No. 20-62

IN THE

Supreme Court of the United States

PARENTS FOR PRIVACY, *et al.*,

Petitioners,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, *et al.*,

Respondents.

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

RESPONDENT DALLAS SCHOOL DISTRICT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent is a school district. A transgender boy who was a student in the district asked whether he could use the boys' bathroom at his high school. The district agreed that he could. Petitioners are some parents of other students in the district. They demanded that the district force the transgender boy to use the girls' bathroom. Did the district violate these parents' civil rights when it refused to force the transgender boy to use the girls' bathroom? Did the district violate other students' civil rights when it refused to force the transgender boy to use the girls' bathroom?

PARTIES TO THE PROCEEDINGS

The petition correctly states the names of all parties to the case.

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INTRODUCTION

Five years ago, the respondent school district allowed a transgender boy to use the boys' bathroom and locker room at the high school he attended over the objections raised by some district parents. These parents formed a group called Parents for Privacy to advance their views that multi-user bathrooms must remain strictly segregated by sex. This group then sued the district over the district's refusal to accede to its views on bathroom use. The complaint accordingly asked for a court order forcing the transgender boy back into the girls' facilities.

The complaint made four claims of relevance to support its requested relief. Three of these were based on supposed rights secured by the Constitution, while the last was brought under Title IX. The district court dismissed these claims after finding that each was fundamentally misconceived in one or more ways, and that neither the Constitution, Title IX, nor any other law could possibly entitle the parents to a court order forcing a transgender child into bathrooms or locker rooms that did not match their gender. The Ninth Circuit affirmed, largely adopting the district court's reasoning.

There has only been one other circuit-level opinion that dealt with claims made by parents who objected because a school allowed a transgender child to use the bathroom or locker room that matched their gender. Just as happened here, that one other opinion affirmed the district court's dismissal of those claims. *See generally Doe v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019). (This Court subsequently denied a petition for review challenging that affirmance.)

Parents for Privacy as the Petitioners here therefore cannot and do not cite any circuit split involving the dismissal of the kinds of claims they attempted in their complaint. Instead, their petition for review tries to manufacture splits by comparing the Ninth Circuit's affirmance with decisions from other federal courts of appeal in scenarios that are only putatively analogous. The petition adopts a similar tactic in devising "conflicts" between the Ninth Circuit's decision and this Court's precedent.

For example, Petitioners made a claim for an alleged due process violation of the right students have to their bodily privacy. The petition characterizes the Ninth Circuit as dismissing this claim after finding that public school students do not enjoy any right to bodily privacy. Whereas, by contrast, other courts have held that even *prisoners* have that right. Incredulous that the Ninth Circuit could have found that prisoners have more rights than students, the petition for review asks this Court to resolve the discrepancy.

The petition has innumerable shortcomings when it comes to identifying any of the "compelling reasons" this Court's Rule 10 says would warrant the Court's exercise of the discretion it has to grant review. Among other things, the complaint's requested relief is moot since the transgender boy graduated long ago; the petition largely asks for simple error correction since at heart it just argues that the Ninth Circuit misapplied settled law to the set of facts before it; and many of the arguments the petition makes, and even the theories of liability it advances, were not raised below let alone addressed by the lower courts.

But one shortcoming overwhelms all others. Petitioners continue to perpetuate the same mistakes of

law that doomed their claims in the first place. For example, the petition for review more-or-less gives an accurate description of how courts have assessed bodily privacy claims made by prisoners. But Petitioners remain oblivious to what those claims are fundamentally about, and what that means when it comes to their own bodily privacy claim.

Petitioners supported their bodily privacy claim with allegations that the school district had created a "risk" that the transgender boy and cisgender boys—that is, fellow students—might see each other undressing. The claim failed for several reasons. For one, the transgender boy and cisgender boys never actually did see each other undressing. So even if the bodily privacy right exists to protect against mere "opposite sex nudity" as Petitioners believe, there was none.

But more to the point here, bodily privacy claims involving prisoners are about the limits due process places on the power of *guards* to demand to see prisoners naked. Thus Petitioners' bodily privacy claim failed because it was not based on allegations that any school *official* had used his power to watch students undressing.

The rest of Petitioners' claims failed in the same way: because they were all misconceived, the complaint never alleged or could have alleged facts to establish the elements of those claims. The petition asks this Court to review the Ninth Circuit's decision affirming the dismissal of their claims mostly by arguing that it created irreconcilable "conflicts" with decisions from other circuit courts of appeal or this Court's precedent. However, the only conflicts are those traceable to the various but basic flaws behind each of Petitioners' claims.

STATEMENT OF THE CASE

A. *Factual Background*

The respondent school district operates the lone high school in rural Dallas, Oregon. In September 2015, a student at that school who was born and who remained biologically female publicly identified as a boy. He then asked school officials whether he could use the boys' bathroom and locker room. (Pet. App. 204a–206a.) The district agreed to his request over the objections raised by some parents of other students in the district. Thereafter and until he graduated three years later, the transgender boy[1] used the boys' bathroom and locker room—that is, the facilities that matched his gender—without incident. (Pet. App. 209a–210a, 259a–262a.)

Despite a complaint that runs about 17,000 words, the paragraph above lists the only alleged facts that are relevant to the dismissed claims for which Petitioners seek review. Suffused throughout the petition, however, are charges about how the district "compelled" students to "expose their bodies to opposite sex students," and to "embrace beliefs" that were "at odds" with their religion, etc.

The district court allowed a public interest group named Basic Rights Oregon to intervene in the suit as a defendant. Basic Rights Oregon, or BRO, has filed

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[1] A transgender person does not identify with the gender that is typically associated with their sex at birth, while a cisgender person does. For example, a transgender boy is someone who identifies as being a boy despite being born biologically female. A transgender person is referred to by the pronouns that match the gender with which they identify.

an opposition brief too. That opposition brief addresses these charges. In sum, BRO explains that not only are these charges entirely new, they contradict Petitioners' prior allegations and admissions. No student was "compelled" to do anything, except perhaps to refrain from harassing the transgender boy. Again, the only relevant event the complaint alleged was that the district allowed the transgender boy to use the boys' bathroom and locker room.

Meanwhile, BRO explains, the boys' bathroom and locker room at Dallas High School are typical in that they include private toilet and shower stalls. The school district also gave cisgender boys the option to use several other single-occupancy facilities not normally available for students if, despite the stalls, they still had privacy concerns about being in the same bathroom or locker room at the same time as the transgender boy. And of note, BRO points out that Petitioners conceded during litigation that none of their children ever saw the transgender boy undressing or using the bathroom, or vice versa. In fact, they never even "encountered" the transgender boy in the bathroom or locker room before he graduated.

Petitioners admittedly based the complaint's claims only on the "risk" that cisgender boys *could have* encountered the transgender boy in the bathroom or locker room, and they then *could have* seen each other undressing or using the bathroom. In other words, all the claims were based on Petitioners' objection to simply the transgender boy's "presence" in the boys' bathroom and locker room since that flouted their belief that those facilities must be kept strictly segregated by sex.

B. *Proceedings Below*

The parents who objected to the transgender boy using the boys' bathroom and locker room formed a group called Parents for Privacy and, along with five individuals, sued the respondent school district in November 2017. The petition for review was filed with this Court on behalf of Parents for Privacy, but only three of the original five individual plaintiffs. Those three are the Gollys and Nicole Lillie. (Pet. ii.) As alleged in the complaint, the Gollys are the parents of a cisgender *girl* who attended high school with the transgender boy, and a student who was in middle school when the transgender boy was in high school. Obviously, neither of the Gollys' children were affected by the district's decision to allow the transgender boy to use the boys' bathroom and locker room. Meanwhile, the complaint made no allegations about Lillie whatsoever. For that reason, the district court dismissed her from the suit. (Pet. App. 85a.)

The defendants named in the complaint included the respondent school district. The complaint also named many other defendants besides the school district, like the federal government. Later, the district court allowed Basic Rights Oregon, a non-profit public interest organization, to intervene as a defendant. (Pet. App. 82a.)

The complaint's prayer for relief asked the court to order the school district to "permit only biological males to enter and use district's boys' restrooms, locker rooms and showers." (Pet. App. 254a–257a.) The complaint made eight claims to support this requested relief. However, Petitioners are now only pursuing four of those claims, and they are only pursuing those claims against the school district.

Three of these claims were constitutional claims. Two were made under the Due Process Clause of the Fourteenth Amendment. The first was nominally made on behalf of male, cisgender classmates of the transgender boy. The complaint alleged that they suffered a substantive due process violation of their fundamental right to "bodily privacy." This claim was supported by allegations that the school district had created a never-realized "risk" that the transgender boy and cisgender boys might see each other undressing or using the bathroom. (Pet. App. 233a–237a.)

The second due process claim was nominally made on behalf of their parents. The complaint alleged that they suffered a substantive due process violation of their fundamental right to "direct the education and upbringing of their children." This claim was supported by allegations that the school district violated that right when it decided, against some parents' wishes, to let the transgender boy use the boys' bathroom and locker room. (Pet. App. 238a–241.)

The complaint's third constitutional claim was made under the Free Exercise Clause. This claim was supported by allegations that Petitioners have religious beliefs wherein for reasons of "modesty" multi-user bathrooms and locker rooms must remain strictly segregated by sex. The school district kept Petitioners from being able to practice these beliefs about modesty, and thereby violated their free exercise rights, when it allowed the transgender boy to use the boys' bathroom and locker room. (Pet. App. 249a–251a.)

Finally, the complaint made a claim under Title IX. Petitioners supported this claim by alleging that the transgender boy's mere "presence" in the

boys' bathroom and locker room generated an unlawful, "sexually harassing hostile environment" for the students at his school. (Pet. App. 241–247a.)

All the defendants moved to dismiss the complaint in its entirety for failure to state claims on which relief could be granted. On July 24, 2018, the district court found that the complaint indeed failed to state any claims for relief. It also found that there was no way the complaint could be amended to entitle Petitioners to an order forcing the transgender boy into the girls' bathroom and locker room. The court therefore granted the defendants' motions, and dismissed the complaint with prejudice. (Pet. App. 78a–172a.)

Petitioners appealed the judgment dismissing their complaint with prejudice to the Ninth Circuit. The Ninth Circuit agreed with the district court's reasoning, likewise found that each of the claims were fatally flawed, and therefore affirmed. (Pet. App. 1a–77a.) Petitioners did not then file a petition for a rehearing or a rehearing en banc.

REASONS FOR DENYING THE PETITION

The petition for review pursues four of the claims made in Petitioners' complaint. As described, those claims include two substantive due process claims, one nominally made on behalf of cisgender boys, the other their parents. The third was a free exercise claim. And the fourth claim was brought under Title IX. The district court dismissed these claims after finding that they were based on misunderstandings or misapplications of the law, and were therefore legally deficient. The Ninth Circuit agreed and affirmed.

Despite couching its request for review in terms meant to satisfy the "compelling" Rule 10 reasons that would typically warrant the grant of review, the petition really just argues that the complaint's claims were not, in fact, legally deficient. The petition's transparent request for simple error-correction should be grounds enough to deny it. But in addition and as explained below, the Ninth Circuit was correct to find that Petitioners fundamentally misconceived each of the claims whose dismissal they are asking this Court to review.

I. The substantive due process claim Petitioners made on behalf of students failed because it was not based on the alleged deprivation of any recognized fundamental right

Petitioners made a substantive due process claim under the Due Process Clause for an alleged violation of the "fundamental right to bodily privacy." The complaint described this right as simply protecting against "opposite sex nudity." By allowing the transgender boy to use the boys' bathroom and locker room, the school district created a "risk" that he might see cisgender boys undressing. In creating this "risk" the school district thereby violated the right. (Pet. App. 233a–237a.)

As covered above, the petition changes what the complaint originally alleged from the district having created a "risk" that students might see each other undressed, to the district having "compelled [students] to fully undress…in the presence of a student of the opposite sex." (Pet. 21.) Not only did Petitioners never

tell the courts below that they could amend the complaint to add any such allegations, but they conceded the impossibility.

In any event, the petition characterizes the Ninth Circuit as basing its decision to affirm the dismissal of the bodily privacy claim on a holding that public school students do not enjoy any such right. (Pet. 18.) The petition goes on to argue that this decision "conflicts" with decisions from other cases which held, to the contrary, that students—and even prisoners(!)—have a right to bodily privacy that must be weighed against the necessity of government action intruding on that right. Because the Ninth Circuit mistakenly held that students have no right to bodily privacy, it never balanced the school district's intrusion on that right with its justification for the intrusion. Indeed, if it had, the Ninth Circuit would have found the justification wanting.

Students have a fundamental right to bodily privacy like anyone else does, and neither the district court nor the Ninth Circuit held otherwise. Rather, they explained that the right as protectable through a substantive due process claim derives from the Fourth Amendment's guarantee against "unreasonable searches" at the hands of government officials. Like so many other fundamental rights, the protection the right is afforded by substantive due process is interstitial. Sometimes an official's intrusion on our fundamental right to bodily privacy does not qualify as a "search" and so cannot be vindicated as it normally would through the Fourth Amendment.

To fill this gap, courts have found the right to also be protectable by substantive due process. *See*, *e.g.*, *York v. Story*, 324 F.2d 450 (9th Cir. 1963). As such, the

Due Process Clause protects the sight of our naked bodies, for example, from the prying eyes of a government official when the Fourth Amendment does not apply because there was no search. *Cf. Brannum v. Overton County School Board*, 516 F.3d 489, 494 (6th Cir. 2008) (explaining that bodily privacy claims are preferably resolved under the Fourth Amendment when possible). Meanwhile, the right is implicated regardless of the respective sexes of the leering official and the subject he leered. *Ioane v. Hodges*, 903 F.3d 929, 935 n. 2 (9th Cir. 2018) (surveying cases to make this point). Though just as in a Fourth Amendment analysis, if the official and the subject are of the opposite sex then the official's justification for his intrusion must typically be that much stronger to avoid a constitutional violation. *Id*.

Given the above, Petitioners therefore misconceived their bodily privacy claim for at least two, basic reasons.

One, Petitioners did not base the claim on any allegation that a school *official* had, for example, lasciviously videotaped students changing clothes. *See*, *e.g*., *Brannum*, 516 F.3d at 491–92 (involving a bodily privacy claim resolved under the Fourth Amendment that was based on similar allegations). Rather, the claim challenged students' proximity to a fellow *classmate* in the school bathroom and locker room. In effect, the complaint imagines that the bodily privacy right means that the government must police its facilities to ensure that opposite-sex citizens do not see each other naked. But no case has ever described the bodily privacy right as limiting anything other than the power of an *official* himself to invade a subject's bodily privacy by viewing the subject at least partially unclothed.

And two, Petitioners never suffered a redressable injury even under their mistaken notion that the government must ensure that opposite-sex citizens do not see each other naked.[2] *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013) (describing that a plaintiff has no standing to pursue a claim unless he has suffered an "actual" or "certainly impending" injury). As explained, the complaint's bodily privacy claim was based only on allegations that the transgender boy *might have*, but never did, observe cisgender boys undressing or using the bathroom.

The petition for review cites several cases to support its argument that the Ninth Circuit erred in affirming the dismissal of the bodily privacy claim. But even their own description of these cases belies the ostensible reason Petitioners cited them. While these cases do concern bodily privacy rights, each only serves to highlight where Petitioners' attempted bodily privacy claim fails.

For instance, the petition describes a string of Fourth Amendment cases deciding the constitutionality of school searches. Two involve school drug testing where a school official accompanied a student of the *same* sex to the bathroom to ensure the fidelity of urine samples. (Pet. 19–21.) In both cases this Court held that the privacy intrusion did not violate the Fourth Amendment because the school's interest in conducting the searches outweighed the students' interest in maintaining their privacy.

Petitioners praise these cases as giving examples

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[2] That is, apart from the fact that none of the identified Petitioners were male, cisgender classmates of the transgender boy.

of the kinds of reasons sufficient to justify a school official's intrusion of a student's bodily privacy. This stands in contrast, the petition argues, to the insufficient reason the school district gave for why it allowed the transgender boy to use the bathroom and locker room that matched his gender. But Petitioners completely miss the broader context and the implications that has for their claim: these cases explore the limits the Constitution places on an *official's* power to invade a person's bodily privacy through a *search*.

Likewise, the petition describes at length *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364 (2009). In *Safford*, the petition reports, this Court found that "a school violated a student's right to bodily privacy when it compelled her to expose her private parts to two female staff members as part of a search for contraband prescription drugs." (Pet. 22.) The description is accurate, though it neglects to say that the bodily privacy right was vindicated through the Fourth Amendment, not the Due Process Clause of the Fourteenth Amendment. But again, Petitioners miss the case's salient attributes: this Court invalidated the *search* of a student by a school *official* and where, incidentally, the student and the official were of the *same* sex.[3]

This section of the petition continues in the same vein with cites to several federal courts of appeal cases on the bodily privacy rights of prisoners. (Pet. 29–30.)

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[3] As explained, the bodily privacy right is implicated regardless of the respective sexes of the official and the subject. Assume for the sake of argument that Petitioners were otherwise correct that the government must ensure that fellow citizens never see each other undressing. This would lead to the nonsense result that the government must police its bathrooms and locker rooms to keep people of the *same* sex from seeing each other undressing.

Surely if prisoners have bodily privacy rights, the petition argues, then so too must students. But just like the cases involving the bodily privacy rights of students, these cases dealt with the question of whether and when *guards* may constitutionally strip-search prisoners and the like. These cases and all the others Petitioners cite therefore do not "conflict" in any way with the Ninth Circuit's decision to affirm the dismissal of the complaint's bodily privacy claim.

II. The substantive due process claim Petitioners made on behalf of the parents of students failed because it was not based on the alleged deprivation of any recognized fundamental right

Petitioners made a substantive due process claim for a deprivation of the fundamental right that belongs to parents to decide how their children should be raised. To support this claim, the complaint alleged that the school district's unilateral decision to allow the transgender boy to use the boys' bathroom and locker room usurped what should have been a parent's exclusive role to choose whether their sons would "risk" being "exposed" to a transgender boy in those facilities. (Pet. App. 238a–241a.) The claim was nominally made on behalf of the parents of cisgender boys even though none were specifically identified in the complaint, much less named as an individual plaintiff.

Parents have a fundamental right to make decisions about how to raise their children, which includes a right to decide how they should be educated. Under that right, the state cannot prohibit parents from sending their children to parochial or other private schools, or from educating their children at home.

Likewise, the state cannot make parents send their children to public school. *See generally Pierce v. Society of Sisters*, 268 U.S. 510 (1925). But parents who *do* elect to send their children to public school have no constitutional right to dictate what the school teaches their children, or how the school operates. *See*, *e.g.*, *Fields v. Palmdale School District*, 427 F.3d 1197, 1206–17 (9th Cir. 2005).

In dismissing and affirming the dismissal of the due process claim made by the parents, the district court and the Ninth Circuit correctly explained the contours of the right parents have to make decisions about their child's education. (Pet. App. 44a–57a, 162a–165a.) Namely, if a public school teaches or otherwise operates contrary to a parent's wishes, then due process affords that parent only the right to remove their child from public school so that he can be educated to the parent's liking.

Petitioners argue that the Ninth Circuit's explanation on the limits of a parent's right to decide how their children should be raised "conflicts with" this Court's precedent. (Pet. 11–17.) However, none of the supposedly conflicting precedent the petition cites involves the claim at issue here. That is, a substantive due process claim based on allegations that a public school violated a parent's fundamental right to decide how their children should be raised through some aspect of its curriculum or operation.

For example, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), invalidated on First Amendment grounds a state requirement, enforceable through various penalties, that all students salute the flag. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court held that a state infringed on the

free exercise rights of a religious sect's members by making formal education (via public school or otherwise) compulsory past the 8th grade. And in *Troxel v. Granville*, 530 U.S. 57 (2000), this Court struck down a state law that potentially gave non-parents visitation rights over the objection of the parents. And so on.

In fact, this Court has never addressed whether and when parents would have a fundamental due process right to dictate a public school's curriculum or its operation. But as the cases the Ninth Circuit cited in its opinion indicate, the courts of appeal are unanimous that the fundamental right that belongs to parents to raise their children as they see fit does not extend that far.

The petition for review also alleges that the transgender boy's mother objected to the school district's decision to allow him to use the boys' bathroom and locker room. Therefore, the petition argues, the school district infringed on her fundamental right as a parent to make decisions for her child on which bathroom and locker room she wanted him to use. (Pet. 15–17.)

However, the transgender boy's mother was not a plaintiff and so is not included among the Petitioners, and the complaint makes no allegations whatsoever about what she wanted for her child. Likewise and regardless of what was included in the complaint, Petitioners did not pursue a due process claim on her behalf in their briefing to the courts below nor, again, did their briefing include any allegations about which bathroom or locker room the transgender boy's mother preferred for her son.

Of course, the courts below did not address

whether the mother stated or could have stated a substantive due process claim from allegations that she would have liked for the school district to force him to use the girls' bathroom and locker room. This Court normally will not consider new arguments that either were not pursued by petitioners in the courts below, or were not addressed by those courts. *See*, *e.g.*, *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011); *Baldwin v. Reese*, 541 U.S. 27, 34 (2004).

Regardless, if the mother disagreed with the school district's decision to allow her son to use the boys' bathroom and locker room, then she had a fundamental right to remove her child from its school. But she had no more of a right to dictate transgender bathroom use in her son's school than any other parent.

III. Petitioners' free exercise claim failed because it was not based on the alleged deprivation of their free exercise rights

Petitioners made a claim under the Free Exercise Clause. They supported the claim by alleging that the school district's decision to allow the transgender boy to use the boys' bathroom and locker room kept them from "practicing" their religious beliefs about what "modesty" requires. Under those beliefs, members of "the opposite biological sex" are not supposed to be in each other's "presence" while they are undressing or using the bathroom. (Pet. App. 249a–251a.)

A. *Petitioners never alleged or argued below that Respondent prohibited them from exercising their religious beliefs*

The Free Exercise Clause says that it protects against government action "prohibiting the free exercise" of religion. The "crucial word in the constitutional text is 'prohibit.'" *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 451 (1988). In context, *prohibit* means that a plaintiff who wants to state a free exercise claim must identify, as the *first* element of his claim, how the government barred him from acting, or made him act, through some mandate backed by the government's coercive power. Whereas a plaintiff who merely alleges that he was unable to practice his religion as the byproduct of some government decision which did not *itself* mandate his action or inaction has failed to make out the first element of a free exercise claims. Two cases illustrate the difference.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the plaintiffs had challenged a law which banned a certain drug. They alleged that the law violated their free exercise rights because they needed to use the drug in their religious ceremonies. Ultimately this Court held that the law did not violate the plaintiffs' free exercise rights because it did not satisfy the *second* element necessary to make out a free exercise claim. However, the law clearly satisfied the *first* element inasmuch as it *prohibited*, under threat of criminal penalties, a practice the plaintiffs alleged was necessary to their religion.

In *Lyng*, by contrast, the plaintiffs had challenged a U.S. Forest Service decision to build a road

and to permit timber harvesting in a certain wilderness by alleging that this wilderness was critical to their religious practices. *Lyng*, 485 U.S. at 442–43. This Court presumed that the Forest Service's decision would have "devastating effects" on the wilderness and hence the plaintiffs' religious practices. *Id*. at 449, 451. However, the decision was not any kind of law that "coerced" the plaintiffs into doing or refraining from any act whatsoever; in other words, the decision *itself* did not mandate the plaintiffs' action or inaction. *Id*. at 449–50. Rather, the unfortunate effects the decision had on the plaintiffs' religious practices were only "incidental" to that decision. *Id*. at 450. Thus the plaintiffs failed to state a free exercise claim because they had not properly alleged that the Forest Service had *prohibited* them from practicing their religion. *Id*. at 452.

Petitioners' free exercise claim obviously suffered from the same fatal defect as the claim made by the plaintiffs in *Lyng*. Petitioners alleged that the decision they have challenged prevented them from practicing their religious beliefs about "modesty." But the school district's decision was not, for example, a law that required cisgender and transgender students to change clothes in front of each other under threat of criminal penalties. Again, the decision merely allowed the transgender boy to use the bathroom or locker room that matched his gender.

As in *Lyng*, therefore, Petitioners' free exercise claim failed because the alleged consequences the school district's decision had on their religious practices were incidental to a decision that came with no government-backed proscription or compulsion directed at Petitioners themselves. The religious *objections* Petitioners had to the transgender boy's use of

the boys' bathroom and locker room, untethered to an actual *prohibition* of their religious practices, did not give them a claim under the Free Exercise Clause to challenge his use of those facilities.

B. *Petitioners only now argue that Respondent prohibited them from exercising their religion from allegations they disavowed to the lower courts*

In *Smith*, this Court held that the drug laws the plaintiffs challenged did not violate their free exercise rights because, though they *prohibited* the plaintiffs from fully practicing their religion, those laws were "neutral" and "generally applicable." That is, the drug laws were not enacted with the aim of restricting or burdening any religious beliefs or practices, and they did not on their face or in their enforcement selectively restrict or burden any religious beliefs or practices. Thus the plaintiffs' religion could not excuse them from having to comply with the drug laws just the same as everyone else. *Smith*, 494 U.S. at 878–79.

This Court in *Smith* went on to say, however, that if a law *did* have the effect of prohibiting a plaintiff from practicing his religion, and it was *not* neutral and generally applicable, then the plaintiff would be excused from compliance if the law was not the least restrictive way to satisfy a compelling government interest. *Id*. at 882–89. Petitioners' arguments to the courts below took this cue from *Smith*.

Namely, they glossed over the *first* element of any free exercise claim which, as described, requires a plaintiff to properly allege that the government *pro-*

hibited him from practicing his religion. Instead Petitioners only made arguments that nominally went to the *second* element of any free exercise claim. Thus Petitioners argued that the school district's decision to allow the transgender boy to use the boys' bathroom and locker room was not neutral and generally applicable and, moreover, that it failed a strict-scrutiny standard or review.

Though Petitioners had glossed over the first element of any free exercise claim, both the district court and the Ninth Circuit addressed the claim on the terms in which Petitioners presented it. In short, the courts explained that their free exercise claim failed because the complaint did not allege facts showing that the school district decided to allow the transgender boy to use the boys' bathroom and locker room as a way to *target* Petitioners' religious beliefs or practices. Rather, the district's decision was inarguably motivated by the goal of ensuring that the transgender boy had access to a bathroom or a locker room that suited his gender. The conclusion that the school district had not targeted Petitioners' religious beliefs or practices remained unaffected, the courts continued, by the fact that the district made and stuck to its decision despite the religious objections Petitioners raised. (Pet. App. 57a–75a, 166a–169a.)

Petitioners argue for the first time in their petition for review that the school district actually *did* "compel" them to "act" contrary to their religious beliefs. The petition alleges, for example, that the school district "compelled" students "to expose their bodies and be exposed to bodies of opposite sex classmates." (Pet. 33.) As covered above, nothing of the kind happened by Petitioners' own previous admissions and, again, the decision Petitioners are challenging on its

face did nothing more than allow the transgender boy to use the boys' bathroom and locker room. Until their petition for review, the religious objections Petitioners had to that decision were based only the "risk" it created that students of the opposite sex might "expose their bodies" to each other.

Regardless and as described above, this Court normally will not consider new arguments that either were not pursued by petitioners in the courts below, or addressed by those courts. Here, Petitioners never argued that the school district *prohibited* them from exercising their religious beliefs by "compelling" them to "act" contrary to those beliefs. Rather, their arguments were focused exclusively on why the decision they challenged was supposedly not neutral and generally applicable. Likewise, the courts below never addressed whether Petitioners satisfied the *first* element of any free exercise claim. Rather, they exclusively rebutted Petitioners' arguments that nominally went to the *second* element of a free exercise claim.

Of course, the petition for review also argues that the Ninth Circuit erred in finding that their complaint failed to allege facts to satisfy this second element. In essence, Petitioners argue that the school district's decision to allow the transgender boy to use the boys' bathroom and locker room was "hostile" to their religious beliefs, and so not neutral and generally applicable, because the district refused to accede to their religious-based objections. (Pet. 31–35.)

That argument completely misconceives this element of a free exercise claim. As *Smith* and other cases explain, including those Petitioners themselves cite, government action is not neutral and generally applicable if it actively *targets* a religious belief or

practice. Whereas, here, Petitioners fundamentally based their free exercise claim on allegations that the school district *ignored* their religious beliefs and practices when it allowed the transgender boy to use the boy's bathroom and locker room.

IV. The Title IX claim Petitioners made on behalf of students failed because they alleged no sexually hostile environment

Title IX provides that "no person…shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity" offered by a public school. 20 U.S.C. § 1681(a).

A. *Petitioners pursued the Title IX claim below exclusively under a peer sexual harassment theory but alleged no peer sexual harassment*

Though Title IX only prohibits a school's intentional discrimination by a school itself, a school can nonetheless be liable under Title IX for not acting to stop known "student-on-student" sexual harassment it had the ability to control. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 637–38 (1999). To be liable under Title IX for peer sexual harassment, a school must have had actual knowledge of, and been deliberately indifferent to, in-school harassment "on the basis of sex" that was so severe, pervasive, and objectively offensive that it deprived the victim of access to an education. *Id*. at 641–53.

Petitioners' complaint and briefing to the lower

courts pursued a Title IX claim under a peer sexual harassment theory. To support their Title IX claim under that theory, Petitioners alleged and argued that the transgender boy's mere "presence" in the boys' bathroom and locker room equated to the unlawful "sexual harassment" of any cisgender boys who might have been there too. (Pet. App. 242a–247a.)

The word *harassment* means something like conduct that is intentionally and repeatedly directed at someone, and that disturbs them and serves no legitimate purpose. Sexual harassment, then, is harassing conduct perpetrated because of the victim's sex. As the district court held, (Pet. App. 140a–150a), and as the Ninth Circuit affirmed, (Pet. App. 36a–44a), Petitioners' complaint failed to state a Title IX claim for peer sexual harassment because it did not allege that the transgender boy did anything in the boys' bathroom or locker room but mind his own business. Meanwhile, Petitioners never pointed to any allegations of actual *harassment* they could have added to their complaint if given the chance to amend. They instead insisted that their complaint in its current form sufficed to state a viable Title IX claim.

B. *Petitioners pursue their Title IX claim under new theories of liability that either ask this Court to resolve hypothetical questions, or that are wholly misconceived*

The petition for review does not argue whether the complaint stated a viable Title IX claim under a peer sexual harassment theory. Rather, Petitioners ask this Court to decide whether the school district lawfully could have *refused* to allow the transgender boy to use the boys' bathroom under Title IX. (Pet. 35–

38.) Of course, Petitioners sued the respondent school district because they were aggrieved by its decision to *allow* the transgender boy to use the boys' bathroom and locker room. Petitioners are thus asking this Court to grant review to decide what Title IX would say about a hypothetical scenario.

Article III of the Constitution restricts the judicial power of the United States only to "cases" and "controversies." Federal courts therefore cannot give advisory opinions on "what the law would be upon a hypothetical state of facts." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). This Court accordingly cannot grant review to decide whether the respondent school district lawfully *could have*, despite Title IX, *refused* to allow the transgender boy to use the boys' bathroom and locker room.

In fact, Petitioners also argue that this Court should grant review to resolve their Title IX claim under an entirely new theory of liability. This new theory of liability is premised on the idea that the Ninth Circuit's decision on whether Petitioners' complaint stated a Title IX claim "conflicts" with *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020).

In *Bostock*, this Court held that laws like Title VII or Title IX that prohibit discrimination "on the basis of sex" cover discrimination against someone because of their sexual orientation or their status as a transgender person. Petitioners argue that the school district treated cisgender students less favorably than the transgender boy because it gave only him the option to use either the boys' or the girls' bathrooms and locker rooms. (Pet. 39.) Citing *Bostock*, Petitioners argue that this amounts to unlawful sex discrimination since the school district treated the cisgender students

less favorably than the transgender boy, and it did so solely because of their status as cisgender persons.

Petitioners face four insurmountable problems in asking the Court to grant review to consider this new theory of liability derived from their reading of *Bostock*.

First, the premise of this new theory of liability is false. Petitioners seem to think that the school district allowed the transgender boy to use whichever bathroom he wanted as suited his mood or convenience in the moment. However, the school district did not give the transgender boy unfettered access to twice as many bathrooms and locker rooms as cisgender students. Rather, the district allowed the transgender boy to use only the bathroom or locker corresponding to his gender. (Pet. App. 259a, 261a.) The transgender student identified as a boy and, according to the complaint, thereafter he only used the boys' bathroom and locker room. That placed him on equal footing with cisgender students: the school district allowed both he and cisgender students to use the bathroom or locker room corresponding to their gender.

Second, as described, Petitioners pursued a Title IX claim in their complaint and briefing below under a peer sexual harassment theory. They never pursued a Title IX claim under a theory of liability whereby cisgender students were the victims of unlawful discrimination because they were not allowed to use both the boys' *and* the girls' bathrooms and locker rooms. For that reason, the courts below did not hold one way or another whether such a theory of liability was viable under Title IX. As listed above, this Court normally

will not consider new arguments, much less new theories of liability, that either were not pursued by petitioners in their briefing below, or were not addressed by the lower courts. Practically, the Court cannot grant review on a theory of liability it normally would not consider if it did grant review.

Third, Petitioners misconceive what anti-discrimination laws guarantee. They do not prohibit mere differential treatment for its own sake. Rather, they prohibit differential treatment which has the effect of depriving members of the protected class equal access, or equal opportunities, as compared to members outside that protected class. *Davis*, for example, turns on this distinction: the differential treatment of a female student compared to her male counterparts through sexual harassment is only actionable under Title IX once it crosses a threshold and becomes differential treatment that also has the effect of denying her equal access to an education. So even if the school district here had allowed the transgender boy to use whichever bathroom suited him in the moment, Petitioners failed to state a Title IX claim because they never alleged that cisgender students' bathroom needs remained unsatisfied because they were not given that same option.

Finally, Petitioners did not sue the school district because they want all students to be able to use both the boys' and girls' bathrooms and locker rooms regardless of their sex. In fact, Petitioners' entire suit is based on their fundamental opposition to that very idea. They believe that schools must keep multi-user bathrooms and locker rooms strictly segregated by sex. This is reflected in the relief Petitioners sought in their complaint. Of course, their prayer did not ask for an order allowing cisgender students to use *both* the

boys' and girls' bathrooms so that they received the same privilege they imagined was granted to the transgender boy. The prayer instead asked for the opposite: a court order forcing all students to use only the bathroom which corresponds to the gender typically associated with their sex at birth.

Petitioners therefore are not using Title IX to ensure that *they* have equal access to bathrooms and locker rooms as compared to members outside their protected class. Rather, they are trying to use Title IX to take away something which the school district granted the transgender boy to ensure that *he* was not denied equal access to bathrooms or locker rooms just because his gender did not match the gender typically associated with his sex at birth. Petitioners' Title IX claim is therefore antithetical to what Title IX was enacted to guarantee.

CONCLUSION

For the reasons given above, the Dallas School District No. 2 respectfully requests that this Court deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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