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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B. Deferring to the letter would force public

Julie Bosman & Motoko Rich, As Transgender Students Make Gains, Schools Hesitate Over Bathroom Policies, N.Y. TIMES , (Nov. 4, 2015), available at

QUESTION S 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If Auer is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?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 W K H ' H S D U W P H Q W · V V S H F L I L F L Q W H U S U H W D Title IX and 34 C.F.R. § 106.33 be given effect?

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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" in federally funded education programs. 20 U.S.C. § 1681(a) (2017). Title IX's implementing regulations provide an exception to this prohibition by expressly permitting schools to provide separate toilets, 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 showers "consistent with their gender identity" regardless of community views or the privacy concerns of other

[2] NSBA addresses only the first question presented [3] the application of Auer deference [3] 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.

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

> ´ > L @ W L V I D L U W R D V V X P H J H Q H U D O O \ W K D W 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 I R U P D O D G M X G L F D W L R Q µ

United States v. Mead Corp., 533 U.S. 218, 230 ²31 (2001). An informal, non -public declaration se nt by a mid-level employee ³ such as the letter here ³ 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 Fe rg-Cadima letter , Y L H Z L Q J L W D V W K H D J H Q F \ · V L Q W H U S U H W D W own regulation . Even were this an accurate F K D U D F W H U L] D W L R Q R I W K H D J H Q F \ · V D F W L R Q urge this Court to adopt a more circumscribed

[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

[5] Some commentators have suggested that one approach to cabining

consideration demanded by the formal rulemaking process.

II. GRANTING AUER DEFERENCE WOULD IMPOSE UNEXPECTED AND UNTEN - ABLE BURDENS ON SCHOOL DISTR ICT EFFORTS TO ACCOMMODATE ALL

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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 ORFDO JRYHUQDQFH RI SXEOLF VFKRROV ´DOORZV VR WKDW VFKRRO SURJUDPV FDQ ILW ORFDO QHH

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,

by sharing toilet, locker room, and shower facilities with students of th e opposite biological sex. Based on applicable legal standards and their experience with the local needs, views, and values of t heir communities and students , different local school boards have made different decisions. This approach

encounter or anticipate future opposition or controversy .[8]

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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

Procedures Act by adopting without notice and comment procedures a legislative rule that it treated as binding on school districts. T hough 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 law s in implementing those policies .

That same month , the Department issued its Dear Colleague Letter, reaf firming the position it first announced in the Ferg -Cadima let ter and citing, among other things, W K H) R X U W K & L U F X L W · V G H F L V L R Q L 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 litiga tion positions [3] of which agencies provide little, if any, notice and no opportunity for comment [3] in a manner that facilitates this sort of age ncy bootstrapping to create new and unforeseeable requirements on federal fund recipients generally .[17]

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 RSHUDWLRQ Rhas Vong Fbeen Rthought essential both to the maintenance of community concern DQG VXSSRUW IRU SXEOLF VFKRROV µ

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

The Ferg-Cadima letter, an informal and private letter issued by an un elected agency employee, is entitled to far less legitimacy as either D Q L Q W H U S U H W D W L R Q R I W K H V W D W X W H R U W K H 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 Four th 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 M X G L F L D O Y D O L G D W L R Q R I W K H D J H Q position .

Such unfettered authority upsets the constitutional system of checks and balances by permitting the executive branch to redefine a and balances by

CONCLUSION

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

Respectfully submitted,

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