

participants are concerned about preserving basic American freedoms and monitoring the growth of government bureaucracy.

Co-amicus, The National Legal Foundation (NLF), is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation upon which America was built. The NLF and its donors and supporters—especially those in Virginia, where the NLF’s national headquarters are located—are vitally concerned with the outcome of this case because of the impact it will have on parental rights, religious liberty, and the safety of students within the Fourth Circuit and throughout the United States. Furthermore, the NLF has litigated several cases before this Court. *See, Lefemine v. Wideman*, 133 S. Ct. 9 (2012) (per curiam); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (mem.) (1996); and *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990). The NLF believes its experience and perspective will assist this Court in its consideration of this Petition.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case implicates sensitive privacy issues involving some of the youngest members of American society. But “[t]he resolution of this difficult policy issue is not” the business of this Court. *Texas v. United States*, No. 7:16-CV-00054-O, 2016 U.S. Dist. LEXIS 113459, *3-4 (N.D. Tex. Aug. 21, 2016). “Instead, the Constitution assigns those policy choices to the appropriate elected and appointed officials, who must follow the proper legal procedure.” *Id.* at *4. This Court

should grant the Petition because the Fourth Circuit decision, and decrees² from two executive agencies, the Departments of Justice and Education (collectively “the Departments”), pose ominous threats to representative democracy on both vertical and horizontal levels. Horizontally, these executive actions jeopardize the Constitution’s separation of powers—not only by issuing mandates that conflict with unambiguous statutory language but also by usurping judicial authority to interpret the law. Vertically, these decrees remove a matter of intense local concern from the state and local elected representatives closest to the people and most responsive to their concerns. Moreover, the ultimatums hold a “gun to the head” of local authorities by threatening to withdraw federal funding from those who fail to comply. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2604 (2012). Even under the most generous construction of *Auer v. Robbins*, 519 U.S. 452, 462 (1997), the court’s extreme deference to the agencies is untenable. At the very least, this Court should grant review to refine and clarify the principles of judicial deference announced in *Chevron*, *Auer*, and their progeny.

² The following federal decrees are relevant: The opinion letter dated January 5, 2015 from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy in the Department of Education (“DOE”) Office of Civil Rights (the “Ferg-Cadima Letter”), and the “Dear Colleague” letter dated May 13, 2016 from the Departments of Education and Justice to every Title IX-covered educational institution in America (the “Dear Colleague Letter”) (collectively, the “Letters”).

ARGUMENT

I. THE FOURTH CIRCUIT OPINION VIOLATES THE SEPARATION OF POWERS.

Power is of an “encroaching nature” and “ought to be effectually restrained from passing the limits assigned to it.” Federalist No. 48, at 305 (James Madison) (Clinton Rossiter ed., 1961). In order to preserve liberty and guard against tyranny, the founders structured the Constitution to allocate power among three branches of government. Indeed, “the Constitution’s core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights.” *Nat’l Labor Relations Bd. v. Noel Canning, et al.*, 134 S. Ct. 2550, 2592-2593 (2014).

The *legislative* branch—not the *executive* branch—is charged with making the law. U.S. Const., Art. I, § 1. The executive branch has limited rulemaking authority in the course of executing the law but lacks authority to alter the statutory scheme:

The true distinction . . . is between the *delegation of power to make the law*, which necessarily involves a discretion as to what it shall be, and *conferring authority or discretion as to its execution*, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Field v. Clark, 143 U.S. 649, 693-694 (1892) (emphasis added) (quoting *Moers v. Reading*, 21 Pa. 188, 202 (1853)). Here, an executive agency attempts to alter not only the statutory scheme, but its own implementing regulation.

The expansion of the administrative state is undeniable. The executive branch has become extremely powerful—perhaps, as one commentator suggests, “the most powerful branch of government.” Robert J. Reinstein, *The Limits of Executive Power*, 59 *Am U. L. Rev.* 259, 265 (2009). Agencies “today routinely establish policy and even issue binding regulations pursuant to statutes that provide only vague and highly general guidance regarding Congress’s desired policy.” Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 *Vand. L. Rev.* 671, 683 (2014). But the limits woven into the constitutional fabric must be preserved:

An agency has no power to “tailor” legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always “give effect to the unambiguously expressed intent of Congress.” *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007) (quoting *Chevron*, 467 U.S. at 843).

Util. Air Reg. Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014) (“*UARG*”). The Departments of Education and Justice have done exactly what they are constitutionally powerless to do—“tailor” Title IX, contrary to “the unambiguously expressed intent of Congress,” to impose radical social engineering on the American people without their consent.

A. The Agencies Invade Legislative Territory Because Their Recent Interpretation Conflicts With Unambiguous Language In Both Title IX And Its Implementing Regulation.

Over the years, this Court has developed basic principles of judicial deference to executive agencies. The Fourth Circuit disregards those principles by giving extreme deference to an interpretation that conflicts with Title IX, C.F.R. § 106.33, and basic logic.

If a statute is at issue, judicial review first inquires as to “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). An agency interpretation “inconsisten[t] with the design and structure of the statute as a whole” does not merit deference. *Univ. of Tex. Southwestern Medical Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013). Where Congress expressly or implicitly leaves gaps for an agency to fill, the agency’s “reasonable interpretation” is entitled to deference. *Chevron*, 467 U.S. at 844. As this Court later explained, *Chevron* deference is appropriate “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.” *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001). Courts also defer to an agency’s “reasonable interpretation” of an ambiguous statute. *Christensen v. Harris Cnty.*, 529 U.S. 576, 586-587 (2000).

In *Auer*, this Court extended deference to an agency’s interpretation of its own regulation. But such

deference is due “only when the language of the regulation is ambiguous.” *Christensen*, 529 U.S. at 588. Other documents have a weaker claim to deference. Opinion letters such as the Ferg-Cadima Letter “lack the force of law” and “do not warrant *Chevron* deference.” *Id.* at 587. Interpretive rules, exempt from notice-and-comment requirements (5 U.S.C. § 553(b)(A)), “do not have the force and effect of law and are not accorded that weight in the adjudicatory process.” *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015) (internal quotation marks and citation omitted). At most these are “entitled to respect” provided they have the “power to persuade.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). But—if courts allow an agency opinion letter to command deference and bind the public—it essentially does have the “force and effect of law.” That is precisely what the Fourth Circuit allowed, creating the opportunity for encroachment on both legislative *and* judicial power.

The Fourth Circuit, while purporting not to set policy because that task is entrusted to the political branches, endorsed a radically novel policy dictated by non-binding agency documents reinterpreting the unambiguous term “sex” in Title IX and C.F.R. § 106.33:

We conclude that the Department’s interpretation of its own regulation, § 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.

G. G. v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016). This case highlights *Auer*’s potential for

abuse. Extreme deference grants an agency permission, “under the guise of interpreting a regulation, to create *de facto* a new regulation.” *Christensen*, 529 U.S. at 588. Addressing issues similar to *G. G.*, a district court in Texas got the point: “Permitting the definition of sex to be defined in this way would allow Defendants to ‘create [a] *de facto* new regulation’ by agency action without complying with the proper procedures.” *Texas v. United States*, 2016 U.S. Dist. LEXIS 113459, *46-47 (citing *Christensen*).

B. The Agencies Usurp Judicial Power To “Say What The Law Is.”

“It is emphatically the province and duty of the *judicial* department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (emphasis added). As Justice Thomas warned, *Seminal Rock-Auer* deference has generated executive encroachment on judicial territory:

Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.

Perez, 135 S. Ct. at 1213 (Thomas, J., concurring). *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (“*Seminole Rock*”) opened the door to “a doctrine of deference that has taken on a life of its own.” *Id.* The executive intrusion on judicial power erodes the ability of judges to exercise “independent judgment . . . to decide cases in accordance with the law of the land, not

in accordance with pressures placed upon them through either internal or external sources.” *Id.* at 1218 (Thomas, J., concurring). It is ultimately the judiciary’s responsibility to determine whether a particular agency interpretation is correct. “*Auer* deference is not an inexorable command in all cases.” *Id.* at 1208 n. 4.

[T]he reviewing court shall . . . interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

5 U.S.C.S. § 706. Here, the Fourth Circuit treated *Auer* as “an inexorable command” by granting extreme deference to an executive agency’s illogical and unworkable interpretation of a straightforward statute and regulation.

An agency regulation duly adopted according to statutory authority has the effect of law, and courts grant the agency’s interpretation “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Seminole Rock*, 325 U.S. at 413-414; *Auer*, 519 U.S. at 462. But “[a]gencies do not receive deference where a new interpretation conflicts with a prior interpretation.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994). Moreover, “[it] seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.” *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the

agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands.

Decker v. Nw. Env'tl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013) (Scalia, J., dissenting). If an agency has carte blanche to interpret—and later reinterpret—its own regulations, that agency has arrogated judicial authority to itself. That is exactly what happened here, in contrast to *Auer* itself. In *Auer*, the Fair Labor Standards Act of 1938 (FLSA) granted the executive agency “broad authority” to define the relevant exemption from overtime pay requirements. *Auer*, 519 U.S. at 456. Congress granted no comparable authority to define—let alone *redefine*—the unambiguous term “sex” in Title IX.

The longevity of an agency’s interpretation is a relevant factor though not necessarily conclusive. “Courts will normally accord particular deference to an agency interpretation of longstanding duration. *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 522 n. 12 (1982).” *Barnhart v. Walton*, 535 U.S. 212, 220 (2002). Such an interpretation is “more likely to reflect the single correct meaning.” *Id.* at 226 (Scalia, J., concurring), citing *Watt v. Alaska*, 451 U.S. 259, 272-273 (1981). The corollary is also true: “[A]n agency’s interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view.” *Thomas Jefferson Univ.*, 512 U.S. at 515 (internal quotation marks and citation omitted). Reading Title

IX together with the regulation expressly permitting sex-segregation in private facilities, it is crystal clear that both presuppose the objective, biological reality of a binary system (male and female) in contrast to the asserted interpretation at issue.

Title IX and its implementing regulation date back over four decades. The Departments' recent interpretation conflicts with both. The Fourth Circuit admitted that "[r]ead plainly . . . § 106.33 permits schools to provide separate toilet, locker room, and shower facilities for its male and female students." *G. G.*, 822 F.3d at 720. It requires verbal somersaults to construe the government's position as "a permissible construction of the statute." *Auer*, 519 U.S. at 457, quoting *Chevron*, 467 U.S. at 843. Its logical incoherence reveals it is "plainly erroneous" and "inconsistent with the [implementing] regulation" originally issued. As Judge Niemeyer explains, the term "sex" must logically mean one of the following now that the government has rejected "biological sex" as the sole definition: (1) biological sex *and* "gender identity" (conjunctive); (2) biological sex *or* "gender identity" (disjunctive); (3) *only* "gender identity." *G. G.*, 822 F.3d at 737 (Niemeyer, J., dissenting). The results expose the Departments' flawed reasoning:

- (1) "[A] transgender student's use of a boys' or girls' restroom or locker room could not satisfy the conjunctive criteria . . . such an interpretation would deny G.G. the right to use either the boys' or girls' restrooms." *Id.*
- (2) "[T]he School Board's policy is in compliance because it segregates the facilities on the basis

of biological sex, a satisfactory component of the disjunctive.” *Id.*

(3) Under this option, “privacy concerns would be left unaddressed.” *Id.* at 738. Yet it was exactly those concerns that led to the provision of sex-segregated facilities in the first place. Indeed, “the whole concept of permissible sex-segregation collapses” (Pet. 35) in view of the extremely subjective standard advanced in the “Dear Colleague Letter.” A student’s mere notice to the school—with or without parental consent (or even knowledge) or any additional supporting evidence—obligates the school to allow that student to use the facilities of his or her choice.

According to the Fourth Circuit, the Department of Education has chosen the third option, “determining maleness or femaleness with reference to gender identity.” *G. G.*, 822 F.3d at 720. The implications are astounding. If a transgender person elects to use facilities corresponding to biological sex rather than “gender identity,” is that permissible? If so, transgender students have the privilege of using the restrooms for either sex—a privilege not granted to non-transgender persons. Would the school then be discriminating against non-transgender students? The Department’s interpretation of “sex” is not coherent—let alone persuasive. Instead of resolving an ambiguity in either the statute or regulation, it has created one.

One rationale asserted for *Seminole Rock* (or *Auer*) deference is that “Congress has delegated to agencies the authority to interpret their own regulations.” *Perez*,

135 S. Ct. at 1224 (Thomas, J., concurring). Congress cannot delegate power it does not possess. In an analogous context, this Court held that Congress cannot grant *executive* power to itself: “The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.” *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). Similarly, “the Constitution does not empower Congress to issue a judicially binding interpretation of the Constitution or its laws. Lacking the power itself, it cannot delegate that power to an agency.” *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring).

Both *Chevron* and *Auer* presuppose that—under our constitutional structure separating legislative, executive, and judicial powers—Congress could lawfully delegate discretion to executive agencies to resolve statutory ambiguities or fill gaps in the process of executing a statutory scheme. This discretion must be exercised within reasonable limits. It is not a license to usurp legislative power by using “interpretation” to do an end-run around Congress and turn existing law on its head. Nor is it a license to encroach on judicial power by seizing authority to reinterpret its own regulation, decades later, transforming its meaning so the original becomes incomprehensible—as the Letters here do by redefining “sex” and destroying the privacy rationale underlying the law.

Auer deference invites executive agencies to be “vague in framing regulations, with the plan of issuing ‘interpretations’ to create the intended new law without observance of notice and comment procedures.” Robert A. Anthony, *The Supreme Court and the APA*:

Sometimes They Just Don't Get It, 10 Admin. L.J. Am. U. 1, 11-12 (1996). If the Fourth Circuit decision stands, agencies have a powerful incentive to frame imprecise regulations they can later revise according to the exigencies and political winds of the day. This is a formula for arbitrary government and tyranny.

Expansive executive discretion also impairs political accountability. By obscuring the lines between the three branches, executive “lawmaking” and interpretation generate confusion as to who is responsible for existing laws and policies. This also disrupts the political process at state and local levels, removing matters of local concern from the communities most directly impacted and denying the people the opportunity to participate in government. This strikes at the heart of representative government.

II. THE AGENCIES USURP STATE AND LOCAL AUTHORITY TO CRAFT PUBLIC POLICY.

The Departments attempt to place state and local authorities in a straight-jacket, disabling their ability to craft workable policies that address the rights and concerns of local citizens. Their ultimatum grates against the structure of American government and jeopardizes individual liberty to participate in shaping public policy.

The architects of the Constitution created a federal government “powerful enough to function effectively yet limited enough to preserve the hard-earned liberty fought for in the War of Independence.” *Shelby v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012). “[A] group of formerly independent states bound themselves together under one national government,” delegating

some of their powers—but not all—to the newly formed federal administration. *Reynolds v. Sims*, 377 U.S. 533, 574 (1964). Power is divided, not only horizontally among the three co-equal branches (Section I), but also vertically between federal and state governments. This Court has long recognized the critical need to preserve that structure. The Letters not only encroach on legislative and judicial territory, but also invade a matter of intense state and local concern that is not among the federal government’s enumerated powers.

A. Education Is Primarily A State And Local Concern.

Education is among the many powers reserved to the states and the people. Apart from a constitutional restriction such as equal protection of the law:

[S]tate governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, *running public schools*, and zoning property for development, to name but a few—even though the Constitution’s text does not authorize any government to do so.

NFIB, 132 S. Ct. at 2578 (emphasis added). Judicial restraint should characterize any federal attempt to intervene in public education:

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities.

Epperson v. Arkansas, 393 U.S. 97, 104 (1968). “We see no reason to intrude on that historic control in this case.” *Bd. of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 91 (1978) (citing *Epperson* and declining to formalize the academic dismissal process by requiring a hearing). The same is true here. There is no reason for the federal judiciary to interfere in the privacy policies of local schools and shut citizens out of the process.

B. The Fourth Circuit Decision Threatens Individual Liberty To Participate In The Political Process.

This case implicates the most sensitive privacy concerns of young school children. Accommodation of those concerns—both for transgender students and all others—requires compassion and skillful crafting of workable policies for each school district. It may also require construction or remodeling of facilities to implement accommodations. The federal government has attempted to dictate a one-size-fits-all “cookie cutter” solution for the entire nation. It is impossible, at the federal level, to consider the multitude of factors that may differ from one school district to another.

Federalism safeguards individual liberty, allowing states and local communities to “respond to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.” *Bond v. United States*, 564 U.S. 211, 221 (2011). Public school boards illustrate the outworking of this fundamental principle. Board members are typically selected, often by popular election, from among local citizens. Parents, teachers,

and even students have the opportunity to participate in meetings and express their concerns. If the Fourth Circuit decision stands, these voices will be silenced all across America.

This Court recently reinforced the importance of maintaining “the status of the States as independent sovereigns in our federal system . . . [o]therwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.” *NFIB*, 132 S. Ct. at 2602. In short, “federalism protects the liberty of the individual from arbitrary power.” *Id.* at 2578 (internal quotation marks and citation omitted). It is hard to imagine a more striking instance of arbitrary power than this case presents.

The “double security” of American federalism is deeply rooted in the nation’s history:

“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.” *The Federalist No. 51*, p. 323.

Gregory v. Ashcroft, 501 U.S. 452, 458-459 (1991) (quoting James Madison). The “federalist structure of joint sovereigns . . . increases opportunity for citizen involvement in democratic processes.” *Id.* at 458. The Letters foreclose that opportunity for every citizen and every local school board in America.

CONCLUSION

Amici urge this Court to grant the Petition and reverse the Fourth Circuit decision.

Respectfully submitted,

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