

THE SUPREME COURT OF THE UNITED STATES  
SPRING TERM, 2024

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DOCKET NO. 24-1234

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JANE BOE, by and through her next  
friend and father, JACK BOE,  
Petitioner,

v.

DUNE UNIFIED SCHOOL DISTRICT BOARD,  
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRTEENTH CIRCUIT

**Brief for the Petitioner**

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TEAM 13 (assigned Petitioner)

Issue #1 (Title IX)

[REDACTED]

[REDACTED]

Issue #2 (Equal Protection)

[REDACTED]

[REDACTED]

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## **QUESTIONS PRESENTED**

1. Whether a school board policy that denies a student the opportunity to attend a human sexuality class with peers of the same gender identity, instead requiring her to take class with peers of a different gender identity or opt-out of sexual education altogether, violates the prohibition against sex discrimination under Title IX of the Education Amendments Act of 1972.
2. Whether the same policy, established for the purpose of promoting students' education and public health, violates the Equal Protection Clause of the Fourteenth Amendment.

## **OPINION BELOW**

The opinion of the Court of Appeals is reproduced at Boe v. Dune Unified Sch. Bd., 123 F.7th 45 (13th Cir. 2023).

## **CONSTITUTIONAL RULES AND PROVISIONS**

U.S. Const. amend. XIV § 1

42 U.S.C. § 2000e-2(a)(1) (2018)

20 U.S.C. § 1681 (2018)

20 U.S.C. § 1686 (2018)

34 C.F.R. § 106.34 (2023)

34 C.F.R. § 106.33 (2023)

## INTRODUCTION

Petitioner Jane Boe urges the Supreme Court to reverse the ruling of the Thirteenth Circuit and find the Dune Unified School District Board's Resolution 2022-14 (the "Policy") a violation of Title IX and the Fourteenth Amendment.

The Policy violates Title IX. It presents Jane with two untenable options: take a human sexuality class where she would suffer extreme humiliation and potential harassment, hindering her ability to learn, or take no class at all. With both paths curtailing Jane's learning, the Policy denies her the benefits of a federally funded education — and does so on the impermissible basis of her sex at birth, as this Court reasoned in Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741-42 (2020). Only if Jane were biologically female would she have the genuine chance to learn. It is exactly this kind of discrimination that Title IX was designed to prevent.

The Policy also violates the Fourteenth Amendment's Equal Protection Clause. It classifies students like Jane on two quasi-suspect bases: sex and transgender identity. Accordingly, this Court must subject the Policy to heightened scrutiny. The critical question is whether the Policy substantially furthers genuine and important interests of the Board. It does not. While the Board claims separating students by sex at birth advances

their education and health, as applied to Jane the opposite is true.

### **STATEMENT OF THE CASE**

This case arises from Jane Boe's desire to preserve her dignity among peers, attain a quality education, and vindicate her statutory and constitutional rights. Jane is 12 years old and a seventh-grade student at Dune Junior High School, which is overseen by the Dune Unified School Board. Although she was assigned "male" at birth, Jane has been living as a girl since the age of seven. She plays sports with female friends and uses the girls' bathrooms and changing rooms at school, as permitted by district policy. Only a handful of Jane's closest friends know that she is transgender.

At the start of the 2023 school year, Jane and her parents learned that under a new Board policy ("the Policy"), Jane's school would assign her to a male human sexuality class. The news distressed Jane, who said she would find the class humiliating, especially because everyone at Dune otherwise treats her as a girl. Jane feared the boys asking "why a girl is in the boys' class" and "tell[ing] the teacher that [she] do[es]n't belong." Although the policy allows students to opt-out of the human sexuality classes altogether, Jane's parents want her to learn "accurate, age-appropriate, and evidence-based information" from "professional teachers and counselors."



Moreover, they stated that providing a similar education at home would be too "costly and burdensome."

In addition to dividing human-sexuality education "according to biological sex" as assigned at birth, the Policy requires all classes to cover six subjects, including "healthy relationships" and sexually transmitted infections. Courses "must" tailor instruction in the male and female classes "according to anatomical and physiological characteristics, and [their] unique experiences and health care needs." However, courses can provide the same information when that information is "equally relevant." The Policy's preamble offers guiding value statements, including that students in Dune public schools are "entitled to high-quality education," that "accurate, age-appropriate, and evidence-based information" is necessary for students' "individual and public health" and that "the provision of human sexuality education" in Dune schools "is inconsistent."

Petitioner Jane, through her next friend and father Jack Boe, sued the Board in October 2023, alleging the Policy violated Jane's rights under Title IX and Equal Protection Clause of the Fourteenth Amendment. The Board claimed, in turn, that Title IX permitted sex segregation for human sexuality classes and that the Policy was constitutional for its furtherance of an important government interest. On a cross-

motion for summary judgment, both the District Court and Thirteenth Circuit ruled for the Board. Jane appealed.

### ARGUMENT

I. The Policy Violates Title IX by Prohibiting Jane from Attending Human Sexuality Classes Consistent with Her Gender Identity on the Basis of Her Sex.

A. Discrimination Against Transgender Students in Federally-Funded Educational Programs is Necessarily a Violation of Title IX as it Discriminates on the Basis of Sex.

In Price Waterhouse v. Hopkins, this Court held that a female employee who was denied a promotion for, among other things, not conforming to the “feminine” qualities her supervisor expected of a female employee, was a violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e-2(a)(1) (2018). 490 U.S. 228, 251 (1989). It reasoned that discrimination for failing to conform to sex stereotypes constitutes discrimination “because of” sex, which is expressly forbidden by Title VII, even if it was one of several factors considered during the promotion process. Id. In Bostock v. Clayton Cnty., the Court confirmed that the sex-stereotyping rationale is applicable to transgender individuals. 140 S.Ct. 1731, 1741-42 (2020). In fact, the Court suggested that any discrimination against transgender individuals is a violation of Title IX because transgender persons necessarily

contravene sex stereotypes by failing to conform in their appearance, manner, or otherwise to the characteristics associated with their sex assigned at birth. Id.

Although Bostock and Price Waterhouse interpreted Title VII, the language in Title VII (prohibiting discrimination “because of” sex, among other things, in employment contexts) mirrors that in Title IX (prohibiting discrimination “on the basis of sex” in educational contexts). 42 U.S.C. § 2000e-2(a)(1) (2018); 20 U.S.C. § 1681 (2018). Further, both statutes were motivated by closely analogous rationale. Accordingly, several courts have extended Bostock’s sex-stereotyping rationale to Title IX discrimination analysis, holding that discriminating on the basis of transgender identity necessarily discriminates on the basis of sex. See, e.g., Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020); Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1, 858 F.3d 1034, 1048 (7th Cir. 2017), abrogated on other grounds, Kluge v. Brownsburg Cmty. Sch. Corp., 64 F.4th 861 (7th Cir. 2020); Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004).

Not all courts have agreed with this interpretation. Some contend that Title VII is inherently different from Title IX. E.g., Neese v. Becerra, 640 F. Supp. 3d 668, 679 (N.D. Tex.

2022). However, the plain meaning of the Title IX text, considered independently, leads to the same conclusion: that Title IX, like Title VII, prohibits discrimination on the basis of transgender identity because discrimination against a transgender person inherently discriminates on the basis of sex.

Title IX forbids discrimination "on the basis of sex" in federally funded educational programs. 20 U.S.C. § 1681(a) (2018). The "basis" of something is the fact or idea or reason that leads to a consequence. Basis, Britannica, (Feb. 13, 2024, 12:02 PM), <https://www.britannica.com/dictionary/basis> ("something (such as an idea or set of ideas) from which another thing develops or can develop ... [or] a reason for doing something."). When A is based on B, B does not have to be the only item on which A is based, just one factor from "which [A] develops." Id. Basis, Merriam-Webster (Feb. 13, 2024, 12:02 PM), <https://www.merriam-webster.com/dictionary/basis> ("something on which something else is established or based").

The definition of "sex" is equally straightforward. Today "sex" typically refers to "biological sex" or sex as assigned at birth, often based on reproductive organs and structures. Grimm, 972 F.3d at 594. "Gender," in contrast, refers to "gender identity" or a "deeply felt, inherent sense of... gender." Id. (quotations omitted). Similarly, at the time that Congress

passed Title IX in 1972, dictionary definitions generally suggested "sex" meant "biological sex" and referenced reproductive functions. Id. at 632-33 (Niemeyer, J., dissenting). Therefore, both in 1972 and now, "sex" is most naturally read to refer to the sex a person is assigned at birth.

Therefore, Title IX prohibits discrimination resulting from sex assigned at birth. Transgender persons necessarily act in a manner that does not conform with the expectations of someone of their sex assigned at birth. Discrimination due to their nonconformance is necessarily because of their sex assigned at birth and therefore "based on sex." For example, take two people who identify as women and are identical in every respect, including their manner of dress. If they are treated differently because one of them was assigned "male" at birth and, thus, breaks sex stereotypes by dressing femininely, that person was subject to discrimination "on the basis of" their sex. In that, and all other, instances if the discriminator falls within the purview of Title IX, then the discriminator has violated Title IX.

B. The Policy Denies Jane Equal Access to Educational Opportunities on the Basis of Her Sex.

The Policy gives Jane two choices: attend a human sexuality class with boys or opt-out of the human sexuality instruction. R. at 4. If Jane chooses to attend the boys' human sexuality class, her mental and emotional well-being are put at serious risk, and it will likely hinder her learning. Alternatively, she may opt-out and not receive any human sexuality instruction. In either case, she does not receive —and is in fact denied —the benefits of the human sexuality curriculum.

Jane is only "out"<sup>1</sup> to a handful of peers. R. at 5. Attending the boys' human sexuality class when it is not widely known that she was assigned male at birth will undoubtedly raise questions from classmates and even, possibly, staff. There is no dispute that doing so would "humiliate" her. Id. In her own words, if Jane were forced to attend the boys' human sexuality classes, she would "rather just stay home instead of going to school." Id.

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<sup>1</sup> To be "out" refers to when a person who is, for example, lesbian, gay, transgender, or queer is publicly open about their sexual or gender identity.

Besides the fact that her presence in the boys' classes would likely be disruptive for her and the boys in her human sexuality class, the rest of her education is likely to be disrupted as well. "Transgender students face unique challenges in the school setting" including "verbal harassment," "physical attack[s]," and harsher discipline. Grimm, 972 F.3d at 596. Thus, it is unrealistic and unfair to expect Jane to choose to attend the boys' human sexuality class. Jane's parents would like for her to receive the human sexuality instruction, and she, as a student of the Dune School District, is entitled to an equal opportunity to receive such instruction. However, in order to protect her mental and physical safety, and preserve a healthy school environment, they and she acknowledge she must opt out.

Of course, if Jane had been instead assigned female at birth, she would be at equal liberty to choose between attending the human sexuality classes in alignment with her gender identity and opting out. The only requirement to attend the girls' human sexuality class in Dune Junior High is to have been assigned female at birth by a doctor, as demonstrated by a birth certificate. Therefore, Jane's sex as assigned at birth is the exclusive reason that she is deprived of equal access to the human sexuality classes. Therefore, Jane is excluded from and denied the benefits of her public school education on the

exclusive basis of her sex. This is a clear violation of Title IX, which prohibits “exclu[sion] from participation in [and] deni[al of] the benefits of” any federally-funded education program. 20 U.S.C. § 1681 (a) (2018).

C. The Policy Discriminates Against Jane as a Result of Her Being Transgender.

Under the Policy in question, “[s]chools must tailor instruction for male and female human sexuality classes according to anatomical and physiological characteristics, and the unique experiences and health care needs associated with those characteristics.” R. at 3-4 (emphasis added). Underlying this requirement is the assumption that students assigned male at birth will have the same characteristics, experiences, and needs, and that these characteristics, experiences, and needs will differ from students assigned female at birth. This is plainly sex stereotyping.

Jane, as a transgender girl who was assigned male at birth, has different experiences and needs from other peers assigned male at birth. In the future, Jane may also differ in her anatomical and physiological characteristics if she chooses to undergo hormone therapy or other gender confirmation procedures, as may be appropriate for persons with gender dysphoria. Grimm. 972 F.3d at 596.



Jane contravenes sex stereotypes by having and asserting needs that are different than peers who were also assigned male at birth. Moreover, if her assigned sex at birth had been female, she would be allowed to attend the girls' human sexuality class. Her sex is not only the primary reason, or basis, for discrimination, it is the only reason for discrimination.

Even if the information provided in the boys' human sexuality class is identical to that of the girls' human sexuality class (as allowed by the Policy (R. at 4)), Jane's needs would still be unmet. It is undisputed that Jane is "afraid" to be in the boys' classroom and that to force Jane to participate in human sexuality classes with boys "would be humiliating to her." R. at 5. This level of discomfort at the mere thought of being placed in the boys' classroom is itself a break from sex stereotypes. If her assigned sex at birth had been female, the school would accommodate any discomfort she felt in a boys' class by placing her in the girls' class. Once again, her sex is the only reason for discrimination.

D. Neither Educational Nor Privacy Interests Are Served by Forcing Transgender Students to Attend Class with Students of a Different Gender Identity.

Title IX does include some exceptions not contained in similar Civil Rights legislation. For example, it allows for, among other things, sex-segregated social fraternities and sororities, voluntary youth service organizations, and Boys and Girls conferences. 20 U.S.C. § 1681 (a) (6)-(7). The Department of Education has interpreted the statute to mean 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) (2023). Since Title IX’s very purpose is prohibition of discriminatory treatment based on sex, it follows that there must be a legitimate reason why human sexuality classes may be segregated by boys and girls.<sup>2</sup> Although neither the Department of Education’s regulation nor the statute animates the rationale behind this particular exception, the regulation does provide guidance on sex-segregated educational opportunities. In

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<sup>2</sup> To be clear, Jane Boe does not challenge the idea that some policy of sex or gender segregation could be appropriately applied to some students in human sexuality classes, just that this policy as applied to her is a violation of Title IX.

general, these opportunities may be allowed if the sex-segregation is meant to "improve educational achievement" or "meet the particular, identified educational needs of its students." 34 C.F.R. § 106.34(b)(1)(i)(A)-(B) (2023).

However, Jane's educational achievement is likely to diminish as a result of being forced to attend human sexuality classes with peers of a different gender identity. To do so would forcibly "out" her to her peers, very few of whom know that she is transgender. R. at 5. A staggering 77% of respondents in the 2015 U.S. Transgender Survey who were known or perceived as transgender reported harassment at their schools. Grimm 972 F.3d at 597. Unsurprisingly, transgender students experiencing harassment "had significantly lower grade point averages" in the same survey. Id. Outing Jane would expose her to heightened likelihood of harassment on the basis of her sex, with the potential of affecting her academic success. Moreover, her presence in the boys' classroom is likely to surprise and distract her peers who do not know she is transgender (R. at 5), disrupting their education. This is explicitly contrary to the educational objectives that allow for sex-segregation in the first place. The Policy is more likely to disturb, not improve, the education of Jane and her peers. Therefore, separation of students in human sexuality classes

exclusively by biological sex as assigned at birth cannot be justified by educational objectives.

Privacy concerns are the other motivation often articulated by courts for the separation of boys and girls in educational settings. Title IX explicitly allows educational programs to maintain "separate living facilities for the different sexes." 20 U.S.C. § 1686 (2018). The Department of Education has interpreted this to permit "separate toilet, locker room, and shower facilities" for different sexes. 34 C.F.R. § 106.33 (2023). Although neither the statute nor the implementing rules state explicitly that privacy concerns may validly animate sex-segregation, courts have recognized the implied privacy interests endorsed by the statute. E.g., Grimm, 972 F.3d at 628 (Niemeyer, J., dissenting); Doe ex rel. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 534 (3d. Cir. 2018) (referring to toilets, locker rooms, and shower facilities as "privacy facilities").

However, the Policy in this case differs substantially from the much more frequently litigated restroom or locker-room policies because students are never physically exposed or nude during human sexuality classes. Instead, the privacy interest of the students deals more with the comfort they feel in a classroom setting discussing a sensitive topic. Jane's presence

in the boys' classroom would almost certainly hurt, rather than protect, that privacy interest. Jane's presence in the boys' class would be unsettling to many, if not most, of the students who know Jane as a girl and do not know that she is transgender. In her own words, the boys will probably tell her to "[g]et out! and probably tell the teacher that [she] doesn't belong." R. at 5.

This is to say nothing of Jane's own privacy interest in taking a human sexuality class in a space in which she feels comfortable. Forcing her to take a human sexuality class in the boys' classroom — and removing from Jane the choice of when, where, how, and if she reveals that she is transgender — are themselves tremendous violations of privacy.

## II. The Policy Violates the Fourteenth Amendment's Equal Protection Clause by Excluding Transgender Students from Classes Aligned with Their Gender Identity.

The Fourteenth Amendment's Equal Protection Clause protects "against intentional and arbitrary discrimination." Sunday Lake Iron Co. v. Wakefield Tp., 247 U.S. 350, 352 (1918). When a government classifies persons on the basis of sex or another "quasi-suspect" classification its action is unconstitutional unless the government can show it passes "heightened scrutiny." Lyng v. Castillo, 477 U.S. 635, 635 (1986); J.E.B. v. Alabama ex

rel. T.B., 511 U.S. 127, 135 (1994) (holding "heightened scrutiny" applies to sex). To do this, the government must prove its classification is "substantially related to a sufficiently important governmental interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

The Policy merits heightened scrutiny because it discriminates against Jane on the basis of two quasi-suspect classes: sex and transgender status. Further, the Policy fails to pass this level of review because its classifications are not substantially related to an important government interest. Since the Policy violates the Equal Protection Clause, Jane should prevail on her constitutional claim.

#### A. The Policy Merits Heightened Scrutiny.

##### 1. The Policy Merits Heightened Scrutiny for Discrimination on the Basis of Sex.

As established infra Part I.B, the Policy prevents Jane from participating in classes for female students because her sex assigned at birth is male. R. at 3-4. In contrast, if Jane's sex assigned at birth were female, the Policy would allow her to take classes aligned with her gender identity. This is plainly discrimination on the basis of sex.

Other courts have reached the same conclusion with similar sets of facts. In Whitaker, the Seventh Circuit reviewed a school policy excluding a transgender student from bathrooms matching

his gender identity. 858 F.3d at 1042. Because the exclusionary policy could “not be stated without referencing sex,” the court concluded it was “inherently based on a sex-based classification.” Id. at 1051. See also J.A.W. v. Evansville Vanderburgh Sch. Corp., 396 F.Supp.3d 833, 843 (S.D. Ind. 2019). In assigning students to sexuality classes “according to biological sex,” R. at 3, the Policy challenged here likewise depends on a reference to sex and, as such, is a sex-based classification.

That the Policy allows Jane some human sexuality education—that offered to males — does not defeat her claim of sex-based discrimination under U.S. v. Virginia, 518 U.S. 515 (1996). In Virginia, this Court reviewed the State’s creation of a public university for women as a parallel program to the all-male Virginia Military Institute. Id. The Court held that, despite the existence of an all-female university, the “categorical exclusion” of women from the “educational opportunities” of the male school constituted a sex-based classification. Id. at 516. Here, Jane has the option to take a class where she would be humiliated, hindering her learning, or no class at all. Like female students in Virginia, Jane’s exclusion from a single-sex class denies her critical educational opportunities because of her sex, thus constituting clear sex-based discrimination.

The Policy's opt-out provision, which allows students not to participate in any sexual education if they so choose, also does not make the Policy any less of a sex-based classification. When the issue is exclusion from a certain single-sex setting because of a student's sex, an alternative avoiding their inclusion with the opposite single-sex setting does not cure the discrimination. See Whitaker, 858 F.3d (gender-neutral bathrooms did not fix discrimination when a trans female was excluded from female bathrooms; J.A.W., 396 F.Supp.3d (same)).

For all these reasons, the Policy involves a discrimination on the basis of sex. Therefore, it merits heightened scrutiny.

2. The Policy Merits Heightened Scrutiny for Discrimination on the Independent Basis of Transgender Status.

Even if this Court does not find that the Policy discriminated on the basis of sex, the Policy also independently discriminates on the basis of transgender status, because it is only transgender students who are excluded from sexuality classes aligned with their gender identity. While the Policy does not classify by transgender status on its face, like it does for sex, even facially "neutral" laws are unconstitutional when applied for "discriminatory purpose." Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979). "Neutral terms can mask discrimination that is unlawful." Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 64 (2001). See also In Re Emp. Discrim. Litig. Against Ala., 198 F.3d 1305



(M.D. Ala. 1999) (“What the Constitution prohibits is intentional discrimination on the part of state actors”) (emphasis added). For the Board to have intentionally discriminated, it must have “selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.” Feeney, 442 U.S. at 279.

A “stark” and “clear pattern” of discriminatory impact is sufficient to show discriminatory intent, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 251, 266 (1977). While cases that successfully show this kind of impact are rare, the Policy’s exclusionary effect on every transgender student demonstrates such a pattern. Even if it did not, other actions of the Board make the Board’s discriminatory intent undeniable. Less than two years before the Board passed the Policy, the same Board members passed a resolution allowing transgender students to partake in athletics and use restrooms consistent with their gender identity. R. at 3. Although the Board’s rationale for the 2021 resolution is unclear, its existence demonstrates the Board knows it is sometimes good policy for transgender students to participate in activities aligned with their gender identity. This knowledge underscores the Board’s intentionality in denying transgender students the same opportunity in human sexuality classes.

Moreover, transgender identity meets the criteria required for an independent quasi-suspect class. While this Court has not yet found transgender status to be quasi-suspect, two Circuit Courts have. Grimm, 972 F.3d at 611; Karnoski v. Trump, 926 F.3d 1180, 1200-1201 (9th Cir. 2019) (upholding a lower court's determination of quasi-suspect class). Numerous district courts also agree. See, e.g., M.A.B. v. Bd. of Educ. of Talbot Cnty., 286 F.Supp.3d 704, 719 (D. Md. 2018) (holding that transgender people constitute a quasi-suspect class); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (same); Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (same); Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016) (same).

Even more than the "number" of recent holdings affirming transgender identity as quasi-suspect, the "consistency and direction" of these rulings should drive this Court's holding, as it has in other contexts in the past. See Atkins v. Virginia, 536 U.S. 304 (2002) (concluding the same in the death-penalty context).

Four factors are relevant to whether a classification is quasi-suspect. Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012). These are:

- i. Whether the class has historically been “subjected to discrimination.” Bowen v. Gilliard, 483 U.S. 587, 602 (1987)
- ii. Whether the class exhibits a characteristic that “frequently bears [a] relation to ability to perform or contribute to society.” Cleburne, 473 U.S. at 440-41.
- iii. Whether the class has “obvious, immutable, or distinguishing characteristics that define them as a discrete group.” Bowen, 483 U.S. at 602 (emphasis added).
- iv. Whether the class is “a minority or politically powerless.” Id.

Transgender students “readily satisfy” each of these four factors. Grimm, 972 F.3d at 611. First, numerous federal courts have found that “transgender individuals face discrimination, harassment, and violence because of their gender identity.” See, e.g., Whitaker, 858 F.3d at 1052 (“One would be hard-pressed to identify a class of people more discriminated against historically . . . than transgender people.”); Flack v. Wis Dept. of Health Servs., 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018).

Second, transgender status does not have any bearing on performance or contribution to society. American Psychiatric Association, Position Statement on Discrimination Against Transgender and Gender Diverse Individuals (July 2018) (“Being transgender or gender diverse implies no impairment in judgment, stability, reliability, or general social or vocational

capabilities"). See also Grimm, 972 F.3d at 612 (noting the same).

Third, the high levels of verbal assault by strangers transgender people face in public places suggest their gender identity is "distinguishing" and "obvious." Daniel Trotta, U.S. Transgender People Harassed in Public Restrooms: Landmark Survey, Reuters (Dec. 8, 2016), <https://www.reuters.com/article/idUSKBN13X0BJ/> (finding 60% of transgender individuals had been harassed in public bathrooms). This distinguishing mismatch between sex and gender identity, which is "deeply ingrained and inherent" for transgender people, defines them as a "discrete group." See Evancho, 237 F.Supp.3d, 288-89.

Finally, constituting only 0.5% of U.S. adults, transgender individuals are a minority, ULCA Williams Institute, Transgender People, <https://williamsinstitute.law.ucla.edu/subpopulations/transgender-people/>, and a politically powerless one at that. For one, even while LGBTQ representation more broadly has grown in Congress, there have never been any openly transgender Congresspersons. Pew Research Center (Jan. 11, 2023), <https://www.pewresearch.org/short-reads/2023/01/11/118th-congress-breaks-record-for-lesbian-gay-and-bisexual-representation/>.

Meeting all factors, transgender identity is a quasi-suspect class. Because of this, and because the Policy discriminates on

the basis of transgender status, it should be subject to heightened scrutiny. Cleburne, 473 U.S. at 442 (noting quasi-suspect classifications call for a “more exacting standard of judicial review”).

#### B. The Policy Fails Heightened Scrutiny.

To satisfy heightened scrutiny, the Board must show the Policy’s classification by sex and transgender identity serves “important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). “The fit between” a policy’s “means and the important end” it serves “must be exceedingly persuasive.” Nguyen, 533 U.S. at 70. The Board has not met this “demanding” burden. See Virginia, 518 U.S. at 533.

##### 1. The Policy’s Exclusion of Transgender Students from Classes Matching Their Gender Identity is Not Substantially Related to the Government’s Important Interest in High-Quality Education or Individual and Public Health.

Under heightened scrutiny, to determine the governmental “interest” at issue, courts assess only the government’s “genuine,” stated purpose for a classification at the time of its adoption, not justifications that are “hypothesized or invented *post hoc* in response to litigation.” Virginia, 518 U.S. at 516. Here, in the Policy’s preamble, the Board suggests several

overlapping objectives relating to education and health. These include (1) ensuring Dune students have a "high-quality education that will prepare them for fulfilling, healthy, successful lives"; (2) providing "accurate, age-appropriate, and evidence-based information about human sexuality"; and (3) "protect[ing] and advanc[ing]" their "individual and public health." R. at 3.

The Board fails to show that the fit between the Policy's discriminatory classifications and these ends is "exceedingly persuasive." Nguyen, 533 U.S. at 70. The Board insinuates that a "high-quality education" and "public health" necessitate excluding transgender students from classes matching their gender identity. R. at 3. This assumption, however, is based on several "sex-based stereotypes," which are insufficient to sustain a quasi-suspect classification. J.E.B., 511 U.S. at 138. First, the Board assumes that Jane and others will receive the best personal education when assigned to a class with peers of the same sex. This is "sheer conjecture and abstraction." Whitaker, 858 F.3d at 1052. For Jane, because most of her peers do not know she is biologically male, such an assignment would be humiliating and could put Jane at risk of later harassment or worse. As previously noted, surveys have found that over three quarters of "out" transgender students report harassment by students, teachers, and staff. Grimm, 972 F.3d. at 597. Moreover, because Jane has decided the embarrassment of attending the male class

would be too great, the Board's policy has the practical effect of excluding her from any sexuality education at all. Counter to the Board's claim of promoting Jane's individual health and education, its policy forces Jane to choose between humiliation and opting out.

Even in assuming Jane stays in the boys' class and is not humiliated, she is not likely to receive a significantly better education there than in the girls' class. In fact, the opposite could be true. Many of the mandatory topics, like "healthy relationships," could contain identical content for both sexes. The male and female courses are most likely to differ in their "tailor[ed] instruction" according to students' "anatomical and physiological characteristics." R. at 3-4. If Jane decides to undergo hormone therapy or gender reassignment surgery later in life, female sexuality courses could be more applicable. The Board cannot predict students' anatomical characteristics and needs simply based on their sex at birth; "[P]hysical aspects of maleness and femaleness may not be in alignment [with sex at birth] (for example, a person with XY chromosomes [may] have female-appearing genitalia) . . . [and] a person can be female after a hysterectomy." Adams ex rel. Kasper v. Sch. Bd. Of St. Johns Cnty., 57 F.4th 791, 857 (Pryor, J., dissenting). The assumption that students born with one biological sex have, and will continue to have, its associated anatomical characteristics

is an "overbroad generalization" insufficient to justify the sex-based classification of students here. Virginia, 518 U.S. at 516; see also Grimm 972 F.3d at 610.

Second, the Board assumes Jane's peers will receive a worse education if Jane is not in a class matching her biological sex. Here, as in Virginia, fear about the effects of sexual integration on a school's larger educational quality, is not "solidly grounded," 518 U.S. at 545, as the Board has provided no facts to support this concern. In fact, if the Board assumes boys will feel uncomfortable in classes with girls, this reasoning would support Jane's inclusion in the girls' class. Because Jane plays on female athletic teams, uses female restrooms, and otherwise represents herself as female, Jane's peers see and understand her to be a girl. Taking the Board's assuming at face value, Jane's peers could feel more uncomfortable with her in the male class.

If Jane's school needs to make adjustments, curricular or otherwise, to accommodate Jane's participation in the female class, those changes would not affect the finding of unconstitutional discrimination in the current Policy. In situations demanding far greater changes to accommodate the integration of the opposite sex into a single-sex curriculum, the Court has held "experience shows such adjustments are manageable." Virginia, 518 U.S. at 550 n.19.



The purpose of heightened scrutiny is to “assure the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” Hogan, 458 U.S. at 725-26. The modern courts have recognized “estimates of what is appropriate for most [of one sex] no longer justify denying opportunity” to those “outside the average description.” Virginia, 518 U.S. at 550. “Inherent differences between men and women” are not cause for “artificial constraints on an individual’s opportunity.” Id. at 533. Here, any arguments that the Board’s Policy furthers its stated purpose is built on sex-based stereotypes. They cannot survive heightened scrutiny.

## 2. Discrimination Against Transgender Students Cannot Be Justified by Administrative Efficiency.

In addition to its educational goals, the Board suggests one other objective driving the Policy: rectifying the “inconsistent” provision of “human sexuality education” across Dune schools. R. at 3. The furtherance of “consistency” by itself, however, does not aid individual students; consistent curriculum could still be consistently poor. Uniformity is far more likely to assist the administration of an education system by, for one, making it easier for administrators to compare students’ and educators’ performance across schools.

"Administrative ease and convenience" the only clear reasons for the "consistency" requirement, are not "sufficiently important objectives to justify gender-based classifications." Craig v. Boren, 429 U.S. 190, 198 (1976). See also Frontiero v. Richardson, 411 U.S. 677, 690 (1973). ("Any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience . . . involves the very kind of arbitrary legislative choice forbidden by the Constitution.")

3. Discrimination Against Transgender Students Cannot Be Justified by Interests the Government Has Not Stated, Like Those Related to Privacy.

There "has been a long tradition in this country of separating sexes in some . . . circumstances," like bathrooms. Adams, 57 F.4th at 802. However, as previously noted, in the case of bathrooms and other areas, sex segregation is often justified on the basis of privacy concerns not at issue in this case. Grimm, 972 F.3d at 634 (Niemeyer, J., dissenting) ("In light of the privacy interests that arise from the physical differences between the sexes, it has been commonplace . . . to separate on the basis of sex those public restrooms, locker rooms, and shower facilities.") (emphasis added). Because Equal Protection analysis cannot be based on "hypothesized" governmental interests, Virginia, 518 U.S. at 516, this Court

must disregard any concerns it might have about student privacy or other justifications for the Policy that the Board did not state at the time of the Policy's creation.

The sole question here is whether the Board's only permissible, explicit interests — promoting high-quality education and individual and public health — are interests that the Policy substantially furthers. They are not.

### **CONCLUSION**

For the foregoing reasons, Petitioner Jane Boe respectfully requests that the Supreme Court reverse the decision of the Thirteenth Circuit and hold that the Policy violates Title IX and the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

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Attorneys for Petitioner