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 District Court Case No. 3:22-cv-00337

BRIEF OF *AMICUS CURIAE* OHIO SUPPORTING APPELLANTS

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The Ohio Constitution was written for times like these. Disputes over deeply personal views, which create conflicts over publicly shared spaces, are an enduring thorn in the history of human government. From its founding, America has rejected the zero-sum solution of crushing dissenting religious groups. Instead, we have codified protections for religious exercise that require the government to seek resolutions for all, not just the most popular or sympathetic. Such resolutions can be challenging, but Ohioans happily have two layers of protection for their religious liberties: the U.S. Constitution and the Ohio Constitution. The State submits this brief to highlight how the religious liberty protections of Ohio's Constitution exceed its federal counterpart.

Ohio's Constitution does not brook "any interference with the rights of conscience." Ohio Const. art. I, §7. By these words, its highest court has held, the Ohio Constitution protects religious liberty by applying strict scrutiny to all free exercise claims, even ones that would not trigger strict scrutiny under the federal Constitution. *See Humphrey v. Lane*, 89 Ohio St. 3d 62, 67, 2000-Ohio-435. Under the Ohio Constitution, then, Bethel Local School District's challenged action—burdening students' religious convictions with respect to the use of intimate spaces at school—triggers and fails strict scrutiny. Even if Bethel can claim a compelling interest, its

policy does not advance any such interest. In fact, Bethel's action exacerbated and enflamed the very problems it sought to address. And the policy is not the least restrictive means of pursuing any interest because it ignores the alternatives that address Bethel's interests without burdening religious exercise. Rather than shifting the burdens faced by some students onto religious students, Bethel should have sought a policy that serves *all* students.

The Attorney General is Ohio's "chief law officer" and "shall appear for the state in any court or tribunal in a cause . . . in which the state is directly interested." Ohio Rev. Code §109.02. Ohio has a sovereign interest in the application of its own Constitution and a duty to safeguard its citizens' rights of religious freedom and conscience as recognized in the Ohio Constitution.

ARGUMENT

"The Ohio Constitution is a document of independent force." *Arnold v. Cleveland*, 67 Ohio St. 3d 35, syl.1 (1993). Even when it shares core concepts with the federal Constitution, the Ohio Constitution maintains its own boundaries to protect the rights of Ohioans. Here, the Ohio Constitution's enduring protections of religious freedom require Bethel's policy to pass strict scrutiny, and it cannot. The District Court did not engage with the plaintiff's claims based on the Ohio Constitution because it misinterpreted standing principles related to their Title IX claim. If

this Court corrects that error, the Ohio Constitution's protections for religious liberty will land in the forefront: the actions that Bethel took under the guise of following Title IX were not only needless under Title IX; they were prohibited by the Ohio Constitution.

I. Ohio's Constitution has historically secured religious liberty.

State constitutions, just as the federal Constitution, are sources of protection for civil rights and liberties. First in time, and arguably first in priority, States' bills of rights are not an imitation of the federal Bill of Rights—quite the opposite. Consequently, reading State constitutions requires appreciating their varied methods of protecting liberties, many of which outpace the federal Constitution in important ways. Ohio has highly regarded religious liberty from the beginning. To that end, it adopted broad protections for conscience rights that diverge from the federal Constitution—at least as it stands in federal precedent today. Under Ohio's well-established test for laws that affect religious liberty, Bethel's actions fail strict scrutiny and are unconstitutional.

A. State constitutions can and do provide added protection for rights.

"Historically, the states' commitment to individual rights came first." Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 382 (1980). States were the cutting edge in adopting express protections for

fundamental liberties—not uniformly under dictate from the federal Congress (a plan that was proposed and rejected), but through their own individual constitutions adopted on their own prerogatives. Fletcher M. Green, *Constitutional Development in the South Atlantic States, 1776-1860: A Study in the Evolution of Democracy*, 52–56 (1930). The original thirteen States' bills of rights preceded the federal Bill of Rights, and later States borrowed from other state constitutions rather than copying from the federal Constitution. Linde, *First Things First* at 381.

As a "font of individual liberties," a State's constitutional protections may extend "beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). A State is "entirely free to read its own State's constitution more broadly than [the Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the Supreme Court] in favor of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982).

To allow the federal Constitution to overshadow state constitutions frustrates the federal design. It removes state courts from the debates on complex social issues like religious liberty, and it delays development of States' laws under their own—usually more specific—state constitutional provisions. G. Alan Tarr, *Church and*

State in the States, 64 Wash. L. Rev. 73, 77–78 (1989). Such effects are a grave loss; States have historically played an important role in piloting solutions to difficult religious-liberty issues as our collective understanding of religious liberty has continued to mature. *Id.* at 85–86. Failing to recognize the legitimate sweep of a state constitution—effectively treating it "merely as a restatement of the Federal Constitution"—thus "insults the dignity of the state charter and denies citizens the fullest protection of their rights." *Arnold*, 67 Ohio St. 3d at 42 (quotation omitted).

Respecting state constitutions arguably requires giving them priority. In some instances, it would be impossible to tell if the State had violated the federal Constitution without first determining if the state constitution would right the alleged constitutional wrongs. Tarr, *Church and State in the States* at 107 (collecting sources). And beginning with state constitutional claims may make federal constitutional analysis unnecessary. Linde, *First Things First* at 383. But more fundamentally, addressing state constitutional claims first honors the States' longstanding position in the protection of individual rights; their laws "started out as, and remain, the place to *begin* any search for individual rights." Jeffrey S. Sutton, *51 Imperfect Solutions* 180 (2018).

Ohio holds its own as a leading force in the quest to safeguard citizens' basic rights. Before the U.S. Supreme Court applied the federal Second Amendment to

the States, the Ohio Supreme Court had already recognized an individual's right to bear arms in the Ohio Constitution. *Arnold*, 67 Ohio St. 3d at 41; *see* Ohio Const. art. I, §4. The Ohio Supreme Court has also held that the Ohio Constitution "provides greater protection than the Fourth Amendment to the United States Constitution against warrantless arrests for minor misdemeanors." *State v. Brown*, 99 Ohio St. 3d 323, 2003-Ohio-3931 ¶7. In another context, the Ohio Supreme Court willingly adopted a federal standard for analyzing a constitutional right because it found the test "logical and reasonable," but it emphasized that it did so freely and revocably, not because it had an obligation to walk lockstep with the federal courts. *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 10, 1999-Ohio-77.

To be sure, this Court does not often encounter claims under the Ohio Constitution because they frequently arise in suits against state officials. Such suits, if brought in federal court, would involve a "federal court instruct[ing] state officials on how to conform their conduct to state law," which the Eleventh Amendment forbids. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Here, the Eleventh Amendment does not apply because the defendants are local-government officials and entities who do not enjoy immunity. *See Alden v. Maine*, 527 U.S. 706, 756 (1999). And when immunity does not apply, this Court properly entertains state constitutional claims. *See, e.g.*, *Mixon v. Ohio*, 193 F.3d 389, 399 (6th Cir. 1999).

B. Ohio's Constitution takes a high view of religious liberty, with textual elements broader than in the federal First Amendment.

Ohio's history of religious liberty begins in the Northwest Ordinance, which is considered one of the four "official sources of the organic laws of the United States," along with the Constitution, Declaration of Independence, and Articles of Confederation. Matthew J. Hegreness, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 Yale. L. J. 1820, 1824 (2011). The Northwest Ordinance sought to extend "the fundamental principles of civil and religious liberty, which form the basis whereon these republics [the original states], their laws and constitutions, are erected" and establish "those principles as the basis of all laws, constitutions, and governments" that would be formed in the territory. *Id.* at 1829 (brackets in original) (quoting Northwest Ordinance of 1787, §13). The Northwest Ordinance protected religious liberty in Article I: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory." Northwest Ordinance of 1787, art. I. When Ohio took on statehood, Congress charged Ohio with adopting laws "not repugnant to" the Northwest Ordinance. Hegreness, *An Organic Law Theory* at 1857 (quoting Act of Apr. 30, 1802, ch. 40, §5, 2 Stat. 173, 174).

Ohio's Constitution answered the charge. Among other fundamental rights enshrined in Ohio's first Constitution of 1803, religious liberty had a prominent position. Ohio Const. art. 8, §3 (1803). Likewise, Ohio's second (and current) Constitution adopted virtually the same provision in 1851, which has not been altered since:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

Ohio Const. art. I, §7.

This language addresses religious liberty topics not explicitly addressed by the federal Constitution. It specifically protects Ohioans from compelled contributions to places of worship. It prevents religious tests for witnesses in court. And most relevant to this case, it prevents "interference with the rights of conscience." *Id.* This provision, more than any other, paved the way for Ohio's robust protection of religious exercise.

C. Ohio's courts protect religious liberty by applying strict scrutiny to free-exercise challenges, even against neutral laws.

The Ohio Supreme Court has long recognized that there is "no reason to conclude that the Religion Clauses of the Ohio Constitution are coextensive with those in the United States Constitution." *Simmons-Harris*, 86 Ohio St. 3d at 10. The federal and state clauses have "quite different" language, which suggests that they may have a different scope or method, *id.*, though not necessarily so, *Humphrey v. Lane*, 89 Ohio St. 3d 62, 67, 2000-Ohio-435.

For many years, Ohio's religious-liberty analysis was virtually the same as the federal free-exercise analysis. For example, before *Employment Division v. Smith*, the U.S. Supreme Court recognized that a compulsory-schooling law burdened Amish religious practices without "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). Ohio agreed with that requirement when it held that a county's intrusive standards for private schools burdened religious practice in the schools without an "interest of sufficient magnitude" to justify it. *State v. Whisner*, 47 Ohio St. 2d 181, 218 (1976) (quoting *Yoder*, 406 U.S. at 214).

Ohio law and federal law diverged with *Smith*. Addressing a claim for employment benefits after the petitioners were fired for using peyote (a hallucinogenic drug) as part of a religious ritual, the U.S. Supreme Court held that a "valid and neutral

law of general applicability" need not pass strict scrutiny even if it burdens religious exercise. *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990).

The *Smith* approach to religious neutrality has been fraught with difficulty. Applied consistently, the *Smith* framework would condone "surprising results that are inconsistent with strong intuitions." Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1000 (1990). For example, *Smith* would seem to condone a prohibition-type law with no exception for the Eucharist or Seder (a hypothetical scenario), *id.*, and religiously-offensive autopsies even when the cause of death is already known such that the autopsy could serve no purpose (disturbingly non-hypothetical), Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J.L. & Pub. Pol'y 627, 657–59 (2003) (listing cases). For this and other reasons, many have called on the Supreme Court to overrule *Smith*. *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring); *id.* at 1883–1926, (Alito, J., concurring); *id.* at 1926–31 (Gorsuch, J., concurring).

Smith's fate, however, does not direct this case for two reasons. First, even *Smith* supports relief here because Bethel's policy treats "comparable secular activity more favorably than religious exercise." Plaintiffs' Br. at 12 (quoting *Tandon v.*

Newsom, 593 U.S. 61, 62 (2021) (per curiam)). And second, Ohio's Religion Clause already protects religious liberty in ways that *Smith* declined to.

Recall that Ohio's Constitution prohibits "interference with the rights of conscience." Ohio Const. art. I, §7. This provision is not focused on the type of restraint it imposes on government. Instead, it focuses on the personal right that it protects. *Compare* U.S. Const. amend. I ("Congress shall make no law…"), *with* Ohio Const. art. I, §7 ("nor shall any interference with the rights of conscience be permitted"). In other words, it is a "ban on any interference" with religious practice, rather than a prohibition on laws targeting religion. *Humphrey*, 89 Ohio St. 3d at 67.

Because it focuses on individuals' rights rather than the government's actions, Ohio's conscience provision can only be understood to regulate even incidental burdens on religion. That is, "even those tangential effects" on religious practice are "potentially unconstitutional." *Id.*

In this respect, Ohio law consciously exceeds the protections accorded by federal religious-liberty precedent. The Ohio Supreme Court acknowledged that *Smith* marked the "divergence of federal and Ohio protection of religious freedom." *Humphrey*, 89 Ohio St. 3d at 67. In Ohio, even a "generally applicable, religion-neutral state regulation that allegedly violates a person's right to free exercise of religion" will be unconstitutional unless it "serves a compelling state interest and is the

least restrictive means of furthering that interest." *Humphrey*, 89 Ohio St. 3d at 66; *see also Whisner*, 47 Ohio St. 2d at 217. It makes no difference whether the burdensome laws stem from apathy or animus.

Ohio law's protection for religious liberty sounds in the heartland of protecting religious exercise. While some laws may specifically target religious practices out of disgust or animus, *see, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), many will burden religion inadvertently. Without constitutional protections, "the insensitivity of governmental bureaucracy will be a continual and disturbing source of imposition upon religious minorities." Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021, 1025 (2005).

In cases of actual religious animus as well, Ohio law protects religious minorities from abuse by those in power. "The majority can protect itself. Constitutions are enacted for the very purpose of protecting the weak against the strong; the few against the many." *Bd. of Ed. of Cincinnati v. Minor*, 23 Ohio St. 211, 251 (1872). Because Ohio recognizes that individuals' religious exercise is worthy of protection, even from generally applicable laws that do not mention religion, religious minorities in Ohio are not dependent "upon the leniency of government, or the liberality of any class or sect of men." *Bloom v. Richards*, 2 Ohio St. 387, 390 (1853). They possess

the "natural indefeasible rights of conscience, which, in the language of the constitution, are beyond the control or interference of any human authority." *Id.* at 390–91.

II. Ohio's religious-liberty protections prohibit Bethel's transfer of burdens to religious students.

Ohio precedent defines the rule for all laws that burden religious liberty. The "standard long held in Ohio regarding free exercise claims" is "that the state enactment must serve a compelling state interest and must be the least restrictive means of furthering that interest." *Humphrey*, 89 Ohio St. 3d at 68. "That protection applies to direct and indirect encroachments upon religious freedom." *Id.*

Ohio's test for free exercise claims is threefold. First, a court will "look at the beliefs of the person affected by the state action, and how those beliefs are affected by the state action." A plaintiff states a "prima facie free exercise claim" when he shows "that his religious beliefs are truly held and that the governmental enactment has a coercive affect against him in the practice of his religion." *Humphrey*, 89 Ohio St. 3d at 68. Second, "the burden shifts to the state to prove that the regulation furthers a compelling state interest." *Id.* at 69. Finally, "the state must prove that its regulation is the least restrictive means available of furthering that state interest." *Id.* Bethel's policy fails that test, and if there is any doubt on that measure, this Court

may certify the question to the Ohio Supreme Court, where Ohio would participate in answering the question.

A. The plaintiffs presented a prima facie free exercise claim.

The plaintiffs demonstrated that they have a genuine religious conviction that prevents them from disrobing in the same room as those of the opposite biological sex. The Muslim plaintiffs "sincerely believe that Allah makes men and women in the womb as distinct and separate genders" and that "Allah desires modesty and separateness between the sexes." Compl., R.1, PageID#11 (citing An-Najm 45–46; Al-Hujurāt 13; An-Nisā 1 & 118–119; Ar-Rūm 30; An-Noor 31 & 60; Al-Mā'idah 87). The Christian plaintiffs believe that "their identity as people comes from God, who made human beings in his image—male and female" and that disrobing in the presence of the opposite sex degrades "a fundamental part of [their] dignity." Compl., R.1, PageID#14 (citing Genesis 1:26–28; Matthew 19:4–6). The District Court and Bethel do not argue that the plaintiff's beliefs are not genuinely held. Op., R.94, PageID#2031 n.7; Intervenor Mot. to Dismiss, R.75, PageID#1622–32.

Bethel's policy burdens these fundamental beliefs by rendering the school's intimate facilities unfit for the plaintiffs' use because of their religious beliefs. Bethel's policy permits use of the school's intimate facilities based on gender identity. (This brief refers to the affected facilities as "intimate facilities" to include

bathrooms, showers, locker rooms, and overnight housing because Bethel does not deny that the policy applies equally to all previously sex-segregated facilities. Compl., R.1, PageID#16–17.) Because an individual's gender identity may differ from his or her biological sex, this means that individuals using intimate facilities may find themselves in the presence of someone of the opposite biological sex.

As a result, children with religious objections to disrobing in a room with the opposite sex must "hold their urine and avoid using the restroom at school" or risk violating their religious beliefs about sex. Compl., R.1, PageID#12. This causes "anxiety and emotional distress" for children who are "now deeply uncomfortable using the restroom at school" for fear that they "will be exposed to a member of the opposite biological sex." Compl., R.1, PageID#14. Even when alone in a multi-person intimate facility, they have no way to know if they will be joined by an opposite-sex person at any time—even when they are in a state of undress—or whether that person would be a fellow student, an adult teacher, or a stranger. Compl., R.1, PageID#17.

This burdens their religious exercise. To begin, Bethel's policy is premised on the fact that these harms are an intolerable burden when experienced by a transgender student. It would defy reality to claim that they are not a burden when experienced by religious students. Indeed, any argument that would marginalize the

religious students' harms would—if applied consistently—also undermine Intervenor Roe's claim of harm (and any related claim of a state interest in the new policy). *See, e.g.*, Intervenor Mot. to Dismiss, R.75, PageID#1627 (discounting religious claims because the religious students have access to the exact private bathrooms that Roe found insufficient); *id.* at 1628 (arguing that religious students have no right to object to a uniform gender-identity bathroom rule, in support of Roe's objection to a uniform sex-based bathroom rule). And insofar as Roe has argued that the plaintiffs must show a coercive effect, *id.* at 1629, plaintiffs face the choice between holding their urine, waiting past the start of class for a single-use bathroom, or else jeopardizing their religious convictions. If that does not suffice for coercion, it is hard to see how Roe could claim harm from facing that same choice.

The fact that irreligious people also experience anxiety at the thought of disrobing before the opposite sex does not diminish the religious burden. Courts "have long found a privacy interest in shielding one's body from the opposite sex." *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 805 (11th Cir. 2022). And for millennia, intimate facilities have been separated by sex, most likely to support women's safety and freedom from sexual harassment. W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol'y Rev. 227 (2019).

Organizations that have disregarded this history have demonstrated the imminent necessity of separations for exactly that purpose, usually at the cost of women's safety. *See, e.g.*, Chris Glorioso and Kristina Sola, *Man posing as transgender woman raped female prisoner at Rikers, lawsuit says*, NBC New York (Jan. 24, 2024), https://perma.cc/Y6JP-PNGE; Salvador Rizzo, *Victim of school bathroom sexual assault sues Va. School district*, Washington Post (Oct. 5, 2023), https://perma.cc/A7ZX-7U7D; Op. of Ohio Att'y Gen., No. 2023-0006, at 14–15 (May 26, 2023), https://perma.cc/VYB6-6J5C (collecting sources). And sadly, women who are uncomfortable with undressing in front of biological males are frequently treated with dismissive scorn regardless of the reasons they express. *See, e.g.*, Sierra Rucker, *Teen speaks out on having to share locker rooms with transgender women in Springfield YMCA*, WAND TV (July 14, 2023).

But these commonsense concerns coexist with uniquely religious concerns about modesty. The existence of a similar secular concern cannot deny the plaintiffs their religious claims. For example, the Barnette children's religious objection to saluting the flag held merit even though others might object solely on the basis of anti-nationalism. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–41 (1943).

B. Bethel's policy does not further any compelling interest because it defeats its desired outcome.

After the plaintiffs articulate a prima facie free exercise claim, the government must "prove that the regulation furthers a compelling state interest." *Humphrey*, 89 Ohio St. 3d at 69.

Defining which interests are "compelling" is difficult. For one, the level of abstraction can powerfully skew how compelling the government's interest appears, and the framing of the interest can cause this prong to collapse into the narrow-tailoring prong. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1321–25 (2007). For another, courts and litigants can manipulate the asserted interest based on prior beliefs about the correct outcome of the case. *Id.*; Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 Mont. L. Rev. 275, 287–89 (2017).

This case need not answer imponderable questions on the details of the standard, however, because Bethel's policy fails under any conceivable articulation of the public interest. Roe has framed the interest as "providing equal educational opportunities to all students," which Roe says is compromised by the harms detailed in the briefing. Intervenor-Defendant's Memo., R.13-3, PageID#150. Roe has also framed the interest as anti-discrimination, meaning minimizing "social stigma, invasion of privacy, risk of emotional or physical harm, and limitations on school

participation." Intervenor Mot. to Dismiss, R.75, PageID#1626. (Roe has also argued a compelling interest of eliminating only discrimination against transgender students, *id.* at 1630, but that only begs the question of how trading one form of discrimination for another could accomplish any valid goal.)

Ohio understands Bethel's interest in eliminating—or reducing as much as feasible—harms to student wellbeing that unravel students' access to equal educational opportunities. In other contexts, Ohio has found a compelling interest in "the education of its citizens." *State v. Schmidt*, 29 Ohio St. 3d 32, 33 (1987). The State also has a compelling interest in "protecting children from physical or mental harm." *Pater v. Pater*, 63 Ohio St. 3d 393, 398 (1992); *see also State v. Romage*, 138 Ohio St. 3d 390, 393, 2014-Ohio-783 ¶10; *State v. Mole*, 149 Ohio St. 3d 215, 232, 2016-Ohio-5124 ¶53. Even still, Bethel's policy does not further that interest in the student body, so the policy fails the first prong of Ohio's constitutional analysis.

Start with the harms to Roe. Bethel's policy is supposed to help because it will prevent Roe from feeling "effectively expel[led]" from "the girls' communal restroom." Intervenor-Defendant's Memorandum, R.13-3, PageID#138. When Roe could only use the single-occupancy restroom, Roe felt "humiliated" and ostracized because other children were using the multi-person restroom. Intervenor-Defendant's Memorandum, R.13-3, PageID#141–42. Going to a separate restroom also

"force[d] disclosure" of Roe's "transgender identity," which in turn invited further "bullying and abuse" from a school environment that could be "especially hostile" to students who are different. Intervenor-Defendant's Memorandum, R.13-3, PageID#146, 150. This caused Roe to "refrain[] from drinking water and suffer[] from dehydration," have "urinary tract infections," and experience "pain and discomfort" in an effort to avoid using the restroom. Intervenor-Defendant's Memorandum, R.13-3, PageID#142. And using the single-occupancy facilities sometimes detracted from Roe's class time because of the travel or wait times for those restrooms. *Id.* at 141.

Ohio does not dispute that Roe alleges harms that no one would wish on a child. Middle school and high school are a formative time, and feeling humiliated or ostracized is no way to navigate those years. Searching for a solution that alleviates those feelings, whatever their cause—for Roe or any other child—is a worthy goal.

But Bethel did not solve those harms; it just transferred them to different students. Some students' religious convictions prevent them from disrobing with the opposite sex, and now those students bear the exact same burdens that Roe did. They cannot use communal intimate facilities that are open to the opposite sex, so they are now effectively expelled from the communal facilities in the school. *Compare* Compl., R.1, PageID#11, 14, *with* Intervenor-Defendant's Memorandum, R.13-

3, PageID#138. This means they must either seek out the single-user facilities or hold their urine until the end of the day. Using the single-user facilities naturally forces disclosure of their personal religious convictions, which singles them out to be humiliated and ostracized because of their religion. *Compare* Compl., R.1, PageID#11, *with* Intervenor-Defendant's Memorandum, R.13-3, PageID#141–42, 146. The alternative of dehydration and holding urine is not any healthier for religious students than it was for Roe. *Compare* Compl., R.1, PageID#12, *with* Intervenor-Defendant's Memorandum, R.13-3, PageID#142. And now they face detraction from their class time as they wait for those same single-occupancy facilities. *Compare* Compl., R.1, PageID#11, *with* Intervenor-Defendant's Memorandum, R.13-3, PageID#142. (Roe disregards the plaintiffs' claim that they suffer from long wait times, apparently concluding that the exact same delays that Roe experienced just months before had suddenly vanished without cause—indeed, in the face of increased demand for the single-occupancy facilities. Intervenor Mot. to Dismiss, R.75, PageID#1632.)

To be sure, this does not mean that Bethel should shift all those harms back to the transgender students at Bethel. Instead, the Board should consider *all* students' concerns and come up with solutions that meet *all* students' needs as much as possible. If done in good faith, the result will likely not grab any headlines for winning

any culture wars—such a goal has no place in the public schools to begin with. It will merely permit Bethel's students to go to the bathroom, change in the locker rooms, and house on overnight trips without feeling deeply violated. The plaintiffs have proposed solutions, *see below* at 23–24, and Bethel is free to brainstorm on its own or hire help to do so. "[H]uman liberty is a good thing, and especially so with respect to matters that are deeply personal." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 840 (2014). Bethel "can protect liberty and equality for both sides of this conflict if [they] have the will to do so." *Id.*

Because Bethel's policy merely transfers harms from one set of students to another, it cannot further the compelling interest of protecting children or promoting education.

C. Bethel's policy is not narrowly tailored because it ignores all religion-friendly solutions.

To pass constitutional muster, a law that burdens religious practice must also be the "least restrictive means of furthering" the State's interest. *Humphrey*, 89 Ohio St. 3d at 69. Also called narrow tailoring, this prong concerns whether any "less restrictive means was available to serve the stated interests." *Portage Cnty. Educators Ass'n for Developmental Disabilities-Unit B, OEA/NEA v. State Emp. Rels. Bd.*, 169 Ohio St. 3d 167, 174, 2022-Ohio-3167 ¶27. Put another way, is the burden on religion the "only way" to achieve the compelling interest? *Id.*

Bethel fails this prong because it overlooked—indeed, apparently did not even search for—solutions that did not burden the plaintiffs' religious practice. Plaintiffs pointed out that Bethel likely solved most of Roe's complaints by constructing a new, more convenient single-occupancy restroom with the plaintiffs' money. Appellant's Br. 25. Even more, the school could have constructed a third communal restroom open to everyone. *Id.* We could add more possibilities. Bethel and Roe identified the chronic overcrowding of the bathrooms during the exceedingly short passing periods as a source of difficulty. Roe Decl., R.13-1, PageID#124; Chrispin Decl., R.18-5, PageID#642. An easy solution to that problem would be to lengthen the passing period by merely a couple of minutes, which would enable the limited number of transgender students plenty of time to access the single-occupancy restrooms. Bethel apparently made no effort to use these less restrictive alternatives to preserve the plaintiffs' free exercise.

Even as concerned parents sacrificed their own resources to create mutually beneficial solutions, Bethel sabotaged their efforts. "[M]embers of the Muslim community… donated their own resources to build a sex-neutral restroom next to the other restrooms in the school" so that transgender students would not have to use remote single-use restrooms meant for staff. Compl., R.1, PageID#10. Bethel

pretended to accept that solution. But in reality, it maintained the same policy, effectively rejecting the proposed solution and ignoring those parents' concerns. *Id.*

In sum, Bethel's new policy is not the only way to further its interests. Indeed, Bethel chose a method uniquely harmful to the other children under its care. Because the policy burdens religious free exercise, the policy is not just poorly considered; it is unconstitutional.

* * *

The Ohio Constitution prevents the zero-sum approach that Bethel took to addressing Roe's and the religious students' concerns. Because Bethel's policy burdens religious practice, it faces strict scrutiny—which it fails. The District Court missed the importance of Ohio's Constitution because it wrongly held that the plaintiffs had no standing on their federal claims. *See* Appellant's Br. 33–58. Reversing that error will bring Ohio's Constitution to the forefront, where it defends the religious liberty of the students at Bethel.

CONCLUSION

For these reasons, the State of Ohio urges this Court to reverse.

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume requirements and contains 5,447 words. *See* Fed. R. App. P. 29(a)(5), 32(a)(7).

I further certify that this 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.

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2024, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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