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

BRIEF OF *AMICUS CURIAE* WISCONSIN INSTITUTE FOR LAW & LIBERTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?

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 If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

3. 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?

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INTEREST OF *AMICI CURIAE*[1]

Through education, litigation, and participation in public discourse, the Wisconsin Institute for Law & Liberty (WILL) seeks to advance the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society. Because these goals are undermined by the dissolving separation of powers among the branches of the federal government and among the federal and state governments, WILL recently established a Center for Competitive Federalism, which seeks to advance a federalism that respects the separate spheres of the federal and state governments and the limits imposed by our constitutional structure on both of them. WILL and its new Center, therefore, have an interest in this Court's determination of the validity of the *Auer* doctrine and of executive branch guidance documents that seek to coerce the states into enacting policies outside the federal government's constitutional powers.

SUMMARY OF ARGUMENT

One of the first and most crucial issues faced by the delegates to the Constitutional Convention in Philadelphia was whether the powers of the new federal government should operate on state govern-

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[1] Pursuant to this Court's Rule 37.2(a), all parties were given timely notice of, and have consented to, the filing of this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in any manner, and no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

ments or on individual citizens. The experience of the Articles of Confederation compelled the Convention to reject the former, embodied in the New Jersey Plan, in favor of a federal government that would operate directly on individuals, as embodied in the Virginia Plan. "One frequently expressed objection to the New Jersey Plan was that it might require the Federal Government to coerce the States into implementing legislation." *New York v. United States*, 505 U.S. 144, 164 (1992).

This respect for the autonomy of the states not only respected the institutional integrity of state governments, but operated as a further protection of individual liberty and robust democratic decision-making. By creating what Madison called a "compound republic," our federalism allowed the federal and state governments to function as restraints on each other. By empowering states to serve as "laboratories of democracy," it facilitated a multiplicity of approaches that could be expected to serve a large and diverse nation and yield, over time, the best public policy.

In the centuries since the Convention, America's system of government has changed profoundly. "Yet today state and federal governance and interests are more integrated than separate." Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 Yale L.J. 1920, 1956 (2014). This is due, in substantial part, to "cooperative federalism," the panoply of conditional federal programs, generally under either the Spending Clause or Commerce Clause, that provide inducements and penalties de-

signed to conscript the states into the federal policy-making apparatus.

While the Court has been generally permissive of such programs, it has continued to insist that the states must "remain independent and autonomous within their proper sphere of authority." *Printz v. United States*, 521 U.S. 898, 928 (1997). It has warned that the federal government can neither compel state governments to regulate, nor compel state officials to perform any particular function. *Printz*, 521 U.S. at 935. In the context of conditional federal grants to the states, such as the federal education funds at the core of the case at bar, the Court has warned that conditions may not "be so coercive as to pass the point at which pressure turns into compulsion." *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). However, Title IX guarantees recipients' right to maintain "separate living facilities for the different sexes," 20 US.C. § 1686, while 34 C.F.R. § 106.33 further guarantees recipients' right to maintain "separate toilet, locker room, and shower facilities on the basis of sex."

Every application for federal education assistance to which Title IX applies must provide an assurance that the education program or activity to which the federal assistance applies will be operated in compliance with Title IX and the regulations adopted pursuant thereto. 34 C.F.R. §106.4. Title IX provides that every federal department or agency empowered

to extend education assistance is authorized to effectuate the provisions of Title IX "by issuing rules, regulations or orders of general applicability," but "[n]o such rule, regulation or order shall become effective unless and until approved by the President." 20 U.S.C. § 1682.

At issue in this case is the legal effect, if any, to be given a letter written by James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy in the Department of Education's Office of Civil Rights, dated January 7, 2015, in response to an email request for any "guidance or rules" relevant to the Gloucester County School Board's resolution of December 9, 2014, which triggered the current litigation.

The Ferg-Cadima letter states that "Title IX ... prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity," and that when maintaining separate facilities for the different sexes as permitted by the statute and its regulations, "a school generally must treat transgender students consistent with their gender identity." It is crucial to note that the Ferg-Cadima letter mentions both separate bathroom facilities, which are covered by 34 C.F.R. § 106.33, and separate "housing" facilities, which fall under the "living facilities" provision in the statute itself, 20 U.S.C. § 1686. The Ferg-Cadima letter is therefore an interpretation of *both* regulation *and* statute.

Applying the doctrine of deference to agency interpretations of their own regulations articulated by the Court in *Auer v. Robbins*, 519 U.S. 452 (1997), the Fourth Circuit in the decision below gave the

Ferg-Cadima letter controlling weight as an interpretation of Title IX and 34 C.F.R § 106.33. *G.G. v. Gloucester Country School Board*, 822 F.3d 709 (4th Cir. 2016).

As a result of the Fourth Circuit's decision below, Petitioner faces the loss of federal education assistance, if it does not comply with the Ferg-Cadima letter. Federal education assistance compromises more than five percent of Petitioner's operating fund revenue for FY 2017. *Gloucester County Public Schools FY '17 School Board's Approved Budget: Operating Fund Revenue.*

The situation into which the Ferg-Cadima letter has thrown Petitioner raises a number of grave constitutional problems for federalism, one that is substantive and the other, procedural.

The first set of problems concerns the coercive nature of the transgender-related conditions that now attach to federal education funds as a result of the Fourth Circuit's ruling. First, the Fourth Circuit has demonstrated that *Dole*'s distinction between "encouragement" and "compulsion" of state governments offers little protection from the coercive manipulation of conditions attached to federal funds. Second, under *NFIB v Sebelius*, 132 S.Ct. 2566 (2012), there is now a serious factual question as to whether the threatened loss of federal education funds for failing to comply with the Ferg-Cadima letter, in this case amounting to more than five percent of Petitioner's entire operating budget, is "relatively mild encouragement" or a "gun to the head." *See*, 132 S.Ct. at 2604. Third, Petitioner had no reason to imagine that the conditions described in the Ferg-Cadima letter might be attached to the federal funds it applied

for and agreed to accept, and certainly had no adequate notice of such conditions, as this Court has required. *See, NFIB*, 132 S. Ct. at 2606.

The second set of problems concerns *Auer* deference. As noted below, the integrity of the states and the interest of citizens in the proper allocation of authority between the federal and state governments, *see*, *Bond v. United States*, 131 S.Ct. 2355 (2011), is respected not only by substantive limits on the exercise of federal authority but procedural restrictions that give states a vital stake in the separation of powers among the branches of the federal government. Put simply, Congress makes the laws and the executive branch enforces them. This division of labor serves federalism. While the theory is not without its problems, this Court has remained loyal to the theory of "process federalism" that was fully embraced in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985). As Justice Breyer has pointed out, Congressional decision-making can serve federalism because its members represent the states and may be attuned to their particular interests. *U.S. v. Morrison*, 529 U.S. 598, 660 (2000) (Breyer, J., dissenting).

But Congress did not act here. Whatever the merits of the underlying issue, it is preposterous to suggest that, in enacting Title IX in 1972, it "really" intended to create rights for transgendered persons to use the bath and locker facilities reserved for the other biological gender or even adopted a general principle that could be bent to that purpose. If given authoritative weight under *Auer*, the very informality inherent in guidance letters such as the Ferg-Cadima letter vitiates what little protections the

states enjoy in the federal political progress. Not only did Congress not act, there was no formal process at all by which the interests of the states or their citizens could be represented. Moreover, that same informality has allowed the Department to essentially enact a new rule of law, while escaping the boundaries that Congress has carefully imposed as a predicate of its delegation of rulemaking authority under Title IX and the Administrative Procedure Act.

ARGUMENT

I. THE DEPARTMENT'S INTERPRETATION OF TITLE IX AND 34 C.F.R. § 106.33 IS UNCONSTITUTIONALLY COERCIVE OF STATE GOVERNMENTS.

A. Conditional Federal Funding Programs Are Inherently Coercive.

The Court has long recognized that conditional federal spending programs have the potential to coerce states into implementing federal policy, in violation of the Constitution's structural guarantees of federalism. Unfortunately, the Court has embraced a doctrine which seeks to elucidate whether the threatened penalty of losing federal funds is "mere encouragement" or "passes the point at which pressure turns into compulsion." *Dole*, 483 U.S. at 211. Experience has shown that this distinction is unworkable in practice, and, at least until *NFIB v. Sebelius*, provided states essentially no protection from federal coercion.

The distinction between encouragement and compulsion at the root of *Dole* is a logical fallacy. The Court has often noted that "legislation enacted pursuant to the spending power is much in the nature of

a contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). But in the private contract setting, offer and acceptance cannot create a binding contract where one party uses its dominant economic position to extract unfair concessions that it could never obtain in a truly arms-length negotiation, much less where that party enters into the negotiation offering to return to an agent property taken from the agent's principal. That is simply coercion, whether the amount in question is one dollar or a million.

Taxing isn't the same as stealing, of course, but the contract analogy is even weaker because one party – the federal government – has the power to make the citizens of the states pay for what is being offered whether or not they decide to accept the offer itself. No state legislator would willingly choose to let the state's residents be taxed twice for the same service, or once for no service, yet conditional federal grants force state legislators to choose between one of those alternatives, or taking the federal money and complying with whatever conditions may be attached to it.

This explains why, until very recently, it was virtually unheard of for state legislators in any state to turn down conditional federal grants. Meanwhile, the logical fallacy at the root of *Dole* explains why, until very recently, no federal court applying the *Dole* standard has ever found a federal conditional grant program unconstitutionally coercive, with one exception.

B. Enforcing the Ferg-Cadima Letter Would Be a "Gun to the Head" of School Districts.

That exception was, of course, *NFIB v. Sebelius*, in which the Court held that conditioning the continued receipt of all Medicaid on the states' compliance with the Affordable Care Act's Medicaid-expansion requirements was a "gun to the head." 132 S.Ct. at 2604. *NFIB* took *Dole* at its word, and asked whether, as a practical matter, the scale of the penalty involved in the threatened loss of federal funds "passe[d] the point at which pressure turns into compulsion." *Id.*

In *Dole*, the Court held that the threatened loss of five percent of a state's federal transportation funding did not "pass the point at which pressure turns into compulsion." 483 U.S. at 212. The threatened penalty in *Dole* amounted to "less than half of one percent of South Dakota's budget at the time." *NFIB*, 132 S.Ct. at 2604 (2012). By contrast, the threatened loss of all federal Medicaid funding in *NFIB* amounted to at least 10 percent of the average state's total budget. *Id.* For the Court in *NFIB*, that was much more than the "relatively mild encouragement" upheld in *Dole*, it was a "gun to the head." *Id.* In an opinion joined by Justices Breyer and Kagan, Chief Justice John Roberts wrote that the threatened loss of all Medicaid funding as a penalty for refusing to comply with what amounted to a new program was unconstitutionally coercive.

There are few, if any, public schools in the U.S. that could suffer the loss of five percent or more of their entire operating budgets without catastrophic consequences for students, which in many cases could include running afoul of adequate funding requirements imposed by the federal courts themselves. The threatened loss of all federal funding as a

result of noncompliance with the Ferg-Cadima letter is, like the threatened loss of all federal funding in NFIB, "a gun to the head."

C. The Ferg-Cadima Letter Violates the Requirement of Adequate Notice of Conditions Attached to Federal Funds.

The Ferg-Cadima letter is analogous to the Medicaid-expansion provision struck down in *NFIB* in another way: At the time it applied for and accepted federal assistance, Petitioner could not possibly have known that it would be subject to the requirements set forth in the letter. If the Ferg-Cadima letter is an authoritative interpretation of Title IX, then Title IX violates the "clear notice" that this Court has repeatedly required of conditions attached to federal funds. *See*, *NFIB*, 132 S. Ct. at 2606; *Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-97 (2006); and *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981).

In *Arlington*, the Court insisted, "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" 548 U.S. at 296 (quoting *Pennhurst*, 451 U.S. at 17). In dissent, Justice Breyer wrote, "[T]he basic objective of *Pennhurst's* clear-statement requirement does not demand textual clarity in respect to every detail." 548 U.S. at 317. Rather, the "basic question" was, "Would the States have accepted the Federal Government's funds *had they only known* the nature of the accompanying conditions." *Id.* But if that is indeed the "basic question," then *Dole* assumes central importance, because of course the question whether the states would have accepted the funds anyway will often depend not on the onerousness of the con-

dition merely, but on whether the penalty involved passes the point "at which pressure turns into compulsion." Given a high enough penalty, a State might agree to a great many things against its will.

II. *AUER* DEFERENCE VIOLATES BOTH FEDERALISM AND SEPARATION OF POWERS.

The lack of notice of the conditions applicable to federal funds under Title IX as a result of the Fourth Circuit's decision is particularly grave when combined with the problems of applying *Auer* deference to the Ferg-Cadima letter. The lack of notice arises from the informality inherent in guidances and other informal communications, compared with the much greater "notice" attendant on rules enacted through the APA's notice-and-comment rulemaking, (which in the case of Title IX require formal presidential approval), to say nothing of a formal act of Congress.

This becomes clear when viewed through the twin lenses of federalism and separation of powers. Applying *Auer* doctrine in this case would both vitiate both the political and procedural safeguards of federalism, and violate the core legislative prerogative of Congress.

A. Applying *Auer* Deference to Informal Agency Guidance is Incompatible with the Protections States Are Supposed to Be Afforded in the Federal Political Process.

The practice of promulgating what amounts to a significant new rule through an informal (indeed, private) communication both vitiates the protections that states are said to enjoy under the federal politi-

cal process, and violates the prerogatives of Congress. Any protection the states may enjoy in the federal political process when Congress exercises federal power are completely absent when federal power is exercised pursuant to totally informal procedures in which nobody is afforded the slightest notice or opportunity to comment.

In *U.S. v. Morrison*, Justice Breyer argued that it is for Congress, not the courts, to "strik[e] the appropriate federal/state balance." 529 U.S. 598, 660 (2000) (Breyer, J., dissenting). "Congress is institutionally motivated to do so. Its Members represent state and local district interests. They consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place." 529 U.S. at 661.

The Court has remained loyal to the theory of "process federalism" that was fully embraced in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985). To be sure, the theory has been subject to serious criticism. *See, e.g.*, Bulman-Pozen, 123 Yale L.J. at 1925 (2014) (arguing that "Wechsler's process federalism failed to protect federalism"). As a result, commentators have pointed to political parties and administrative agencies as venues for States to vindicate their interests within the federal government. *Id.* at 1925-27.

The various theories advanced for how the States' separate and independent existence might be safeguarded within the structural processes of the national government rest on rationales as varied as the commentators who examine them. But they all presuppose some degree of formal process within which

States can make their voices heard and their influence felt.

If *Garcia*'s process federalism has been losing adherents outside the federal courts, it still commands more influence than the political party or administrative theories, because unlike all the other theories, states are actually formally represented in the process whereby Congress makes a law. Political parties and administrative proceedings can provide protections for federalism, if at all, only to the extent that they constitute actual proceedings.

Whatever the merits of the various theories advanced for the structural safeguards of federalism, none of those merits obtain in the case of informal agency guidances.

In other words, the process federalism of *Garcia* and Justice Breyer's dissent in *Morrison* argues overwhelmingly against applying *Auer* deference to guidances and informal letters that emerge from essentially no process at all.

B. Applying *Auer* Deference to the Ferg-Cadima Letter Violates the Prerogatives of Congress.

When given the force of law under *Auer* deference, the same lack of formality that engenders serious federalism problems also allows agencies to escape the boundaries that Congress has carefully placed on delegated legislative authority through both their enabling statutes and the Administrative Procedure Act. As noted by Petitioner, the Ferg-Cadima letter was not publicized, does not appear to have been approved by an agency head, and was ultimately signed by a relatively low-level "Acting"

Deputy Assistant Secretary. Not surprisingly, the Ferg-Cadima letter runs afoul of Title IX, the regulations enacted pursuant thereto, and the APA.

As argued by Petitioners, there is simply nothing in Title IX's text or structure to support the Department's interpretation that forbidding discrimination "on the basis of sex" can be read as forbidding discrimination on the basis of "gender identity". By all tools of conventional interpretation, "sex" as used in Title IX refers to biological sex assigned at birth. All of the contemporaneous definitions of "sex" included reference to biological or physiological characteristics. None referred to gender identity, whatever its etiology. Whether or not it makes sense to treat someone with gender dysphoria as possessing the gender with which they identify, Congress certainly has not done so.

Additionally, treating gender identity as synonymous with "sex" creates a number of anomalies. A person who identifies with a gender other than the one to which he or she is "assigned" at birth, i.e., the one that is reflected in his or her physiology, biology and genes, has an identity that even the Respondents concede is at variance with his or her sex as that term was used in 1972 and is still generally used today. As the Respondents put it, for such a person, sex is not "binary." Unless one concludes that sex is nothing but gender identity, then determining how to react to that variance is not a simple matter of nondiscrimination. It raises questions regarding the determination of who is and is not transgender and how the interests of transgendered persons are to be balanced against those who see sex as something more than gender identity. How to handle that

variance is not something that Congress has ever addressed.

Addressing that issue is not much helped by the concept of nondiscrimination on the basis of either sex or gender identity. Respondent argues that G.G. is a male and that Title IX's definition of sex requires that he be recognized as such. If so, he cannot have been excluded from the boy's room on the basis of sex. Title IX's prohibition of "sex discrimination" doesn't much work here.

Nor is it helped by the notion of nondiscrimination on the basis of transgender status. As one commentator recently noted, discrimination normally requires treating someone differently on account of the characteristics said to be the basis for discrimination. For example, a person discriminates on the basis of race when race factors into the relevant decision, religion when it factors into the relevant decision, and nationality when it factors into the relevant decision, just to name a few. It follows that when these factors are not relied on during the decision making process, there is no discrimination on the basis of the protected status.

In the same way, a person discriminates on the basis of gender identity when that factor is determinative in the relevant decision. But the Petitioner is not discriminating against persons on the basis of gender identity. It is simply refusing to take gender identity into account. Indeed, as Petitioner points out, a prohibition against transgender status would more readily – or at least just as easily – prevent a school district from prohibiting a transgender male from using the girls room. He would, after all, be a

physiological female who is being excluded simply because he identifies as a male.

Of course, it would be possible to pass a law that provides the protections that Respondent wants. But Congress has not done so. These anomalies arise because Congress has not addressed the matter and, therefore, Respondent and the Department of Education's Office of Civil Rights are trying to shoehorn the issue of how to treat transgender students into a statutory framework that does not address it. Because of this perversion of Title IX and the sensitivities surrounding school policy for transgender students, it is imperative that *Congress*, and not the judicial branch or informal agency pronouncements, provide a framework that educational leaders and boards may follow to both comply with Title IX while also protecting the interests of *all* students involved. Instead of twisting itself into knots to make "gender identity" fit within the definition of "sex" in Title IX, something the original drafters of the statute never intended, and maybe never even considered, this court should respect the role of Congress in making the (possibly) necessary revisions to Title IX to better address these admittedly novel views on "sex", or at least novel vis-à-vis Title IX.

The Department argues that its interpretation is compelled because the policy issue at stake is novel. If that is true, it is a particularly damning admission, because *Auer* deference is supposed to be accorded in cases where the regulation is *ambiguous*, not where the regulation clashes with a new policy issue, or with an old one that has suddenly become politically controversial or fashionable.

Despite the Department's protestations to the contrary, the Ferg-Cadima letter does indeed seek, in effect, to amend existing regulations. As such, it triggered the requirements of the APA, and not having observed those requirements, must be accorded no weight.

CONCLUSION

This case demonstrates that the erosion of "dual federalism" and the erosion of separation of powers among the branches of the federal government are mutually reinforcing processes, tending to the consolidation of government powers at the federal level in the hands of an increasingly unaccountable and uncontrollable executive branch. Arresting this trend will require more than the intervention of this Court, but cannot happen without that intervention. For this and the foregoing reasons, this Court should grant certiorari in this case, and consider the grave constitutional questions it raises.

Respectfully submitted,

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