At heart of transgender rights case at SCOTUS, a controversial legal doctrine

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Briefing wrapped up this week in one of the most hotly anticipated petitions the U.S. Supreme Court will consider this fall: a Virginia school board's request for the justices to review a federal circuit ruling that under the Department of Education's interpretation of Title IX, a transgender high school student who identifies as a boy is entitled to use boys' bathrooms at school.

The case is the first challenge to the Obama administration's policy on the rights of transgender students to reach the Supreme Court, which this summer stayed an injunction requiring the Gloucester County School Board to allow the student, Gavin Grimm, to use boys' bathrooms.

As my Reuters colleague Lawrence Hurley has reported, there are many reasons for the justices to decline to take this case, including the unfilled seat of Justice Antonin Scalia. But even if the court passes this time around, Hurley said, the justices will have plenty more chances to look at the rights of transgender students since other school bathroom cases are making their way through the federal courts. It seems likely that sooner than later, the Supreme Court will have to decide whether public schools must allow transgender students to choose bathrooms that correspond to their gender identity.

And school bathrooms are only part of the reason why conservatives are so eager to get one of these cases to the justices. Beneath the fight over the rights of transgender students is a legal doctrine loathed by opponents of big government. Critics of the so-called administrative state see the bathroom access cases as an opportunity to overturn the Supreme Court's 1997 decision in Auer v. Robbins, which established that courts must consider a federal agency's interpretation of its own regulations to be controlling unless the interpretation is plainly wrong.

The Auer doctrine is a close relative of Chevron v. Natural Resources Defense Council, the 1984 Supreme Court holding that courts must defer to executive branch agencies to interpret ambiguous statutes in their sphere of enforcement. Chevron itself is controversial; at least two influential appellate judges have questioned whether the ruling is an unconstitutional expansion of the power of the executive branch.

Auer is even more egregious, according to its critics. In 2001, the Supreme Court put a limit on Chevron deference in U.S. v. Mead, holding that federal agencies are only owed deference in statutory interpretation when Congress has delegated rulemaking authority to them. As the libertarian Cato Institute explained this week in an amicus brief urging the Supreme Court to

take the Gloucester case, Mead has forced federal agencies to engage in formal notice-and-comment procedures in order to be accorded deference in interpreting ambiguous statutes – but because there's no such limit on Auer deference, the same agencies can decide unilaterally how to shape regulations. That power, according to critics, is a violation of the constitutional separation of powers principle.

Auer came into play in the transgender bathroom litigation because the 4th U.S. Circuit Court of Appeals said its ruling in the Gloucester case was controlled by the Department of Education's interpretation of Title IX, which bars gender discrimination in schools that receive federal funding. The agency first articulated its policy – that federally funded schools must generally treat transgender students consistent with their gender identity – in an opinion letter from its Office of Civil Rights in January 2015, after Gavin Grimm had sued the Gloucester school board. The Department reiterated its position as an amicus at the 4th Circuit in Grimm's case, and, after the 4th Circuit decided its interpretation is entitled to deference, sent out a notification letter to all federally funded schools, explaining how schools should comply with the department's policy. "Needless to say, it did not go through notice-and-comment rulemaking," wrote the Gloucester school board's lawyers at **Schaerr Duncan**.

At the very least, the school board said in its cert petition, the Supreme Court should take this case to decide whether a mere letter from a mid-level agency official – which was the Department of Education's only policy statement on Title IX and bathroom access for transgender students in the early stages of the Grimm litigation – is entitled to Auer deference.

The American Civil Liberties Union, which represents Grimm, knows Auer is bait for the Supreme Court's conservatives. Justice **Clarence Thomas** and **Samuel Alito** have already expressed reservations about court deference to agency interpretation of their regulations, as did Justice Antonin Scalia. The ACLU said Auer's endurance in the face of the conservative wing's disapproval is all the more reason for the justices to leave the doctrine alone. "In the past five years, three sitting justices have called for Auer to be overruled or reconsidered, but a majority of this court has not expressed interest in doing so," the ACLU wrote in its brief opposing certiorari. "There is no special justification for overturning this settled principle of administrative law now."

The justices are scheduled to conference on the Gloucester cert petition on Oct. 14. If they take the case, a lot more than transgender students' rights to use the bathroom of their gender identity will be at stake.