No. 20-62

IN THE

Supreme Court of the United States

PARENTS FOR PRIVACY, et al.,

Petitioners,

—v.—

WILLIAM P. BARR, ATTORNEY GENERAL, et al.,

—and—

Respondents,

BASIC RIGHTS OREGON,

Respondent-Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT-INTERVENORS

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QUESTIONS PRESENTED

Whether parents have a substantive due process right of parental autonomy to veto a school district's decision to allow a transgender student to use the restrooms and locker room associated with his gender identity while offering alternatives for students who seek more privacy.

Whether students have a substantive due process privacy right to veto a school district's decision to allow a transgender student to use the restrooms and locker room associated with his gender identity while offering alternatives for students who seek more privacy.

Whether students have a free exercise right to veto a school district's decision to allow a transgender student to use the restrooms and locker room associated with his gender identity while offering alternatives for students who seek more privacy.

Whether a school district's policy allowing a transgender student to use the restrooms and locker room associated with his gender identity, while offering alternatives for students who seek more privacy, constitutes "harassment" because of sex in violation of Title IX.

Whether the Court should grant certiorari where Petitioners' claims are not justiciable, as no Petitioner's child could have used a restroom or locker room with a transgender student, the only transgender student at the high school graduated two years ago, and the plan that prompted the complaint is no longer operative.

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INTRODUCTION

In this case, parents assert that a school district violated their rights when it allowed a transgender boy to use school facilities on the same terms as other boys, while offering alternatives to any student seeking more privacy. The facts and legal arguments largely mirror those made unsuccessfully in *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018), *cert. denied* 139 S. Ct. 2636 (2019), in which this Court denied review last year. As in *Boyertown,* the district court and all three judges on the court of appeals agreed that Petitioners presented no viable claim. Not only is there no split in the circuits on the issues presented, but not a single appellate judge has seen merit in any of these claims.

On that basis alone, the Court should deny certiorari. But this is an even worse case for Supreme Court review than *Boyertown* for two reasons.

First, at this stage, the dispute is entirely abstract, and is not even justiciable. The record reflects that only a single transgender student ever used facilities consistent with his gender identity at Dallas High School (identified here only as Student A)—and he graduated in 2018. Plaintiffs challenge an individualized plan drawn up specifically for Student A, which has no continued application since his graduation. There is therefore no basis for prospective relief. And as to retrospective relief, *no student* who could have used a restroom or locker room with Student A while he was at Dallas High School has ever been a party to this case. Counsel for Petitioners has admitted that no Plaintiff ever used a restroom or locker room at the same time that a transgender student did. Indeed, at this stage no students remain

in this case at all—only parents and parents' rights groups petition the Court. Nothing in the record establishes that any of those Petitioners or their members have children who could have used a restroom or locker room with Student A. The abstract character of the dispute at this point, two years after Student A graduated, means the case is not justiciable, and also makes the case an especially poor vehicle for resolving the questions presented.

Second, key facts central to the Petition are contradicted by Petitioners' own Complaint. Petitioners state in the Petition that their rights were violated because non-transgender students had to change clothes and "engage in intimate bodily functions" in the presence of a transgender student. Pet. i. But according to the Complaint, no student actually had to disrobe in the view of any other student. In fact, as the court of appeals acknowledged, the school district offered "alternative options and privacy protections to those who do not want to share facilities." Pet. App. 34a. Students could choose to change for gym or use the restroom in available stalls, or in separate single-occupancy facilities. No compelled exposure of anyone's body to anyone—transgender or otherwise—is alleged to have ever occurred.

In addition, Petitioners have identified no split among the circuits. In the only two similar cases that have reached a court of appeals, those courts have reached the same unanimous conclusion: nothing in the Constitution or federal laws against sex discrimination bars schools from allowing transgender people to use restrooms and locker rooms consistent with their gender identity. *See Boyertown*, 897 F.3d at 527–31; *Cruzan v. Spec. Sch. Dist. No. 1*,

294 F.3d 981, 983–84 (8th Cir. 2002) (per curiam). No court at any level has held that the Constitution or federal law prohibits schools from choosing to treat transgender students equally, as Dallas High School did here.

Three courts of appeals have addressed a distinct question: whether Title IX or the Equal Protection Clause *requires* schools to allow transgender students equal access to single-sex facilities consistent with their gender identity. All three have held that schools are legally required to do so, because anything else would deprive transgender students of equal access to education because of their sex. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 606–16, 618–19 (4th Cir. 2020); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1304, 1310–11 (11th Cir. 2020); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050, 1054 (7th Cir. 2017).

But that question is not presented by this case, which asks instead whether Title IX or the Constitution *prohibits* a school from *choosing* to permit transgender students to use facilities associated with their gender identity, on the same terms that apply to all other students. There is no support for Petitioners' position, much less any conflict requiring this Court's resolution. The Court should deny certiorari.

STATEMENT OF THE CASE

The courts below resolved this case on a motion to dismiss, and therefore the facts set forth in this statement are taken from the Plaintiffs' Complaint unless otherwise indicated. In September 2015, Student A, who attended Dallas High School in rural

Oregon, sought permission to use the boys' locker room, consistent with his gender identity. Pet. App. 205a. Student A is a transgender boy; he was assigned female at birth and identifies as male. *Id.* He was a student at Dallas High School from 2015 to 2018, when he graduated early after skipping a grade. The record indicates no other transgender students at Dallas High School using facilities consistent with their gender identity then or since.

The principal of Dallas High School applied the school district's existing non-discrimination policy and approved Student A's request to use the school's locker room designated for boys. *Id.* at 259a. Student A also received permission to use the schools' restrooms designated for boys. *Id.* at 261a. The decision was consistent with guidance from Oregon's Department of Education. *Id.* at 186a–87a. The school district memorialized its decision about Student A in an individualized Student Safety Plan ("Student A's Safety Plan"), which also listed safe adults Student A could consult, indicated that Student A's gym teacher should be the first one in and last one out of the locker room during his gym class, assigned a locker to Student A within sight of the coach's office, and reminded staff of anti-harassment policies. *Id.* at 259a–62a. The school district informed students in Student A's gym class that he would start using the boys' locker room. *Id.* at 206a.

Students at Dallas High School were required to take gym class, and were required to change before and after gym. *Id.* at 213a. The main locker rooms had both a communal area in which to change, and private shower stalls and toilet stalls where students could change if they preferred a more private space. *Id.* at 212a. The school also made other single-occupancy

facilities available to any student desiring to use them. *Id.* at 12a. In addition to the private changing areas in the locker room, these facilities included a staff lounge, a restroom in the nurse's office, and other facilities available through the main office. *Id.* at 206a, 209a, 246a.

When some parents and students complained to the principal about Student A's Safety Plan, the principal reaffirmed the district's non-discrimination policy, and explained that any students concerned about their privacy could use single-occupancy facilities. *Id.* at 209a, 246a. Petitioners alleged that these alternative facilities were less convenient than the public multi-user facilities, but they did not allege that they were ineffective in addressing concerns about privacy and modesty. The school district was also investing substantial resources in renovations to increase the private restroom and locker room options available to all students. *Id.* at 206a.

Petitioners Kris and Jon Golly and their children Lindsay Golly and A.G. (the Golly family) had a religious basis for their belief that Lindsay and A.G. should not change clothes or use a restroom in the presence of anyone they perceived to be of a different sex, including transgender people who were assigned a different sex at birth than they were. *Id.* at 217a. School officials were not alleged to have any knowledge of these religious beliefs, to have required anyone in the Golly family to act in violation of these beliefs, to have made any statements related to religion, to have treated any conduct differently depending on whether it was religiously motivated, or to have taken any actions for the purpose of favoring or disfavoring religion generally or any specific

religious belief. Moreover, Lindsay and A.G. were not even in high school when the Complaint was filed.

Student A used the boys' public restrooms and locker room throughout his time at Dallas High School. *Id.* at 206a. Student A was not alleged to have done anything inappropriate in the locker room or restrooms; he simply used them in the same way other students did. *Id.* at 207a.

In November 2017, more than two years after Student A received permission to use the boys' restrooms and locker room, two organizations (Parents for Privacy and Parents Rights in Education) and several individuals (T.F., Melissa Gregory, Nicole Lillie, Lindsay Golly, A.G., Jon Golly, and Kris Golly) brought this action. *Id.* at 180a. None of the Plaintiffs were boys who attended Dallas High School at the same time as Student A. Student A was a senior at the time the Complaint was filed, and graduated in June 2018. *Id.* at 205a.

Plaintiffs asserted that the school's choice to permit Student A to use restrooms and locker rooms that matched his gender identity infringed on their rights. In a wide-ranging complaint, they alleged that the school district violated their constitutional rights to parental autonomy, privacy, and free exercise and inflicted sexual harassment on them in violation of Title IX. *Id.* at 221a–54a. They also named as defendants the U.S. Attorney General and Secretary of Education, claiming that they had violated the Administrative Procedures Act, the Religious Freedom Restoration Act, and the Constitution (substantive due process and free exercise). *Id.* at 187a–89a. And they brought pendent state law claims against the school district and the governor of Oregon.

Id. at 183a–87a. The Complaint did not allege that the U.S. Attorney General, the Secretary of Education, or the governor of Oregon was even aware of Student A's Safety Plan, the object of their challenge.

In April 2018, the district court granted Respondent Basic Rights Oregon's motion to intervene as a defendant. *Id.* at 82a.

Respondents moved to dismiss. Petitioners consented to the dismissal of many of their claims, including those against the governor of Oregon, all the claims of Lindsay Golly and Nicole Lillie, a parental autonomy claim regarding a student survey used at a middle school that asked about students' sexual orientation and gender identity, and the damages claims of the only two individual students who remained in the action, A.G. and T.F. *Id.* at 82a, 84a–85a. At oral argument on the motions to dismiss, counsel for Plaintiffs clarified that no Plaintiff had ever encountered any transgender student in a restroom or locker room.[1]

A few weeks after oral argument, Student A graduated, and Student A's Safety Plan ceased to have any effect.

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[1] THE COURT: Have any of the Gollys actually encountered the situation that you're most concerned about, and that is a transgender student in either a bathroom or a shower or anything like that?

MR. GREY: Not to this point, Your Honor.

THE COURT: Have any of the plaintiffs encountered that?

MR. GREY: Not to my knowledge.

Mot. Hr'g Tr. 21:20–22:2.

The district court dismissed all of Plaintiffs' claims with prejudice. *Id.* at 172a. Rejecting the students' substantive due process privacy claim, the court reasoned that high school students do not "have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs." *Id.* at 116a. It concluded that parents do not have a substantive due process right to veto a school district's choice to treat transgender students in a nondiscriminatory fashion. *Id.* at 164a–65a.

It dismissed the free exercise claims, concluding that Student A's Safety Plan was "neutral and generally applicable with respect to religion" and that "[i]n any event, Plaintiffs do not have standing to bring this claim" because the Gollys—the only Plaintiffs alleged to have relevant religious beliefs—did not have children at the high school. *Id.* at 169a. The court dismissed the Title IX claims because the Complaint did not allege facts establishing harassment that effectively denied students equal access to educational resources and opportunities. *Id.* at 149a. The district court also dismissed the state law claims and all claims against the federal defendants. *Id.* at 155a–59a, 171a–72a.

The court of appeals affirmed. It found that in the absence of any allegations of "privacy intrusion by government officers or the public disclosure of photos or video footage," the district court was correct to dismiss the substantive due process privacy claim. *Id.* at 32a.

With regard to parental autonomy, the court of appeals looked to history, tradition, and precedent, and found that parents do not have a substantive due

process right "to determine the bathroom policies of the public schools to which [they] may send their children." *Id.* at 9a, 44a–57a. Because Student A's Safety Plan was rationally related "to the legitimate purpose of protecting student safety and well-being, and eliminating discrimination on the basis of sex and transgender status," the court also affirmed the dismissal of the free exercise claim. *Id.* at 72a–75a. It further held that mere presence in a locker room or restroom "does not constitute actionable sexual harassment under Title IX just because a person is transgender." *Id.* at 9a. The court of appeals affirmed the district court's dismissal with prejudice because "Plaintiffs have not shown, either in their briefing or at oral argument, how they could amend their complaint to remedy the many legal deficiencies in their claims." *Id.* at 75a.

Parents and parents' rights groups seek this Court's review on the substantive due process, free exercise, and Title VII questions. No individual current or former Dallas High School student seeks review. Pet. ii. And there are no allegations that any of the parents have children who were boys and attended high school at the same time as Student A. Nor are there any allegations that either of the organizations have members who are boys and who attended high school when Student A's Safety Plan was in effect, or who are parents of such boys. There is no allegation that there are any transgender students using facilities associated with their gender identity at Dallas High School at this time.

The only Petitioners before this Court are as follows:

- *Kris and Jon Golly* (the Gollys) are parents in the school district. They have two children, neither of whom could ever have been in a restroom or locker room at the same time as Student A. Pet. App. 182a. Lindsay Golly, the Gollys' daughter, could not have been in the same restroom or locker room as Student A, who used boys' facilities. Pet. 5; Pet. App. 182a, 194a. Moreover, she graduated from Dallas High School before the Complaint was filed. Pet. App. 182a. (Lindsay was originally a plaintiff, but Petitioners consented to dismissing her claims for lack of standing.) Pet. App. at 85a. The Gollys' son, A.G., was in middle school at the time the Complaint was filed; the earliest he could have entered Dallas High School was September 2018, after Student A had graduated. *Id*. (A.G. was also originally a plaintiff, but is not a Petitioner before this Court.) Pet. ii.
- *Parents Rights in Education* is an organization "comprised of educators, school board members, parents and grandparents." *Id.* at 180a. Petitioners do not allege that any members were parents of any students within the school district, much less that they had boys who attended Dallas High School when Student A was there. Nor has Parents Rights in Education alleged that the school district's actions impaired its ability to carry out its mission or caused it to divert its resources.
- *Parents for Privacy* is an organization that, at the time of filing the Complaint, alleged it had student and parent members affected by the school district's policies. *Id.* at 181a. The

Complaint did not allege anything about the number, grade level, or sex of the student members, or the children of the parent members, except to state that its members included the Golly family, already plaintiffs in their own right. The Complaint did not allege that any of the student members or any of the children of the parent members ever encountered a transgender student in a locker room or restroom or that they were likely to do so. Petitioners' counsel admitted before the district court that no Plaintiff had encountered a transgender student in the restroom or locker room. Nor did the Complaint allege that the school district's actions impaired the organization's ability to carry out its mission or drained its resources.[2]

[2] The Petition also describes Nicole Lillie as a Petitioner, but she consented to the dismissal of her claims before the district court, Pet. App. 85a, and cannot properly petition this Court. She was listed in the caption of the Complaint, but the Complaint contained no allegations about her whatsoever.

REASONS FOR DENYING THE PETITION

I. This Case Presents an Inappropriate Vehicle, Both Because It Is at Most an Abstract Dispute, and Because the Facts Alleged in the Complaint Contradict those in the Petition.

This dispute is entirely abstract, and does not present the concrete case or controversy required by Article III. Furthermore, the facts that Petitioners describe in their Petition as necessary for their claims are rebutted by their own Complaint. Both defects render this Petition a wholly inappropriate vehicle for resolution of any of the questions presented.

A. This Case Presents an Abstract Disagreement, Not a Concrete Case or Controversy.

No student who used or could have used a restroom or locker room at the same time as Student A has ever been a party to this lawsuit; at this point, no individual students remain in the case at all. This dispute was abstract at its outset, and became even more so when Student A, the only transgender student identified at Dallas High School, graduated in 2018. His graduation rendered obsolete the Student Safety Plan about which Petitioners complain. Mere disagreement with a school district's decision does not suffice to create a genuine case or controversy absent some more "concrete and particularized," "actual or imminent" injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Justiciability may be raised at any stage of a proceeding, as it goes "to the power of the federal courts to entertain disputes." *Renne v. Geary*, 501 U.S. 312, 316 (1991).

Here, no Petitioner or Petitioner's child ever encountered—or was even ever likely to encounter—Student A in a restroom or locker room. That is because Petitioners include no boys or parents of boys who attended Dallas High School at the same time as Student A. Their "injury" stems solely from abstract disagreement with the school's safety plan for another student. As such, they do not have an "actual" or "imminent" injury-in-fact that is fairly traceable to the conduct of the defendants and redressable by the court. *Lujan*, 504 U.S. at 560.

Furthermore, all of the claims in the Petition, except the one concerning a substantive due process right to parental autonomy, rest on the rights of *students*. But none of the Petitioners are students. Pet. ii. While one Petitioner is an organization alleged to have student members, the Complaint offers no specifics about those members, and thus there is no basis to conclude that any of them are boys who attended school with Student A, and thus could have used a restroom or locker room with him.

At oral argument before the district court, Petitioners conceded that none of the Plaintiffs had ever encountered Student A, or any transgender student, in a restroom or locker room, and that they were instead seeking relief based on the risk that such an encounter might occur in the future.[3] At the time

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[3] As noted above, *see supra*, at note 1, Counsel conceded no student represented here ever encountered Student A in a locker room or restroom:

> THE COURT: The harm that you're describing isn't harm that has been realized as a result of somebody encountering somebody. The harm that you're describing is the risk that that might happen.

of this concession, Student A's Safety Plan had been in effect, and Student A had been using boys' restrooms and locker rooms, for almost three years, and his graduation was mere weeks away.

Thus, Petitioners admit that no Plaintiff used a restroom or locker room with Student A even once in the nearly three years that Student A's Safety Plan was in place. They do not even allege that any Plaintiff had to use single-occupancy facilities to avoid sharing a restroom or locker room with him. And no Plaintiff alleged hearing of or receiving notice of any transgender student other than Student A using facilities consistent with their gender identity at Dallas High School.[4] Therefore, any purported injury to any Petitioner's child or member flowing from the use of a restroom or locker room with a transgender student was neither "actual" nor "imminent." *Bennett*, 520 U.S. at 167.

> MR. GREY: Correct, which we have alleged. And I believe the allegations are sufficient to --
>
> THE COURT: So your response to my question is: It doesn't matter that an encounter has not ever occurred between any of the plaintiffs and a transgender student in the facilities that you're most concerned about, which are showers and bathrooms.
>
> MR. GREY: I would say that that's -- that's correct. And I believe it's going too far to say that there has to have been some sort of an event already that may be traumatic to somebody, whether it's one of the plaintiffs or someone else, before there's any -- any ability to -- to respond to this Student Safety Plan.

Mot. Hr'g Tr. 22:13–23:4.

[4] The students in Student A's gym class were notified before he began using the boys' locker room. Pet. App. 206a.

The parental autonomy claim is equally abstract. The Gollys are parents of children within the school district, but neither of their children were boys who attended high school with Student A. Pet. App. 182a. As such, it is not possible that either of their children could have used a restroom or locker room at the same time that he did. Parents Rights in Education did not allege that it had any members affected by the school district's actions. And Parents for Privacy did not allege any of its parent members' children were boys who attended high school at the same time as Student A.

Nor does the Complaint establish any likelihood of future encounters, as Student A has long graduated, Student A's Safety Plan is no longer operative, and the Complaint identifies no other transgender students in attendance at Dallas High School. A suit is not ripe if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580–581 (1985)). Because there is no reason to believe that any of the Petitioners' children or members ever used a restroom or locker room with Student A, or face an imminent risk of using a restroom or locker room with any transgender student at this point, no claim for relief is ripe.

If this suit was ever a live controversy, it is surely moot now. A suit becomes moot "'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)) (per curiam)). Plaintiffs' request for prospective

injunctive relief became moot when Student A graduated. While Plaintiffs included a general claim for damages in their Complaint, no damages claim on behalf of any student remains in this case. Pet. App. 85a. And no parent who remains in this suit has a child who used, or even could have used, a restroom or locker room with Student A. Petitioners do not explain what "damages" they could possibly pursue under these circumstances.

Thus, this dispute, arising from a no-longer-operative safety plan for a student no longer at the school, is entirely abstract, and does not present a case or controversy sufficient to satisfy Article III. Petitioners disagree with Dallas High School's decision as to Student A, but cannot point to any imminent, ongoing, or past concrete injury that they suffer.

Moreover, even if the Complaint's vague allegations somehow sufficed to present a current case or controversy, the highly abstract character of the claims makes this an especially poor vehicle for addressing the issues in the Petition. Vague allegations about the possibility of past encounters that concededly never materialized, at a school no known transgender student continues to attend, where the Petition is brought not by students but by parents and parents' rights organizations who do not identify any members who were harmed, hardly provide the kind of defined dispute that might warrant this Court's review.

B. The Facts Alleged in the Complaint Contradict those Asserted in the Petition.

Even if the Court were to conclude that this case is justiciable, the Petition is predicated on facts contradicted by Petitioners' own Complaint. Petitioners ask this Court to decide whether the school district would have violated the Constitution or Title IX if it "compel[led] children to . . . expose their bodies to classmates of the opposite sex," or if it forced students or parents to "affirm that a child is the sex with which he or she self-identifies." Pet. i. According to the allegations in the Complaint, however, no one was required to do either. No student was ever required to change clothes or to use the restroom in the presence of any other student; all students were given the option to use private single-occupancy facilities or stalls. Pet. App. 209a. And the Complaint contains no allegations whatsoever concerning anyone having to affirm anyone's sex. As such, the compulsion that forms the central basis of the Petition is wholly absent from the Complaint's allegations, making this case an inappropriate vehicle to consider the questions Petitioners seek to raise.

Each of Petitioners' claims rests on the premise that non-transgender students had to change clothes or use restroom stalls in the presence of a transgender student who was assigned a different sex at birth than they were:

- They describe the substantive due process parental autonomy question as "[w]hether parents surrender their fundamental right to direct the upbringing of their children by enrolling them in public school so that a school

district can *compel* children to . . . expose their bodies to classmates of the opposite sex." Pet. i (emphasis added).

- They describe the substantive due process privacy question as "[w]hether schoolchildren's rights to bodily privacy are violated when they are *compelled* to undress and engage in intimate bodily functions in the presence of members of the opposite sex who self-identify as something other than their sex . . . ." *Id.* (emphasis added).
- They assert, with regard to their free exercise claim, that "the Plan as implemented by the District *compelled* them to violate their sincere religious beliefs that they must not undress in the presence of a member of the opposite biological sex and must not be in the presence of the opposite biological sex while the opposite biological sex is undressing." *Id.* at 8 (emphasis added).
- In connection with their Title IX claim, they object to "[t]he District's *forced* interaction between biological males and biological females in privacy facilities." *Id.* at 38 (emphasis added).

But according to their own Complaint, no student was ever compelled to change clothes or to use the toilet in front of anyone else.

On the contrary, the Complaint makes clear that students had the choice of changing either in the common areas or in the private stalls within the locker rooms. Pet. App. 212a. If they were not satisfied with the privacy of the stalls, the school district permitted any student to use its single-occupancy changing or

restroom facilities. *Id.* at 209a, 216a, 246a. While the Complaint alleges that these facilities were inferior to the main locker rooms, it does not contend that they were inadequate to let students avoid any unwanted exposure to others.[5]

With regard to restrooms, ordinary latching toilet stalls were available for students to use. *Id.* at 207a. The Complaint alleged that students might accidentally see someone through the gaps in the stall doors while walking past. *Id.* But according to the Complaint, any students concerned about that possibility could have used single-occupancy facilities. *Id.* at 209a, 216a, 246a.

Petitioners also seek review of whether it violates students' or parents' rights to be compelled to "affirm that a child is the sex with which he or she self-identifies." Pet. i. But the Complaint did not allege that the school compelled anyone to affirm anyone's sex. In fact, the Complaint does not allege that non-transgender students had to say anything at all. While the Complaint alleges that the principal told students they could not circulate a petition to ban Student A from the boys' restrooms and locker room, Petitioners neither asserted a free speech claim below nor alleged that any school official instructed students

[5] In some places, Petitioners go even further and seek review of whether it would violate students' rights to be "compelled to *fully* undress and perform bodily functions in the presence of a student of the opposite sex without objection." Pet. 21 (emphasis added). But the Complaint does not allege that the School District required students to fully undress at all.

to say or do anything affirmative related to Student A, sex generally, or Student A's sex specifically.[6]

Therefore, the core of the constitutional and Title IX violations asserted in the Petition—being forced to be seen unclothed, or being forced to affirm someone's identity—is directly contradicted by Petitioners' own allegations. Because, according to Petitioners' own Complaint, students were free to maintain their privacy and were not required to affirm anything, this case makes an inappropriate vehicle to consider whether it would have been lawful for the school district to require otherwise.

II. PETITIONERS HAVE IDENTIFIED NO CIRCUIT SPLIT.

This case also does not require review because Petitioners have identified no split among the courts of appeals. The only two other courts of appeals to address the question presented here—whether a school district violates federal sex discrimination law or the Constitution when it chooses to allow transgender people to use restrooms or locker rooms consistent with their gender identity—reached the same conclusion as the court of appeals here. *See Boyertown*, 897 F.3d at 521; *Cruzan*, 294 F.3d at 983–84. In fact, *every* appellate judge to consider claims akin to those advanced here has rejected them. Yet

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[6] Petitioners also now assert that "Student A, who self-identifies as a male can use either the female's or male's privacy facilities." Pet. 39. But according to Student A's Safety Plan, attached as an Exhibit to the Complaint, Student A was allowed only to use facilities with which he "identified," and he identified as "male." Pet. App. 259a, 261a. According to the Complaint, he consistently used facilities designated for boys once the safety plan was implemented.

Petitioners do not even cite these cases. For the same reason that the Court denied certiorari in *Boyertown*, it should deny review here.

Claims like those presented here have reached federal appellate review only twice before. Both times, the court of appeals unanimously rejected the claims, affirming a district court's decision. In *Boyertown,* the Third Circuit ruled that plaintiffs had not established that "the mere presence of transgender students in bathrooms and locker rooms constitutes sexual harassment so severe, pervasive, or objectively offensive… 'that [the plaintiff] is effectively denied equal access to an institution's resources and opportunities.'" *Boyertown*, 897 F.3d at 535 (quoting *DeJohn v. Temple University*, 537 F.3d 301, 316 n.14 (3d Cir. 2008). It also held that no substantive due process privacy violation had taken place, because the school district did not "force any cisgender student to disrobe in the presence of any student—cisgender or transgender." *Id.* at 531.

Almost two decades earlier, the Eighth Circuit affirmed a district court ruling that a transgender woman teacher using a women's restroom at a public school did not create a hostile work environment where she had not "engaged in any inappropriate conduct other than merely being present in the women's faculty restroom." *Cruzan*, 294 F.3d at 984. The court also ruled that her presence in a women's restroom did not constitute religious discrimination against a non-transgender woman who had religious reasons for objecting to her presence. *Id.*

Petitioners concede, as they must, that there is no circuit split on their substantive due process parental autonomy, free exercise, and Title IX claims.

They attempt to manufacture a circuit split only with respect to their substantive due process privacy claim, suggesting that the courts are divided on whether students are entitled to "protection from compelled exposure of their unclothed bodies." Pet. 18. But that argument fails for two reasons: no such compulsion occurred here, and no such circuit split exists. As the court of appeals pointed out, the cases Petitioners cite involved government officials themselves intruding on individuals' bodily privacy through strip searches, hidden cameras, or both. Pet. App. 32a.[7] The courts of appeal agree that these sorts of actions can infringe on privacy rights. Plaintiffs simply did not allege any such conduct here.

Thus, far from there being any circuit split, the only two cases that remotely resemble this one were both also resolved unanimously, rejecting the novel claims Petitioners assert.

III. THE COURT OF APPEALS WAS CORRECT.

Finally, the court of appeals' decision is correct. The claims Petitioners assert are unsupported by precedent, and they would lead to intrusive federal judicial interference with local schools on the basis of a virtually limitless range of parental and student objections. The court of appeals applied established legal standards appropriately, and even if it had not,

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[7] The facts in these cases could not be more different from the facts alleged here. *See, e.g., Doe v. Luzerne Cty.*, 660 F.3d 169 (3d Cir. 2011) (male officers surreptitiously filming woman officer while completely undressed); *Poe v. Leonard*, 282 F.3d 123 (2d Cir. 2002) (same); *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994) (non-emergency cross-gender strip search); *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489 (6th Cir. 2008) (school officials gratuitously filming and viewing footage of middle school students changing in locker rooms).

that alone would not be a reason to grant certiorari. *See* Sup. Ct. Rule 10.

Substantive due process parental autonomy. As parents, Petitioners assert that their substantive due process rights were violated because they were not permitted to veto the school district's decision about Student A using the boys' public restrooms and locker room at Dallas High School. But simple disagreement—no matter how strongly held—with a public school district's action cannot suffice to state a substantive due process claim. There is no historical support for the notion that the Due Process Clause lets parents challenge a school's otherwise lawful policy choices regarding restroom and locker room use. Such a standard would be both unprecedented and unworkable; as Petitioners offer no limiting principle, it would give every parent license to go to court to veto not only decisions about restroom access, but any decision of a school district with which they disagreed—simply because they disagree.

The legal standard in this area has been well settled for a century. Parents have a right to make decisions about the care, custody, and control of their children. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). But that right does not allow parents to dictate the myriad policy decisions of public schools. *See Meyer*, 262 U.S. at 402 ("The power of the state to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports."); *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) ("[T]he state has a wide range of power for limiting parental

freedom and authority in things affecting the child's welfare.").

In the absence of any support in substantive due process jurisprudence, Petitioners invoke free speech and free exercise cases. Pet. 11–13 (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)). While it is of course true that school districts may not infringe the free speech or free exercise rights of students, those claims are distinct from substantive due process parental autonomy claims. Here, the Petitioners never raised a free speech claim. And their free exercise claim, discussed below, is meritless.

In a pluralistic society, school districts risk one or more parents disagreeing with virtually any decision they might make on any of dozens of issues. As the court of appeals commented, "School districts face the difficult task of navigating varying student (and parent) beliefs and interests in order to foster a safe and productive learning environment, free from discrimination, that accommodates the needs of all students." Pet. App. 8a. School districts simply cannot align their decisions with all views. Neither this Court nor any court of appeals has ever ruled that they must.

Substantive due process privacy. Petitioners also assert a substantive due process claim based on student privacy. As an initial matter, as noted above, no students remain in this case, and none of the parents or parents' organizations asserts a claim on behalf of a student whose privacy was or could have been compromised. That is sufficient to reject Petitioners' claims. And certainly where, as here, a school provides alternatives fully adequate to

preserve whatever privacy interests students may have in this context, there is no basis for finding a substantive due process privacy violation.

As noted above, the courts of appeals have recognized that when the government compels someone to expose their unclothed body to a government official, it can infringe on constitutionally-protected privacy interests. *See, e.g., Doe v. Luzerne Cty.,* 660 F.3d 169 (3d Cir. 2011); *Poe v. Leonard*, 282 F.3d 123 (2d Cir. 2002); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1415 (9th Cir. 1992). While these cases are most often resolved under the Fourth Amendment, a claim not presented here, some have been addressed as substantive due process cases. But here, the court of appeals correctly held that "because this case does not involve a privacy intrusion by government officers or the public disclosure of photos or video footage," no constitutional violation had taken place. Pet. App. 32a.

To the extent Petitioners seek recognition of a new substantive due process right to be free from any risk of encountering a transgender student in a school restroom or locker room, such a right has no historical or traditional basis, and is not "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). No court has ever recognized such a right, and the court of appeals correctly held that there is no basis for doing so here. Pet. App. 28a–32a.

Free exercise. The court of appeals also correctly ruled that Student A's Safety Plan did not violate the Free Exercise Clause. As an initial matter, the only students who alleged that they had relevant religious beliefs, Lindsay Golly and A.G., are not

Petitioners here, and in any event could not have used a restroom or locker room with Student A. As noted above, Lindsay, who went to school with Student A, is a girl, and A.G., a boy, never attended school with Student A. *Id.* at 182a. Even if, counter to fact, one of the Golly children were a boy who attended Dallas High School when Student A did, he would have been allowed to use a single-occupancy restroom or changing room. *Id.* at 209a, 246a. Thus, even under the free exercise standard that preceded *Smith,* Plaintiffs would have no plausible claim, because they did not allege any burden—much less a substantial burden—on their religious practice.

In any event, the school's policy is neutral and generally applicable as to religion. *See Emp't Div., Dep't of Human Res. of Oregon v. Smith,* 494 U.S. 872, 880 (1990). There are no allegations in the Complaint that indicate otherwise. Under *Smith*, rational basis review applies, and the court of appeals correctly ruled that Student A's Safety Plan easily satisfied that review because it served the interests of "protecting student safety and well-being, and eliminating discrimination on the basis of sex and transgender status." Pet. App. 72a.

Petitioners assert for the first time in their Petition that the school district exhibited hostility to religion. Pet. 31, 34–35. But the allegations in the Complaint allege no hint of hostility toward religion. In fact, there are no allegations that school officials were even *aware* of the religious basis of the Golly's objections to Student A's Safety Plan.

Title IX. Finally, the court of appeals correctly rejected Petitioners' Title IX claim. Petitioners asserted a "hostile environment" peer sexual

harassment claim, maintaining that the mere presence of Student A in boys' facilities created a hostile environment. Pet. App. 243a–47a. Here, again, as a threshold matter, no one was required to share a restroom or locker room with Student A, given the alternatives the school made available to all. *Id.* at 209a, 246a. And the Petition raises no question as to the governing legal standard, but only as to its application. Pet. 35–39.

In any event, the allegations here do not come close to asserting a hostile environment claim. This Court held in *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) that such a claim requires a plaintiff to show that the school permitted a student to engage in sex-based "misconduct" that was "sufficiently severe" to deprive a student of equal access "to the educational opportunities or benefits provided by the school." *Id.* at 649–50. Here, there was no misconduct alleged at all. The court of appeals correctly held, like the Third and Eighth Circuits before it, that merely being transgender does not transform the ordinary act of using restrooms and locker rooms for their intended purpose into an act "sufficiently severe or pervasive that a reasonable person would agree that it is harassment." Pet. App. 43a.

Petitioners now argue, for the first time, that they have a distinct Title IX sex discrimination claim because Student A was allowed to use the boys' restrooms and locker room, but non-transgender girls were not allowed to use the boys' restrooms and locker room. Pet. 39. As an initial matter, because the lower courts had no opportunity to consider this argument, this claim is not properly presented. But in any event, it is without merit. It is of course true that boys,

whether transgender or not, had access to boys' restrooms and locker rooms, while girls did not. That is a sex-based policy, as it would be even if no transgender student had ever attended Dallas High School.

But Petitioners have never asserted that any girl who attended Dallas High School, much less anyone represented before this Court, ever *wanted* to use a boys' restroom or locker room, sought permission to do so, or was injured in any way by not being permitted to do so. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1753 (2020) ("[T]he term 'discriminate against' refers to 'distinctions or differences in treatment that *injure* protected individuals'") (emphasis added) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006)). Nor did they seek relief that would provide access to these facilities to girls. Pet. App. 254a–257a. In fact, they emphatically reject any policy that does not enforce sex separation in restrooms and locker rooms. Pet. 38; Pet. App. 254a–55a. Their objection has always been to Student A's use of the boys' facilities because he is transgender, not to the exclusion of non-transgender girls from the boys' facilities. Petitioners' effort to transform their case at the petition for certiorari stage is without basis.

Finally, contrary to Petitioners' suggestion, this case does *not* involve the "precise issue" Justice Alito expressed concern about in his dissent in *Bostock*. Pet. 37. Justice Alito identified the outstanding question of whether Title VII or Title IX *requires* school districts to do what the school district did here, noting that "[t]he Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed." *Id.* at 36, quoting *Bostock*, 140 S.

Ct. at 1779 (Alito, J., dissenting). Indeed, transgender plaintiffs making such claims have succeeded in other cases, and petitions for certiorari may be forthcoming in two of them. *See Grimm*, 972 F.3d 586; *Adams*, 968 F.3d 1286; *Whitaker*, 858 F.3d 1034.

But this case does not present that question. It presents only the question of whether anything in Title IX *barred* a school district from choosing to permit a transgender boy to use the boys' restrooms and locker room on the same terms as others, while offering private alternatives to all students.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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