

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 Respondent

Team 14, Respondent



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QUESTIONS PRESENTED

1. Does Application of the Policy on Human Sexuality Education Violate Title IX of the Education Amendments Act of 1972?
2. Does the Policy on Human Sexuality Education violate the Equal Protection Clause of the Fourteenth Amendment?

OPINION BELOW

Boe v. Dune Unified School District Board, --F. __-- (13th Cir. 2023).

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INTRODUCTION

This case asks whether a policy implemented by Respondent Dune Unified School District Board (the "Board") in December 2022, that separates students by biological sex for human sexuality classes (the "Policy"), violates Title IX and the Equal Protection Clause of the Fourteenth Amendment. Respondent contends that the Policy does not violate either Title IX or the Equal Protection Clause of the Fourteenth Amendment.

The Policy does not violate Title IX because it only applies to human sexuality classes, which is permitted under Title IX. To prove a claim for impermissible discrimination, Boe would have to

show that she was treated differently than other students based on her transgender status and that she was harmed by impermissible discrimination. Boe was not treated differently than other students because all students are assigned to human sexuality classes based on their birth-assigned sex. Boe also cannot demonstrate that she has suffered or will suffer harm because her stated concerns have already been addressed by the Board through its 2021 policy. The 2021 policy requires all schools within the district to treat transgender students consistently with their gender identity, including access to bathrooms and participation on sports teams.

Bostock is not applicable to this case because this Court's ruling there was narrowly tailored to gender discrimination in employment and does not extend beyond that context. Additionally, the ruling in *Bostock* was an interpretation of Title VII, which does not include the carveouts permitted by Title IX for distinguishing by biological sex in certain areas of education.

The Policy also does not violate the Equal Protection Clause of the Fourteenth Amendment. Because the Policy outlines a discrimination that is facially sex-based, heightened scrutiny is the appropriate standard of review. The Policy passes muster under this standard because it serves the important government interest of providing students with accurate, appropriate human sexuality education based on their anatomy and physiology. The

discrimination is not based on gender identity because it explicitly refers to birth-assigned sex. Even if the discrimination were based on gender identity, heightened scrutiny would be inappropriate because transgender people only satisfy two of the four factors required for a finding of suspect or quasi-suspect status. The Court should exercise judicial restraint and defer to Congress to determine whether such a classification is appropriate. In exercising that restraint, the Court should apply rational basis review as the applicable standard of review. The Policy easily passes muster under rational basis review.

STATEMENT OF THE CASE

In July 2021, the Board enacted a policy designed to protect and support transgender students. *Boe v. Dune Unified School District Board*, --F.__-- (13th Cir. 2023) (“DECISION ON APPEAL”) at 4. The policy provides that 1) all Dune public schools are required to include gender identity in their anti-bullying policies; 2) all Dune public schools are required to allow transgender students to access restrooms consistent with their gender identity; and 3) all Dune elementary and middle schools are required to allow transgender students to join sports teams consistent with their gender identity. *Id.* The policy was passed unanimously by the five-member Board. *Id.* The Board has certified that all Dune schools are in compliance with

this policy. *Id.*

The following year, in December 2022, the same five-member Board enacted the Policy requiring all public schools in the Dune Unified School District to offer accurate, age-appropriate, and evidence-based information about human sexuality to students in grades seven through ten. *Id.* at 3-4. The Policy identifies specific topics that should be covered, including “reproductive anatomy; puberty and the development of secondary sex characteristics; healthy relationships, including the signs of sexual and emotional abuse within intimate relationships; safe sex practices and the use of contraceptives; HIV and other sexually transmitted infections; reproductive health care, including preventative care and self-screening for early detection of cancer and other conditions.” *Id.* at 3.

The Policy provides that the instruction on human sexuality should be provided separately for male and female students, and that students should be assigned to a designated class based on their biological sex as determined by a doctor at birth as stated on their birth certificate. *Id.* The Policy specifies that instruction should be tailored to students according to their anatomical and physiological characteristics to provide them with accurate and relevant sex education. *Id.* The same information, however, can be provided to both male and female students if it is equally relevant to students of both sexes.

Id. at 4. The Policy allows students to opt out of the human sexuality classes if they or their parents prefer that they do not participate. *Id.*

In June of 2023, Jane Boe ("Boe") moved to Dune with her parents before the start of her seventh-grade school year. *Id.* Boe is 12 years old and is a transgender girl. *Id.* Boe was assigned "male" on her birth certificate and is still biologically male, but she has identified as a girl since the age of seven. *Id.* Boe's parents have treated her as a girl since learning of her gender identity, and she is treated as a girl by her family, teachers, friends, and the public. *Id.* Boe uses her grandmother's middle name as her first name and uses female pronouns. *Id.* However, she has not received any gender-affirming care and is not taking puberty blockers. *Id.* Boe and her parents intend to follow her doctor's medical advice regarding future medical care. *Id.*

While reviewing enrollment paperwork for school, Boe and her parents became aware of the Policy regarding human sexuality classes. *Id.* They realized that Boe would be assigned to the boys' human sexuality class because she is biologically male. *Id.* The school confirmed that Boe would be assigned to the boys' human sexuality class in compliance with the Policy. *Id.*

Boe and her parents acknowledge that Boe has been treated consistently with her gender identity in every way at Dune

Junior High. *Id.* at 5. Boe is permitted to use the girls' bathroom and changing facilities and to participate in sports with her friends, consistent with her gender identity. *Id.* All her teachers and friends use her preferred pronouns when referring to her. *Id.*

However, Boe and her parents have expressed concerns that it might be humiliating for Boe to be assigned to the boys' human sexuality class. *Id.* They stated that many of Boe's fellow students do not know that she is transgender and that she has told only a small group of close friends with whom she regularly spends time. *Id.* Boe stated that she wants to be in class with her friends and is afraid to be with the boys because she does not really talk to them or hang out with them. *Id.* She is worried that the boys will ask why a girl is in the boys' class and will not want her there. *Id.* She stated that she would rather stay home than go to school if she has to be in the boys' class. *Id.*

Boe's parents have indicated that the opt-out provision in the Policy will not work for their family. *Id.* They want Boe to receive human sexuality instruction at school from professional teachers and counselors that addresses the topics outlined in the Board's Policy. *Id.* They stated that it would be expensive and burdensome for them to seek out information for their daughter on their own. *Id.*

In October 2023, Boe's father filed a lawsuit against the Board in federal district court on Boe's behalf. *Id.* The lawsuit alleged (1) that application of the Policy discriminates against Boe based on her sex in Violation of Title IX of the Education Amendments of 1972, and (2) that the Policy violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution by unjustifiably treating transgender and cisgender students differently. *Id.*

The Board responded that (1) Title IX permits schools to separate students based on biological sex for human sexuality instruction and therefore the Policy does not violate the statute, and (2) the Policy does not discriminate against transgender students but instead offers separate instruction based on students' anatomy, which serves an important - if not compelling - government interest and therefore does not violate the Equal Protection Clause. *Id.* The parties filed cross motions for summary judgment. *Id.* The parties agreed that no were no disputed issues of fact and no trial was required. *Id.*

The District Court granted the Board's motion for summary judgment, finding that the Policy does not violate Title IX or the Equal Protection Clause. *Id.* Boe appealed to the United States Court of Appeals for the Thirteenth Circuit. *Id.* The parties made the same arguments to the Thirteenth Circuit that they made to the District Court. *Id.* No other arguments were

raised by either party. *Id.* The Thirteenth Circuit affirmed the District Court's ruling. *Id.* at 8. Boe then appealed to the United States Supreme Court, which granted certiorari.

ARGUMENT

I. THE POLICY COMPLIES WITH TITLE IX BECAUSE SEX SEGREGATION IN HUMAN SEXUALITY CLASSES IS PERMITTED UNDER THE STATUTE AND DOES NOT CONSTITUTE IMPERMISSIBLE DISCRIMINATION.

Title IX provides 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 U.S. Department of Education issued a regulation implementing Title IX, which provides in part, “classes 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). Nothing in the statute prohibits school districts from assigning students to human sexuality classes based on their birth-assigned biological sex, and the regulation expressly provides for sex segregation in human sexuality classes without violating the statute.

The Policy implemented by the Board provides, in relevant part:

Instruction on human sexuality shall be provided separately for male and female students. Students shall be assigned to human sexuality classes according

to biological sex as determined by a doctor at birth and recorded on their original birth certificate. Schools 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 these characteristics.

DECISION ON APPEAL at 3-4.

The Policy complies with Title IX because it applies only to human sexuality classes, which the regulation allows.

Additionally, under the Policy, all students are treated the same regardless of their status or gender identity. *Bostock* does not apply because Title VII does not include the same carveouts for sex segregation that Title IX allows. This Court also specified that *Bostock* is specific to employment and does not apply to other areas such as bathrooms, locker rooms, or anything else of the kind. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1753, (2020).

A. The Policy complies with Title IX because it only applies to human sexuality classes and does not treat Boe differently than others on the basis of her transgender status.

To establish a prima facie case of impermissible discrimination under Title IX, a plaintiff must allege: (1) that she was subjected to discrimination in an educational program; (2) that the program receives federal assistance; and (3) that the discrimination was on the basis of sex. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020).

Here, like in *Grimm*, there is no dispute that the Board receives federal funding or that the human sexuality classes are part of the education program. The issue is whether the Board acted on the "basis of sex" and, if so, whether that was impermissible discrimination that harmed Boe. Here, the Board acted in compliance with Title IX and did not treat Boe differently than others on the basis of her gender identity.

1. *The Policy complies with Title IX because the statute permits distinction between biological sexes for human sexuality education.*

At the time Title IX was enacted, the term "sex" "referred to physiological distinctions between males and females, particularly with respect to their reproductive functions. *Grimm*, 972 F.3d at 632; *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015) (finding that transgender university student expelled for using male-designated locker room and bathroom facilities could not state Title IX discrimination claim based on his transgender status because Title IX's prohibition on discrimination "on the basis of sex" only referred to the traditional binary conception of sex consistent with one's birth or biological sex).

Additionally, the regulation interpreting Title IX provides carveouts that allow for sex-segregated locker rooms, sports teams, choruses, and human sexuality classes, which reinforces the definition of "sex" furnished by this Court in *Grimm*. 34

C.F.R. § 106.34(a)(3); *O'Connor v. Board of Education*, 449 U.S. 1301 (1980) (finding that school complied with Title IX in not allowing a female student to try out for the boys' basketball team).

The Policy implemented by the Board specifies that students will be separated by their biological birth-assigned sex only for human sexuality classes, specifically because instruction will be tailored to students based on their anatomical and physiological characteristics. DECISION ON APPEAL at 3. The Policy is consistent with courts' definition of the term "sex" because it is based only on physiological traits and not on status or gender identity. The Policy explains that the classes will emphasize the unique health care needs associated with those physical characteristics. DECISION ON APPEAL at 3-4. It is true that Boe identifies and lives as a girl and is treated as a girl in every other way at school. *Id.* at 4-5. But it is equally true that her sexual organs are genetically male. *Id.* Therefore, the appropriate education specific to her own anatomy is provided in the boys' human sexuality class.

Boe and other transgender students are permitted to use bathrooms and participate in sports teams that align with their gender identity, as demonstrated by the Board's 2021 policy. DECISION ON APPEAL at 4. The Policy at issue only applies to human sexuality classes, even though the carveout in the

regulation allows for sex segregation in other areas like sports teams and locker rooms. C.F.R. § 106.34(a)(3) The Board has narrowly tailored its policies so that biological sex is only considered in connection with sex education and is not a factor in any other area. The Policy does not distinguish among, or separate students based on gender identity or transgender status and only makes the distinctions expressly allowed under Title IX. Therefore, the Policy does not violate Title IX.

2. The Policy does not treat Boe differently due to her transgender status because all students are assigned to human sexuality classes based on their birth-assigned biological sex.

In the Title IX context, impermissible discrimination “mean[s] treating that individual worse than others who are similarly situated.” *Grimm*, 972 F.3d at 618. Boe has not been treated worse than others who are similarly situated because all students, regardless of gender identity, are assigned to the human sexuality class that aligns with their birth-assigned biological sex. DECISION ON APPEAL at 3. These assignments are based solely on physiological characteristics so the students can receive information applicable to their specific anatomy. *Id.* The classes include information on topics like reproductive anatomy, puberty, the use of contraceptives, sexually transmitted diseases, and self-screening for signs of cancer or other conditions. *Id.*

The included topics are largely specific to a student's physical anatomy and have no connection to their gender identity. Boe is not being excluded from or required to attend a particular class because she is transgender. Instead, Boe is being assigned to a class that aligns with her physical anatomy which will provide her with health and sexual education tailored to her physiology. *Id.* The school also provides an opt-out alternative which is available to all students; no student is forced to attend a human sexuality class. *Id.* at 4. Boe is not being singled out because all students, regardless of gender, have the option to participate in the classes or to opt out of the instruction. *Id.*

Title IX does not treat transgender status as a protected characteristic. *Johnston*, 97 F. Supp. 3d at 674. Federal courts have consistently found that transgender individuals are not a protected class even under Title VII. *Id.*; *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218 (10th Cir. 2007) (finding that transgender people may not claim protection from discrimination under Title VII based solely on their transgender status); *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984) (finding that the plain language of Title VII does not outlaw discrimination based on sexual identity); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (stating that nearly all

federal courts have said transgender status is unprotected by Title VII).

Discrimination on the basis of sex has been interpreted as discrimination on the basis of a person's biological sex, not sexual orientation, sexual identity, or intention to change sex. *Johnston*, 97 F. Supp. 3d at 674-75. Additionally, the Ninth Circuit has found that treating both male and female students the same suggests an absence of gender or sex animus. *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228 (9th Cir. 2020).

Here, the Board is treating male and female students the same because its policy for sex segregation in human sexuality classes is based solely on students' physical anatomical attributes. The Policy therefore demonstrates a lack of any gender or sex animus by the Board and treats Boe the same as any other student.

For these reasons, application of the policy to Boe does not impermissibly discriminate against her on the basis of her sex.

3. Boe cannot demonstrate that she has suffered or will suffer harm because her stated concerns have already been addressed by the Board.

In 2021, the Board implemented a policy that requires all public schools in Dune to include gender identity in their anti-bullying policies and allow students to access restrooms and sports teams consistent with their gender identity. DECISION ON APPEAL at 4.

Boe's only stated concerns about the 2022 Policy are that it might be humiliating to be assigned to the boys' class, that the boys may not want her in their class or may wonder why she is there, and that only a few people are aware of her transgender status. DECISION ON APPEAL at 5. However, as evidenced by its 2021 policy, the Board does not tolerate any type of bullying toward transgender students and would require the school to address any such behavior toward Boe. *Id.* at 4. The Board has confirmed that all Dune schools are in compliance with the 2021 policy. *Id.*

Additionally, Boe is 12 years old and in middle school, which is inherently a difficult and embarrassing time for pre-teens, during which they are entering puberty and their bodies are developing. Confusion and embarrassment about sex and gender identity is common among middle-school-aged students and any resulting harm cannot be attributed to a class assignment.

Boe's parents have raised concerns that if Boe opts out of the human sexuality classes they will have to take on a greater parenting burden by providing their daughter with education themselves. *Id.* at 5. However, these concerns cannot be alleviated by allowing Boe to attend the girls' human sexuality class. Boe would still need education specific to her own physical anatomy, which would have to be provided by her parents if they elect not to have it provided by the school. Allowing Boe

to attend the girls' human sexuality class would therefore have the same result as opting out of the instruction altogether, which is an alternative provided by the Policy. *Id.* at 4.

For these reasons, Boe cannot make the requisite showing that she has suffered harm or will suffer harm as a result of the Policy and cannot prove impermissible discrimination.

B. Boe's reliance on *Bostock* is misplaced because it seeks to expand this Court's deliberately narrow interpretation.

Bostock is distinguishable from the present case because it is specific to an individual claim of workplace discrimination in violation of Title VII. *Bostock*, 140 S. Ct. at 1753. In fact, this Court made clear that its ruling in *Bostock* did not extend beyond Title VII to other federal or state laws that prohibit sex discrimination. *Id.* Applying *Bostock* here would therefore expand this Court's interpretation of sex discrimination beyond what this Court intended.

This Court has previously stated that "Title IX's 'overarching purpose,' which is 'evident in the text' itself, is to prohibit the discriminatory practice of treating women worse than men and denying opportunities to women because they are women (and vice versa)." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Title IX, unlike Title VII, includes express statutory and regulatory carveouts for differentiating between the sexes when it comes to separate living and bathroom

facilities, among others. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022).

In *Adams*, a transgender student was denied access to bathrooms consistent with his gender identity. *Id.* In its reasoning that the bathroom policy did not violate Title IX, the Eleventh Circuit stated, "if to 'provide separate toilet ... facilities on the basis of sex' means to provide separate bathrooms on the basis of *biological* sex, then the School Board's policy fits squarely within the carve-out." *Id.* at 811. Similarly, here, where the Board is providing for separate human sexuality classes on the basis of biological sex, the Policy fits squarely within the carveout. Boe has an even weaker Title IX claim than the student in *Adams* because she is not being denied access to bathroom facilities or even sports teams consistent with her gender identity, but is only being assigned to a designated class that will provide education consistent with her physiological characteristics.

District courts have likewise declined to extend *Bostock's* reasoning to Title IX, instead analyzing "on the basis of sex," as used in Title IX by giving the term its ordinary public meaning at the time of enactment and in the context of Title IX. See e.g., *Neese v. Becerra*, 640 F. Supp. 3d 668, 675-76 (N.D. Tex. 2022). As many courts have recognized, "Title IX was enacted in response to evidence of pervasive discrimination against women

with respect to educational opportunities.” *Id.* at 682.

Boe’s reliance on *Price Waterhouse v. Hopkins* is similarly misplaced because the requirement that students participate in health education related to their anatomy is not based on stereotypes associated with a student’s biological sex. *Johnston*, 97 F. Supp. 3d at 657. *Price Waterhouse* concerned employment discrimination in which a woman was denied a promotion due in part to comments from colleagues that invoked gender stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). This Court’s ruling in *Price Waterhouse* was an interpretation of Title VII and does not reach Title IX. Title IX governs sex discrimination in education and has been interpreted to include carveouts for specific areas of education including human sexuality classes. 34 C.F.R. § 106.34(a)(3).

For these reasons, Boe’s reliance on *Bostock* and *Price Waterhouse* is misplaced, and the Court’s interpretations in those cases are not applicable here.

Boe cannot demonstrate impermissible discrimination by the Board, or that she has suffered or will suffer harm as a result of any impermissible discrimination by the Board. Therefore, the district court correctly granted summary judgment to the Board on Boe’s Title IX claim.

II. THE POLICY DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

To withstand equal protection scrutiny, a sex-based discrimination must serve an important governmental objective and the discriminatory means employed must be substantially related to the achievement of those objectives. *United States v. Virginia*, 518 U.S. 515, 533 (1996). A policy that discriminates based on sex can survive if the advocate of the policy demonstrates an exceedingly persuasive justification for the action taken. *Id.*

The Board can demonstrate that while the Policy is facially sex-based because of the birth-assigned sex requirement, this requirement serves the important governmental objective of offering accurate, age-appropriate, and evidence-based information on human sexuality according to students' anatomical and physiological characteristics. DECISION ON APPEAL at 3-4. Therefore, the Policy withstands equal protection scrutiny.

A. The Policy is subject to heightened scrutiny on the Equal Protection claim because it is a sex-based discrimination.

Laws that facially classify individuals on the basis of their sex receive heightened scrutiny. *Virginia*, 518 U.S. at 532-534. The Policy at issue here facially classifies students on the basis of sex because it includes the language "biological sex as determined by a doctor at birth and recorded on their original birth certificate." DECISION ON APPEAL at 3.

1. *The Policy is subject to heightened scrutiny because it facially classifies students by sex, not by gender identity.*

Courts normally interpret statutory language in accordance with the ordinary public meaning of its terms at the time of enactment, and judges should not modify those terms without legislative direction to do so. *Bostock*, 140 S. Ct. at 1738. The language of the Policy is explicitly clear as relating only to biological sex at birth, not to transgender status. There is no language in the Policy to suggest that it serves as a categorical discrimination against transgender students because of their transgender identity. *Hecox v. Little*, 79 F.4th 1009, 1021 (2023) (holding that the Act at issue and its legislative proponents explicitly referenced transgender women and girls from public school sports teams that correspond with their gender identity).

Additionally, the Fourth, Seventh, and Eleventh Circuits have held that a school district policy basing which bathroom a student may use based on their birth-assigned sex necessarily rests on a sex classification. *Grimm*, 972 F.3d at 608; *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Glenn v. Brumby*, F.3d 1312, 1319 (11th Cir. 2011). Here, the Policy is similarly based on a student's birth-assigned sex, so it is also a facial sex-based classification.

Crucially, however, the Policy does not use birth-assigned sex as a proxy for transgender identity or to punish students for gender non-conformity. *Craig v. Boren*, 429 U.S. 190 (1976) (holding that there was no legitimate justification related to traffic safety for enacting a gender-based statute barring the sale of 3.2 percent alcoholic beer to males under age 21 but not to females over age 18); *Grimm*, 972 F.3d at 608 (noting that sex-based discrimination policies that punish transgender persons for gender non-conformity rely on sex stereotypes). While it is true that the Policy creates two groups of students, namely boys and girls, it is also true that both groups may include cisgender and transgender students. The Policy does not classify based on transgender status or gender non-conformity because it is concerned with a student's anatomy and physiology, not with her gender identity or any related sex stereotypes. DECISION ON APPEAL at 3-4.

In *Adams by and through Kasper v. School Board of St. Johns County*, the 11th Circuit held that a school district bathroom policy that designated which students may use which bathrooms based on students' birth-assigned sex did not discriminate against students based on transgender identity because there was a lack of identity between the policy and transgender status. 57 F.4th at 808-809. The Board's Policy here also lacks connection with transgender status because the concern is not with how a

student identifies, but with the student's anatomy and physiology. DECISION ON APPEAL at 3-4. To that end, the Board is responsible for providing education applicable to its students, and the Policy seeks to fulfill that responsibility.

2. Even if the Policy were based on transgender identity, heightened scrutiny would not apply because transgender people are not a suspect or quasi-suspect class.

The Supreme Court has not recognized transgender status as a suspect or quasi-suspect classification under the Equal Protection Clause because that status does not satisfy the four factors for such a designation. *L.W. by and through Williams v. Skrmetti*, 83 F.4th 460, 486 (2023). The first factor asks whether the group historically has been subjected to discrimination. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). The second factor examines whether the group has a defining characteristic that frequently bears no relation to the ability to perform or contribute to society. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-441 (1985). The third factor considers whether the group has obvious, immutable, or distinguishing characteristics that define them as a discrete group. *Lyng*, 477 U.S. at 638. Finally, the fourth factor examines whether the group is a minority lacking political power. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

On the first factor, the Board does not dispute that transgender people have been subjected to persistent discrimination. Transgender people are disproportionately the victims of discrimination and violence. *Grimm*, 927 F.3d at 611. Therefore, the Board concedes that the first factor weighs in favor of quasi-suspect class designation.

For the second factor, the defining characteristic is transgender people's gender identity differing from their birth-assigned sex. The Board concedes that while transgender people do possess this defining characteristic, this characteristic does not hinder transgender people's ability to perform or contribute to society.

The third factor tends to weigh against a finding of quasi-suspect classification. While it is true that many transgender people undergo gender reassignment surgery or other gender-affirming care that suggests that sex is not actually immutable, it is also true that transgender identity is not definitively ascertainable at the moment of birth. *L.W.*, 83 F.4th at 487. Additionally, transgender identity itself is not immutable, as shown by the numerous stories of those who "detransition" after receiving gender-affirming care. *Id.* Considering the wide swath of identities covered under the "transgender" term that differ from cisgender identity, the group is not discrete because it contains numerous identities and expressions. *Id.* For these

reasons, the third factor weighs against a quasi-suspect classification.

Finally, the fourth factor weighs against a finding of quasi-suspect classification. While very few transgender people have been elected to public office, this alone does not define whether a group has a lack of political power, especially because a small number of people altogether have been elected to public office. Transgender people are not barred from voting and have the ability to organize to affect political change. They have received significant support from the federal government and major medical associations in the form of assistance in federal cases. *L.W.*, 83 F.4th at 487. Almost a third of U.S. States have laws allowing gender-affirming care for transgender individuals. *Id.* The fact that Boe brought this suit further affirms that transgender people do have enough political power to make such an issue known at the federal level. Critically, the power that transgender people do possess suggests that they do not warrant extraordinary protection from the majoritarian political process. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (holding that heightened scrutiny is the improper standard for a mandatory retirement age statute because state officers over 50 do not lack such political power to require extraordinary protection). Because of this, the fourth factor weighs against a finding of quasi-suspect classification.

Although two of the four factors do weigh in favor of a finding of quasi-suspect classification, this Court should exercise restraint due to the lack of an overwhelming finding for such a classification. This Court should instead respect the separation of powers and defer the decision to Congress. *City of Cleburne*, 473 U.S. at 441-442.

B. The Policy is substantially related to the Board's important governmental interest because it serves to offer accurate information on human sexuality according to students' anatomical and physiological characteristics.

A sex-based discrimination is permissible if the Board can show that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 71 (2001). The Board's policy meets this standard.

The purpose of the Policy is written into its own language: to offer accurate, age-appropriate, and evidence-based information about human sexuality according to students' anatomical and physiological characteristics. DECISION ON APPEAL at 3-4. The Policy is not based on vague and unsubstantiated concerns about student health. The Board has a responsibility in loco parentis to students by maintaining discipline, health, and safety within its schools. *Adams*, 57 F.4th at 801-802. The Board

accomplishes that through this Policy, ensuring that students have appropriate health information that is relevant to them and their physiology.

While the Policy could potentially have a disparate impact on students who identify as transgender such as Boe, such an impact is permissible under equal protection review unless it was motivated by purposeful discrimination. *Price Waterhouse*, 490 U.S. 228, 267. No such purposeful discrimination is present here. The meeting at which the Policy was passed included no discussion about intentionally disadvantaging or discriminating against transgender students. DECISION ON APPEAL at 4. In fact, the policy that the Board adopted in 2021 requiring schools within the district to allow transgender students between kindergarten and eighth grade to participate in sports and use restrooms that align with their gender identity and that include gender identity as an enumerated characteristic in their anti-bullying policies demonstrates intentional support for transgender students, not intentional discrimination. *Id.* This 2021 policy suggests the Board supports transgender students and seeks to ensure that students have equal opportunities.

The Board recognizes that the Policy is not perfect and will not meet the needs of every student. Even so, the Policy is not required to be capable of achieving its ultimate objective in every instance. *Tuan Anh Nguyen*, 533 U.S. at 70. Additionally,

the Board is not required to choose between providing every possible option to achieve its goal or not providing any option at all. *Geduldig v. Aiello*, 417 U.S. 484, 495 (1974). The Policy has alternatives available to students, namely opting out of human sexuality education. DECISION ON APPEAL at 4. The Policy also allows for classes to be taught to both boys and girls, providing the information is relevant to both groups. *Id.*

Schools generally do not have sufficient resources to provide education of any type, including human sexuality education, tailored to the needs of every individual student. The Board chose this option to provide quality education to as many students as possible, tailored to their physiological needs. If new information becomes available to the Board about a more effective alternative to providing human sexuality education, it has the ability to adopt a new policy incorporating that alternative. *Danskine v. Miami Dade Fire Dept*, 253 F.3d 1288, 1299 (11th Cir. 2001) (finding that the County based its hiring targets on a point-in-time metric that could be modified on an annual basis depending on new information available to the county). For the time being, however, the Board has implemented the best possible solution to serve the highest possible number of students.

Unfortunately, allowing Boe's preferred remedy is not a viable alternative and is antithetical to the purpose the Board

seeks to achieve. If Boe were allowed to attend human sexuality classes with the girls in her grade, the Board would be doing her a disservice because she would be receiving an education on information that is not relevant to her physiologically. To best achieve the Board's purpose, Boe should attend the classes that teach the information that matches her physiology so she is well-equipped to understand how her body will develop and change, especially because she is not currently on puberty blockers or other forms of medical gender-affirming care. DECISION ON APPEAL at 4.

C. Even if the Policy were based on transgender identity, rational basis review would be the applicable standard because transgender identity is not a suspect or quasi-suspect class.

As discussed above, this Court has not recognized transgender identity as a quasi-suspect class, and should not do so here because transgender identity does not satisfy the four factors for quasi-suspect class designation. Therefore, rational basis review applies to discrimination on the basis of transgender status. *L.W.*, 83 F.4th at 486. Under rational basis review, legislation need only be rationally related to a legitimate state interest. *Romer v. Evans*, 517 U.S. 620, 631-632 (1996). The Board's interest under this standard is the same as under heightened scrutiny and is contained in the Policy itself - to provide accurate, age-appropriate, and evidence-based

information on human sexuality according to students' anatomical and physiological characteristics. DECISION ON APPEAL at 3-4.

Rational basis review requires only the possibility of a rational classification for a law. *L.W.*, 83 F.4th at 489. The Policy recognizes that despite any particular student's gender identity, they will develop physiologically between grades seven and ten according to their birth-assigned sex. The Policy of delivering human sexuality education based on students' physiology according to their birth-assigned sex is rationally related to the Board's objective of providing that education. Given the resources generally available to school districts and the difficulty of providing individualized education to each student, the Policy is the best available and most rationally related method to achieve the Board's objective.

The Policy is further permissible because it is based on the most basic biological differences between the sexes, not on sheer conjecture. *Tuan Anh Nguyen*, 533 U.S. at 73. The basis of the Policy is the undeniable fact that boys and girls have different physiology and different anatomy. DECISION ON APPEAL at 3-4. This Court has recognized inherent differences between the biological sexes that might provide appropriate justification for distinctions. *Virginia*, 518 U.S. at 533-534. This is one such case. Teaching about these differences in classes with only those

of similar physiology is entirely permissible because it is based on actual anatomical needs of the sexes, not on sex stereotyping.

CONCLUSION

The Policy complies with Title IX because it only applies to human sexuality classes, as permitted under the statute. The Policy does not treat Boe differently than other students based on her transgender status because all students are assigned to human sexuality classes based on their birth-assigned sex. Boe cannot demonstrate that she has suffered harm or will suffer harm because her stated concerns have already been addressed by the Board through its 2021 policy requiring that schools within the district treat transgender students consistently with their gender identity. *Bostock* does not apply because it is specific to gender discrimination in employment, and Title VII does not offer the same carveouts that Title IX does for distinguishing by biological sex.

The Policy does not violate the Equal Protection Clause of the Fourteenth Amendment because, under heightened scrutiny, it passes constitutional muster. The Policy is substantially related to the Board's important governmental interest because it serves to offer accurate information on human sexuality according to students' anatomical and physiological characteristics. Even if the Policy were based on transgender identity, heightened scrutiny would then not apply because transgender people are not

a suspect or quasi-suspect class. The appropriate standard would then be rational basis review, and the Policy would pass muster even more easily.

For these reasons, the Court should affirm the ruling of the Fourteenth Circuit.

Respectfully submitted,

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