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 *AMICI CURIAE* CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL, THE MICHIGAN ASSOCIATION OF CHRISTIAN SCHOOLS, AND THE AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Petitioners raise two important questions that compel this Court's review:

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.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Pursuant to Supreme Court Rule 37, *Amici Curiae*, the Christian Educators Association International, the Michigan Association of Christian Schools, and the American Association of Christian Schools, respectfully submit this brief. *Amici Curiae* urge the Court to protect the rights and privacy of students, school faculty, parents, and Christian people nationwide, as required by the U.S. Constitution, federal law, and state law.

Amici Curiae have a significant interest in protecting constitutional rights, privacy rights, and religious freedom. The Christian Educators Association International is an international organization that encourages, equips, and empowers educators to be faithful to their Christian beliefs in all aspects of their lives, including their professions. The Christian Educators Association International promotes educational excellence committed to Biblical principles and the values of the Judeo-Christian heritage. It also serves to protect the legal rights of Christian people in public schools. The organization has 18 formal chapters throughout the United States.

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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.

The Michigan Association of Christian Schools exists to promote, defend, and assist Christian education and its institutions in the State of Michigan. The Michigan Association of Christian Schools advocates for legislation that preserves the First Amendment freedoms of speech and religion both at Christian institutions and in the public schools. The Michigan Association of Christian Schools furthers the belief that there are two things eternal in this world: the Bible and the souls of men; and education touches both. Therefore, the Michigan Association of Christian Schools fights against educational policies and regulations that degrade the culture and require individuals to act in contravention of their Christian faith.

The American Association of Christian Schools has served as a national voice for Christian education since its founding in 1972. Today, American Association of Christian Schools supports over 100,000 student and teacher members throughout the United States. The American Association of Christian Schools advances Christian education in America through influencing federal legislation to protect its members from government entanglement and religious persecution, and promoting educational policy that upholds religious freedom.

Amici Curiae hold special knowledge pertaining to Title IX, its implementing regulations, including 34 C.F.R. 106.33, and the regulations' effect on the Christian faith. *Amici Curiae* oppose the United States Department of Justice's "Dear Colleague" letter dated May 13, 2016 because the statutory interpretation forwarded by the letter unlawfully arrogates

congressional power to promote an immoral political agenda and both curtails and defiles the constitutionally protected rights of Christian people to act, speak, and live out their faith as free Americans. The Department of Education letter ignores the true meaning of sex, substituting the scientific and biblical definition with its own arbitrary meaning.

The policies adopted by Respondent Boyertown Area School District, that mirror the legal analysis provided in the "Dear Colleague" letter fail on the same grounds. Respondent Boyertown Area School District's policies authorize some transgendered individuals to use bathrooms assigned to a different biological sex—with no attention to the religious freedom, morality, or privacy concerns treasured and safeguarded by the *Amici Curiae*. Therefore, *Amici Curiae* file this brief to support the arguments of the Petitioners.

BACKGROUND

In 1979 the United States Congress enacted and President Carter signed the Department of Education Organization Act, establishing the Department of Education. 20 U.S.C. § 3401 *et seq.* Seven years earlier in 1972, Congress passed and President Nixon signed Title IX of the 1972 Education Amendments into law. 20 U.S.C. § 1681*, et seq*. Title IX sought to rectify the inequity women faced in the workforce and to address the gender earnings gap by enabling the progress of women and girls in education. *See, e.g.*, U.S. Dep't of Justice, Civil Rights Division, Title IX Legal Manual, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/ixlegal.pdf, last visited Dec. 19, 2018. As legislative history reveals, the law focused on combating the economic disadvantages

women faced in the workplace by addressing differential treatment on the basis of sex in education. *See, e.g.*, 118 Cong. Red. 5803-07 (1972).

Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a).

Notably, Title IX recognizes the biological and physiological differences between men and women. Title IX also importantly provides that,

> Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes. *Id*. § 1686.

Likewise, Title IX's implementing regulation, C.F.R. § 106.33, expressly allows for schools to designate separate facilities based on sex:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex. 34 C.F.R. § 106.33.

The terms or concept of "gender identity," "transgenderism," and "transsexuality" appear nowhere in Title IX, its enacting regulations, or its legislative history.[2] In sum, Title IX: 1) requires that schools not discriminate on the basis of sex in order to receive federal funding; 2) clearly states that separate "toilet, locker room, and shower facilities" on the basis sex are permissible; and 3) includes *no* provisions, legal or otherwise, pertaining to the special treatment of "gender identity," "transgenderism," or "transsexuality."

For over 40 years, Title IX permitted schools to provide separate bathrooms, changing rooms, and showering facilities on the basis of sex, with discretion resting at the state and local school levels. The clear meaning of the legislation was never questioned.

However, in recent years the use of the bathroom and changing rooms based upon an individual's biological sex has become part of the divided American political landscape. The American Civil Liberties Union (ACLU) filed a lawsuit arguing that a student's biological sex should no longer dictate which bathroom or locker room the child uses in school. *Gloucester*

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[2] These recently coined terms were crafted for political or social purposes, not scientific reasoning. *See, e.g.*, R. Reilly, *Making Gay Okay – How Rationalizing Homosexual Behavior Is Changing Everything*, pp. 11, 47-48, 64, 117-29 (Ignatius Press, 2014) (acceptance and promotion of homosexual behavior is based on politics rather than science). Throughout history, if a boy claims to be a girl, he has not been considered "transgender." *See id.* at 131 (scientific research suggests that at least to some extent "differences in sexual behavior cause (rather than are caused by) differences in the brain").

County School Board v. G.G., No. 16-273. During the pendency of the ACLU's lawsuit, the U.S. Department of Education, under President Obama's administration, sent a "Dear colleague" letter to every Title IX recipient in the country on May 13, 2016. The letter stated:

1. A school may no longer require a student to use the bathroom, locker room, or shower of the opposite sex if the student or his/her parent or guardian asserts a "gender identity" different from his/her actual sex.
2. The assertion by the student or his/her parent or guardian does not need to be supported by a psychological diagnosis, a medical diagnosis, or any evidence of treatment.
3. Students who, as a consequence of this new policy, no longer feel comfortable using the bathroom, locker room, or shower of their own sex for reasons of privacy, modesty, sincerely held religious beliefs, or safety concerns may be relegated to a separate facility.
4. Yet, no school can require that a student whose "gender identity" does not match his/her biological sex use a separate facility. Only non-transgendered students will be required to use a separate facility.

5/13/16 Ltr., *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf, *last visited* Dec. 19, 2018. Seemingly in reaction to this letter, Respondents changed their

longstanding bathroom and locker room privacy policies.[3]

In the present case, without any warning or communication to parents or students, Respondents altered their school policy to allow biological males, to use the girls' room and to allow biological females to use the boys' room. Pet. at 3; App. 24a, 29a. Such action invaded the privacy of Petitioners, who felt embarrassed and uncomfortable using the bathrooms and changing rooms of their biological sex in the presence of the opposite sex. Pet. at 3; App. 7-8a, 44a. For example, Petitioner Mary Smith ran out of the girls' bathroom in fear and confusion after discovering a biological male with her in that intimate space. Pet. at 7; App. 11a, 72-73a.

Respondents' new policy resulted in an outpouring of complaints and concerns from students and parents alike; however, Respondents instructed Petitioners and the school community to tolerate the change. Pet. at 7; App. 47. Ironically, while ostensibly promoting tolerance, Respondents rejected all of Petitioners' concerns with its new policy. Respondents espoused that female students had no expectation of privacy to use changing rooms or bathrooms free from biological males. Pet. at 8, App. 39-40a. Respondents punished Petitioner Joel Doe for failing to change his clothes in front a biological female before gym class. Pet. at 7;

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[3] The U.S. Department of Education has since rescinded its "Dear colleague" letter that was issued during the pendency of the *Gloucester County School Board v. G.G.*, No. 16-273 lawsuit (now vacated). The U.S. Department of Education no longer upholds the position argued in the May 13, 2016 letter.

App. 58a. Respondents exhibited no concern with Petitioners fasting and reducing their water intake to use the bathroom as infrequently as possible to avoid being in a state of vulnerability in front of the opposite biological sex. Pet. at 7, 11; App. 53a, 63-64a, 76a, 82a, 258a. Respondents dismissed all of Petitioners' concerns with being nude, partially nude, or going to the bathroom with members of the opposite biological sex, despite the fact that prior to the 2016 policy change Respondents had *always* accommodated for the biological difference in the sexes by offering separate and private bathrooms and locker rooms. Pet. at 7; App. 19a.

Petitioners seek review from this Court on two bases. First, the Third Circuit erred in holding that students do not have a constitutionally protected interest in the privacy of their own bodies (i.e., an interest that allows public schools to recognize the compelling interest of students to use the bathrooms of their biological sex and that such policies are narrowly tailored). Second, the Third Circuit again erred by denying access to bathrooms and locker rooms "on the basis of sex" under Title IX and its implementing regulations, including 34 C.F.R. § 106.33, which allows for the separation of toilets, locker rooms, and showers based on sex. For the purposes of this brief, *Amici Curiae* focus on the second question presented.

SUMMARY OF THE ARGUMENT

Title IX allows educational institutions to provide separate facilities on the basis of sex, recognizing the biological and physiological differences between men and women. 20 U.S.C. § 1681(a); 20 U.S.C. § 1686. Title IX's implementing regulation also clearly permits the designation of "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. Respondents' policy fails to designate separation of bathrooms and locker rooms on the basis of sex, and instead aims to create new policy for students, educators, and administrators on the basis of "gender identity"—not sex. App. 273a, 276a, 279a. The Third Circuit's holding redefines "sex" as including the term "gender identity." App. 279a. The Third Circuit's interpretation is wholly unpersuasive, as Title IX does not mention, and never contemplated, the concept of "gender identity."

Congress passed Title IX to specifically provide women with greater opportunities in education. This did not mean female students obtained equal access to men's bathrooms, showers, or locker rooms. On the contrary, Title IX has allowed for the separation of such facilities for privacy and decency purposes for the last forty years. The Third Circuit's holding that Title IX's definition of sex requires schools to open these separate facilities to students, teachers, and administrators of the opposite sex, who deny their biology and assert a "gender identity" differing from their biological sex, patently conflicts with Title IX. The terms "sex" and "gender identity" hold separate meanings in genetics, in biology, in anatomy, and in our legal precedent, including Title IX.

Moreover, the Third Circuit's interpretation of Title IX ignores the fundamental right of parents to control and direct the upbringing of their children; ignores the First Amendment freedoms of students, faculty, and staff whose valid religious, moral, political, and cultural views necessarily conflict with a political agenda that denies biology; and ignores Biblical teaching and diminishes student privacy and safety. The interpretation also ignores the fundamental constitutional liberty and equal protection interests of students, teachers, and administrators who define their personal identity by their religious beliefs. The Third Circuit's interpretation of Title IX endangers the freedoms of Christian Americans who cannot support or promote "transgenderism" based upon their sincerely held religious beliefs. This Court should grant this petition for writ of certiorari and correct the Third Circuit's flawed and perilous interpretation of Title IX.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO CORRECT THE THIRD CIRCUIT'S ERRONEOUS INTERPRETATION OF TITLE IX.

The Third Circuit's interpretation of Title IX is implausible and requires this Court's review for at least three reasons. First, the Third Circuit conflates the terms "sex" under Title IX with "gender identity," the latter of which is not even a term or classification Congress ever contemplated when passing the statute. Title IX's clear language and its implementing regulations recognize the biological difference between men and women. And, pertinent here, Title IX

expressly permits schools to provide separate toilet, locker room, and shower facilities on the basis of biological sex. 20 U.S.C. § 1686; 34 C.F.R. § 106.33. Title IX, however, makes no mention of the term or concept of "gender identity," let alone instruct schools to ignore the biological sex of its students in order to allow students to use facilities inconsistent with their biological sex.

Second, the terms "sex" and "gender identity" or "transgenderism" are not synonymous, and have never been synonymous. Throughout the ages, the courts and Congress have traditionally interpreted chromosomal make-up and anatomical characteristics. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Craig v. Boren*, 429 U.S. 190 (1976); *Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981); *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Underwood v. Archer Management Services, Inc.*, 857 F. Supp. 96 (D.D.C. 1994). Indeed, the terms "gender identity" and "transgender" are merely recent fabrications of a small group of unelected activists designed to legitimize and promote a political agenda.

Third, the Third Circuit's redefinition of the term "sex" in the context of Title IX is internally inconsistent and asserts an illogical argument. Title IX and its implementing regulations permit a school to provide separate restrooms and showers by biological sex. Yet, the Third Circuit now requires that a school must allow a biological girl to use the boys' facilities (if the girl

simply says she's a boy), and that a school must allow a biological boy to use the girls' facilities (if the boy just says he's a girl). The Third Circuit's interpretation of Title IX is the exact opposite of what Congress stated is the law, as Title IX unambiguously permits schools to restrict access to facilities like bathrooms and showers based solely on sex.[4] Instead, the Third Circuit demands that "[R]equiring transgender students to use single user or birth-assigned facilities is its own form of discrimination." App. 273a. The Third Circuit therefore holds that if a school separates, or treat students differently on the basis of sex, the school must treat transgender students consistent with their "gender identity"—and not their biological sex, the sex with which they were born.

Title IX and its implementing regulations clearly allow a Title IX recipient to provide separate toilet, locker room, and shower facilities on the basis of sex. 20 U.S.C. § 1686; 34 C.F.R. § 106.33. The Third Circuit, however, does not seek to treat "sex" and "gender identity" in the same manner, but creates special, additional rights on the basis of "gender identity"—a concept never contemplated by or allowed under Title IX. The Third Circuit interpreted the unequivocal term Congress used, "sex," to encompass the recently created and politically motivated term "gender identity." Such "interpretation" is not only ill-advised, it is patently unlawful and requires this Court's correction.

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[4] When Congress passes legislation, it is assumed to know what it was passing. A federal judge cannot subsequently change the meaning or add to the plain language of a statute. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1, 8 (1980).

II. ALLOWING THE THIRD CIRCUIT'S HOLDING TO STAND CREATES A HOSTILE AND DISCRIMINATORY ENVIRONMENT FOR CHRISTIAN ADMINISTRATORS, TEACHERS, PARENTS, AND STUDENTS THROUGHOUT OUR NATION.

The Third Circuit's interpretation of Title IX fails to meet the needs of *all* students. Instead, the Third Circuit's holding advances a political agenda that creates special considerations for school administrators, faculty, and children who seek to deny their biological sex and act in accordance with "gender identity." The Third Circuit's interpretation of Title IX violates: 1) the fundamental right of parents to control and direct the upbringing of their children; 2) the First Amendment constitutional freedoms of students, faculty, and staff (whose valid religious, moral, political, and cultural views necessarily conflict with a political agenda that denies biology, ignores Biblical teaching, and diminishes student privacy); and 3) the fundamental constitutional liberty and equal protection interests judicially recognized by this Court in the recent decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (i.e., the personal identity rights of students, faculty, and staff who find their personal identity not in their sexuality but in Jesus Christ or other faith orientation.

A. The Third Circuit's Interpretation of Title IX Unconstitutionally Infringes on the Fundamental Right of Parents to Direct and Control the Upbringing of Their Children.

The Third Circuit's "interpretation" of Title IX substantially infringes upon the parents' right to participate in the education and upbringing of their children. The interpretation imposes immorality into schools by promoting conduct (selecting a "gender identity") contrary to biological sex and Biblical teachings. Respondents' policy fails to even notify parents whether their child will be forced to use a bathroom, shower, or changing room with a child or adult of the opposite sex.

This Court recognizes parental rights to be fundamental rights. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Such liberty serves as a powerful limitation on exercises of government authority, including those exercises of authority that impact the parental role in educational matters. Courts strictly scrutinize government actions that substantially interfere with a citizen's fundamental rights:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of [a fundamental right].

Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Church*

of the Lukumi Babalu Aye, Inc., v. Hialeah, 508 U.S. 520 (1993).

The fundamental rights standard preserves parents' fundamental liberty to control and direct the upbringing of their children. The historical underpinnings of the fundamental right of parents to direct and control the upbringing of their children compel the conclusion that the Third Circuit's interpretation of Title IX violates constitutionally protected fundamental liberty because it infringes upon parental choices grounded in religious conscience. Certainly, no compelling governmental interest exists which would allow a school district to impose immorality into schools by promoting conduct (selecting a "gender identity") contrary to Biblical, biological and other scientific teachings. And even if a compelling interest did exist, the least restrictive means of accomplishing this interest surely must not be the promulgation of a policy that threatens both the privacy and constitutional rights of other students.[5]

The Third Circuit's interpretation of Title IX also conflicts with controlling state laws protecting parents' fundamental right to control the upbringing of their children in contexts outside of exercising their freedom of religious conscience. For example, in Michigan, MCL § 380.10 (Rights of parents and legal guardians; duties of public schools) expressly provides that parents *do*

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[5] Respondents could easily pursue means far less restrictive of Petitioners' constitutional rights and privacy concerns to serve their interests, including the installation of private, unisex restrooms, staggering usage times of the bathroom and changing rooms, and exploring architectural solutions to ensure privacy.

have a fundamental right to direct and control the upbringing of their children. MCL § 380.10 provides:

> It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children. The public schools of this state serve the needs of the pupils by cooperating with the pupil's parents and legal guardians to develop the pupil's intellectual capabilities and vocational skills in a safe and positive environment.

MCL § 380.10; *see also In re A.P.*, 770 N.W.2d 403, 412 (Mich. Ct. App. 2009) ("[D]ue process precludes a government from interfering with parents' fundamental liberty interest in making decisions regarding the care, custody, and control of their children").

Both the Constitution and state law protect the fundamental right of parents to control and direct the upbringing of their children, including in the sensitive and private matters relevant here. The Third Circuit's interpretation of Title IX infringes on the rights of parents and ignores the protections that states have enacted to safeguard parents' rights.

B. The Third Circuit's Interpretation of Title IX Unconstitutionally Infringes Fundamental First Amendment Rights of Conscience and Expression.

The Third Circuit's interpretation of Title IX will lead to censorship and punishment of students, faculty, and administrators whose valid religious, moral, political, and cultural views necessarily conflict with the "gender identity" political agenda. For these

individuals, the Third Circuit's interpretation of Title IX unconstitutionally interferes with and discriminates against their sincerely held religious beliefs and identity, as well as their freedom of speech and expression.

The Constitution prohibits a school district from dictating what is acceptable and not acceptable on matters of religion and politics. The government cannot silence and punish all objecting discourse to promote one political or religious viewpoint. Yet, this is exactly what the Third Circuit's holding does.

For over the last half-century the United States Supreme Court has repeatedly upheld the First Amendment rights of students. Indeed, it is axiomatic that students do not "shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive and often disputatious society.
>
> In order for the [government] to justify prohibition of a particular expression of opinion, it must be able to show that its action was

> caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly, where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

Id. at 508-09.

Here, the Third Circuit's interpretation of Title IX has the effect of inhibiting, if not banning, the expression of a particular viewpoint and religious belief without actual or substantiated evidence that the belief materially and substantially interferes with the operation of schools. For example, a female student can be punished for voicing her concern with changing her clothes in front of a male student for reasons pertaining to modesty and religious conviction. And the school will not need to establish that the female student's objection materially or substantially interferes with the operation of her school. Instead, the female students' personal concerns, under the Third Circuit's ruling, amount to nothing more than intolerance toward the male student's elected "gender identity." In other words, the male student has the right to make the female student go to the bathroom next to him and change her clothes in front of him, and no dissenting opinion or action of the female student should be tolerated.

The Third Circuit's interpretation creates "the ironic, and unfortunate, paradox of . . . celebrating 'diversity' by refusing to permit the presentation to

students of an 'unwelcomed' viewpoint on the topic of homosexuality and religion, while actively promoting the competing view." *Hansen v. Ann Arbor Pub. Schools*, 293 F. Supp. 2d 780, 782 (E.D. Mich. 2003). This re-writing of Title IX requires that everyone get on board with certain political views surrounding "gender identity" or face punishment.

The Third Circuit's interpretation of Title IX is reminiscent of the broad "anti-harassment" policy struck down as facially unconstitutional in *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001). The plaintiffs in *Saxe* sincerely identified as Christians. *Id*. at 203. The plaintiffs, therefore, believed that homosexual behavior is sinful and that their religion required them to speak about homosexuality's negative consequences. *Id*. Plaintiffs feared punishment under the school's policy for discussing and sharing their religious beliefs. *Id*. The Court held that the policy violated the rights of students guaranteed by the First Amendment. *Id*. at 210. The Court found that the "anti-harassment" policy's very existence inhibited free expression because it failed to follow the standard articulated in *Tinker*. *Id*. at 214-15.

Students, faculty, and administrators have a right to articulate their disapproval or concerns with "gender identity" or "transgenderism" on religious grounds. *See, e.g., Zamecnik v. Indian Prairie School Dist. # 204*, 636 F.3d 874, 875 (7th Cir. 2011). Students have a constitutional right to advocate their religious, political, and moral beliefs about homosexuality "provided the statements are not inflammatory—that is, are not 'fighting words,' which means speech likely

to provoke a violent response amounting to a breach of the peace." *Id*.

Indeed, "a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality . . . people in our society do not have a legal right to prevent criticism of their beliefs or even their way of life." *Id.* at 876. A statutory interpretation that punishes a dissenting opinion by promoting another is unconstitutional. *Id*.; *see also Hansen*, 293 F. Supp. 2d at 792-807 (holding a School District's censorship of student speech due to its perceived negative message about homosexuality violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment); *Glowacki v. Howell Public School Dist.,* No.2:11-cv-15481, 2013 U.S. Dist. LEXIS 131760 (Sept. 16, 2013) (holding that a teacher's snap suspension of a student for making a perceived anti-gay comment in class was an unconstitutional infringement on the student's First Amendment freedoms).

Further, the Third Circuit's interpretation fails to adequately respect the First Amendment freedoms of school faculty. The holding requires school administrators, teachers, and support staff to adopt, implement, and enforce Respondents' policy that promotes the concept of espousing a "gender identity" contrary to one's biological sex. School district mandated promotion and affirmation of a dissonance between the concept of "gender identity" and biologically assigned sex coerces school faculty members who do not ascribe to such belief for religious purposes to either violate their religious conscience and endorse this message or face punishment. Nowhere in

the Third Circuit's interpretation of Title IX does the court seek to protect dissenting opinions or sincerely held religious views. It must be remembered that "[t]olerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

As this Court has emphasized, government officials, including officials within a school district, are not thought police: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). The Third Circuit's holding violates this critical principle, ascribing that transgenderism and the selection of a "gender identity" different from one's biological sex is orthodoxy.

C. The Third Circuit's Interpretation Unconstitutionally Infringes on the Constitutional Liberty and Equal Protection Interests Recognized by the Supreme Court in *Obergefell*.

This Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), created a new constitutional right of personal identity for all citizens. This Court held that one's right of personal identity precluded any state from proscribing same-sex marriage. In *Obergefell*, the justices in the majority held that "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Id.* at 2593; *see also Masterpiece Cakeshop,*

Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).

Because this Court defined a fundamental liberty right as including "most of the rights enumerated in the Bill of Rights," and "liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," this new right of personal identity must broadly comprehend factual contexts well beyond same-sex marriage. Clearly, this newly created right of personal identity applies not just to those who find their identity in their sexuality and sexual preferences—but also to citizens who define their identity by their religious beliefs.

Many Christian people, for example, find their identity in Jesus Christ and the ageless, sacred tenets of His word in the Holy Bible. For followers of Jesus, adhering to his commands is *the* most personal choice central to their individual dignity and autonomy. A Christian whose identity inheres in their religious faith orientation, is entitled to at least as much constitutional protection as those who find their identity in their sexual preference orientation. There can be no doubt that this newly created right of personal identity protects against government authorities who use public policy to persecute, oppress, and discriminate against Christian people.

The Third Circuit's interpretation of Title IX unconstitutionally infringes on the personal identity, liberty, and equal protection this Court established in *Obergefell*. *Id.* at 2607 ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles

that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

According to *Obergefell,* then, beyond the First Amendment religious liberty protections expressly enshrined in the Bill of Rights, the substantive due process right to personal identity now provides Christian and other religious people additional constitutional protection. Henceforth, government action not only must avoid compelling a religious citizen to facilitate or participate in policies that are contrary to their freedoms of expression and religious conscience protected by the First Amendment, but it must also refrain from violating their personal identity rights secured by substantive due process.

The Third Circuit's statutory interpretation requires that Christian or other religious people relinquish their First Amendment freedoms, and the constitutional right to "identity" recognized by this in *Obergefell*. The Third Circuit's infringement of these important freedoms necessitates review by this Court.

CONCLUSION

This Honorable Court should grant the petition, vacate and reverse the decisions of the Third Circuit court to correct its misinterpretation of Title IX and to protect the privacy and constitutional rights of all Americans.

Respectfully submitted,

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