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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Petitioners raise two questions of jurisprudential significance: whether their constitutional right to bodily privacy is entirely contingent on others' beliefs about their own gender, and whether Boyertown's locker room and restroom policy constructively denies Petitioners access to those facilities "on the basis of sex." Pet. i. Rather than address those important questions, Respondents argue about strawmen.

Petitioners are not asking for a "national standard prohibiting transgender students from using facilities" reserved for members of the opposite sex. Contra Boyertown Opp'n 2. Nor are they asking this Court to forbid "local school districts from choosing as a matter of school policy to allow boys and girls who are transgender to use the same common restrooms and locker rooms as other boys and girls." Contra Intervenor Opp'n 1.

Petitioners merely ask that schools—and lower courts—identify a compelling interest and consider less-restrictive alternatives before deciding to violate the acknowledged bodily privacy rights of more than 99% of a student body. Nothing in Petitioners' request prohibits Boyertown from creating a local policy if it proves the policy is necessary to advance a compelling government interest, and that less intrusive approaches are unavailing. The problem is that Boyertown has not come close to satisfying that standard, and the Third Circuit changed the strict-scrutiny test to make it easier for the school to violate student rights.

Respondents are also wrong to say that their policy is necessary to accommodate students with disabilities, such as gender dysphoria. Boyertown Opp'n 2. There are many ways to accommodate without infringing on the constitutional rights of other students. If a student's dysphoria involved strong uneasiness around other students, no school would suggest excluding all other students from the building during school hours. Accommodation does not work that way.

That point segues into another of Respondents' errors: that schools can remedy bodily-privacy violations by giving students the opportunity to exclude themselves from communal locker rooms and restrooms. That violates the unconstitutional-conditions doctrine, which holds that "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quotation omitted). No court has held that plaintiffs lack proof of irreparable harm because they have the freedom to abandon their rights.

So, it is Respondents—not Petitioners—who insist that theirs is the only possible solution to accommodating all students. Petitioners' point is that every student has inherent worth, and that there are many ways to accommodate unique needs. Strict scrutiny and the best interests of all students require a thoughtful, individualized assessment, not a one-size-fits-all approach. No such assessment took place here. This Court should review these important issues before allowing schools across the country to violate students' recognized right to bodily privacy.

REPLY ARGUMENT

I. There is a circuit conflict regarding the test that applies when the government infringes an acknowledged fundamental right.

A. The Third Circuit created a new test for narrow tailoring.

As the petition explained, the Third Circuit's most obvious distortion of the strict-scrutiny test is how it measured narrow tailoring. Simply put, the government's proof that a policy is narrowly tailored requires evidence that less intrusive alternatives are unavailable, impractical, or ineffective for advancing the government's interest. Pet. 17 (citations omitted).

Boyertown's first strawman is to say Petitioners are advocating for a "*least* restrictive means" test. Boyertown Opp'n 17 (emphasis added). On the contrary, Petitioners consistently argued that strict-scrutiny requires an examination of "less intrusive" alternatives, something the Third Circuit did not do. Pet. 17–22.

So, assume for a moment that Boyertown's possible interests—affirming students with gender dysphoria, eliminating discrimination, and promoting tolerance—are compelling and at issue. The Third Circuit should have asked whether the school's policy was necessary to advance these interests, and if so, whether the goal could have been accomplished less intrusively to student privacy. The Third Circuit did not do that, and its failure was not simply a misapplication of the test.

To begin, consider the interest in affirming students with gender dysphoria. No student identifying as the opposite sex testified that they were continuing to suffer mental distress despite the school's other methods of affirmation. To be sure, Boyertown's expert said that using sex-segregated spaces that correspond with the opposite biological sex can, in some instances, assist a gender-dysphoric student. But see Br. of *Amicus Curiae* Walt Heyer 13–20 (arguing from personal experience and pointing to psychiatric research demonstrating that such a policy harms the very students it is intended to help). That does not mean that use of opposite-sex privacy facilities were necessary for the particular Boyertown students experiencing gender dysphoria at the time the school adopted its blanket policy. The school did not consider alternative methods that did not violate other students' privacy rights, much less prove that such alternatives were unavailable. That failure would have been fatal in any other circuit, demonstrating the infirmity of the school's approach and the Third Circuit's strict-scrutiny test.

To bolster its case, the school highlights risks of not treating gender dysphoria. Boyertown Opp'n 11. But that is another strawman. No one contends that gender-dysphoric students should *not* receive treatment. Petitioners agree such students should be supported and accommodated. The question is whether such support *requires* that the school violate the bodily privacy rights of others. And on that point, Boyertown is silent, just as the school is silent about the harm it inflicts on teenagers who are seen partially clothed by the opposite sex.

Next, consider the school's interests in protecting gender-dysphoric students from discrimination and promoting tolerance. Boyertown Opp'n 23–24. The school, echoing the Third Circuit, spends all its time talking about the harms of intolerance and discrimination. *Id.* at 24–25. But it never identifies evidence that *its* students were being discriminated against or were acting intolerant. In fact, Boyertown concedes that its students "have been very accepting of their transgender classmates." Boyertown Opp'n 5 (citing App. 38a–39a). Again, in any other circuit, a court would have asked whether a policy change was necessary to advance the school's anti-discrimination and pro-tolerance interests. And if the answer was yes, the school would have been obligated to show that less intrusive policy changes could not have eliminated discrimination. That didn't happen.

Instead, "the Third Circuit panel effectively placed on *Petitioners* the burden of disproving narrow tailoring, creating a rebuttable presumption that the District's policy passed strict scrutiny." Br. of Constitutional Law Scholars as *Amici Curiae* 12 (emphasis added) [hereinafter "Scholars Br."]. By shifting the burden, the Third Circuit changed the test and "also contradict[ed] the core purpose of strict scrutiny analysis: to zealously protect 'fundamental' rights against unjustified intrusion." *Ibid.* (citing *Reno* v. *Flores*, 507 U.S. 292, 302 (1993)). Allowing the Third Circuit's decision to stand will "impermissibly shield government policies that restrict . . . fundamental rights by placing the onus on the injured plaintiff," *id.* at 13, while showing intolerance to the other 99% of the student body whose rights are violated.

That goes to the heart of what's wrong with the Third Circuit's opinion. By abandoning the requirement that Boyertown at least investigate the possibility of less intrusive alternatives, the Third Circuit allowed the school to "restrict [rights] without an adequate justification." *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). Such a change in protecting student rights warrants review.

B. The Third Circuit created a new test for evaluating "compelling" interests.

The Third Circuit also relieved Boyertown of its burden to prove its purported "compelling interests" with evidentiary support. Pet. 23 (citations omitted). The school's proof problem is twofold.

Boyertown's only "evidence" supporting its compelling interests was "a study that does not reach the level of scientific reliability." Scholars Br. 7. Even Boyertown's expert admitted that no study exists showing that allowing children who identify as the opposite sex to use opposite-sex locker rooms and restroom will promote their mental health or decrease suicide risks. App. 107a.

More problematic, Boyertown did not show that a lack of affirmation or a scourge of discrimination were issues that needed solving. Stopping drug use at school is certainly a "compelling" government interest. But absent proof of a problem *at Boyertown*, that interest does not justify violating student privacy.

Boyertown offers no authority for its position (i.e., that it need not show it has a problem to solve). Boyertown Opp'n 25. Instead, it asserts that no opposing authority exists. Not so. Even while

acknowledging that promoting diversity can be a compelling interest, circuits regularly reject race-based employment policies in the absence of evidence that there is a need to remedy past discrimination. *E.g.*, *Hayes* v. *North State Law Enf't Officers Ass'n*, 10 F.3d 207, 214 (4th Cir. 1993); *Cannatella* v. *City of New Orleans*, 100 F.3d 1159, 1169 (5th Cir. 1996).

In *Ward* v. *Polite*, the Sixth Circuit did not disagree that a university had a compelling interest in maintaining its accreditation. Yet the court still held unlawful the university's expulsion of a student because there was no concrete evidence the student's action (referring a patient to a different therapist so the student would not violate her religious beliefs) jeopardized that accreditation. 667 F.3d 727, 740 (6th Cir. 2012).

And in *Awad* v. *Ziriax*, 670 F.3d 1111, 1117–19 (10th Cir. 2012), the Tenth Circuit invalidated a state constitutional amendment. Again, the court did not disagree that the state's purported interests were compelling. But those justifications were insufficient where the state had no evidence the interests were actual problems.

Taking a different tack, Intervenor pretends this case is about the record, not the law, intoning that the district court made "69 findings of fact." Intervenor Opp'n 14, 25. But none of those findings established a compelling problem that needed solving, or that any problem identified could be solved only by adopting the school's blanket policy rather than a less intrusive alternative. It is impossible to critically examine the Third Circuit's decision and see any judicial scrutiny that could fairly be described as "strict."

C. Imposing conditions on Petitioners and other students does not cure the problem or avoid irreparable injury.

Boyertown insists no bodily-privacy right has been violated because "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." Boyertown Opp'n 12. That trope does not withstand scrutiny. It's akin to saying that a religious school is not discriminated against when it is denied equal access to public funding because the school could choose not to be religious and thus be eligible. Cf. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017).

That argument violates the unconstitutional-conditions doctrine. As this Court held in *Koontz*, "the government may not deny a benefit to a person because he exercises a constitutional right." *Id.* 570 U.S. at 604 (quotation omitted). Here, Boyertown tells students that if they want their constitutional bodily privacy right, they must forfeit access to common, single-sex facilities. That is irreparable harm. Contra Boyertown Opp'n 12, 29–30; Intervenor Opp'n 20–21. If Petitioners continue using opposite-sex privacy facilities, they will involuntary be exposed when in a state of undress to opposite-sex students. That is also irreparable harm. Contra Intervenor Opp'n 22–23.

It makes no difference that Petitioners can avoid the violation by giving up facilities designed for their use. This Court would have rejected the argument if Missouri had said that Trinity Lutheran Church suffered no irreparable harm from the state's Blaine

Amendment because the Church had the choice to abandon its religious identity.

Respondents' flawed reasoning would allow the government to justify any policy that infringes constitutional rights. Individuals should never be forced to choose between a benefit and a right.

D. If left in place, the Third Circuit's decision will have wide consequences.

Strict scrutiny ensures the government cannot violate fundamental rights except in extreme circumstances. The Third Circuit's approach allows government to run roughshod over such rights. The damage is not limited to high school showers, restrooms, and locker rooms. "[W]atering . . . down" strict scrutiny here will "subvert its rigor in the other fields where it is applied." *Employment Div.* v. *Smith*, 494 U.S. 872, 888 (1990). The Third Circuit's test will erode constitutional protections in others areas, including race discrimination, content-based speech discrimination, and religious liberty. Scholars Br. 20–24.

Additionally, when a school fails to consider practical reasons behind privacy rights, it increases the likelihood of inflicting severe trauma on sexual-abuse survivors. Br. of *Amicus Curiae* Hands Across the Aisle 2–9. When a school says that students can avoid having their bodily privacy right violated by leaving, it unwittingly communicates that such survivors should put up with trauma or give up those places designed as a refuge from the opposite sex. "This response . . . is demoralizing to survivors." *Id.* at 3.

Boyertown's policy eliminates consent to be viewed by the opposite sex, and it allows students without gender dysphoria to take advantage by accessing private spaces reserved for the opposite sex. This can take the form of voyeurism and worse. See, *e.g.*, Br. of *Amicus Curiae* William J. Bennett 20–24; Br. of *Amicus Curiae* Women's Liberation Front 11–15.

Petitioners ask that school officials be held to the same standard as any other public official who promulgates a policy that violates a fundamental right: prove there is a compelling need to fix a problem and show that less intrusive alternatives won't work. Officials around the nation need this Court to hold, unequivocally, that schools must consider the bodily privacy of *all* students before violating that privacy.

II. Boyertown cannot justify its Title IX violation.

Title IX prohibits a school from denying any student the benefits of any education program or activity "on the basis of sex." 20 U.S.C. 1681. It does not require proof of discriminatory treatment. Here, Boyertown is denying Petitioners the use of facilities based solely on sex, because the school is allowing members of the opposite sex to use those facilities. That is a *prima facie* violation.

Boyertown first argues that proof of discrimination is always required, and there is no discrimination here because boys and girls are treated the same. Boyertown Opp'n 28. That is a misreading of the statute. Section 1681 prohibits public schools from doing any one of three mutually exclusive things "on

the basis of sex": (1) "exclude[ing] from participation in," (2) "den[ying] the benefits of," *or* (3) "subject[ing] to discrimination" under.

Alternatively, Boyertown says there could be no Title IX violation because it did not preclude Petitioners from using privacy facilities, and Petitioners could use a single-user facility. Boyertown Opp'n 29. As noted, this blames Petitioners for putting themselves in a spot where their rights will be violated. It is no different than cancelling all women's sports, then claiming no Title IX problem because female students can choose non-athletic activities.

Boyertown disregards the mechanism of sex-based exclusion: It is the Petitioners' own sex that dictates whom they consent to associate with when undressing in a privacy facility, and reserving a given facility for one sex protects that consent.

Rather than acknowledge that sex matters in privacy facilities, Intervenor accuses Petitioners of bigotry. Intervenor compares these teenagers' privacy concerns as equivalent to refusing to use restrooms with "classmates of Mexican descent." Intervenor Opp'n 31–32.

This kind of race-baiting argument should be emphatically rejected. This Court and others have long recognized the need for separating male and female students in showers, restrooms, and locker rooms. *E.g.*, *United States* v. *Virginia*, 518 U.S. 515, 556–58 (1996). And that need is particularly acute when regulating the conduct of high school students. Biology is not bigotry, Br. of *Amicus Curiae* Ryan T. Anderson, Ph.D. 6–20, which is why it has never been discrimination to separate privacy facilities based on sex. That is why sex separation is permissible but racial separation is not.

The Third Circuit's rewriting of Title IX and its reinterpretation of "sex" as a mere social construct have far-reaching implications. Women and girls will lose preferences that have been used to address historical and systemic discrimination. Br. of *Amicus Curiae* Women's Liberation Front 15–18. Fundamental First Amendment rights of conscience and expression will be lost. Br. of *Amici Curiae* Christian Educators Assoc. Int'l et al. 16–21. These concerns do not even touch on the female student who loses her spot on the high school team to a male student who believes he is a female. The Third Circuit would hold that the female student has no Title IX claim because her exclusion was not based on "sex."

III. This case warrants immediate review.

Boyertown says that its diverse privacy facilities make this a poor vehicle. Boyertown Opp'n 30–31. Not so. It is precisely *because* of these many options that this Court should grant the petition and decide whether the Third Circuit held the school to constitutional minimums (*e.g.*, proof of compelling interests and no less restrictive alternatives available) before unilaterally violating student rights.

Boyertown also asserts again the lack of irreparable harm. *Id.* at 31. But as already explained, Boyertown has forced Petitioners to either accept an involuntary invasion of their bodily privacy right or give up their right to enter the multi-user facilities that are designed by state law for their exclusive use. Either way, Petitioners are irreparably harmed.

The issue of who can access school showers, restrooms, and locker rooms is important and far-reaching. The Third Circuit's decision is a road map for how *not* to address the issue. The published opinion gives schools *carte blanche* to impose policies without considering alternatives that will protect privacy and serve the interests of all students. It is difficult to imagine a more important or pressing issue for our nation's school children. Certiorari is warranted.

CONCLUSION

For the foregoing reasons and those stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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