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.,*
Respondents,

BASIC RIGHTS OREGON,
Respondent-Intervenor

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Reply In Support of Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether 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 disregard biological reality by requiring that they expose their bodies to classmates of the opposite sex and affirm that a child is the sex with which he or she self-identifies.

2. Whether 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 while using privacy facilities.

3. Whether a school district can compel children to violate sincerely held religious beliefs that sex is based on biological reality by being forced to affirm that members of one biological sex are members of the opposite sex if they self-identify as that sex.

4. Whether a school district violates Title IX when it compels children to accept into sex-separate privacy facilities members of the opposite sex who self-identify as something other than their sex and to affirm that students are members of whatever sex with which they self-identify.

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SUMMARY OF REASONS FOR GRANTING THE PETITION

The Ninth Circuit's determination that parental and student rights are extinguished when students enter public school is antithetical to this Court's precedents. The court's conclusion that there is no Title IX violation if male privacy facilities are used by females who subjectively identify as males points to the need for this Court to clarify how its decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), affects the rights of students in public schools under Title IX. This is particularly critical because lower federal courts are co-opting *Bostock* to find that Title IX requires that schools provide access to privacy facilities based on gender identity instead of sex.

This Petition presents a viable controversy between parents' and students' fundamental rights and state overreach under the guise of educational policymaking. This is not an academic question. The same conflicts related to children who say they identify as the opposite sex seeking accommodations and the competing rights of parents and other students are being addressed nationwide. This Court's determination of the underlying constitutional and statutory issues is critically important.

REASONS FOR GRANTING THE PETITION

I. There Are No Jurisdictional Barriers To This Court's Review.

Respondents fabricate facts and misrepresent the allegations of the Complaint to attempt to erect jurisdictional barriers against this Court's consideration of the Petition. Their claims that Petitioners do not have standing and that any claims they might have had are moot are factually and legally unsupported.

A. Petitioners Have Standing.

Respondents use misrepresentation to claim that there is no "case or controversy" under which Petitioners can seek relief. Respondent Basic Rights Oregon ("BRO") falsely states, *inter alia*, that 1) No student actually had to disrobe in the view of any other student (BRO Brief in Opposition "BIO" at 2); 2) There are no plaintiffs who are parents of or students who are boys who attended high school with the transgender student (*Id.* at 9); 3) There are no allegations of any transgender students using facilities at District schools (*Id.*); 4) No Petitioner ever encountered—or was even ever likely to encounter Student A in a restroom or locker room (*Id.* at 13) and 5) No Plaintiff ever had to use single-occupancy facilities to avoid sharing facilities with Student A (*Id.* at 14).

Each of those claims is false. The Complaint alleges that: 1) There are Boy Plaintiffs who at the time the Complaint was filed attended District

schools and so were subject to the District policy (Appx., 181a); 2) Student A used boys' privacy facilities and undressed while Boy Plaintiffs were present (Appx. 206a-207a); 3) There likely are other students attending District schools who self-identify as transgender. (Appx, 210a); 4) Students risked tardiness to use distant privacy facilities to avoid having to share a restroom with a student of the opposite sex (Appx., 208a).

The District implies that there are no parents who have standing because Student A's parent was not a Plaintiff. (District BIO, 16). That is a faulty conclusion because the allegations of the Complaint show violation of parental rights as to a number of Petitioners. Also, the District has no factual basis for its conclusion that Student A's parent is not a party. Since Student A is not identified, there is nothing on the face of the Complaint from which the District can conclude that her parent is not a Plaintiff.

The allegations of the Complaint show infringements of Petitioners' constitutional and statutory rights that are actual, concrete, particularized, fairly traceable to the District's actions and redressable by a favorable ruling, thus satisfying *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct suffice to establish standing, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

B. Petitioners' Claims Are Not Moot.

Respondents fabricate facts in order to assert that the case is moot. Respondents state: 1) Student A graduated in 2018 after skipping a grade. (BRO BIO 4, 6, 7; District BIO 4); 2) The Student Safety Plan became obsolete when Student A graduated. (BRO BIO, 7, 12); and 3) There are no transgender students currently attending District schools (*Id.* at 16,17). However, those asserted facts are not contained in the record.

The Complaint was drafted in 2017 and alleged on information and belief that there were students who were transgender. There was not and could not be any allegations regarding the composition of the student body today. Furthermore, the claim that the policy is somehow obsolete is contradicted by the Ninth Circuit, which stated that the policy was drafted for "any other transgender student who might make a similar request in the future, in order to ensure that transgender persons like Student A could safely participate in school activities." (Appx., 10a-11a).

Even if Respondents' allegations were true, they would not render the case moot. "The burden of demonstrating mootness is a heavy one." *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979). Even when the conduct being challenged is discontinued, a case does not become moot unless the defendant can demonstrate "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Respondents

cannot claim that, even if the policy were obsolete, the District could not be expected to reinstitute it if another transgender student requested it. The Ninth Circuit's statement that the policy was drafted to ensure that transgender persons could safely participate in school activities belies any claim that the circumstances will not recur.

Petitioners' claims include injunctive and declaratory relief and compensatory and nominal damages. Even if Student A and all of the students affected by the policy have graduated, the case would still not be moot. *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020). In *Grimm*, the transgender student had graduated and had amended her complaint to eliminate claims for injunctive relief and compensatory damages, leaving only claims for declaratory relief and nominal damages. *Id.* at 604. The Fourth Circuit, citing *Already, LLC,* rejected the school district's claim that the case was moot. *Id.* The bar for maintaining a legally cognizable claim is not high: "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* Grimm's claim for nominal damages was sufficient. *Id.* That is even more true here with claims for compensatory damages, nominal damages and declaratory relief remaining even if the facts showed that injunctive relief was no longer available (which they do not).

Respondents' attempts to halt this Court's review of Petitioners' request for lack of jurisdiction are unavailing. This Court should grant the Petition, as set forth further below.

II. This Court Should Resolve The Conflict Between Its Precedents And The Ninth Circuit's Erasure Of Parental Rights.

Contrary to Respondents' assertions, this Court *has* addressed whether and when parents have a due process right to dictate some of the myriad policy decisions of public schools. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Under those decisions parental rights do extend as far as Petitioners assert, *i.e.,* beyond the threshold of the school door, contrary to the Ninth Circuit's decision. (Appx. 165a, citing *Fields v. Palmdale Sch. Dist*., 427 F.3d 1197, 1207 (9th Cir. 2005)). It is the conflict between this Court's precedents and the Ninth Circuit's ceding parental rights to public schools which should be resolved by this Court.

As was true in *Meyer v. Nebraska,* 262 U.S. 390, 402 (1923), Petitioners are not challenging the District's authority to prescribe a curriculum, compel attendance at school, or establish regulations regarding conduct. Instead, as in *Meyer*, Petitioners are challenging a policy that is "without reasonable relation to any end within the competency of the state." *Id.* at 403. In *Meyer* this Court found that the state exceeded its authority when it prohibited all children from learning a foreign language because it failed to respect the fundamental rights of the parents. *Id.* at 401. This Court noted that while it would be advantageous if all students knew English, "this cannot be coerced by methods which conflict with the Constitution—a

desirable end cannot be promoted by prohibited means." *Id.* In other words, contrary to the Ninth Circuit's decision, parents' and students' rights do not disappear at the threshold of the school door.

The same was true in *Barnette* and *Yoder*. The Jehovah's Witnesses parents' rights to direct the upbringing of their children were not surrendered to the school board's decree that all students must salute the flag. 319 U.S. at 633. Neither did the Amish parents in *Yoder* cede their right to provide vocational education to their children after eighth grade to the state. 406 U.S. at 218. The Ninth Circuit's conclusion that Petitioners surrendered their fundamental parental right to decide whether their children will be compelled to undress in the presence of an opposite sex student and accept a classmate's assertion that they are to be regarded as the opposite sex is contrary to *Meyer, Barnette,* and *Yoder*.

III. This Court Should Clarify Whether *Bostock* Requires That Female Students Be Permitted To Use Privacy Facilities Assigned To Males If The Females Self-Identify As Male.

The Ninth Circuit erroneously contends that sex-separate privacy facilities are being used for their intended purpose when a female is permitted to use facilities designed for males if she says she identifies as male. (Appx. 43a, BRO BIO, 27). Therefore, it mistakenly concludes such female's use of male privacy facilities cannot possibly create a hostile educational environment. (Appx. 43a;

District BIO, 24). The lower courts and Respondents use linguistic obfuscations to reach this contradictory conclusion. Instead of accurately stating that Student A is a female who was permitted to use male privacy facilities, the court and Respondents take it upon themselves to refer to Student A using male pronouns and label her a "transgender boy." (Appx. 10a, 87a; BRO BIO *passim*, District BIO, *passim*). In this way, the court and Respondents can misrepresent that there cannot be a Title IX violation because the District is permitting a "boy" to use the boys' privacy facilities with other boys. This linguistic legerdemain disregards biological reality and the privacy and safety issues that created the hostile educational environment Petitioners described in their Complaint. (Appx. 193a, 195a, 197a, 209a, 218a, 227a 241-247a).

Other circuit courts and parties have employed the same linguistic obfuscation to find that female students using male privacy facilities cannot constitute sexual harassment because the privacy facilities continue to be used as intended, only by "boys" or "girls," which includes "transgender boys" and "transgender girls." *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020); *Grimm*, 972 F.3d 586. In each of these cases, as here, the circuit courts redefined "sex" in Title IX to mean "gender identity" so that students could be relabeled according to their subjective beliefs about their

identity instead of anatomical reality and then be granted access to privacy facilities of the opposite sex. This is the genesis of the Ninth Circuit's conclusion that the "normal use" of boys' privacy facilities includes use by a girl who says she identifies as a boy. (Appx., 9a).

Circuit courts are misusing this Court's ruling in *Bostock* to justify similar linguistic legerdemain. Eschewing this Court's statement that it was not addressing the question of sex-separate privacy facilities under either Title VII or Title IX, circuit courts are using *Bostock* to validate redefining "sex" in Title IX to erase biological reality. *See, Adams,* 968 F.3d at 1305 (With *Bostock*'s "guidance," the court concluded that the district discriminated against a girl when it refused her request to use boys' privacy facilities); *Grimm,* 972 F.3d at 616 (same). As Justice Alito stated, mixing the sexes in privacy facilities can have profound consequences. *Bostock,* 140 S.Ct. at 1779 (Alito, J. dissenting). "For women who have been victimized by sexual assault or abuse, the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm." *Id.* So long as this Court fails to address the questions left unanswered in *Bostock,* children will be forced to endure the consequences Justice Alito alluded to as schools will point to *Bostock* as authority for abandoning biological reality in favor of subjective gender identity.

IV. This Court Should Resolve Conflicts Between The Ninth Circuit's Decision and Precedents Upholding Children's Rights to Bodily Privacy.

The Ninth Circuit's and Respondents' linguistic obfuscation also infects their analysis of Petitioner's claims for violation of bodily privacy. By adhering to the unfounded assertion that Student A is a "transgender boy" instead of a girl, as the complaint states that she is, the court and Respondents conclude that there can be no violation of bodily privacy when a "transgender boy" is sharing male privacy facilities with boys. (Appx., 33a; BRO BIO at 25). However, viewing the case through the lens of biological reality, it is apparent that the court's conclusion contradicts established precedent that children have a right to be free from compelled exposure of their unclothed or partially clothed bodies. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374-75 (2009). "Adolescent vulnerability" exacerbates the privacy violation, which manifests as embarrassment, humiliation and fear. *Id.* at 374. The fact that the classmate subjectively identifies as a boy or that the school and court call her a "transgender boy" does not change her physical attributes so as to diminish the embarrassment, humiliation, and fear experienced by boys, such as plaintiffs here, who are compelled to expose their bodies to a female or compelled to be in the presence of a female while she is undressing. (Appx., 212a-215a).

This Court and circuit courts have found that compelling schoolchildren to expose their bodies to

others is "repugnant to notions of human decency and personal integrity." *Brannum v. Overton County School Bd.*, 516 F.3d 489, 495 (6th Cir. 2008) *see also, Beard v. Whitmore Lake School Dist.,* 402 F.3d 598, 605 (6th Cir. 2005). Here, the District forced students to expose their bodies to members of the opposite sex by mandating that all students change clothes for mandatory PE, no student could object to an opposite sex student using the privacy facilities, and that students who did not accept the opposite sex student using the privacy facility had to retreat to inadequate, inaccessible facilities. (Appx., 207a-210a).

Respondents and the lower courts also misstate precedent when they claim that there cannot be any violation of the right to bodily privacy unless District staff were directly ordering that the students disrobe in front of school officials. (District BIO, 11; BRO BIO, 25; Appx., 135a). In *Beard,* the court found that requiring female students to undress in front of each other instead of just in front of school staff made the searches particularly egregious. 402 F.3d at 605. In *Brannum*, there were no school officials conducting searches of students. 516 F.3d at 495. Instead, the school had installed surveillance cameras in the locker rooms. *Id.* It was not just school officials who viewed the students undressing, but at least 98 strangers who accessed the school's Internet Protocol address. *Id.* It was the fact that the students' bodies were exposed to others, not whether school officials were directly ordering a search, that constituted the privacy violation. *Id.* Similarly here, it is the fact that students were compelled to view and be viewed by opposite sex

classmates without objection that constituted the privacy violation.

V. This Court Should Resolve The Conflict Between The Ninth Circuit's Decision And This Court's Free Exercise Precedents.

The lower courts' and Respondents' insistence that the District did not infringe Petitioners' Free Exercise rights because it merely permitted a "transgender boy" to use boys' privacy facilities consistent with "his gender" does not comport with biological reality or this Court's precedents prohibiting subtle departures from neutrality and covert suppression of religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). Recasting Student A, a female who said she identified as a male, as a "transgender boy" addressed by male pronouns disregards the biological reality that schoolchildren were being compelled to accept that a female classmate could be "recreated" as male by stating she believed she was male. The only way Boy Plaintiffs could reasonably be expected to be at ease with their male bodies being exposed to a female student while undressing or engaging in intimate bodily functions is if they accepted the notion that the female student was actually a "boy." It is that compelled acceptance under the imprimatur of the school, combined with the threat of discipline for asserting contrary sincerely-held religious beliefs that infringes Petitioners' Free Exercise rights.

The District's actions go beyond merely compelled acceptance to intolerance and hostility toward Petitioners' religious beliefs akin to the hostility exhibited by the state in *Masterpiece Cakeshop,* 138 S.Ct. at 1731. There as here, the government sent the message that those who did not accede to the government-sanctioned belief system were bigoted and intolerant. (Appx 215a). Such messages violate the District's obligation to "proceed in a manner neutral toward and tolerant of [Petitioners'] religious beliefs." *Masterpiece Cakeshop,* 138 S.Ct. at 1731. The Ninth Circuit's conclusion that there is no cognizable Free Exercise claim conflicts with that precedent.

CONCLUSION

The Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals should be granted.

Dated November 6, 2020

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