No. 18-658

IN THE

Supreme Court of the United States

JOEL DOE, ET AL.,

Petitioners,

—v.—

BOYERTOWN AREA SCHOOL DISTRICT, ET AL.,

—and—

Respondents,

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

Mary Catherine Roper
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102

Amanda L. Nelson
COZEN O'CONNOR
45 Broadway, 16th Floor
New York, NY 10006

Harper S. Seldin
COZEN O'CONNOR
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103

Ria Tabacco Mar
Counsel of Record
Leslie Cooper
James D. Esseks
Louise Melling
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
rmar@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Counsel for Respondent-Intervenor

QUESTIONS PRESENTED

1. Whether Petitioners' Fourteenth Amendment right to substantive due process prohibits a public high school from allowing boys and girls who are transgender to use the same common restrooms and locker rooms that other boys and girls use, where all students may use individual private facilities to go to the restroom or to change clothes.

2. Whether Title IX prohibits a public high school from allowing boys and girls who are transgender to use the same common restrooms and locker rooms that other boys and girls use, where all students may use individual private facilities to go to the restroom or to change clothes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

INTRODUCTION

Petitioners press this Court to intervene at the preliminary injunction stage and grant certiorari, suggesting that this case presents the same issue this Court agreed to review in *Gloucester County School Board v. G.G.*, No. 16-273. It does not. *Gloucester County* presented the question whether Title IX *requires* schools to allow boys and girls who are transgender to use the same common restrooms and locker rooms as other boys and girls.

This case presents a very different question: whether the Constitution or Title IX *forbids* 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 when there are alternative, completely private facilities available to all. Petitioners ask the Court to impose a one-size-fits-all rule for all students in all schools—one that enforces the exclusion of one group (transgender students) in order to oblige the objections of other students. Petitioners ask the Court to read into the Constitution and Title IX an implicit prohibition on local school officials adopting policies that, in their judgment, prevent and eliminate discrimination against vulnerable students.

The district court denied Petitioners' request for a preliminary injunction to halt the Boyertown Area School District's (the "District") practice of allowing boys and girls who are transgender to use the same common restrooms and locker rooms as other boys and girls. The District assesses the needs of each transgender student on a case-by-case basis in consultation with the student's guidance

counselor, grade-level assistant principal, and principal. Following this practice, the District approved three requests by transgender high school students to use facilities that match their gender identity in the 2016–17 school year.

Petitioners claim the District's practice is constitutionally and legally prohibited. They contend that their constitutional right to bodily privacy and Title IX prohibit the District from choosing to allow boys and girls who are transgender to use the same common restrooms and locker rooms as other boys and girls—no matter what privacy safeguards are afforded to all students. And they claim that they are irreparably harmed by the District's decision, even though they conceded that the District's provision of single-user facilities is adequate to protect their privacy.

After an evidentiary hearing, the district court found that no student at the Boyertown Area Senior High School (the "High School") is required to change clothes in view of other students because of privacy safeguards within the common facilities as well as alternative, private facilities, including eight single-user restrooms available to any student seeking to use the restroom or to change clothes. Petitioners do not challenge that factual finding, and they admitted that the alternative facilities protect their privacy. Accordingly, the district court concluded that Petitioners had not shown that they would suffer irreparable harm if the District's practice were to continue while this litigation is pending. A panel of the Third Circuit unanimously affirmed, agreeing that the High School's single user facilities ensure that no one, including Petitioners, faces irreparable

harm. The full Third Circuit denied rehearing en banc; while four judges disagreed with what they viewed as dicta about Title IX in the panel opinion, the entire Third Circuit agreed that the denial of a preliminary injunction was appropriate.

Review by this Court is not necessary to resolve the standard of review applicable to the infringement of fundamental rights because application of a different standard here could not change the result. The courts below held, on the basis of an extensive factual record, that Petitioners suffered no infringement of their privacy because they are free to use individual, private spaces to go to the restroom or change clothes. Thus, the applicable standard of review would make no difference to the outcome of this case. This Court should not grant certiorari to resolve a legal question that could not change the result below. *See* Stephen M. Shapiro et al., Supreme Court Practice 249 (10th ed. 2013) (citing *Sommerville v. United States*, 376 U.S. 909 (1964) (certiorari denied where the resolution of a circuit split could not change the outcome)).

Nor is there any conflict among the lower courts on the merits of Petitioners' novel claims. In the few similar cases that have arisen, courts have held that nothing in the Constitution or federal laws against sex discrimination bars schools from choosing to allow transgender people to use common restrooms and locker rooms consistent with their gender identity, particularly where private alternatives are available to all. *See, e.g.*, *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983–84 (8th Cir. 2002) (per curiam). Petitioners have identified no split among the circuits or other exceptionally

important reason to grant review on the question presented here.

Similarly, there is no reason for this Court to review the Third Circuit's interpretation of Title IX's prohibition against discrimination "on the basis of sex." The unchallenged evidentiary findings establish that Petitioners have not been denied any school resource because, like other students, they may use the common restrooms and locker rooms, or they may choose from a variety of available private spaces to go to the restroom or change clothes. Because Petitioners have not been denied access to any educational program, the outcome below remains the same no matter how "on the basis of sex" is interpreted. Here, too, there is no split among the circuits; indeed, no court has adopted Petitioners' novel theory that merely allowing transgender students to use restrooms or locker rooms associated with their gender identity denies *other* students access to education based on sex.

A school may reasonably conclude, as a matter of managing school resources and multiple interests, that it would best support the privacy and comfort of all students for boys who are transgender to use the boys' facilities and for girls who are transgender to use the girls' facilities while making individual private facilities available to all on an equal basis. Nothing in the Constitution or federal law prohibits local school districts from making this judgment.

The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background.

The district court held a three-day hearing on Petitioners' request for a preliminary injunction and made extensive findings of fact, none of which Petitioners have challenged on appeal. The facts that follow are drawn from the district court's factual findings.

1. Transgender students at the High School.

The District first learned that a transgender student attended the High School during the 2014–15 school year. Pet. App. 20a. Two years later, the District decided to consider individual requests by transgender students to use restrooms and locker rooms that match their gender identity. Pet. App. 24a. After consulting with those students, their parents, their guidance counselors, and other school administrators, the District "permitted transgender students to use restrooms and locker rooms aligned with their gender identity on a case-by-case basis." *Id.* As the district court found:

> Before the [District] grants permission to a transgender student to use the restrooms and/or locker rooms consistent with the student's gender identity, the student has discussed the student's situation and desire with the student's school guidance counselor, the counselor has discussed this issue with the grade-level assistant principal, and the counselor and the grade-level

> assistant principal have conferred with [the principal].

Pet. App. 27a. Accordingly, "the decision to grant a request by a transgender student" is tailored to individual circumstances and is "not 'automatic.'" Pet. App. 27a–28a.

During the 2016–17 school year, the District granted requests from three transgender students to use facilities at the High School consistent with their gender identity. Pet. App. 26a. Three other transgender students received permission to use first names and pronouns consistent with their gender identity but did not receive permission to use gender-congruent facilities. *Id.*[1]

One of the students granted permission was Aidan DeStefano, *id.*, pictured below.

[1] It is unclear from the record whether these three students requested permission to use facilities consistent with their gender identity. *See* Pet. App. 26a n.10; *see also* Pet. App. 29a.

J.A. vol. II 221.[2] Aidan has always identified as male, but he was designated female at birth. Pet. App. 110a. Aidan has been diagnosed with gender dysphoria, the clinical classification for the experience of incongruence between a person's gender identity and their sex assigned at birth where such incongruence results in clinically significant distress. During his junior year, in accordance with the medically accepted standards of care for adolescents with gender dysphoria, Aidan started hormone therapy, which deepened his voice, increased his facial and body hair, and caused him to develop musculature in ways typical of adolescent males; he also underwent chest surgery. Pet. App. 99a, 110a, 112a; J.A. vol. II 217–19. He legally changed his name to Aidan, dressed and wore his hair in a manner more typical of males, ran on the boys' cross country team, and was elected by his peers to the homecoming court as a boy. Pet. App. 110a, 112a. At the High School's graduation ceremony, he wore the black robe worn by other boys. Pet. App. 110a.

When Aidan used the girls' restroom in seventh grade—well before starting hormone therapy or having chest surgery—the girls told him never to return because they thought he was male. Pet. App. 110a–111a. When he started at the High School, he had the same experience. When he entered the girls' restroom there, he "got yelled at by literally everyone that was in there" and was told "not to come back." Pet. App. 111a. Aidan then used the nurse's restroom, as using the girls' facilities was

[2] Citations to "J.A. vol. __" refer to the Joint Appendix filed in the court of appeals.

simply not a tenable option. *Id.* As the district court noted after observing Aidan testify, "the court can confirm that he appears like a stereotypical male." Pet. App. 110a n.42. When out in public, Aidan uses the restrooms designated for men without incident. Pet. App. 114a.

At the start of Aidan's senior year, the District permitted him to use the restroom and locker room facilities that other boys use. Pet. App. 112a–113a. He explained that to be allowed, finally, to use the boys' facilities "fe[lt] so good—I am finally 'one of the guys,' something I have waited for my whole life." Pet. App. 104a.

Although the District's decision to consider requests such as Aidan's was prompted by guidance from the federal government that the current administration has withdrawn, Pet. App. 24a, 42a, the School Board voted to continue its practice as a matter of school policy. Pet. App. 43a. That decision reflects the District's view that "transgender students should have the right to use school bathrooms and locker facilities on the same basis as non-transgender students" and that allowing them to do so "is fair and equitable under the circumstances." Pet. App. 42a–43a.

2. Facilities at the High School.

The High School offers a range of restroom and locker room facilities. There are multi-user restrooms with individual toilet stalls, each with a locking door. Pet. App. 33a. Additionally, there are individual toilet stalls in the locker rooms. Students may use any of those stalls to go to the restroom or to change clothes for gym or sports. Students may also change

clothes in private, curtained shower stalls within the locker rooms. *Id.* Within the multi-user facilities, students typically do not undress fully in common areas. Very few, if any, students shower after gym class. Pet. App. 32a. For those who do, the High School has replaced its communal showers with individual shower stalls with curtains. *Id.* And, for any student who desires even greater privacy, the High School offers eight single-user restrooms throughout the school; these facilities may be used as restrooms or for changing clothes. Pet. App. 35a.

3. Petitioners' complaints.

Petitioners disagree with the School Board's decision to allow boys like Aidan to use facilities designated for boys; they do not want boys and girls who are transgender to use the same common restrooms and locker rooms that other boys and girls use. Petitioners Joel Doe, Jack Jones, Mary Smith, and Macy Roe are former students at the High School, and therefore their claims for injunctive relief are moot. Joel Doe and Jack Jones each complained that on one occasion Student A, a boy who is transgender, was changing clothes for gym in the common area of the boys' locker room at the same time that they were changing clothes. Pet. App. 44a, 59a. None of the boys was fully undressed at the time. Pet. App. 44a, 59a. Mary Smith complained that she walked into the girls' common restroom while Student B, a girl who is transgender, was washing her hands at the sink. Pet. App. 72a. Macy Roe is unaware of ever using the girls' restrooms or locker rooms at the same time as a transgender girl but complained that she did not wish to do so. Pet. App. 84a. Petitioners Chloe

Johnson and James Jones are current students at the High School who complain that boys and girls who are transgender are allowed to use the boys' and girls' common restrooms and locker rooms, respectively. Neither identified any incident in which they contend their privacy was intruded upon. *See* Johnson & Jones Decls. in Support of Uncontested Mot. to Add Parties and to Proceed Pseudonymously, *Doe v. Boyertown Area Sch. Dist.*, No. 17-3113 (3d Cir. Mar. 29, 2018). All Petitioners who testified conceded that the High School's single-user facilities for using the restroom and changing clothes were adequate to protect their privacy. Pet. App. 49a, 55a, 64a, 68a, 78a, 85a; *see also* J.A. vol. X 2394, 2435–36.[3]

4. Adolescents with gender dysphoria.

Gender identity is one's deeply held sense of self as a particular gender. Pet. App. 91a. For most people, their gender identity aligns with the sex they were assigned at birth. Pet. App. 91a, 92a. The term "transgender" describes a person whose gender identity differs from the sex that person was assigned at birth. Pet. App. 91a. Thus, for example, a boy who is transgender is a person who has a male gender identity but was assigned the sex female at birth. Pet. App. 92a.

Many people who are transgender experience gender dysphoria, a condition marked by a clinically significant level of distress resulting from the

[3] Petitioners also complain that they were not told about the practice in advance, but the manner in which Petitioners learned of the practice in the past has no bearing on the prospective injunctive relief they seek.

incongruence between their gender identity and their sex assigned at birth. Pet. App. 93a, 95a. Gender dysphoria, if not addressed, places adolescents at great risk for mental health problems, including depression, anxiety, self-injurious behavior, and suicidal ideation and behavior. Pet. App. 96a–97a.

There are accepted standards in the medical and mental health fields for treating adolescents with gender dysphoria. Pet. App. 95a–96a. In general, the goal of treatment is to alleviate the distress adolescents experience by helping them live in accordance with their gender identity. Pet. App. 97a–98a. These standards have been endorsed by the major medical and mental health organizations, including the American Medical Association, the American Psychological Association, and the American Psychiatric Association. Pet. App. 96a.

Social transition is the process of living in accordance with one's gender identity. Pet. App. 100a. That includes dressing and grooming, using a name and pronouns, and using single-sex facilities in accordance with one's gender identity. Pet. App. 98a, 100a. Because the prescribed treatment for gender dysphoria is to live in accordance with one's gender identity, when adolescents with gender dysphoria are able to use school restrooms and locker rooms that match their gender identity, it can have a significant positive effect on their mental well-being. Pet. App. 103a–104a. Conversely, barring transgender adolescents from using restrooms and other facilities consistent with their gender identity can cause depression, undermine self-esteem and self-worth, and hamper their ability to trust others

and to go out into the world during adolescence, a crucial time of development. Pet. App. 101a–103a. Transgender youth who cannot use the restroom or other facilities consistent with their gender identity are at risk of missing class or leaving school altogether. Pet. App. 102a.

Many adolescents with gender dysphoria also undergo hormone and surgical treatments to acquire sex characteristics consistent with their gender identity. Pet. App. 98a–99a. Adolescents treated with puberty suppressing drugs do not go through puberty of their assigned sex at birth. Pet. App. 98a. When those adolescents receive hormone therapy, they instead develop secondary sex characteristics consistent with their gender identity. Pet. App. 99a. That includes facial and body hair, a deeper voice, and muscle mass typical of boys for transgender boys. *Id.* For transgender girls, hormone therapy causes them to develop breasts and the muscle mass and fat distribution typical of girls. *Id.* Some transgender boys have a mastectomy to remove breast tissue and create a male chest. *Id.* Some older transgender students may have genital surgeries. *Id.*; *see also* J.A. vol. III 391.

As a result of these medical treatments as well as social transition, it is often impossible to distinguish transgender boys and girls from non-transgender boys and girls. Pet. App. 99a; *see, e.g.*, J.A. vol. II 221–22 (photographs of Aidan DeStefano).

Petitioners acknowledge that it is impossible to tell what sex a person was assigned at birth just by looking at them. Pet. App. 165a n.61. For example, when shown the photograph of the young transgender woman below, who is known as H.S.,

Petitioner Mary Smith testified that she would "probably not" have any concerns if she saw H.S. using the girls' room, since she assumed that H.S. was assigned female at birth. J.A. vol. V 1525.

Joel Doe Dep. Ex. D-17. Petitioner Joel Doe's guardian, John Doe, testified that he would object to H.S. using the boys' locker room because she "appears to be a girl," even though she was assigned male at birth. J.A. vol. X 2409. And Jane Doe, Joel Doe's other guardian, testified that, if Joel Doe came to her and told her that he had seen H.S. in the boys' locker room, she would consider reporting the incident to the District. J.A. vol. X 2455.

B. Proceedings Below.

1. Petitioners' motion for a preliminary injunction.

Petitioners filed a motion for a preliminary injunction seeking to bar the District from allowing any transgender student to use the facilities that match their gender identity, regardless of the student's individual circumstances. The district court considered an extensive evidentiary record, Pet. App. 14a–15a, including testimony from Petitioners and the District as well as Respondent Pennsylvania Youth Congress Foundation ("PYC"), a youth-led, statewide LGBTQ advocacy organization, whose intervention in the litigation was unopposed. Pet. App. 6a, 13a.

a. Expert testimony. Both Petitioners and PYC identified expert witnesses to aid the district court. The district court accepted the testimony of PYC's expert, Dr. Scott Leibowitz, a clinical psychiatrist with extensive experience in treating children and adolescents with gender dysphoria, as an expert in gender dysphoria and gender identity issues in children and adolescents. Pet. App. 108a–109a. At the conclusion of Dr. Leibowitz's testimony, Petitioners withdrew the expert they had previously identified. J.A. vol. III 648. The district court made 69 findings of fact regarding gender dysphoria based on unrefuted expert testimony. Pet. App. 88a–109a.

b. Additional factual findings. The district court found that no student at the High School is required to change clothes in front of other students of any sex. Pet. App. 144a–145a.

Specifically, the court found that students may change their clothing in individual toilet stalls, with locking doors, in both the common restrooms and locker rooms. Pet. App. 33a, 144a–145a. Students may also change clothes in private, curtained shower stalls in the locker rooms. Pet. App. 33a. And the High School offers eight single-user restrooms throughout the school, which may be used as restrooms or for changing clothes. Pet. App. 35a, 145a.

The High School replaced all communal showers with individual shower stalls. Pet. App. 32a. Even so, very few, if any, students shower after gym class. *Id.* Most students do not undress completely while changing for gym class. Pet. App. 50a, 65a. And while a handful of students do change their underwear in view of others, Pet. App. 77a, there was no evidence that any transgender student has ever changed underwear in common areas. Pet. App. 44a, 60a. In fact, Dr. Leibowitz testified that transgender students tend to be hypervigilant about not exposing their physical anatomy. Pet. App. 105a.

Accordingly, the district court found that there is no compelled nudity or compelled exposure to other students' nudity at the High School.

c. The district court's decision. The district court denied Petitioners' motion for a preliminary injunction, finding that they had not established irreparable harm absent an injunction given the fact that all students have the option of using the restroom and changing clothes in private. Pet. App. 197a–198a.

For the same reason, the district court found Petitioners were unlikely to succeed on the merits. First, the court held that the constitutional right to bodily privacy, though recognized in the Third Circuit, is infringed only when the state compels individuals to expose intimate parts of their bodies. Pet. App. 198a–199a. Because no student is required to change clothes in front of other students—let alone to expose intimate body parts while doing so, Pet. App. 144a–145a—Petitioners were not likely to be able to show any infringement of their constitutional rights. Pet. App. 148a. And Petitioners and their parents admitted that using the single-user facilities at the High School would adequately protect their privacy. Pet. App. 49a, 55a, 64a, 68a, 78a, 85a; *see also* J.A. vol. X 2394, 2435–36. In the alternative, the district court found that the District's practice advances a compelling state interest in not discriminating against transgender students with respect to the use of school facilities, and is narrowly tailored to achieve that goal because (1) no student is required to use common restrooms or locker rooms, (2) students who wish to use facilities consistent with their gender identity and not their assigned sex at birth must first seek permission through an individualized process, (3) the District affords privacy options to all students within the common restrooms and locker rooms, and (4) the District provides multiple single-user facilities as an alternative to the common facilities. Pet. App. 151a–152a.

The district court also declined to enter a preliminary injunction on Petitioners' Title IX claim, finding no authority for the notion that by merely allowing transgender students to use the common

area of a locker room, a school created a sexually harassing hostile environment in violation of Title IX. Pet. App. 178a–179a. And while Petitioners undoubtedly object to the District's practice, the district court observed that the numerous alternatives to using the common facilities "eliminate any potential issues" regarding potential discomfort of some students in sharing common restroom or locker room areas with students who are transgender. Pet. App. 179a.

2. Third Circuit proceedings.

a. Panel decision. Noting that the district court's opinion was "exceedingly thorough, thoughtful, and well-reasoned," Pet. App. 207a; *see also* Pet. App. 253a, a panel of the Third Circuit unanimously affirmed "substantially for the reasons set forth in the District Court's opinion." Pet. App. 208a, 247a; *see also* Pet. App. 254a, 290a.

The Third Circuit affirmed the district court's core conclusion that the eight single-user restrooms at the High School ensure that no one, including Petitioners, faces irreparable harm during the pendency of this litigation, thus obviating the need for a preliminary injunction. Pet. App. 247a; *see also* Pet. App. 290a.

The Third Circuit also agreed with the district court's alternative reasoning on the constitutional claim that the District's practice does not give rise to a constitutional violation because, even if it infringed privacy to some extent, it is narrowly tailored to serve the compelling interest in protecting transgender students from discrimination. The court of appeals noted that "[w]hen transgender students

face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening." Pet. App. 223a; *see also* Pet. App. 269a. And it rejected Petitioners' proposed alternative of forcing transgender students to use single-user facilities, particularly in light of the ready availability of fully private restrooms and changing areas, because to do so "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." Pet. App. 227a; *see also* Pet. App. 273a.

As to Petitioners' Title IX claim, the Third Circuit agreed that merely allowing transgender students to use a locker room does not amount to severe, pervasive, or objectively offensive conduct required for a private right of action for sexual harassment. Pet. App. 237a; *see also* Pet. App. 283a. Finally, the panel in dicta reasoned that the district court could not be faulted for declining to enter an injunction that would itself violate Title IX by barring transgender students from facilities that their peers are allowed to use. Pet. App. 243a.

b. Amended opinion. After Petitioners filed a motion for panel rehearing or rehearing en banc, the panel granted panel rehearing and issued an amended opinion. Pet. App. 292a–293a. The amended opinion, like the panel opinion before it, recognized that the question whether Title IX *requires* schools to make the same choice as the District is "very different" from the question presented in this case, namely, whether Title IX *prohibits* the District from making the choice as a matter of school policy. Pet. App. 243a; *see also*

Pet. App. 286a. Accordingly, the amended opinion omitted the language regarding the lawfulness under Title IX of the injunction Petitioners sought as unnecessary to the result in this case. *Compare* Pet. App. 240a–244a *with* Pet. App. 286a.

The full Third Circuit declined to grant rehearing en banc from the amended opinion. Judge Jordan, writing for himself and three other judges, dissented from the denial of rehearing en banc. Pet. App. 293a–298a. Notably, the dissent expressly did *not* "take issue with the panel's ultimate denial of [preliminary] injunctive relief." Pet. App. at 293a. Rather, in the dissenters' view, the panel's amended opinion did not go far enough in removing further dicta that they feared might suggest that the proposed injunction might have violated Title IX, a question the dissenters emphasized was "unnecessary" to resolution of the case. Pet. App. 295a.

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT'S REFUSAL TO ENTER A PRELIMINARY INJUNCTION ON PETITIONERS' CONSTITUTIONAL PRIVACY CLAIM DOES NOT WARRANT REVIEW.

Petitioners maintain that denial of a preliminary injunction on Petitioners' constitutional claim warrants this Court's review because the Third Circuit assertedly misapplied the "strict scrutiny" standard. But this case does not merit the Court's review for four reasons. First, the courts below merely denied a preliminary injunction, and that

decision is fully supportable solely on the absence of irreparable injury. Second, because the decision below rests independently on a determination that no student's right to privacy is even implicated given the private facilities available to all students, the case is an inappropriate vehicle for reviewing strict scrutiny analysis. Third, there is no split among the circuits, either as to the court of appeals' application of strict scrutiny or as to the legality of the District's practice. And fourth, the court of appeals' application was correct based on the extensive factual record developed in the district court, and in any event Petitioners' disagreement with how the court applied the legal standard to the facts is not an issue worthy of certiorari.

A. There Is No Basis for Certiorari at This Preliminary Stage of the Litigation, Particularly in Light of Petitioners' Failure to Demonstrate Irreparable Injury.

Petitioners seek this Court's intervention at a preliminary stage of this litigation. At this juncture, the court of appeals has merely affirmed the denial of a preliminary injunction. Petitioners are still free to seek final judgment and a permanent injunction in the district court.

Moreover, the district court and the court of appeals denied the preliminary injunction because Petitioners had failed to demonstrate irreparable injury, a prerequisite for a preliminary injunction. The gravamen of Petitioners' constitutional claim is that they object to using the restroom or changing clothes in a common facility that transgender students of the same gender identity are permitted to

use. But the courts below found that the High School has provided multiple opportunities for those who object to using the restroom, or to undressing in spaces where other students may be changing clothes, to use the restroom or change clothes in private settings—including individual toilet stalls in the restrooms, individual toilet and shower stalls in the locker rooms, and single-user restrooms throughout the school. Pet. App. 33a, 35a. Petitioners themselves admitted that the single-user facilities protected their privacy. Pet. App. 49a, 55a, 64a, 68a, 78a, 85a; *see also* J.A. vol. X 2394, 2435–36. And they have never challenged any of these factual findings. There is thus no basis for a preliminary injunction and no reason for this Court to intercede at the initial stage of this litigation.

B. This Case Does Not Provide an Appropriate Vehicle for Reviewing the Application of Strict Scrutiny Because the Decision Below Rests on an Independent Ground.

Petitioners urge the Court to grant certiorari to address the strict scrutiny standard applied by the Third Circuit. But there is no reason to do so where Petitioners have not even challenged an independent basis for the decision—that Petitioners will suffer no infringement of their constitutional rights or irreparable injury because they are not required to use the restroom or change clothes in the presence of other students. As a result, a different application of strict scrutiny would make no difference to the result, and certiorari should be denied. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 248–49 (10th ed. 2013) (citing *S. Dakota v. Kan. City S.*

Indus., Inc., 493 U.S. 1023 (1990) (certiorari denied where there was alternative basis for affirmance)).

The courts of appeals have recognized a constitutional right to bodily privacy where the government compels *involuntary* exposure of the intimate parts of one's body. Such cases frequently involve law enforcement, hidden cameras, or both. *See, e.g.*, *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 491–92 (6th Cir. 2008) (school administrators secretly videotaped middle school students changing in the locker rooms); *Poe v. Leonard*, 282 F.3d 123, 125 (2d Cir. 2002) (trooper secretly filmed civilian while changing her clothes). But there is no involuntary exposure on the facts of this case, as the district court found.

Here, the district court concluded after an evidentiary hearing that there is no intrusion on any constitutional privacy right at all because Petitioners are not compelled to use the restroom or change clothes in front of other students, transgender or not. Pet. App. 144a–145a. Rather, they may use private areas within the common facilities or, for still further privacy, single-user restrooms, Pet. App. 33a, 35a—an alternative Petitioners acknowledged adequately protects their privacy.

The district court found the absence of government compulsion to expose their intimate body parts to anyone fatal to Petitioners' constitutional privacy claim. Pet. App. 148a. As a result, no level of constitutional scrutiny is triggered under the facts of this case—not rational basis review, not intermediate scrutiny, not strict scrutiny. The district court relied on the same lack of compulsion to find that Petitioners had not established the

irreparable harm necessary for issuance of a preliminary injunction. Pet. App. 197a–198a. Petitioners do not seek review of either determination, both of which were upheld by the court of appeals. Pet. App. 247a. But each of these grounds is independently sufficient to uphold the denial of Petitioners' motion for a preliminary injunction without even addressing strict scrutiny. Accordingly, this case does not present an appropriate vehicle to address the Third Circuit's application of strict scrutiny.

C. There Is No Conflict Between the Third Circuit's Opinion and Decisions of This Court or Other Courts.

Despite the fact that strict scrutiny analysis is unnecessary to the outcome below, Petitioners claim that there is a conflict in *how* strict scrutiny is applied. Pet. 17. But that amounts to a disagreement not with the standard of review itself, but with the application of that standard to the evidentiary record in this case. And it is well established that certiorari is generally not warranted where the court of appeals "properly stated [the] rule of law," and the "asserted error" consists of misapplication of that rule to the facts of the case. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *see also* Shapiro, *supra*, at 352 ("Error correction is outside the mainstream of the Court's functions and not among the compelling reasons that govern the grant of certiorari." (brackets, ellipsis, and internal quotation marks omitted)). In any event, the Third

Circuit's application of strict scrutiny was correct, as discussed below, so there is no conflict. *See infra* § I.D.

In addition, there is no conflict among the circuits with respect to the constitutional privacy claim Petitioners assert—namely, whether the Constitution bars a school from choosing as a matter of school policy to allow transgender students on a case-by-case basis to use common restrooms and locker rooms associated with their gender identity while making private facilities available for any students who wish to use them. Indeed, Petitioners do not even cite the only other two decisions that have addressed similar privacy claims, both of which are wholly consistent with the Third Circuit's opinion here. A district court in Illinois denied a motion for preliminary injunction in a case virtually identical to this one for the same reason that animated the district court's decision here: No student was required to undress in front of others, and all students could change clothes in private spaces. *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016), *report and recommendation adopted*, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017). More recently, a district court in Oregon rejected an identical privacy claim. *Parents for Privacy v. Dall. Sch. Dist. No. 2*, 326 F. Supp. 3d 1075 (D. Or. 2018), *appeal docketed*, No. 18-35708 (9th Cir. filed Aug. 23, 2018).

To be sure, the universe of cases addressing similar constitutional privacy claims is small. Petitioners' claims are novel. But that militates against review by this Court, not in favor of it. To date, there is no disagreement among the federal

courts that local school districts are free to adopt practices like the District's here. If a conflict on that question should develop, this Court can evaluate whether intervention is necessary at that time.

D. The Third Circuit Correctly Applied Strict Scrutiny to the Factual Findings Below.

The Third Circuit's decision does not warrant review in any event because the court correctly applied strict scrutiny to the extensive factual record developed in this case.

1. Compelling interest.

Based on unrebutted expert testimony, the district court found that the District has a compelling interest in not discriminating against transgender students by excluding them from facilities that match their gender identity. Pet. App. 101a–103a, 151a–152a. In affirming that conclusion, the Third Circuit reiterated the severity of the harms: "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." Pet. App. 269a.

Contrary to Petitioners' claim that "the Third Circuit did not point to any evidence showing an ongoing problem," Pet. 24, the Third Circuit affirmed the district court's extensive factual findings, including 69 findings based on the unrebutted expert testimony of Dr. Leibowitz. Pet. App. 88a–109a. As the district court found, Dr. Leibowitz is a clinical

psychiatrist with extensive experience in treating children and adolescents with gender dysphoria. Pet. App. 108a–109a. Petitioners quarrel with the scientific evidence on which Dr. Leibowitz relied, Pet. 24, but those are arguments for a *Daubert* motion, not a petition for certiorari. And, while Petitioners had the opportunity to counter Dr. Leibowitz's expert opinions with those of their own expert, they opted not to do so.

Equally unavailing is Petitioners' theory that the District's interest is not compelling because the District has granted permission to transgender students to use facilities that match their gender identity on an individual basis rather than "across the board." Pet. 25. The District's approach is consistent with medically accepted standards of care. As Dr. Leibowitz testified, transition is an individual process, and determining whether a particular intervention (such as use of single-sex facilities consistent with gender identity) is indicated for a particular adolescent may require "case-by-case determination." Pet. App. 100a.

The District has adopted "a very careful process that include[s] student-specific analysis." Pet. App. 259a. That choice in no way diminishes the state's compelling interest in affording equal educational opportunity to all, including transgender students, and, as shown below, only underscores the narrowly tailored nature of the District's approach.

2. Narrow tailoring.

The District's practice of considering requests on a case-by-case basis is narrowly tailored to further the compelling interest in ensuring equal educational

opportunity for all, including boys and girls who are transgender.

Petitioners criticize the District for considering each request on its own merits, and they suggest that the District's failure to automatically grant every request somehow renders its practice underinclusive. Pet. 20. But an individualized inquiry is narrowly tailored to address the issue.

Petitioners' proffered alternative would require every transgender student to use facilities for the sex they were assigned at birth or separate facilities apart from everyone else. But as the district court found, that approach would undermine the District's objective in fostering equal educational opportunity for all students, including transgender students.

The court found that for many transgender students, being forced to use facilities designated for their assigned sex would cause significant distress and exacerbate their gender dysphoria. It can lead to physical and emotional consequences including avoiding using the restroom, depression, and the sense that who they are is not valid. Pet. App. 101a–103a. It can even cause students to drop out of school altogether. Pet. App. 102a.

In addition to having negative physical and emotional consequences, using facilities for their assigned sex is not a practical possibility for many transgender students. While Petitioners claim they would be comfortable sharing common facilities with transgender students based on the sex they were assigned at birth—regardless of their anatomy, Pet. App. 56a, 66a, 80a, 86a—that feeling may not be

shared by others, as the record here illustrates. Although Petitioners insist on calling Aidan "female," Pet. 19, girls who saw Aidan in the girls' restroom complained that there was a boy in the girls' room and told him to get out. Pet. App. 111a.

Moreover, Petitioners admit there is no way to tell what sex a person was assigned at birth just by looking at them. Pet. App. 165a n.161. In other words, if Petitioners had seen Aidan in the girls' room without knowing that he is transgender, they too would have objected to his being there. *See id.* Yet they claim that forcing boys like Aidan to use the girls' room is not only permissible, but constitutionally *required*.[4]

As a practical matter, Petitioners' proffered alternative would require transgender students—and only transgender students—to use separate facilities from everyone else. That would be humiliating and degrading, as the Third Circuit recognized. It "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." Pet. App. 273a. For students with gender dysphoria, the district court found that exclusion from facilities consistent with their gender identity can also "have

[4] Petitioners mischaracterize the record when they assert that the District allows students to experiment with using sex-separated facilities as a diagnostic tool for gender dysphoria. Dr. Leibowitz testified, and the district court found, that social transition may be used as a diagnostic tool in limited circumstances, such as while the student is at home or on vacation. Pet. App. 101a. Dr. Leibowitz did not testify that using sex-separated facilities at school is typically used to diagnose gender dysphoria, and there is no evidence the District has ever done so.

detrimental effects on the[ir] physical and mental health, safety, and well-being," including heightened risk of "anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness, and eating disorders." Pet. App. 256a (internal quotation marks omitted). Petitioners do not challenge any of these findings.

Petitioners have multiple options to ensure their privacy when changing clothes should they continue to have concerns, including using private areas within multi-user facilities. And while Petitioners say they feel compelled not to use those spaces and instead use single-user facilities, any "compulsion" stems from their own sense of personal privacy, not the actions of the District.[5] There is a profound difference between *choosing* to use separate facilities because of *one's own* beliefs about modesty (or anything else), and being *forced* to use them because of *someone else's* belief that who you are—indeed, your very presence—is unacceptable.

Additionally, the inconveniences that Petitioners say they face as a result of their choice not to use facilities where transgender students may be present are "not analogous" to the extremely serious harms to transgender students. Pet. App.

---

[5] Some students may well feel uncomfortable seeing another student's intimate body parts—regardless of the sex of the students involved. Pet. App. 108a. The District is free to address those concerns in a nondiscriminatory way, as it did here by creating individual private facilities that are available to anyone. Alternatively, a school could adopt a policy that students may not expose intimate body parts in common areas, and any student wishing to undress fully must use a private stall.

258a. In a recent survey of transgender people, "40% reported a suicide attempt (a rate nine times higher than the general population)." Pet. App. 257a. Importantly, these psychological risks can be alleviated when transgender students are allowed to use facilities alongside their peers. *Id.*

Petitioners' argument that the District's practice is not narrowly tailored relies on Aidan DeStefano's testimony that being required to continue using the nurse's restroom during his senior year would not have caused him to leave school. That one student believes he could have endured the stigma inflicted by being made to use a separate facility that no other student is required to use does not support Petitioners' position. As Dr. Leibowitz testified and the district court found, forcing transgender students to use separate facilities puts them at risk of serious psychological and emotional harm. Pet. App. 101a–103a.

II. THE THIRD CIRCUIT'S REFUSAL TO ENTER A PRELIMINARY INJUNCTION ON PETITIONERS' TITLE IX CLAIM DOES NOT WARRANT REVIEW.

A. Petitioners Have Not Established a Title IX Violation Regardless of How the Phrase "on the Basis of Sex" Is Interpreted.

Title IX provides that students must not "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" regarding educational opportunities on the basis of sex. 20 U.S.C. § 1681(a). Petitioners take issue with the Third Circuit's interpretation of the phrase "on the

basis of sex," Pet. 26–27, but their Title IX claim fails regardless of the meaning of that phrase because they have not shown they were excluded from any particular school resource. *See Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650–51 (1999).

Petitioners' theory—that they are being excluded from restrooms and locker rooms at the High School—is contradicted by the factual record in this case. They are not excluded from any facilities available to other students, but rather are just as free as all others to use the common locker rooms and restrooms. Pet. App. 33a, 35a, 145a. Moreover, the district court found that Petitioners, like all students at the High School, may choose from a variety of available private spaces to use the restroom or change clothes. Pet. App. 33a, 35a. Petitioners have never challenged any of these factual findings. The fact that Petitioners may choose, because of their own sense of personal privacy, to use some of the available options and not others does not mean they are being excluded from the facilities they opt not to use. *See supra* at 29.

In the absence of any actual exclusion from facilities, Petitioners claim they are "constructively" denied access to restrooms and locker rooms because they do not wish to use those spaces with transgender students. In fact, Petitioners object not to being excluded from any facilities, but to others being *included* solely because they are transgender. Just as students would not have a Title VI claim if they objected to using restrooms alongside classmates of Mexican descent, so too Petitioners do not have a Title IX claim because they object to using facilities in common with certain transgender

students. Although Petitioners try to shoehorn their claim into Title IX, what they actually seek is a new right to selectively exclude some of their peers—those who are transgender—from shared facilities, even where the District has made private, single-user facilities available to all.

Petitioners can point to no case that has found a hostile environment based on another person simply using facilities alongside others—regardless of the sex of anyone involved. Instead, they claim this case is analogous to *Davis*, Pet. 26, a case involving sexual harassment so severe that the harasser was convicted of criminal sexual misconduct. *See* 526 U.S. at 653. But *Davis* is plainly inapposite; there are no allegations of misconduct by any student, transgender or not, at the High School.

Because Petitioners have not been deprived of any school resources, they have suffered no violation of their rights under Title IX regardless of how the phrase "on the basis of sex" is interpreted.

B. There Is No Conflict as to How Petitioners' Title IX Claim Should Be Resolved.

There is no conflict among the lower courts as to whether allowing transgender people to use restrooms and locker rooms consistent with their gender identity violates Title IX. Not a single court has accepted Petitioners' contention that it does. In the few instances where plaintiffs have claimed that the mere presence of transgender people is severe, pervasive, or objectively offensive conduct creating a sexually harassing environment, courts have uniformly rejected that theory. *See Cruzan v.*

Special Sch. Dist. No. 1, 294 F.3d 981, 983–84 (8th Cir. 2002) (per curiam) (teacher could not show hostile work environment based on sex based on transgender colleague "merely being present in the women's faculty restroom"); *Parents for Privacy*, 326 F. Supp. 3d at 1102–04; *Students & Parents for Privacy*, 2016 WL 6134121, at *32. Petitioners do not even cite *Cruzan*, the only other circuit court opinion to address the question, let alone identify any conflict between the Eighth Circuit's decision in *Cruzan* and the Third Circuit's decision below.

In short, the only cases that involve challenges to transgender people using facilities alongside their non-transgender peers have rejected Petitioners' argument. There is no conflict among the lower courts on Petitioners' Title IX claim.

III. THIS CASE IS NOT A VEHICLE FOR DECIDING WHETHER SCHOOLS MUST ALLOW TRANSGENDER STUDENTS TO USE FACILITIES THAT MATCH THEIR GENDER IDENTITY.

Petitioners argue that this case, which asks whether the Constitution or Title IX *precludes* schools from choosing as a matter of school administration to allow transgender students to use restrooms and locker rooms associated with their gender identity, is a good vehicle for deciding a very different question: whether the Constitution or Title IX *requires* schools to do so. It is not, and there is no reason for this Court to answer either question in this case.

Several courts have addressed the question of whether Title IX requires that schools allow boys and

girls who are transgender to use the same common restrooms and locker rooms as other boys and girls. *See, e.g.*, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018). However important that question may be, this case presents the inverse question: whether school districts must, based on a constitutional or statutory requirement, bar boys and girls who are transgender from using the same common restrooms as other boys and girls, even where they provide privacy-protective alternatives to all on a nondiscriminatory basis.[6]

There is good reason to allow schools to take the approach the District has chosen here—and nothing in the Constitution or Title IX prevents them from doing so. Indeed, as a result of widely accepted medical treatments,[7] which include puberty suppression, hormone therapy, surgeries, and social transition, there is no straightforward way to

[6] Thus, this case does not raise the issues that were before the Court in *Gloucester County School Board v. G.G.*, No. 16-273 (U.S. Apr. 7, 2017) (vacating and remanding). *But see* Pet. 29. Nor does it involve a challenge to the provision of sex-separated facilities. *But see* Pet. 31.

[7] Petitioners admit they do not "know the best treatment for gender dysphoria," yet they opine that the "preferred method" for treating transgender adolescents is to seek to align gender identity with assigned sex and that the medically accepted treatments lead to poor psychiatric outcomes. Pet. 30 n.6. Those theories are flatly contradicted by the factual findings in this case based on unrefuted expert testimony. The district court found that it is harmful and unethical to attempt to change someone's gender identity to their sex assigned at birth and that withholding treatment, not providing it, results in higher rates of suicide and self-injury. Pet. App. 96a–97a.

distinguish boys and girls who are transgender from non-transgender boys and girls based on visual cues alone. Pet. App. 99a. Yet the legal and constitutional rule Petitioners insist on here would mean that boys like Aidan DeStefano (*see* photograph, *supra* at 6) must use the girls' room because they were assigned female at birth, and that girls like H.S. (*see* photograph, *supra* at 13) must use the boys' room because they were assigned male at birth.

Though Petitioners claim they want to encourage school districts to explore a variety of approaches, Pet. 30, the result they seek would limit legally permissible approaches to one—their own. That would tie the hands of school administrators, who might well conclude that Petitioners' proposed rule would be unworkable in practice. *See Amici Curiae* Br. of Sch. Administrators from Thirty States & D.C. in Support of Appellees and Intervenor-Appellee at 3–4, *Doe v. Boyertown Area Sch. Dist.*, No. 17-3113 (3d Cir. Jan. 23, 2018). That is precisely why the District has rejected the one-size-fits-all approach Petitioners would impose in favor of "a very careful process that include[s] student-specific analysis." Pet. App. 213a.

No court has mandated Petitioners' blanket approach. To the contrary, the consensus of the few courts that have considered similar challenges is to allow schools the discretion to afford such individualized consideration, not to forbid it. There is no reason for this Court to grant certiorari now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

Mary Catherine Roper
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102

Amanda L. Nelson
COZEN O'CONNOR
45 Broadway, 16th Floor
New York, NY 10006

Harper S. Seldin
COZEN O'CONNOR
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103

Ria Tabacco Mar
Counsel of Record
Leslie Cooper
James D. Esseks
Louise Melling
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
rmar@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Counsel for Respondent-Intervenor
Pennsylvania Youth Congress Foundation

Dated: January 22, 2019