

No. 17-3113

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

JOEL DOE *et al.*

Plaintiffs–Appellants,

v.

BOYERTOWN AREA SCHOOL DISTRICT *et al.*

Defendants–Appellees,

and

PENNSYLVANIA YOUTH CONGRESS FOUNDATION

Intervenor–Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania, No. 5:17-cv-01249-EGS
The Honorable Edward G. Smith

**BRIEF *AMICI CURIAE* THE ANTI-DEFAMATION LEAGUE ET AL.
IN SUPPORT OF APPELLEE AND SUPPORTING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Amici curiae Anti-Defamation League, Americans United for Separation of Church and State, Autistic Self Advocacy Network, the Education Law Center, Equality Pennsylvania, Human Rights Campaign, the Mazzoni Center, National Center for Transgender Equality, National Center for Youth Law, National Council of Jewish Women, Inc., and People for the American Way Foundation are all registered non-profits and have no parent corporations, nor does any publicly held corporation own 10% or more of their stock.

INTERESTS OF AMICI CURIAE

Anti-Defamation League (“ADL”) was founded in 1913 to combat anti-Semitism and other forms of prejudice, and to secure justice and fair treatment to all. Today, ADL is one of the nation’s leading civil rights organizations. As part of its commitment to protecting the civil rights of all persons, ADL has filed *amicus* briefs in numerous cases addressing the unconstitutionality or illegality of discriminatory practices or laws, as well as *amicus* briefs supporting anti-discrimination laws and policies that protect historically persecuted groups. ADL has a substantial interest in this case. As a leading provider of anti-bias education, ADL works with educators, students, and communities in understanding and challenging bias, and ensuring safe, respectful, and inclusive learning environments where all students can learn and thrive. ADL’s education work is nationally recognized, and our programs are implemented in schools across the country, including in the Boyertown School District, which has been an ADL partner for over a decade.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United recognizes that the rights to believe, or not, and to worship, or not, according to the dictates of conscience are sacrosanct but ought

not be used as excuses for discriminating against and harming others. Americans United represents more than 125,000 members and supporters across the country, including thousands who reside in this Circuit. Since its founding in 1947, Americans United has regularly served as a party, as counsel, or as an *amicus curiae* in scores of church–state cases before the U.S. Supreme Court, this Court, and other federal and state courts nationwide.

Autistic Self Advocacy Network (“ASAN”) is a national, private, nonprofit organization, run by and for individuals on the autism spectrum. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN’s advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to education in mainstream settings; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals to participate fully in community life and enjoy the same rights as others without disabilities. ASAN believes that comprehensive, school-based anti-bullying policies are critical to ensuring the welfare of autistic students, including autistic students who are transgender or gender-variant.

Education Law Center-PA (“ELC”) is a non-profit legal advocacy organization dedicated to ensuring access to quality public education for all children in Pennsylvania. For over 40 years, ELC has advocated on behalf of the most at-risk students—children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English language learners, LGBTQ students, and children experiencing homelessness. Its priority areas include ensuring all students have equal access to the services and programs they need to succeed, and addressing systemic inequalities that lead to disparate educational outcomes based on race, gender, sexual orientation, gender identity, gender expression, disability status, and other categories. It seeks to participate as *amicus* to explain the importance of creating safe and affirming school environments for transgender and gender-nonconforming students.

Equality Pennsylvania is the Commonwealth of Pennsylvania’s leading organization advancing equality and opportunity for lesbian, gay, bisexual, and transgender people. With more than 45,000 supporters across the state, the organization believes in fairness, equality, equity, and justice for all Pennsylvanians. Equality Pennsylvania believes that allowing people to use the bathrooms, locker rooms, and changing facilities consistent with their gender identity creates an inclusive and non-discriminatory environment that is not only consistent with the values recognized by the Supreme Court of the United States,

but in the best interests of transgender people and the communities where they live, work, learn, and serve.

Human Rights Campaign (“HRC”) is the largest national lesbian, gay, bisexual and transgender political organization. HRC envisions an America where lesbian, gay, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is freedom from discrimination and access to equal opportunity.

Founded in 1979, **Mazzoni Center** is the only health care provider in the Philadelphia region specifically targeting the unique health care needs of the LGBT community by providing comprehensive health and wellness services in an LGBT-focused environment while preserving the dignity, and improving the quality of life of the individuals it serves. Mazzoni’s Pediatric & Adolescent Comprehensive Transgender Services program (“PACTS”) is a comprehensive approach to addressing the specific needs of trans youth and their families. Its collaborative approach to care draws on the input and expertise of multiple departments within Mazzoni Center—medical providers, social workers, therapists, and legal staff—to provide the best possible care for clients. PACTS currently serves more than 354 youth, ranging in age from 4 to 20, along with their families.

National Center for Transgender Equality (“NCTE”) is a national social justice organization founded in 2003 and devoted to advancing justice, opportunity, and well-being for transgender people through education and advocacy on national issues. NCTE has worked with local, state, and federal government agencies and other organizations around the country for over a decade to develop fair and effective policies in many areas, including schools.

National Center for Youth Law (“NCYL”) is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities necessary for healthy and productive lives. NCYL has always focused on certain populations of disadvantaged youth, such as children at risk of entering the juvenile justice system and children in foster care. Studies suggest that these populations contain a disproportionate number of transgender youth. In particular, NCYL works to ensure that low-income children get the education they need. NCYL values diversity in all forms, including gender identity, and believes that inclusive school policies effectively reduce bias, harassment, and bullying and contribute to a safer school environment.

National Council of Jewish Women (“NCJW”) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action.

Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "laws, policies, programs, and services that protect every child from abuse, neglect, exploitation, bullying, discrimination, and violence." Consistent with its Principles and Resolutions, NCJW joins this brief.

People for the American Way Foundation ("PFAWF") is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including equality for all. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle that voluntary action by school districts and others to prevent and remedy discrimination, against transgender students and others, is important and should be authorized by the courts, and accordingly joins this brief.¹

¹ No person or party, other than ADL and its counsel, authored this brief in whole or in part; and no person or party contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(c)(5). The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In 2016, the Boyertown Area School District (“Boyertown”) established a policy that respects and acknowledges transgender students by permitting them to access bathrooms and locker rooms consistent with their gender identity (the “Policy”). Boyertown’s Policy is not novel. Rather, it reflects a core American constitutional principle: the prevention of discrimination, which the Supreme Court has acknowledged is particularly damaging in an educational environment. Furthermore, Boyertown’s Policy ensures the School District’s compliance with anti-discrimination protections under federal law.

The District Court, in a detailed opinion, rejected Plaintiffs’ challenge to that Policy and denied their request for preliminary injunctive relief. Importantly, the District Court held that, even assuming Plaintiffs’ challenge was based on a legitimate privacy interest, Boyertown’s Policy was narrowly tailored to serve a compelling government interest—specifically, a compelling interest not to discriminate against transgender students. Those reasons alone warrant this Court affirming the District Court.

In addition, the District Court’s ruling is supported by social science and empirical research that show policies like Boyertown’s are in the best interests of all students and promote safe, inclusive, and successful school environments. Transgender students face a disproportionate amount of discrimination, bias, and

harassment. Policies like Boyertown's help prevent such discrimination and harassment by fostering a unified and cohesive school environment. Such policies benefit not only transgender students but also the student community as a whole.

At bottom, this Court's decision affects more than bathroom and locker room accessibility. It affects students' ability to safely attend school and engage in day-to-day activities without facing routine demoralization, bias, discrimination, or harassment. It affects the school's obligation to protect transgender students from discrimination. And, more broadly, it affects the standards imposed on an upcoming generation of children and the trajectory of expectations on a national and global level. Policies like Boyertown's should be celebrated, not condemned. For those reasons, and the reasons discussed below, *amici curiae* respectfully request that the District Court be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE BOYERTOWN AREA SCHOOL DISTRICT HAS A COMPELLING STATE INTEREST NOT TO DISCRIMINATE AGAINST TRANSGENDER STUDENTS

Since the 2016–2017 school year, Boyertown Area School District (“Boyertown”) has allowed transgender students to access bathrooms and locker rooms consistent with their gender identity (the “Policy”). *See* Joint Appendix (“JA”) at 27 [Dist. Ct. Op. at 17].² In a detailed opinion, the District Court held that Plaintiffs failed to identify a constitutionally protected privacy interest that was violated by that Policy and, even if they had, that Boyertown’s Policy was narrowly tailored to serve “a compelling state interest not to discriminate against transgender students,” rendering Boyertown’s Policy constitutional regardless of whatever level of scrutiny applies to Plaintiffs’ claims. *Id.* at 111 [Dist. Ct. Op. at 106]. For the reasons discussed in the Brief of Defendant–Appellee Boyertown Area School District and Intervenor–Appellee Pennsylvania Youth Congress, the District Court’s holding was correct and this Court should affirm.

Additionally, the District Court’s holding is consistent with United States Supreme Court precedent on the harm of discrimination in education and the deference due to government educational institutions in combating it. The

² For details on Boyertown’s Policy, *see* JA at 22–25 [Dist. Ct. Op. at 17–20].

Supreme Court has emphasized that education is one of “the most important function[s] of state and local government.” *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954); *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982)) (observing the Court has “repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society”). The Court has also recognized that discrimination in an educational setting is particularly harmful because it “generates a feeling of inferiority as to [students’] status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown*, 347 U.S. at 493. As a result, the Court has recognized that “a degree of deference” is owed to the decisions of an educational institution regarding the manner in which it prevents or remedies potential discrimination. *Grutter*, 539 U.S. at 328; *see also Regents of Univ. of California v. Bakke*, 438 U.S. 265, 311–14 (1978) (recognizing a compelling interest in the attainment of a diverse student body); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (public schools are “clearly charged with the affirmative duty to take whatever steps might be necessary” to eliminate state-sponsored discrimination in education).

Boyertown’s Policy—designed to create an inclusive and non-discriminatory environment for all students (including transgender youth) and to comply with laws prohibiting discrimination—therefore furthers Boyertown’s interests consistent with the civic and constitutional values recognized by the Supreme Court.³ Accordingly, this Court should affirm.

II. BOYERTOWN’S POLICY IS IN THE BEST INTERESTS OF TRANSGENDER STUDENTS AND THE SCHOOL COMMUNITY AT LARGE

Data from numerous studies demonstrate that Boyertown’s Policy is in the best interests of transgender students and the entire school community. Specifically, it is well-documented that anti-transgender bias in a school setting harms transgender students’ development and psyche, and negatively affects the student population as a whole. Inclusive policies like Boyertown’s help prevent such discriminatory bias and harassment, which is in the best interest of *all* students. For those reasons, among others, Boyertown’s Policy is not only consistent with constitutional standards, but is also critical to the physical and

³ Plaintiffs’ entire argument to the contrary appears to be that Plaintiffs believe “sex” is a purely biological concept and reject the concept of gender identity, meaning that, in their view, transgender students do not (or should not) exist. *See* Appellants’ Br. at 10–11. But whatever Plaintiffs may believe about transgender students, and whatever the source of those beliefs may be, that does not and cannot bar the school district from protecting its students against discrimination.

psychological well-being of Boyertown students, and central to the achievement of Boyertown's educational directives.

A. Anti-Transgender Bias and Harassment Harms Transgender Students and the Student Population as a Whole

Transgender students suffer from substantially higher rates of harassment, threats, and bullying than other students.⁴ This harassment and bullying often relates directly to their use of restrooms. For instance, the 2015 U.S. Transgender Survey⁵ reported that 24% of transgender respondents were questioned or challenged when entering a restroom in the past year, 9% were denied access to a restroom in the past year, and 12% were verbally harassed, physically attacked, or sexually assaulted when accessing or using a bathroom in the past year. USTS at 225. In one survey of transgender middle- and high-school students, “almost half of all transgender students reported skipping a class at least once” to avoid

⁴ *E.g.*, SANDY E. JAMES ET AL., NAT'L CENTER FOR TRANSGENDER EQUAL., REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 131 (2016) [hereinafter “USTS”].

⁵ The USTS, conducted by the National Center for Transgender Equality, was “the largest survey examining the experiences of transgender people in the United States,” summarizing survey responses from 27,715 respondents across all fifty states, the District of Columbia, American Samoa, Guam, Puerto Rico, and U.S. military bases overseas. USTS at 21. The report “provides a detailed look at the experiences of transgender people across a wide range of categories,” including education. *Id.*

harassment and bullying, including “missing at least one day of school” during a one-month period.⁶

The increased harassment, threats, and bullying experienced by transgender students have been linked not just to poorer performance in school⁷ but also to higher rates of homelessness,⁸ higher rates of suicidal thoughts and attempted

⁶ JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 36 (2011) (“Seventy-eight percent (78%) of the 1,876 respondents who expressed a transgender identity or gender non-conformity in grades K-12 reported harassment by students, teachers or staff. Many of the students experienced violence in the form of physical assault by either a peer or teacher/staff member (35%) or sexual assault (12%).”); NAT’L EDUC. ASS’N, LEGAL GUIDANCE ON TRANSGENDER STUDENTS’ RIGHTS 9 (June 2016) [hereinafter “NEA LEGAL GUIDE”] (discussing survey reporting that many transgender students “avoid[ed] sex-segregated areas at school, such as locker rooms or restrooms, altogether, because they fe[lt] unsafe or uncomfortable in th[ose] spaces”).

⁷ See NEA LEGAL GUIDE, *supra* note 6, at 8–9 (reporting “more frequently harassed LGBT students scored almost half a grade lower than LGBT students who were harassed less frequently” and citing supporting surveys).

⁸ See, e.g., USTS at 144 (reporting that 29% of transgender respondents, or more than twice the rate of the U.S. adult population, were living in poverty); *id.* at 132 (reporting that, among respondents who were perceived as transgender in K-12, those who had one or more negative experiences were more likely to experience homelessness).

suicides,⁹ and other adverse outcomes later in life. *See generally* USTS at 137.¹⁰

These other adverse outcomes include a higher probability of being funneled into the “underground economy,” resorting to sex work or selling illicit drugs, “higher rates of drug and alcohol abuse and smoking to cope with the mistreatment,” higher rates of incarceration, and higher rates of contracting HIV.¹¹

The harm caused by open harassment of and bias against transgender students adversely affects other students as well. Specifically, a school environment that exposes students to witnessing incidents of harassment and bullying adversely affects the psychological and educational development of *all*

⁹ *See, e.g.*, USTS at 112 (reporting that 29% of transgender respondents made plans to kill themselves in the past year, compared to 1.1% of the U.S. adult population, and 7% of respondents attempted suicide in the past year, compared to 0.6% of the U.S. population); Kristie L. Seelman, *Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. HOMOSEXUALITY 1378, 1388–89 (2016) (finding that those who have been denied access to a school bathroom or other facility due to being transgender are more likely to have attempted suicide at some point in time compared to those who were not denied access to a school bathroom or facility).

¹⁰ *See also* Daniel J. Flannery et al., *Impact of Exposure to Violence in School on Child and Adolescent Mental Health and Behavior*, 32 J. CMTY. PSYCHOL. 559, 569 (2004) (“Being victimized by violence adds to the risk of experiencing problem outcomes . . .”).

¹¹ GRANT ET AL., *supra* note 6, at 33.

students, not just those who are subject to the harassment and bullying.¹² In other words, even “observing the victimization of other peers can have a significant negative impact on multiple indicators of mental health.”¹³

B. Inclusive Policies Like Boyertown’s Help Prevent Discriminatory Bias and Harassment to the Benefit of All Students

Boyertown’s Policy at issue in this case—implemented during the 2016–2017 school year to prevent the harm caused by anti-transgender bias¹⁴—is a natural extension of its on-going efforts to combat discrimination and bias and to ensure diversity and inclusion. Boyertown has partnered with *Amicus* Anti-Defamation League to combat patterns of threatening and hateful incidents since 2004.¹⁵ Boyertown’s efforts to embrace diversity include holding Unity Walks to bring the community together, enrolling in the “No Place for Hate” program,¹⁶ and

¹² Ian Rivers et al., *Observing Bullying at School: The Mental Health Implications of Witness Status*, 24 SCH. PSYCH. Q. 211, 218 (2009).

¹³ *Id.*

¹⁴ See JA at 6 [Dist. Ct. Op. at 1].

¹⁵ After incidents of racism involving the Ku Klux Klan in the community, Boyertown began to address disunity aggressively. See, e.g., Kate Wilcox, *Boyertown Schools’ Embrace of Diversity Honored*, READINGEAGLE.COM, NEWSBANK, May 21, 2012, Record No. 20120521 (describing “episodes of racism involving the Ku Klux Klan”).

¹⁶ “No Place for Hate” is a self-directed program where school districts and communities “take the lead on improving and maintaining a school climate so all students can thrive,” which includes, among other things, designing and implementing school-wide anti-bias or bullying prevention activities.

adopting a district-wide anti-bullying action plan.¹⁷ As a result of Boyertown's efforts, students have embraced and participated in the school district's initiatives to prevent bullying and discourage stereotyping.¹⁸

As discussed below, studies have shown that policies like Boyertown's are effective in preventing discrimination and bias, and creating cohesive, inclusive, and supportive school environments. As a result, such policies create a safer learning environment for all students, leading to improved academic and psychological outcomes. This Court should not stand in the way of Boyertown's effort to achieve these goals.

No Place for Hate, ADL.COM, <https://www.adl.org/who-we-are/our-organization/signature-programs/no-place-for-hate> (last visited Jan. 19, 2018).

¹⁷ *Boyertown Schools' Embrace of Diversity Honored*, *supra* note 15 (highlighting the Barry Morrison Courageous Conversations Award that Boyertown received from the Anti-Defamation League for these initiatives).

¹⁸ *See* Kate Wilcox, *Students Teaching Peers About Respect*, READINGEAGLE.COM, NEWSBANK, Feb. 17, 2011, Record No. 20110217 (reporting that "Boyertown is the first Berks County school district to conduct peer leadership training" where "20 sophomores . . . shared anti-bullying tactics with more than 500 ninth-graders in the junior high schools").

1. Inclusive Policies Like Boyertown’s Reduce Discriminatory Bias, Harassment, and Bullying

Studies have demonstrated that transgender students are safer and feel more comfortable in schools that adopt inclusive policies.¹⁹ In particular, policies that allow transgender students to use sex-segregated facilities consistent with their gender identity effectively reduce bias, harassment, and bullying and contribute to safer school environments.²⁰

¹⁹ Stephen T. Russell et al., *Safe Schools Policy for LGBTQ Students*, SOC. POL’Y REP., 2010, at 6–7 (LGBT students have more academic success at schools with positive and supportive environments than those with negative environments); NAT’L ASS’N OF SCH. PSYCHOLOGISTS & GENDER SPECTRUM, GENDER INCLUSIVE SCHOOLS: POLICY, LAW, AND PRACTICE 2 (2016) (citing Jenifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 J. YOUTH & ADOLESCENCE 1175 (2010)) (in schools with anti-LGBT bullying policies, students have better relationships with staff and as a result feel safer in the school).

²⁰ Cf. Statement from 250 Sexual Assault and Domestic Violence Organizations, *Inclusive Transgender Bathroom Policies Do Not Endanger Women*, (Apr. 21, 2016), <https://web.archive.org/web/20170307123105/https://mary-meredith-t6qi.squarespace.com/4vawa/2016/4/21/full-and-equal-access-for-the-transgender-community> (“Transgender people already experience unconscionably high rates of sexual assault—and forcing them out of facilities consistent with the gender they live every day makes them vulnerable to assault. As advocates committed to ending sexual assault and domestic violence of every kind, we will never support any law or policy that could put anyone at greater risk for assault or harassment. That is why we are able to strongly support transgender-inclusive nondiscrimination protections—and why we oppose any law that would jeopardize the safety of transgender people by forcing them into restrooms that do not align with the gender they live every day. . . . [D]iscriminating against transgender people does nothing to decrease the risk of sexual assault.”).

Standards and policies communicate values. They send a strong message about who and what matters in the school community, which directly affects how students treat each other. Thus, it is no surprise that LGBTQ youth demonstrably feel safer and more comfortable in schools with “nondiscrimination and anti-bullying policies that enumerate or specifically include . . . gender identity or expression.”²¹ By adopting an express policy that permits transgender students to use facilities consistent with their gender identity, Boyertown has communicated the importance of acknowledging, accepting, and supporting the dignity and well-being of transgender students; and it has taken steps to affirmatively eliminate an environment of bias and harassment connected with transgender students’ use of sex-segregated facilities.²²

²¹ Russell et al., *supra* note 19, at 7; *id.* (students feel safer and more comfortable in schools with “support groups or clubs (often called ‘gay-straight alliances’ or GSAs)”); GLSEN, 2015 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF GAY, BISEXUAL, TRANSGENDER AND QUEER YOUTH IN OUR NATION’S SCHOOLS xix (2016) (“[S]tudents who had a [gay-straight alliance] in their school . . . were less likely to hear negative remarks about gender expression and transgender people . . .”).

²² Cf. Mark A. Schuster et al., *Beyond Bathrooms – Meeting the Health Needs of Transgender People*, 375(2) NEW ENG. J. MED. 101, 102 (2016) (laws and policies that permit discrimination “send a message that transgender people are not welcome in workplaces or schools, reinforcing the stigma, bias, and fear that fuel discrimination against transgender people”).

In addition, Boyertown's Policy regarding the use of restroom and locker room facilities is inextricably intertwined with its broader program to reduce discrimination and bias. Boyertown enumerates specific protections for transgender students and provides educators and school staff with the tools to combat anti-transgender bias and harassment.²³ Boyertown's Policy is a manifestation of these protections.

It is well demonstrated that LGBTQ youth feel safer and more comfortable in schools that take active steps to combat and prevent discrimination, bias, and harassment, especially where schools provide teachers and staff with the concrete means to combat and prevent harassment.²⁴ For example, in one study, LGBTQ students in states with comprehensive, enumerated "safe school" policies, including restroom policies like Boyertown's, reported experiencing "lower levels

²³ See District Mission Statement, Boyertown Area School District Policies, (Dec. 8, 2015), <https://www.boyertownasd.org/cms/lib/PA01916192/Centricity/Domain/32/101%20-%20Mission%20Statement%20-%20FINAL.pdf> (making it a priority to "[e]nsure that students feel secure in all school environments so they are ready to learn"); Nondiscrimination in School and Classroom Practices, Boyertown Area School District Policies, (Dec. 8, 2015), https://www.boyertownasd.org/cms/lib/PA01916192/Centricity/Domain/32/103_Nondiscrimination_in_School_and_Classroom_Practices_FINAL.pdf ("declar[ing] it to be the policy . . . to provide an equal opportunity for all students to achieve their maximum potential through the programs offered in the schools regardless of . . . *sex, [or] sexual orientation*" (emphasis added)).

²⁴ Russell et al., *supra* note 19, at 7.

of harassment and assault based on their sexual orientation or gender expression” and “a higher frequency of staff intervention in instances of harassment.”²⁵

Overall, Boyertown’s Policy is consistent with the type of inclusive policies scholars have identified as reducing bias, harassment, and bullying.

2. Reducing Bias, Harassment, and Bullying is in the Best Interest of All Students

Policies like Boyertown’s that reduce bias, harassment, and bullying in schools are in the best interests of all students and help create healthy and safe learning environments.

a. Inclusive Policies like Boyertown’s Promote the Best Interests of Transgender Students

Generally, “[g]ender affirmation—having one’s gender identity acknowledged and accepted in social, legal, and other settings—can greatly enhance overall psychological health.”²⁶ The distress that results from

²⁵ *Id.* at 9.

²⁶ Schuster et al., *supra* note 22, at 102; Lily Durwood et al., *Mental Health and Self-Worth in Socially Transitioned Transgender Youth*, 56(2) J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 116, 120 (2017) (finding normal levels of depression in transgender children who had already socially transitioned as compared to a control group of non-transgender children, in contrast to previous studies’ findings of “markedly higher rates of anxiety and depression and lower self-worth” among “gender-nonconforming children who had not socially transitioned”); NEA LEGAL GUIDE at 24 (“An important stage in the transition is social transition, which means that the transgender person experiences living full-time as the transitioned gender. During this social transition, patients should present consistently, on a day-to-day basis and across all settings of life, in their desired gender role,

experiencing disapproval or mistreatment from others, especially in a school community, can be particularly detrimental. *See, e.g.*, Rebecca Tobles et al., *Removing Transgender Identity from the Classification of Mental Disorders: A Mexican Field Study for ICD-11*, 3 LANCET PSYCHIATRY 850, 857 (2016) (explaining that distress is “more strongly predicted by experiences of social rejection and violence than by gender incongruence, consistent with the perspective that these reflect the result of stigmatization and maltreatment rather than integral aspects of transgender identity”).

Allowing transgender students to use facilities consistent with their gender identity, especially in settings such as schools that are a central focus of young people’s lives, is particularly important to preventing such distress. As the National Education Association has recognized, “it is essential to the health and well-being of transgender people for them to be able to live in accordance with their internal gender identity in all aspects of life and restroom usage is a necessary part of that experience.”²⁷ Likewise, eliminating bias by respecting gender identity

including using sex-segregated facilities including restrooms and locker rooms.” (internal quotation marks omitted) (quoting Eli Coleman et al., *Standards of Care for the Health of the Transsexual, Transgender, and Gender Nonconforming People*, 13 INT’L J. TRANSGENDERISM 165, 203 (2011)).

²⁷ NEA LEGAL GUIDE at 24; *see also* Laura J. Wernick et al., *Gender Identity Disparities in Bathroom Safety and Wellbeing Among High School Students* 46 J. YOUTH ADOLESCENCE 917, 927 (2017) (“LGBT students may also

in other settings such as “dances, sports, physical education, [and] locker room environments” promotes overall psychological well-being.²⁸

In addition to emotional and psychological benefits, inclusive policies like Boyertown’s help reduce drop-out rates among transgender students, who are frequent targets of harassment and bullying.²⁹ Indeed, inclusive policies like Boyertown’s can further the goal of increasing the matriculation of transgender

benefit from interventions designed to ensure safe access to bathrooms for trans students.”); Jenifer K. McGuire et al., *Mental Health of Transgender Youth: The Role of Family, School, and Community in Promoting Resilience*, CHILDREN’S MENTAL HEALTH EREVIEW, 4, 7 (Apr. 2017), <https://www.extension.umn.edu/family/about/docs/mhtg-youth.pdf> (“[T]here is developing evidence that when family, community, school, and medical support mechanisms are in place, trans-identified young people experience a similar range of mental health and well-being compared to the rest of the population. . . . Schools with a climate that is perceived as safe by transgender youth . . . are likely to foster positive psychological outcomes and promote academic achievement for trans students.”); WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 9–10, 50 (7th ed. 2011) (explaining gender dysphoria may be treated by living consistently with one’s gender identity, including using sex-specific facilities).

²⁸ Jenifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 J. YOUTH & ADOLESCENCE 1175, 1177, 1186 (2010).

²⁹ See USTS, at 131, 135 (reporting that mistreatment forced 17% of people who were perceived as transgender to quit or transfer from K-12 schools and six percent were expelled); GRANT ET AL., *supra* note 6, at 33 (finding “harassment was so severe that it led nearly one-sixth (15%) to leave school in grades K-12 or in higher education settings”).

students at colleges and universities.³⁰ Consequently, inclusive policies like Boyertown’s will improve the long-term financial positions of transgender persons who, as a result of bias, often suffer from diminished job opportunities.³¹

Moreover, Boyertown’s Policy alleviates significant health concerns faced by transgender students. Restricting access to sex-segregated spaces imposes immediate health consequences on transgender students. *See* USTS at 225. Specifically, the United States Transgender Survey reported that 59% of respondents avoided using the restroom in the past year because they feared confrontation, 32% limited eating and drinking to reduce public restroom trips in the past year, and 8% suffered from kidney-related problems such as urinary tract

³⁰ *See* 2015 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF GAY, BISEXUAL, TRANSGENDER AND QUEER YOUTH IN OUR NATION’S SCHOOLS, *supra* note 21, at 68, 70 (explaining that students in school with LGBT-inclusive curriculums and students with supportive staff were both less likely to say they did not plan to pursue some type of post-secondary education and less likely to say they did not plan to or were unsure if they would graduate high school). *Cf.* SUE RANKIN ET AL., 2010 STATE OF HIGHER EDUCATION FOR LESBIAN, GAY, BISEXUAL & TRANSGENDER PEOPLE 16 (2010) (“When individuals do not have to expend energy hiding aspects of their identity, they, in turn, tend to be more satisfied and productive.”).

³¹ *See* JA at 1945–46 [Expert Decl. of Scott F. Leibowitz, M.D. at 8–9, ¶¶ 18–20] (“[Transgender] youth are hampered in their ability to access opportunities . . . such as getting a job or exploring educational enrichment opportunities. The loss of these activities . . . can have long term consequences on an individual’s financial and employment prospects later in life . . .”).

infections and kidney infections because they avoided restrooms in the past year.

*Id.*³² By targeting these issues, Boyertown's Policy promotes transgender student health and welfare.

As a result of Boyertown's Policy, transgender students may comfortably focus on learning rather than agonize over their bathroom or locker room use. Ultimately, Boyertown's students will be better college and university applicants, better job candidates, and healthier and more secure persons as a result of Boyertown's Policy.³³

³² See also Schuster et al., *supra* note 22, at 101 (discussing health issues caused by “[d]elayed bathroom use,” including “the ongoing fear of harassment and violence when using public bathrooms” and how it “can take a toll on mental health”); Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 J. PUB. MGMT. & SOC. POL'Y 65, 75 (2013) (detailing how 54% of transgender respondents reported medical conditions related to restroom usage, including dehydration, urinary tract infections, and kidney infections); Weinhardt et al., *Transgender and Gender Nonconforming Youths' Public Facilities Use and Psychological Well-Being: A Mixed Method Study*, 2.1 TRANSGENDER HEALTH 140, 148 (2017) (“[G]ender minority youth who felt unsafe in bathrooms have adverse mental health impacts and lower [quality of life].”).

³³ Indeed, as the District Court recognized below, Boyertown's failure to implement its Policy would subject it to liability for violating the Equal Protection Clause and Title IX. See JA at 151 [Dist. Ct. Op. at 141 n.77]. *Accord Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (“A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017) (same, but with regard to the equal protection clause).

b. Boyertown’s Policy Benefits the Entire School Community

The benefits of Boyertown’s inclusive policy are not limited to transgender students. The Policy improves the learning environment for all students and creates greater solidarity within the school community. Indeed, school administrators nationwide have identified school buildings as “not only a place for transgender students to feel safe . . . [but also] the ideal place to preach acceptance and courage among young people.” Layla J. Kurt & Krystel H. Chenault, *School Policy and Transgender Identity Expression: A Study of School Administrators’ Experiences*, INT. J. EDUC. POL’Y AND LEADERSHIP, 2017, at 8.³⁴ And “enumerated policies” like Boyertown’s create “stronger connections” between students and their school communities. Stephen T. Russell, *Are School Policies Focused on Sexual Orientation and Gender Identity Associated with Less Bullying? Teachers’ Perspectives*, 54 J. SCH. PSYCHOL. 29, 30 (2016).

Additionally, by curbing bullying and other harassment against transgender students, Boyertown’s Policy produces a school community, and promotes positive

³⁴ See also N. Eugene Walls et al., *Gay-Straight Alliances and School Experiences of Sexual Minority Youth*, 41 YOUTH & SOCIETY 307, 323–25 (2010) (finding trans-inclusive policies and practices, appropriate response to bullying, and allowing transgender students to be acknowledged in accordance with their gender identity creates a more positive overall school climate, which leads to better outcomes for all students).

psychological developments for all students. Bullying harms not only its direct victims, but also bystanders: merely “observing the victimization of other peers can have a significant negative impact on multiple indicators of mental health.”

See Ian Rivers et al., *supra* note 12.

In addition to improving the school’s community and safety for all students, Boyertown’s Policy better prepares students for success later in life. When students learn to accept others, prejudice is reduced, cross-cultural friendships are formed, and all students benefit by preparing for an increasingly global and diverse workplace. See, e.g., JEANNE L. REID & SHARON LYNN KAGAN, A BETTER START: WHY CLASSROOM DIVERSITY MATTERS IN EARLY EDUCATION 9 (Apr. 2015).

Policies like Boyertown’s that promote the recognition of all individuals send a clear message to students about their personal value in the community, strengthen bonds across demographics, and help students feel like they belong.³⁵ They also

³⁵ See also Stephen Brand et al., *Middle School Improvement and Reform: Development and Validation of a School-Level Assessment of Climate, Cultural Pluralism and School Safety*, 95 J. EDUC. PSYCHOL. 570, 571 (2003) (discussing an earlier study focused on African American students that found when educators are positive about inclusion and respect all students, students in diverse class rooms have higher academic achievement); *Diversity In Primary Schools Promotes Harmony, Study Finds*, SCIENCE DAILY (July 26, 2008), <https://www.sciencedaily.com/releases/2008/07/080724064835.htm>; Jaana Juvonen et al., *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools*, 17 PSYCHOL. SCIENCE 393, 398 (2006) (finding ethnic diversity in schools is associated with “feelings of

ensure compliance with protections under Title IX. *See supra* note 33. In other words, adopting a policy that reflects the current global consensus of inclusion³⁶ produces advantages to all Boyertown students during and after their primary education.

CONCLUSION

For the reasons discussed above, and the reasons discussed in the Brief of Defendant–Appellee Boyertown Area School District and Intervenor–Appellee Pennsylvania Youth Congress, the District Court should be affirmed.

safety and social satisfaction in school” and students feeling “safer, less harassed, and less lonely”).

³⁶ *See, e.g.*, USTS, at 137 (reporting 56% of respondents cited supportive classmates, 39% cited neither supportive nor unsupportive classmates, and only 5% cited unsupportive classmates); ANDREW R. FLORES ET AL., PUBLIC SUPPORT FOR TRANSGENDER RIGHTS: A TWENTY-THREE COUNTRY SURVEY 6 (2016) (“A majority of respondents from 15 countries agreed that transgender people should be allowed to use the restroom associated with their gender identity.”); Layla J. Kurt & Krystal H. Chenault, *School Policy and Transgender Identity Expression: A Study of School Administrators’ Experiences*, INT. J. EDUC. POL’Y AND LEADERSHIP, 2017, at 7 (“[S]tudents and faculty were mostly supportive and presented little resistance to the accommodation of transgender students, while parents and other community members exhibited the most resistance and were often the underlying source of what little animosity was demonstrated by students.”).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and 29(a)(5) because this brief contains less than 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and this Court's Local Rule 29.1(b).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013's 14-point font Times New Roman.

This brief complies with the electronic filing requirements of this Court's Local Rule 31.1(c) because the text of the electronic brief filed with this Court is identical to the text of the paper copies of the brief filed with the Court and served on the parties; and the Symantec Endpoint Protection 11.0.3001.2224 virus detection program has been run on the file containing the electronic version of this brief and no viruses have been detected.

Counsel for *Amicus Curiae* hereby certifies that George G. Gordon and Ryan M. Moore are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2018, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Third Circuit using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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