No. 21-231

In the Supreme Court of the United States

JULIE ELLEN WARTLUFT, F/K/A JULIE ELLEN BARTELS; FREDERICK L. BARTELS, JR., AS ADMINISTRATORS OF THE ESTATE OF ABRIELLE KIRA BARTELS, DECEASED

Petitioners,

vs.

THE MILTION SCHOOL AND SCHOOL TRUST, THE HERSHEY TRUST COMPANY, AS TRUSTEE OF THE MILTON HERSHEY SCHOOL,

Respondents.

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

REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

John W. Schmehl, Esquire
Counsel of Record
DILWORTH PAXSON LLP
1500 Market Street
Suite 3500E
Philadelphia, PA 19102
(215) 575-7200
jschmehl@dilworthlaw.com
Counsel for Petitioners

I. Argument

A. Evidence that Failure to Perform Chores Can Lead to Dismissal is Contained in the School's Very Own Enrollment Agreement

Petitioners, Administrators of the Estate of Abbie Bartels, a former student of the Milton Hershey School (the "School"), respectfully submit this Reply to the School's Response to Petition for a Writ of Certiorari (the "Response") to address misstatements and faulty legal arguments and to cite to record evidence in the Third Circuit refuting the School's unsupported claims.

The School's objections are based almost entirely on the Third Circuit's factual conclusion (itself facially erroneous) that chores required of the School's students to remain in residence are mandated in a strictly charitable sense and are educational and thus cannot, under any circumstances, be treated as consideration under the FHA. This would be regardless of the magnitude of the chores or whether the School would otherwise need to hire housekeepers, chefs, gardeners and groundskeepers if the students did not perform these chores.

At pages i and 9, the Response wrongly charges Petitioners with a material misstatement as concerns the chore requirement. In support, the Response argues that a student cannot be terminated from residence for not performing chores, citing its own student Enrollment Agreement. However, that Enrollment Agreement provides the opposite of what the School claims and expressly states that refusal to perform chores is grounds for removal.

The Enrollment Agreement in plain English provides that the failure to obey rules, including "chores," can be grounds for dismissal. Paragraph 6 of the Agreement states the obvious in this regard. After delineating chores as one of the rules and policies that a child must obey, the paragraph concludes: "*You understand that failure to follow these rules and policies will result in discipline for your child and could lead, in the sole discretion of the School, to your child's dismissal*." Exhibit 7 in Support of Motion for Summary Judgment, A443-446. Thus, from the language of the very agreement the School quotes, Abbie Bartels would have been dismissed from residence at the School for failure to do required chores. This is very evidence that the School claims is lacking. The School's position that they may properly bar her from residence for adolescent depression, but would not bar her if she and she alone at the student home refused to lift a finger to do chores, strains all credulity.

The School presents the Third Circuit's decision as sacrosanct and as making a proper factual finding that chores were "more like homework, a core part of her educational experience to prepare her for life after school" (Response at 4). This was determined on summary judgment, however, where the Court should not have been the fact-finder and without any support in the evidentiary record on this question: the trial court reached this untenable conclusion in an evidentiary vacuum. The Third Circuit then based its decision in large part on counsel's erroneous statement during oral argument that a student could not be expelled for failure to do chores. The Third Circuit followed by crediting the unsupported statement of the School's counsel

during oral argument as somehow having not merely probative but dispositive value.

With respect, this breaches multiple evidentiary and appellate standards: counsel was hardly qualified as the sole witness in this matter. Yet, the decision below effectively produced that outcome. This is clear error.

B. Failure to Follow Supreme Court Precedent on Liberal Construction

The School also ignores the Third Circuit's failure to follow the liberal construction rules applicable to civil rights cases, as if the lower court could ignore this United States Supreme Court mandate without consequence. However, cases that refer to this standard have reversed lower court decisions for failure to follow it. This should particularly be the case where the ruling below is determined on summary judgment. *See, e.g., Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) (reversing the Ninth Circuit for its narrow interpretation of the definition of a "person aggrieved" under the FHA). The School also mistakenly claims that Petitioners do not argue that the Third Circuit erred in interpreting the definition of "renter" under Section 3604(f)(1) of the FHA. Response at 12.

However, this is *precisely* what Petitioners argue, that is, that the Third Circuit erred

in finding that chores cannot be consideration to qualify Abbie Bartels as a renter with standing under the FHA. The Third Circuit should have merely examined whether chores are a form of consideration, using a liberal definition of "recompense" or "something of value" in order to

allow Abbie's Estate to have standing to enforce this country's civil rights laws as to housing. Instead, the decision below decided to impose as harsh a standard as possible on such children as Abbie Bartels, stripping them of rights that they most need in a manner that contravenes the remedial goals of the FHA.

While the School complains that there is no case directly on point on this question, it also cannot cite such a case in support of its position. This stalemate is another reason why this case is one deserving of the grant of certiorari in order to provide definitive guidance on the question of potentially wide application to residential schools, treatment centers, homeless shelters, or other housing where the resident is required to "earn their keep" by doing chores. Surely, the FHA was not meant to exclude all these classes of citizens.

Lastly, in seeking to establish that it had raised before the trial court what was in fact a new argument raised for the first time at the Third Circuit — to the effect that a student would not be dismissed for not doing required chores — the School cites to the lower court opinion at 2020 WL 1285332 at *7 (M.D. Pa. Mar. 18, 2020). This is a phantom cite: the page contains no such language or factual finding because the School never made this point below.

C. The Merits Behind the Discrimination Are Misstated by the School

The School distorts the nature of Petitioners' discrimination claim in order to minimize the importance of this case. Petitioners do not complain that Abbie was admitted to a residential care facility

for short-term treatment or argue that the assessment that she needed such an admission was improper. On the contrary, Petitioners are focused on Abbie being wrongly and summarily barred from her 8th grade graduation, from a graduation party on the School campus (both of which were the subject of invitations to Abbie), and from all of her 9th grade year even after being cleared to return to her normal student life by the short-term facility. The School's robotic reaction prejudged young Abbie, and violated every principle of non-discrimination. It was biased knee-jerk punishment for a disability or perceived disability, out of fear, and the law proscribes it.

This is not unlike the illegal conclusive presumption that every pregnant teacher who reaches the 5th or 6th month of pregnancy is physically incapable of teaching and must suffer a forced LOA that Justice Stewart found abhorrent in *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 644 (1974). In *LaFleur*, there was a bias toward treating pregnant women as disabled merely as a result of pregnancy. No assessment was made of the womens' abilities to perform their jobs while carrying their children.

Here, the School just assumed that once disabled for any period at all, Abbie was disabled for a minimum period of 14 months, before they would even consider her eligible for a new mental health assessment to return to school.

Moreover, the record is clear that the School did not and would not provide any psychological assessment of Abbie *after* her short-term treatment. Dr. Herr, Abbie's treating psychologist at the School, testified in his deposition that the School *never* made an

assessment of whether the School could continue to serve Abbie's needs after this treatment. The relevant part of his testimony is as follows:

> Q. Turning to target goals on Page 2, target goals as of June 14, 2013, were to determine if Milton Hershey School is able to meet Abbie's high level of mental health needs; do you see that?
>
> A. Yes.
>
> Q. And then it says -- well -- so, actually, as of the 14th, that hadn't been determined yet as of June 14, 2013, correct?
>
> A. What hadn't been determined?
>
> Q. If Milton Hershey School was able to meet Abbie's high level of mental health need-- that was one of the target goals --
>
> A. Yes. Yes.
>
> Q. Was that ever determined?
>
> A. No.

A2108-A2109. [Herr Dep. (Higson, Ex. "7") 213:19-214:8.] The evidence demonstrating error below could not be more compelling: this is a smoking gun as to Defendants' failure to satisfy even the most rudimentary of nondiscrimination standards — and it comes directly from the testimony of School employee Dr. Herr, *Abbie's treating psychologist at the School.*

II. Conclusion.

The Petition should be granted for the reasons stated therein to afford citizens like Abbie the protections they deserve.

Respectfully submitted,
October 1, 2021

/s/ John W. Schmehl

John W. Schmehl, Esquire
Dilworth Paxson LLP
1500 Market Street
Suite 3500E
Philadelphia, PA 19102
Telephone: 215-575-7200
Email: jschmehl@dilworthlaw.com

Counsel for Petitioners