DUE PROCESS — TRANSGENDER RIGHTS — THIRD CIRCUIT HOLDS THAT ALLOWING TRANSGENDER STUDENTS TO USE THEIR PREFERRED SEX-SEGREGATED SPACES DOES NOT VIOLATE CISGENDER STUDENTS' RIGHT TO PRIVACY. — *Doe ex rel. Doe v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018).

Transgender kids have it rough. Faced with threats of violence,[1] high suicide rates,[2] and a political climate hostile to their existence,[3] they must also worry whether they'll be allowed to use the right bathrooms.[4] They might encounter resistance from their peers or — if they must prove their gender identity before gaining access to their preferred sex-segregated facilities — their school administrators. Recently, in *Doe ex rel. Doe v. Boyertown Area School District*,[5] the Third Circuit rejected a claim by cisgender students that the presence of transgender students in sex-segregated spaces aligning with their gender identities violated cisgender students' constitutional right to bodily privacy.[6] *Boyertown* is surely a victory for the transgender community. However, the Third Circuit's application of strict scrutiny to the school district's trans-friendly policy — and its subsequent conclusion that the policy was narrowly tailored in part because it conditioned access to gendered facilities on administrator approval — was unnecessary. After *Boyertown*, school districts should feel empowered to welcome transgender students into their preferred sex-segregated spaces and should consider deferring to transgender students' own perceptions of their genders when doing so.

During the 2016–2017 school year, Boyertown Area Senior High School (BASH) began granting transgender students access to their preferred sex-segregated bathrooms and locker rooms.[7] However, under BASH's policy, transgender students must be approved to enter these facilities after meeting with BASH's "trained and licensed" counselors,

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[1] *See* Marina Pitofsky, *"Epidemic of Violence": 2018 Is Worst for Deadly Assaults Against Transgender Americans*, USA TODAY (Sept. 28, 2018, 11:35 AM), https://usat.ly/2Ii9Itg [https://perma.cc/682Q-YQSC].

[2] Isaac Stanley-Becker, *More than Half of Transgender Male Adolescents Attempt Suicide, Study Says*, WASH. POST (Sept. 14, 2018), https://wapo.st/2Qsf4pz?tid=ss_tw&utm_term=.47699adc9c5a [https://perma.cc/4HY4-ATAK] (citing Russell B. Toomey et al., *Transgender Adolescent Suicide Behavior*, PEDIATRICS, Oct. 2018, at 4 fig.1).

[3] *See* Erica L. Green et al., *"Transgender" Could Be Defined out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), https://nyti.ms/2R9W1jB [https://perma.cc/3QMQ-X6L8].

[4] Diana Ali, *The Status of Trans Rights in 2018*, NAT'L ASS'N OF STUDENT PERS. ADM'RS (Mar. 1, 2018), https://www.naspa.org/rpi/posts/the-status-of-trans-rights-in-2018 [https://perma.cc/7BL7-L4WM] (examining proposed legislation in Kentucky and Tennessee that, though unlikely to pass, would "limit bathroom and facility access based on either sex assigned at birth or listed on a birth certificate").

[5] 897 F.3d 518 (3d Cir. 2018).

[6] *Id.* at 530–31.

[7] *Id.* at 524.

who "often consult[] with additional counselors, principals, and school administrators."[8]

Four cisgender students — claiming that BASH's policy violated Title IX, Pennsylvania tort law, and their constitutional right to bodily privacy — sought to enjoin it.[9] The district court rejected the Title IX and tort law claims.[10] On the constitutional issue, the court found that, even if BASH's policy infringed on cisgender students' right to bodily privacy,[11] it survived strict scrutiny. BASH had a compelling interest in not discriminating against transgender students,[12] and its policy was narrowly tailored because (1) it didn't coerce any student to use multiuser facilities; (2) it provided alternative single-user ones to uncomfortable students; (3) its multiuser facilities had "privacy protections" like bathroom stalls with locking doors, shower curtains, and urinal dividers; and (4) transgender students had to be preapproved before entering facilities consistent with their gender identities.[13] Having found that the plaintiffs were unlikely to succeed on the merits or suffer irreparable injury,[14] the district court refused to grant a preliminary injunction.[15] The plaintiffs appealed.[16]

In an unusual move, the Third Circuit affirmed immediately after oral argument[17] and issued its formal opinion two months later. Writing for the panel, Judge McKee[18] praised the lower court's "exceedingly thorough, thoughtful, and well-reasoned opinion" and noted that the Third Circuit "affirm[ed] substantially for the reasons set forth in the District Court's opinion."[19] Turning to the constitutional issue,[20] the

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[8] *Id.*

[9] *Id.* at 525.

[10] BASH's policy didn't violate Title IX because (1) it treated all students similarly and thus did not discriminate on the basis of sex, *see* Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 276 F. Supp. 3d 324, 394–95 (E.D. Pa. 2017), and (2) even if it were discriminatory, a reasonable person wouldn't find the policy "hostile, threatening, or humiliating," *id.* at 401. The district court rejected the tort claim for "essentially the reasons" it rejected the constitutional and Title IX claims. *Boyertown*, 897 F.3d at 525.

[11] The district court explicitly rejected the assertion that the plaintiffs had a broad "constitutional right not to share restrooms and locker rooms with transgender students whose sex assigned at birth is different from theirs." *Boyertown*, 276 F. Supp. 3d at 387.

[12] *Id.* at 390.

[13] *Id.* at 387, 390, 402.

[14] The students did not suffer irreparable harm because BASH was neither denying them a benefit because they were attempting to exercise their constitutional rights nor coercing them into giving up a constitutional right. *See id.* at 410.

[15] *Id.* at 412.

[16] *Boyertown*, 897 F.3d at 526.

[17] *See* Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 890 F.3d 1124 (3d Cir. 2018) (mem.).

[18] Judge McKee was joined by Judges Nygaard and Shwartz.

[19] *Boyertown*, 897 F.3d at 521.

[20] On the other issues, the Third Circuit agreed that BASH's policy didn't violate Title IX, *see id.* at 533–36, that the tort claim was weak, *see id.* at 537, and that the plaintiffs failed to demonstrate that they would experience irreparable harm absent an injunction, *see id.*

court began by expressing deep concern for the psychological health of transgender students. It emphasized that the exclusionary policies championed by the plaintiffs — like ones exiling transgender students to single-user bathrooms or gendered facilities corresponding to their birth-determined sex — might exacerbate mental health problems and could cause "severe psychological distress often leading to attempted suicide."[21]

It then examined the plaintiffs' assertion of two constitutionally protected privacy interests: (1) a broad privacy interest focusing on *presence* that would be violated when cisgender students "are forced to share bathrooms and locker rooms with transgender students whose gender identities correspond with the sex-segregated space, but . . . do not align with their birth sex,"[22] and (2) a narrow privacy interest focusing on *sight* that would be violated when cisgender students are "viewed by members of the opposite sex while partially clothed."[23] The Third Circuit rejected the first interest, noting that no other court had ever recognized a privacy right so broad that it "would be violated by the presence of students who do not share the same birth sex."[24] Contrary to the plaintiffs' reading of two cases allowing sex-segregated facilities,[25] the court explained that the Constitution merely "*tolerates*" single-sex facilities; it does not "*demand*[]" them.[26]

Analyzing the narrow interest, the court acknowledged that people have "a constitutionally protected privacy interest in [their] partially clothed bod[ies]" and that BASH's policy implicated this interest.[27] Without explicitly deciding that strict scrutiny was the correct standard of review, it then subjected BASH's policy to it.[28] Like the district court, the Third Circuit acknowledged that BASH had "a compelling interest in protecting the physical and psychological well-being of minors"[29] and

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[21] *Id.* at 523 (internal quotation marks omitted) (quoting Amici Curiae Brief of the National PTA et al. in Support of Appellees at 18, *Boyertown*, 897 F.3d 518 (No. 17-3113)). In particular, the court noted that the reported attempted suicide rate of transgender individuals is nine times higher than that of the general population. *Id.*

[22] *Id.* at 531.

[23] *Id.* at 527.

[24] *Id.* at 531.

[25] The court explained that the plaintiffs' citations to *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993) and *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010) were unconvincing because they stand only for the propositions that privacy needs may, under certain circumstances, justify sex-segregated facilities or same-sex health providers. *See Boyertown*, 897 F.3d at 532.

[26] *Boyertown*, 897 F.3d at 532.

[27] *Id.* at 527 (citing Doe v. Luzerne County, 660 F.3d 169, 177 (3d Cir. 2011)). The court also took the opportunity to clarify *Luzerne*'s holding: "If there were any doubt after [*Luzerne*] that the constitution recognizes a right to privacy in a person's unclothed or partially clothed body, we hold today that such a right exists." *Id.* at 527 n.53.

[28] *Id.* at 528 n.58 (noting that the court "need not decide which standard of review is appropriate here").

[29] *Id.* at 528.

agreed that BASH's policy was narrowly tailored.[30] It explained that the plaintiffs' proposed solution — providing single-user accommodations to transgender students — would not be a less restrictive alternative to BASH's policy because doing so would undermine the state's compelling interest by "publicly brand[ing] all transgender students with a scarlet 'T,' and they should not have to endure that as the price of attending their public school."[31]

Both the district court and Third Circuit analyzed the constitutional issue in this case — a conflict between cisgender students' privacy right and the government's interest in protecting transgender students from psychological harm — using strict scrutiny.[32] Under this standard of review, a policy must "capture within its reach no more activity (or less) than is necessary to advance [the government's] compelling ends."[33] Phrased differently, the policy "must be the 'least restrictive alternative' available to pursue those ends."[34] To be narrowly tailored, then, BASH's policy must restrict students' privacy right as little as possible while still protecting transgender students' psychological health. However, because the constitutional privacy interest in not having one's partially clothed body viewed by others is narrow and usually at issue only when the viewing is invasive, it is doubtful that strict scrutiny was the appropriate standard of review. Even if strict scrutiny were appropriate, BASH's facilities are sufficiently protective of individual privacy. In contrast, BASH's preapproval requirement is not relevant to the narrow tailoring analysis and unduly impinges on transgender students' autonomy.

The Third Circuit's recognition of a privacy right in one's partially clothed body is rooted in its decision in *Doe v. Luzerne*[35] and similar decisions in other circuits.[36] However, by finding this right at issue and applying strict scrutiny when students' partially clothed bodies were merely *viewed* by others, the Third Circuit expanded the scope of this right further than both *Luzerne* and the cases *Luzerne* relied upon for support. Unlike *Boyertown*, *Luzerne* involved a case where a woman was videotaped while partially clothed.[37] Similarly, the Sixth, Second,

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[30] *Id.* at 530.

[31] *Id.*

[32] *Id.* at 528 & n.58.

[33] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006).

[34] *Id.* at 800–01. When applying strict scrutiny, the Court has sometimes used this "least restrictive alternative" language in lieu of the more common "narrowly tailored" language. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) ("Unquestionably we have held that a [policy] which restricts 'fundamental rights' . . . is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.").

[35] 660 F.3d 169 (3d Cir. 2011).

[36] *See Boyertown*, 897 F.3d at 527 n.53 (collecting cases).

[37] *See Luzerne*, 660 F.3d at 177.

and Ninth Circuit decisions cited in *Luzerne* involved situations where partially clothed people were either photographed or videotaped.[38] None involved only a viewing. As the Third Circuit mentioned in a footnote in *Boyertown*, strict scrutiny applies only when "the intrusion on an individual's privacy [is] severe."[39] Viewing someone's partially clothed body is significantly less invasive than photographing or videotaping it. Furthermore, because the court found that locker rooms and restrooms, where it is "not only common . . . [but] expected" to "encounter others in various stages of undress," are simply "not that private,"[40] and because a transgender student poses no more risk to others' privacy rights than "an overly curious student of the same biological sex who decides to sneak glances at his or her classmates" in sex-segregated spaces,[41] it should not have subjected BASH's gendered-space policy to strict scrutiny.[42]

Even if strict scrutiny were appropriate, BASH's preapproval policy is unnecessary for its policy to be narrowly tailored. First, BASH never makes any assertions about the validity of its transgender students' genders via its preapproval policy. It concedes that it is unable "to determine whether a student is gender nonconforming or gender dysphoric, and [school administrators] cannot determine a student's gender identity."[43] Therefore, even if students had a heightened right to privacy when members of another gender viewed their partially clothed bodies, BASH's preapproval requirement does not allow it to maintain single-sex facilities that are less private than all-sex facilities must be.

Next, facilities that adequately shield students' partially clothed bodies — like those present at BASH, which include urinal dividers,

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[38] *Id.*; *see also* Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489, 496 (6th Cir. 2008) (involving a school district's surveillance equipment that allowed it to "videotape [students], without their knowledge, in various states of undress while they changed their clothes"); Poe v. Leonard, 282 F.3d 123, 129 (2d Cir. 2002) (involving a male police officer who, while filming a video for internal police use, requested that an actress "lose [her] bra" and "change clothes in his office," where he had placed a running video camera (internal quotation marks omitted)); York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) (involving a male police officer "unnecessarily photograph[ing] the nude body of a female citizen who ha[d] made complaint of an assault upon her").

[39] *Boyertown*, 897 F.3d at 528 n.58 (quoting Doe v. SEPTA, 72 F.3d 1133, 1139–40 (3d Cir. 1995)).

[40] *Id.* at 531.

[41] *Id.* (quoting Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1051 (7th Cir. 2017)).

[42] It is possible the Third Circuit's understanding of a constitutional privacy right in one's partially clothed body is inextricably linked to birth-determined sex. On this view, a student's privacy interest peaks when they are viewed by someone of the opposite biological sex; it reaches its nadir when the student is viewed by a member of the same sex. *Luzerne* makes this link more explicit. 660 F.3d at 177 ("We conclude that Doe had a reasonable expectation of privacy . . . particularly while in the presence of members of the opposite sex."). However, by aggrandizing birth-determined sex at the expense of gender identity, this binary understanding of the right to bodily privacy would be inherently transphobic.

[43] Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 276 F. Supp. 3d 324, 340 (E.D. Pa. 2017).

toilet stalls, and shower curtains[44] — are sufficient to protect privacy interests. The *Boyertown* court implied that a school district could constitutionally create an all-gendered facility if it protected its students' interests in their partially clothed bodies;[45] indeed, some public school districts have already done so.[46] If the presence of students with differing sexes or genders in bathrooms or locker rooms is not a per se constitutional violation, as the Third Circuit held, then facilities that adequately shield students' partially clothed bodies from everyone — like BASH's do — would pass constitutional muster regardless of whether boys, girls, or nonbinary students use them. BASH's preapproval requirement is thus superfluous to the court's narrow tailoring analysis. The other factors mentioned by the district court — the availability of single-user facilities, students' ability to use them, and the adequacy of privacy protections[47] — go to this "adequate shielding" question; conditioning access on counselor approval does not.

Although BASH likely implemented its preapproval requirement in good faith, it is not necessary to ensure transgender students' safety or screen out bad actors. If school districts want to keep track of which students are using their preferred gendered spaces to help them do so safely, requiring notice instead of approval would work equally well. While there have been instances of disruptive students abusing gendered-space policies,[48] the stigmatized nature of transgender identities discourages gender identity fraud.[49] Rules against bad faith could also prevent abuses of gendered-space policies.[50] A bad faith rule is preferable to a preapproval requirement because it treats transgender students like cisgender students (who need not prove their gender before using their preferred single-sex facilities). An approval-less system is also tractable; California has deferred to students' own determinations

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[44] *Id.* at 387.

[45] *See Boyertown*, 897 F.3d at 531–32.

[46] *See* Mará Rose Williams, *In This KC-Area District, Boys and Girls Will Share Gender-Neutral Restrooms*, KAN. CITY STAR (Aug. 14, 2018, 7:40 AM), https://www.kansascity.com/news/local/article216439305.html [https://perma.cc/XDF2-69UJ] (outlining plans at elementary and high schools in the North Kansas City School District to open gender-neutral bathrooms with "toilets . . . enclosed inside individual stalls with floor-to-ceiling walls and lockable doors" and quoting a school administrator who claims students prefer this design because it is "more private").

[47] *See Boyertown*, 276 F. Supp. 3d at 390.

[48] *See, e.g.*, Doe v. Reg'l Sch. Unit 26, 86 A.3d 600, 603 (Me. 2014) (describing an incident where a transgender girl was using the girls' bathroom "with no complaints . . . until a male student," "acting on instructions from his grandfather," "followed her into the restroom . . . claiming that he, too, was entitled to use the girls' bathroom").

[49] *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 972 (2019) ("Due to continued stigma and bias against transgender people, it is unlikely that many people would be willing to claim a gender identity not their own in any public context.").

[50] For example, if a self-determination policy allows one student to violate another's privacy, the school district should punish the offending student rather than preemptively placing the burden on transgender students to show that they will not violate other students' privacy rights.

of their gender identities without major incident since its School Success and Opportunities Act went into effect in 2014.[51]

BASH's preapproval requirement is troubling not only because it is unnecessary to protect cisgender students' constitutional privacy right but also because it restricts transgender students' autonomy. LGBTQ people have a long and complicated history with authorities policing and categorizing their bodies. When the concept of a homosexual identity was invented in the late nineteenth century, it was used to force gays and lesbians into a "psychological, psychiatric, medical category."[52] While this categorization contributed to stigmatization,[53] it also enabled a "'reverse' discourse" whereby "homosexuality began to speak [on] its own behalf" and "demand that its legitimacy or 'naturality' be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified."[54] Rallying around this imposed identity enabled gays and lesbians to successfully challenge laws targeting them[55] and, eventually, to secure the right to marry.[56]

Body policing and categorization is more complicated in the transgender community. Access to important rights — like gender-affirming surgery, preferred-gendered bathrooms, and name changes — often comes at the expense of autonomy and self-determination because these rights are conditioned on transgender people's ability to prove their gender by submitting "evidence to the right authorities."[57] For example, until 2011 the World Professional Association for Transgender Health (WPATH) required that transgender people have "real-life experience" (RLE) living in their preferred gender role before gaining access to hormone and surgical treatment.[58] A more modern "informed

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[51] CAL. EDUC. CODE § 221.5(f) ("A pupil shall be permitted to participate in sex-segregated school programs and activities . . . and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.").

[52] 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 43 (Robert Hurley trans., Random House 1978) (1976); *see id.* at 43–44; *see also* Lawrence v. Texas, 539 U.S. 558, 568 (2003) ("[A]ccording to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century.").

[53] *See* Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565, 570–71 (2015). Although the Diagnostic and Statistical Manual of Mental Disorders (DSM) dropped "homosexuality" as a diagnosis in 1973, it continued to stigmatize it under the label "Sexual Orientation Disturbance" and, later, "Ego Dystonic Homosexuality" before finally "accept[ing] a normal variant view of homosexuality" in 1987. *Id.* at 571.

[54] FOUCAULT, *supra* note 52, at 101.

[55] *See, e.g.*, *Lawrence*, 539 U.S. at 578–79 (overruling Bowers v. Hardwick, 478 U.S. 186 (1986), by invalidating a Texas law criminalizing same-sex sodomy).

[56] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[57] *See* Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 15–17 (2003).

[58] *See* Gennaro Selvaggi et al., *The 2011 WPATH Standards of Care and Penile Reconstruction in Female-to-Male Transsexual Individuals*, ADVANCES IN UROLOGY, May 2012, at 4 tbl.2 (comparing the sixth and seventh editions of WPATH's standards of care).

consent" model of care focuses on transgender people's autonomy instead of external requirements; it trusts them to choose their own care without outside evaluations or therapy.[59]

Like the outdated RLE requirement, preapproval policies like BASH's risk conditioning access to preferred gendered spaces on students' ability to successfully perform their gender identities. When schools position administrators as gatekeepers to bathroom access, students are pressured to conform with school officials' conceptions of what "real" boys and girls are and must convince these officials that their gender identities are legitimate. This requirement not only limits transgender students' autonomy but also reinforces the gender binary and sex stereotypes.[60] Students might also be in the process of discovering their own gender identities and may not currently (or ever) identify as either male or female. Administrative scrutiny of their preferred sex-segregated spaces could force them into ill-fitting gender expressions.[61] Policies like BASH's also give administrators the power to deny the validity of students' identities in individual, personal ways that could be psychologically harmful. As upsetting as it would be for one school district to tell a student, "we reject the concept of transgender students generally," it might be more psychologically cutting for another to say "we recognize that transgender students exist and should be allowed to access their preferred gendered spaces, but you, specifically, should not."

After *Boyertown*, school districts should be emboldened to create transgender-friendly gendered-space policies without fear of legal action from cisgender students. When doing so, however, they should realize that transgender students — not school officials — are in the best position to determine which sex-segregated facilities best fit their needs. Because students' constitutionally protected interest in their partially clothed bodies is not severely invaded when transgender students use their preferred sex-segregated spaces, courts should not analyze these policies using strict scrutiny. If they do, however, they should recognize that preapproval policies like BASH's restrict transgender students' autonomy and are unnecessary to protect the privacy right of students.

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[59] *See* Timothy Cavanaugh et al., *Informed Consent in the Medical Care of Transgender and Gender-Nonconforming Patients*, 18 AMA J. ETHICS 1147, 1149 (2016).

[60] *See* JUDITH BUTLER, UNDOING GENDER 81 (2004) (arguing that diagnosing gender identity disorder (GID), which preceded gender dysphoria in the DSM, requires "that we all more or less 'know' already what the norms for gender — 'masculine' and 'feminine' — are and that all we really need to do is figure out whether they are being embodied in this instance").

[61] *Cf. Developments in the Law — Sexual Orientation & Gender Identity*, 127 HARV. L. REV. 1682, 1744 (2014) ("Some experts on transgender children advocate gender neutrality, both because some children outgrow gender dysphoria and because children should be allowed to figure out their own identity . . . .").