NO. _____

IN THE
Supreme Court of the United States

JOEL DOE, ET. AL,
Petitioners,

v.

BOYERTOWN AREA SCHOOL DISTRICT, ET. AL,
Respondents,

and

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,
Respondent-Intervenor.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Boyertown Area School District by policy authorizes some transgender students to use high school locker rooms and restrooms that match their subjective gender identity rather than their objective sex, as a means of affirming their beliefs about their gender and promoting tolerance. The policy forces students using those facilities to be seen by the opposite sex when they are partially or fully undressed, or to forgo using the facilities altogether. The Third Circuit correctly held that students have a constitutional right not to be seen undressed by the opposite sex but nonetheless upheld the policy, concluding it satisfied strict scrutiny. This petition presents two questions:

1. Given students' constitutionally protected privacy interest in their partially clothed bodies, whether a public school has a compelling interest in authorizing students who believe themselves to be members of the opposite sex to use locker rooms and restrooms reserved exclusively for the opposite sex, and whether such a policy is narrowly tailored.

2. Whether the Boyertown policy constructively denies access to locker room and restroom facilities under Title IX "on the basis of sex." 20 U.S.C. 1681.

PARTIES TO THE PROCEEDING

Petitioners Joel Doe, Macy Roe, Mary Smith,[1] Jack Jones, James Jones, and Chloe Johnson were Plaintiffs-Appellants in the court of appeals.

Respondents Boyertown Area School District, Dr. Brett Cooper, Dr. E. Wayne Foley, and David Krem were Defendants-Appellees.[2] Respondent Pennsylvania Youth Congress Foundation was Defendant-Appellee after intervening in the district court.

[1] Contemporaneously with her high school graduation, Mary Smith chose to proceed under her true name, Alexis Lightcap.

[2] The District Court dismissed the individual Defendants by agreement of the parties.

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JURISDICTION

The judgment of the court of appeals was entered on July 26, 2018. On October 17, 2018, this Court extended the time to file this petition until November 19, 2018. This Court has jurisdiction under 28 U.S.C. 1254(1).

PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App. 299a–304a.

INTRODUCTION

On May 13, 2016, the U.S. Departments of Justice and Education sent an extraordinary "Dear Colleague" letter to the nation's schools. The letter explained that under Title IX—which authorizes schools to maintain separate locker rooms and restrooms for men and women, 34 C.F.R. 106.33—schools were *required* to allow access to such facilities based on "an individual's internal sense of gender." 5/13/16 Ltr., p. 1, https://bit.ly/2kQOcUa. Refusal to capitulate risked federal funding. *Id.* at 2. This Court agreed to review that policy in *Gloucester County School Board* v. *G.G.*, No. 16-273, and stayed an order that would have compelled implementation of the letter's policy. But the case was vacated after the Departments retracted their guidance. Although the government changed its position, the guidance letter generated numerous lawsuits and threats to schools to adopt the policy.

Beginning in the 2016-17 school year, Respondent Boyertown Area School District adopted such a policy. It authorized some transgender students to use locker rooms and restrooms based on their beliefs about their gender rather than their biological sex. Boyertown did not notify students or parents of this change. The first Petitioners learned of it was when, while undressed in the locker room, they realized they were in the presence of a student of the opposite sex. Embarrassed and confused, Petitioner Joel Doe went to school officials, and the officials said to try and act "natural." Joel Doe was marked down in gym class for failing to change his clothes, and he eventually felt forced to leave the school entirely.

Petitioners filed suit and moved for a preliminary injunction, which the district court denied. The Third Circuit affirmed. The panel correctly recognized that each Petitioner has a "constitutionally protected privacy interest in his or her partially clothed body." App. 266a. Nevertheless, the court held that Boyertown's policy survived strict scrutiny because it "served a compelling interest—preventing discrimination against transgender students—and was narrowly tailored to that interest." App. 267a.

The Third Circuit's decision is just as extraordinary as the Dear Colleague letter. Educators, parents, and even this Court have long recognized the need for separating male and female students in locker rooms, restrooms, and showers. *E.g.*, *United States* v. *Virginia*, 518 U.S. 515, 556–58 (1996) (recognizing need to continue separating these facilities when integrating women into the Virginia Military Institute). Forcing a teenager to share a locker room or restroom with a member of the opposite sex can cause embarrassment and distress, particularly for students who have been victims of sexual assault.

Recognizing this reality does not diminish concern for students who believe they are of the opposite sex. Schools can (and should) teach that every student has inherent dignity and worth and should be treated as such. Schools can (and should) assure students with gender dysphoria that they are valuable and important members of the school community. And school officials can (and should) provide them with resources and support. Despite such alternatives, Boyertown chose to violate the privacy rights of all other students.

The Third Circuit endorsed this privacy violation. First, the court adopted a new test for "narrow tailoring," one that relieves the government of its burden to prove that less-intrusive alternatives have not worked, overlooks any underinclusiveness, and "balances" the severity of the constitutional deprivation against the government's purported interest. The court also did not require Boyertown to prove that its asserted interests were compelling.

Second, the court rejected Petitioners' Title IX claim. Title IX prohibits a school from denying a student educational benefits "on the basis of sex." 20 U.S.C. 1681(a). The Third Circuit held this provision inapplicable because Boyertown's policy affects all students equally. But it remains true that the cause of the harm was Boyertown's authorization of opposite-sex students in privacy facilities. The result was to deprive other students of those facilities "on the basis of sex," precisely what Title IX prohibits.

In support of these two holdings, the Third Circuit decided that a male who identifies as a female *is*, in fact, female, and vice versa. And the court criticized Petitioners for declining to embrace the view that their right not to be viewed undressed by members of the opposite sex depends entirely on what another person believes about their own gender. *E.g.*, App. 271a (noting Petitioners' surprise to be in an intimate space with a student "*they understood*" was of the opposite sex); *id.* at 271a n.69 (chiding Petitioners for feeling uncomfortable around students "*whom they define*" as the opposite sex); *id.* at 276a (discounting Petitioners' risk of encountering students whom Petitioners "*identify*" as the opposite sex).

Thus, declared the court, an opposite-sex "transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at . . . classmates." App. 276a (quoting *Whitaker by Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017)). This erases any privacy problem, the court said, because the "presence of a transgender student in a locker room should not be objectively offensive to a reasonable person." App. 262a.

But Petitioners are reasonable, and they *were* embarrassed by the presence of opposite-sex students in the locker room and restrooms, so much so that Joel Doe felt compelled to leave the school entirely. It didn't have to be that way. A former student who identified as the opposite sex testified to using an individual facility from 7th through 11th grades. The student suffered no bullying or discrimination. And the student even recommended the use of single-user facilities to other students who believed themselves to be of the opposite sex. In other words, the student with gender dysphoria commended the very course of action that maximizes privacy protections.

The Third Circuit distorted the law by requiring Petitioners to view sex and gender through its prism and making Petitioners' privacy rights entirely contingent on the beliefs of other students about their own gender. Because the court of appeals' opinion gives legal cover for other schools to maintain or promulgate identical policies that similarly violate student privacy, certiorari is warranted.

STATEMENT OF THE CASE

A. The policy

When a high school student enters a school locker room, restroom, or shower, he or she consents to be seen undressed only with members of the same sex. This consent is based on the sign posted on the door marked "Men" or "Women." Such consent is why a woman does not object to other women changing into or out of swimsuits in her locker room, and why a man is not allowed to enter that same space. *E.g.*, 18 Pa. Cons. Stat. § 7507.1.

Policies that allow some students' beliefs about their gender to erase sex distinctions eviscerate the consent of students of the same sex. A female student's right to privacy from members of the opposite sex does not spring into existence, or cease to exist, based on what male students believe about their own gender.

In the 2016-17 school year, Respondent Boyertown Area School District began authorizing students of one sex to use the locker rooms and restrooms of the opposite sex if those students self-identified with the opposite sex. App. 24a. The District chose not to inform either students or their parents of this new policy. App. 29a.

Instead, the policy was discovered by Petitioner students in the most embarrassing way possible. Petitioner Joel Doe—clad only in his underwear in the men's locker room—encountered a female student wearing nothing above her waist except her bra. App. 7a–8a, 44a. Petitioner Jack Jones, also in the men's locker room and in his underwear, similarly realized

there was a female student standing near him. App. 10a, 59a. And yet another student, Alexis Lightcap (Petitioner Mary Smith), encountered a male student in the women's restroom and, as caught on video, was so shocked she fled. App. 11a, 72a–73a. It wasn't until Petitioners approached the administration that they learned about the policy, were instructed to "tolerate" the new arrangement, and directed to make it seem "natural." App. 47a.

The consequences were predictable. Because of the policy, Petitioners used the restrooms as infrequently as possible. App. 53a, 63a–64a, 76a, 82a. They stopped changing in the locker rooms, where partial and full nudity is a common occurrence. App. 53a. Joel Doe was penalized in gym class for not changing into gym clothes. App. 53a. And after the lower courts denied preliminary-injunction relief, Joel Doe left the school entirely and missed his senior year at Boyertown. App. 58a.

The District's policy was a drastic change from the way locker rooms and restrooms have been regulated for the entire history of public-school systems. At Boyertown itself, students had always been "separated on the basis of their biological sex in part to protect their personal privacy and safety from members of the opposite sex while using bathrooms and locker rooms." App. 19a (citing principal's testimony). Opposite-sex students were not allowed. And the irony of the policy's sudden and unannounced change was the District's motive: a concern to make students "comfortable." Yet the District did not even consider the concerns of students who were now being asked to undress with opposite-sex students and to make it as "natural" as possible.

Because school officials were unable to determine whether students believed they were of the opposite sex (i.e., experiencing gender dysphoria) or simply rejected gender norms, they relied on student reporting. App. 29a. School officials gave short shrift to other students' privacy interests, concluding that "a female student . . . has no expectation of privacy from a [male professing to be a] female when using . . . the bathrooms or locker rooms." App. 39a–40a.

From the perspective of underinclusivity, Boyertown did not grant locker room and restroom access to all students who believed they were of the opposite sex. While the District granted access to three students, three other gender-dysphoric students who changed names and pronouns did not receive permission to change facilities, App. 26a–27a & n.10, and were still permitted to use the facilities consistent with their biological sex, App. 27a.

B. District Court proceedings

With school officials rebuffing the students' privacy concerns, Petitioner Joel Doe filed this lawsuit and asked that the previous policy (single-sex, multi-user locker rooms and restrooms along with single-user facilities) be restored pending a merits resolution. Joel claimed that the District's authorization of opposite-sex access to locker rooms and restrooms violated his constitutional right to bodily privacy; deprived him of access to educational benefits under Title IX; and was an intrusion upon seclusion under Pennsylvania law. Given the risks of retaliation and the sensitive subject matter, Joel sought and received permission to proceed pseudonymously, as did the later-joining Plaintiffs/Petitioners.

On April 3, 2017, the Pennsylvania Youth Congress Foundation, an LGBTQ advocacy group, and Aidan DeStefano, a senior female student who identified as a male, moved to intervene. (DeStefano was not involved in any incident described in the Complaint.) On April 18, Petitioners Mary Smith, Macy Roe, and Jack Jones—all students who wanted to preserve their privacy in the very facilities provided for that purpose—joined the case via an amended complaint. The district court granted intervention to the Foundation but denied DeStefano's intervention motion as DeStefano had graduated. After discovery and evidentiary hearings, the district court denied the preliminary-injunction request on August 25, 2017.

The district court adopted a "broader" and "more contemporary definition of sex" that included "gender identity." App. 3a. In the district court's view, this is not a case about a student in a state of undress being confronted with a student of the opposite sex. "Instead, . . . this case involves . . . whether it violates cisgender students' right to privacy for transgender students to be in the locker room or bathroom that does not correspond to the transgender student's biological sex at birth." App. 142a–143a.

According to the district court, the female student who Joel encountered when both were half-undressed was in fact a male wearing a bra, and there are no privacy implications when two boys are undressed together in a locker room. As a result, the district court held that the plaintiffs failed to show a likelihood of success on the merits under a strict-scrutiny standard and failed to show irreparable harm. App. 120a–153a, 166a–181a, 194a–201a.

The district court went further. It found that a "reasonable person" would not be offended by being undressed with a member of the opposite sex, provided the opposite-sex person declared themselves to be of the same sex as the undressed person. App. 191a. The court gave no credence to the sworn statements of Petitioners, who testified unequivocally that they were embarrassed and shocked by that precise situation. The court also ignored the plain language and original meaning of Title IX, which speaks in terms of "sex" not beliefs about gender.

C. Third Circuit proceedings[1]

The Third Circuit affirmed.[2] "Sex," said the panel, is "determined at birth based on the appearance of external genitalia." App. 254a. In contrast, a person's "gender identity" is a "subjective, deep-core sense of self as being a particular gender." *Ibid.* "Policies that exclude transgender individuals from privacy facilities that are consistent with their [self-professed and subjective] gender identities have detrimental effects on the physical and mental health, safety, and well-being of transgender individuals." App. 256a (cleaned up). And the panel speculated that requiring students who identify as transgender to use restrooms or locker rooms that match their actual sex

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[1] On April 6, 2018, the Third Circuit added Petitioners James Jones and Chloe Johnson, who are other Boyertown students wanting to preserve their privacy.

[2] The Third Circuit's initial opinion endorsed *Whitaker*, 858 F.3d 1034 (7th Cir. 2017), which held that a school *must* allow a female student who identified as a male to use the male restroom. App. 240a–243a. The Third Circuit filed an amended opinion without the endorsement on July 26, 2018, which is discussed here.

rather than their self-identified gender may exacerbate mental-health issues. App. 257a.

As for Petitioners, the Third Circuit said there was record evidence that they "reduced water intake, fasted, etc. in order to reduce the number of times they need to visit the bathroom so they can minimize or avoid encountering" opposite-sex students. App. 258a. But the panel did not view this stress as comparable to the desires of students who identify as the opposite sex to use facilities consistent with their beliefs about their gender. App. 258a. The panel did not require Boyertown to prove that other alternatives would not have advanced the school's goal of tolerance and inclusivity. App. 270a. Anything less than allowing students to use privacy facilities according to their beliefs about their gender "would significantly undermine" the school's interest, concluded the court. App. 273a.

Turning to Petitioners' likelihood of success on their constitutional claim, the Third Circuit correctly acknowledged its own precedent that a person has "a constitutionally protected privacy interest in his or her partially clothed body." *Doe* v. *Luzerne Cty.*, 660 F.3d 169, 176 (3d Cir. 2011). The panel pointed to several other circuits' similar holdings, including the Ninth: "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed [figure] from view of strangers, and *particularly strangers of the opposite sex*, is impelled by elementary self-respect and personal dignity." App. 220a n.53 (emphasis added, quoting *York* v. *Story*, 324 F.2d 450, 455 (9th Cir. 1963)).

The Third Circuit's observation is particularly true for adolescents at school. Yet the panel held that Petitioners were not likely to prevail because the District's policy satisfied strict scrutiny by serving a compelling interest in a narrowly tailored manner. App. 261a—262a.

That compelling interest, said the panel, was preventing discrimination/affirming individual students' beliefs about their gender and promoting "inclusivity, acceptance, and tolerance." App. 270a. "Accordingly, the School District's policy not only serves the compelling interest of protecting transgender students, but it benefits *all* students by promoting acceptance." App. 270a–271a (emphasis added). As for "those cisgender students who feel" uncomfortable being undressed or sharing a restroom with those of the opposite sex, they "can use the single-user bathrooms in the school." App. 271a.

The Third Circuit also said that Boyertown's policy was narrowly tailored. The court rejected the suggestion that the dignity of students who identify as transgender could be respected by giving them access to single-user facilities. App. 273a. "[R]equiring transgender students to use single user or birth-assigned facilities is its own form of discrimination." *Ibid.* Apparently, forcing Petitioners to use single-user facilities is not.

Because male students expressing a female identity are actually female, and female students expressing a male identity are actually male, the panel reasoned, "[a] transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly

curious student *of the same biological sex* who decides to sneak glances at his or her classmates." App. 276a (quoting *Whitaker*, 858 F.3d at 1052).

The Third Circuit's redefinition of sex allowed it to disclaim conflict with numerous circuit decisions (including its own) that recognize the right not to be viewed in a state of undress by the opposite sex. *E.g.*, *Luzerne Cty.*, 660 F.3d at 175–76 n.5 (Fourteenth Amendment right to bodily privacy bans people from viewing the partially clothed bodies of members of the opposite sex); *Faulkner* v. *Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (recognizing "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns"); *Chaney* v. *Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) ("same-sex restrooms [and] dressing rooms" are allowed "to accommodate privacy needs," while "white-only rooms," which do not implicate bodily privacy, are illegal); *Canedy* v. *Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (right to privacy is vitiated when a member of one sex is "viewed by a member of the opposite sex"); *Fortner* v. *Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (quoting *Lee* v. *Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)) ("involuntary exposure of [one's unclothed body] in the presence of people of the other sex may be especially demeaning and humiliating").

The Third Circuit also summarily rejected Petitioners' claim under Title IX, holding that there could be no constructive denial of facilities "on the basis of sex" when all students were subjected to the same locker room policy. App. 279a. Instead, the court speculated (but did not hold) that the school might be in violation of Title IX were it to *decline* to allow a

student to use the facility corresponding to their professed gender. App. 286a–287a.

Having decided that no reasonable adolescent could find it uncomfortable to be in a locker room with an opposite-sex student, provided the latter student *professes* to be of the same sex, it was easy for the Third Circuit to find no irreparable harm. App. 278a, 288a–289a. And for those unreasonable students who disagreed, the "District has provided adequate privacy facilities for [them] to use during this litigation." App. 289a. The panel ignored the record testimony showing that the District's policy harmed all Petitioners and caused Joel Doe to leave the school entirely for his senior year.

The Third Circuit denied rehearing en banc over four judges' dissent. App. 292a–293a. Petitioners now ask this Court to grant their petition and hold that their recognized right to bodily privacy is not contingent on others' beliefs about their gender.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for several reasons. First, the panel redefined the strict-scrutiny test for determining whether a governmental policy can override a constitutional right. The Third Circuit's new test relieves the government of its burden to produce evidence showing that less-intrusive alternatives have not worked, ignores any underinclusiveness, "balances" the severity of the constitutional deprivation against the government's purported interest, and requires no proof of a compelling interest. The result of this change is to severely diminish constitutional protections.

Second, the Third Circuit distorted what it means to deprive a student of educational benefits "on the basis of sex" under Title IX. 20 U.S.C. 1681(a)(1). According to the panel, so long as a school policy treats all students "equally," there can be no Title IX problem. But that changes the meaning of the statutory prohibition. When a school policy opens all school locker rooms and restrooms to members of the opposite sex, a student that reasonably feels embarrassed and harassed and can no longer use the facility has been denied access "on the basis of sex."

Finally, the Third Circuit redefined "sex" in the privacy and Title IX contexts as depending solely on a student's subjective perceptions and feelings. Nothing in this Court's precedents or the plain language of Title IX supports such a redefinition. While this Court need not define what "sex" means in all contexts, it can and should say that it is not reasonable for a student's privacy rights to change based on what someone else believes about their own gender.

ARGUMENT

I. The Third Circuit created a new strict-scrutiny test, one that conflicts with precedent and endangers constitutional rights in all contexts.

Under the Fourteenth Amendment, the government may not infringe fundamental rights "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno* v. *Flores*, 507 U.S. 292, 301–02 (1993) (cleaned up). This strict-scrutiny inquiry requires "critical examination" of the state interests advanced. *Zablocki* v. *Redhail*, 434 U.S. 374, 383 (1978).

The Third Circuit here correctly acknowledged Petitioners' constitutional right of privacy not to be seen undressed by the opposite sex. App. 266a & n.53 (citing *Brannum* v. *Overton Cty. Sch. Bd.*, 516 F.3d 489, 494, 498 (6th Cir. 2008); *Poe* v. *Leonard*, 282 F.3d 123, 136 (2d Cir. 2002); *York*, 324 F.2d at 455 ("The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.")). The interest is so strong it is even preserved for inmates. *Forts* v. *Ward*, 621 F.2d 1210 (2d Cir. 1980) (female inmates had a privacy interest in not being seen completely or partially unclothed by male guards). But the court upheld the District's violation of Petitioners' constitutional right because it did not critically examine the relevant interests as this Court's case law requires.

A. The Third Circuit remade the test for narrow tailoring.

The court of appeals' most obvious distortion of the strict-scrutiny test is how it dealt with the narrow-tailoring analysis. Narrow tailoring is the "fit" between the government's objective and its means. The Third Circuit's weakening of the test manifested itself in three distinct ways.

1. Less intrusive alternatives. A government policy that violates a constitutional right is not narrowly tailored when there are less intrusive alternatives. Numerous circuits have so held in a wide variety of circumstances. *E.g.*, *Entm't Software Ass'n* v. *Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (state policy compelling speech not narrowly tailored where an educational campaign could have sufficed); *Lopez-Valenzuela* v. *Arpaio*, 770 F.3d 772, 782–84 (9th Cir. 2014) (absence of any credible showing that government policy addressed a particularly acute problem showed the policy was not narrowly tailored); *Eng'g Contractors Ass'n of S. Fla., Inc.* v. *Metro. Dade Cty.*, 122 F.3d 895, 927–28 (11th Cir. 1997) (narrow tailoring requires serious consideration of whether alternatives could serve the governmental interest at stake); *Lutheran Church-Missouri Synod* v. *F.C.C.*, 141 F.3d 344, 356 (D.C. Cir. 1998) (narrow tailoring requires evidence to support need for regulations to achieve purported interest). *Accord United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (states must use "a less restrictive alternative").

Here, Boyertown failed to show that alternative policies that did not invade student privacy would be

unable to advance the goals of eliminating discrimination/affirming students with gender dysphoria and promoting tolerance. For example, leaving aside that the Third Circuit pointed to no evidence of discrimination or intolerance, Boyertown never tried a comprehensive policy of making single-user facilities available to and providing support for students experiencing gender dysphoria. This would appear to be a logical first step to at least try before granting opposite-sex students access to locker rooms and restrooms where teenage students are undressing.

Moreover, Boyertown offered no evidence in the form of testimony from students who identify as the opposite sex that they were continuing to suffer mental distress despite the school's other methods of affirming students with gender dysphoria—such as participation in some sports based on gender belief rather than sex and allowing a female to run for the homecoming-king title. None of the then-enrolled students who identified as the opposite sex testified on any topic, whereas Petitioners testified in person and via affidavits as to the direct emotional and dignitary harms, and the denial of educational benefits suffered from the privacy violations.

Conversely, there *is* evidence that a policy change was unnecessary. Each Petitioner testified that they had no objection to sharing a locker room or restroom with same-sex students who identify with the opposite sex, and the District admitted that no student had complained about sharing privacy facilities with students of their own sex who identified with the opposite sex. In fact, Boyertown's expert testified that transgender students *are* generally accepted and affirmed at Boyertown. App. 39a.

In addition, a now-graduated female student who identified as a boy testified to using a single-user privacy facility from 7th through 11th grades despite overtly identifying as a male. That student was "comfortable" and "fine" using that restroom. App. 110a–112a. And the student suffered no "bullying, questioning, or physical altercations" and "'didn't get discriminated' against." App. 114a. What's more, the student recommended the use of single-user facilities to other students who identified as the opposite sex. The Third Circuit's flat rejection of this alternative approach (or any other) conflicts with the narrow-tailoring test that other circuits apply.

The failure to consider possible alternatives applies equally to Boyertown's asserted interest in promoting tolerance and inclusion. As stated above, Boyertown students with gender dysphoria are generally accepted and affirmed, and no student has complained about sharing facilities with same-sex students who identify as the opposite sex. This makes sense because, as just noted, Boyertown already deploys several methods of accommodating such students without trenching on anyone's privacy. Because there is no evidence that Boyertown has explored all viable alternatives—much less proof that such alternatives have proven themselves unworkable for Boyertown students with gender dysphoria—Boyertown has necessarily failed to show that its privacy policy is narrowly tailored. Indeed, that Boyertown's policy drove Petitioner Joel Doe out of the school shows that it is neither inclusive nor tolerant.

2. Underinclusiveness. A government policy also fails the narrow-tailoring requirement if it is under-inclusive, i.e., if the proffered objectives are not pursued with respect to analogous conduct. Again, this is a principle that other circuits regularly apply. *E.g.*, *Tyler* v. *Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 331 (6th Cir. 2014), *vacated on other grounds*, 837 F.3d 678 (6th Cir. 2016) ("a regulation flunks the narrow-tailoring requirement by being 'underinclusive' if 'the proffered objectives are not pursued with respect to analogous conduct'") (cleaned up); *281 Care Comm.* v. *Arneson*, 766 F.3d 774, 787 (8th Cir. 2014) ("A narrowly tailored regulation is one that . . . does not leave significant influences bearing on the interest unregulated (is not underinclusive)"); *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023 (Fed. Cir. 2008) (narrow-tailoring analysis involves an analysis of the over- and underinclusiveness of the classification).

Here, no matter how compelling Boyertown's asserted interests, the school did not extend the use of opposite-sex facilities to three of six students who identified as the opposite sex. The privacy-neutral affirmation measures were apparently sufficient. Because Boyertown has not pursued its objectives with respect to these similarly situated students, there is no fit between the policy and its impact, much less the narrowly tailored fit that is required under strict scrutiny. Such a result from applying the policy is "grossly underinclusive" and does not satisfy narrow tailoring. *Bishop* v. *Smith*, 760 F.3d 1070, 1081 (10th Cir. 2014) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978)).

The "fit" is no better when considering the general wellbeing of students who identify as the opposite sex and chose to use opposite-sex facilities. The Third Circuit made no inquiry into how those students' use of opposite-sex locker rooms fit with the school's interest. Had it done so, it would have found a poor fit. Boyertown's expert admitted that not only did he have "limited evidence" on whether social transitioning is an appropriate treatment for a particular individual, but that also he had no evidence specific to students' use of opposite-sex facilities. App. 102a. And he could not even estimate the risk that gender-affirmation treatments might ultimately harm, rather than help, troubled students. App. 107a.

In addition, it is not uncommon for students to explore their gender expression. Testimony revealed that experimenting with opposite-sex use of locker rooms and restrooms is actually a part of discovering whether a student is truly experiencing gender dysphoria. App. 100a. This means that a student may be in opposite-sex facilities under a presumption of being transgender, only to be properly diagnosed later as non-dysphoric. That would be a privacy violation even under the Third Circuit's redefinition of sex. Yet the court failed to inquire into the fit between the policy and the stated interest. This is not narrow tailoring under any existing understanding.

3. Balancing of interests. Having introduced an entirely new brand of strict scrutiny to address Boyertown's policy, the Third Circuit further confused its analysis by attempting to "balance" Petitioners' constitutional privacy concerns against the interests the policy purportedly advanced—which is not a strict scrutiny tool, but rather an aspect of intermediate

scrutiny. *E.g.*, *Nat'l Treasury Emps. Union* v. *U.S. Dep't of Treasury*, 25 F.3d 237, 242–43 & n.2 (5th Cir. 1994) (right to confidentiality implicated balancing test "aptly described as an intermediate standard of review rather than a strict-scrutiny analysis"); *Siefert* v. *Alexander*, 608 F.3d 974, 983 (7th Cir. 2010) (restriction on judicial political endorsements subjected to "a balancing approach, not strict scrutiny"); *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc.* v. *Brown*, 567 F.3d 521, 524–25 (9th Cir. 2009) (non-discriminatory laws regulating commerce are not subject to strict scrutiny but need only "satisfy a less rigorous balancing test").

Applying such a balancing test here was not appropriate to evaluate the violation of Petitioners' bodily privacy. Armed with the broader discretion inherent in a balancing inquiry, the Third Circuit's analysis gave the back of its hand to Petitioners' privacy interest. Its analysis bears no semblance to strict scrutiny as this Court has established it. It is a judicial pronouncement that privacy in the locker room or restroom is dependent solely on what a member of the opposite sex believes about their own gender.

B. The Third Circuit did not require Boyertown to prove that its asserted interests are compelling.

This Court and many circuits recognize that a government's purportedly "compelling interest" must have sound evidentiary support. *E.g.*, *Bush* v. *Vera*, 517 U.S. 952, 977 (1996) (compelling state interest must have "strong basis in evidence"); *Shaw* v. *Hunt*, 517 U.S. 889, 909–10 (1996) (same); *Brown* v. *Entm't Merchants Ass'n*, 564 U.S. 786, 799–800 (2011) (state's burden under strict scrutiny is to show that policy is "actually necessary" to solve an "actual problem"; "ambiguous proof" or a mere "predictive judgment" "will not suffice"); *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 504 F.3d 338, 353 (2d Cir. 2007) (general assertion of an interest in the absence of evidence showing an actual problem is insufficient to demonstrate a compelling state interest); *Galda* v. *Rutgers*, 772 F.2d 1060, 1066–67 (3d Cir. 1985) (same); *Hayes* v. *N. State Law Enf't Officers Ass'n*, 10 F.3d 207, 214 (4th Cir. 1993) (same); *Police Ass'n of New Orleans Through Cannatella* v. *City of New Orleans*, 100 F.3d 1159, 1168 (5th Cir. 1996) (same); *Ward* v. *Polite*, 667 F.3d 727, 740 (6th Cir. 2012) (same); *Awad* v. *Ziriax*, 670 F.3d 1111, 1130 (10th Cir. 2012) (same). The Third Circuit eschewed that requirement here.

Separate locker rooms and restrooms are designed to protect the privacy of one sex from the other. Those facilities are unique in that they are the one place students can go and be undressed without members of the opposite sex present.

The Third Circuit identified two possible state interests that would warrant invading this privacy: (1) protecting Boyertown students with gender dysphoria from discrimination and affirming their beliefs about their own gender, and (2) promoting inclusivity, acceptance, and tolerance. App. 268a–271a. But the Third Circuit did not point to any evidence showing an ongoing problem such that discrimination needed to be eliminated or tolerance promoted.

Moreover, there is no "strong basis in evidence" that these interests are compelling. Boyertown came forward with no specific evidence that its students who identified as the opposite sex were at risk if they could not use opposite-sex facilities, only general statistics (with no sample validity) to support its vague claims.[3] Indeed, Boyertown's expert had to admit that no study existed showing that allowing children who identify as the opposite sex to use opposite-sex restrooms and locker rooms will promote their mental health or decrease suicide risks. App. 107a. And as previously mentioned, three of six students identifying as the opposite sex were not granted permission to use opposite-sex facilities.

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[3] According to the American Psychological Association's most recent Diagnostic and Statistical Manual of Mental Disorders—the DSM-5—98% of boys experiencing gender dysphoria and 88% of girls will naturally resolve their dysphoria as they mature. DSM-5 p. 455 (2013). Accord, *e.g.*, Kelley D. Drummond *et al.*, *A Follow-up Study of Girls with Gender Identity Disorder*, 44 Developmental Psychology 34–45 (2008) (gender dysphoria persisted in only 3 of 25 girls treated for gender dysphoria).

Boyertown's interest is also not compelling because it is not pursued across the board. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546-47 (1993). As noted above, while Boyertown granted opposite-sex access to locker rooms and restrooms for some students, it did not for others and still allowed the others to use the facilities based on their biological sex. App. 26a–27a & n.10. So while Boyertown says it has a compelling interest, it does not demonstrate that fact when treating *all* students identifying as the opposite sex. That reality undermines any claim that the interest is compelling.

Boyertown's asserted "inclusivity" interest fares no better. Inclusivity and diversity are important goals, to be sure. But there was no evidence presented that inclusivity and diversity were problems at Boyertown. As noted above, the actual evidence showed just the opposite. And in any event, Boyertown did not secure inclusivity and tolerance by implementing its policy; it is neither inclusive nor tolerant to tell students to make changing with members of the opposite sex "natural" or to drive a student out of the high school by forcing him to undress in the presence of opposite-sex students.

II. The Third Circuit's decision rewrites Title IX's plain language.

Title IX prohibits public schools from denying any person participation in, or the benefits of, any education program or activity "on the basis of sex." 20 U.S.C. 1681(a). Whatever else Title IX prohibits, "students must not be denied access to educational benefits and opportunities on the basis of gender." *Davis* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). As an example, the *Davis* opinion describes a case of student-on-student sexual harassment in which male students physically threaten their female classmates, successfully preventing the female students from using a "particular school resource." *Id.* at 650–51.

The situation this Court described in *Davis* mirrors what happened here, though without the threats of physical violence. By allowing opposite-sex students to use school locker rooms and restrooms, Boyertown has constructively prevented Petitioners, both male and female students, from using a "particular school resource"—the locker rooms and restrooms. And that constructive bar is not based on race, ethnicity, or disability. It is unequivocally based on sex. But for allowing students of the opposite sex to access the facilities, there would be no denial of the benefits of these facilities to any student.

In rejecting Petitioners' Title IX claim, the Third Circuit erred. The Petitioners claim that they have been deprived of Boyertown's locker rooms and multi-user restrooms "on the basis of sex" in two independent ways. The claim is based on Petitioners' own sex, which dictates whom they consent to be with

when undressing in a school privacy facility. And the claim is based on sex in a more general way because the school's permission to use a locker room or restroom depends on the sex designation of that facility. Either way, the claim falls within Title IX's plain language, contrary to the Third Circuit's conclusion.

The court of appeals felt that Petitioners failed to show harassment "severe, pervasive, or objectively offensive" enough to undermine their educational experience. App. 280a (quoting *DeJohn* v. *Temple Univ.*, 537 F.3d 301, 316 n.14 (3d Cir. 2008)). That conclusion is difficult to understand, given that Petitioner Joel Doe complained to school officials, was instructed to act "natural" while undressed in front of opposite-sex students, and *felt forced to leave the school entirely*. App. 47a, 58a.

Moreover, other students testified about how uncomfortable they were finding themselves with members of the opposite sex when undressed in the locker room or when in the restroom, all because of Boyertown's policy. Such testimony establishes that the policy's direct effect was sufficiently severe, pervasive, and objectively offensive to detract from Petitioners' educational experience and effectively deny them access to the school resource of locker rooms and multi-user restroom facilities.

The court of appeals also questioned whether Petitioners could state a Title IX claim when Boyertown's policy applies equally to male and female students. App. 282a–283a. But unlike Title VII, Title IX does not require proof of "discrimination," a term that at least implies disparate treatment. Not so in Title IX, where a student may prove a statutory violation merely "on the basis of sex." And as explained above, Petitioners allege that they have been constructively denied access to locker rooms and restrooms on the basis of sex. A school's failure to step in when a student is denied access to facilities based on sex is actionable no matter how "equal" the denial is.

As with its analysis of Petitioners' privacy rights, the Third Circuit's view of the Title IX claim was influenced by its belief that male students professing to be female actually are female and vice versa. If having such a student in a female locker room is "no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex," App. 276a, it is easy to see why the Third Circuit could not understand why Joel felt uncomfortable, embarrassed, and confused. But just as a student's privacy rights do not turn on others' beliefs about their gender, Title IX does not suggest that others' belief that they are a member of the opposite sex somehow negates a deprivation "on the basis of sex."

III. This case is an ideal vehicle for this Court to address whether school locker room and restroom policies like Boyertown's are constitutional and satisfy Title IX.

The fallout of the Third Circuit's decision has far-reaching consequences for how courts apply the Fourteenth Amendment and Title IX. Clarity and direction from this Court are needed to prevent further watering-down of the strict-scrutiny test that this Court and other circuits routinely apply to protect fundamental rights like one's bodily privacy, and to give courts, litigants, and school districts guidance on walking the sensitive line between providing proper support to students experiencing gender dysphoria and protecting the privacy of other students.

This case raises pure questions of law with no material facts disputed. It raises a school policy very similar to the one at issue in *Gloucester County* while providing specific facts on how such policies play out in high school locker rooms and restrooms. The record also demonstrates the legal, physical, and emotional impacts on other students affected by the policy. Indeed, the question presented is pressing not only because of the impact on students' bodily privacy, but because of possible social pressures.[4]

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[4] A recent study by a Brown University professor identifies a rapid-onset social "contagion," where groups of students contemporaneously declare themselves to be transgender at statistically improbable rates. Lisa Littman, *Rapid-onset gender dysphoria in adolescents and young adults: A study of parental reports* (Aug. 16, 2018), https://bit.ly/2EQEFa7. After the University issued a news release promoting the study, Brown

The issues presented are also crucially important for students experiencing gender dysphoria. As noted above, the Third Circuit accepted Boyertown's assertions about how best to help these students without requiring the kind of particularized proof that strict scrutiny requires. That deficiency is significant, because there are countervailing considerations that suggest other approaches may be equal to or better than Boyertown's policy for assisting these students.[5] But under the Third Circuit's watered-down version of strict scrutiny, other approaches will not be explored.

Moreover, this Court has already recognized that "physical differences between men and women" are *not* "gender-based stereotypes." *Nguyen* v. *INS*, 533

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rescinded the release. Parents and researchers are trying to reverse that decision, see generally https://bit.ly/2PT8fNx.

[5] Seeking to align one's mind with reality has always been the preferred method for treating other dysphorias, such as anorexia, xenomelia (the feeling that one or more limbs do not belong), or transdisability (believing one has a physical disability that does not actually exist). No school would ever address anorexic students' needs by providing only minute portions of low-calorie food in their lunches. Petitioners do not claim to know the best treatment for gender dysphoria. But one of the most comprehensive scientific studies tracking individuals who underwent sex-reassignment surgery revealed that (1) the rate of psychiatric hospitalization was approximately three times higher for postoperative individuals than a control group; (2) mortality rates and rates of criminal conviction also increased; (3) suicide attempts were almost five times more likely than before surgery; and (4) the likelihood of suicide following surgery was *19 times* higher than the control group, adjusted for prior psychiatric illness. Cecilia Dhejne et al., *Long-term follow-up of transsexual persons undergoing sex reassignment surgery* (Feb. 22, 2011), https://bit.ly/2xl6HDr.

U.S. 53, 68 (2001) (cleaned up). Because the government only has an interest in suppressing invidious (i.e., irrational) discrimination, many courts recognize that it is appropriate to account for sex differences in the context of living facilities, locker rooms, and restrooms. *E.g.*, *Virginia*, 518 U.S. at 550 n.19; *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007); *Luzerne Cty.*, 660 F.3d at 176 n.5; *Faulkner*, 10 F.3d at 232; *Chaney*, 612 F.3d at 913; *Canedy*, 16 F.3d at 185; *York*, 324 F.3d at 455; *Fortner*, 983 F.2d. at 1030; *Torres* v. *Wis. Dep't of Health & Soc. Servs.*, 859 F.2d 1523, 1531 (7th Cir. 1988) ("It is hardly a myth or purely habitual assumption that the presence of unrelated males in living spaces where intimate bodily functions take place is a cause of stress to females") (cleaned up); *Johnston* v. *Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015) (providing sex-specific locker rooms and restrooms is "consistent with society's long-held tradition").

Given this reality, it is untenable that the Third Circuit made students' right to bodily privacy contingent on what others believe about their own gender. This Court's immediate intervention is sorely needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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