No. 21-231

In the Supreme Court of the United States

JULIE ELLEN WARTLUFT, f/k/a Julie Ellen Bartels and FREDERICK L. BARTELS, JR., as Administrators of the Estate of Abrielle Kira Bartels, Deceased,

Petitioners,

v.

THE MILTON HERSHEY SCHOOL and HERSHEY TRUST COMPANY, as Trustee of the Milton Hershey School Trust,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether a student at the Milton Hershey School who is provided free student housing qualifies as a "renter" under Section 3604(f)(1) of the Fair Housing Act. 42 U.S.C. § 3604(f)(1).

Section 3604(f)(1) prohibits the denial of housing to any "buyer or renter" of a dwelling. The Fair Housing Act defines "to rent" as "to lease, to sublease, to let and otherwise to grant for consideration the right to occupy premises not owned by the occupant." 42 U.S.C. § 3602(e). The Milton Hershey School is a private, residential school that provides a completely *cost-free* education to low-income children from pre-kindergarten to twelfth grade.[1]

The United States Court of Appeals for the Third Circuit correctly concluded in its *non-precedential* decision that a student who is provided free student housing by the Milton Hershey School does not qualify as a "renter" pursuant to Section 3604(f)(1) of the Fair Housing Act.

[1] In compliance with this Court's Rule 15.2, undersigned counsel points out material misstatements of fact throughout the Petition beginning with Petitioners' Question Presented, specifically that participation in a mandatory chore program at the student home is "a requirement to remain in residence at the School," and further that such alleged requirement is "set forth in an enrollment agreement." (Pet., at i). To the contrary, the Third Circuit found that the Milton Hershey School "is completely free" and that the School provides housing to its students out of charity, not because they made a promise to perform chores while residing in free student housing. (App. 2a, 6a). Indeed, the record establishes that any chores students perform are not bargained-for consideration, but rather "were more like homework: a core part of [the] educational experience to prepare [students] for life after school." (App. 6a). The enrollment agreement provides nothing different.

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent, The Hersey Trust Company, as Trustee of the Milton Hershey School Trust, states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

Respondent, the Milton Hershey School, also states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents, the Milton Hershey School ("MHS" or the "School") and The Hershey Trust Company ("HTC") (together "Respondents"), through undersigned counsel, hereby file this Response in Opposition to Petitioners' Petition for Writ of Certiorari regarding the *non-precedential* opinion issued by the United States Court of Appeals for the Third Circuit (App. 1a, 11a), which affirmed the entry of summary judgment by the United States District Court for the Middle District of Pennsylvania in favor of Respondents. (App. 15a, 29a). For the reasons set forth below, the Court should deny the Petition for Writ of Certiorari.

THIRD CIRCUIT OPINION (NON-PRECEDENTIAL)

On June 30, 2016, Petitioners filed this action, asserting various tort claims as well as claims for purported discrimination in violation of the Fair Housing Act ("FHA").[2] On March 18, 2020, the Honorable John E. Jones, III, Chief Judge of the United States District Court for the Middle District of Pennsylvania, issued a comprehensive and well-reasoned Memorandum Opinion entering summary judgment in Respondents' favor on all claims. (App. 15a).

On February 1, 2021, the United States Court of Appeals for the Third Circuit issued a non-precedential decision affirming the District Court's decision. (App. 1a-10a). With respect to Petitioners' FHA claim, the Third Circuit noted that Section 3604(f)(1) prohibited the denial of housing "to any buyer or renter." (App. 5a). The Third Circuit applied the FHA's definition of "to rent" in this case to include "to lease,

[2] Petitioners are the parents of Abrielle Kira Bartels (hereinafter and identified in the Third Circuit's decision as "Abbie"), a former student enrolled at MHS.

to sublease, to let and otherwise to grant for consideration the right to occupy premises not owned by the occupant." 42 U.S.C. § 3602(e). All parties agreed that Abbie did not lease or sublease her student housing from MHS. (App. 5a). Thus, whether Section 3604(f)(1) applied turned on whether chores performed by Abbie as part of MHS's home-life curriculum – no differently than her performance of academic coursework in the School's companion scholastic curriculum – constituted "consideration" for the School's provision of her gratuitous student housing. (*Id.*)

Petitioners contended that Abbie's performance of chores in her student home constituted consideration for the free student housing she received at MHS. The Third Circuit, however, held that the record evidence established that the chores Abbie performed were not bargained-for consideration, but rather were part of the home-life portion of the education provided by MHS, aptly describing the chores as "more like homework: a core part of her educational experience to prepare her for life after school." (App. 6a). In so holding, the Third Circuit noted that MHS "is completely free" and that the School "housed Abbie out of charity," not because she made a promise to perform chores while residing in the student home. (App. 2a, 6a). Accordingly, the Third Circuit concluded that Abbie did not qualify as a "renter" pursuant to Section 3604(f)(1).

Thereafter, Plaintiff filed a Petition for Panel Rehearing and/or Rehearing *en banc*, arguing that the decision conflicted with precedent from the Third Circuit and this Court – which it did not. On March 16, 2021, the Third Circuit denied the Petition and the instant Petition for a Writ of Certiorari followed. (App. 13a).

STATEMENT OF FACTS

MHS is a private residential school funded by the Milton Hershey School Trust, a charitable trust established by Deed of Trust in 1909 by Milton S. Hershey and his wife, Catherine, to fund the School's operations in perpetuity. MHS provides cost-free education to low-income children from pre-kindergarten to twelfth grade. (App. 2a, 20a). On-campus benefits provided to students include housing, food, clothing, and some healthcare services, all at no cost to students and their parents/sponsors.[3] (App. 2a). In addition to classroom instruction provided as part of a traditional scholastic curriculum, students also participate in a unique home-life curriculum, teaching students life and social skills through residential living in a campus student home. (App 6a).

Consistent with best practices for schools, MHS employs psychologists to work with students on campus as needed in order to monitor students' mental health symptoms and engage therapeutic strategies. (App. 2a-4a). In addition, MHS employs social workers that liaise with parents/sponsors to assist them in obtaining medical services for students, including certain mental health services that MHS does not or is not otherwise licensed to provide. MHS has an infirmary on campus, called the "Health Center," where students can go if they are feeling sick or if they are injured. (*Id.*)

[3] Contrary to misstatements in Petitioners' Statement of the Case, Abbie was never in "institutional care" at MHS. (Pet., at 2). MHS is a school where Abbie was a student, and throughout her entire enrollment at MHS, she lived at home, off-campus, with Petitioners when not attending school. Abbie was also never in a "residential care facility" while at MHS. (Pet., at 4). MHS is not a residential care facility, nor is it licensed to provide such services. (App. 2a). Moreover, the facilities where MHS referred Abbie to receive higher levels of mental health services than the School could provide were duly licensed mental health hospitals, not residential care facilities. (App. 3a-4a).

MHS is a school – it is not a mental health hospital or a residential treatment facility. (App. 2a-3a). Thus, Pennsylvania law precludes MHS from providing to its students the types or level of services provided by licensed mental health hospitals and/or residential treatment facilities. (App. 2a). To ensure its students receive appropriate mental health services, MHS performs individualized assessments of its students with mental health needs to determine the requisite level of care. (App. 3a-4a). When MHS's individualized assessment results in a determination that the student requires a higher level of care than the School can provide, MHS refers the student to a duly licensed third-party medical provider who can provide such services and meet the student's needs. (*Id.*)[4]

With respect to Abbie's student housing at MHS, the record is undisputed that the housing provided by MHS was free. Indeed, Petitioners have always acknowledged that MHS provided Abbie with cost-free student housing. (App. 20a). The enrollment agreement signed by Petitioners with MHS confirms this fact. (*Id.*) Like every other student at MHS, Abbie was required to perform chores as part of the School's home-life curriculum. This responsibility was no different than Abbie's

[4] Although not germane to the Section 3604(f)(1) issue raised by Petitioners, contrary to the misstatement in Petitioners' Statement of the Case, (Pet., at 6), this practice was followed with respect to Abbie. In fact, on this point, the District Court determined that Petitioners had "not presented any evidence demonstrating that the School did not conduct an independent evaluation of [Abbie's] condition." (App. 25a). Moreover, following the School's individualized assessment, Petitioners consented to Abbie's admission to the outside mental health hospitals where MHS referred her and have never disputed that Abbie required the higher level of care that only those outside facilities – and not the School – were licensed to provide. (App. 4a).

Petitioner further misstates the record evidence as to their failed foundational allegation of the existence of a discriminatory policy at the School relating to mental health hospitalizations. (Pet., at 23). As the District Court concluded, "[o]ther than their own unsubstantiated allegations, [Petitioners] have not presented any basis to conclude" that the School admitted Abbie to an outside mental health facility "for any nefarious reason." (App. 23a).

responsibility to complete math, social studies, or science coursework in the School's academic curriculum. (*Id.*) Whereas MHS's home-life curriculum teaches students life and social skills through residential living, the School's scholastic curriculum teaches academic skills like arithmetic, reading, and writing in a classroom setting.

Contrary to Petitioners' claims, the record evidence is undisputed that a student may receive disciplinary infractions for failing to complete chores within the home-life curriculum, just as they would be subject to discipline for failing to complete homework in the academic curriculum. (App. 6a). Abbie's student housing was not conditioned upon her completion of daily chores within the School's home-life curriculum. (*Id.*) There is simply no evidence to support Petitioners' repeated misstatement alleging that Abbie would have been barred from her student housing had she had not completed any aspect of her home-life curriculum, including chores. (*Id.*)

REASONS FOR DENYING THE PETITION

Petitioners have presented no compelling reasons for the granting of the Petition for a Writ of Certiorari, and none of the reasons outlined in this Court's Rule 10 are present. Sup. Ct. R. 10.

I. THE THIRD CIRCUIT'S *NON-PRECEDENTIAL* OPINION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER COURTS OF APPEAL REGARDING THE INTERPRETATION OF "RENTER" IN SECTION 3604(f)(1).

Petitioners argue that the Third Circuit's ruling conflicts with decisions from this Court, the Ninth Circuit, and the Third Circuit's prior case law. (Pet., at 10-14). It does not. The cases Petitioners cite as conflicting *do not* address the issue decided by the Third Circuit in its non-precedential decision, namely what constitutes legal

consideration sufficient to qualify someone as a "renter" under Section 3604(f)(1) of the FHA. As such, Petitioners' assertion of a conflict with other decisions is illusory.

Rather than identifying any true conflict with the Third Circuit's decision, Petitioners merely cite a series of cases that stand for the general proposition that the FHA is to be construed broadly. (Pet., at 10-12 (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) (holding that two residents had standing under Section 810(a) of the FHA to assert claims of race discrimination); *U.S. v. Columbus Country Club*, 915 F.2d 877, 883 (3d Cir. 1990) (holding that religious discrimination claim was proper because the "bungalows" in question constituted "dwellings" under Section 3602(b)); *Gladstone v. Village of Bellwood*, 441 U.S. 91, 93 (1979) (holding that plaintiffs had Article III standing to bring claims for race based discrimination in housing); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995) (concluding that local zoning ordinance did not qualify as a "maximum occupancy restriction" under Section 3607(b)); *Helen L. v. DiDario*, 46 F.3d 325, 333 n.14 (3d Cir. 1995) (involving claims under Title II of the Americans with Disabilities Act); *Revock v. Cowpet Bay W. Condo. Ass'n*, 853 F.3d 96, 110 (3d Cir. 2017) (holding that FHA claims survive the death of the plaintiff and that the plaintiff had a viable claim under Section 3604(f)(3)(B)); *Alexander v. Riga*, 208 F.3d 419, 425 (3d Cir. 2000) (holding that element of "legal causation" is satisfied where plaintiff shows he or she was subjected to illegal discrimination); *Mt. Holly Gardens Citizens in Action, Inc. v.*

Twp. of Mount Holly, 658 F.3d 375, 385 (3d Cir. 2011) (concluding that plaintiffs are entitled to assert disparate impact claims under the FHA)).[5]

Petitioners do not argue that the Third Circuit erred in interpreting the definition of "renter" under Section 3604(f)(1) of the FHA. Neither do they identify any case from any court that is remotely analogous to the discrete facts of this case, or otherwise that legally conflicts with the decision of the Third Circuit. Rather, Petitioners merely argue that the Third Circuit did not interpret "renter" as broadly as they would have liked. Thus, Petitioners argue nothing more than "the misapplication of a properly stated rule of law," which is not a valid basis for granting certiorari. *See* Sup. Ct. R. 10.

II. THE THIRD CIRCUIT DID NOT RELY UPON FACTS NOT IN EVIDENCE OR MISAPPLY THE WELL-KNOWN SUMMARY JUDGMENT STANDARD.

Petitioners contend that the Third Circuit's reference in its non-precedential Opinion to an answer given by Respondents' undersigned counsel in response to a question from the Panel at oral argument, confirming that chores were not a requirement of housing, contravenes *Lloyd v. HOVENSA*, 369 F.3d 263 (3d Cir. 2004). It does not. *Lloyd* merely stands for the proposition that a court cannot consider arguments raised on appeal that were not presented to the District Court, and the Third Circuit did not contravene this precedent in rendering its Opinion.

[5] Petitioners cite one case that concerned the proper interpretation of a "rental" under the FHA. (Pet., at 13-14 (citing *Salisbury v. City of Santa Monica*, 998 F.3d 852 (9th Cir. 2021))). However, the Ninth's Circuit's decision in *Salisbury* is entirely consistent with the Third Circuit's definition of "renter" in this case. Like the Third Circuit, the Ninth Circuit held that a plaintiff must have paid rent or supplied some other form of consideration for the dwelling to be considered a "rental," and then granted summary judgment in favor of the defendant because the plaintiff had not supplied any such consideration.

First, Respondents *did* raise this argument in the District Court, *see Wartluft v. Milton Hershey Sch.,* 2020 WL 1285332, at *7 (M.D. Pa. Mar. 18, 2020). Second, it is well-settled that a court of appeals can affirm the district court on any basis supported by the record, *see Guerra v. Consol. Rail Corp*., 936 F.3d 124, 135 (3d Cir. 2019). Third, *Lloyd* does not hold that it is error to reference dialogue between the court and counsel during oral argument. Accordingly, Petitioners fail to set forth any compelling reason for granting certiorari on this issue. *See* Sup. Ct. R. 10.

Petitioners' contention that the Third Circuit's non-precedential decision "violates the summary judgment standard" set forth in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000) and *Tolan v. Cotton*, 572 U.S. 656 (2104) is equally unavailing. Petitioners assert their belief that the Third Circuit should have drawn different inferences and made different findings based upon the undisputed evidence. (Pet., at 16-23). This argument is merely a disagreement with the Third Circuit's application of the summary judgment standard with respect to the specific facts of this case. As such, like the FHA argument above, Petitioners again argue nothing more than "the misapplication of a properly stated rule of law," which is not a valid basis for granting certiorari. *See* Sup. Ct. R. 10.

III. THE THIRD CIRCUIT'S NON-PRECEDENTIAL DECISION DOES NOT PRESENT AN IMPORTANT FEDERAL ISSUE THAT SHOULD BE DECIDED BY THIS COURT.

Petitioners' assertion that that the legal issue decided by the Third Circuit Panel in its non-precedential Opinion is one of exceptional federal importance is greatly exaggerated, particularly when considering the distinct factual circumstances of this case.

There is no dispute that the Milton Hershey School is a private, *cost-free*, residential school. (App. 20a). Student housing, like every other service provided by the School for the benefit of its students, is entirely free. (App. 2a, 6a, 20a). As the Third Circuit concluded, student housing is provided by MHS "out of charity." (App. 6a). In addition, the School includes traditional classroom instruction, as well as a home-life curriculum designed to teach students life and social skills through residential living in a campus student home. (App. 6a).

On these narrow facts, the Third Circuit's non-precedential determination that chores performed at MHS were a core part of Abbie's education, and *not* consideration for her free student housing, does not present an important federal issue, let alone an exceptional one.[6] Moreover, the Panel's non-precedential decision concerning the definition of "renter" under Section 3604(f)(1) of the FHA does not extend beyond the free student housing model unique to MHS.

[6] Petitioners misstate that the District Court had a "change of heart" in ruling on this issue between Respondents' Motion to Dismiss and Respondents' Motion for Summary Judgment. (Pet., at 26-27). To the contrary, these opinions are not inconsistent with one another. Rather, they were simply based on different standards, the first upon the Rule 12(b)(6) standard and the second upon the more stringent Rule 56 summary judgment standard. In the end, when required to support their chores claim with actual evidence of record, Petitioners' claim failed.

CONCLUSION

In consideration of the foregoing, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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