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 WOMEN'S LIBERATION FRONT IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Women's Liberation Front ("WoLF") is a 501(c)(3) membership organization of radical feminists dedicated to the liberation of women. Among other things, WoLF seeks to end male violence, regain reproductive sovereignty and preserve women-only spaces. WoLF's interest in this case stems from its own challenge to the same interpretation of Title IX and its implementing regulations that the Fourth Circuit uncritically accepted below: *Women's Liberation Front v. U.S. Department of Justice et al.*, No. 1:16-cv-00915 (D.N.M. August 11, 2016).

In mandating that schools must allow students to use restrooms matching their self-declared "gender identity" rather than requiring them to use the restrooms assigned to their sex,[2] the decision below relied on a letter from an Acting Assistant Deputy Secretary of the Department of Education ("the Ferg-Cadima Letter") interpreting 34 C.F.R. § 106.33, and an amicus brief filed by the United States. Subsequently, and expressly relying on the decision below, the Department of Education ("DOE") and the Department of Justice ("DOJ") issued a "Dear Colleague"

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[1] No counsel for any party authored any part of this brief, and no party, their counsel, or anyone other than WoLF, has made a monetary contribution intended to fund its preparation or submission. Counsel of record for all parties received timely notice of WoLF's intent to file this brief under Rule 37.2(a) and have consented to its filing.

[2] WoLF uses "sex" throughout to mean exactly what Congress meant in 1972: the binary biological classification of human beings as either female ("women") or male ("men").

guidance document expanding the Ferg-Cadima interpretation to include showers, locker rooms, single-sex dormitories, etc., and ordering every school subject to Title IX to abide by their re-definition of "sex" to mean "gender identity".

Federal officials have thus mandated that men be allowed absolutely unfettered access to women's restrooms, locker rooms, showers, dorm rooms and tents, with the ***only*** barrier to entry being that such students (but *not* such teachers, administrators or other employees want that access) "notif[y] the school administration that the student will assert a gender identity that differs from previous representations or records." Pet. App. 130a. WoLF's complaint alleges that the Dear Colleague document is a legislative rule adopted without the required notice and comment rulemaking, that it conflicts with the plain language of Title IX, and that it violates Constitutional rights to privacy.

WoLF accepts that Title IX protection extends to discrimination against people (including G.G.) because they do not conform to gender stereotypes, but this Court should draw the line *to ensure that those remedies are not expanded in a way that strips women and girls of the rights and protections Congress expressly gave them in Title IX*. The idea that women and girls must surrender their rights and protections under Title IX – enacted specifically to secure women's access to education – in order to extend Title IX to cover men claiming to be women is a jaw-dropping act of administrative jujitsu. By mandating that every school must now affirmatively invade women's privacy and

threaten their physical safety in the places heretofore reserved exclusively for them – restrooms, locker rooms, single-sex dormitories – DOE and DOJ have turned Title IX on its head. Title IX was enacted to ensure women's equal access to educational opportunity; it is difficult to imagine a less plausible interpretation of Title IX than reading it to eliminate the very places created to help assure that access.

But even that is not the worst of it.

Women have been harassed, assaulted and raped by men since time immemorial, and a government policy that merely makes that more likely is nothing new (although doing so under the rubric of a statute designed to ensure women's equality certainly is). What is new and truly extraordinary is an administrative ukase decreeing that, as far as the law is concerned, there really is no such thing as a woman. When the law requires that any man who wishes (for whatever reason) to be treated as a woman *is* a woman, then "woman" (and "female") lose all meaning. With the stroke of a pen, women's reality – shaped by their unique and immutable biology since *Homo sapiens* emerged as a species some 200,000 years ago – has been eliminated by fiat. By redefining "sex" to mean "gender identity", DOE's policy presents one of the extremely rare instances when the phrase "existential threat" is no exaggeration.

SUMMARY OF REASONS FOR ISSUING THE WRIT

That an Acting Assistant Deputy Secretary of Health could pen a letter to a member of the public resulting in the legal redefinition of "sex" to mean "gender identity" is Orwellian in both its language and its bureaucratic arrogance. It also gives rise to at least three separate grounds for granting the Petition.

First, the decision below has created a clear conflict with a decision from another Circuit as to whether educational employers can require employees to use restrooms and other single-sex facilities consistent with their sex. The Fourth Circuit held that Title IX does not allow schools to require students (and, as explained below, necessarily also teachers, administrators and other employees) to use restrooms consistent with their sex, but in *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (2007), the Tenth Circuit held that Title VII *does* allow an employer to require its employees do so. Since both Title VII and Title IX apply to sex discrimination by institutions receiving federal education funding, and claims under each are governed by the same legal standards,[3] whether it is discrimination "on

[3] "The identical standards apply to employment discrimination claims brought under Title VII [and] Title IX[.]" *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n.1 (2d Cir. 2000); "[M]ost courts that have addressed the question have indicated that Title VII principles should be applied to Title IX actions, at least insofar as those actions raise employment discrimination claims." *Preston v. Commonwealth of Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994).

the basis of sex" to require employees of those institutions to use restrooms consistent with their sex is now solely a matter of geography: What is permissible in the Tenth Circuit is illegal in the Fourth.

It is equally clear that the Fourth Circuit has also decided an important question of federal law that has not been, but should quickly be, settled by this Court. Twenty-three states and/or their Governors have sued the federal government over the policy of forbidding schools from restricting students to single-sex facilities – restrooms, locker rooms, showers, single-sex dorms, etc. – that match their sex. One district court has enjoined the federal policy; another has enjoined a state law that conflicts with that policy; another has ordered a school district to allow restroom access based on "gender identity". Two other pending cases involve students and parents suing school districts that the federal government has strong-armed into adopting its policy, and WoLF's own case challenges the legality of the Dear Colleague guidance document. Enormous resources are being devoted to an explosive issue that this Court has the opportunity to resolve.

This case also offers an opportunity for the Court to fix this error before it spreads any further; lost in the litigation fog is the fact that Title IX applies to "*any* education program or activity receiving Federal financial assistance," 20 U.S.C. § 1681(a) (emphasis added).

According to DOE, tens of thousands of museums, libraries and other institutions *also* receive federal education funding, and thus are subject to this policy.[4]

Lastly, the decision below contravenes this Court's precedents that no deference is owed to an agency interpretation that is "plainly erroneous or inconsistent with the regulation" (*Auer v. Robbins*, 519 U.S. 452, 461 (1997)) or conflicts with prior agency interpretations, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012).

In focusing exclusively on whether DOE's interpretation was consistent with the regulation, the decision below did not devote a second thought – or even a first one – to whether that interpretation was consistent with Title IX. It is impossible to imagine a more bizarre interpretation of a regulation providing women with their own restrooms than one that opens each stall door indiscriminately to *any* man who wants to enter them. And it is equally impossible to imagine a more perverse interpretation of a statute designed to guarantee that women can avail themselves of equal

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[4] Federal "on-budget funds for education" includes $9.5 billion for "other education" programs, which "includes libraries, museums, cultural activities, and miscellaneous research." U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 2014* (available at http://nces.ed.gov/pubs2016/2016006.pdf), p. 730 and n.3. These funds are distributed by DOE and by the Departments of Agriculture, Commerce, Defense, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Labor, State, Transportation, Treasury, and Veterans Affairs, and more than 20 independent agencies. *Id*. pp. 733-738.

educational opportunities than one which affirmatively discourages women from doing so.

Nor did the decision below say a word about the government's previous interpretations of the word "sex". For *decades* the federal government maintained that the word "sex" did *not* encompass "transgender" status or "gender identity" (let alone mandate that men have free access to women's showers). It was not until 2014 that Attorney General Holder announced that he had "determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity", while conceding "that Congress may not have had such claims in mind when it enacted Title VII".[5] Remarkably, as recently as 2011 the Department of Justice maintained *as to its own employment practices* that claims of "gender identity" discrimination were simply not cognizable as discrimination on the basis of "sex". *Macy v. Holder*, Appeal No. 0120120821 (EEOC April 20, 2012). Ignoring this history, the court below uncritically accepted the federal government's about-face – made without a single public notice or opportunity to comment – that "sex" now means "gender identity".

By overlooking the history of previous agency interpretations, the Fourth Circuit also missed the fact that DOE's newest one is the result of pure regulatory bootstrapping. The *only* agency authority that the

[5] *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, December 15, 2014 ("Holder Memo"), p. 2 (available at https://www.justice.gov/file/188671/download).

Ferg-Cadima letter cited to justify allowing men into women's restrooms was a DOE document interpreting a separate regulation concerning single-sex *classes* (and mandating that these be open to whomever "identified" with the relevant sex). Putting aside the difference between classrooms and restrooms, that earlier document itself cited *no* authority for its conclusions which, as shown below, are flatly contrary to the agency's express intent when it wrote the classroom regulation in 1975. DOE's policy (in all its manifestations) is a regulatory house of cards.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE A CIRCUIT SPLIT AS TO WHETHER TITLE IX EMPLOYERS MAY LIMIT EMPLOYEE ACCESS TO RESTROOMS ON THE BASIS OF SEX.

The Fourth Circuit held that under Title IX, schools may not limit student access to restrooms on the basis of sex. This holding applies equally to school teachers, administrators, or other employees, because DOE's regulations expressly extend Title IX's protections to employees of covered institutions: "No person shall, on the basis of sex, . . . be subjected to discrimination in employment, or recruitment, consideration, or selection therefor . . . under any education program

or activity operated by a recipient which receives Federal financial assistance." 34 C.F.R. § 106.51(a).[6]

In short, the decision below *requires* schools to allow male teachers, administrators, and other employees the same unfettered access to women's restrooms as extended to students on the basis of a self-declared female "gender identity". Not surprisingly, on August 26, 2016, a district court in the Fourth Circuit declared that it was "bound by" the Circuit's decision in this case and enjoined the University of North Carolina from enforcing against the plaintiffs (two students *and a University employee*) that portion of a state statute limiting access to restrooms, locker rooms, etc., on the basis of sex. *Carcaño v. McCrory*, No. 1:16-cv-236, 2016 WL 4508192 (M.D.N.C. August 26, 2016).

By forbidding schools from keeping male teachers, administrators and other employees out of women's bathrooms, the decision below conflicts with the Tenth Circuit's decision in *Etsitty v. Utah Transit Auth*., 502 F.3d 1215 (2007). Etsitty, a male bus driver whose self-declared "gender identity" was female, was fired by the defendant transit agency because bus drivers use

[6] DOE's authority to promulgate the Title IX employment regulations was upheld in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), and the regulation at issue here ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex . . . "; 34 C.F.R. § 106.33) has a similar counterpart in DOE's employment regulations: "[N]othing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex." 34 C.F.R. § 106.61.

public restrooms on their routes, and Etsitty insisted on using women's restrooms.

Relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Etsitty claimed that "terminating her because she intended to use women's restrooms is essentially another way of stating that she was terminated for failing to conform to sex stereotypes."[7] *Etsitty*, 503 F.3d at 1224. While courts have generally recognized *Price Waterhouse* "sex stereotyping" employment discrimination claims in cases involving "transgendered" plaintiffs, the Tenth Circuit understood the inherent limits to this doctrine (*id*.):

> However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.

Ever since this Court's decision in *Franklin v. Gwinnett County Pub. Sch*., 503 U.S. 60, 75 (1992), which expressly relied on its Title VII decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), to hold that Title IX supported actions for damages,

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[7] *Price Waterhouse* "sex stereotyping" (now "gender nonconformity") claims have become the prevailing remedy for transgender employment discrimination because most courts have held that discrimination based on transgendered status, in and of itself, is not sex discrimination under Title VII precisely because "sex" means "male" or "female", but not "transgender". *Etsitty*, 502 F.3d at 1221; *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 749-750 (8th Cir. 1982).

courts have read Title IX in light of Title VII. "This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX[.]" *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J. dissenting). Nowhere is this truer than in the area covered by both statutes, *i.e.*, sex discrimination in educational employment. "The identical standards apply to employment discrimination claims brought under Title VII [and] Title IX[.]" *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n.1 (2d Cir. 2000); "[M]ost courts that have addressed the question have indicated that Title VII principles should be applied to Title IX actions, at least insofar as those actions raise employment discrimination claims." *Preston v. Commonwealth of Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994).

Thus the Circuit split: The Tenth Circuit held that Title VII allows employers to require employees to use restrooms consistent with their sex, but the Fourth Circuit says that employers may not do so under Title IX. And while courts disagree as to whether Title IX provides a private right of action for employment discrimination by covered institutions, or whether such claims must be brought under Title VII,[8] the United States may enforce either Title VII or Title IX against

[8] *Compare Preston*, *supra*, 31 F.3d at 206 (Title IX's implied private right of action "extends to employment discrimination on the basis of gender by educational institutions receiving federal funds") with *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995) ("Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions.").

an educational institution discriminating in employment on the basis of sex.[9]

The decision below thus presents a Circuit split on a pure question of law that needs no further factual development before review in this Court.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE FOURTH CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Expressly relying on the decision below, within weeks the federal government expanded via a "Dear Colleague" guidance letter its noxious policy beyond restrooms to locker rooms, showers, and single-sex accommodations such as dormitories or (for school trips) hotel rooms and tents. Pet. App. 126a-142a.

With astonishing speed, a legal morass ensued, with 23 states or their Governors suing DOE and DOJ over that "Dear Colleague" letter in two cases, *Texas v. United States of America*, No. 7:16-cv-00054 (N.D. Tex. May 25, 2016) and *Nebraska v. United States of America*, No. 4:16-cv-03117 (D. Neb. July 8, 2016). At least four other cases have been filed against the federal

[9] The U.S. is currently litigating at least one such case alleging that a self-declared transgender professor was denied promotion and tenure in violation of Title VII: *United States v. Southeastern Oklahoma State University*, No. 5:15-cv-324 (W.D. Okla. March 30, 2015).

government[10] and another two against local school boards. Resp. 22 n.12.

All of that is in addition to the legal free-for-all playing out in the North Carolina federal courts: the Governor sued DOJ over its threatened enforcement of this policy (*McCrory v. United States*, No. 5:16-cv-238 (E.D.N.C. May 9, 2016)); on the same day, DOJ sued North Carolina over a state law limiting restroom access by sex (*United States v. State of North Carolina*, No. 1:16-cv-425 (M.D.N.C. May 9, 2016)); a group of University of North Carolina students and employees had previously sued the state over the same state law (*Carcaño v. McCrory*, *supra*); and finally a group of parents and students sued the U.S. over the federal policy (*North Carolinians for Privacy v. U.S. Department of Justice*, No. 1:16-cv-845 (M.D.N.C. May 10, 2016)).

So far, dueling injunctions have issued: The Texas district court held that plaintiffs there would likely establish that DOE's interpretation of its regulation violated Title IX (as well as the notice and comment provisions of the Administrative Procedure Act) and enjoined enforcement of the "Dear Colleague" letter (Pet. 31-32); as noted, based on the ruling below, the *Carcaño* court enjoined a state statute because it

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[10] *Student and Parents for Privacy v. U.S. Department of Education*, No. 1:16-cv-4945 (N.D. Ill. May 4, 2016); *Board of Education of the Highland Local School District v. U.S. Department of Education*, No. 2:16-cv-524 (S.D. Ohio June 10, 2016); *Privacy Matters v. U.S. Department of Education*, No. 0:16-cv-03015 (D. Minn. September 7, 2016), and WoLF's own case (*supra*).

violated DOE's interpretation of its regulation; and another court (citing the decision below) has ordered a school district to allow restroom access on the basis of "gender identity". *Whitaker v. Kenosha Unified School District*, 2:16-cv-00943 (E.D. Wis. September 22, 2016). Meanwhile, preliminary injunction motions are pending in at least three of the cases against the federal government in three other circuits.

And that is just the legal fight.

Underlying all of this litigation is a serious issue: how can the law protect people who are treated unfairly because they claim to be "transgender", while not revoking express Title VII and Title IX protections for women?

An *ad hoc* "policy" redefining "sex" to mean "gender identity", penned by an Acting Deputy Assistant Secretary of Education in a letter to a private citizen, is not the answer. Nor was that "policy" improved when, based on the decision below and without any public notice or comment, DOE quickly expanded it to cover locker rooms, showers, and single-sex accommodations such as dormitories or (for school trips) hotel rooms and tents.

Two federal officials have thus mandated that men be allowed completely free access to women's restrooms, locker rooms, showers, dorm rooms and tents, subject only to the condition that such students "notif[y] the school administration that the student will assert a gender identity that differs from previous representations or records." Pet. App. 130a. On the other

hand, male teachers, administrators, or other employees can simply visit the women's showers whenever they wish.

Nor was that student notification provision intended to provide protection to women, because *the school must keep such notification confidential*. Schools may disclose "directory information" such as "a student's name, address, telephone number, date and place of birth", etc., but "School officials may not designate students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy." Pet. App. 140a. It is truly mind-boggling that informing women as to which men might have the "right" to join them in the showers is an "invasion of privacy", but it is *not* an invasion of women's privacy to invite those men into the women's shower in the first place.

It gets worse:

> A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students. Pet. App. 131a (footnote omitted).

The United States thus contemptuously dismisses *the physical protections guaranteed by Title IX* as blind prejudices. This gross hypocrisy is astonishing: The discomfort that self-declared transgendered students feel at having to use the facilities according to their sex is worthy of the full legal protection of the federal civil rights laws, but any "discomfort" that women feel from men invading spaces where they are at their most vulnerable, and threatening their physical safety, is of no moment. Women, in short, should just get over it.

And even *that* is not the worst of it.

If allowed to stand, the decision below threatens women's very existence as an identifiable class of persons who share the immutable characteristics of their sex. Redefining "sex" to mean "gender identity" means that the sex-class comprising women and girls now includes men, with all the physiological and social characteristics that come with being male (and vice-versa). Likewise, the agencies make little effort to keep up the pretense that "transgender" is a coherent descriptor; under their policy a transgender person is simply any person who claims to be so, and that person's "sex" is whatever they say it is whenever they say it. By rendering men legally indistinguishable from women, the policy threatens to extinguish the very meaning (and independent legal existence) of women.

III. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS CONCERNING DEFERENCE GIVEN TO AGENCY INTERPRETATIONS OF THEIR REGULATIONS.

DOE is entitled to deference in interpreting its regulation unless it is "plainly erroneous or inconsistent with the regulation". *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The Fourth Circuit ignored the first part of this test: Having held (incorrectly) that "sex" in 34 C.F.R. § 106.33 was ambiguous, it then accepted DOE's interpretation *without ever examining whether the regulation, so interpreted, violated Title IX*.

This Court has also held that an agency interpretation deserves no deference if it "conflicts with a prior interpretation", *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012). The decision below never considered the *decades* of federal agency interpretations holding that "sex" did *not* include "gender identity".

A. The Fourth Circuit Limited *Auer* to Eliminate its "Plainly Erroneous" Requirement.

Whether regulations (or statutes) are ambiguous is to be determined based on the understanding of their terms at the time they were enacted or promulgated. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Judge Neimeyer's dissent below thoroughly

discusses the common and accepted meaning of the word "sex" in 1972 (Pet. App. 54a-55a), as does the *Texas v. United States* injunction decision (Pet. App. 221a-222a). There is no credible basis for DOE's assertion that the word "sex" was understood to be ambiguous when Congress enacted Title IX in 1972 or when the Department of Health, Education and Welfare ("HEW") issued the Title IX regulations in 1975.

Such was also the conclusion of the only previous case to consider the specific issue of whether limiting access to restrooms based on sex violated Title IX, *Johnston v. Univ. of Pittsburgh*, 97 F.Supp.3d 657, 678 (W.D. Pa. 2015). After extensive consideration, *Johnston* concluded that, "Title IX and its implementing regulations clearly permit schools to provide students with certain sex-segregated spaces, including bathroom and locker room facilities, to perform certain private activities and bodily functions consistent with an individual's birth sex."

But what should have been the ultimate touchstone for DOE's interpretation of its regulation – whether, so interpreted, it conflicted with Title IX itself – is conspicuously missing from the decision below. The Fourth Circuit avoided *any* discussion of whether the interpreted regulation conflicted with Title IX. The more you look for it, the more you see it isn't there.

The decision below is all the more remarkable since the dissent noted that the word "sex" is "a term that must be construed uniformly throughout Title IX and its implementing regulations" (Pet. App. 50a) and

discussed the consequences that would follow from redefining it to mean "gender identity". The majority's response was to elide the issue: "It is not apparent to us, however, that the truth of these propositions undermines the conclusion we reach regarding the level of deference due to the Department's interpretation of its own regulations." Pet. App. 25a-26a. The impact on Title IX was not apparent to the Fourth Circuit only because it cabined its reading of *Auer* so as to avoid examining whether the newly-interpreted regulation conflicted with the statute.

Nothing better illustrates the pernicious nature of this (mis)reading of *Auer* than how the court treated *Johnston*, which was to dismiss it in a footnote: "Because the *Johnston* court did not grapple with the questions of administrative law implicated here, we find the Title IX analysis in *Johnston* to be unpersuasive." Pet. App. 25a, n.9. In other words, *Johnston*'s conclusions as to whether Title IX allowed schools to limit restroom access on the basis of sex were irrelevant because the *only* relevant criterion in judging the validity of an agency's interpretation of its regulation is consistency with the regulation, regardless of its consistency with the statute.

B. The Fourth Circuit Ignored This Court's Requirement to Consider Previous Agency Interpretations.

1. The Decision Below Ignored Previous Agency Definitions of "Sex".

The Fourth Circuit acknowledged that an agency interpretation must be examined to see if it conflicts with previous interpretations. Pet. App. 23a. But, just as it blinkered itself as to whether the interpreted regulation must comport with the statute, the decision below gave the narrowest possible definition of what constituted a prior interpretation: "Although the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015, novelty alone is no reason to refuse deference and does not render the current interpretation inconsistent with prior agency practice." *Id*. (internal quotation omitted.)

While DOE and DOJ may not have interpreted the word "sex" in 34 C.F.R. § 106.33 before 2015, they had a 40-year history of interpreting the word "sex" as used elsewhere in both Title VII and Title IX. And for decades, the government's consistent position was that "sex" did *not* include "gender identity." Nowhere is this more apparent than in federal employment practices under Title VII.

As recently as 2011, DOJ maintained, *as to its own employment practices*, that claims of discrimination on the basis of "gender identity" were simply not cognizable under the prohibition of discrimination on the basis

of "sex", a position rejected only in *Macy v. Holder*, Appeal No. 0120120821 (EEOC April 20, 2012). *Macy* expressly stated that it was overruling a whole line of cases affirming the government's view that discrimination on the basis of "gender identity" did not fall within the meaning of discrimination on the basis of sex. *Id.* at 25, n.16, citing, *inter alia*, *Kowalczyk v. Department of Veterans Affairs*, Appeal No. 01942053 (EEOC December 27, 1994) at 4 ("The Commission finds that the agency correctly concluded that appellant's allegation of discrimination based on her acquired sex (transsexualism) is not a basis protected under Title VII and therefore, the final agency decision properly dismissed this basis"); *Cassoni v. United States Postal Service*, Appeal No. 01840104 (EEOC September 28, 1984) at 4 (rejecting Title VII claim of "gender identity" sex discrimination because: "Absent evidence of Congressional intent to the contrary, and in light of the aforementioned case law, this Commission finds that the phrase 'discrimination because of sex' must be interpreted in accordance with its plain meaning").

In fact, it was not until 2014 that Attorney General Holder announced that he had "determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity" (Holder Memo, *supra* n.5). Remarkably, in that same document he admitted "that Congress may not have had such claims in mind when it enacted Title VII". *Id.*

That the Fourth Circuit limited its examination to just the government's interpretation of "sex" in the regulation at issue further emphasizes the Fourth Circuit's dangerously cramped reading of this Court's cases emphasizing the importance of the agency's prior interpretations.

2. The Decision Below Ignored the Lack of Historical Basis for the Agency's Interpretation.

The *only* citation in the Ferg-Cadima Letter regarding DOE's policy as to restroom access (Pet. App. 123a) is to a document entitled, "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities" ("Classroom Q&A"; available at http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf).

The Classroom Q&A contains no discussion whatsoever of restrooms (or locker rooms, showers, etc.) But because the Fourth Circuit never evaluated whether this regulatory bootstrapping was justified, it unquestioningly deferred to a decision allowing men into women's restrooms that was based on a policy of having boys and girls share classrooms.

If the court *had* examined the Classroom Q&A, it would have seen that although DOE's regulations allow for sex-segregated "classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality" (34 C.F.R. § 106.34(a)(3)), the Classroom Q&A states that "a recipient generally

must treat transgender students consistent with their gender identity in all aspects of . . . single-sex classes." Classroom Q&A p. 25. The Classroom Q&A fails to cite *any* source or authority whatsoever for this policy statement, and the regulation's actual history shows that the policy contradicts it.

There was no provision concerning single-sex classes in HEW's proposed Title IX regulations. 39 Fed. Reg. 22228 (June 20, 1974). However, three weeks later HEW published a supplemental notice from Secretary Weinberger that is worth quoting at length:

> Immediately after the text of the proposed regulation was made public on June 18, 1974, the Department received numerous inquiries as to whether § 86.-34(a) permitted elementary and secondary schools to present separately to boys and girls brief presentations in the area of sex education. Although the language of the proposed regulation precludes such separation, I had not intended it to do so in the area of sex education. . . . In view of personal and parental attitudes concerning the subject, and because rights of privacy on these matters, desired by both students and their parents may well be invaded by requiring mixed classes on sex education, school administrators, for reasons not applicable to other subjects, might properly decide that some of or all of such sessions be conducted separately for boys and girls. . . . I hereby give notice that I propose to insert in the final regulation, when published, a proviso at the end of the

> present text of proposed § 86.34 to read as follows. . . .

39 Fed. Reg. 25667 (July 12, 1974). The Classroom Q&A ignores Secretary Weinberger's remarkable personal acknowledgment of the "numerous inquiries" made about separate sex-education classes, and his statements that privacy rights that "may well be invaded" by not allowing such sex-segregated classes for "boys and girls". DOE presumably believes that privacy rights would not be invaded if the members of the opposite sex simply tell the teacher (but not the other students) that they do not identify as such.

Following publication of HEW's final regulations, Congress held six days of hearings on them; according to the chair of the relevant committee, their purpose was to review the regulations "solely to see if they are consistent with the law and with the intent of the Congress in enacting the law. . . . solely to see if the regulation writers have read [Title IX] and understood it the way the lawmakers intended it to be read and understood." *Sex Discrimination Regulations. Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor, House of Representatives, Ninety-Fourth Congress, First Session* (available at http://eric.ed.gov/?id=ED118012), p. 1.

Not surprisingly, Secretary Weinberger's testimony touched on the issue of sex-segregated classes: "[C]lasses in health education, if offered, may not be conducted separately on the basis of sex, but the final regulation allows separate sessions for boys and girls

at the elementary and secondary levels during times when the materials and discussion deal exclusivly [*sic*] with human sexuality". *Id*. p. 439. In order to show public support for the regulations, Secretary Weinberger placed into the record numerous editorials expressing approval; these too, addressed the issue of single-sex classes, *e.g.*, "One particularly controversial point, the implication that since all classes must be open to both sexes this meant sex education, too, was quickly clarified by HEW as a mistake; in the latest version, sex-education classes are exempted." *Louisville Courier-Journal*, *id*. p. 458.

An agency's interpretation does not get deference if an "alternative reading is compelled by the regulation's plain language *or by other indications of the Secretary's intent at the time of the regulation's promulgation*." *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988) (emphasis added). Secretary Weinberger's personal supplemental notice concerning single-sex classes and his Congressional testimony show that neither he nor Congress (nor the public) thought that there was any ambiguity in the single-sex class regulation or, indeed, with the word "sex".

DOE's most recent regulatory action concerning single-sex classes further undermines the Classroom Q&A. In 2006, DOE amended its Title IX regulations "to clarify and modify" requirements for "single-sex schools, classes and extracurricular activities", but despite taking the opportunity to change the very regulation concerning sexual education classes (34 C.F.R. § 106.34(a)(3)), DOE did not say a word about

"gender" or "gender identity". 71 Fed. Reg. 62530 n.6 (October 25, 2006).

DOE introduced its redefinition of "sex" with "gender identity" in addressing single-sex classes in the Classroom Q&A; the Ferg-Cadima Letter then bootstrapped off that to extend the doctrine to restrooms, and then when the decision below deferred to the Ferg-Cadima Letter, DOE issued the Dear Colleague guidance extending the "sex" = "gender identity" doctrine to showers, locker rooms, dormitories, etc. And it bears repeating that DOE justifies creating this revolutionary social policy without a single public notice or opportunity for comment on the grounds that it was doing nothing more than "clarifying" the meaning of the word "sex".

CONCLUSION

For the reasons stated herein, the Court should grant the Petition for Certiorari.

Respectfully submitted,

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