No. 18-658

In the Supreme Court of the United States

JOEL DOE, *et al.*,
Petitioners,

v.

BOYERTOWN AREA SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR FAITH AND FAMILY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Institute for Faith and Family, as *amicus curiae*, respectfully urges this Court to grant the Petition and reverse the Third Circuit ruling.

Institute for Faith and Family (IFF) is a nonprofit, tax-exempt organization based in Raleigh, NC that exists to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. *See* https://iffnc.com. IFF has an interest in ensuring that American citizens are free to live and work according to conscience and religious faith.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Third Circuit admits that "sex" is based on "anatomical and physiological processes that lead to or denote male or female"—*objective* factors—and that gender identity is a "*subjective*, deep-core sense of self as being a particular gender." *Doe v. Boyertown Area School District*, 897 F.3d 518, 522 (3d Cir. 2018) (emphasis added). But the court seized the permissive language of Title IX and its regulations to conclude that although privacy concerns "may justify" separate bathroom facilities, the Constitution does not *compel* them. *Id*. at 532-533. Thus the privacy concerns of

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief. *Amicus curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

Petitioners, admittedly rooted in constitutional guarantees, were summarily cast aside and the court upheld the controversial bathroom policy of the Boyertown Area School District ("Boyertown" or "the School District").

The key to unraveling the court's ruling is its reliance on anti-discrimination principles. "Discrimination" has swept broadly through the legal system, triggering a cornucopia of litigation. But a clear definition is long overdue. A school district does not engage in the irrational, arbitrary, or unreasonable discrimination the Constitution prohibits when it acts to protect the fundamental privacy rights of students—like Petitioners—who are not transgender. Discrimination is arbitrary where an entire class of persons is treated differently because of irrelevant factors. But it is hardly "arbitrary" to segregate the two sexes in private areas, based on relevant anatomical differences, in order to preserve bodily privacy. If the School District properly considered the privacy rights of its non-transgender students—accommodating the transgender students rather than offering a faux "accommodation" to all others—such action would not constitute arbitrary, irrational or unreasonable discrimination.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO DEFINE THE CONTOURS OF CLAIMS ASSERTING A COMPELLING INTEREST IN ELIMINATING DISCRIMINATION.

The Third Circuit framed its decision in terms of eradicating discrimination against transgender persons. The appellate court agreed with the District Court's conclusion that the policy—which requires Petitioners to be viewed by persons of the opposite sex while partially clothed—is constitutionally permissible because it allegedly serves "a *compelling interest—preventing discrimination against transgender students*—and was narrowly tailored to that interest." *Boyertown*, 897 F.3d at 527-528 (emphasis added).

Anti-discrimination principles originated in the context of race. This Court has rightly upheld civil rights legislation intended to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But as protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and—as this case demonstrates—impose social change on unwilling participants. Race is irrelevant to public transportation, lodging, food, etc., but the anatomical differences between male and female are highly relevant to privacy concerns.

The term "discrimination" needs a clear, consistent definition before a court can accurately characterize an action as discrimination and find a compelling interest

in eliminating it. Here, the Third Circuit obscures the issues—first, by redefining "sex" in Title IX as tantamount to "gender identity," and second, by failing to carefully define the contours of transgender discrimination. As one commentator observed, Americans "need to develop thicker skin" if they wish to "preserve their civil liberties," but "[t]he current trend . . . is to give offended parties a legal remedy, as long as the offense can be construed as 'discrimination.'" David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 245 (2003). This is not a First Amendment case, but similar principles apply. The trend to expand "discrimination" remedies threatens other core rights in a variety of contexts.

Anti-discrimination principles have ancient roots. The Massachusetts law at issue in *Hurley* was derived from the common law principle that innkeepers and others in public service could not refuse service without good reason. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 571 (1995). But like many other states today, Massachusetts broadened the scope to add more categories and places. *Id*. at 571-572. The same trend was apparent in *Dale*. The traditional "places" moved beyond inns and trains to commercial entities and even membership associations. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000). Protected categories also expanded, adding criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology. *Id.* at 656 n. 2. Here, bodily privacy is "good reason" to separate male and female in private facilities, particularly where minor children are at risk.

Early American laws were carefully crafted with narrow definitions of the people and places regulated. These laws focused almost exclusively on eliminating the racial discrimination that had plagued the nation for decades. James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 Vand. L. Rev. 961, 965 (2011). Primary responsibility shifted to the states after this Court invalidated the Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875). *The Civil Rights Cases*, 109 U.S. 3 (1883). *See Just Shoot Me,* 64 Vand. L. Rev. at 965 n. 7. Later federal attempts succeeded but again highlighted racial equality. The Civil Rights Act of 1964 "was enacted with a spirit of justice and equality in order to remove racial discrimination from certain facilities which are open to the general public." *Miller v. Amusement Enters., Inc*., 394 F.2d 342, 352 (5th Cir. 1968); *see* Civil Rights Act of 1964, 42 U.S.C. § 2000a.

Protected categories and places have both expanded exponentially. The vast expansion of covered categories has often proceeded with little analysis of the difference between race and newly protected classes—or as to how the criteria might be relevant. A current District of Columbia statute prohibits discrimination based not only on race or color, but also "religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual." D.C. Code § 2-1402.31(a); *see Just Shoot Me*, 64 Vand. L. Rev. 961 at 966; *Dale*, 530 U.S. at 656 n. 2. Early anti-

discrimination laws narrowly defined the applicable places in terms of transient lodging, theaters, restaurants, and places of public entertainment. *Just Shoot Me*, 64 Vand. L. Rev. 961 at 966. But as traditional "places" expanded in scope, so did the potential for collision with other rights. *Dale*, 530 U.S. at 657; *see also Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Even today, federal law is reasonably similar to common law rather than broadly sweeping in *any* establishment that offers *any* goods or services to the public. 42 U.S.C. § 2000a(b). Title IX, the key statute in this case, extended anti-discrimination principles to education, ensuring equal opportunities for men and women but providing for separation in private facilities such as restrooms. This reasonable extension of anti-discrimination law—from public accommodations to public education—does not grant schools or courts carte blanche to reconfigure the definition of "sex" so that it coincides with the very different concept of "gender identity" and essentially erases the distinction between male and female.

II. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO PRESERVE EQUALITY, TOLERANCE, AND INCLUSION FOR ALL STUDENTS.

The Third Circuit undermines the very values it purports to advance—equality, tolerance, inclusion. The Boyertown policy allegedly facilitates "an environment of inclusivity, acceptance, and tolerance." *Boyertown*, 897 F.3d at 529. But promoting these concepts when students are in class fully clothed is not equivalent to coercing them in an intimate setting where privacy interests are heightened.

Inequality. The court uses "discrimination" as a smokescreen to obscure the invidious inequality it creates. "[R]equiring transgender students to use single user or birth-sex-aligned facilities is its own form of discrimination." *Boyertown*, 897 F.3d at 530. Students who accept and interact with their transgender classmates, but oppose sacrificing their bodily privacy, are now treated as *unequal*. The court expressly acknowledges that "the constitution recognizes a right to privacy in a person's unclothed or partially clothed body" (*id*. at 527 n. 53), but then makes short shrift of Petitioners' rights. Non-discrimination principles should never be applied in a discriminatory, unequal manner that squelches the rights of those outside the protected category.

Intolerance. As the Sixth Circuit observed, "tolerance is a two-way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). Despite increasing statutory and judicial trends to protect transgender persons, there is no corollary right to eviscerate the privacy rights of others. Boyertown displays *intolerance* toward students who are uncomfortable sacrificing basic privacy in the presence of biologically opposite sex classmates. Students were essentially told to "get over it"—to "tolerate" the new policy and make it seem "natural." See Pet. 7, App. 47a.

Exclusion. The Constitution is an inclusive document protecting the life and liberty of all within its jurisdiction. But the Third Circuit ruling creates an intolerable danger that non-transgender students will be *excluded* from full participation in public school life. Indeed, Petitioner Joel Doe was so distressed by

Boyertown's policy that he left the school for his entire senior year. Pet. 14.

The only discrimination here is that which lurks in the shadows of the case—not discrimination against transgender students, but Boyertown's blatant discrimination against non-transgender students. Transgender rights are a relatively recent development. Advocates have accomplished dramatic social and political transformation by exercising their rights to free speech, press, association, and the political process generally. As with other minority groups, the status of transgender persons has improved dramatically because the Constitution guarantees free expression and facilitates the advocacy of new ideas. But no group can demand for itself what it would deny to others—otherwise, the constitutional foundation will crumble and all Americans will suffer. Overly aggressive assertion of particular rights can erode protection for other liberties. Here, Boyertown's policy directly attacks the privacy rights of students who are not transgender. The rights of those few students undergoing a gender transition do not trump the rights of everyone else.

III. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO AFFIRM THE SCHOOL DISTRICT'S OBLIGATION TO PRESERVE THE FUNDAMENTAL PRIVACY RIGHTS OF ALL STUDENTS.

Just as this Court must preserve the constitutional rights of all Americans, Boyertown must protect the privacy rights of all students. The Third Circuit openly admits that "the state has a compelling interest in protecting the physical and psychological well-being of

minors." *Boyertown*, 897 F.3d at 528. But the court wields anti-discrimination principles as a sword, elevating transgender concerns above the fundamental rights of all other students. The right to transition to the opposite gender does not trump the time-honored right to bodily privacy. We dare not sacrifice basic American freedoms through misguided—or even well-intentioned—government efforts to accommodate the unique concerns of transgender individuals.

In other contexts, this Court has found that statutory anti-discrimination rights cannot be applied in a manner that overrides certain constitutional rights. *Hurley*, 515 U.S. 557 (association rights); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (same). This Court cannot brush aside Petitioners' privacy concerns without flouting these precedents. There is no statutory right at stake. Instead, the Third Circuit looked beyond statutes and constitutions to find a compelling interest in eradicating discrimination against transgenders—and then, based on "vague claims" and statistics rather than adequate evidence from the School District (Pet. 24)—weighed that against long recognized rights to bodily privacy.

The policy's coercive impact on school children is troubling. This case implicates the most sensitive privacy concerns of young school children. Accommodation of those concerns—both for transgender students and all others—requires compassion and skillful crafting of a workable policy. Time-honored rights to bodily privacy should not be dismantled to coerce compliance with newly minted transgender rights. Young citizens who have no voice in setting policy are compelled to sacrifice their liberty

and reasonable expectation of bodily privacy on a daily basis.

The public school is the place where minor children spend most of their waking hours. Education is compulsory and many families have little choice but to place their children in public schools rather than an alternative educational setting. Some parents can afford private school tuition—in addition to the taxes they must pay to support public education—but many cannot.

As this Court has observed in another context, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). This case does not involve a religious exercise, but it does involve the coercive environment of the public school system. The coercion in this case is even greater. *Lee v. Weisman* involved a one-time event. This case involves daily school activities. *Lee v. Weisman* required students to stand respectfully for a few minutes. This case demands that children routinely sacrifice their bodily privacy, even exposing their unclothed bodies to students of the opposite sex, e.g., when changing clothes for physical education. *Lee v. Weisman* was about high school seniors ready to graduate and become adults. This case encompasses both elementary and secondary students—many of them too young to understand the concept of transgenderism. The coercion is extreme and pervasive. Public schools are not "enclaves of totalitarianism," and school officials "do not possess absolute authority over their students." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S.

503, 511 (1969). Students are persons and public schools must respect their fundamental rights. *Id*. In other contexts, perhaps there is an "emerging awareness that liberty gives substantial protection to *adult* persons in deciding how to conduct their *private* lives in matters pertaining to sex." *Lawrence v. Texas*, 539 U.S. 558, 571-572 (2003) (emphasis added). But here, Boyertown demands that *children* sacrifice bodily privacy in a *public* place among other students—including those of the opposite biological sex. This is unconscionable.

Moreover, "[c]ourts . . . must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). *Davis* was about student-on-student sexual harassment, which can be difficult to distinguish from typically immature student behavior. This Court noted the unique qualities of the school setting, where "students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *Id.* at 651-652. In this environment, it is disastrous to mandate that children regularly expose their unclothed bodies to students of the opposite sex. Not only does this endanger the students who are not transgender—it potentially subjects *transgender* students to "insults, banter, teasing, shoving, pushing" beyond what might otherwise occur. There is no compelling reason for Boyertown to jeopardize the liberty and privacy of young schoolchildren—rights

long recognized by this Court and many others.[2] Instead, Boyertown could (and should) explore ways to uphold the rights of transgender students to receive an education, and respect their liberty to assume the gender identity of their choice—but without transgressing the privacy rights of other students.

CONCLUSION

This Court should grant the Petition and reverse the decision of the Third Circuit Court of Appeals.

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[2] *See, e.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374-375 (2009); *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1168 (11th Cir. 2001), *vacated on other grounds by* 122 S. Ct. 2653 (2002); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992); *Beard v. Whitmore Lack Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005); *Doe v. Renfrow*, 631 F.2d 91, 92–93 (7th Cir. 1980).

Respectfully submitted,

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