No. 23-3740

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John and Jane Doe No. 1, et al.,
Plaintiffs-Appellants

v.

Bethel Local School District Board of Education, et al.,
Defendants-Appellees

On Appeal from the United States District Court for the Southern District of Ohio
No. 3:22-cv-337, Hon. Michael J. Newman

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

For nearly all its history, the Bethel Local School District segregated communal restrooms by sex. That changed after "Anne Roe," a transgender middle-school student, complained. Bethel offered to let Roe use a single-occupancy restroom. But Roe found that restroom inconvenient based on its location and alleged overuse. Additionally, Roe was embarrassed by having to use the single-occupancy restroom. Roe's mother threatened legal action if Bethel refused to let the child use communal restrooms designated for the opposite sex. Bethel's attorneys advised the school board that Title IX requires allowing students to use whatever restroom accords with their "gender identity." That is incorrect. *See Adams by and through Kasper v. Sch. Bd. of St. Johns County*, 57 F.4th 791, 811–15 (11th Cir. 2022) (*en banc*); *Amicus Curiae* Br. of Tennessee and Kentucky at 4–15. Still, the school board caved.

Bethel accommodated Roe by transferring the hardship the child complained about to another group of students: those who objected to sharing restrooms with the opposite sex, including especially devout Muslims and Christians who objected on religious grounds. The single-user restroom was no more convenient for them. Indeed, it would be *less* convenient, as there would now be even more students competing for the same space. All this posed an immense burden on religious students, who now had to choose between violating their religious beliefs by sharing a restroom with

the opposite sex, avoiding restrooms altogether (impeding their education), or using the same single-occupancy restroom that Roe found inconvenient. Bethel proceeded anyway.

Bethel made a bad situation worse when it refused to answer parents' questions about the new policy's application. The school would not answer questions about how the policy applied to adults, at sporting events, to overnight school trips, and so on.

The plaintiffs in this case—devout Muslim and Christian students, their parents, and a not-so-religious father who objects to having his child share a communal restroom with children of the opposite sex—sued Bethel. They argued that the preferential treatment afforded Roe's secular beliefs violated the Free Exercise Clause of the First Amendment and §7 of Article I of the Ohio Constitution (Ohio's Bill of Rights). They further sought a declaratory judgment establishing that Title IX does not require allowing transgender students to use restrooms designated for the opposite sex. Finally, the parents argued that the school's adopting the challenged policy while refusing to answer their questions about the policy's operation violated the "fundamental right[] … to direct the education and upbringing of one's children." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

The District Court dismissed the Title IX claim for lack of standing, entered judgment on the pleadings with respect to the free-exercise and due-process claims, and declined to assert jurisdiction over the plaintiffs' state-law free-exercise claim. It erred in every respect. The plaintiffs explained why in their opening brief. And neither Bethel nor its *amici* offer any sound refutation. The Court should reverse.

ARGUMENT

I. The challenged policy violates the plaintiffs' religious freedom.

The Court should reverse the District Court's judgment dismissing the plaintiffs' free-exercise claims.

A. The plaintiffs alleged a plausible claim for relief under the Free Exercise Clause and Section 7 of Ohio's Bill of Rights.

On the facts alleged, the challenged policy violates both the Free Exercise Clause and Article I, §7 of the Ohio Constitution.

1. Recall the governing law. The Free Exercise Clause forbids the "government" to "treat religious persons, religious organizations, or religious speech as second-class." *Shurtleff v. City of Boston*, 596 U.S. 243, 261 (2022) (Kavanaugh, J., concurring). It thus requires "'neutrality' to religion." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020) (*per curiam*) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)). For this reason, "neutral and generally applicable" policies and regulations that burden religious practice only

"incidentally" do not violate the Free Exercise Clause. Critically, however, the government "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs." *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021). And policies are not "generally applicable" when they prohibit "religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 534. When a law that burdens religious practice is *not* neutral and generally applicable, it can be upheld only if it survives strict scrutiny. *Id.* at 533.

Section 7 of Ohio's Bill of Rights provides even more robust protection for religious freedom. Under that provision, even "generally applicable, religion-neutral state regulation[s]" are subject to strict scrutiny when they burden religious practice. *Humphrey v. Lane*, 89 Ohio St. 3d 62, 66–67 (2000); *see also Amicus Curiae* Br. of Ohio at 1–13. Section 7 thus requires the government to affirmatively accommodate religious beliefs unless the refusal to do so is narrowly tailored to advancing a compelling state interest.

2. Accepting the truth of the facts alleged, Bethel violated both the Free Exercise Clause and the similar protection in Ohio's constitution. The challenged policy treats "comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (*per curiam*). Specifically, it treats Roe's secular desire to use the girls' restroom more favorably than other students' religious desire

to share communal restrooms with only students of the same sex. Remember, the policy alleviates the hardships Roe experienced—specifically, the need to use a limited number of inconvenient or embarrassing single-user restrooms—by requiring religious students to either bear the same hardships or violate their religious beliefs. By adopting this policy, the school "proceed[ed] in a manner intolerant of religious beliefs." *Fulton*, 593 U.S. at 533. And it burdened "religious conduct" in order to accommodate "secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 534.

Because the policy burdens religious practice, it is subject to strict scrutiny under the Ohio Constitution. And because the policy in question is not neutral or generally applicable, it is subject to strict scrutiny under the Free Exercise Clause. At the pleading stage, Bethel cannot (and does not) argue that its policy survives strict scrutiny. It follows that the District Court erred by dismissing this claim under Rule 12(c). And indeed, the State of Ohio filed an *amicus* brief confirming that the facts alleged state a claim for relief under the §7 of Article I of the Ohio Constitution. *See* Br. of Ohio at 13–24.

B. Bethel's arguments for affirmance all fail.

1. Bethel's response is largely non-responsive. It starts on the wrong foot by mischaracterizing the plaintiffs' theory, claiming that they "object to accommodation

of a transgender student." Bethel Br.4. That is incorrect. The plaintiffs *supported* accommodation, even donating supplies to support the construction of an extra single-occupancy bathroom. *See* Opening Brief ("Op.Br.") at 4. The plaintiffs object only to accommodating the student in ways that burden their own sincerely held religious beliefs.

On the merits, Bethel's primary strategy regarding the First Amendment claim is to insist that its policy is neutral and generally applicable because the school board adopted the policy based on bad legal advice, not based on animus. That is a *non sequitur*. "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62 (emphasis in original). That is true without regard to whether animus motivates the disfavored treatment; the Court made no finding of animus in *Tandon*, for example. And the Supreme Court expressly resolved *Fulton* without considering evidence of animus toward religious beliefs. 593 U.S. at 533. Thus, even if Bethel adopted its policy based on bad legal advice, that is no defense. That is especially obvious after *Carson v. Makin*, 596 U.S. 767 (2022), which struck down, as violative of the Free Exercise Clause, a school-funding policy that Maine adopted based on a

former Attorney General's misguided understanding of the Establishment Clause. *Id*. at 774–75; *see also* 781 (rejecting current counsel's identical defense).

In addition to being not generally applicable, the challenged policy is not neutral. That is because Bethel acted "in a manner intolerant of religious beliefs." *Fulton*, 593 U.S. at 533. Bethel insists otherwise, claiming it was just following the advice of counsel. But counsel's advice was, it seems, to treat Roe's secular preferences more favorably than the preferences of religious students. Preferring the one to the other means proceeding in a manner intolerant of religious beliefs.

Bethel next argues that, "even if plaintiffs could allege the policy lacks neutrality or general applicability, no substantial burden on their religious practice is plead[ed] or exists." Bethel Br.18. Another *non sequitur*. Plaintiffs "may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened [their] sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (citation omitted). The plaintiffs here did just that. The policy is not neutral and generally applicable for the reasons discussed above; Bethel concedes the sincerity of the plaintiffs' beliefs, *see* Bethel Br.16; and the policy burdens those beliefs by forcing students to either violate their sincerely held beliefs or else accept the hardships that led to Anne Roe's objections. Indeed, when Roe

complained of those same hardships, Bethel thought them serious enough to change a longstanding policy requiring separate communal bathrooms for each sex.

When Bethel addresses *Fulton*, it insists that *Fulton*'s "rational[e] illustrates why" the decision "does not support reversal." Bethel Br.19. But Bethel's argument is hard to follow. It appears to read *Fulton* as holding that policies are not generally applicable *only when* they contain exemptions that permit authorities to exercise discretion—discretion they could, potentially, wield to discriminate against religious practice. Bethel Br.22. That misreads *Fulton*. The case did indeed hold that discretion-conferring exemptions are *sufficient* to establish a lack of general applicability. It did not, however, hold that *only* laws with discretion-conferring exemptions fail the general applicability test. *Fulton*, 593 U.S. at 534–34.

In fact, *Fulton* expressly recognized other means of proving that a law or policy is not generally applicable. For example, a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 534. That insight applies here. Bethel's policy accommodates secular conduct (transgender students' using communal restrooms with students of the opposite sex) by burdening religious conduct (religious students' sharing communal restrooms with only same-sex students). The result, as already explained, is to make religious students bear the hardships Bethel's

policy is supposed to alleviate. By treating religious conduct less favorably than secular conduct that "undermine[] the government's asserted interests in a similar way," Bethel's policy triggers strict scrutiny. *Id.*

Fulton is relevant for another reason, too. Whereas the challenged policy in *Fulton* "create[ed] *opportunities* for less-favorable treatment of equivalent hardships" faced by secular and religiously motivated people, "the challenged policy" here "*in fact* treats hardships stemming from religious convictions less favorably than hardships stemming from secular beliefs." Op.Br. 23–24 (emphasis in original). *Fulton* thus dictates the outcome of this case.

At times, Bethel suggests there can be no free-exercise problem because the challenged policy "impact[s] the religious and non-religious plaintiffs the exact same way." Bethel Br.22. Yet another *non sequitur*. It is true that some people, including one parent-plaintiff, objected to the policy for secular reasons. But it is undisputed that many of the plaintiffs objected for religious reasons. Bethel was less accommodating of these plaintiffs' religiously motivated hardships than it was of Roe's secularly motivated hardships. It thus treated "comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. The fact that Bethel treated Roe's secular concerns more favorably than other students' religious *and* secular concerns does not excuse its disfavored treatment of religious concerns; "[i]t is no answer" to

a free-exercise challenge that the government "treats some comparable secular … activities as poorly as or even less favorably than the religious exercise at issue." *Id.* Were the rule otherwise, churches shuttered by governmental decree during the pandemic would not have been able to bring free-exercise challenges whenever the government *also* shuttered non-religious entities. But churches did bring those challenges, and they regularly prevailed. *See, e.g.*, *id.* at 63–64; *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 479 (6th Cir. 2020) (*per curiam*).

Bethel (wisely) never argues that its policy can survive strict scrutiny, which is fatal because the government bears the burden of making that showing. *Kennedy*, 597 U.S. at 524. The *amici* supporting Bethel try to pick up the slack. *See* Br. of *Amici Curiae* Equality Ohio and Roe ("*Amici* Br.") at 6–7. To no avail.

As an initial matter, Bethel silently concedes its inability to satisfy strict scrutiny by failing to brief the issue, and the Court cannot consider merits arguments raised only by *amici*. *Self-Ins. Inst. of Am., Inc. v. Snyder*, 827 F.3d 549, 560 (6th Cir. 2016) (quoting *Cellnet Commc'n, Inc. v. FCC*, 149 F.3d 429, 443 (6th Cir. 1998)). Regardless, the *amici*'s fleeting discussion of heightened scrutiny never engages with the plaintiffs' arguments regarding why the challenged policy fails strict scrutiny. *See* Op.Br.24–25. As for *amici*'s suggestion that the challenged policy "was as narrowly tailored as possible to accommodate all of its students while serving the interests of

nondiscrimination and safety," *see Amici* Br.7, that claim rests on the unstated premise that Bethel could advance its interests in nondiscrimination and safety *only by* allowing transgender students to use restrooms designated for the opposite sex—a radical proposition that the *amici* never defend. And while it is irrelevant to the legal issues presented, the *amici*'s claim that "the only effective treatment for gender dysphoria … is to enable a transgender person to live fully in accordance with their gender identity," *Amici* Br.10, is not the "consensus," evidence-based position the *amici* say it is, *see* Hilary Cass, INDEPENDENT REVIEW OF GENDER IDENTITY SERVICES FOR CHILDREN AND YOUNG PEOPLE, 163-64 (2024) (available at, https://perma.cc/G3QV-XDNJ).

Finally, Bethel refuses to engage with the plaintiffs' state-law free-exercise claim, insisting the claim is "not relevant at this stage of the litigation." Bethel Br.24. But it is relevant, both on its own terms and because it affects the standing analysis relating to the Title IX claim. The plaintiffs explained why at length in their opening brief. *See* Op.Br.32–33. Bethel, by refusing to brief the matter, forfeited any right to rebut the plaintiffs' arguments that the District Court abused its discretion by refusing to assert jurisdiction over the state constitutional claim.

II. The plaintiffs have Article III standing to seek a declaratory judgment.

A. The pleadings establish the plaintiffs' standing.

Bethel adopted the challenged policy because the school board believed, incorrectly, that Title IX required it to. *See* Compl., R.1, PageID#3, 9; Order, R.94 Page ID#2003–04. The plaintiffs sought a declaratory judgment establishing that Title IX does not require allowing transgender students to use same-sex restrooms. Indeed, the plaintiffs argued that Bethel *violated* Title IX by adopting the policy. Bethel's longstanding rules segregating communal restrooms by sex guaranteed that no student was denied an equal educational opportunity "on the basis of sex," as Title IX requires. 20 U.S.C. §1681(a); *see also* Compl., R.1, PageID#21. By adopting the challenged policy without also adopting safeguards to protect students uncomfortable with sharing restrooms with students of the opposite sex, Bethel violated Title IX. *See* Resp. in Opp. to Mot. to Dismiss, R.81, PageID#1689–91, 1698.

The District Court erred when it held that the plaintiffs lacked standing to bring this claim. To establish standing at the pleading stage, plaintiffs must allege that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *SFFA v. Harvard*, 600 U.S. 181, 199 (2023) (quotation omitted). The plaintiffs alleged facts establishing each element.

First, they alleged an injury in fact. The plaintiffs' pleadings show that the challenged policy violates the plaintiffs' constitutional rights. *See above* 3–5; *see below* 18–21. That is an injury in fact. *New Doe Child #1 v. Congress of United States*, 891 F.3d 578, 586 (6th Cir. 2018). The plaintiffs' pleadings also establish that the challenged policy impedes the students' educational experience, as they are uncomfortable sharing communal restrooms with students of the opposite sex and hold their urine to avoid doing so. The policy thus interferes with "access to the educational opportunities or benefits provided by the school," which constitutes an injury-in-fact. *Kollaritsch v. Michigan State Univ. Bd. of Tr.*, 944 F.3d 613, 622 (6th Cir. 2019) (quotation omitted).

Second, these injuries are traceable to the challenged policy because, but for the policy, the plaintiffs would not be injured.

Finally, a declaratory judgment would redress the plaintiffs' injuries. If the District Court holds that Title IX forbids the policy, Bethel will have no choice but to abandon it. Bethel must also abandon the policy if the District Court holds that Title IX *does not require* the policy. That is because, as addressed above, the policy violates §7 of the Ohio Bill of Rights. If Title IX does not require the policy, and if the Ohio Constitution forbids it, Bethel will lack even a colorable argument for maintaining the policy. If the Court has any doubts on what the Ohio Constitution has to

say about Bethel's policy, it should certify the following question to the Ohio Supreme Court:

> Do schools violate §7 of the Ohio Bill of Rights when they alleviate hardships arising from secular preferences by imposing identical hardships on students who experience these hardships because of their religious beliefs?

An affirmative answer would establish standing on the Title IX claim *and* confirm the validity of the plaintiffs' merits argument.

It bears noting that, even if Bethel had a *choice* to retain the policy, the plaintiffs plausibly alleged that the defendants are maintaining the policy only because they believe the law requires them to. A declaratory judgment correcting their misunderstanding of the law would thus redress the injury for this independent reason.

B. Bethel's contrary arguments all fail.

Bethel's arguments regarding standing consist largely of block quotes to the District Court's opinion. What additional independent reasoning Bethel offers is unpersuasive.

Injury in fact. Consider first what Bethel has to say about the injury-in-fact requirement. It never disputes that interference with "access to the educational opportunities or benefits provided by the school" constitutes an injury-in-fact. *Kollaritsch*, 944 F.3d at 622 (quotation omitted). Bethel claims, however, that it "deprived no plaintiff access to … educational opportunities or benefits." Bethel Br.31.

This ignores the plaintiffs' allegations that the bathroom policy *has* impeded their access to educational opportunities. Op.Br.38–39; Compl., R.1, PageID#12, 14. Bethel insists that the plaintiffs can use the single-occupancy restrooms if they want to. But if (as Anne Roe said) those bathrooms were too often occupied to provide a viable option for a single transgender student, they would be an even less-viable option for a larger group of religious students competing for access to the same space. If transgender students suffer a cognizable injury when their educational opportunities are impaired by *denial* of access to opposite-sex restrooms, *see Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 617–18 (4th Cir. 2020), students whose educational opportunities are impaired by *granting* transgender students such access necessarily suffer the same injury.

In any event, as noted already, the plaintiffs alleged that the policy violates their constitutional rights. That is an injury in fact as a matter of law. Bethel does not argue otherwise; it simply denies that the plaintiffs adequately pleaded a constitutional claim. Bethel Br.27–28. Bethel is wrong for the reasons laid out in this brief and in the plaintiffs' opening brief.

Redressability. Again, if the plaintiffs prevail in securing declaratory relief, Bethel will have no choice but to abandon its policy.

First, a declaratory judgment could establish that the challenged policy *violates* Title IX. Bethel seemingly agrees that such a ruling would redress the plaintiffs' injuries. But it says the plaintiffs "waived" this argument. That is doubly wrong. For one thing, waiver principles apply to claims, not arguments. *See Ohio Adjutant Gen.'s Dep't v. FLRA*, 21 F.4th 401, 406 (6th Cir. 2021); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.") (brackets and quotation omitted). More substantively, the plaintiffs' complaint alleged that the policy change denied the student-plaintiffs access to "a longstanding educational benefit," Compl. R.1, PageID#21, and the plaintiffs further developed their argument that this deprivation violated Title IX in their dismissal-stage briefing, *see* Opp. to Mot. to Dismiss, R.81, PageID#1689–91, 1698. The District Court (mistakenly) declined to engage with this argument, Order, R.94, PageID#2018 n.5, but never denied that the plaintiffs made it.

Second, if a declaratory judgment establishes that Title IX does not *require* sex-segregated restrooms, that too would redress the plaintiffs' injuries. Initially, the plaintiffs alleged—and the evidence establishes—that Bethel would in fact abandon the policy if it were to win a ruling establishing that Title IX does not require the policy. *See* Op.Br. 40–41 (collecting citations). Bethel's brief never denies this. More

importantly, if Title IX does not compel the policy, Bethel must abandon it, as Bethel would no longer have any argument that Title IX frees it to retain the challenged policy notwithstanding the state constitutional violations addressed previously. *See above* 11; Op.Br.40–42. Bethel's only counterargument is that the plaintiffs' state constitutional argument is "not on appeal." Bethel Br.35. In fact, the plaintiffs appealed the dismissal of their state constitutional argument, and that argument will be part of the case on remand if the plaintiffs prevail before this Court. Because the plaintiffs litigated the state constitutional claim below and on appeal, Bethel is wrong to suggest that the plaintiff "waived" their argument that the state constitution forbids the challenged policy. Bethel Br.26.

Ripeness. Bethel asserts the Title IX claim is "unripe." Bethel Br.32. It never explains why, and the plaintiffs cannot venture a guess. "Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *NRA v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997). The plaintiffs are seeking a ruling on an actual, already-in-effect policy that already injured them. Their claims are ripe.

III. The parent-plaintiffs adequately pleaded a claim that Bethel violated their fundamental right to control the upbringing of their children.

A. The District Court erred when it dismissed the substantive-due-process claim under Rule 12(c).

The Due Process Clause protects parents' "fundamental right … to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality op.). This includes the right "to direct the upbringing and education of children under their control." *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534–35 (1925).

The District Court held that this right consists exclusively of the right to choose the school one's child attends. It dismissed the claim on that basis. Order, R.94, PageID#2025. The District Court erred. The right to direct the upbringing of one's child "plainly extends to the public school setting." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005). And both the Supreme Court and this Court's sister circuits have held that the right encompasses more than the right to enroll a child in private school. *See Meyer v. Nebraska*, 262 U.S. 390, 401–03 (1923); *Gruenke v. Seip*, 225 F.3d 290, 306–07 (3d Cir. 2000); Op.Br.55–57.

That is reason enough to reverse, but there is more to say. As the Third Circuit has recognized, public schools violate the fundamental right to control a child's upbringing when they "obstruct the parental right to choose the proper method of

resolution" regarding matters of great importance to a child's upbringing. *Gruenke*, 225 F.3d at 306. They may do so, for example, by hiding information about a student's pregnancy from her parents, *id.*, or concealing information about a child's gender dysphoria, *see Amicus* Br. of Tammy Fournier at 1–2.

Accepting that principle requires reversing. Bethel obstructed the parent-plaintiffs' rights to direct their children's upbringing. First, it adopted the challenged policy, which is directly contrary to the "moral standards" and "religious beliefs" parents hope to "inculcat[e]." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). In addition to contradicting parents' religious beliefs, the policy creates a risk of physical danger to students. *See* Compl., R.1, PageID#8, 16–17, 20; Op.Br. at 52–53. Yet the school entirely refused to answer parents' questions about the policy's operation. It thus refused to give the parents information they needed to determine how best to respond to a policy that bore directly on their children's moral upbringing and safety. By improperly "obstruct[ing] the parent[s'] right to choose the proper method" of responding to these issues, *Gruenke*, 225 F.3d at 306, the school violated the Due Process Clause.

B. Bethel's counterarguments fail.

Bethel parrots the District Court's conclusion that a parent's right "to direct the … education of [his] children," *Pierce*, 268 U.S. at 534, consists exclusively of the

right to determine "the school the student attends," Bethel Br.40. That contradicts binding precedent, the Third Circuit's decision in *Gruenke*, and the nature of parental rights. The plaintiffs already explained why, Op.Br.55–57, and Bethel mounts no serious rebuttal. It cites numerous cases establishing that parents have no right to "direct *how* a public school teaches their child." *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008) (emphasis in original) (quoting *Blau*, 401 F.3d at 395); *see also Skoros v. City of New York*, 437 F.3d 1, 41 (2d Cir. 2006); *Leebaert v. Harrington*, 332 F.3d 134, 142–43 (2d Cir. 2003); *Thomas v. Evansville-Vanderburgh Sch. Corp.*, 258 F. App'x 50, 54 (7th Cir. 2007); *Parents for Priv. v. Barr*, 949 F.3d 1210, 1231 (9th Cir. 2020). But Bethel identifies no case establishing that the right consists *exclusively* of the right to send one's child to private school.

To the extent Bethel offers any argument, it mischaracterizes the plaintiffs' claims. For example, it claims that the parents seek "to raise their children apart from transgender individuals," and claim a right "to dictate school operations." Bethel Br.38, 40. The first assertion is false and defamatory—it disrespects the efforts that parents, including some of the plaintiffs, made to ensure that Anne Roe would have access to a more conveniently located single-occupancy restroom. The second assertion is incorrect. The parents are not arguing that they have a right to dictate school operations. Rather, they argue that the school's adopting this significant policy while

concealing important information "arrogat[ed] … the parental role" by "obstruct[ing]" the parents in deciding how best to respond. *Gruenke*, 225 F.3d at 306; *accord* Op.Br.51–55. Bethel's let-them-eat-cake argument that the parents in this humble community could simply "send" their children "to a different school" if they do not like the school's refusal to answer is misguided. Parents do indeed have the right to choose the school that their child attends. They also have a right to direct their children's moral upbringing and to ensure their physical safety. The government burdens those rights when it refuses to give parents information they need to responsibly wield the rights. The plaintiffs explained why in their opening brief. Op.Br. 57–58. Bethel offers no rebuttal.

IV. Bethel does not understand official-capacity suits.

Bethel argues that, at the very least, this Court should order the dismissal of "Lydda Mansfield, Lori Sebastian, Danny Elam and Jacob King," all of whom were sued in their official capacities as board members. Bethel Br.2. Why? Because they no longer serve on the board. *Id*. But that does not warrant dismissal. "In an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official's successor in office." *Kentucky v. Graham*, 473 U.S. 159, 166 n.11 (1985); *accord* Fed. R. App. P. 43(c)(2); Fed. R. Civ. P. 25(d). Rather than dismissing these defendants, the Court should alter the caption to

include the names of the individuals who now compose the Bethel school board: Jackie Leskowich, Regan Butler, Andrew Vieth, Natalie Donahue, and Rachael Kiplinger.

CONCLUSION

This Court should reverse the District Court's judgment dismissing the plaintiffs' religious-liberty, due-process, and Title IX claims.

May 29, 2024

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CERTIFICATE OF COMPLIANCE

I certify, as required by Rule 32(g) of the Federal Rules of Appellate Procedure, that this document complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 4,777 words.

I further certify that this reply brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
Benjamin M. Flowers

CERTIFICATE OF SERVICE

I certify that on May 29, 2024, I filed this reply brief electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
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