

No. 18-658

In the Supreme Court of the United States

JOEL DOE, *et al.*,

Petitioners,

v.

BOYERTOWN AREA SCHOOL DISTRICT, *et al.*,

Respondents.

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

**BRIEF OF AMICUS CURIAE HANDS ACROSS
THE AISLE IN SUPPORT OF PETITIONERS**

JOEL A. READY
CORNERSTONE LAW FIRM
8500 Allentown Pike
Suite 3
Blandon, PA 19510
(610) 926-7875
joel@cornerstonelaw.us

AARON D. MARTIN
Counsel of Record
METTE, EVANS & WOODSIDE
3401 North Front Street
P.O. Box 5950
Harrisburg, PA 17110-0950
(717) 232-5000
admartin@mette.com

Counsel for *Amicus Curiae*,
Hands Across the Aisle

QUESTION PRESENTED

1. Given the 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 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.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The presence of naked bodies of the opposite sex acts as a trigger for PTSD, anxiety and the reliving of past trauma. 5

 A. Intrusive memories are frequently triggered by opposite sex body parts in vulnerable spaces. 5

 B. Title IX was created to protect women in educational settings, and women who have experienced trauma are uniquely disadvantaged by allowing the opposite sex into bathrooms and showers. 9

 C. Title IX requires state-run schools to ensure that sexual assault survivors are heard before changes are implemented. 11

 D. The issue is not whether Transgender students are more aggressive or more likely to cause an assault than other students—the issue is how the unwanted exposure of survivors to the opposite sex without consent will impact survivors’ educational rights. . . 15

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

<i>Tinker v. Des Moines</i> , 393 U.S. 503 (1969)	9
<i>Cannon v. Univ. of Chicago</i> , 441 U.S. 677 (1979)	9
<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	5
<i>Davis v. Monroe County Bd. Of Educ.</i> , 526 U.S. 629 (1999)	9
<i>Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.</i> , 135 S. Ct. 2507 (2015)	10

Legislative History

<i>Discrimination Against Women: Hearing Before the Spec. Subcomm. on Educ. on § 805 of H.R. 16098 of the Comm. on Educ. and Labor, 91st Cong., 2d Sess. (1970)</i>	9
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

Statistics

U.S. Bureau of Justice Statistics, <i>Special Report: Violence Against Women: Estimates from the Redesigned Survey</i> (NCJ-154348), August 1995, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=805	4
U.S. Bureau of Justice Statistics, <i>2003 National Crime Victimization Survey</i> (2003) http://www.bjs.gov/index.cfm?ty=pbdetail&iid=766	4

- U.S. Bureau of Justice Statistics, 2016 National Crime Victimization Survey (2016) <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245> 4
- U.S. Bureau of Justice Statistics, *Indicators of School Crime and Safety: 2017* (2017) (Indicator 17) <https://www.bjs.gov/content/pub/pdf/iscs17.pdf> 4
- Psychological Journals**
- Anke Ehlers, *The nature of intrusive memories after trauma: the warning signal hypothesis*, Volume 40, Issue 9, *Behaviour Research and Therapy* 995 (2002) 5
- Deborah A. Lee, Peter Scragg, Stuart Turner, *The role of shame and guilt in traumatic events: A clinical model of shame based and guilty-based PTSD*, Volume 74, Issue 4, *Psychology and Psychotherapy* 451 (2001) 6
- Office of the Assistant Secretary, Department of Education. “Dear Colleague Letter,” <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>, last accessed December 15, 2018 10
- ACLU Website, Title IX and Sexual Assault. <https://www.aclu.org/title-ix-and-sexual-violence-schools?redirect=cpreirect/39147>. Last Accessed on December 15, 2018 10

INTEREST OF THE *AMICUS CURIAE*¹

Hands Across the Aisle (HAA) is a bipartisan coalition of women united around shared opposition to gender identity-based legislation, which *amicus* sees as an assault on women's hard-fought sex-based protections.

HAA's members include many sexual assault survivors and their allies who advocate for safety and privacy for sexual assault survivors in traditionally private spaces. HAA is non-partisan. Its membership is socially and politically diverse.

SUMMARY OF ARGUMENT

The opposite-sex access policy challenged in this case risks a host of unintended consequences for survivors of sexual assault. Survivors can suffer from Post-Traumatic Stress Disorder, anxiety and "intrusive memories." Survivors are uniquely vulnerable to the triggers of partial or complete nudity of the opposite sex, and allowing individuals with opposite sex body parts into traditionally safe and private settings such as locker rooms, showers and bathrooms puts survivors at risk of triggering.

Even worse, the policy in this case was implemented without warning and without opportunity for students

¹ The parties were timely notified of, and have consented to, the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or their counsel made a monetary contribution to its preparation or submission.

to comment. When students did comment, their concerns were dismissed. If allowed to stand, such a dismissal of legitimate concerns and the implementation of a potentially triggering new policy without warning, will put student survivors across the country in constant fear of a potential change coming to their school district.

Survivors are entitled to bodily integrity and privacy, to having a voice in their education and to an education on equal footing with all other students. This Court should grant *certiorari* to consider how Title IX and the Fourteenth Amendment protect the needs of survivors of sexual assault from traumatic emotional triggers in public school settings.

ARGUMENT

Silenced and robbed. Objectified. Told to shut up, to keep their pain to themselves. Blamed for their injury, and told they should have behaved, dressed or spoken differently. This is how many stories of sexual assault begin. Sadly, for too many, this story replays itself even after the physical event of assault has terminated.

Sexual assault survivors live in fear. The fear manifests itself in panic attacks and nightmares, in day-dreams repeating the episode or imagining some fresh hell that may arise in the aggressor's sudden and unexpected presence, or in a new helpless episode in which the survivor is again subjected to an unwanted assault. These fears are exacerbated when survivors are not permitted to take refuge in spaces of privacy.

Survivors suffer from PTSD, "intrusive memories" and re-traumatization at a host of triggers. While schools cannot be held responsible to remove all of

these triggers from the educational environment, they can certainly be required not to introduce them as a matter of policy to student populations that will undoubtedly be populated with survivors.

Survivors are all too often taught that the assault was their fault for one reason or another. “Victim blaming” results in survivors being told that the way they dressed, acted or spoke brought on an attack. Survivors are also told they should have avoided a certain space, or even interacted with their attacker differently.

Now students are told that if they are fearful at the presence of a male body in the female bathroom, it’s their fault. They should avoid the bathroom, or go out of their way to avoid needing to urinate during the day. This response by school officials is demoralizing to survivors. Survivors now have to go further out of their way to seek safety and are forced to ostracize themselves to seek privacy.

This case illustrates the point clearly. A student is undressing in a locker room. He turns around and sees a girl wearing nothing above the waist but her bra. Regardless of the girl’s subjective understanding of her own gender, Joel Doe was immediately confronted with partial nudity while he himself was partly nude. This situation is the worst nightmare of a survivor, and the fact that it can happen at any school in America without any warning immediately puts every survivor in danger and constant fear in locker rooms and bathrooms.

Students who objected to this new policy learned quickly that they had no voice and saw their concerns

labeled as transphobia by an unsympathetic administration. Absurdly, their concerns about the situation were criticized as unsympathetic and abusive when it was they who were blindsided by this change.

Rape can be perpetrated by either sex and against either sex. Women are the most common target by far, by a factor of roughly 9 to 1.² In addition, female students in schools continue to report greater fear of attack or harm at school and away from school.³ Accordingly, while all students' rights are implicated by the creation of a sexually harassing atmosphere, young women are at the greatest risk. *Amicus* submits this brief in support of the petition for *certiorari*, and asks the Court to take into consideration the impact that policies like the policy that the Boyertown Area School District adopted will have on the psyche of students who are survivors of sexual assault.

²U.S. Bureau of Justice Statistics, *Special Report: Violence Against Women: Estimates from the Redesigned Survey* (NCJ-154348), August 1995, <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=805>; U.S. Bureau of Justice Statistics, *2003 National Crime Victimization Survey* (2003) <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=766>; U.S. Bureau of Justice Statistics, *2016 National Crime Victimization Survey* (2016) <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245>.

³U.S. Bureau of Justice Statistics, *Indicators of School Crime and Safety: 2017* (2017) (Indicator 17) <https://www.bjs.gov/content/pub/pdf/iscs17.pdf>.

I. The presence of naked bodies of the opposite sex acts as a trigger for PTSD, anxiety and the reliving of past trauma.

A. Intrusive memories are frequently triggered by opposite sex body parts in vulnerable spaces.

Survivors frequently suffer from “intrusive memories,” a phenomenon wherein a past victim of sexual assault is triggered into a largely-uncontrollable reliving of the sexual encounter upon being confronted with something which reminds them of the assault.⁴ These reminders are frequently subconscious.⁵ Furthermore, these intrusive memories “commonly consist[] of stimuli that were present immediately before the traumatic event happened or shortly before the moments that had the largest emotional impact (i.e. when the meaning of the event became more traumatic).”⁶

In recognition of this, schools have long required separate changing and bathroom facilities for the sexes, or where appropriate, separate living facilities in boarding schools and in higher education. *See United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (“Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex

⁴ Anke Ehlers, *The nature of intrusive memories after trauma: the warning signal hypothesis*, Volume 40, Issue 9, Behaviour Research and Therapy 995 (2002).

⁵ *Id.*

⁶ *Id.*

privacy from the other sex in living arrangements.”). Whether rooted in Title IX’s statutory protections or in the 9th and 14th Amendment’s protections of long-standing inalienable rights, students and our society have come to expect safety and privacy in locker rooms, showers and bathrooms.

Intrusive memories trigger visual memories of the actual assault, which aggravates the original trauma, and acts as the equivalent of a physical reinjury. The flashbacks incurred can trigger panic attacks and involuntary “fight or flight” responses and can lead to somatic symptoms, as well. Post-traumatic stress disorder, which is classified as an anxiety disorder with fear as the predominant emotion, is also deeply tied to guilt and shame.⁷ The shame factor of PTSD is intensified in situations where the sufferer is required to remove clothing, such as in doctor’s offices and in changing rooms, heightening the likelihood of an intrusive memory.⁸

Survivors report that seeing a person of the same sex as their assailant is a common trigger. This trigger can be intensified when the survivor sees someone of the same sex as their assailant in a position where the survivor is already feeling vulnerable. Survivor K.S.⁹

⁷ Deborah A. Lee, Peter Scragg, Stuart Turner, *The role of shame and guilt in traumatic events: A clinical model of shame based and guilt-based PTSD*, Volume 74, Issue 4, *Psychology and Psychotherapy* 451 (2001).

⁸ *Id.*

⁹ Survivors who have shared their stories will be identified by initials to protect their privacy.

reports that when bathrooms were open to members of the opposite sex in Washington state, “I was in denial for months . . . I kept telling myself this would not affect us due to the fact I have teens now. Reality was, it was already affecting our lives more than anyone knew. Flashbacks from the first 30 years of my life as well as my re-occurring nightmares returned with a vengeance.”

This was also C.P.’s experience. When her local gym began allowing men who identified as transgender women to use the women’s locker room, “the traumatic memories of powerlessness [from her prior sexual assault] came flooding back at full force.” C.P. became “hypervigilant” about her surroundings, and found herself “noticing everything and everyone around her all the time.” C.P. reports that triggers tied to the initial assault at her apartment complex are what she is most vigilant about avoiding. “Thirty years later, that hasn’t changed. It’s become a way of life.”

The memories of an assault that have been suppressed can be reawakened by these triggers. The mere seeing of a member of the opposite sex can awaken the memories—to say nothing of one who is naked or partially naked while the victim is also in a state of undress. The likelihood of a trigger causing an intrusive memory is heightened by the element of surprise. Sexual assault survivors have much to fear from the sudden and unexpected presence of persons of the opposite sex in vulnerable places, which can trigger somatic and psychological episodes that re-injure them at the points of their original trauma.

The situation is far worse for women whose initial assault happened when someone of the opposite sex

assaulted them in a bathroom or shower. PTSD-linked shame and guilt, combined with a sense of powerlessness, leave many survivors vulnerable to new trauma in similar settings as those where their attack occurred. Indeed, this is the situation that A.C. confronts every single day. As a college freshman, she studied late on a Friday night and went to the shower in her single-sex dorm. Aware of the drunken parties and frequent male visitors on her hall, she picked a shower where she could see the doors. Vulnerable and alone, she was horrified when the door to the bathroom open and a pair of men's boots appeared outside the shower. As the shower curtain was pulled back, she screamed and defended herself.

Like C.P., A.C. is now “hyper-aware” of her surroundings, and fears the need to use public restrooms. “In my work with domestic violence agencies throughout the years, I know many women like me who have resorted to using bathrooms as an escape route from the violent men trying to harm them,” she says. A.C. fears that changing social mores and laws will eliminate one of the only safe spaces a woman fleeing an attacker can seek. As A.C. reports, this leaves women “vulnerable, exposed and on the losing side of a very obvious power differential. It's really harmful to women like me who have endured enough trauma already.”

This last point—the power differential obvious when someone born as a man, no matter how he identifies, enters a bathroom—is raised by many survivors. Survivors have lived through an experience of being overpowered by someone stronger than they, and many live in fear of it occurring again. Some have

the irrational fear that their assailant will suddenly reappear, or that someone new will try the same thing. But the fear is based in the feeling that the survivor will be unable to fight off a man if he attacks her.

B. Title IX was created to protect women in educational settings, and women who have experienced trauma are uniquely disadvantaged by allowing the opposite sex into bathrooms and showers.

Students in a school setting are a captive audience. They are compelled by the state to attend school, and as such, constitutional rights attach to these students. *See, e.g., Tinker v. Des Moines*, 393 U.S. 503 (1969). Furthermore, Title IX was passed by Congress to ensure that women are not denied equal access to education and its benefits and that the environment created in the scholastic setting does not act to bar women from equal education. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (Title IX meant to apply the same protections of the Civil Rights Act against sex-based discrimination in government-funded education). *See also Discrimination Against Women: Hearing Before the Spec. Subcomm. on Educ. on § 805 of H.R. 16098 of the Comm. on Educ. and Labor*, 91st Cong., 2d Sess. (1970).

It is well established that “student-on-student sexual harassment [may] rise to the level of ‘discrimination’ for purposes of Title IX.” *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 639 (1999). The U.S. Department of Education’s Office for Civil Rights agrees, and in its “Dear Colleague Letters” has encouraged schools to be vigilant about responding to reports of, and protecting students from, instances of

sexual harassment. “The sexual harassment of students . . . interferes with students’ right to receive an education free from discrimination.”¹⁰ The ACLU agrees: “[W]hen students suffer sexual assault and harassment, they are deprived of equal and free access to an education.”¹¹ But schools have not fulfilled their Title IX obligations by merely *responding* to reports of assault—they must also avoid taking steps that trigger those already harmed by sexual assault.

Harassment takes many forms, and intent is not always a required element of harassment. In other fields of law, “disparate impact” claims have been developed to challenge actions taken by employers and schools that, despite lacking a specific discriminatory intent, nonetheless manifest “disproportionately adverse effect[s]” on protected classes. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507, 2513 (2015) (dealing with racial claims, rather than Title IX).

In crafting policies for students in sensitive places such as locker rooms and showers, schools should be cognizant that students forced to change clothes and shower in these facilities are impacted in different ways. Indeed, student Joel Doe was penalized for not

¹⁰ Office of the Assistant Secretary, United States Department of Education. “Dear Colleague Letter,” <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (last accessed December 15, 2018).

¹¹ ACLU Website, *Title IX and Sexual Assault*. <https://www.aclu.org/title-ix-and-sexual-violence-schools?redirect=cpreirect/39147> (last accessed December 15, 2018).

completing an assignment in this case—failing to change clothes for gym class. Students impacted by the trauma of sexual assault are already uniquely vulnerable to episodes triggered by PTSD, anxiety and fear in being forced to change clothes for classes, and in being forced to share common spaces where they are required to be naked. Forcing a student to do so in the presence of other students acts as an additional trigger—one confronting the survivor in a very direct way.

The need for a safe and private space when one is otherwise vulnerable is particularly important to trauma survivors. After innocence is stolen, vulnerability is lost, and the trauma can be of indefinite duration. Regardless of where the assault took place, survivors report feeling afraid to use public restrooms, lockers and showers. The act of removing clothes in a place immediately accessible to the public makes one feel uniquely vulnerable. The presence of members of the opposite sex—individuals with the opposite sex's body parts, regardless of their subjectively-chosen gender identity—is immensely threatening to someone recovering from trauma.

C. Title IX requires state-run schools to ensure that sexual assault survivors are heard before changes are implemented.

The record in the present case is silent as to whether any of the petitioners have survived sexual assault. However, as discussed above, discovering someone with the body parts of the opposite sex removing clothing in a locker room plays into one of the greatest fears of many survivors: being confronted in a safe place with someone of the opposite sex. In the

present case, Petitioner Joel Doe's testimony is that he was in his underwear when he first noticed the presence of a girl wearing only a bra for a top in the locker room. Doe's concerns were not only ignored by the administration—he was essentially told that his attitude was the problem. Doe ultimately removed himself from the school to pursue his studies elsewhere. This decision would not be an option for all survivors. Due to socioeconomic factors, scholastic considerations or simply as a matter of convenience, many survivors would be unable to remove themselves from the situation. More pointedly, they shouldn't have to.

C.P. relates the paralyzing effect of being unable to relocate after a sexual assault by a neighbor. She felt “powerless and scared” after the apartment manager where she and her assailant lived near each other told her there was nothing to be done unless the assailant were convicted of the sexual assault. Later, when C.P.'s local gym opened the locker rooms to both sexes, C.P. confronted the management about her concerns. She was once again told that there was nothing that could be done for her until an assault occurred, and that her “emotional distress” was her problem. Like the students in this case who were told not to make things “uncomfortable” for the students identifying as transgender, C.P. was told that she was prohibited under state law from even attempting to determine whether individuals were truly transgender, or whether they were posing in order to get access to the women's locker rooms and showers. “It's one thing to have established authority systems refuse to protect you,” she says. “It's another thing entirely when you're not legally allowed to protect yourself.”

The school's response to the concerns of the students in this matter raises the same concerns that C.P. raises. The students were told not to speak of their concerns, and told that they were obligated to make the situation work. Finally, they were told that if they had a problem with the new policy, they should remove themselves from the situation and use a single-stall bathroom. In other words, a survivor is placed in the position of having to take themselves out of the situation, having to step up and reveal that there is something in their own psyche that could be triggered by the situation, to invite inquiring minds of fellow students to ask triggering questions.

The lack of gravity with which the school district handled Doe's concerns is startling, and this Court should examine whether schools run afoul of Title IX considerations in such situations. Because roughly 90% percent of survivors are female, this policy peculiarly disadvantages women.¹² To implement a policy that disproportionately triggers women in school directly undermines the directives of Title IX to ensure equal, safe access to schools.

Students suffering from the symptoms discussed above—PTSD, intrusive memories, fear—will naturally suffer in their schoolwork. Students are less likely to perform well, less likely to engage in extra-curricular activities, less likely to take the chances necessary to prepare for and seek out education at the next level when they are being forced to relive memories of their sexual assaults.

¹² See n. 2, *supra*.

The objectification that results in an assault is relived by survivors when they are silenced. Survivors who are not given a chance to voice their concerns about the opening of bathrooms and locker rooms to the opposite sex are left feeling, once again, as though they have no voice, no say, no access to the power centers where decisions are made. They are told, yet again, to shut up as their rights and privacy are stolen.

K.S. speaks for many adults who have weighed in on this issue when she explains her motivation for speaking up. “I cannot sit back and do nothing . . . My mind keeps saying, if I do nothing, I am no better than all the adults from my childhood that could have and should have stepped up to help me.” K.S. was berated by adults in her life when she tried to tell them about her assault. Her mom blamed her for seducing a family friend who molested her, despite the fact that she was not even yet a teenager when the first of many sexual assaults by this same man occurred. She wants survivors to have a voice in policy-making in schools, but fears that students who are already more likely to be afraid to speak up than their peers will be further damaged in their self-image when school districts tell them they’re not “accepting” because they voice their concerns.

Survivors should be given a voice—and particularly when their safety and privacy are proposed to be compromised.

D. The issue is not whether Transgender students are more aggressive or more likely to cause an assault than other students—the issue is how the unwanted exposure of survivors to the opposite sex without consent will impact survivors’ educational rights.

Amicus bears no animus toward transgender individuals. It is a sad component of public discourse today that advocacy for a disadvantaged group’s rights is often painted as being against that of others. Some might respond to the genuine concerns raised by *Amicus* by arguing that assaults can happen between members of the same sex and that transgender individuals are more peaceful than so-called “cis-gender” individuals. *Amicus* does not believe that those identifying as transgender are more likely to perpetrate a sexual assault than a “cis-gender” individual. The primary point *Amicus* wishes to emphasize is that the presence of male bodies in various stages of undress in spaces where a woman expects privacy is a uniquely disconcerting phenomenon to a survivor of assault, especially where the survivor is given no warning of the change and no voice to oppose it.

When survivors are confronted with a naked body of the opposite sex, they suffer a very real injury. That this type of policy can be implemented without warning in a space where a survivor is compelled by law to be—a school—is a threat to the psychological well-being and sense of safety for student survivors everywhere.

CONCLUSION

Our society is awakening to the needs of survivors of sexual assault. Colleges and universities are implementing policies to combat sexual exploitation on campus more directly, and workplaces are working to find new ways to level the playing field for those who have been victimized. It is disconcerting then, to find that some schools would casually jeopardize the privacy and safety of survivors without so much as a word of warning and without so much as an opportunity to comment. Schools must be instructed that the bodily privacy of students is paramount, that violation of that privacy is a violation of both Title IX and the Fourteenth Amendment, and that students have a right to safety in showers and locker rooms

This Court should grant *certiorari* in this case to re-establish the privacy protections for sexual assault survivors that have historically attached to same-sex restrooms and locker rooms in schools across the country. The presence of the opposite sex in school locker rooms and bathrooms can be a trigger and very traumatic for sexual assault survivors. Such presence violates survivors' rights under Title IX and the Fourteenth Amendment.

Respectfully Submitted,

AARON D. MARTIN
Counsel of Record
METTE, EVANS & WOODSIDE
3401 North Front Street
P.O. Box 5950
Harrisburg, PA 17110-0950
(717) 232-5000
admartin@mette.com

JOEL A. READY
CORNERSTONE LAW FIRM
8500 Allentown Pike, Suite 3
Blandon, PA 19510
(610) 926-7875
joel@cornerstonelaw.us

Counsel for *Amicus Curiae*,
Hands Across the Aisle

December 2018