THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 2024

DOCKET NO. 23-1234

JANE BOE, by and through

her next friend and

father, JACK BOE;

Plaintiff-Petitioner,

v.

DUNE UNIFIED SCHOOL

DISTRICT BOARD,

Defendant-Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

Brief for Respondents

Team 12

Issue #1 (Equal Protection)

Issue #2 (Title IX)

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QUESTIONS PRESENTED

The Dune Unified School District Board ("Board") introduced a policy that afforded students the opportunity to participate in sexuality education classes tailored to the specific health care needs of their biological sex assigned at birth, with the option to opt out of such instruction entirely ("the Policy"). The district and circuit courts upheld the Board's policy, which is now under review by this Court. The questions presented are:

1. Whether the Board's policy establishing sex-separated classes on human sexuality education violates the Equal Protection Clause of the Fourteenth Amendment.
2. Whether the Board's policy establishing sex-separated classes on human sexuality education violates Title IX of the Education Amendments Act of 1972.

OPINION BELOW

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

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amend. XIV.

Pub. L. No. 92-318, tit. IX, 86 Stat. 373.

INTRODUCTION

This Court should affirm the Thirteenth Circuit's judgment that the Board's policy establishing sex-separated human sexuality education classes withstands Equal Protection and Title IX scrutiny.

The Equal Protection Clause demands that the government treats similarly situated students alike in all relevant respects. That is exactly what the Board's policy does by offering separate human sexuality classes for males and females. The goal is straightforward: to give students what they are entitled to – relevant and accurate information about their own bodies. By separating these classes based on sex, the Board is able to provide information directly relevant to the unique healthcare needs of males and females. Thus, as a sex classification subject to intermediate scrutiny, the Policy meets the two requirements of this Court's Equal Protection jurisprudence: (1) it achieves an important governmental objective, and (2) its means are a substantial fit for its ends.

The Policy does not classify based on transgender status — neither accidentally nor purposely. The relevant criteria is biological sex: anatomy and physiology decide which class a student enters, not their identity. No administrator ever considers a student's gender identity in assigning them to a class. In fact, some transgender girls attend the female human sexuality class. Petitioner claims that the Policy's refusal to consider gender identity is itself a classification on transgender status. The Board asks the Court to reject this paradox.

Without a facial classification, Petitioner's argument collapses. This Court's precedent makes clear that absent a facial classification, Petitioner must show that the Board intended to discriminate against transgender students. She simply cannot. Not only does the Board not discriminate against transgender students, but it has also consistently taken steps to affirm their identities. But when the Board's *primary* mission—education—would be furthered by sex separation, sex is the sole criterion the Board will consider. Because the Policy treats similarly situated students alike, it survives any Equal Protection challenge.

Furthermore, the Board's policy comports with Title IX. This Court should not read "discrimination on the basis of sex" as "discrimination on the basis of gender identity." Under both plain-meaning and original-public-meaning frameworks, Title IX's prohibitions against sex discrimination apply only to biological sex. Given that the Board's actions fit within the bounds set by Congress, the Court should not arbitrarily overturn clear legislative intent. The Policy is specifically authorized by one of numerous carve-outs that permit educational institutions to differentiate on the basis of sex in a limited way.

The Court's Title VII jurisprudence is inapposite to this case. Bostock v. Clayton County is expressly limited to employment discrimination and its reasoning does not cleanly

transfer to the Title IX context. A middle school classroom is not a corporate workplace, and Title IX is not Title VII.

Recognizing the distinct text and purposes of each law, the Court should side with a reading of Title IX that is drawn from the text of the statute itself, not from precedents that bear a passing resemblance to Title IX. And even if the Court finds that Bostock applies, it does not follow that a statutorily authorized sex-based classification implies gender identity discrimination. Thus, under any reasonable interpretation of Title IX, Petitioner's claim must fail.

STATEMENT OF THE CASE (SUMMARY OF FACTS)

In December 2022, the Board unanimously approved a policy establishing "accurate, age-appropriate, and evidence-based" sexuality education for grades seven through ten. Dune Sch. Bd., Resolution 2022-14 (2022). Out of concern for the inconsistent provision of human sexuality education across Dune Public Schools, the Policy ensures that all students receive relevant and accurate information about their bodies. Accordingly, the Policy creates a scheme in which human sexuality classes are conducted "separately on the basis of sex," as specifically provided for—along with chorus and contact sports—by the Department of Education's Title IX regulations. 34 C.F.R. § 106.34(a).

Jane Boe is a transgender girl in the seventh grade at Dune Junior High. She is integrated into the school community, partly because of the Board's previous attempts to ensure that transgender students feel affirmed in their schools. Dune Sch. Bd., Resolution 2021-4 (2021). In September 2023, Boe contacted the school to request admission to the female human sexuality class. Under the Board's policy, she was denied admission because she was assigned male at birth.

Boe's father filed suit against the Board in the District of Texington, alleging that the Board violated the Equal Protection Clause and Title IX. The District Court granted the Board's motion for summary judgment. Boe appealed to the Thirteenth Circuit Court of Appeal. Similarly, the Thirteenth Circuit found in favor of the Board. The appeal now finds its way to this Court.

ARGUMENT

I. THE BOARD'S POLICY SATISFIES THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE

A. Separating human sexuality classes by biological sex satisfies intermediate scrutiny.

In addressing Equal Protection claims, this Court typically (1) determines the classification in question, (2) establishes the appropriate level of scrutiny for that classification, and

(3) assesses whether the policy in question withstands the applied level of scrutiny. Clark v. Jeter, 486 U.S. 456, 461 (1988). Under this paradigm, this Court should hold that the Board's policy is a sex-based classification. Thus, it is subject to intermediate scrutiny, which it easily survives.

1. **The Board's policy is subject to intermediate scrutiny because it facially classifies based on sex, not transgender status.**

The Policy's unambiguous language creates a facial classification based on sex, so this Court should analyze the statute under intermediate scrutiny on that basis. When faced with an Equal Protection claim, this Court logically "begin[s] with the statutory classification itself." Califano v. Boles, 443 U.S. 282, 294 (1979). Thus, when dealing with a straightforward policy such as the Board's, this Court hesitates to graft a classification onto statutory text that does not facially create one. See, e.g., Geduldig v. Aiello, 417 U.S. 484, 497 (1974) (holding that a legislative classification concerning pregnancy was not a sex-based classification because it did not involve discrimination based upon sex *as such*); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236–37 (2022) (holding that statutory classifications concerning abortions are not sex-based classifications because, even though they impact one sex, their motivation is not invidious discrimination). On its face, the

Board's policy creates a statutory classification based on sex: "[i]nstruction on human sexuality shall be provided separately for *male* and *female* students." Dune Sch. Bd., Resolution 2022-14 (2022) (emphasis added). There is no hidden agenda or invisible discriminatory intent. The Policy clearly mandates sex-specific human sexuality education and creates a sex-based classification to reach this goal.

The preliminary question of whether the statute creates a classification on sex or transgender status is paramount in this case. Petitioner concedes that Dune School District may separate human sexuality classes by sex. Boe, 123 F.7th at 51 (Bernstein, J., dissenting). Should this Court determine that sex is the policy's sole classification, Petitioner's claim disintegrates. This Court's modern sex jurisprudence was founded on the notion that sex-based classifications are usually permissible when they reflect "enduring" physical differences. United States v. Virginia, 518 U.S. 515, 533 (1996) ("VMI"). Thus, for Petitioner's Equal Protection claim to succeed, she must contort an argument that the Board's policy is a hidden classification based on transgender status, despite the policy not even implying that it reaches gender identity.

The lower court correctly rejected Petitioner's argument, instead relying on the Policy's facial classification to determine the Policy only classified based on sex. Boe, 123

F.7th at 50. However, the dissent took a simple – if fallacious – path to construct the statute into a classification on transgender status, claiming "[c]isgender girls are assigned to the girls' human sexuality class, while transgender girls are not." Id. at 51.

But this framing assumes the conclusion by misreading the Policy. There is no "*girls'* human sexuality class." The Policy creates a human sexuality class for the *female* sex, not for the *girl* gender identity. See Dune Sch. Bd., Resolution 2022-14 (2022) ("Schools must tailor instruction for . . . [the] female human sexuality class[] according to anatomical and physiological characteristics"). Although sex and gender identity are often confused today, they are distinct concepts and must be analyzed separately. Sex, APA Dictionary of Psychology (2d ed. 2006) ("Sex refers especially to physical and biological traits, whereas gender refers especially to social or cultural traits, although the distinction between the two terms is not regularly observed."); see also Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 807 (11th Cir. 2022) (in a case upholding separating school bathrooms based on biological sex, "even the dissent acknowledge[d], as it must, that gender identity is different from biological sex").

Sex is an "immutable characteristic determined solely by the accident of birth." Frontiero v. Richardson, 411 U.S. 677,

686 (1977). Gender identity is the "internalized representation of [one's] gender role." Gender identity, Stedman's Medical Dictionary (28th ed. 2014). Statutory definitions consistently stress that gender identity is independent of the individual's assigned sex at birth. See, e.g., Vt. Stat. tit. 1, § 144 (2007); Nev. Rev. Stat. § 0.034 (2017); Va. Code § 38.2-3449.1 (2020). The human sexuality classes are classified according to these "immutable" biological "characteristics" highlighted in Frontiero. 411 U.S. at 686. In fact, the female human sexuality class includes non-girls, such as transgender boys and non-binary teenagers assigned female at birth. Hence, it resists reduction to the transgender status-based classification that the dissent misinterprets it as.

Under Petitioner's logic, the only way the Board could avoid creating a classification by gender identity is to assign students to classes based on their gender identity. In other words, Petitioner claims that not recognizing gender identity as a basis for assigning classes is itself an act of classification. This paradoxical understanding is simply unworkable. It fails on the facts, and it fails on the law.

First, as a factual matter, the claim that transgender girls are barred from participating in the female human sexuality class is false. Not all transgender girls are assigned male at birth. For instance, girls who are assigned female at

birth but identify as gender non-binary would be assigned to the female sexuality class. They both identify as transgender and as a girl, and they are sorted into the female human sexuality class.

This is not a one-off exception. A demi-girl is someone who at least partially identifies as a girl, regardless of their assigned sex at birth. Lal Zimmer, Gender Diversity and the Voice, in The Routledge Handbook of Language, Gender, and Sexuality 69, 69 (Jo Angouri & Judith Baxter eds., 2021). Demi-girls often self-identify and are identified as transgender. See Morgan Lev Edward Holleb, The A-Z of Gender and Sexuality 90 (2019) ("People with demigenders fit within the broader categories of transgender"). A demi-girl who (1) identifies as transgender and (2) identifies as a girl would be allowed to attend the female human sexuality class, given that she was assigned female at birth. Again, the Board's policy only considers one's sex assigned at birth, not their gender identity, transgender status, or position on the gender spectrum. Petitioner's argument that the Policy creates a classification based on transgender status necessarily sweeps gender non-conforming transgender people under the rug.

Second, this Court's Equal Protection jurisprudence has already foreclosed Petitioner's hidden-classification argument. The Equal Protection Clause only protects against "purposeful

discrimination." McCleskey v. Kemp, 481 U.S. 279, 292 (1987); see also Vill. of Arlington Heights v. Metro. Hous. Develop. Corp., 429 U.S. 252, 265 (1977). Accordingly, this Court acknowledges only three contexts in which Equal Protection challenges may prevail: (1) explicit facial classifications; (2) facially neutral laws enforced in a discriminatory manner; and (3) facially neutral laws chosen "because of," not merely "in spite of," their adverse effects upon an identifiable group. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

First, the Policy creates no facial classification on gender identity or transgender status. A facial classification must, on its face, "explicitly distinguish[] between people on the basis of some protected category." Hayden v. Cnty. of Nassau, 180 F.3d 42, 48 (2d Cir. 1999). A facial classification exists "if the statutory language requires reference to [a protected characteristic]." L. W. *ex rel* Williams v. Skrmetti, 83 F.4th 460, 498 (6th Cir. 2023) (White, J., dissenting) (citing Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 485 (1982)). Putting aside the fact that not all transgender girls are barred from the female human sexuality class, see supra pp. 6-8, the Policy does not consider either gender identity nor transgender status in its text or in its implementation. Administrators assigning classes to students will have no knowledge of any student's transgender status—and a student's

transgender status will not affect the placement of a student. It would be preposterous to call this a facial classification.

Second, even assuming *arguendo* that Petitioner can show a disparate impact on transgender students, disparate impact is not enough to render a policy unconstitutional. Arlington Heights, 429 U.S. at 265. Absent a facial classification, Petitioner must show proof of discriminatory intent to convert a disparate-impact claim into a successful Equal Protection claim. Feeney, 442 U.S. at 279.

The discriminatory-intent cases set a high hurdle to clear, and Petitioner falters at the starting line. Petitioner must show that the Policy was chosen "because of," not merely "in spite of" its adverse effects on transgender students. Id. Furthermore, this Court does not read discriminatory intent when "[t]he purposes of a [policy] provide the surest explanation for its impact." Id. at 275. Instead, this Court has laid out contextual factors for evidencing discriminatory intent, such as the policy's history, procedural irregularities, and statements from decision-makers. Arlington Heights, 429 U.S. at 267. The Board's actions show exactly the opposite: it affirms transgender students' identities. Amid a national culture war over transgender rights, the Board—elected by a public that respects Petitioner's gender identity—firmly stood with transgender students. Boe, 123 F.7th at 49. It unanimously

passed a policy allowing students access to restrooms and sports teams that align with their gender identity. Dune Sch. Bd., Resolution 2021-4 (2021). It explicitly includes gender identity in its anti-bullying policy. Id. In fact, Petitioner herself claims that she is treated consistent with her gender identity by the entire school. Boe, 123 F.7th at 50. The evidence demonstrates not just a lack of discriminatory intent against transgender students, but a will to protect them.

Given no evidence of either facial classification or discriminatory intent, this Court has no reason to indulge Petitioner's proposed framework of the Policy as a classification based on gender identity or transgender status. The plain language of this Policy shows that it classifies based on sex, and the Court should analyze it accordingly.

2. **The Board's policy easily survives intermediate scrutiny because classifying by biological sex substantially serves the important governmental objective that children receive relevant sexual education.**

As a sex-based classification, the Policy triggers intermediate scrutiny. See Craig v. Boren, 429 U.S. 190, 197 (1976). To survive intermediate scrutiny, a classification must serve "important governmental objectives," and the means employed must "substantially relate[]" to the State's goal. VMI,

518 U.S. at 533 (1996). The Board's policy easily fulfills both parts of the test.

First, the "protection of the public health of young Dune residents" is an important governmental objective. Dune Sch. Bd., Resolution 2022-14 (2022) (cleaned up). Courts agree in the context of teenage sexual health. This Court has recognized that, for instance, the government has a "compelling interest" in preventing teenage pregnancies. Michael M. v. Superior Ct. of Sonoma Cnty., 450 U.S. 464, 467 (1981) (plurality). The appellate courts have generally found that sexual education is integral to the state's compelling interest in both protecting public health and fostering student engagement in society. See, e.g., C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 181 (3d Cir. 2005) (holding a school's interest in administering a sexual education survey served an interest compelling enough to outweigh a student's privacy rights); Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1209 (9th Cir. 2005) (authorizing sexual education surveys in elementary schools because the "rearing of children into healthy, productive, and responsible adults" was part of the state's "compelling interest in the broad ends of education.").

Second, providing relevant and accurate information about human sexuality tailored to one's anatomical and physiological characteristics is substantially related to the Policy's ends.

The Equal Protection Clause does not require that a policy's classification be capable of achieving its objective in every instance. Nguyen v. I.N.S., 533 U.S. 53, 70 (2001); see also Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974) (in a case regarding a classification of widows and widowers, "the issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen . . . are within constitutional limitations"). In other words, intermediate scrutiny "does not demand a perfect fit between means and ends." Adams, 57 F.4th at 801. As with this Court's other lines of Equal Protection jurisprudence, purposeful discrimination is the target. The question of fit is meant to ensure that a benign justification describes actual state purposes, not mere rationalizations after the lawsuit. VMI, 518 U.S. at 536. The actual purpose of the classification must resemble the alleged objective. Id. Thus, this Court is much less skeptical of classifications concerned with the "biological difference" between the sexes. Nguyen, 533 U.S. at 64.

Here, the fit between the classification and the goals is clear – so clear, in fact, that human sexuality education is one of the only provided-for exceptions to Title IX's prohibition on sex-separation. 34 C.F.R. § 106.34(a)(3) (2023). The sole focus of the Policy is providing students tailored instruction about their specific "anatomical and physiological characteristics"

and the "unique experiences and healthcare needs" that come with them. Dune Sch. Bd., Resolution 2022-14 (2022). The differences in these unique sex-specific experiences are stark. See Dominick Splendorio & Lori Reichel, Tools for Teaching Comprehensive Human Sexuality Education 24-25 (2014) (discussing how to teach males and females about their different healthcare needs). According to the Policy, males will be taught about specific health concerns relevant to them, such as how to perform testicular self-examinations, the importance of prostate cancer screenings, and the dangers of testicular torsion. On the other hand, females might learn about breast self-examination, the signs and prevention of vaginal yeast infections and urinary tract infections, and the need for regular pap smears — topics inapplicable to males. These biological differences justify teaching different curriculums to groups differentiated by these characteristics. The policy of sex-separated human sexuality classes allows the Board to do so effectively, thus passing this Court's heightened scrutiny.

B. As applied to transgender people, the Board's policy survives any level of scrutiny because it does not treat "similarly situated" persons differently.

Although the Court need not reach this question because the Policy does not discriminate on "transgender status," the Board's policy satisfies the Equal Protection Clause by ensuring

equal treatment for similarly situated students. As this Court has long recognized, the Equal Protection Clause "direct[s] that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). Accordingly, the Equal Protection Clause does not require people that are "different in fact . . . be treated in law as though they were the same." Tigner v. Texas, 310 U.S. 141, 147 (1940). In other words, it prevents "governmental decisionmakers from treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

Courts do not recognize Equal Protection claims when the comparative groups are not "in all relevant respects" alike. Id. The circuits have thus focused on relevance in questions about transgender inclusion. The Eleventh Circuit found that a bathroom policy that required students to use the bathroom associated with their biological sex, or a sex-neutral bathroom, did not violate the Equal Protection Clause. Adams, 57 F.4th at 811. The court reasoned that students' privacy interests made a student's biological sex a relevant characteristic in determining the permitted bathroom they may use. Id. at 804-808. The Fourth Circuit found on similar facts that such a policy was unconstitutional because the privacy argument was merely speculative. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586,

615 (4th Cir. 2020). Thus, there was no clear reason why biological sex, not gender identity, was relevant. Id.

The circuits are split, but not on the issue presented here. In all cases, each court recognizes a real physiological difference between transgender girls and cisgender girls. See Adams, 57 F.4th at 810 ("bathroom policy relies on . . . the biological differences between males and females"); Grimm, 972 F.3d at 622 (Wynn, J., concurring) ("except for his genitals, [a transgender boy] could have used the girls' restroom"). They just disagree as to whether this is relevant in the context the cases presented. That physiological difference is certainly relevant in human sexuality education, even more so than in either the athletics or the sports cases.

Petitioner would rather the policy focus on gender identity. After all, this is the key similarity between her alleged classifications of transgender girls – or, rather, male-to-female transgender girls, see supra at 9 – and cisgender girls. At first glance, this makes sense: Petitioner is a girl, just like many of the girls in the female sexuality class. The Board agrees. Accordingly, when the Board's policies concern gender identity, the Board affirms Petitioner's gender identity. That is, where biological sex is not relevant, the Board uses gender to classify.

But biological sex, not internal conceptions of gender, is the relevant respect in a human sexuality class. Gender identity does not dictate the curriculum. This is not unique to sex-separated classrooms. Even coeducational classrooms often split students to discuss their healthcare needs in separate groups. Dominick Splendorio & Lori Reichel, Tools for Teaching Comprehensive Human Sexuality Education 25 (2014). Students assigned male at birth—including transgender girls—need education on male-specific health issues, such as testicular self-examination and prostate cancer. Students assigned female at birth focus on issues like endometriosis and menstruation. Even postoperative transgender women must get regular prostate exams, and they often do not know this. Joshua Sterling and Maurice M. Garcia, Cancer Screening in the Transgender Population, 9 Translational Andrology and Urology 2771, 2777 (2020). Knowledge about sexual health is vital, and it is the school's responsibility to teach students the risks and remedies associated with their bodies.

Including transgender girls in classes tailored to their biological sex ensures they receive essential health education relevant to their needs. If anything, separating these classes by gender identity–as Petitioner would have the Board do–would harm the educational mission of the school. If a transgender girl is placed in the female human sexuality class, she will be

reminded of specifically *female* issues. Put aside for now that menstruation will not be relevant to her, discussions of these female issues, such as menstruation, may even increase her gender dysphoria. Separating classes by gender identity simply does not align with—and may even counteract—the Policy's mission. That makes sense: gender identity is not relevant to the Policy's objectives. Because the Board's policy treats all students similarly situated alike, it comports with the standards of the Equal Protection Clause.

II. THE BOARD'S POLICY IS AUTHORIZED BY TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

A. This Court should not rewrite Title IX to cover discrimination on the basis of gender identity.

The analysis of any statute begins with its text. Ross v. Blake, 578 U.S. 632, 638 (2016). Title IX provides that "[n]o person ... shall, on the basis of sex, be ... subjected to discrimination under any education program or activity receiving Federal financial assistance." Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, § 901(a), 86 Stat. 373. Both the plain meaning today and the original public meaning in 1972 of "on the basis of sex" exclude gender identity from the statute's reach. Thus, Petitioner's claim that the Policy violates Title IX is not cognizable by the statute, as it uses a permissible carveout to classify on the basis of sex. 34 C.F.R. § 106.34.

1. The plain meaning of Title IX precludes reading "on the basis of sex" to include discrimination based on gender identity.

Title IX speaks in the language of biological sex binarism throughout its text. See, e.g., § 901(a)(2), 86 Stat. 373 (permitting an institution to change from an "institution which admits only students of *one sex* to being an institution which admits students of *both sexes*"); § 901(a)(5) (limiting the law's application to "any public institution ... that traditionally and continually from its establishment has had a policy of admitting students of *one sex*"); § 901(b) (adding a proviso that the law would not require an institution to "grant preferential or disparate treatment to the members of *one sex* on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex"); § 907 (adding a proviso that the law would not prohibit "any educational institution ... from maintaining separate living facilities for the different sexes") (emphasis added throughout).

Reading gender identity discrimination into § 901(a) would render Title IX internally inconsistent. Creating surplusage should be avoided when interpreting statutes, lest the original intent of Congress be ignored. United States v. Butler, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used"). Section 907, for example, would be

inoperative if § 901(a) included gender identity discrimination. If a school created sex-separated living facilities as permitted by § 907, it would risk violating an interpretation of § 901(a) that includes gender identity discrimination. Adams, 57 F.4th at 813 ("[I]f 'sex' were ambiguous enough to include 'gender identity' ... [§ 907], as well as the various carveouts under the implementing regulations, would be rendered meaningless").

Individual actors and Federal agencies have significant reliance interest in a consistent interpretation of Title IX. In its implementing regulations, the Department of Education relies on sex binarism in the original statute to permit sex separation in athletics, choirs, and locker rooms. 34 C.F.R. § 106.34. An interpretive shift that renders the various exemptions to Title IX nugatory would undermine the basis of these regulations and cast doubt on their legality. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1779 (2020) (Alito, J., dissenting). End users charged with Title IX compliance would then be placed in the impossible position of choosing between obeying an otherwise valid federal regulation or complying with a potentially relevant judicial opinion.

2. **The original public meaning of "sex" in 1972 concerned physiological differences, not gender identity.**

Contemporary dictionaries help clarify the original public meaning of statutory text. See, e.g., St. Francis College v. Al-

Khazraji, 481 U.S. 604, 609–12 (1987) (consulting 19th century dictionaries to determine the meaning of "race"). Around the time Title IX was passed, leading dictionaries defined "sex" as the biological differences in bodily functions between males and females of a given species. Courts read it analogously. Adams, 57 F.4th at 812 ("[W]hen Congress prohibited discrimination on the basis of "sex" in education, it meant biological sex, i.e., discrimination between males and females") (quoting Sex, American Heritage Dictionary of the English Language (2d ed. 1976)).

Just as it does today, "discriminate" referred to a difference in treatment or favor compared to others. Bostock, 140 S. Ct. 1731, 1740 (2021) (defining "discriminate" as "[t]o make a difference in treatment or favor") (quoting Discrimination, Webster's New International Dictionary (2d ed. 1954)). Thus, at the time of drafting, Title IX prohibited treating a person differently on the basis of reproductive or biological functions.

The drafters of Title IX also did not understand it to cover transgender status. The historical context of a statute's creation is relevant to the original meaning of the statutory text. United States v. Rabinowitz, 339 U.S. 56, 70 (1950) ("Words must be read with the gloss of the experience of those who framed them."). The years preceding the enactment of Title

IX were filled with debates on the role of women in American society. In the summer of 1970, a future sponsor of Title IX chaired a series of hearings entitled "Discrimination Against Women." Cannon v. Univ. of Chicago, 441 U.S. 677, 696 n.16 (1979). When the Senate debated the text that would become Title IX, a sponsoring senator described the proposal as "an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills." 118 Cong. Rec. 5802–5815 (1972) (statement of Senator Evan Bayh).

When the drafters of Title IX spoke of terms such as "sex," they did so in the context of the struggle for women's equality in American society. The purpose of Title IX, like its 1972 counterpart in the Equal Rights Amendment, was to ensure greater educational access for women and address past discrimination. Id.; 92 H.J. Res. 208, 86 Stat. 1523. It did not contemplate coverage of LGBTQ+ persons. Bostock, 140 S. Ct. at 1828 ("Seneca Falls was not Stonewall.") (Kavanaugh, J., dissenting). Thus, this Court would be contravening the original public meaning and original intent of the statute's drafters by reading "gender identity" into "on the basis of sex."

3. **The Court should not decide this question of immense social importance, deferring to Congress instead.**

Congress has attempted on several occasions to amend Title IX to include sexual orientation and gender identity discrimination. See Student Non-discrimination Act of 2013, H.R. 1652, 113th Cong. (2013); Student Non-Discrimination Act of 2015, S. 439, 114th Cong. (2015). Continued attempts to amend Title IX suggest that the plain meaning of the statute does not include gender identity discrimination. In other contexts, Congress has amended laws to include "sexual orientation" and "gender identity" as protected classes. 18 U.S.C. § 249(a)(2); 34 U.S.C. § 12291(b)(13)(A). Reading Title IX to include gender identity would make those amendments unnecessary additions, a result at odds with the traditional guidelines of statutory interpretation.

Furthermore, proclaiming by judicial fiat that Title IX includes gender identity would remove the issue from the public sphere, where it is subject to intense political debate. Compare Public Facilities Privacy & Security Act, North Carolina H.B. 2 (2016) (requiring all public facilities to restrict gender-specific bathrooms to the person's assigned sex at birth) with Equal Restroom Access, California A.B. 1732 (2016) (doing the opposite). Absent a contrary command from Congress, courts should be wary of importing their policy preferences to judicial decisionmaking, particularly when those preferences conflict with the plain meaning of the operative statute. Bostock, 140 S. Ct. at 1738 ("If judges could add to, remodel, update, or

detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives.”)

B. Looking to distinct statutory structure and purpose, the Court should not export Title VII-style reasoning to Title IX.

Title IX is not Title VII and should not be read as equivalent. Some lower courts have occasionally looked to Title VII case law to inform interpretations of Title IX. See, e.g., Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 616-17 (4th Cir. 2020). But this gets Petitioner no further: these two laws employ different statutory structures to achieve different legislative purposes. Compare Cannon, 441 U.S. at 696 n.16 (contextualizing Title IX within the movement for women’s rights) with Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (“The objective of Congress in the enactment of Title VII … was to achieve equality of employment opportunities [between white and non-white employees]”). Importing reasoning tailored for Title VII employment discrimination to the middle school classroom ignores numerous contextual distinctions and overly simplifies a complicated issue best left for Congress.

Title VII provides that “[i]t shall be unlawful employment practice for an employer to … discriminate against any

individual … because of … sex." Civil Rights Act of 1964, Pub. L. 88-352, tit. VII, § 703(a), 78 Stat. 253, 255. As numerous lower courts have noted, the classroom is not the same as the workplace. See, e.g., Neal v. Bd. of Trs. of Cal. State Univs., 198 F.3d 763, 772 n.8 (9th Cir. 1999) (Title VII "precedents are not relevant in the context of collegiate athletics. Unlike most employment settings, athletic teams are gender segregated.").

Furthermore, the operative phrases "because of" and "on the basis of" vary between the statutes, suggesting that the meaning of the latter term may not be identical to the former. See, e.g., Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). Accordingly, some lower courts have held that the "statutory interpretation of the word 'because' [in Bostock] does not apply to Title IX." Neese v. Becerra, 640 F. Supp. 3d 668, 677 (N.D. Tex. 2022).

1. **Bostock v. Clayton County is expressly limited to Title VII employment discrimination and should not be applied to Title IX.**

In the context of Title VII, "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex." Bostock, 140 S. Ct. at 1747. Proceeding from the assumption that "sex" referred to biological

differences between males and females, as it did in 1964, the Court reasoned that discrimination because of sex was a "but for" cause of a wrongful termination due to sexual orientation or gender identity. Id. at 1742. The rationale of Bostock applies narrowly to employment discrimination and is a unique result of Title VII's broad language and statutory structure. Id. at 1753 ("[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind.").

Uncritically applying Bostock-style reasoning to Title IX would invalidate much of the underlying statute—a result Bostock itself cautions against. Id. at 1739 ("The question isn't just what 'sex' meant, but what Title VII says about it."). Title IX contains several provisions allowing for sex-separated programs and facilities, and its implementing regulations allow for other situations where sex separation is permitted. See, e.g., § 907, 86 Stat. 373; 34 C.F.R. § 106.34. A Bostock-like reading of the statute would cause chaos within the carefully crafted bounds of Title IX, rendering whole sections irrelevant, inapplicable, or superseded by judicial ruling. Adams, 57 F.4th at 813.

Such an interpretation would run counter to the long-established statutory purpose of Title IX: increasing educational access and equality for women and girls. Cannon, 441 U.S. at 696 n.16. Title VII, in contrast, includes sex discrimination as a last-minute addition by opponents of the

Civil Rights Act of 1964. Bostock, 140 S. Ct. at 1752 (characterizing the addition of "sex" as a "poison pill"). There is thus reason to read Title VII sex discrimination expansively. Id (stating that the "broad language" of the additions allows Title VII to apply to "unanticipated" circumstances). Title IX has no similar legislative history that suggests a purpose as broad as that of Title VII. See, e.g., 118 Cong. Rec. 5802–5815 (1972) (statement of Senator Evan Bayh).

2. **Even if applied to Title IX, Bostock does not support a sex discrimination claim in this case.**

The issue presented here centers on the "converse of [the reasoning in Bostock]—whether discrimination based on biological sex necessarily entails discrimination based on transgender status." Adams, 57 F.4th at 809 (11th Cir. 2022). The sex separation of human sexuality classes does not facially discriminate on the basis of transgender status. Because transgender students fall on both sides of the sex-based division, there is a "lack of identity" between the groups. Id. at 809 (quoting Geduldig, 417 U.S. at 496–97 n.20).

Bostock is a disparate treatment case. Bostock, 140 S. Ct. at 1740. This case presents a different issue: whether statutorily authorized sex separation necessarily implies discrimination on the basis of gender identity. Bostock says nothing about that scenario. Id. At best, petitioner advances a

disparate impact theory in which a facially neutral sex separation policy indirectly discriminates against transgender students. Boe, 123 F.7th at 53.

Title IX does not operate with disparate impact in mind. See Alexander v. Sandoval, 532 U.S. 275, 282 (2001) ("[Cannon] … had no occasion to consider whether the right reached regulations barring disparate-impact discrimination."); see also Bostock, 140 S. Ct. at 1740 (defining "discriminate" as "[t]o make a difference in treatment or favor"). And even if it does, Title IX only provides relief for discrimination on the basis of sex, the plain meaning of which entails a biological definition. Id. Petitioner's claim of discrimination is thus not cognizable under Title IX.

3. Sex stereotyping does not apply on the facts of this case.

This Court has recognized that "in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989). As with Bostock, Price Waterhouse is a Title VII case. Lower courts are divided in their application of sex stereotyping theories to Title IX. Compare Whitaker ex rel Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1048 (7th Cir. 2017) (applying sex stereotyping theory to a Title IX claim brought by a transgender student)

with Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, 680 (W.D. Pa. 2015) (holding the opposite).

The difficulty of the lower courts with sex stereotyping shows its unworkability as a Title IX standard. As noted above, Title IX contains numerous exceptions that allow for differentiating based on biological sex. Distinguishing on biological sex does not constitute sex stereotyping—it is simple categorization. Adams, 57 F.4th at 813 ("[S]ex is not a stereotype") (internal quotations omitted). And in all relevant respects, the Board's separate policy on transgender students allows petitioner to comport with her stated gender identity. Johnston, 97 F. Supp. 3d at 681 (upholding a single restriction on a transgender student where the student was not stereotyped in all other respects). At base, Price Waterhouse involves disparate treatment when a woman defies patriarchal norms by acting "aggressive[ly]." Price Waterhouse, 490 U.S. at 250. But differentiating based on sex is not stereotyping.

CONCLUSION

This Court should affirm the lower court's decision.

Respectfully submitted,

/s/ ____________________

Partner 1

/s/ ____________________

Partner 2

Attorneys for Respondent