No. 23-1234

In the Supreme Court of the United States

Jane Boe,
Petitioner,

v.

Dune Unified School District Board,
Respondent

On Writ of Certiorari
to the Supreme Court of the United States

BRIEF FOR THE RESPONDENT

Counsel of Record
TEAM 10
[redacted]

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II. Whether the school Board's policy violates the Equal Protection Clause of the Fourteenth Amendment since it separates students according to their sex assigned at birth during the instruction on human sexuality.

OPINION BELOW

Doe v. Dune Unified Sch. Bd., 123 F.7th 45 (13th Cir. 2023).

CONSTITUTIONAL RULES AND PROVISIONS

Title IX of the Education Amendments Act of 1972 states in relevant part that: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The Equal Protection Clause of the Fourteenth Amendment states in relevant part, "no state shall deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

INTRODUCTION

I. The Title IX sex discrimination clause was created under Congress' constitutional spending power, distinguishing the analysis required for Title IX from the analysis required for Title VII. The Spending Clause requires all terms in Title IX to be interpreted according to their ordinary definitions, and "sex" is ordinarily defined as biological and distinct from gender. Dune Unified School Board's human sexuality education policy follows this interpretation exactly,

segregating sex education classes according to biological sex, and therefore does not violate Title IX on these grounds. Even if this Court decides to analogize this case to Title VII sex discrimination and stray from mandatory authority, the human sexuality education policy still does not violate Title IX. The policy does not segregate students based on social perceptions of gender and Jane Boe's transgender status was not a motivating factor in placing her in the male sex education class.

II. The Policy is unequivocally constitutional under the Equal Protection Clause. The Equal Protection Clause prohibits states from denying any person the equal protection of the laws. This Court has deemed sex-based classifications constitutional under the Equal Protection Clause so long as they satisfy heightened scrutiny review. Therefore, heightened scrutiny review applies to review of the Board's policy, which separates students during the instruction on human sexuality, because the policy separates students according to their biological sex.

The Policy sets out to advance and protect students' health by delivering accurate information about their bodies. Students are separated by sex so that they have a learning experience tailored to their physiology. Thus, the two prongs of heightened scrutiny are satisfied. Even if the Court were to find the policy was based on a transgender classification rather than a sex-based classification, the Policy would still be constitutional under rational basis review since the separation of students is rationally related to an important governmental interest: advancing young people's health.

STATEMENT OF THE CASE

In 2018, Jane Boe ("Jane"), assigned male at birth[1], knew that she was a girl. *Doe v. Dune Unified Sch. Bd.*, 123 F.7th 45, 4 (13th Cir. 2023). At the ripe age of seven, she confidently came out to her parents, adopted her grandmother's middle name "Jane" as her own, and began using she/her pronouns. *Id*. Her family has been extremely supportive. *Id*.

Dune Unified School District is a public K-12 school district in Dune, Texington. *Id.* at 2. Two years before the Boes moved to Dune, the Dune Unified School District Board ("the Board" or "Respondent") independently decided that protections for transgender students were long overdue. *Id*. at 4. The Board proposed Resolution 2021-4 ("Transgender Student Bill of Rights") which (1) required all district schools to add gender identity as a protected class in their anti-bullying policy, (2) allowed all transgender students to use bathrooms and changing facilities consistent with their gender identity, and (3) allowed all transgender elementary and middle school students to participate in sports consistent with their gender identity. *Doe*, 123 F.7th at 4 (referencing Dune Sch. Bd., Resolution 2021-4 (2021)). The Board passed the Transgender Student Bill of Rights unanimously, without debate or discussion. *Doe*, 123 F.7th at 4.

In 2022, the same five-member Board adopted Resolution 2022-14 ("the Policy"), addressing human sexuality education for grades seven through ten. *Doe*, 123 F.7th at 4 (referencing Dune Sch. Bd., Resolution 2022-14 (2022)). The Policy was passed to address inconsistencies between district schools in their sex education curriculum. *Id.* at 3. Additionally, the Policy ensured that Dune students were provided "accurate, age-appropriate, and evidence-

[1] "Assigned [sex] at birth" is a phrase used to denote an individual's biological sex at birth. *See generally AMAB,* Merriam-Webster, https://www.merriam-webster.com/dictionary/AMAB. This phrase is often used in cases where an individual's sex does not match their gender identity. *Id*.

based information about human sexuality." *Id.* The Policy provides all students comprehensive sex education, covering reproductive anatomy, puberty, healthy relationships, contraceptives, sexually transmitted diseases, signs of sexual and emotional abuse, among other topics. *Id.* at 3-4. Schools are required to give parents and guardians 14-days' notice before the sex education unit begins, where parents and guardians can request that their student not participate. *Id.* at 4.

The Policy calls for classes to be separate for "male" and "female" students, defined as "biological sex as determined by a doctor at birth and recorded on their original birth certificate." *Id.* at 3. This allows teachers to tailor instruction to students' respective "anatomical and physiological characteristics, and the unique experiences and health care needs associated with these characteristics." *Id.* at 3-4. However, the Policy ensures that all students are provided information on topics relevant to both sexes. *Id.* at 4.

The Boes moved to Dune, Texington in June 2023. *Id.* They were provided a packet on Dune Junior High School guidelines, including the Policy. *Id.* Since starting at Dune Junior High School as a seventh grader, Jane has been embraced by her school community. *Id.* She has made multiple friends, plays on the girls' volleyball and field hockey teams, uses the girls' bathroom and changing facilities, and is always addressed by the correct name and pronouns by students and staff alike. *Id.* at 5.

Jane's father Jack Boe, on behalf of Jane (collectively, "Petitioner") filed suit against the Board in October 2023 claiming that the Policy was discriminatory. *Id.* Jane is not currently out to many of her classmates, and Petitioner worries that putting Jane in the male sex education class would be embarrassing: Jane would have to explain to her peers why a girl is in the "boys" class, and she dreads such a situation. *Id.* Petitioner also believes that opting out of sex education is not fair since Jane would be denied access to information on "healthy relationships, the signs

of sexual and emotional abuse, contraceptives and safe sex practices, HIV and STIs, and other topics." *Id.*

At the time of this suit, Jane has not taken puberty blockers and has not yet undergone any gender-affirming procedures. *Id.* at 4. Jane and her family plan to follow doctor recommendations on this in the long run but have not yet confirmed a treatment plan. *Id.*

ARGUMENT

I. THE BOARD'S POLICY ON HUMAN SEXUALITY EDUCATION DOES NOT VIOLATE TITLE IX OF THE EDUCATION AMENDMENTS ACT OF 1972 BECAUSE IT COMPLIES WITH THE ORDINARY MEANING OF THE TERM "SEX" AND THE BOARD DID NOT ENGAGE IN GENDER IDENTITY DISCRIMINATION.

Title IX's sex discrimination clause plainly states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX broadly speaks to requirements for education in the United States, but has a particular focus on providing equal education for all students. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818-821 (Lagoa, J., *concurring*) (11th Cir. 2022). This is largely implemented through a ban on sex segregation, except for cases in which the Department of Education ("ED") has deemed sex segregation appropriate. Human sexuality classes are one such exception, as the ED states that "[c]lasses or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls." 34 C.F.R. § 106.34(a)(3).

While this Court has addressed the issue of "sex" and "gender" under Title VII, it has not yet done so under Title IX. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) (finding that sex and gender are related but distinct under Title VII). As a result, there is a current circuit

split on whether Title IX sex discrimination should be tested under a plain language analysis or under the tests enumerated for Title VII. Regardless, this Court should affirm the Thirteenth Circuit's decision because (1) a plain language interpretation of Title IX is constitutionally mandated, (2) the Policy complies with the plain meaning of "sex" segregation, and (3) the Policy is not discriminatory under *Price Waterhouse* or *Bostock.*

A. This Court should apply Spending Clause analysis instead of analogizing to Title VII because Congress, the ED, and the Supreme Court have distinguished Title IX and Title VII sex discrimination.

It is an error to translate Title VII case law to the Title IX context. A few circuits have attempted to do so, viewing Title VII's "because of [sex]" language as sufficiently similar to Title IX's "on the basis of sex." *E.g., A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023). However, while both Title IX and Title VII involve similar sex discrimination clauses, they are by no means identical, in substance or form. For example, while Title VII holds a rather stringent and straightforward standard for sex segregation, Title IX provides educational institutions several nebulous exceptions allowing sex segregation. *Compare* 42 U.S.C. § 2000e-2(a) *with* 20 U.S.C. § 1681(a) *and* 34 C.F.R. § 106.34(a). Additionally, Congress enacted Title VII and Title IX were enacted under different congressional powers, naturally calling for different interpretive methods. *M.K. v. Pearl River Cnty. Sch. Dist.*, No. 1:22-cv-25-HSO-BWR, 2023 U.S. Dist. LEXIS 227387 at *23 (S.D. Miss. Dec. 21, 2023) ("[T]he Court must scrutinize Title IX for a *clear statement* that it covers sexual-orientation discrimination because Congress enacted Title IX under the Spending Clause, whereas it enacted Title VII under the Commerce Clause.") Thus, the *Price Waterhouse* and *Bostock* tests are inappropriate and unusable in the Title IX context.

1. Title IX and Title VII sex discrimination are distinct because Title IX has more complex exceptions to its clause.

Title VII makes a virtual outright ban on sex discrimination in the workplace. The single statutory exception is when sex (or other identities such as religion or national origin) is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," where such discrimination is allowed. 42 U.S.C § 2000e-2(e). In this day and age, it is hard to think of an instance where hiring employees of only one sex is reasonably necessary for a business' operations. Perhaps that is exactly the point. Employers should be hiring employees based on their individual skills because that is ultimately all that matters in the workplace. And such a simple rule only needs a "simple test" of but-for causation. *See Bostock*, 140 S.Ct. at 1748-1749.

Unlike Title VII, Title IX includes multiple detailed carveouts for sex discrimination, specifically tailored to benefit education quality. The very first (and broad) exception to Title IX sex discrimination is "classes of educational institutions…" 20 U.S.C. § 1681(a). 34 C.F.R § 106.34(a) attempts to clarify these bounds, creating varied rules for contact sports, choruses, physical education, and other nonvocational classes. *See* 34 C.F.R. § 106.34(a). Where a school does have some discriminatory practice, the ED provides a multitude of guidelines to ensure that education among the sexes is substantially equal, as well as a system for periodic evaluation. *See* 34 C.F.R. § 106.34(b). This web around Title IX sex discrimination is complicated and for good reason: sometimes there may be great educational benefit for separating the sexes entirely or substantially, but schools should not be able to determine that the sexes are entirely different in all respects. This delicate balance cannot be achieved by the "simple test" *Bostock* touts.

2. The Supreme Court agrees that Title IX is a Spending Clause issue and not analogous to Title VII.

In *Davis*, a panel of Eleventh Circuit justices analyzed a Title IX hostile work environment claim under the same standards as a Title VII hostile work environment claim. *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 637 (1999). The Eleventh Circuit *en banc* reversed on Spending Clause grounds. *Id*. The Supreme Court upheld that Title IX's hostile work environment provision must be interpreted under a Spending Clause analysis, and that analogy to Title VII was unworkable. *Id*. at 640. Under this precedent, any argument that Title IX should be interpreted in the same manner as Title VII is a losing argument.

Several courts have applied Title VII reasoning to Title IX cases, but they fail to explain why or how this comports with the Spending Clause. *Cf. Neese v. Becerra*, 640 F.Supp.3d 668, 678 (N.D. Tex. 2022) (noting that the Fourth Circuit provides "scant analysis" on why it applies Title VII case law for Title IX claims). A plain language analysis under the Spending Clause makes sense for the case at hand, since this analysis is specifically tailored to ensure terms are fair for schools which receive federal funds. Title VII makes no such consideration.

As this Court notes in *Davis*, "[c]ourts…must bear in mind that schools are unlike the adult workplace." *Davis*, 526 U.S. at 651. Title VII and Title IX acknowledge this difference through their unique exceptions and reasoning, and their legal analyses should acknowledge this difference too. Deciding this case under a spending power analysis would not only comport with this Court's own precedent but would resolve the circuit split on this issue once and for all.

B. A narrow reading of the term "sex" in Title IX comports with its ordinary meaning, as Congress intends it to.

Congress enacted Title IX under its Spending Clause powers. *Davis*, 526 U.S. at 640 ("[W]e have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority

under the Spending Clause"). This power allows Congress to condition the granting of federal funds so long as (1) these conditions are in pursuit of "the general welfare," (2) the conditions are related to a federal interest, (3) the conditions are constitutional, (4) the conditions are not coercive, and (5) the conditions are unambiguous and put states on notice of what compliance entails. *S.D. v. Dole*, 483 U.S. 203, 207-208 (1987). The Board agrees that conditioning federal funding on a prohibition of sex discrimination is in the general and federal interest, and that such a condition is constitutional and not coercive. Additionally, the Board agrees that "sex" as used in Title IX is defined unambiguously through its standard biological meaning. Even if "sex" is deemed ambiguous, this Court should still find for the Board as it has acted in good faith in assuming the ordinary meaning of the term.

1. "Sex" must have its ordinary meaning distinct from "gender" in Title IX to be enforceable under the Spending Clause.

The Court in *Pennhurst* likens spending power legislation to a contract between the federal government and public agencies: "in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Like any contract, both parties must understand what is required of them in order to comply. As the drafting party, Congress must make the terms of the "contract" clear to agencies receiving federal funding, or else such ambiguous terms will be deemed non-conditions. *Id*.

In *Pennhurst*, a hospital patient sued a state-operated mental hospital for violating the bill of rights proviso of the Developmentally Disabled Assistance and Bill of Rights Act of 1975. *Id*. at 5. This statute was enacted under the congressional spending power. *Id*. at 9. The statute makes clear that hiring qualified handicapped individuals and submitting service evaluations are "*condition[s]* for providing [federal] assistance" to any state-operated mental hospital. *Id*. at 12 (*emphasis added*). Meanwhile, the bill of rights provision claims in relevant part that "Congress

makes the following *findings* respecting the rights of persons with developmental disabilities…" *Id*. at 13 (*emphasis added*). The Court finds that while the first portion of the statute is clear about its mandatory nature, the bill of rights reads as suggestions or aspirations. *Id*. As such, the Court holds that compliance with the bill of rights proviso is not mandatory, because "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id*. at 17.

Pennhurst put Congress on notice that it must use unambiguous language in the Title IX sex discrimination clause to make it enforceable. And even as transgender rights have become a tense debate in American society, Congress has remained steadfast in keeping the phrase "on the basis of sex" unchanged for the last forty years, implying that its intended definition of "sex" has remained exactly the same.

Indeed, the ordinary definition of "sex" has remained the same since 1972: biological and separate from gender identity. Dictionaries from the time of enactment each define "sex," as well as "male" and "female," through reproductive functions. *See Adams*, 57 F.4th at 812 (citing three dictionaries from the 1970's defining "sex," "male," and "female" as biological terms). In modern times the differentiation between sex and gender remains prevalent, if not heightened. Reputed dictionary Merriam-Webster explains that sex is used in reference to biology, while gender is "referring to the behavioral, cultural, or psychological traits typically associated with one sex." *Sex vs. Gender: How They're Different*, Merriam-Webster, https://www.merriam-webster.com/grammar/sex-vs-gender-how-they2019re-different/. Even transgender rights advocacy groups like the Human Rights Campaign acknowledge the difference between the terms. *Sexual Orientation and Gender Identity Definitions*, Human Rights Campaign Foundation, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-

terminology-and-definitions/ (“One's gender identity can be the same or different from their sex assigned at birth”).

This distinction does not undermine the validity of transgender or nonbinary identities, but merely demonstrates that “sex” is used solely in reference to biology and chromosomal makeup, and “gender” is about social expression. In using the term “sex” without providing further caveats or carveouts to this term, only biological and chromosomal differences are implicated in the Title IX sex discrimination clause.

While Jane’s gender is female, her sex is currently still male as she is not on any hormone blockers nor has she undergone any gender-affirming procedures. *Doe*, 123 F.7th at 4. The Board’s Policy and other policies are carefully constructed to follow these ordinary definitions of “sex” and “gender.” The Policy requires segregation by *sex*, and explicitly clarifies that this is about biological characteristics. *Id.* at 3-4. By contrast, in 2021 the Board unanimously passed its Transgender Student Bill of Rights: allowing students to use bathrooms consistent with their *gender*, adding *gender* identity as an enumerated protected class in the district’s anti-bullying policy, and allowing young students to engage in the sex-segregated sport consistent with their *gender*. *Id*. at 4. The Board’s careful use of the term “sex” in the human sexuality instruction policy is clearly intentional. Sex segregation in the sex education class provides students with pertinent information about their own bodies and the anatomical and physiological changes they are about to undergo as young teenagers. *Id*. at 3.

Although Jane’s gender may differ from many of her classmates in the biologically male sex education class, Jane is not being excluded or denied the benefits of comprehensive sex education due to her biological sex. The very purpose of sexual education is to discuss students’ reproductive features. The school has included her in the biological male class at this point in

time because she will be undergoing puberty that corresponds with her XY chromosomes; to deny her the opportunity to learn about it would be discrimination. Because the Board has instead explicitly *included* her with peers of the same sex, the policy does not violate Title IX.

2. A narrow reading of "sex" makes sense given the Department of Education's sex discrimination carveouts.

In general, the ED's sex discrimination regulations state that federally-funded schools cannot carry out educational programs "separately on the basis of sex." 34 C.F.R. § 106.34(a). Section 106.34(a) notes several exceptions to this rule. For example, a choral class may be limited to certain vocal ranges which "may result in a chorus or choruses of one or predominantly one sex," but still cannot be limited by sex itself. 34 C.F.R. § 106.34(a)(4). Physical education classes can involve grouping students by physical ability, but this must be "developed and applied without regard to sex." 34 C.F.R. § 106.34(a)(2). By contrast, the ability for schools to separate human sexuality classes by sex is completely unqualified. 34 C.F.R. § 106.34(a)(3).

Like Congress, the ED clearly has the ability to unambiguously qualify sex segregation. Section 106.34(a) indicates that the ED acknowledges that many human characteristics, while perhaps more common in one sex, can still be apparent in another. *See* 34 C.F.R. § 106.34(a). A lack of qualification for segregation in human sexuality classes implies reference to biological sex since reproductive functions between XX and XY chromosome types are immutably different. The Board's Policy follows this interpretation exactly.

3. If "sex" is deemed as ambiguous, the Board cannot be held in violation of Title IX under Pennhurst since the Board made a good faith effort to comply.

The Eleventh Circuit in *Adams* emphasizes that "[e]ven if the term 'sex,' as used in Title IX, were unclear, we would still have to find for the School Board." *Adams,* 57 F.4th at 815. If

this Court finds that "sex" and "gender" are synonymous for purposes of the Title IX sex discrimination clause, then the Board was not put on sufficient notice and therefore cannot be held in violation of this clause. *See id*. A plethora of evidence appears to distinguish "sex" and "gender," and the Board has taken painstaking efforts to clarify where each one is implicated in their policies. *See Doe*, 123 F.7th at 3-4. The Board has gone above and beyond what is legally required to protect transgender students, doing so unanimously and without second thought. *Id*. at 4.

Punishing a contracting party for not following a term which the other deceptively defined is never upheld in court. Punishing the Board for not following a deceptive definition of sex when it has made every effort to embrace and protect transgender students is similarly unjustifiable.

C. Even under *Price Waterhouse* and *Bostock*, Petitioner fails to establish sex discrimination based on her transgender status.

If this Court decides to use Title VII precedent in this case, Petitioner still cannot establish sex discrimination. Under Title VII, it is unlawful for an employer to discriminate against any employee "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). In 1989, the Supreme Court defined "because of" as an employer's reliance on sex stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989), *overruled in part by* 42 U.S.C. § 2000e-2(m).

In 2020, the Court in *Bostock* defined "because of" as a simple "but-for" causation test: but for the plaintiff's transgender status, the defendant would not have discriminated against the plaintiff. *Bostock*, 140 S.Ct. at 1748; *but see Price Waterhouse*, 490 U.S. at 240 ("To construe the words "because of" as colloquial shorthand for "but-for causation" ...is to misunderstand them"). The plaintiff's trans identity does not have to be the only actual cause, it merely has to be

one of the actual causes (or motivating factor) for liability to attach. *Bostock*, 140 S.Ct. at 1742. "Discrimination" in this context means treating the plaintiff worse than similarly situated individuals. *Id*. at 1740.

Though *Bostock* appears to change the test for Title VII sex discrimination, many courts treat both *Price Waterhouse* and *Bostock* as controlling for this statute, including the Thirteenth Circuit. *Doe*, 123 F.7th at 9. Even so, if this Court does find that Title VII sex discrimination is sufficiently analogous to Title IX sex discrimination, the Board's Policy is not discriminatory under either of these tests.

1. The Board's human sexuality policy is not discriminatory under *Price Waterhouse* because it is not based on social stereotypes of the sexes.

Under *Price Waterhouse* as modified by the 1991 Civil Rights Act, a plaintiff can only prove sex discrimination in showing that the defendant relied on sex stereotypes in its decision-making. *Price Waterhouse*, 490 U.S. at 250. In *Price Waterhouse*, an employer denied a female employee promotion. *Id*. at 233. Partners complained about her cursing as a woman, advised her to talk and dress more femininely, and told her to "take a course at charm school" before she would be seriously considered for the promotion. *Id*. at 234-235. The Court held that the employer had relied on sex stereotyping since the employer denied the employee promotion solely because it thought she should act "more like" a woman. *Id*. at 250.

The Court in *Bostock* builds on this idea for transgender individuals. *See Bostock*, 140 S.Ct. at 1737. The *Bostock* Court acknowledges that transgender status is inextricably bound up with sex, because if sex refers to the biological sexes, being transgender means that an individual is not conforming with stereotypes associated with their biological sex. *Id*. at 1741 (explaining that firing a male employee for his attraction to men would be discriminatory because it is based on the stereotype that all men are heterosexual).

Both of these cases make clear that sex stereotypes are based on social expectations of the traditional sex and gender binary. The employer in *Price Waterhouse* failed to promote the female employee because it expected her to conform to traditional social expectations of dress and attitude for women. In *Bostock*, each employer fired employees after learning the employees did not conform with the traditional social expectation that men are attracted to women and vice-versa.

The Board has not placed Jane in the male sex education class because she fails to dress, act, or appear feminine enough. In fact, the Board has allowed Jane to defy cisgender normativity in all relevant aspects: Jane is an active part of girls' sports teams, uses the girls' bathroom and changing facilities, and is always referred to by the correct name and pronouns at school. *Doe*, 123 F.7th at 5. Jane is in the male sex education class because the policy is based on anatomical makeup, and Jane's anatomical makeup—as it stands currently—is male. Sex stereotyping may be prevalent in a case where a plaintiff in Jane's situation had undergone hormone treatment and/or gender affirming care and thus would not be experiencing the traditional markers of male puberty. However, those are not the facts before this Court today. Jane is not on puberty blockers, nor has she undergone gender-affirming care, and thus education about XY chromosome puberty is entirely relevant to her at this point. *Id*. at 4. Social stereotypes or norms were not a consideration in the Board's policy; scientific accuracy was. As such, Petitioner fails to prove sex discrimination under *Price Waterhouse*.

2. The Board's human sexuality policy is not discriminatory under *Bostock* because Jane's transgender status was not an actual cause for placing her in the male sexual education class.

Per *Bostock*, the question of causation can be posed as "but for Jane's transgender status, Jane would not have been placed in the male sex education class," or alternatively, "but for

Jane's transgender status, Jane would have been placed in the female sex education class."[2] Both statements are untrue. The Board's sex education policy focuses on teaching students about their respective "reproductive anatomy[,] puberty and the development of secondary sex characteristics…" *Doe,* 123 F.7th at 3. The male and female classes are separate so they may address anatomical and physiological issues unique to XY chromosome puberty and XX chromosome puberty, respectively. *Id*. at 3-4. Additionally, the Board encourages schools to provide all students information on topics not unique to any one sex, such as healthy relationships, safe sex practices, sexually transmitted diseases, and family planning. *Id*. If Jane were a cisgender male, meaning her gender identity aligned with her male sex assigned at birth, Jane would still be put in the male sex education class. By the same coin, if Jane were a cisgender male, she would not be put in the female sex education class.

The Board's policy is completely devoid of consideration for transgender status, and according to *Bostock*, that is exactly what is required in order to avoid discrimination. In fact, accounting for Jane's gender identity would lead to one of two negative outcomes: either Jane is put in the female class, or Jane is placed in a third category specifically for non-cisgender students. If Jane were put in the female class, she would be given inaccurate information about what her own body is experiencing as she goes through XY chromosome puberty. Not only would such an outcome violate the Board's policy to provide "accurate…information about human sexuality" to all students, it would also violate ED's regulation of single-sex classes by

[2] Petitioner may argue that the test is properly phrased as "but for Jane being a transgender girl as opposed to a cisgender girl, Jane would be placed in the female sex education class." This is a misinterpretation of the *Bostock* test. But-for causation calls for changing "one [factor] at a time." *Bostock*, 140 S.Ct. at 1739. This alternative phrasing not only changes Jane's gender identity, but her biological sex. Therefore, this phrasing is invalid.

failing to meet "the particular, identified educational needs of its students." *Doe*, 123 F.7th at 3.; 34 C.F.R. § 106.34(b)(1)(i)(B). Though Jane's gender identity is female and the Board should honor that in every space possible, a middle school human sexuality class is primarily focused on puberty and physiological changes. Sex segregation in human sexuality classes is allowed under ED regulation, and providing Jane proper education is not discrimination under *Bostock.*

The other alternative would be placing Jane in a third category specifically for non-cisgender students, which would be explicitly discriminatory. In *Grimm*, a transgender student was denied access to the bathroom associated with his gender, as well as the bathroom associated with his biological sex. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021). The student was instead forced to use the gender-neutral bathroom on campus, which was far from class and only used by transgender students. *Id.* at 600. This policy was created specifically to isolate the student as the school board received complaints from people nationwide about allowing a trans student to use their gender-accurate bathroom. *Id*. at 588. The Fourth Circuit ultimately held that being forced to use the third "gender-neutral" bathroom simply due to trans status was isolating and unequal, and therefore discriminatory under Title IX. *Id*. at 619-620.

Placing Jane in a sex education class of her own would be similarly isolating and unequal. Like *Grimm*, making such a class would send the message that "transgender students…should exist only at the margins of society…" *Grimm*, 972 F.3d at 625 (Wynn, J., *concurring*). Such a policy would not only out Jane's transgender identity but would punish her for it.

Admittedly, the Board's Policy may out Jane as transgender. *Doe*, 123 F.7th at 5. This is a valid concern. However, Title IX merely requires the Board to avoid trans discrimination at the

administrative level, to allow students to opt-out of the school's sex education class, and to implement anti-bullying policies at the peer level. *See* 34 C.F.R. § 106.34(b)(1)(iii)*; see also* Adele P. Kimmel, Feature, *Title IX: An Imperfect but Vital Tool To Stop Bullying of LGBT Students,* 125 YALE L.J. 2006 (2016) The Board's policies comply with all three. Even if there are potential negative consequences to the Policy, the Board has met and exceeded expectations under Title IX, and has provided Jane a means of avoiding such consequences entirely. Therefore, because the Board's sex education policy does not discriminate based on gender identity, the policy also complies with *Bostock*.

II. THE BOARD'S POLICY ON HUMAN SEXUALITY EDUCATION DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE IT PASSES CONSTITUTIONAL MUSTER UNDER HEIGHTENED SCRUTINY REVIEW, THE APPROPRIATE STANDARD OF REVIEW FOR CLASSIFICATIONS BASED ON SEX.

The Policy adopted by the Dune Unified School Board unequivocally embodies a sex-based classification. It separates students "according to [their] *biological sex* as determined by a doctor at birth" during the instruction on human sexuality. *Doe v. Dune Unified Sch. Bd.,* 123 F.7th 45, 3 (13th Cir. 2023) (*emphasis added*). This explicit reference to biological sex indicates it is a sex-based classification. Under the Equal Protection Clause of the Fourteenth Amendment to the Constitution, no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. The Court has fashioned three different levels of scrutiny when evaluating government actions against different groups of people: strict scrutiny, intermediate or heightened scrutiny, and rational basis scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

When evaluating alleged violations of the Equal Protection Clause, this Court has found that the requisite level of scrutiny for sex-based classifications is heightened scrutiny. *U.S. v.*

Virginia, 518 U.S. 515, 533 (1996); *Clark*, 486 U.S. at 461. For a government action to survive heightened scrutiny review, the government classification must serve "'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150, 100 (1980)). Under this standard, the Board's Policy is constitutional because it serves a legitimate government interest, advancing students' health, and uses a means, separating students by sex, that is substantially related to that interest.

A. The Court should review the Policy under heightened scrutiny because the Board made a sex-based classification, not because it classified students according to their transgender status.

Petitioner's position that heightened scrutiny should be applied in the Court's review of the Policy because it makes a sex-based classification *and* a classification based on students' transgender statuses is wrong. *Doe*, 123 F.7th at 7. The Policy only makes a sex-based classification. Petitioner's proposition is incorrect for three reasons. First, the Policy does not classify students by transgender status because it makes no mention of students' gender. Second, there is a "lack of identity" between the separation of students by sex and discrimination against transgender students. Third, the Board did not intend to exclude transgender students from the Policy.

1. The fact that transgender status is not mentioned in the Policy indicates the Board did not make a classification based on transgender status.

In *Adams by and through Kasper v. School Board of St. Johns County*, the Eleventh Circuit considered whether the school board's bathroom policy, which mandated that students use bathrooms that aligned with their biological sex assigned at birth, was constitutional under the Equal Protection Clause. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 797-98 (11th

Cir. 2022). The court reasoned that the policy did not make a classification based on transgender status because references to "transgender status and gender identity" were nowhere to be found in the policy when the board separated students. *Adams*, 57 F.4th at 808. To the court, it was simply a case of "an individual of one sex seeking access to the bathrooms reserved for those of the opposite sex." *Id.* The Policy before the Court is similar in this regard.

Just as the policy in *Adams* made no mention of transgender students, the Board only classifies students by biological sex as evidenced by its explicit separation of students based on students' "biological sex." *Doe*, 123 F.7th at 3. The fact that the Policy only references the separation of "male" and "female" students also suggests that the Board did not, in fact, classify its students based on transgender status. *Id.* No student's, including Jane's, gender identity is considered in the policy. *Cf. Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 599 (4th Cir. 2020) (applying heightened scrutiny to a bathroom policy that explicitly separated students according to their "biological *gender*") (*emphasis added*). Additionally, the Policy so clearly only referred to students' sex that even Jane's parents realized that their daughter would be assigned to the human sexuality class for boys before school began, prompting them to reach out to the school to request that Jane be placed in the class for girls. *Doe*, 123 F.7th at 4. Since the Policy facially classifies students according to sex, heightened scrutiny should apply.

It makes sense that the Board would want to classify students according sex rather than gender since the instruction on human sexuality was focused on teaching students about "anatomical and physiological characteristics" of their bodies. *Doe*, 123 F.7th at 4. This focus indicates that students would learn about the function of their sexual organs, a concept distinct from gender identity. Had the purpose of the Policy been to educate students on issues related to gender identity, which it did not, it would seem unnecessary to separate students by sex.

However, since the focus of the Policy is to educate students on their bodily functions and experiences, separation of students by sex is completely appropriate for this type of instruction.

2. Because there is a "lack of identity" between transgender students and the Policy, the Board did not make a classification based on transgender status.

This Court has implicitly found that where there is a "lack of identity" between a state action and a class of people, there is no targeting of a particular group. *Geduldig v. Aiello,* 417 U.S. 484, 496 n.20 (1974). The Court in *Geduldig v. Aiello* explained that a statute limiting disability protection for pregnant women with normal pregnancies did not discriminate on the basis of sex or gender because there was a "lack of identity" between normal pregnancy-related disabilities and pregnant women's gender. *Geduldig,* 417 U.S. at 496 n. 20. A lack of identity meant that the sex or gender of the people being excluded from the policy, pregnant women, was immaterial. *Id.* This was because *all* pregnant women would still be entitled to disability insurance for abnormal pregnancy-related disabilities. *Id.* at 490-91. Because the statute did not treat women with normal pregnancies differently than others, there was no violation of the Equal Protection Clause. *Id.* at 494.

In the present case, just as the state legislature excluded *all* pregnant women with normal pregnancies from receiving disability pay, the Board intended to include *all* students in its sex-based classification. *Doe,* 123 F.7th at 3-4. Transgender students, like non-transgender students, are included in the "male" or "female" categories. Even those who identify as non-binary, that is,

they do not associate themselves with any gender, are included within the Policy because even non-binary individuals were assigned a sex at birth.[3]

Petitioner relies on circuit cases that conflate the meaning of sex and gender. *See Grimm*, 972 F.3d at 59; *see also Evancho v. Pine-Richard Sch. Dist.*, 237 F.Supp.3d 267, 285-86 (W.D. Pa. 2017). But as this Court has recognized, sex and gender are not the same. Sex is immutable, while gender identity is mutable. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), *see also Bostock*, 590 U.S. at 1758 (stating "discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex.") (Alito, J., *dissenting*). Therefore, they should be treated separately. With these concepts in mind, no one, whether cisgender or transgender, is excluded from the Policy.

3. The Board's intent to include transgender students indicates that the Policy does not discriminate against transgender students.

The Board championed transgender students' rights in the Transgender Student Bill of Rights. It did not intend to exclude transgender students from the Policy. The fact that the Board passed the Transgender Student Bill of Rights, aimed specifically at protecting transgender students before the Policy was passed suggests that the Board intended to include transgender students in its classifications of students as "male" or "female" in the Policy. *Doe*, 123 F.7th at 4. Just as the Board explicitly mandated that schools permit transgender students to access bathrooms and participate in school sports consistent with their gender identity under the Transgender Student Bill of Rights, it also could have explicitly mandated that transgender

[3] Petitioner may argue that the Policy does not include all students since it does not account for intersex individuals whose sex assigned at birth is not solely male or female. Respondent concedes that intersex individuals occupy a unique space in the sex discrimination context. However, this issue is not before the Court in the present case.

students be allowed to participate in the human sexuality class that was consistent with their gender identity. *Id.* Had the Board done this, only then would it be arguable that it made a classification based on transgender status. Because the Board made no suggestion that transgender students could participate in the class that aligned with their gender identity similar to its Transgender Student Bill of Rights, it is apparent that there was no classification based on transgender status in the Policy.

Despite Petitioner's suggestion to the contrary, the Board's requirement that students participate in the class that aligns with their sex assigned at birth is for the wellbeing of its students. *Id.* at 3. It is important for students to be in the classroom that aligns with their sex assigned at birth so they can have a greater, accurate understanding of their anatomy and the physiological experiences unique to males and females, respectively. *Id.* at 3-4. Jane, who has yet to undergo gender-affirming treatment, would gain the most out of these lessons if she was educated on how her body functions in its current form. *Id.* at 4. Respondent is sympathetic to Jane's position as the only transgender person at school. However, it is in her best interest to obtain accurate information about her body. As such, Jane, who was assigned male at birth, should be with other biological males during the lesson on human sexuality.

B. The Court should consider the Policy under rational basis review only if the Court finds the Policy classifies students according to transgender status.

Because the Court has never decided the level of scrutiny applicable to transgender classifications, Petitioner's position that the Policy should be reviewed under heightened scrutiny because of a supposed transgender classification in the Policy is unfounded. Kaleb Byars, Bostock: *An Inevitable Guarantee of Heightened Scrutiny for Sexual Orientation and Transgender Classifications,* 89 TENN. L. REV. 483, 485 (2022). Petitioner argues that transgender status warrants heightened scrutiny review because "classification based on

transgender status is a form of classification based on sex" and because transgender people qualify as a quasi-suspect class. *Doe,* 123 F.7th at 10. However, the Court has not classified transgender people as belonging to a suspect or quasi-suspect class requiring heightened scrutiny review. *L.W. by and through Williams v. Skrmetti,* 83 F.4th 460, 486 (6th Cir. 2023). Where the Court has not classified a class as suspect or quasi-suspect, rational basis scrutiny applies. *Id.* Because the Court has not identified transgender people as belonging to a suspect or quasi-suspect class, rational basis review would apply to a review of the Policy's constitutionality, but only if the Court finds the Policy classified students by transgender status.

1. Transgender status is not a form a sex-based classification because gender and sex are treated differently by the Court.

As to their first point, Petitioner's contention that a classification of transgender status is a form of classification based on sex is rooted in two irrelevant Court decisions, *Price Waterhousecel v. Hopkins* and *Bostock v. Clayton County, Georgia.* These two cases are not related to the present issue because these cases dealt with two employees' Title VII sex discrimination claims against their employers. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 232 (1989); *Bostock v. Clayton Cnty.*, 590 U.S. --- (2020). In *Price Waterhouse,* the Court found that sex stereotyping based on an employee's gender violated Title VII. *Price Waterhouse,* 490 U.S. at 258. And in *Bostock,* the Court found that firing an employee *because of* his sexual orientation violated Title VII. *Bostock*, 590 U.S. at 1753. The Court in *Bostock* admitted that it did not "purport to address bathrooms, lockers or anything else of the kind." *Id.* Surely, a classroom fits within this category of cases the Court chose not to address in its consideration of sex discrimination in the employment space, especially since issues in education are governed by Title IX. These findings are irrelevant to the facts at issue because the Policy does not perpetuate

any sex stereotypes against students nor does Petitioner allege the Policy targets Jane *because of* her gender.

2. The Policy should not be reviewed under heightened scrutiny because the transgender people are not recognized as a quasi-suspect class.

Additionally, Petitioners' contention that transgender status is a quasi-suspect class is not rooted in mandatory authority. *Doe,* 123 F.7th at 10. Rather, Petitioner refers the Court to a slew of district court cases that have no bearing on this Court's decision. *Id.* In order to determine if a class of persons belongs to a quasi-suspect class, courts like the ones cited by Petitioner look to four factors: (1) "whether the groups historically has been subjected to discrimination," (2) "whether the group has a defining characteristic that 'frequently bears no relation to the ability to perform or contribute to society,'" (3) "'whether the group has obvious, immutable, or distinguishing characteristics that define them as a discrete group,'" and (4) "whether the group is a minority lacking in political power." *Adams,* 57 F.4th at 848 (quoting *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)) (quoting *Lyng v. Castillo,* 477 U.S. 635, 638 (1986)). A review of these factors is unnecessary because the issue of whether transgender people are a quasi-suspect class is not before the Court. Without formal recognition by this Court, the classification should be reviewed under rational basis scrutiny. Even if the Court finds that transgender people qualify as a quasi-suspect class, heightened scrutiny review could apply in considering the constitutionality of the Policy. This is because the Policy makes a sex-based classification, not a transgender-based classification.

Even though it has been given the opportunity to do so on various occasions, this Court has not identified transgender people as belonging to a suspect or quasi-suspect class. There are only five characteristics this Court has distinguished with heightened scrutiny review: race, national origin, alienage, sex, and nonmarital parentage. Kenji Yoshino, *The New Equal*

Protection, 124 HARV. L. REV. 747, 756 (2011). The fact that the Court has not added to the five characteristics given heightened scrutiny distinction suggests that there is a need to preserve the novelty of granting heightened scrutiny distinction. *Id.* at 758. If the Court unnecessarily adds characteristics to be protected under heightened scrutiny, it risks lowering the threshold for heightened scrutiny review. *Id.* Not to mention, classifying transgender people as a quasi-suspect class would call into question far too many public policy issues, such as the permissible medical treatment for transgender minors, that are not for this Court to resolve. *L.W.*, 83 F.4th at 486-87. Without categorizing transgender people as a quasi-suspect class, a review of the Policy should be under rational basis review only if the Court finds the Board made a transgender-based qualification.

3. The Policy would pass constitutional muster under rational basis review since it is rationally related to a legitimate state interest.

Whether the Policy would pass rational basis review is not in dispute since both parties agree that heightened scrutiny applies to review of the Policy. *Doe,* 123 F.7th at 7. But to quell any concern that it does not serve a legitimate government purpose, Respondent offers a few reasons why it would pass this standard of review. Rational basis scrutiny is the lowest level of scrutiny set forth by the Court. For a policy to satisfy rational basis review, there must be a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe,* 509 U.S. 312, 320 (1993). All that is required is a "reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 320.

In *Heller v. Doe by Doe,* the Court considered the different treatment by the Kentucky legislature of mentally ill people and mentally "retarded" people. *Heller,* 509 U.S. at 315. The Court analyzed the medical differences and treatments between "mental illness" and "mental retardation" in assessing the government interests in classifying these two groups as distinct. *Id.*

at 322-25, 329. The Court found that different burdens of proof required for involuntary commitment proceedings of these two groups was rationally related to the classification of both groups. *Id.* at 315, 323. It also found that the difference of whether guardians and family members were able to be present at these proceedings was rationally related to the classification of mentally ill and mentally "retarded" people. *Id.* at 315, 328-29.

Similar to the medical distinction between "mental illness" and "mental retardation," males and females have inherent differences that require boys and girls to be in separate classrooms when learning about human sexuality. The purpose of the Policy was to advance the health of students by providing accurate information. *Doe,* 123 F.7th at 3. The separation of students by sex is only to ensure that male students receive accurate information about the physiological changes they will experience and to ensure that female students receive accurate information about the physiological changes they will experience. This separation of students by sex is akin to the Kentucky legislature's distinction of "mental illness" and "mental retardation." Therefore, there is a rational relationship to the separation of students by sex to the purpose of the Policy. The Policy would satisfy rational basis review only if the Court finds there is a transgender-based classification in the Policy.

C. The Policy passes constitutional muster under heightened scrutiny review.

Having established that heightened scrutiny is the appropriate standard of review since the Policy is based on a sex-based classification, this Court must look to the two prongs of heightened scrutiny review. Under the first prong, the state action involved must serve an important governmental objective. *Mississippi,* 458 U.S. at 724. As to the second prong, the means employed to further that important governmental objective has to be "substantially related to the achievement of those objectives." *Id*. The classification must be "exceedingly persuasive"

and "must be genuine" and "...not rely on overbroad generalizations..." *Virginia,* 518 U.S. at 533. Under this standard of review, the Policy is constitutional.

1. The Policy satisfies the Court's standard of serving an important governmental objective because the need to advance children's health and deliver accurate information is exceedingly persuasive.

In *United States v. Virginia,* the Court considered the constitutionality of Virginia Military Institute's (VMI) male-only admissions policy. *Virginia,* 518 U.S. at 523, 530. The purported purpose of maintaining VMI as a single-sex institution was to produce "'citizen-soldiers,' men prepared for leadership in civilian life and military service." *Id.* at 520. The school sought to further "physical and mental discipline" and "impart to [students] a strong moral code." *Id.* The Court reasoned that this purpose did not amount to an exceedingly persuasive justification for excluding women from the school. *Id.* at 544-45. This was in part because there was proof that women were more than capable of joining the U.S. military and there was little proof that the rigors of VMI were "inherently unsuitable to women." *Id.* at 541, 544-45. The Court rejected VMI's argument that VMI had to remain a single-sex institution because the school put forth outdated generalizations about women, such as the notion that women do not thrive in adversative environments. *Id.* at 541-42. Thus, the school did not serve a legitimate government purpose in excluding women at VMI. *Id.* at 546.

In the present case, the Board has established that the separation of boys and girls during the instruction on human sexuality is aimed at serving an important government interest: protecting and advancing the health of young students by providing accurate information to students about their bodies. *Doe,* 123 F.7th at 3. Unlike the purpose of VMI's admissions policy, which promoted unjustified discrimination against women based on outdated stereotypes about women's physical and mental capabilities, the Policy seeks to promote the health and wellbeing

of all its students, regardless of their sex, to provide a high-quality education. *Id.* at 3. The fact that the Board mandates schools within the district to include transgender students in sex-segregated sports and allows transgender students to use the bathroom that aligns with their gender identity indicates that separating students by sex for this particular instruction is imperative. It would be a challenge to see how educating young people about these topics would be anything but important to them and society in general. The Policy merely categorizes students by their sex in order to create a more effective, tailored classroom environment so the purpose of the Policy can be carried out effectively.

2. The Policy satisfies the standard of means used to achieve the important governmental objective.

The Court should next consider whether the Board's means used to achieve this governmental objective is substantially related to the objective. In *Virginia,* VMI was concerned that, by admitting women, the school would have to adjust its adversative method to accommodate women's supposed inferior capabilities. *Virginia,* 518 U.S. at 542. It also thought that the school would lose its prestige if it admitted women. *Id*. The Court held that the outright exclusion of women for these purposes was unjustified. *Id.* at 546. In other words, the means, exclusion of women, was not substantially related to serving the purpose of the school, which was to create the quintessential citizen-soldier. *Id.* at 520.

Unlike VMI's exclusion of women, which was based on the notion that women could not handle the challenges the school provided, the Board separates students by sex, not because of different capabilities between boys and girls or according to gross stereotypes of either sex, but because it is the most effective way for students to learn about the unique experiences they will face as they go through puberty and beyond. Students are separated by sex to receive the instruction on human sexuality so that they could have lessons tailored according to physical

changes specific to males and females. *Doe,* 123 F.7th at 3-4. This separation is not based on overbroad generalizations of boys and girls, nor does it reflect any motivation by outside parties to keep the two groups separate. Instead, it serves as a simple, feasible way to ensure all students receive evidence-based information about their bodies.

Providing students an environment to learn about the functions of their bodies separate from members of the opposite sex is an effective way to ensure that students can comfortably learn about their body changes and experiences. Petitioner may argue that boys and girls can just as easily learn about their bodies if they were placed in the same classroom. However, even though this means of promoting the Board's interest in advancing student's health may not be ideal to some, "enough of a fit" will suffice, and the separation of students by sex meets this standard. *Danskine v. Miami Dade Fire Dpt.,* 253 F.3d 1288, 1299 (11th Cir. 2001). Because the Policy serves a legitimate governmental purpose and uses a means that is substantially related to achieve the purpose, it passes constitutional muster under the Equal Protection Clause.

CONCLUSION

The Policy satisfies the requirements of both Title IX and the Equal Protection Clause. It does not violate Title IX because the Policy follows the ordinary definition of "sex," which Congress and federal funding recipients alike are required to follow. Even if the Policy were subjected to the standards the Court has set forth in Title VII sex discrimination cases, it would comport with the tests laid out in *Price Waterhouse* and *Bostock.* Additionally, the Policy satisfies both prongs of heightened scrutiny, the appropriate standard of review for sex-based classifications, since it furthers important government interests, ensuring students are given accurate information about their physiology and their health is protected, and the Board chose a means that furthers these objectives by separating students by sex.

For the foregoing reasons, Respondent respectfully requests that the Court affirm the decision of the Thirteenth Circuit by finding the following: (1) the Policy does not violate Title IX of the Education Amendments Act of 1972 and (2) the Policy does not violate the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

[redacted]

[redacted]

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