No. 18-658

In The
# Supreme Court of the United States

JOEL DOE, et al.,

*Petitioners,*

v.

BOYERTOWN AREA SCHOOL DISTRICT, et al.,

*Respondents,*

and

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,

*Respondent-Intervenor.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Did the policy of the Boyertown Area School District allowing transgender students to use restrooms and locker rooms aligned with their gender identity violate the constitutional right to privacy of cisgender (non-transgender) students where all students have the right to use single-user restrooms and where no one is forced to use any restroom or locker room alongside other students in which they would not be comfortable?

2. Did the policy of the Boyertown Area School District allowing transgender students to use restrooms and locker rooms aligned with their gender identity deny or limit access to educational opportunities of cisgender students in violation of Title IX where all students have the right to use single-user restrooms and where no one is forced to use any restroom or locker room alongside other students?

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## INTRODUCTION

In 2016, after receiving a request from a transgender student, the Boyertown Area School District (the "School District") decided that it would – on a case-by-case basis – allow transgender students to use the restrooms and/or locker rooms (together "facilities") of their gender identity after making a request to do so and then meeting with guidance counselors and other administrators to allow the School District to assess the student's situation and intentions. 24a-25a.[1]

On February 22, 2017, the U.S. Departments of Education and Justice issued a Dear Colleague Letter (the "2017 Letter") that stated that the departments were taking the position that the issue of how schools should respond to requests by transgender students to use restrooms and locker rooms consistent with their gender identity should be left up to local officials and not determined by the federal government. Specifically, the letter stated, "In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy." 42a.

Following receipt of the 2017 Letter, the School District made the decision to continue to allow transgender students to use facilities aligned with their gender identity because the School District "believes that transgender students should have the right to use school bathroom and locker facilities on the same basis as non-transgender students." 42a. Furthermore, the

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[1] Citations in the form of page numbers followed by the letter "a" refer to pages in the appendix submitted by Appellants in conjunction with their Petition for a Writ of Certiorari.

School District believes that its "position is consistent with guidance from the Pennsylvania School Boards Association, the National School Boards Association, our Solicitor and what the school district administration believe is fair and equitable under the circumstances." 43a.

By framing this case as an alleged infringement of the privacy rights of cisgender students, Petitioners effectively ask this Court to set a national standard prohibiting transgender students from using facilities aligned with their gender identity without taking into consideration any factors other than the sex of individuals as assigned at birth and the signs on the restroom and locker room doors. The Petitioners' suggested outcome would remove the legal duty of state and local officials to make decisions regarding how to handle the interplay of the rights of cisgender students who don't want to share facilities with the transgender students along with the rights of transgender students to be free from discrimination.

Under laws such as the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, the Individuals with Disabilities Education Act, and Title IX, local officials are required to protect students from unlawful discrimination. And to the extent that students have disabilities – including gender dysphoria or other emotional impairments – accommodations are required, taking into account the facts that exist in the school district.

As the District Court and Third Circuit Court of Appeals have recognized, Petitioners have failed to show any infringement of their rights. Meanwhile, the Petition for a Writ of Certiorari failed to make any availing claim of an abuse of discretion by the lower courts in reaching their decisions. As such, the School District's autonomy to make educational decisions for its students must not be usurped. Unlike the federal government or even this Court, the School District's teachers, administrators, and school board members possess the knowledge concerning the needs of all of its students, the resources and facilities available to meet those needs, and how to allocate those resources in order to ensure that students' educational needs are met.

This Court has cautioned courts to resist "substitut[ing] their own notions of sound educational policy for those of school authorities which they review," because judges lack the on-the-ground expertise and experience of school administrators. *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 686 (2010) (*citing Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206 (1982)). Petitioners offer no valid argument for this Court to overrule the sound educational policy in place in Boyertown.

Accordingly, the Petition for a Writ of Certiorari should be denied.

## STATEMENT OF THE CASE

Transgender individuals are people whose gender identity – or sense of self – is incongruent with the gender associated with their assigned sex at birth as determined by external genitalia. There are an estimated 1.4 million American adults who identify as transgender. 92a. The School District has, since the beginning of the 2016-2017 school year, permitted transgender students to use restrooms and locker rooms aligned with their gender identity upon request on a case-by-case basis. 23a-24a. This practice and its implementation have not been reduced to writing. 25a. By the end of the 2016-2017 school year, permission had been granted to two transgender males and one transgender female to use restrooms aligned with their gender identity. One transgender male also requested, and was given, permission to use the boys' locker room. 26a. During the 2016-2017 school year, three other transgender male students requested permission to use different first names aligned with their gender identity, and to be addressed by male pronouns.[2]

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[2] Expert witness Dr. Scott Leibowitz testified regarding the transitioning process for transgender students, and his testimony was accepted by the District Court. Dr. Leibowitz testified that among the accepted clinical interventions to treat adolescents with gender dysphoria are social transition, pubertal suppression, hormone therapy, and in some cases, surgery. 98a. Social transitioning refers to the process of living in accordance with one's gender identity, such as adopting a name traditionally associated with that gender identity, using different pronouns, and perhaps changing one's hairstyle and even voice. 100a. It can also include using facilities corresponding to the gender identity. 101a. Dr. Leibowitz said that the social transitioning process is often incremental. 100a-101a.

Under the School District's practices, before a transgender student is granted permission to use the restrooms and/or locker room aligned with his or her gender identity, several conversations occur between the student and his or her guidance counselor regarding the student's situation and intentions. Permission is not granted automatically. 27a-28a. When a transgender student at Boyertown Area Senior High ("BASH") requests and is granted permission to use the facilities aligned with their gender identity, they are no longer permitted to use the facilities of their assigned sex. 259a.

The practice of allowing transgender students to use the restrooms and locker rooms aligned with their gender identity has not resulted in any disruption to the educational program or activities of the School District. BASH students have been very accepting of their transgender classmates. 38a-39a.

In 2016, the School District reconstructed the showers in the locker rooms at the high school to remove group showers and replace them with individual shower stalls with curtains. 32a. As part of renovations, BASH added several restrooms for both students and staff – both multi-user and single-user – for the 2017-2018 school year. 33a. The additions brought the number of single-user restrooms available to students to eight. 35a. All of the multi-user restrooms at BASH have individual toilet stalls, each with a locking door for privacy. 33a. Four of the single-user restrooms for students were to have lockers added for the 2017-2018 school year so that students changing in those

restrooms could store their belongings without using their regular hall lockers. 37a. Both the boys' and girls' locker rooms at BASH have individual restroom stalls and shower stalls. 32a-33a. BASH Principal Dr. Brett Cooper is not aware of any transgender student ever showering in either of the BASH locker rooms. 39a.

In addition to the gym locker rooms, there are "team" locker rooms near the gyms. These locker rooms have lockers, toilet stalls and showers. 35a-36a. The School District will permit use of the team locker rooms to assuage the concerns of students who feel uncomfortable changing in the presence of others. 36a, 38a. There is no need for a student using the team locker rooms to walk into or through the gym locker rooms. 35a-36a.

No preliminary injunction is needed to protect the privacy concerns of the Petitioner students as no student is required to undress in the presence of any other student, and single-user restrooms may be used by any students who prefer to use them. 35a-37a.

**Petitioners' Factual Claims**

Petitioner Joel Doe[3] was in the 11th grade at BASH during the 2016-2017 school year. 43a. Doe has never taken a shower at school and has never seen anyone take a shower at the school. 49a. On October 31, 2016, Doe witnessed "Student A," a transgender

[3] The District Court granted a motion for each of the four Petitioner students to proceed pseudonymously.

boy, changing in the boys' locker room at BASH. According to Doe, Student A was wearing shorts and a sports bra. 44a. Doe was partially undressed, *i.e.*, in his underpants and a shirt, and in the process of changing into his gym clothes when he noticed Student A. 44a. Before Doe ever had gym again, BASH Assistant Principal Dr. E. Wayne Foley met with Doe and offered him two alternative places to change for gym other than the boys' locker room – in the nurse's office restroom or a single-user restroom near the gym. 48a-49a.

Doe did not use the boys' locker room at BASH after October 31, 2016. 53a. He also chose not to change in the alternative private spaces that were available. Despite not changing for gym class, Joel Doe was permitted to participate in gym classes. *Id.* Doe agreed that when using a single-user restroom, his privacy was protected. 55a.

Petitioner Mary Smith was in the 11th grade at BASH during the 2016-2017 school year. 70a. Smith testified that in March 2017 she walked into a girls' restroom at BASH and saw "Student B," a transgender female student, washing her hands. Smith then immediately ran out of the restroom. 72a. Both Smith and Student B were fully dressed at the time. *Id.* After the incident, Smith still used girls' restrooms at BASH two to four times per week. 76a. Smith has no knowledge of ever seeing a transgender female in the girls' locker room. 80a. On March 23, 2017, Smith met with Foley and learned that transgender students were permitted to use the restrooms and locker rooms aligned with their gender identity. 74a-75a. Smith is

aware that there are single-user restrooms for student use at BASH, and that she could have utilized those restrooms. 78a-79a.

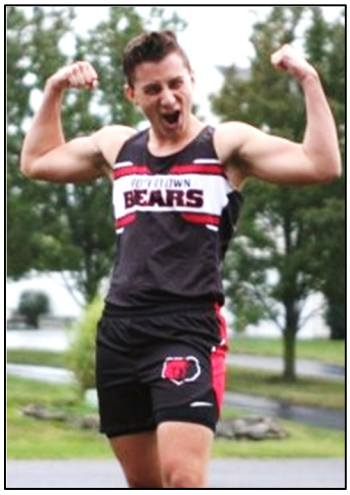
Petitioner Jack Jones was in the 11th grade at BASH during the 2016-2017 school year. 58a-59a. During the first week of November 2016, while changing in the BASH boys' locker room after gym class, a classmate alerted Jones to the presence of the transgender male standing next to him. 59a. Jones was wearing a shirt and underpants when he was alerted to the transgender student's presence. 59a. He then grabbed his belongings and moved toward a group of boys to be out of the transgender student's view. 59a-60a. Jones never saw the transgender student in the locker room again. 62a. Jones continued to change in the boys' locker room throughout the year after seeing the transgender male in the locker room. 63a. Jones never asked anyone at the School District whether he could change for gym elsewhere. But even if he could change elsewhere, he feels this would not solve the issue. 64a. Jones never discussed any issue regarding transgender students with then-Superintendent Dr. Richard Faidley, BASH Principal Brett Cooper or Assistant Principal E. Wayne Foley. 69a. Jones testified that his alleged irreparable harm in this case was having to "be the guy who has to go and say that there was a girl in the locker room." 70a.

Petitioner Macy Roe was in 12th grade at BASH during the 2016-2017 school year and graduated in June 2017. 81a. Roe does not know if she ever saw a transgender student in a girls' restroom or locker room. 84a. Roe never discussed any issue regarding

transgender students with Faidley, Cooper, Foley, administrators or teachers. 86a.

**Other witnesses' testimony**

Intervenor's witness Aidan DeStefano was a senior at BASH during the 2016-2017 school year and graduated at the end of the school year. 110a. DeStefano is a transgender male, and despite being assigned as female at birth, has always identified as a male. *Id.* The Petitioners want him to use the girls' restroom and the girls' locker room. On his first day at BASH in 10th grade, DeStefano used a girls' restroom and was "yelled at by literally everyone that was in there." 111a.[4] For the rest of his time at BASH, DeStefano used either a single-user restroom in the nurse's office or boys' restrooms. 111a-113a. DeStefano has used men's restrooms in public places for several years, including in the courthouse on the day that he testified. 114a. As a senior,




[4] It is easy to understand why girls would yell at him if he goes into a girls' restroom or girls' locker room as the Petitioners argue he should. Above is a photograph of Aidan in his BASH cross-country uniform. Because to the world he is a man and gives the appearance of being a man, he used the men's restroom at the federal courthouse without incident. The Petitioners would argue that the Court should have excluded him from that facility and instead directed him to the women's restroom.

DeStefano changed clothes for gym class in the boys' locker room. DeStefano did not experience any problems using the boys' locker room. 113a.

Expert witness Dr. Scott Leibowitz has specialized training and expertise in the diagnosis and treatment of children and adolescents with gender dysphoria and related psychiatric conditions. 89a-90a. Dr. Leibowitz is medical director for the behavioral health component for the THRIVE gender and sex development program at Nationwide Children's Hospital in Columbus, Ohio. He is also an associate clinical professor at the Ohio State University College of Medicine. *Id.* Gender dysphoria is the clinical diagnostic classification used when an individual has clinically significant distress that results from a lack of alignment between an individual's gender identity and their assigned sex at birth that characterizes a transgender identity or experience. 93a.

Clinical interventions for appropriately assessed children and adolescents with gender dysphoria include social role transition and potentially physical interventions in older and more mature youth, such as puberty blockers, hormone therapy, and sometimes surgery. 98a. Social role transition refers to steps that one takes to present themselves as the gender with which they most identify. It typically includes the adoption of a different name, use of a different pronoun set, wearing clothes and hairstyles typically associated with their gender identity, and using sex-segregated spaces that correspond with their gender identity.

100a. Social gender transition can help to alleviate gender dysphoria. *Id.*

The risk of not treating gender dysphoria has significant ramifications, including potentially exacerbating psychiatric illness, and leading to self-injury, suicidal ideation, and suicidal behavior. 96a. Prohibiting a transgender youth from using restrooms aligned with their gender identity can undermine the benefits of their social gender transition by sending the message that they are not really the person they identify as being. Data shows that such youths have much higher rates of truancy and cutting class. 102a. The major professional medical organizations have come out against policies that bar transgender people from accessing restrooms and other sex-segregated facilities that correspond to their gender identity. Such policies are harmful to the healthy psychological and emotional functioning of transgender youth, and these negative consequences can have ramifications through adulthood. 105a.

**Lower Court Rulings**

On August 25, 2017, Judge Edward G. Smith of the U.S. District Court for the Eastern District of Pennsylvania issued a memorandum opinion denying Petitioners' motion for a preliminary injunction. 1a (*Doe v. Boyertown Area School Dist.*, 276 F. Supp. 3d 324 (E.D. Pa. 2017)).

On June 18, 2018, the U.S. Court of Appeals for the Third Circuit issued an opinion affirming the ruling of

the District Court. 204a (*Doe v. Boyertown Area School Dist.*, 893 F.3d 179 (3d Cir. 2018)). On July 26, 2018, the Third Circuit issued a revised opinion, again affirming the ruling of the District Court. 248a (*Doe v. Boyertown Area School Dist.*, 897 F.3d 515 (3d Cir. 2018)).

## SUMMARY OF THE ARGUMENT

Respondents respectfully request that this Court deny the Petitioners' Petition for a Writ of Certiorari (the "Petition") for the following reasons: (1) the factual premise underlying the Petition is false; as the District Court found, no one is required to share a restroom or locker room with a transgender student – or anyone else – if he or she does not want to do so; (2) the District Court and Third Circuit both held that even if the Petitioners' right to privacy had been implicated, the School District's policy passed strict scrutiny review because the School District has a compelling interest in protecting transgender students and the policy was narrowly tailored to meet that interest; (3) the Petitioners failed to show that the District Court or Third Circuit abused their discretion in finding that the School District policy does not violate Title IX; (4) the Petitioners do not argue that the lower courts abused their discretion in determining that the Petitioners failed to show irreparable harm in the event that a preliminary injunction was not granted; and (5) the decisions as to how to address the rights of transgender students under the myriad of laws that are implicated

should be left in the hands of trained, educated and certificated school administrators who know what facilities they have, what students need, and how to grant all students – cisgender and transgender alike – the safe educational environment to which they are rightfully entitled.

## ARGUMENT

Petitioners ask this Court to grant a writ of certiorari to determine whether the School District policy infringes on their right to privacy in violation of the Fourteenth Amendment and whether the policy violates Title IX. However, as the Court is well aware, the duty of this court in reviewing denial of a preliminary injunction is not to decide the merits, but simply to determine whether the discretion of the court below has been abused. *See, e.g.*, *Brown v. Chote*, 411 U.S. 452, 457 (1973); *State of Alabama v. United States*, 279 U.S. 229, 231 (1929). An examination of the record here reveals no such abuse.

Moreover, as will be shown, each of the Petitioners' claims is clearly refuted in the thoughtful and thoroughly analyzed opinions below from both the District Court and the Third Circuit, both of which denied the Petitioners' efforts to receive a preliminary injunction halting implementation of the School District policy.

## I. The Third Circuit Did Not Abuse Discretion by Finding Petitioners Failed to Show Likelihood of Success on Their Right to Privacy Claim.

Petitioners take issue with the "new strict-scrutiny test" allegedly applied by the Third Circuit. Yet their arguments fail for at least two reasons. First, the application of strict scrutiny analysis is only applicable where there is an infringement on a plaintiff's constitutional rights. In this case, the District Court held that there was no such infringement. The privacy rights of the Petitioners were not violated, and the facts show that the School District made ample arrangements to protect the privacy of all students. Instead, the District Court merely addressed the strict scrutiny to state that *even if the plaintiffs' constitutional rights had been infringed*, the School District's policy would withstand strict scrutiny analysis.

Second, as will be shown, the Third Circuit did not apply strict scrutiny any differently than other courts, including this honorable court.

### A. The District Court Found No Intrusion on Petitioners' Constitutional Rights.

Petitioners rely on their challenges to the Third Circuit's strict scrutiny analysis. However, the District

Court found that no constitutional rights were infringed, and the Third Circuit affirmed. 265a.[5]

In analyzing the constitutional claims, the District Court found that "plaintiffs have yet to prove that the defendants violated their constitutionally protected privacy interest in their partially clothed bodies." 134a. The court then noted that the plaintiffs were "seeking to include additional conduct as violating their rights to privacy." 135a.

> It appears that these additional forms of conduct include (1) males being able to hear females when females are opening products to deal with menstruation issues or using the restrooms, (2) males being around females with the opportunity to view females where they could discern that the girls are having menstruation issues, (3) members of the opposite sex being in locker rooms or restrooms with each other regardless of anyone being in a

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[5] The Third Circuit explicitly rejected all four of the Petitioners' challenges.

> The appellants contend that the District Court erroneously concluded they were unlikely to succeed on their claim that the School District's policy violated their constitutional right to privacy. They assert that the District Court (1) failed to recognize the "contours" of the right to privacy; (2) failed to recognize that a policy opening up facilities to persons of the opposite sex necessarily violates that right; (3) erroneously concluded that the School District's policy advanced a compelling interest; and (4) incorrectly found that the policy was narrowly tailored to serve that interest. We reject each of these arguments in turn.

265a.

> state of undress, and (4) having to view a transgender person in a state of undress since that student is actually a member of the opposite sex.

135a-136a. The court then carefully analyzed and dismissed each of these arguments, 136a-148a, before concluding:

> Since this matter does not involve any forced or involuntary exposure of a student's body to or by a transgender person, and the School District has instituted numerous privacy protections and available alternatives for uncomfortable students or to protect against the involuntary exposure of a student's partially clothed or unclothed body, the plaintiffs have not shown that the defendants infringed upon their constitutional privacy rights.

148a. Although the District Court went on to discuss the application of strict scrutiny, it did so only "to the extent that the defendants' practice infringes upon the plaintiffs' privacy rights regarding the involuntary exposure of the intimate parts of the body (or even the possible disclosure of their partially clothed bodies). . . ." 151a. Having already determined that there was no infringement of the plaintiffs' rights, the strict scrutiny analysis was unnecessary.[6]

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[6] It is not clear from the decision whether the court was conducting the strict scrutiny analysis to address future violations of students' right to privacy or if it was doing so just for the sake of completeness if there had a been a violation of the Petitioners' constitutional rights. In either case, the analysis was purely academic after a finding that there was no violation of the Petitioners' right to privacy.

### B. The Third Circuit Correctly Applied Strict Scrutiny Analysis.

Petitioners claim that the Third Circuit's strict scrutiny analysis represented a "weakening of the test" through a failure to properly conduct the narrow tailoring analysis. Pet. 17. As will be shown, the Petitioners' claim fails.

#### 1. Narrow Tailoring Does Not Require School District to Prove It Employed Least Restrictive Means Possible.

Petitioners claim that a government policy "is not narrowly tailored when there are less intrusive alternatives." Pet. 17. Importantly, Petitioners cite no decision of this court supporting this proposition. In fact, this Court has stated that narrow tailoring does not require the least restrictive means possible. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

> We have refrained from imposing a least-restrictive-means requirement – even where core political speech is at issue – in assessing the validity of so-called time, place, and manner restrictions. We uphold such restrictions so long as they are "narrowly tailored" to serve a significant governmental interest, a standard that we have not interpreted to require elimination of all less restrictive alternatives. Similarly, with respect to government regulation of expressive conduct, including conduct expressive of political views. In requiring that

> to be "narrowly tailored" to serve an important or substantial state interest, we have not insisted that there be no conceivable alternative, but only that the regulation not burden substantially more speech than is necessary to further the government's legitimate interests. And we have been loath to second-guess the Government's judgment to that effect.

*Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 477-78 (1989) (citations and quotations omitted). Similarly, Petitioners mischaracterize the cited decisions from the courts of appeals as supporting their least restrictive means argument, when, in fact, the decisions simply hold that the government regulations at issue were not narrowly tailored.

Accordingly, contrary to the Petitioners' argument, the School District was not required to show that alternative policies might also be able to advance the School District's compelling interest in not discriminating against transgender students. Instead, had there been a violation of the Petitioners' fundamental rights, the School District would have been required to show that its policy was narrowly tailored to achieve the compelling interest. And both the District Court and the Third Circuit held that the School District did so. 152a-153a; 272a-274a.

Furthermore, even if the Petitioners' rights had been infringed and the School District were required to use the least restrictive means necessary to achieve its compelling interest in protecting transgender students, the School District has done so. As the Third

Circuit stated, although Petitioners advocate encouraging transgender students to use single-user restrooms, such a policy would invite more scrutiny and attention from fellow students. The court opined, "Adopting the appellants' position would very publicly brand all transgender students with a scarlet 'T,' and they should not have to endure that as the price of attending their public school." 273a.

### 2. Petitioners' 'Underinclusiveness' Arguments Are Unavailing.

Petitioners next present several unavailing arguments under the title of "underinclusiveness." They first allege that the School District policy's underinclusiveness is evidenced by the fact that three of the six identified transgender students at BASH did not use the restrooms and locker rooms aligned with their gender identity. Pet. 20. Petitioners then proceed to make the unsupported deductive leap that "[t]he privacy-neutral affirmation measures were apparently sufficient." *Id.* Petitioners also allege that the Third Circuit made no inquiry into whether transgender students' use of facilities consistent with their gender identity fit with the School District's interest. Pet. 21. Finally, Petitioners claim that a student may "experiment" with use of facilities without having gender dysphoria, thus violating other students' privacy. *Id.*[7]

[7] There is no evidence in this case that any student was "experimenting" or that students who were merely experimenting would be allowed to use the facilities consistent with their gender identity.

Regarding the first argument, the Petitioners' argument is fallible. Just because three transgender students were not given permission to use the facilities aligned with their gender identity does not mean that other measures aimed at preventing discrimination were "sufficient." As the District Court found based on the testimony of Dr. Leibowitz, "social transitioning [including using facilities aligned with gender identity] can occur in increments." 100a-101a. Therefore, students just beginning the process of social transitioning might choose not to use the facilities aligned with their gender identity. As the District Court found, "determining the proper intervention for a particular adolescent is a case-by-case determination resulting from a collaborative process and considering the advantages and disadvantages of a particular intervention." 100a. Furthermore, it is simply disingenuous for Petitioners to argue that unless all transgender students use facilities aligned with their gender identity, none should be permitted to do so.

The Petitioners' second argument is even more spurious. They claim that the Third Circuit made no inquiry into how transgender students' use of locker rooms consistent with their gender identity "fit with the school's interest." Pet. 21. Petitioners then mischaracterize the testimony of Dr. Leibowitz, claiming that he provided no evidence specific to students' use of facilities consistent with gender identity rather than assigned sex at birth. *Id.* However, Dr. Leibowitz testified that if an adolescent is barred from facilities matching their gender identity, data suggests there are

much higher rates of not going to school, leaving school, and cutting class. 102a. And when adolescents with gender dysphoria can use facilities corresponding to their gender identity, it can have a positive effect on their mental wellbeing. 103a-104a. In contrast to the Petitioners' argument, the Third Circuit clearly reviewed and positively cited Dr. Leibowitz's testimony, as well as a concurring amicus brief from groups including the American Academy of Pediatrics and the American Medical Association. 255a-259a; 256a n.16.

As noted above, Petitioners' final argument regarding underinclusiveness is that students may "experiment" with use of facilities aligned with their gender identity despite not suffering from gender dysphoria. Petitioners allege, "That would be a privacy violation even under the Third Circuit's redefinition of sex." Pet. 21. First, the Third Circuit did not redefine sex. At the beginning of its decision, the Third Circuit defines sex as the Petitioners presumably do: "'Sex' is defined as the 'anatomical and physiological processes that lead to or denote male or female.' Typically, sex is determined at birth based on the appearance of external genitalia." 254a. Meanwhile, Petitioners do not explain why someone who is transgender but not suffering from gender dysphoria would be committing a privacy violation, and they provide no case law or citations to the record to support their argument. Respondents can only assume that Petitioners mean to argue that a student who does not truly have a gender identity different from the sex they were assigned at birth would be violating the privacy of others by using the

facilities designated for a sex other than the one they were assigned at birth. However, in this case, that is highly unlikely as transgender students requesting to use facilities aligned with their gender identity go through a rigorous review process with school counselors and administrators to ensure that the requests are being properly made. 27a-28a. Accordingly, the Petitioners' underinclusiveness arguments have no merit.

### 3. Balancing of Interests Was Not Part of Decision.

Petitioners next claim that the Third Circuit improperly attempted to "'balance' Petitioners' constitutional privacy concerns against the interest the policy purportedly advanced. . . ." Pet. 21. Unfortunately, Petitioners provide no citation to the Third Circuit decision, and it is not clear from a reading of the decision where the alleged balancing occurs.[8] This argument is even more shallow when one considers that under the facts here, this case is not about privacy because the School District has fully protected the privacy interest of the Petitioners and all other students as no student is required to undress in the presence of any other student. 145a.

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[8] The Third Circuit did state, "The constitutional right to privacy is not absolute. It must be weighed against the important competing governmental interests." 267a. However, it did so to introduce the concept of strict scrutiny analysis and did not conduct any balancing test.

Respondents agree with Petitioners that a balancing test is not required under strict scrutiny analysis. *See* Pet. 21-22. Therefore, since the Third Circuit found that the School District had a compelling interest and that the School District policy was narrowly tailored to serve that interest (274a), the strict scrutiny analysis was complete. Accordingly, this Court's review is unnecessary.

### C. The Third Circuit Held That the Record Supported the Existence of a Compelling State Interest.

Petitioners challenge whether the Third Circuit required the School District to prove that its interests in protecting transgender students were compelling. However, both the District Court and the Third Circuit found that the School District had compelling interests and that those interests were well supported in the record.

Petitioners allege that the Third Circuit "identified two possible state interests," which were: "(1) protecting Boyertown students with gender dysphoria from discrimination and affirming their beliefs about their own gender, and (2) promoting inclusivity, acceptance, and tolerance." Pet. 24. In reality, the Third Circuit held that "[t]he District Court found that the School District's policy served 'a compelling state interest in not discriminating against transgender students'. . . . We agree." 268a (quoting 151a-152a).[9]

[9] It is important to note that the Third Circuit found that the compelling interest was protecting transgender students

Although the Third Circuit acknowledged that the School District's policy also "benefits all students by promoting acceptance" (270a-271a), the court did not state that promoting acceptance is a compelling interest.

The Third Circuit then held that "[t]his record clearly supports the District Court's conclusion that the School District had a compelling state interest in protecting transgender students from discrimination." 269a. The court noted specifically:

> Mistreatment of transgender students can exacerbate gender dysphoria, lead to negative educational outcomes, and precipitate self-injurious behavior. When transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated – indeed, it can be life threatening.

*Id.* More specifically, the District Court found that: numerous data indicate that co-occurring psychiatric diagnoses occur in much higher rates in transgender youths (97a); the risk of not treating a gender dysphoric adolescent has "significant and substantially higher . . . poor psychiatric outcomes" including suicide and self-injury (96a); if a transgender adolescent is barred from facilities aligned with their gender identity, there are higher rates of cutting class and leaving school (102a); and allowing transgender adolescents to

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generally and not just those experiencing gender dysphoria as Petitioners suggest.

use facilities aligned with their gender identity has a positive effect on their mental wellbeing (103a-104a).

Petitioners allege that these data do not prove the School District had a compelling interest because the School District did not show that ***its*** students were at risk if they could not use facilities aligned with their gender identities. Pet. 24. However, they point to no authority to support this argument. Indeed, none of the cases cited by Petitioners regarding the need for evidentiary support (Pet. 23) hold that the problem to be addressed must be currently occurring in the given forum. For example, in *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011), a California law restricting the sale of violent video games to minors was challenged. *Id.* at 789. California did not point to any specific instances of violence but rather relied on research purporting to show a connection between exposure to violent video games and harmful effects on children. *Id.* at 800. This Court rejected the studies not because they were general, but because they were challenged by other studies, and more importantly, because they showed no link between playing violent video games and acting aggressively.

In this case, Petitioners do not point to ***any*** studies conflicting with the testimony of Dr. Leibowitz or the studies he cited.[10] Moreover, after identifying an expert of their own and supplying a report from said expert,

[10] The District Court held that Dr. Leibowitz was qualified as an expert in "gender dysphoria and gender identity issues in children and adolescents," and found his testimony to be "reliable and relevant." 108a-109a.

the Petitioners voluntarily chose not to have that expert testify. Instead, the Petitioners simply assert in conclusory fashion that the lack of specific incidents of discrimination preclude a compelling interest. No such requirement exists.

Petitioners then assert once again that the School District does not have a compelling interest "because it is not pursued across the board." Pet. 25 (*citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993)[11]). Petitioners attempt to support this claim by alleging that the School District allowed some transgender students to use facilities aligned with their gender identities, but "did not for others," referring to three School District students who did not use facilities aligned with their gender identity. *Id.* The School District disputes Petitioners' version of the facts.[12]

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[11] Meanwhile, the decision in *Lukumi Babalu Aye* is inapposite as the Court in that case rejected statutes outlawing religious ritual sacrifice of animals because the statutes did not prevent the killing of animals in other ways that might also be deemed cruel. *Lukumi Babalu Aye*, *supra*, at 546-47 ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."). This case would be more compelling if Petitioners alleged that the School District's policy does not prevent other potential harms to transgender students; however, no such argument is made.

[12] There is conflicting evidence in the record as to whether the three students in question requested permission to use facilities consistent with their gender identity. Compare 26a n.10 (noting both principal's testimony that the students had requested

Yet even if the School District had rejected some students' requests, this would not affect the compelling interest analysis, as the facts specific to each student's situation are reviewed and considered by the School District. 27a-28a. As the Third Circuit noted, "Constitutional right to privacy cases 'necessarily require fact-intensive and context-specific analysis.' Bright line rules cannot be drawn." 278a (*citing Doe v. Luzerne County*, 660 F.3d 169, 176 (3d Cir. 2011). And as stated *supra*, the School District's review of transgender students' requests on a case-by-case basis supports the requisite narrow tailoring of the policy.

## II. The Third Circuit Correctly Decided the Title IX Claim.

Petitioners claim that the Third Circuit improperly affirmed the District Court's holding that the Petitioners were unlikely to succeed on their Title IX claim. Pet. 26-28. Petitioners allege that they were "deprived" of the School District's locker rooms and restrooms "on the basis of sex" based on the Petitioners' discomfort with sharing facilities with transgender students who were assigned a different sex than them at birth, and more generally because facilities are segregated by sex. *Id.* Petitioners further allege that under Title IX, they need not show any discrimination. Pet.

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permission and an interrogatory response failing to list the students as having permission to use facilities aligned with their gender identity), with 29a (finding that the School District had not denied any request by a transgender student to use facilities consistent with their gender identity).

28. Petitioners cite no authority for their contention that they need not show discrimination to succeed on their Title IX claim, stating vaguely that "a student may prove a statutory violation merely 'on the basis of sex.'" *Id.*

Title IX states, in pertinent part, "No person in the United States shall, on the basis of sex,[13] 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. . . ." 299a (20 U.S.C. § 1681(a)). The heading of that subsection of the statute is "Prohibition against discrimination; exceptions." *Id.* Petitioners do not cite, and Respondents could not find, any cases alleging a Title IX claim that do not make a claim of some form of discrimination. This point was also noted by the Third Circuit. 282a ("The appellants have not provided any authority – either in the District Court or on appeal – to suggest that a sex-neutral policy can give rise to a Title IX claim.")

Even assuming that Title IX requires no showing of discriminatory effect, Petitioners do not allege how they were "excluded from participation in" or "denied the benefits of" any education program as a result of the School District's policy. Any decision of the Petitioners not to use the School District's facilities based on the School District's policy was of the Petitioners'

[13] Neither Title IX nor the implementing regulations define the term "sex," nor do they mandate how to determine who is male and who is female when a school provides sex-segregated facilities.

own making. The School District did not preclude any Petitioner from using either the School District's locker rooms or restrooms, and the School District certainly did not discriminate by treating males or females any differently under the policy. The facts are clear and undisputed that all students – male and female, cisgender and transgender – had the exact same rights to use single-user restrooms or multi-user restrooms, and to use the regular gym locker rooms or to take advantage of facilities that afford complete privacy protections. Accordingly, there is no need for this Court to review the Third Circuit's decision regarding Petitioners' Title IX claim.

## III. Petitioners Have Not Challenged the Finding That They Failed to Show Irreparable Harm.

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Curiously, Petitioners make no argument challenging the Third Circuit's holding that they "did not demonstrate irreparable harm would result from denying an injunction." 289a. This holding was based on the District Court's finding that no student is required to undress or use the restroom in the presence of any other student. 145a. Indeed, plaintiffs admitted that the single-user facilities adequately protected

their privacy. 55a, 64a, 68a. Absent such a challenge, the Petitioners are unable to overturn the District Court's denial of a preliminary injunction. Accordingly, this Court's review is unnecessary.

## IV. This Case is Not a Good Vehicle for the Court to Address the Use of Schools' Facilities by Transgender Students.

Petitioners ask this Court to review this case to provide guidance to school districts attempting to balance the rights of transgender students with the rights of those cisgender students who object to sharing facilities with transgender students. Pet. 29. However, there are several aspects of this case that make it an inappropriate vehicle to address that issue.

This case is not ideal for certiorari primarily because of the facts of the case. As a very large[14] and recently renovated high school, BASH offers several options for privacy for students who do not want to share facilities with transgender students. The school has eight single-user restrooms. 35a. Both the girls' and boys' locker rooms have separate "team rooms" and additional locker rooms where students could change privately. 35a-36a. The locker room showers are all individual showers rather than "gang showers." 32a. The School District is also committed to making

[14] The high school had 1,659 students during the 2016-2017 school year. 18a. At that time, the school included only grades 10 through 12. In September 2017, following the completion of extensive renovations, the ninth grade was added. 35a, 58a.

facilities available for students who wish to change outside the presence of transgender students (or any other students). 38a. Undoubtedly cases will arise in schools that are unable to offer the range of privacy options that Boyertown is able to provide.

Most importantly, this case is also a poor choice for a grant of certiorari due to the procedural posture of the case. Petitioners here challenge a denial of a motion for preliminary injunction. Therefore, this Court could determine, as the Third Circuit did, that the District Court correctly determined that the Petitioners "did not demonstrate irreparable harm would result from denying an injunction." 289a. Therefore, the Court could dispose of the Petitioners' claims without having to address the issue of whether allowing transgender students to use facilities aligned with their gender identity violates the privacy rights of cisgender students. Accordingly, although the issue of transgender rights is increasingly important as more people openly identify as transgender, this Court should address those issues by reviewing a case where it will be required to address those substantive issues.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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