No. 16-273

IN THE
Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

G.G., BY HIS NEXT FRIEND AND MOTHER,
DEIRDRE GRIMM,
Respondents.

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

AMICI CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION AND AASA THE SCHOOL SUPERINTENDENTS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

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

INTEREST OF *AMICI CURIAE*[1]

In accordance with Supreme Court Rule 37, *amici curiae* National School Boards Association (NSBA) and The School Superintendents Association (AASA) respectfully submit this brief in support of Petitioner. NSBA represents state school boards associations and their more than 90,000 local school board members. As the premier advocate for public schools in the United States, NSBA believes that education is a civil right, that public schools are America's most vital institutions, and that school board leadership advances equity and excellence in public schools. AASA, founded in 1865, is the professional organization for some 10,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. Throughout its more than 150 years, AASA has advocated for the highest quality public education for all students, and provided programming to develop and support school system leaders. AASA members advance the goals of public education and champion children's causes in their districts and nationwide.

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[1] All parties have consented to the filing of this brief under Rule 37.3(a). Letters of consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation and submission of this brief.

Amici have a profound interest in this case's resolution because it will affect schools across the country. School boards and administrators are grappling with conflicting interests regarding the use of sex-separated restroom and locker room facilities by transgender students. In accordance with the strong American tradition of local governance of public schools, local school leaders have accommodated transgender students based on the boards' expertise and experience with the needs of their local communities. Forcing schools to comply with the one-size-fits-all decree of the Ferg-Cadima letter—an informal, unpublished document issued with no stakeholder input—presents serious challenges for public schools nationwide.

SUMMARY OF ARGUMENT

The Ferg-Cadima letter, which interprets the meaning of "on the basis of sex" under Title IX, and not the agency's implementing regulation, should not receive deference under *Auer* v. *Robbins*, 519 U.S. 452, 462 (1996). Nor is it entitled to *Chevron* deference, which applies to the results of a formal administrative process. *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

The Fourth Circuit's erroneous deference to an informal, non-public letter sent by an intermediate U.S. Department of Education ("Department") employee usurps the tradition of local governance of public schools and minimizes the expertise and experience of local school districts. Local school districts have crafted legally compliant transgender student policies that are workable for their communities. If these community-based decisions

must be replaced by a uniform national rule, such a rule should come from Congress and not from an informal, unpublished letter by a mid-level agency official. At a minimum, the Department should proceed through the formal notice-and-comment rulemaking process, in which the agency would benefit from the expertise and experience of school boards and other school leaders in crafting policies that affect public schools and their students. Using this formal process also benefits the other parties involved by creating stability in the law: school boards would not be forced to follow pronouncements that could easily be changed from one administration to the next; and transgender students would not be given the false promise of federal rights that are later summarily withdrawn by the next administration.

When the Department issues a directive without formal process and input from stakeholders, it presents public schools with serious challenges. Faced with a casual federal agency pronouncement that conflicts with many state and local laws, school boards are understandably confused about what requirements to follow. Moreover, by announcing a national rule that removes local governance of schools on a sensitive issue without any formal public process, the Department clouds the legitimacy of the rule, potentially jeopardizing support for public schools and creating fertile ground for litigation. School boards are, therefore, placed in an untenable position: obey the federal directive and risk provoking or alienating state and local lawmaking bodies where their laws conflict; obey conflicting state and local laws and risk losing federal funds; or, in a state whose laws are consistent with the federal directive, obey it

but risk lawsuits from those challenging its legitimacy.[2]

ARGUMENT

I. AS AN INTERPRETATION OF THE STATUTE, THE FERG-CADIMA LETTER DOES NOT QUALIFY FOR *AUER* DEFERENCE.

Title IX prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a) (2017). Title IX's implementing regulations provide an exception to this prohibition by expressly permitting "separate toilet, locker rooms, and shower facilities on the basis of sex." 34 C.F.R. § 106.33 (2017). Neither the statute nor the regulation expressly mandates how schools must treat transgender students who wish to use toilets, locker rooms, and shower facilities that align with their gender identity rather than with their biological sex.

Without providing notice or an opportunity for comment by stakeholders, the Department declared in the Ferg-Cadima letter that transgender students must be permitted to use restrooms, locker rooms, and shower facilities "consistent with their gender identity" rather than their biological sex—regardless of community views or the privacy concerns of other

[2] NSBA addresses only the first question presented—the application of *Auer* deference—and takes no position on the second question presented. Moreover, NSBA takes no position on the applicability of any constitutional rights asserted under the Equal Protection Clause of the Fourteenth Amendment that may be dispositive of the issues at hand.

students. In its more publicized May 2016 "Dear Colleague" letter,[3] citing the Fourth Circuit's decision granting deference to that view, the Department affirmed that policy, in essence adopting it as a uniform national rule dictating how every public school in the land must accommodate transgender student access to sex-separated school facilities. As one court observed, the Department has issued its "marching orders," and local school districts must fall into line. *Students and Parents for Privacy* v. *United States Dep't of Educ.*, No. 16-4945 (N.D. Ill. Oct. 18, 2016), Report & Recommendations, at 21.

The court of appeals erred in granting *Auer* deference to the Ferg-Cadima letter. *Auer* deference only arises when an agency interprets its own vague or ambiguous regulations; it is inapplicable when an agency interprets a statute. *Gonzales* v. *Oregon*, 546 U.S. 243, 256–57 (2006). The Ferg-Cadima letter does the latter, purporting to define what it means to discriminate "on the basis of sex," a phrase that appears in Title IX and that the pertinent regulation parrots without further explanation. And with the press, at least, the Department of Education has admitted that it seeks to remedy a type of "sexual discrimination that Congress did not have in mind when Title VII * * * and Title IX were enacted 40

[3]Dear Colleague Letter: Transgender Students from Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, U.S. Department of Justice, and Catherine Lhamon, Assistant Secretary for Civil Rights, U.S. Department of Education to Colleagues (May 13, 2016), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

years ago."[4]

To receive deference in interpreting a statute, an agency must provide a formal analysis that would satisfy *Chevron*. As this Court has explained,

> "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. * * * Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."

United States v. Mead Corp., 533 U.S. 218, 230–31 (2001). An informal, non-public declaration sent by a mid-level employee—such as the letter here—would not qualify for *Chevron* deference. *See id.* at 230; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

The Fourth Circuit nonetheless applied *Auer* broadly to give controlling weight to the Ferg-Cadima letter, viewing it as the agency's interpretation of its own regulation. Even were this an accurate characterization of the agency's action, *amici* would urge this Court to adopt a more circumscribed

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[4] Duaa Eldeib & Dawn Rhodes, *No decision from judge on barring transgender student from locker room*, CHI. TRIB., Aug. 15, 2016, http://www.chicagotribune.com/news/local/breaking/ct-transgender-lawsuit-palatine-met-20160815-story.html.

approach to deference.[5] By doing so, the Court will avoid granting the force and effect of law to informal interpretive guidance and agency litigation and enforcement positions that seek to impose more expansive obligations on local school districts without first undergoing the rigorous and careful

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[5] Some commentators have suggested that one approach to cabining *Auer* would be to extend the analysis this Court set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), as a matter of course to informal agency interpretations of regulatory language. *See, e.g.,* Nicholas R. Bednar, *Defying* Auer *Deference:* Skidmore *as a Solution to Conservative Concerns in* Perez v. Mortgage Bankers Association, 100 MINN. L. REV. (2015), *available at* http://www.minnesotalawreview.org/2015/06/defying-auer-deference-skidmore-solution-conservative-concerns-perez-v-mortgage-bankers-association/. According to these commentators, courts are familiar with applying the various components of *Skidmore* analysis to determine whether the agency position has any degree of persuasive power. Were the Court to apply the *Skidmore* metric in determining the effect of the letter at issue here, *amici* would urge the Court to give it little, if any, weight in light of its lack of examination of the interpretive problem, its informality, its novel position, its vulnerability to swift agency reversal, its omission of substantive reasoning to support its interpretation, and the absence of special agency expertise with respect to the law, policy and procedures surrounding the interpretation.

Other commentators have suggested that the Court should retrench *Auer*'s expansion of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), by restricting regulatory deference to interpretations meeting the original requirements set forth in *Seminole Rock*, *i.e.,* those that are official, well-publicized and issued contemporaneously with the regulation. *See, e.g.,* Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 102–06 (2015). *Amici* submit that under this approach, the Ferg-Cadima letter would not merit deference by this Court.

consideration demanded by the formal rulemaking process.

II. GRANTING *AUER* DEFERENCE WOULD IMPOSE UNEXPECTED AND UNTENABLE BURDENS ON SCHOOL DISTRICT EFFORTS TO ACCOMMODATE ALL STUDENTS.

A. Deferring to the letter would allow federal agencies to short circuit important principles of federalism by minimizing state and local expertise and experience on matters affecting public schools.

The United States has always been a pluralistic nation. From the earliest days of the republic, our nation has valued diverse viewpoints, accommodated different beliefs, and welcomed different cultures. The federal structure of our government reflects this pluralism by permitting the different states to chart their own courses.

Nowhere is this pluralism more manifest or the principles of cooperative federalism more important than in the "deeply rooted" American tradition of state and local governance of public schools. *Bennett* v. *New Jersey*, 470 U.S. 632, 635 (1985). "[E]ducation is perhaps the most important function of state and local governments." *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988) ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school

officials"). The nation's public schools are operated by more than 14,000 local school boards, a tradition that recognizes the uniqueness inherent in each community and the importance of community ownership of public schools. Even within a single state, communities are unique. Tulsa and Stillwater, for example, need not operate their schools identically. *See Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89, Oklahoma County, Okla.* v. *Dowell*, 498 U.S. 237, 248 (1991) (state and local governance of public schools "allows innovation so that school programs can fit local needs").

Consistent with the tradition of local governance of public schools, individual school boards have been addressing the issues surrounding the accommodation of transgender students for more than a decade.[6] Because the mission of public schools is to serve all children, school boards must balance competing views within their local communities in legally compliant ways that consider all students and other stakeholders. In devising workable solutions to accommodate transgender students, school officials must consider both the views of transgender students who may feel their gender identity deeply, and therefore may be uncomfortable using facilities that correspond to their biological sex, and the concerns of other students who may feel their privacy is violated

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[6] *See, e.g.*, Julie Bosman & Motoko Rich, *As Transgender Students Make Gains, Schools Hesitate Over Bathroom Policies*, N.Y. TIMES, Nov. 4, 2015, at A14, *available at* http://www.nytimes.com/2015/11/04/us/as-transgenderstudents-make-gains-schools-hesitate-at-bathrooms.html?_r=0 (noting that the Los Angeles Unified School District first addressed this issue in 2004).

by sharing toilet, locker room, and shower facilities with students of the opposite biological sex. Based on applicable legal standards and their experience with the local needs, views, and values of their communities and students, different local school boards have made different decisions. This approach reflects the unique character of public schools, recognized by this Court. *E.g., Dowell*, 498 U.S. at 248.

Consider Palatine Township High School District 211 in Illinois. The school district honored a transgender student's request to be treated as female in all respects—including access to all girls' restrooms—except her request to use the girls' locker rooms, where she proposed changing privately in a restroom stall. After a series of meetings with the student, her parents, and other school officials, as well as a campus tour, the superintendent determined that the student could not use the girls' locker rooms because there were too few stalls and too many students to make the student's request to change privately in a stall practicable. *See* Letter to Superintendent Daniel E. Cates from U.S. Dep't of Educ. Office for Civil Rights (Nov. 2, 2015) (OCR Case No. 05-14-1055), at 2–3. As the superintendent explained, the decision was based on both the transgender student's "rights and needs" and "the privacy concerns of all students." *Id.* at 3.

In the case currently before this Court, the Gloucester County School Board took a different approach to accommodate transgender students. Following public meetings, the board determined that the best practice for its local community—to balance

the concerns of all students—was that "[restroom and locker room] facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility." Pet. App. 144a.

Other school districts have made different choices based on local needs and community input. According to an *amicus* brief filed with the Fourth Circuit, the J.M. Atherton High School in Louisville, Kentucky engaged in a collaborative process to develop its non-discrimination policy protecting transgender students. It brought together a panel of school administrators, teachers, and parents to consider carefully the issues raised and to make the evidence reviewed publicly available online. *See Amici Curiae* Brief of School Administrators at 4, 15-16, *G.G.* v. *Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) (Nos. 15-2056, 16-1733), *cert. granted*, 137 S. Ct. 369 (Oct. 28, 2016) (No. 16-273). Thus, different school districts have adopted policies and reached compromises based on the unique needs and circumstances of their students and communities. Some school districts have experienced relatively little resistance in implementing their adopted approaches,[7] while others have continued to

[7] *See, e.g.*, Bosman & Rich, *supra* note 6 (discussing Los Angeles Unified School District's use of transgender restroom and locker room facilities).

encounter or anticipate future opposition or controversy.[8]

In determining the facilities that should be made available to transgender students, the Department of Education is demonstrably not writing on a blank slate. But in the Ferg-Cadima letter, the Department announced its definition of "on the basis of sex" (and which facilities transgender students must be permitted to use) without the benefit of direct local input. Instead, it used an informal, unpublished letter written in the middle of an open investigation of one individual school district to impose a nationwide rule for transgender student access to school restrooms, showers, and locker rooms. By taking this action without providing school and community leaders a formal opportunity to explain what has worked well—or poorly—in states and local communities, the Department deprived itself and the nation's schools and students of thoughtful and deliberate consideration[9] that may have helped shape a more feasible and widely accepted result. Bypassing the principles of cooperative federalism,

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[8] *See* Sally Ho, *Transgender student's bathroom request stirs Nevada debate*, NEV. APPEAL, Oct. 5, 2015, *available at* http://www.nevadaappeal.com/news/transgender-students-bathroom-request-stirs-nevada-debate/ (noting that Elko County, Nevada school board's decision to keep private areas separated by biological sex will stand for now but that it is "a new political hot potato in the state").

[9] The value of local experience is precisely why federal agencies are to consult with state and local officials before issuing any final rule with preemptive effect. *See* Exec. Order No. 13132, 64 Fed. Reg. 43,255, 1999 WL 33943706 (Aug. 4, 1999).

the Department took matters wholly into its own hands and ultimately issued "guidance" that offers only one option to resolve sensitive and difficult issues.

If there must be a national rule directing how schools must accommodate transgender student access to sex-separated facilities, the interests of local schools, the students they serve, and the Department of Education would benefit if it were developed through the Administrative Procedures Act's notice-and-comment rulemaking process subsequent to a congressional directive. This process requires the opportunity for public comments, and the agency must respond to those comments to justify its decision. The Department would thus make a decision informed by the collective wisdom of commenters and the concerns of all who might be affected.

The Department has frequently benefitted from using the formal notice and comment process in other areas of education policy. Recently, in developing the regulations implementing provisions of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act,[10] the Department solicited stakeholder input through both negotiated rulemaking and notice of proposed rulemaking for various issues, including school accountability and student assessments.[11] *Amici*,

[10] 20 U.S.C. § 6301 *et seq.* as amended by Pub. L. No. 114-95 (Dec. 10, 2015).

[11] Elementary and Secondary Act of 1965, as amended by the Every Student Succeeds Act—Accountability and State Plans,

along with other interested parties, provided extensive feedback[12] that enabled the Department to modify the final rules in a manner that addressed some of the concerns of local school leaders. For example, in response to comments by NSBA, the Department removed from the final regulation proposed language that unfairly would have subjected school districts that do not exceed a statutory cap on the use of alternative assessments to state education agency oversight.[13]

B. Deferring to the letter would force public schools to make untenable legal choices that undermine public confidence in their ability to provide students with safe learning environments.

Granting deference to the Ferg-Cadima letter would legitimize the Department's imposition of a national rule for transgender student access to sex-separated facilities via an informal, unpublished

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81 Fed. Reg. 34,540 (proposed May 31, 2016) (to be codified at 34 C.F.R. pts. 200 & 299).

[12] *E.g.,* Letter from Thomas Gentzel, Executive Director of the National School Boards Association, to Meredith Miller, U.S. Department of Education (July 29, 2016) (outlining numerous concerns of school board members on proposed regulations to implement accountability and state plan provisions of the Every Student Succeeds Act), *available at* http://www.nsba.org/nsba-public-comments-essa-accountability-state-plans-notice-proposed-rulemaking.

[13] Title I—Improving the Academic Achievement of the Disadvantaged—Academic Assessments, 81 Fed. Reg. 88,886, 88,913 (final Dec. 8, 2016) (to be codified at 34 C.F.R. § 200.6(c)(4)(iii)).

pronouncement that not only ignored state and local expertise and experience, but also created significant challenges for public schools.

1. Some schools are forced to choose between following an informal agency letter or their own potentially conflicting state law. There are myriad state laws that school boards would have to consider before deciding whether or not to align their policies and practices with the novel interpretation of Title IX announced in the Ferg-Cadima letter.[14] For example, current North Carolina law requires that schools segregate bathrooms, locker rooms, and other intimate settings based on biological sex. North Carolina's Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3.[15] At the very least, preemptive Department of Education directives that place schools in the untenable position of having to choose between competing state and federal legal obligations should be clear, unambiguous and formally promulgated.

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[14] *See generally*, NATIONAL SCHOOL BOARDS ASSOCIATION, TRANSGENDER STUDENTS IN SCHOOLS: FREQUENTLY ASKED QUESTIONS AND ANSWERS FOR PUBLIC SCHOOL BOARDS AND STAFF (2016) (outlining many sensitive and complex legal considerations that must be balanced in accommodating transgender students), *available at* http://www.nsba.org/nsba-faqs-transgender-students-schools

[15] State legislators in at least six other states have introduced or pre-filed legislation similar to North Carolina's law that would limit use of public and school restrooms based on biological sex. *See* Tom Dart, *'Bathroom bills' planned in six states despite furor in North Carolina*, THE GUARDIAN, Jan. 6, 2017, *available at* https://www.theguardian.com/world/2017/jan/06/bathroom-bills-planned-north-carolina-texas-lgbt-tran.

2. Such an informal, yet highly directive, mandate has deepened the legal quagmire for public schools as competing interests from concerned parents and students play out in school board meetings and courts across the country.[16] Palatine Township High School District 211 is illustrative. After the U.S. Department of Education rejected the school district's efforts to accommodate the needs of all students and threatened to stop federal funding to the high school if it did not allow a transgender girl to change in the girls' locker room, the district reached a settlement with the Department that allowed the student access to the locker room. Six months later in May 2016, a group of other students and parents then sued the Department and the school district, asserting privacy and other interests and alleging violations on six counts of federal law, including Title IX. *Students and Parents for Privacy v. United States Dep't of Educ.*, No. 16-4945 (filed N.D. Ill. May 4, 2016). The plaintiffs asserted claims that the Department had violated the Administrative

[16] *Amicus* NSBA has documented widespread and ongoing federal litigation or administrative investigatory and enforcement activity involving the accommodation of transgender students in public schools that has occurred in at least 17 states over the last four years. These proceedings have been initiated by transgender students (and parents), non-transgender students (and parents), the federal government, state governments, and advocacy groups. NSBA, *Transgender Student Litigation Chart* (last updated Dec. 19, 2016)*, available at* http://www.nsba.org/transgender-litigation-chart-december-2016-snapshot. Much of this litigation has involved school districts directly as defendants. The outcome of other litigation where school districts are not named parties may also have a significant impact on their legal obligations with respect to transgender students.

Procedures Act by adopting without notice and comment procedures a legislative rule that it treated as binding on school districts. Though the parents acknowledged that the school district had, in part, adopted the objectionable policies upon threat of losing federal funds, they nonetheless asserted that the district had violated federal and state laws in implementing those policies.

That same month, the Department issued its Dear Colleague Letter, reaffirming the position it first announced in the Ferg-Cadima letter and citing, among other things, the Fourth Circuit's decision in this case and the resolution agreements entered into by Palatine and other school districts under investigation for alleged violations of the rights of transgender students under Title IX. *Amici* urge the Court to deny deference to agency enforcement and litigation positions—of which agencies provide little, if any, notice and no opportunity for comment—in a manner that facilitates this sort of agency bootstrapping to create new and unforeseeable requirements on federal fund recipients generally.[17]

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[17] Federal agencies have used this backdoor rulemaking strategy under other laws affecting the policies and operation of public schools. For example, the U.S. Department of Justice filed an *amicus* brief asserting for the first time that a school could fail to meet ADA Title II's "effective communication" requirement even though it complied with IDEA's "free and appropriate public education" requirement. *See* Brief of United States as *Amicus Curiae* at 10–12, *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013) (No. 11-56259). The Ninth Circuit deferred to DOJ's interpretation under *Auer*. *K.M.*, 725 F.3d at 1100–01. Over a year later, DOJ issued a "Dear Colleague" letter reaffirming its interpretation and citing the Ninth Circuit's decision, again without utilizing the notice-and-

Granting deference in such instances renders the notice and comment process unnecessary and ineffectual.

3. The informality of the letter also undermines its legitimacy in the eyes of the public and threatens support for public schools. As this Court has recognized repeatedly, local governance of the operation of schools "has long been thought essential both to the maintenance of community concern and support for public schools." *Milliken* v. *Bradley*, 418 U.S. 717, 741 (1974); *see also San Antonio Indep. Sch. Dist.* v. *Rodriguez,* 411 U.S. 1, 49–50 (1973) ("The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters."). The Court would weaken this local governance framework by providing *Auer* deference to the Ferg-Cadima letter—which involves an issue of deep concern to many parents and students. Such deference would undermine the public's view of school

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comment process. Letter from Vanita Gupta, Acting Assistant Attorney General, DOJ Civil Rights Division *et al.*, to Colleagues (Nov. 12, 2014), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-effective-communication-201411.pdf. DOJ's interpretation harms both students and schools. *See* Letter from Francisco M. Negrón, Jr., General Counsel, Nat'l Sch. Bds. Ass'n (NSBA), to Vanita Gupta, Acting Assistant Attorney General, DOJ Civil Rights Division *et al.* (Mar. 5, 2015), https://www.nsba.org/sites/default/files/file/NSBA-response-2014-DCL-Communication-Needs-3-5-15.pdf. Had DOJ promulgated its interpretation through notice and comment—rather than *amicus* briefing—interested parties like NSBA would have had the opportunity to provide valuable input and feedback, which might have enabled DOJ to achieve its regulatory goals while reducing the burdens imposed on students and schools.

boards as accountable community leaders willing to engage in open dialogue to arrive at solutions that balance the interests of all concerned; instead, school boards would appear to be powerless captives of federal directives issued by largely inaccessible and unresponsive administrative agencies without any local community input.

In contrast, clear formal rules give school districts a solid legal basis for taking action and may provide a degree of legal lucidness that could eliminate or minimize the expense associated with litigation. Ironically, and to the dismay of schools whose function is to ensure student safety and appropriate learning environments, casual agency pronouncements on issues of deep concern often do not assist schools in meeting those goals or those of the underlying statute. Because they lack the benefit of state and local input and are subject to change from presidential administration to administration, such informal "guidance" may well build resistance to the policy put forward, based more on the flawed (or non-existent) process that produced it, rather than its substance.

By withholding deference here, this Court would help ensure that national policy affecting the responsibilities of school boards to protect the rights of students under federal law is issued through formal, democratic processes that lend legitimacy to the results. A statute enacted by Congress and signed by the President is deemed more acceptable—even by opponents of the statute's policy—because it is the fruit of clear constitutional authority. The same could be true of a decision of this Court interpreting the

statute, or a rulemaking by the agency following formal notice-and-comment.

The Ferg-Cadima letter, an informal and private letter issued by an unelected agency employee, is entitled to far less legitimacy as either an interpretation of the statute or the agency's own regulations. To grant it deference would be to bestow on federal agencies authority far beyond constitutional parameters. Broad deference of the kind conferred by the Fourth Circuit empowers agencies to adopt vague regulations, to interpret (and re-interpret) those regulations at will, to bind regulated entities to those capricious rules, and to virtually compel judicial validation of the agency's position.

Such unfettered authority upsets the constitutional system of checks and balances by permitting the executive branch to redefine a statutory term by declaring it ambiguous. And because such a redefinition only requires the considered opinion of the agency, nothing prevents an administration from withdrawing a previous administration's issuance, or from redrawing it altogether to create an entirely different or opposite policy. This executive branch sleight of hand frustrates the purposes of the separation of powers, leads to instability in the law, and places school boards in the untenable position of having to choose between uncertain legal positions that will result in legal risk no matter the choice. The potential harm from erroneous deference thus suggests that in determining whether to defer to the Department under *Auer*, this Court should weigh in on the side of denying deference.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

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