No. 18-658

In the Supreme Court of the United States

JOEL DOE, ET AL.,
Petitioners,
v.
BOYERTOWN AREA SCHOOL DISTRICT, ET AL.

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

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Boyertown Area School District by policy authorizes some of their transgender students to use high school locker rooms and restrooms matching their gender identity rather than their biological sex. The District promulgated this policy to affirm transgender students' beliefs about their gender, to prevent discrimination, and to promote tolerance. The policy forces other students using those facilities to be seen by the opposite biological 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 brief addresses the first question presented:

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.

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

As the four-judge dissent from *en banc* rehearing explains, the Third Circuit's panel opinion in this case lacks "careful legal analysis supporting the conclusions [it] reach[ed]." Pet. 296a. That is true not only of the panel's implication that Boyertown's policy is required by federal law, but also of the panel's strict scrutiny analysis: If applied more generally, that analysis would severely undercut *all* of the legal rights that trigger strict scrutiny under current law. Rather than being "strict in theory but fatal in fact," strict scrutiny—at least in the Third Circuit—would become "strict in theory but feeble in fact." *Fisher* v. *Univ. of Tex.*, 570 U.S. 297, 314–315 (2013).

Amici—legal scholars concerned about the proper application of strict scrutiny and listed in the Appendix—urge this Court to grant review. Departing from decisions of this Court and several other circuits, the Third Circuit determined there was a compelling interest to support the District's policy—but without any evidence to support that position. Likewise, the panel's argument that the policy was narrowly tailored defies the decisions of this Court and other circuits.

If it stands, the panel decision would impact every circumstance where strict scrutiny currently applies, undercutting the protections currently enjoyed for many classifications. This Court has correctly condemned previous attempts to water down strict scrutiny. It should condemn this one by granting certiorari and overturning the Third Circuit's decision.

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[1] No one other than *amici* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation. Proper notice was given. Consents are on file with the clerk.

STATEMENT

In the 2016-17 school year, Respondent Boyertown Area School District ("Boyertown" or "the District") authorized transgender students to use locker rooms and restrooms based on their self-identified gender rather than their biological sex.

As a result, several Petitioners were unexpectedly exposed, while using the appropriate restrooms, to partially clothed individuals of the opposite biological sex. For example, as the petition describes in more detail (at 6–8), Joel Doe and Jack Jones encountered in the boys' restroom one or more girls who identify as boys, seeing them partially clothed and obviously female. Likewise, Petitioner Mary Smith encountered a boy who identified as a girl in the women's restroom—and instinctively ran away. Pet. 11a, 72a–73a.

As the Petition explains in more detail (at 8–10), the district court rejected the claims that the District's policy violated the students' privacy rights. On appeal, the Third Circuit affirmed.

The Third Circuit first acknowledged that there is a constitutional right to not undress in front of members of the opposite sex. Pet. 266a n.53. It also assumed that the District's policy burdened that right, subjecting it to strict scrutiny. See Pet. 268a. However, in articulating the "compelling interests" the policy supposedly served, the Third Circuit simply relied (at Pet. 270a n.65) on this Court's observation in *Grutter* v. *Bollinger* that diversity is a valuable thing, as a general matter.

The Third Circuit next purported to apply a narrow tailoring test. But the court's analysis repeatedly relied on balancing the interests of Petitioners—whose

constitutional right was being infringed—and the interests of the students who seek to use the bathroom of the opposite gender, whose constitutional rights would *not* otherwise be infringed. Moreover, the panel held that, "even when viewed through the lens of strict scrutiny," the interests of the non-transgender students are merely about discomfort. Pet. 271a n.69. Concluding that the policy was narrowly tailored, the panel affirmed the district court.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's decision warrants review because it substantially alters strict scrutiny review, in conflict with established precedent of this Court and decisions in other circuits.

After affirming that "a person has a constitutionally protected privacy interest in his or her partially clothed body," Pet. 266a, the Third Circuit purported to analyze whether the District's policy survives strict scrutiny. In doing so, however, the Third Circuit departed from settled precedent and, in two critical respects, created an altered and incorrect form of strict scrutiny review.

A. The Third Circuit's altered compelling interest analysis conflicts with precedent of this Court and other circuits.

First, the Third Circuit 's decision conflicts with the strict scrutiny analysis of this Court and other circuits by weakening the evidentiary standard for a compelling government interest. Here the District claimed that it has compelling interests in (1) affirming individual students' beliefs about their own gender, and (2) promoting inclusivity, acceptance, and tolerance. But neither of these interests was supported by adequate evidence.

1. This Court has long held that for a state interest to be compelling, it must be supported by significant evidence. For example, in *Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 799–800 (2011), California had passed a law restricting sale or rental of violent video games to minors, using for evidence a study of the connection between exposure to violent video games and harmful effects on children. *Id.* at 800. The

Court disagreed that this was a compelling state interest, explaining that predictive judgment and ambiguous proof was not enough to satisfy strict scrutiny. *Ibid.* The Court then addressed the reason the evidence used was ambiguous, stating, "These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games cause minors to act aggressively." *Id.* at 800.

Similarly, in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, the Court held that the government failed to demonstrate a compelling interest in preventing hoasca use for a sect's sacraments. 546 U.S. 418, 432 (2006). The Court explained that simply invoking the general dangerous characteristics set forth in the Controlled Substances Act did not qualify as a compelling government interest. What was required instead was a factual showing that the use of hoasca in the sacraments of that sect would itself pose a danger. And because there was no evidence of such a danger, the government's asserted interest did not "count" as compelling for purposes of that dispute. *Ibid. accord Bush* v. *Vera*, 517 U.S. 952, 977 (1996) (three voting districts in Texas found unconstitutional because the state had failed to show a "strong basis in evidence" for the boundaries drawn); *Bates* v. *City of Little Rock*, 361 U.S. 516, 525 (1960) (court must determine whether government action bears a reasonable relationship to achievement of government purpose).

The circuit courts have likewise required significant evidence before recognizing a claimed interest as compelling. For example, the Fourth Circuit held that a race-based promotion policy was unconstitutional in *Hayes* v. *North State Law Enforcement Ass'n*, because

it was not supported by sufficient evidence. 10 F.3d 207, 214 (4th Cir. 1993). The court reasoned that, "[e]ven if a compelling state interest could be based on other than remedying past discrimination, a 'strong basis in evidence' surely would be required for the proffered necessity of diversity among the police sergeants." *Ibid.* In a similar case, the Fifth Circuit said that without evidence of past discrimination that the state was trying to remedy, there was no compelling state interest to justify a race-based promotion program. *Police Ass'n ex rel. Cannatella* v. *City of New Orleans,* 100 F.3d 1159, 1168–1169 (5th Cir. 1996).

Similarly, when a university expelled a graduate student for requesting to refer a patient to another therapist so that the student could observe her religious beliefs, the Sixth Circuit found there was no compelling state interest underlying the expulsion policy. *Ward* v. *Polite,* 667 F.3d 727, 740 (6th Cir. 2012). The court explained that, without concrete evidence that the student's referral request placed the program's accreditation in danger, and because the university had allowed for multiple types of referrals before, there was no compelling state interest in expelling the student that had sought the referral. *Id.*

In an analogous Tenth Circuit case, a state constitutional amendment preventing the use of international law or Sharia Law in Oklahoma courts was challenged as discrimination on the basis of religion. *Awad* v. *Ziriax,* 670 F.3d 1111, 1117–1119 (10th Cir. 2012). The court pointed out that Oklahoma relied on assertions and valid concerns to make its case for a compelling state interest, but had no evidence of any actual problem that the amendment sought to solve. *Id.* at 1130. The state could not show even a single in-

stance of an Oklahoma court using such a law. *Id.* Because the state had provided no evidence, the state interest was found not to be compelling.

2. Here, as noted earlier, the District claims that it has compelling interests in affirming students' beliefs about their own genders, and promoting inclusivity, acceptance, and tolerance. However, the District has not met the requirement for these interests to be considered compelling.

Specifically, like the evidence presented in *Brown* v. *Entertainment Merchants*, the District's only evidence is a study that does not reach the level of scientific reliability. The study was a 2006 article in the Journal of Homosexuality, based on the National Transgender Discrimination Survey (NTDS), which generally indicated positive psychological outcomes for transgender individuals whose gender identities were respected. However, as with the study at issue in *Brown,* the authors of the NTDS study admitted that the findings were skewed because of the methods used. Kristen Clements-Nolle, et al., *Attempted Suicide Among Transgender Persons: The Influence of Gender-Based Discrimination and Victimization*, 51 Journal of Homosexuality 53, 65 (2006) ("Our use of non-probability sampling techniques also limits the generalizability of our findings") And even without its methodological problems, this study doesn't begin to explain how (or how much) "inclusivity, acceptance and tolerance" meaningfully advance any concrete results that could be the subject of a compelling state interest.

This case is also similar to *Hayes* and *Police Ass'n of New Orleans Through Cannatella*, in that here, as there, the government is trying to protect what it reasonably perceives to be a vulnerable group. As in those

cases, however, there simply is no strong evidentiary link between the District's policy and the interests it has asserted. For example, as in those cases, the District has presented no evidence of past discrimination against transgender students—other than denial of access to opposite-sex facilities itself—of the sort that could be remedied by expanding access to bathrooms and locker rooms based on gender identity as well as biological sex. Unless one wishes to maintain than single-sex facilities of the sort expressly permitted under Title IX are inherently odious—which the District has not argued—the District must point to provide evidence that its policy promotes some other compelling interest to satisfy strict scrutiny. But the District has not done so.

This case is also reminiscent of the situation presented in *Awad*, a constitutional violation of religious freedom rights based on (supposedly) valid concerns. Here the District has attempted to abrogate students' constitutional right to privacy based on valid concerns about transgender students. But, like the state in *Awad*, the District has no evidence or even examples of the concerns it is claiming validate the state interest.

In short, the evidence the District has offered on the problems faced by transgender students falls far short of what would be needed to give the District a compelling interest in opening girls' bathrooms and locker rooms to biological males, and vice versa.

3. The Third Circuit also erred in its reliance on *Grutter* v. *Bollinger*, 539 U.S. 306, 330 (2003). True, *Grutter* acknowledged that, in general, diversity can be a compelling interest. *Id.* But racial or gender diversity in a classroom is not the same as biological diversity in a bathroom. See, *e.g.*, *United States* v.

Virginia, 518 U.S. 515, 556–58 (1996) (recognizing need to continue separating facilities when integrating women into the Virginia Military Institute).

Here the majority opinion avoids the central question: is there a compelling interest in biological diversity in restroom or locker-room usage? The majority's compelling interest analysis cites no study that supports an affirmative answer.

Moreover, while the majority analogizes from broader statements on the importance of diversity, *United States* v. *Virginia* all but forecloses reliance on these broader statements. That case, of course, concerned whether Virginia's Military Institute could remain male-only. *Id.* at 530. While concluding that VMI was constitutionally required to admit females as well as males into a previously all-male institution, *id.* at 557, the Court expressly acknowledged that living arrangements for men and women would have to remain separate, *id.* at 550 n.19. Thus, the interest in integrating women and men in military training—mandated (according to the Court) by the Constitution—did not extend to integration in living arrangements.

The Third Circuit, however, made the same logical leap this Court declined to make in *Virginia*: The panel below ignored that, to the extent it is about diversity at all, the dispute in this case is really about whether there is a narrow compelling interest in biological diversity in the use of sex-specific restrooms and locker rooms, not a broader interest in integrating children with various gender identities more generally. One can promote tolerance and acceptance of varying gender identities–just as one promotes acceptance of women in schools, jobs, etc.–without going to the extreme of eliminating separation of the biological sexes

when students will be disrobing. A compelling interest in the former objective therefore does not imply a compelling interest in the latter.

The net effect of the Third Circuit's misapplication of the compelling interest requirement is to allow governments simply to fabricate whatever interest may best fit the dispute at issue. And that of course is one recipe for converting strict scrutiny into what this Court has aptly called "feeble scrutiny." *Fisher,* 570 U.S. at 315.

B. The Third Circuit's narrow tailoring analysis conflicts with precedent of this Court and other circuits.

Erroneously finding that the District's asserted interests were compelling, the Third Circuit then analyzed whether the District's policy was narrowly tailored to further those interests. Pet. 272a–274a. Departing from the precedent of other circuits and this Court, the Third Circuit improperly (1) shifted the burden of proving narrow tailoring from the government to the injured plaintiffs; (2) relied on general rather than specific evidence to demonstrate narrow tailoring; (3) ignored traditional principles of underinclusiveness; and (4) blurred the line between strict and intermediate scrutiny.

1. As this Court has often explained, to be narrowly tailored, a government that infringes fundamental constitutional rights must show that its policy is the "least restrictive alternative" to achieving the government's interests. *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004); *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815–816 (2000). This of course means that a court undertaking such an analysis must

consider other obvious but less restrictive alternatives[2]—something the Third Circuit panel neglected to do.[3] But it also means that the burden of proof must lie with the government rather than the citizens whose protected rights are infringed. As this Court has held many times, when the government restricts a constitutional right, "the [g]overnment bears the burden of proving the constitutionality of its actions." *Playboy Entertainment Group*, 529 U.S. at 816; see also *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U.S. 173, 183 (1999) (same); *Bd. of Trustees of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989) ("[T]he State bears the burden of justifying its restrictions ***."); *Shakur* v. *Schriro*, 514 F.3d 878, 887 (9th Cir. 2008) (government must demonstrate it has "actually looked into" other alternatives, providing "detailed findings in the record."); *Greene* v. *Solano*

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[2] *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, 782–784 (9th Cir. 2014) (absence of any credible showing that government policy was not narrowly tailored); *Eng'g Contractors Ass'n of So. Fla., Inc.* v. *Metro. Dade Cty.*, 122 F.3d 896, 927–28 (11th Cir. 1997) (narrow tailoring requires serious consideration of whether alternatives could serve the governmental interests 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).

[3] The Third Circuit analyzed only one solution proposed by Petitioners— requiring students who are transgender to use single-stall changing facilities. Pet. App. 272a–273a. However, simply requiring *all* students to use single-user facilities would not treat cis- and transgender students unequally and thus would be both consonant with the District's policy and less restrictive in nature: No privacy rights would be violated and no student would be forced to use a privacy facility incongruous with his or her self-identified gender identity.

Cnty. Jail, 513 F.3d 982, 989–990 (9th. Cir. 2008) (government must show it "actually considered and rejected the efficacy of less-restrictive measures.").

Here, however, the Third Circuit panel effectively placed on Petitioners the burden of disproving narrow tailoring, creating a rebuttable presumption that the District's policy passed strict scrutiny. In rejecting Petitioners' solution of private facilities for transgender students, the Third Circuit reasoned that the solution was "unpersuasive" and "fail[ed] to comprehend the depth of the problem," because it would "*not serve the compelling interest* that the [District] had identified *** significantly undermin[ing] it." Pet 273a. (emphasis added). And because the Petitioners' solution was insufficient to accomplish the District's interests, the District's policy was narrowly tailored. Pet 273a–274 a. In other words, according to the panel, the District's policy was narrowly tailored because Petitioners were unable to prove a less restrictive alternative that was sufficiently tailored to the District's interests. For example, the Third Circuit could and should have addressed, *sua sponte* if necessary, the obvious alternative of moving to eliminate group facilities altogether, in favor of single-user facilities. By shifting the burden to Petitioners, the Third Circuit departed from the established principle requiring the government to bear the burden of establishing narrow tailoring.

The Third Circuit's new rebuttable presumption of narrow tailoring also contradicts the core purpose of strict scrutiny analysis: to zealously protect "fundamental" rights against unjustified government intrusion. *Reno* v. *Flores*, 507 U.S. 292, 302 (1993) ("[T]he Fifth and Fourteenth Amendments' guarantee 'due process of law' *** forbid[ing] the government to infringe certain 'fundamental' liberty interests *at all*, no

matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interests."). If, as the Third Circuit suggests, the government need only prove that it has a compelling interest (which it did not even do here), infringements on "fundamental" interests will no longer need to be narrowly tailored—unless of course the injured plaintiff can prove a less restrictive alternative, sufficient to satisfy the government interests. Upholding the Third Circuit's analysis would impermissibly shield government policies that restrict these fundamental rights by placing the onus on the injured plaintiff.

2. In addition to shifting the burden of proof, the Third Circuit failed to evaluate carefully the specific Boyertown policy. To be narrowly tailored, a court must evaluate the specific context of the government policy to determine whether that policy is narrowly tailored. See*, e.g.*, *Reno* v. *ACLU*, 521 U.S. 844, 845 (1997) (rejecting an overly broad restriction on internet censorship because "the evidence indicates" that a less restrictive "method *** will soon be widely available."); *Playboy Entertainment*, 529 U.S. at 816 (requiring government to "prove that the alternative will be ineffective" and citing "evidence showing that [the government's policy]" would not be effective) ; *Republican Party of Minnesota* v. *White*, 536 U.S. 765, 776 (2002) (highlighting the specific effect of an election regulation on "particular parties" and "particular issues" to determine narrow tailoring).

Other circuits uphold this principle. See*, e.g.*, *Shakur*, 514 F.3d at 887 (requiring the government to provide "detailed findings in the record," looking at the "effects that accommodation would have on [a specific prison's] operating expenses."); *City of Wateska* v. *Illinois Public Action Council*, 796 F.3d 1547, 1554 (7th

Cir. 1986) (extensively analyzing the specific effect, restrictions, and requirements of a government ordinance on Watseka, Illinois residents). But the Third Circuit used only general evidence to substantiate its narrow tailoring analysis, ignoring the specific circumstances surrounding the District's policy.

The Third Circuit cited two types of evidence to conclude that the District's policy was narrowly tailored: a Seventh Circuit case recognizing that "a school district's policy *** requir[ing] a transgender student to use 'single-user [facilities] actually invited more scrutiny and more attention from his peers,'" Pet. App. 227a (quoting *Whitaker* v. *Kenosha Unified School District*, 858 F.3d 1034, 1045 (7th Cir. 2017)), and several national studies and psychology journals concluding that allowing "transgender students *** to use facilities that conform with their gender identity [helps] those students reflect the same, healthy psychological profile as their peers." *Id.* at 523 (footnote and quotations omitted). From this, the Third Circuit concluded that the District's policy was narrowly tailored. Pet. 257a.

By not at least requiring an investigation into the specific circumstances surrounding a restrictive policy, the Third Circuit's new test allows the government to "otherwise restrict [rights] without adequate justification." *Playboy Entertainment*, 529 U.S. at 813. After all, if the government can cite general studies to support the application of a specific policy, courts risk affirming government restrictions that may be justified in one part of the country but not in another, or in one community and not another.

The Third Circuit's use of *Whitaker* illustrates this concern. In *Whitaker*, the Seventh Circuit engaged in

a fact-specific inquiry, finding that the student-plaintiff had "alleged that using single-user restrooms actually invited more scrutiny and attention from *his* peers." *Whitaker*, 858 F.3d at 1045 (emphasis added). Indeed "the School District's policy" "further intensified [the student's] depression and anxiety." *Id.* at 1045-1046 (emphasis added). From this fact-specific allegation in *Whitaker*, the Third Circuit extrapolated a rule foreclosing as inadequate any policies requiring transgender students to use single-user facilities. Pet. 273a.

Not only did *Whitaker* represent only one side of the debate, see*, e.g.*, *Johnston* v. *University of Pittsburgh of Commonwealth System of Higher Education*, 97 F. Supp. 3d 657, 678 (W.D. Pa. 2015) (university refusing a student access to privacy facilities of the opposite sex did not violate the Equal Protection Clause), but had the Third Circuit properly considered the specificities of the case, it likely would have reached the opposite conclusion. The District employed "other methods of affirming students with gender dysphoria" with "no evidence" that transgender students "were continuing to suffer mental distress despite the school's other methods ***." Pet. 18. Furthermore, Petitioners testified they accepted "sharing a locker room or restroom with same-sex students who identify with the opposite sex," according with expert testimony that "transgender students *are* generally accepted and affirmed at Boyertown." Pet. 18. Additionally, a now-graduated, transgender male experienced no "bullying, questioning, *** physical altercations" or "discriminat[ion]" while using single-user privacy facilities from "7th through 11th grades despite overtly identifying as a male." Pet. 19. Yet its use of general studies and fact-specific precedent allowed the Third

Circuit to overlook the specific context of the District's policy.

While generally there may "be no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity," Pet. 268a, this general evidence does not suggest that "discrimination, harassment, and violence" were present in Boyertown Area School District, or that the Boyertown-specific policy was narrowly tailored in restricting the privacy rights of Boyertown students. Departing from this and other courts' precedent, the Third Circuit's new approach to narrow tailoring ignores the fact-specific nature of this inquiry.

3. The Third Circuit also failed to heed the basic requirement of strict scrutiny that the District's policy must not be underinclusive. See, *e.g., Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interests of the highest order *** when it leaves appreciable damage to that supposedly vital interests unprohibited.") (internal quotations and citations omitted). It is well established that government conduct will not survive strict scrutiny if it regulates some but not all occurrences contrary to the government's interests. *Id.* In addition to "diminish[ing] the credibility of the government's rationale," *City of Laude* v. *Gilleo*, 512 U.S. 43, 52 (1994), underinclusive regulations aid courts in determining whether a policy or regulation is truly the least restrictive means of achieving a compelling interest.

The various circuits consider underinclusiveness as part of the strict scrutiny analysis. *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 '[t]he proffered objectives are not pursued with respect to analogous *** conduct.'"); *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 underinclusiveness of the classification).

The Third Circuit, however, overlooked this established requirement despite clear evidence that the District's policy is underinclusive. Pet. 267a–269a. Under the District's policy, not all transgender students were given access to opposite-sex facilities: only three of the six were given their preference. Pet. 20. If, as the District argues and the Third Circuit concurs, protecting against discrimination toward, affirming, and promoting tolerance of all transgender students is a compelling interest, it severely "diminishes the credibility of [the District's] rationale" if some but not all transgender students enjoy the benefits of this policy.

To be sure, this discrepancy in application stemmed from the District's "student-specific" vetting process. Pet. 259a. But if the District's policy was only needed "on a case-by-case basis," *id.*, such a broad policy was not narrowly tailored to further the District's putative interests in protecting and affirming all transgender students. The Third Circuit failed to consider the policy's underinclusiveness, which is fatal to a narrow tailoring analysis.

4. In addition to ignoring the policy's underinclusiveness, the Third Circuit blurred the line between strict and intermediate scrutiny. Unlike strict scrutiny

analysis, intermediate scrutiny involves a general balancing test between competing rights. See*, e.g.*, *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc.* v. *Brown*, 567 F.3d 521, 524–525 (9th Cir. 2009) (non-discriminatory laws are not subject to strict scrutiny but need only "satisfy a less rigorous balancing test."); *Nat'l Treasury Emps. Union* v. *U.S. Dep't of Treasury*, 25 F.3d 237, 242–243 & n.2 (5th Cir. 1994) (a balancing test is "aptly described as an intermediate standard of review rather than a strict-scrutiny analysis."). But here, despite purporting to undertake strict scrutiny, however, the Third Circuit's opinion is replete with intermediate-scrutiny-like balancing.

For example, the court balanced (at 258a) the level of harm to students seeing intimate parts of the opposite sex with what it called the "plight of transgender students who are not allowed to use facilities consistent with their gender identity." Calling the different interests "simply not analogous," the court ignored the privacy rights of Petitioners by employing a balancing test. Pet. 271a ("We cannot, however, equate the situation the appellants now face with the very drastic consequences that the transgender students must endure if the school were to ignore the latter's needs and concerns.") Indeed, as explained above, the Third Circuit erred at the threshold by "weighing" the constitutional privacy rights of cis-gender students against a mere policy objective asserted by the District.

Had the Third Circuit instead employed an intermediate scrutiny review, this balancing would have been appropriate. But a strict scrutiny inquiry is not supposed to be a balancing act between cis- and transgender students—it is supposed instead to be a "critical examination" of whether the District's policy

impermissibly restricts the cisgender students' fundamental rights of privacy. See *Zablocki* v. *Redhail*, 434 U.S. 374, 383 (1978). Even in our constitutional structure of competing rights, strict scrutiny review is not a balancing test. Instead, all restrictions of fundamental rights must be *the* least restrictive means of achieving a compelling interest. See, *e.g.*, *Playboy*, 529 U.S. at 813.

To be sure, the challenges facing transgender youth are significant, and of significant concern. However, issues of significant concern do not justify a court rewriting established principles of review designed to zealously protect fundamental rights. Because the Third Circuit's new approaches to narrow tailoring and compelling interest analysis effectively rewrite these core principles of strict judicial review and departs from established precedent—effectively converting strict scrutiny into "feeble scrutiny"—certiorari should be granted.

II. The Third Circuit's watered-down strict scrutiny analysis warrants review because of its potential to seriously erode constitutional protections in other areas.

The Third Circuit's erroneous strict scrutiny analysis threatens to seriously erode constitutional protections in many areas of the law. Indeed, as this Court has previously noted, "watering *** down" strict scrutiny in one context inevitably "subvert[s] its rigor in the other fields where it is applied." *Employment Div.* v. *Smith*, 494 U.S. 872, 888 (1990). Here, the Third Circuit's watered-down approach would seriously erode constitutional protections in, for example, the areas of race discrimination, free speech, and religious liberty.

A. Race discrimination

As to race discrimination, in *Johnson* v. *California*, the government argued that its policy of racially segregating prisoners to prevent racially based violence should not be subject to strict scrutiny because its policy acted equally, neither benefitting nor burdening any group more than any other. 543 U.S. 499, 506 (2005). But this Court reminded the government that it was "ignor[ing] our repeated command that 'racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Johnson*, 543 U.S. at 506 (quoting *Shaw* v. *Reno*, 509 U.S. 630, 651 (1993)). And without a "searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining *** what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Johnson*, 543 U.S. at 505–506 (quoting *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989)

(plurality)). Thus, strict scrutiny is applied "to *all* racial classification to "'smoke out" illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Richmond*, 488 U.S. at 493 (plurality).

This Court roundly criticized a proposed deferential standard that would have required only that such a policy be "reasonably related" to "legitimate penological interests," because "it would make rank discrimination too easy to defend." *Johnson*, 543 U.S. at 513-14. In fact, shirking the strict scrutiny standard would allow the government "to use race-based policies even when there are race-neutral means to accomplish the same goal, and even when the race-based policy does not in practice advance that goal." *Johnson*, 543 U.S. at 513.

Here, the Third Circuit adopted a standard that is even more deferential. Instead of analyzing whether a policy is reasonably related to a state interest, the court just accepted the school district's interest and means for implementation without any critical analysis whatsoever. If the Third Circuit's analysis were applied in *Johnson*, California's prisons would still be racially segregated. And many other racially discriminatory policies would be permitted.

B. Content-based speech discrimination

The same is true in the area of content-based speech discrimination. This Court's analysis of content-based speech discrimination closely follows a strict scrutiny framework. See*, e.g.*, *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991). For example, in *Simon & Schuster*, the government passed a law requiring an accused or convicted criminal's income from works depicting

the crime to be placed in an escrow account. *Id.* at 108. This Court then engaged in a thorough review of the interests advanced by the government, repeatedly supporting its determinations with statutes and case law. *Id.* at 118–121. Ultimately, this Court noted that the government had an interest in both ensuring victims of crime are compensated and that criminals do not profit from their crimes. *Id.* at 118-19.

But although the government had "a compelling interest in compensating victims from the fruits of the crime," it had little, if any, interest in limiting that compensation "to the proceeds of the wrongdoer's speech about the crime." *Id.* at 120-21. In fact, the Court noted that the law at issue was so overbroad that it would encompass a vast swath of literature, perhaps preventing publication of works such as The Autobiography of Malcolm X, Civil Disobedience by Henry David Thoreau, the writings of Martin Luther King, Jr., "and even the Confessions of Saint Augustine *** ." *Id.* at 121.

Here, the Third Circuit's erroneous approach would have allowed the *Simon & Schuster* Court to skip this compelling interest analysis altogether. The result would have been a decision upholding a law taxing speech based on content—an idea "presumptively inconsistent with the First Amendment." *Id.* at 115. If the decision below is not corrected, future decisions applying strict scrutiny will likely contravene *Simon & Schuster* and other decisions of this Court mandating robust strict scrutiny of laws regulating or taxing speech based on its content.

C. Religious liberty

As in free speech litigation, in free exercise litigation a court is required to determine if the government's policy is the least restrictive means of effecting its compelling interest. This "least-restrictive means standard is exceptionally demanding *** ." *Holt* v. *Hobbs*, 135 S. Ct. 853, 864 (2015) (quoting *Burwell* v. *Hobby Lobby*, 134 S. Ct. 2751, 2780 (2014)). It requires the government to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]. *Hobby Lobby*, 134 S. Ct. at 2780. And "if a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt*, 135 S. Ct. at 864 (quoting *Playboy*, 529 U.S. at 815 (2000)).

This robust standard has proven decisive in a number of religious liberty cases. One example is *Holt* v. *Hobbs*, in which a prison refused to allow a Muslim prisoner to grow a short beard, concerned that prisoners might hide contraband therein. 135 S. Ct. at 853. Engaging in a robust strict scrutiny, the Court held that the government "ha[d] failed to prove that it could not adopt the less restrictive alternative of having the prisoner run a comb through his beard." *Id.* And of course, the Court held that the prison's policy did not satisfy strict scrutiny. *Id.* at 867.

Here, by contrast, neither the district court nor the Third Circuit engaged in any serious attempt to determine whether the District's policy was the least restrictive means of effecting the school district's interest, much less placed the burden on the District to justify its policy. If the Third Circuit had correctly followed strict scrutiny, it might have helped the parties find a way to reach a sensible compromise on a

difficult, sensitive issue. But that compromise is not available when a court abdicates its responsibility to scrutinize government policies with the requisite care.

Holt and *Hobby Lobby* are just two illustrations of the need for robust strict scrutiny of governmental intrusions into religious-liberty rights protected by the First Amendment or by statutes like the Religious Freedom Restoration Act. Those and other rights would be seriously compromised under the "feeble scrutiny" applied by the Third Circuit.

CONCLUSION

The Third Circuit's decision seeks a desired policy outcome instead of a sound legal outcome, in the process shattering the accepted strict scrutiny test adopted by this Court and other circuits. Indeed, the Third Circuit's approach threatens to transform the robust strict scrutiny that protects a number of important constitutional and statutory rights into a style of review that is not just "feeble," but toothless.

The petition should be granted.

Respectfully submitted,

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APPENDIX: List of Amici

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