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 *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Boyertown Area School District by policy authorizes some transgender students to use high school locker rooms and restrooms that match their subjective gender identity rather than their objective sex, as a means of affirming their beliefs about their gender and promoting tolerance. The policy forces students using those facilities to be seen by the opposite sex when they are partially or fully undressed, or to forgo using the facilities altogether. The Third Circuit correctly held that students have a constitutional right not to be seen undressed by the opposite sex but nonetheless upheld the policy, concluding it satisfied strict scrutiny. This petition presents two questions:

1. Given students' constitutionally protected privacy interest in their partially clothed bodies, whether a public school has a compelling interest in authorizing students who believe themselves to be members of the opposite sex to use locker rooms and restrooms reserved exclusively for the opposite sex, and whether such a policy is narrowly tailored.

2. Whether the Boyertown policy constructively denies access to locker room and restroom facilities under Title IX "on the basis of sex." 20 U.S.C. 1681.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules, Regulations and Orders

Other Authorities

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INTEREST OF AMICUS CURIAE

Amicus curiae Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding in 1981, EFELDF has defended the founding principles of federalism and separation of powers in

[1] *Amicus* files this brief with all parties' written consent, with 10 days' prior written notice. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

our Constitution. In addition, EFELDF has a long-standing interest in limiting Title IX to its anti-discrimination intent, without courts' or agencies' intruding further than required. For these reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Several pseudonymous students (collectively, the "Petitioners") seek to enjoin a transgender policy that their school – Boyertown Area School District and its officials (collectively, "Boyertown") – adopted to allow transgender students to use sex-segregated facilities (*i.e.*, bathrooms and locker rooms) designated for the opposite biological sex. Pennsylvania Youth Congress Foundation ("Intervenor") intervened to press the rights of transgender students. Petitioners claim the policy violates their right of privacy under the Constitution and excludes them from education-related facilities in violation of Title IX.

Constitutional and Statutory Background

Privacy interests present both a personal right and a legitimate governmental interest for which to provide sex-segregated bathrooms and locker rooms. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *U.S. v. Virginia*, 518 U.S. 515, 550 n.19 (1996). The Equal Protection Clause prohibits state and local government from "deny[ing] to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, §1, cl. 4. Courts evaluate equal-protection injuries under three standards: strict scrutiny for classifications based on factors such as race or national origin, intermediate

scrutiny for classifications based on sex, and rational basis for everything else. *Virginia*, 518 U.S. at 567-68 (Scalia, J., dissenting) (collecting cases).

Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, except that Title IX prohibits sex-based discrimination in federally funded education. *Compare* 42 U.S.C. §2000d *with* 20 U.S.C. §1681(a). Like Title VI, Title IX prohibits only intentional discrimination (*i.e.*, action taken *because* of sex, not merely *in spite of* sex). *Alexander v. Sandoval*, 532 U.S. 275, 282-83 & n.2 (2001). Both Title IX and the Equal Protection Clause allow causes of action against intentional sex-based discrimination but not for disparate-impact claims. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979); *Sandoval*, 532 U.S. at 282-83 & n.2.

For all school-age children, Pennsylvania not only provides a right to a free public education, but also compels school attendance. *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 457-63 (Pa. 2017); 24 PA. STAT. ANN. §13-1327 (compulsory school attendance). While the federal Constitution does not compel attendance or provide a right to education, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973), it does require that states provide education in a nondiscriminatory manner. *Id.* A federal Spending-Clause statute – the Individuals with Disabilities Education Act, 20 U.S.C. §§1400-1482 ("IDEA") – provides students with disabilities the same right to a free appropriate public education that non-disabled students have. 20 U.S.C. §1415(a).

Factual Background

EFELDF adopts the facts as stated by Petitioners, Pet. at 2-14. In addition, EFELDF notes that the term "gender dysphoria" is a construct from the fifth (2013) edition of the Diagnostic & Statistical Manual of Mental Disorders. Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 455 (5th ed. 2013) ("DSM-V"). Prior editions used different terms to describe the same condition. Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 533 (4th ed. 1994) (gender identity disorder); Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 71 (3d ed. 1980) (gender identity disturbance and transsexualism). Although DSM-V does not consider gender dysphoria *per se* a mental disorder when not accompanied by other symptoms, we deal here with transgender students who "face extraordinary … psychological [and] medical risks." Pet. App. 268a, which presents a "Catch-22" for the transgender-rights movement. If the condition affects a student enough to warrant a school's unsettling of third-party rights, the student has a disability that would be more appropriately handled under IDEA. If the condition is under control, there is no need for the school to intervene.

On the disability issue, the Americans with Disabilities Act, 42 U.S.C. §§12101-12213 ("ADA") expressly excludes transsexualism from the ADA definition of "disability." 42 U.S.C. §12211(b)(1). Moreover, when Congress enacted IDEA and Title IX – which lack an exclusion like §12211(b)(1) – the condition was considered a "disorder." *Farmer v. Brennan*, 511 U.S. 825, 829 (1994). Finally, EFELDF

emphasizes that gender dysphoria's persistence rate over time is as low as 2.2% for males and 12% for females. Pet. at 24 n.3 (*citing* DSM-V, at 455). Put differently, up to 88% of females and more than 97% of males with gender dysphoria might resolve to their biological sex, so the condition is largely temporary.

SUMMARY OF ARGUMENT

The parties agree that the compelling-interest test applies, but – primarily because it misconstrued and overstated the rights of transgender students – the Third Circuit erred in applying that test by not considering less-intrusive alternatives, by allowing inconsistent application of the policy, and by using a balancing test (Section I.A). In particular, the Third Circuit erred because requiring students to use the sex-segregated facilities of their biological sex does not discriminate based on sex either under this Court's equal-protection analysis (Section I.B) or under Title IX (Section II.A) because it discriminates, if at all, on the basis of the medical condition of gender dysphoria.

Under Title IX, all tools of statutory construction suggest that Congress in 1972 intended to prohibit discrimination based on biological sex (Section II.A). *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny on impermissible sex-based stereotypes are not to the contrary; instead, these "stereotype" cases concern how males and females act or dress, not who is male or who is female (Section II.B). Finally, the statute most relevant to transgender students is not Title IX but IDEA because gender dysphoria fits the scope of IDEA's protection (Section II.C).

ARGUMENT

I. THIS COURT SHOULD GRANT THE WRIT ON THE CONSTITUTIONAL PRIVACY QUESTION.

The Third Circuit shortchanged Petitioners' right to privacy, based on an erroneous view of transgender students' rights under the Equal Protection Clause. Properly analyzed, Petitioners' privacy rights prevent schools from making sex-segregated facilities open to transgender students of the opposite sex.

A. The Third Circuit improperly applied the parties' strict-scrutiny test to Petitioners' right of privacy.

Perhaps because Intervenor and Boyertown view transgender students' rights as compelling, no party challenged use of the compelling-interest test of *Reno v. Flores*, 507 U.S. 292, 301-02 (1993),[2] which is a form of strict scrutiny. As explained in Sections I.B, and II *infra*, transgender rights are neither compelling nor even extant under the Constitution or Title IX, respectively. As such, the Third Circuit's balancing of rights failed to implement either the strict-scrutiny standard of *Reno* or any lesser intermediate-scrutiny standard. This Court should revisit the Third Circuit's application of the compelling-interest test here.

As Petitioners explain, the Third Circuit failed to consider less-intrusive alternatives (*i.e.*, allowing the transgender students to use single-user bathrooms),

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[2] *See* Pet. App. 222a n.58 (citing parties' briefs and rejecting "intermediate standard of review" under *Doe v. SEPTA*, 72 F.3d at 1133, 1139-40 (3d Cir. 1995), without deciding which standard of review is appropriate).

Pet. at 17-19, did not apply its policy uniformly (*i.e.*, having some, but not all, transgender students use opposite-sex facilities), *id.* at 20-21, and improperly used a balancing test to weigh the respective rights of transgender and other students. *Id.* at 21-22. In these departures from the compelling-interest test, the Third Circuit essentially preferred transgender rights over other students' rights, without any legal basis for doing so. As explained in Sections I.B, *infra*, for the Equal Protection Clause, and in Section II, *infra*, for Title IX, Boyertown had no compelling reason or interest that justified the invasion of Petitioners' privacy rights.

B. Concern for transgender students' rights is an inadequate basis on which to deny other students' rights.

Regardless of which level of scrutiny applies to Petitioners' right of privacy, Boyertown had no basis – compelling or otherwise – to put transgender students' rights over the privacy rights asserted by Petitioners. Equal-protection analysis applies different levels of judicial scrutiny, depending on the basis for the discrimination. As relevant here, discrimination based on sex faces intermediate scrutiny: "To succeed, the defender of the challenged action must show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 524. By contrast, discrimination based on non-suspect criteria – such as a medical condition – faces rational-basis review. *Bd. of Trs. v.*

Garrett, 531 U.S. 356, 365-67 (2001). As further explained in Section II.A, *supra*, the differential treatment (if any) here is based on gender dysphoria, not on sex.

If transgender boys and girls are treated the same, there is no discrimination based on sex – and thus no heightened scrutiny – within the meaning and ambit of *Virginia*, 518 U.S. at 524. If it were necessary to complete the constitutional analysis by applying the rational-basis test applicable here to gender dysphoria, *Garrett*, 531 U.S. at 365-67, the transgender student could not prevail.

To demonstrate unlawfully unequal treatment, a rational-basis plaintiff must demonstrate that the government action does not "further[] a legitimate state interest" and lacks any "plausible policy reason for the classification." *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992). The privacy interest of other students is a legitimate governmental interest, *Skinner*, 489 U.S. at 626; *Vernonia Sch. Dist.*, 515 U.S. at 658; *Virginia*, 518 U.S. at 550 n.19, and it easily satisfies the rational-basis test.

Moreover, unlike heightened scrutiny, rational-basis review does not require narrowly tailoring policies to legitimate purposes: "[rational basis review] is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993), and a policy "does not offend the Constitution simply because the classification is not made with mathematical nicety or because *in practice it results in some inequality*." *Id.* at 316 n.7 (interior quotations omitted, emphasis added). Under this Court's

precedents, that is not a battle that transgender plaintiffs can win, and the Third Circuit thus erred by considering Boyertown's interest compelling.

II. THIS COURT SHOULD GRANT THE WRIT ON THE TITLE IX QUESTION.

Petitioners argue that transgender students in opposite-sex bathrooms and locker rooms violate Petitioners' rights under Title IX, while Intervenor (and the original panel decision) argue that Title IX *requires* schools to allow transgender students to use the opposite sex's bathrooms. Within that spectrum, schools across the country can choose sides or merely attempt to follow direction from their states under state law or from the federal government under Title IX.[3] In this case, Boyertown sides with Intervenor to argue that Title IX *compels* Boyertown's bathroom policy. While it agrees with Petitioners that this Court should grant the writ of *certiorari* on the Title IX question, *amicus* EFELDF disagrees with the merits of their Title IX claim. At this juncture, however, the question presented is whether to *grant* the writ to review the Title IX question. That answer is yes.

Title IX prohibits – and provides a private right of action against – only sex-based discrimination. 20 U.S.C. §1681(a); *Sandoval*, 532 U.S. at 282-83 & n.2. That excludes Petitioners' sex-neutral or disparate-impact claims every bit as much as it excludes Intervenor's or Boyertown's theory of discrimination based on gender identity:

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[3] As this Court is aware, federal administrative guidance can change. *Gloucester Cnty Sch. Bd. v. G.G.*, 137 S.Ct. 1239 (2017).

- As to Petitioners, Boyertown's transgender policy impacts male and female students alike (*i.e.*, male and female bathrooms are equally accessible to females with male gender identities and males with female gender identities). As such, there is no sex-based discrimination under §1681(a). Even if one sex disproportionately feels the burden of sex-neutral treatment, under *Sandoval*, Title IX does not provide a cause of action for disparate-impact claims that do not violate the statute.
- As to Intervenor and Boyertown, sex and gender identity are different things, and Title IX does not apply to gender identity.

Amicus EFELDF strongly opposes a school's allowing transgender students access to the opposite sex's bathrooms and locker rooms, both on policy grounds and on constitutional privacy grounds. *See* Section I, *supra*. To the extent that the Constitution does not apply, that would be a policy question committed to the schools or their states, with nothing added by Title IX either way. The question for this Court to resolve at the petition stage is whether the competing visions of Title IX in this case present the right vehicle for this Court to resolve Title IX's application to transgender issues.

Amicus EFELDF respectfully submits that this case is an appropriate vehicle to resolve the competing interpretations of Title IX. Boyertown will directly oppose Petitioners' Title IX cause of action, and Petitioners will indirectly rebut Boyertown's Title IX theory by rejecting Title IX as a constitutional basis for invading Petitioners' right of privacy. Thus, both sides of the Title IX issue will be argued, even though

this Court likely will have to reject each side's main Title IX position.[4]

As Judge Jordan explained in dissenting for four judges from the denial of rehearing *en banc*, the panel walked back its original suggestion that "the school district would have run afoul of Title IX had it … confined transgender students to use of bathrooms and locker rooms designated for their biological sex," Pet. App. 294a, but even the revised panel decision incorrectly states that "requiring transgender students to use single user or birth-sex-aligned facilities is its own form of discrimination." *Id.* (*quoting* Pet. App. 227a). While it is fanciful to think that Congress in 1972 intended "sex" to include "gender identity," 20 U.S.C. §1681(a), that is exactly what Intervenor and Boyertown argue under Title IX.

As Spending Clause legislation in an area – education – of traditional state and local concern, courts must read Title IX narrowly – within the notice provided by Congress – as to what the statute requires. *Sossamon v. Texas*, 563 U.S. 277, 291 (2011) (clear-statement rule); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (courts "must ask whether [Spending Clause legislation] furnishes clear notice regarding the liability at issue in this case"); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) (presumption against preemption). Honoring these interpretive guideposts

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[4] To the extent that the Court needs an independent voice arguing Title IX's limits expressly, the Court can count on conservative state attorneys general (and EFELDF) to argue the point as *amici*, but the Court also could appoint an *amicus* to defend that position or seek the views of the United States.

compels the conclusion that Title IX does not apply here.

A. Treating students differently based on gender dysphoria is not discrimination based on sex.

Because sex-segregated facilities apply equally to biological females seeking to use boys' restrooms and biological males seeking to use girls' restrooms, such policies do not discriminate *based on sex*. Differential treatment, if any, is based on gender dysphoria (*i.e.*, students without gender dysphoria were allowed into their bathroom of choice, while students with gender dysphoria were not). Differential treatment based on gender dysphoria is not what Title IX prohibits unless the statutory term "sex" means gender identity. *See* 20 U.S.C. §1681(a). Numerous tools of statutory construction confirm that "sex" means no such thing.

First, in several areas outside of Title IX, federal statutes use "gender identity" separately from "sex," *see*, *e.g.*, 42 U.S.C. §13925(b)(13)(A), implying that the two phrases mean different things. *Maracich v. Spears*, 570 U.S. 48, 68-70 (2013) (statutes must be read to avoid interpreting phrases as mere surplusage). Indeed, efforts to amend Title IX to add "gender identity" have failed, *see* Pet. at 31, which also implies that "sex" does not already include "gender identity" under Title IX. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

Second, when Congress enacted Title IX in 1972 and extended the statutory reach in 1988, the then-controlling judicial constructions from this Court and the unanimous courts of appeals held that the word

"sex" did not include gender identity.[5] Under the circumstances, this Court should regard the sex-versus-gender-identity dispute as decided by the Congress that enacted Title IX, consistent with that unanimous judicial understanding. *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015). Congress can amend the law, but until then Title IX hinges on biological sex.

Third, the narrow construction and clear notice required by the Spending Clause, as well as the presumption against preemption for the educational field, compel a narrow reading, absent clear notice and a clear and manifest congressional purpose. *Murphy*, 548 U.S. at 296; *Santa Fe Elevator,* 331 U.S. at 230. Indeed, "[w]hen the text of [a purported] pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior quotation omitted). These interpretative rules clearly favor a biological-sex interpretation.

Fourth, although courts often conflate Title IX and Title VII, *see also* Section II.B, *infra* (regarding "stereotype" cases), this Court's use of Title VII

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[5] This Court recognized that the term "sex" referred to "an immutable characteristic determined solely by the accident of birth" "like race and national origin." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *accord Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001) (same, quoting *Frontiero*); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977).

standards in sexual-harassment cases does not go that far. *See Davis ex rel. LaShonda D., v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992). Quite the contrary, where there are differences between the two statutes, this Court holds precisely the opposite: the Spending-Clause legislation and Title VII "*cannot* be read in *pari materia*." *United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979) (first emphasis added). Sensibly enough, like things are alike, except where they are different.[6]

For all the foregoing reasons, Title IX does not regulate differential treatment based on gender identity.

B. The *Price Waterhouse* "stereotype" cases are inapposite.

Reliance on *Price Waterhouse* and its progeny is also misplaced. These "stereotype" cases concern females' exhibiting masculine traits or males' exhibiting feminine traits. For purposes of her doing her job, it did not matter whether Ms. Hopkins wore dresses or men's suits. However she dressed, she still used the women's restroom. Indeed, it would have been sex discrimination to require a mannishly dressed Ms. Hopkins to use the men's restroom, when all other women could use the women's restroom.

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[6] Although opinions like *Davis*, 526 U.S. at 650, use "gender" loosely to argue that Title IX prohibits discrimination "on the basis of gender," these opinions use "sex" and "gender" interchangeably and do not hinge on sex-versus-gender issues. *Davis* and similar opinions merely uses "gender" to mean "sex," without holding "sex" to mean "gender."

Regulating how boys and girls dress (*e.g.*, clothing, jewelry, hair length) differs fundamentally from segregating restrooms by sex. Whatever the respective merits of dress codes versus sex-segregated restrooms, the *Hopkins* line of cases concerns only the former, not the latter. Whatever impact *Hopkins* has on employers' or schools' ability to require masculinity in men or femininity in women, male employees and students remain male, and female employees and students remain female. The *Hopkins* line of sex-stereotype cases says nothing about which bathroom we use.

C. As between Title IX and IDEA, IDEA applies here.

Transgender students do not suffer differential treatment *based on sex*. Instead, the differential treatment, when it occurs, is based on gender dysphoria. While Title IX plainly does not apply, *see* 20 U.S.C. §1681(a), *amicus* EFELDF submits that IDEA arguably applies here.

Until recently – and when Congress enacted Title IX, IDEA, and its predecessor – gender dysphoria was considered a "disorder." *Farmer*, 511 U.S. at 829. Even if contemporary medical views are less judgmental, the fact remains that students with that condition suffer medical and psychological symptoms. Pet. App. 268a. Thus, whether or not transgenderism *per se* remains a disorder under current medical views, any student with conditions sufficient to warrant interference with sex-separated bathrooms and locker rooms necessarily qualifies as having a "disability"

under IDEA. 20 U.S.C. §1401(3).[7] If so, the bathroom issue would be left to the school systems to decide in the first instance, bolstered by appeals to state education authorities, and only then to federal courts.

Depending on how this Court resolves the privacy issue under the Constitution, it may remain open to different states and school boards to decide the issue differently as a policy matter. Under IDEA, federal courts would give states' decisions and policies "due weight" because the "'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). While *amicus* EFELDF agrees with Petitioners that the Constitution does not allow the flexibility sought by Intervenor and Boyertown, *see* Section I, *supra*, Title IX and the Constitution do not provide them any relief here. *Cf. Smith v. Robinson*, 468 U.S. 992, 1013 (1984) (preempting action under 42 U.S.C. §1983). But IDEA might help transgender students, but only after they exhaust IDEA's administrative remedies.

CONCLUSION

The petition for a writ of *certiorari* should be granted on both questions presented.

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[7] As indicated, the ADA's express exclusion of transsexualism from the definition of "disability," 42 U.S.C. §12211(b)(1), implies that the condition could qualify as a disability absent such an exclusion. IDEA is silent on the issue.

December 18, 2018

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