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,

Petitioner,

v.

DUNE UNIFIED SCHOOL DISTRICT

BOARD

Respondent,

ON WRIT OF CERTIORARI TO COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

Brief for Petitioner

Team 15

Issue #1: Title IX

[redacted]

Issue #2: Equal Protection

[redacted]

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QUESTIONS PRESENTED

I. Does a policy of segregating sexual education classes based upon biological sex violate Title IX when a transgender girl would be forced to be in an all-male class or not to attend a class at all?

II. Does a middle school's policy, which segregates students by their sex assigned at birth, violate the Equal Protection Clause of the Fourteenth Amendment when the school requires a transgender girl to take a boys-only sex education class?

OPINION BELOW

Jane Boe v. Dune Unified Sch. Dist., Docket No. 23-1234 (13th Cir. 2023).

CONSTITUTIONAL RULES AND PROVISIONS

U.S. Const. Amend. XIV, § 1.

20 U.S.C. § 1681(a).

INTRODUCTION

Petitioner Ms. Boe urges this Court to reverse the Thirteenth Circuit's decision and find that the Dune School District's Sexual Education Class Policy does violate Title IX. This Court has held that discrimination on the basis of gender identity constitutes impermissible sex-based discrimination under Title VII. As courts have turned to Title VII case law in interpreting Title IX, the same form of discrimination should constitute sex-based discrimination here. This policy

discriminates against Ms. Boe on the basis of her gender identity.

The Dune School District's sexual education policy requires students be segregated into sex-ed classes based upon sex assigned at birth. Ms. Boe, who would be forced to either take an all-boys class or to not take the class at all, will be excluded from an educational program on the basis of sex. Further, the policy has caused Ms. Boe emotional distress and will lead to Ms. Boe being forcibly outed, which puts her at risk of emotional and physical danger. As this policy will exclude Jane from an educational program on the basis of her sex and will cause Ms. Boe harm, it should be struck down as a violation of Title IX.

Even if this Court is not persuaded that the School Board policy violates Title IX, the policy is still not permissible because it violates the Equal Protection Clause of the Fourteenth Amendment. This Court should apply an intermediate scrutiny analysis because the policy classifies students both on the basis of sex and transgender status. This policy does not pass intermediate scrutiny because it is not substantially related to the school board's goal of protecting and advancing the individual and public health of its students. Therefore, this Court should find that this policy unconstitutionally violates the Equal Protection Clause.

STATEMENT OF THE CASE

Statement of Facts

Jane Boe is a twelve-year-old, seventh grader at Dune Junior High School. R. at 4. Like many girls her age, she loves playing volleyball, field hockey, and spending time with her friends. R. at 5. Her peers and teachers treat her like any other girl. *Id.* However, her school's policy on human sexuality education treats her differently from other girls on the basis of one simple letter that appears on her birth certificate. R. at 3.

At seven years old, Ms. Boe told her parents that she was a girl, despite having been assigned "male" at birth. R. at 4. With her parents' support, Ms. Boe socially transitioned by choosing a new name and using "feminine" pronouns both at home and at school. *Id.* She is not yet medically transitioning, but she and her parents plan to follow her doctor's recommendations in the future. *Id.* Everyone in Ms. Boe's life treats her like the girl she is. *Id.*

Ms. Boe moved to Dune in the summer of 2023 and started at Dune Junior High School that fall. R. at 4. School policy allows her to use the girls' bathrooms and changing facilities and to play girls' sports. R. at 5. However, school policy requires sexuality education classes to be segregated by "biological sex as determined by a doctor at birth and recorded on [the]

original birth certificate." R. at 3. The only option for students who do not identify as their sex assigned at birth is to opt out of the class entirely. *Id.*

At school, only Ms. Boe's closest friends know that she is transgender. R. at 5. She fears the humiliation and discrimination that would come if she were forced to take the all-boys class. *Id.* While Ms. Boe would rather stay home, her parents do not view opting out as an option because it would be expensive and difficult to seek out alternative sexuality education materials. *Id.* They believe that their daughter should have access to the same education as every other student at her school. *Id.*

Procedural History

Ms. Boe and her father filed suit against the School Board, claiming that the school's application of the policy violated Title IX and the Equal Protection Clause. R. at 2-3. The District Court of Texington rejected Ms. Boe's claims and granted the School Board's motion for summary judgment. R. at 3. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed the District Court's ruling, finding that policy did not violate Title IX or the Equal Protection Clause. *Id.* Boe filed a timely appeal and the Supreme Court of the United States granted certiorari.

ARGUMENT

I. The Sexual Educational Class Policy Violates Title IX.

Sex-based discrimination has been an ever-present issue in this Nation's history and is still found today in the workplace and schoolhouse. The wage gap still exists.[1] People of all genders have been excluded from educational opportunities.[2] In response, Congress has enacted statutes to prohibit sex-based discrimination. *See* 20 U.S.C. § 1681(a); 42 U.S.C. § 2000e-2(a). Title IX of the Education Amendments of 1972 prohibits discrimination "on the basis of sex" in federally funded educational institutions. § 1681(a).

The key phrase of Title IX is "on the basis of sex." The conversation around the meaning of sex has become more nuanced as societal understanding of sex and gender has evolved. A key question has been raised: whether discrimination based upon gender identity, "a person's deeply felt, internal, and individual experience of gender, which may not correspond

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[1] Carolina Aragão, Gender Pay Gap in U.S. Hasn't Changed Much in Two Decades, Pew Rsch. (Mar. 1, 2022), https://www.pewresearch.org/?p=257386.

[2] *See generally Peltier v. Charter Day Sch.*, Inc., 37 F.4th 104 (4th Cir. 2022); *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016).

to . . . [a person's] designated sex assigned at birth"[3] constitutes sex discrimination. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1731 (2020). This concept is particularly true when discrimination is against a transgender individual, a person whose gender identity does not align with their sex assigned at birth. *See id.* In the realm of Title VII, the Supreme Court has answered affirmatively. *See id.* As discrimination based upon gender identity constitutes sex-based discrimination under the analogous Title VII, the same type of discrimination should be deemed sex discrimination under Title IX.

A. Gender Identity Discrimination is Sex-Based Discrimination Under Title IX.

1. The Court Should Apply Title VII Case Law to Interpret Title IX.

Title IX expressly prohibits sex-based discrimination at federally funded educational institutions. § 1681(a). Title VII has a similar prohibition on sex-based discrimination in the workplace. *See* § 2000e-2(a). In the realm of Title VII, a key question applicable to this case was raised: does discrimination on the basis of gender identity constitute sex discrimination

[3] Gender, WHO (last visited Jan. 14, 2024), https://www.who.int/health-topics/gender#tab=tab_1.

under Title VII? *Bostock*, 140 S. Ct. at 1737. The Supreme Court answered affirmatively. *Id.* at 1743.

In *Bostock*, a transgender woman, who had recently begun transitioning, challenged her firing as a violation of Title VII. *Id.* at 1738. The Court found that it is "impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Id.* at 1741. The Court strongly proclaimed that sex-based discrimination under Title VII must be interpreted to include gender identity discrimination. *Id.* at 1743.

While the statute at issue in the *Bostock* case was not Title IX, the decision still has great relevance. Courts have often turned to Title VII case law when interpreting Title IX. *See Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX."); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 468 (8th Cir. 1996) (applying Title VII hostile environment standards to a Title IX claim); *Doe v. Univ. of Dayton,* 766 F. App'x 275, 282 (6th Cir. 2019). The application of Title VII interpretations to Title IX issues is commonplace in our legal system and should be followed here.

In the majority opinion, Justice Sandoval correctly stated that the *Bostock* Court did not "purport to address bathrooms,

locker rooms, or anything else of this kind." DECISION ON APPEAL. Yet, the lower court misinterprets what the *Bostock* Court meant. The Court in *Bostock* did not have the opportunity to address these spaces as that was not the issue before the Court. 140 S. Ct. at 1737. However, this statement does not foreclose the application of *Bostock* and its interpretation of Title VII to this case, particularly as it is the norm in many circuits to turn to Title VII case law when ruling on a Title IX matter. *See Jennings,* 482 F.3d at 695; *Kinman*, 94 F.3d at 468; *Univ. of Dayton,* 766 F. App'x at 282. In the wise words of Justice Gorsuch, it is "impossible" to discriminate against some based upon their gender identity without discriminating against them on the basis of sex. *Bostock*, 140 S. Ct. at 1741. Thus, gender identity discrimination should constitute sex-based discrimination under Title IX as it does under Title VII.

2. Even if "Sex" Under Title IX is Interpreted as Biological Sex, Gender Identity Discrimination is Still Covered.

While understandings of sex and gender have evolved, the law has not caught up. Courts have defined the term sex as used in Title IX narrowly to mean "biological sex," focusing on the presence of certain physical attributes. *See D.H. v. Williamson Cty. Bd. of Educ.*, No. 3:22-cv-00570, 2023 U.S. Dist. LEXIS 172738 (M.D. Tenn. Sep. 27, 2023); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 57 F.4th 791 (11th Cir. 2022). Even if

this Court interprets sex under Title IX to only mean "biological sex," gender identity discrimination is still covered.

In *Bostock*, this Court conceded to a definition of sex that relied on biological distinctions between men and women. 140 S. Ct. at 1739. Yet even this focus on biological distinctions supports the finding that gender identity discrimination is still barred. There is now a greater understanding that a person's gender identity is a component of their biological sex.[4] There is also a newfound appreciation that there must be some genetic, or biological, component to one's gender identity.[5] Furthermore, definitions of biological sex that rely solely on the presence of certain physical attributes typically associated with "maleness or femaleness" would certainly lead to some absurd results. *Adams*, 57 F.4th at 857 (Pryor J., dissenting). For example, it is unlikely that someone would state a woman is no longer a woman because she underwent a hysterectomy. *Id.*

By combining these two concepts, it is clear that discrimination based upon biological sex includes gender

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[4] Joshua D. Safer, *A Current Model of Sex Including All Biological Components of Sexual Reproduction*, 85 L. and Contemp. Probs. 47, 50 (2022).

[5] *Id.* at 51-54.

identity discrimination for two reasons. *Id.* First, gender identity is a component of biological sex. Second, as stated in *Bostock*, 140 S. Ct. at 1743, it is impossible to discriminate against someone who is transgender without discriminating on the basis of sex, particularly as this discrimination is often focused on a person's lack of certain attributes associated with one biological sex or another. Thus, even if this Court decides to interpret sex in Title IX to mean "biological sex," gender identity discrimination is still covered.

B. The Sexual Education Policy Violates Title IX as it Discriminates Against Ms. Boe on the Basis of her Gender Identity.

For a plaintiff to prevail on a Title IX claim, a plaintiff must establish "(1) that [plaintiff] was excluded from participation in an education program "on the basis of sex"; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that improper discrimination caused [the plaintiff] harm." *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). The Dune School District is a public school district that receives federal funding; thus, the second prong is not at issue.

1. Sex-Stereotyping is Impermissible Under Title IX.

Under Title VII, it is well established that sex-stereotyping, or discrimination against a person who does not conform to a stereotype about their sex or gender, is

impermissible sex-based discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). Courts have turned to sex stereotyping theories when determining that discrimination against someone for being transgender or gay constitutes sex-based discrimination under Title VII. *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 347 (7th Cir. 2017) (holding that firing a female professor because she was a lesbian was impermissible sex-stereotyping); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (applying a sex stereotyping theory to a Title VII claim involving a transgender plaintiff).

Title VII case law is often used to guide courts in making Title IX decisions. See *Jennings*, 482 F.3d at 695; *Kinman,* 94 F.3d at 468; *Univ. of Dayton,* 766 F. App'x at 282. In following this practice, multiple courts have applied *Price WaterHouse's* theories of sex stereotyping in cases involving transgender students, finding that certain policies violate Title IX as they punish students for their gender non-conformance. *Grimm*, 972 F.3d at 583; *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017). Thus, by following the traditions of various courts to apply Title VII case law to Title IX cases, sex-stereotyping should be considered sex-based discrimination under Title IX.

2. The Sexual Education Policy Relies Impermissibly on Sex Stereotypes in Determining Which Class to Assign Ms. Boe.

"[A] transgender individual does not conform to the sex-based stereotypes of the sex that [they were] assigned at birth." *Whitaker,* 858 F.3d at 1048. School policies that relied on an individual's sex assigned at birth to segregate students have been struck down by the courts as improper sex-stereotyping. *See Whitaker*, 858 F.3d at 1048; *Grimm*, 972 F.3d. at 583; *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 771 (7th Cir. 2023).

In *Whitaker*, a transgender boy, who was assigned female at birth, requested to use the boy's restroom at his school. 858 F.3d at 1038. Under the district's unwritten policy, students may only use the bathroom that matches the student's sex assigned at birth found on the student's birth certificate. *Id.* at 1040. The student challenged this as a violation of Title IX. *Id.* at 1038. The court found that "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Id.* at 1049. The student, a boy, was not permitted to use the boy's bathroom simply because the marker on his birth certificate did not conform with the stereotype of what marker is found on a boy's birth certificate.

Similar policies have been struck down by other courts. *See Grimm*, 972 F.3d at 583; *A.C.*, 75 F.4th at 771. While the maintenance of sex-segregated facilities is permissible under Title IX, Courts have shown that the policy violates Title IX if these policies lead to gender identity discrimination. *See Grimm*, 972 F.3d at 583; *A.C.*, 75 F.4th at 771; *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 717 (D. Maryland 2018).

Under the sexual education policy, a student will be assigned to a class based on the student's sex assigned at birth recorded on the student's original birth certificate. R. at 3. Ms. Boe would then be required to be the sole girl in an all-boys class. R. at 4. This placement discriminates against Boe on the basis of her gender identity as the policy relies on a sex-stereotype of what the marker on her birth certificate means. The stereotyping ignores Ms. Boe's identity as a girl and treats her differently than other girls due to a single letter on Ms. Boe's birth certificate. This difference in treatment is a clear violation of Title IX.

3. The School District Policy Will Exclude Ms.Boe from an Education Program on the Basis of her Gender Identity.

The sexual education policy forces Ms. Boe to make a decision: live her life as a girl or attend her sexual education class. When other school district policies have forced students to choose between their gender identity and educational

experiences, these policies have been found to violate Title IX. See *Whitaker*, 858 F.3d at 1041. For example, courts acknowledged that the transgender students would have to make the *impossible* choice between living their life as who they are or engaging in educational opportunities. *See Whitaker*, 858 F.3d at 1041; *See Grimm*, 972 F.3d at 583; *A.C.*, 75 F.4th at 771.

Here, Ms. Boe is left with a similar choice: either take an all-boys sexual education class or not take one at all. R. at 4. The policy allows her to opt out of the class, however it does not provide for any alternative class. *Id.* If Ms. Boe chooses to not take the class, she will miss out on information regarding human sexuality and safe sex practices. Yet, if Ms. Boe chooses to attend the class, she will be the sole girl in an all-boys class. Ms. Boe, in the record, has indicated fear of what may happen if she takes the all-boys sexual education classes and that she likely would not go to school at all. R. at 5. Thus, under the policy, Ms. Boe will be excluded from an educational program on the basis of her gender identity in violation of Title IX.

4. The School District's Policy Will Cause Harm to Ms. Boe Through Forcible Outing.

Harm under Title IX can be emotional or dignitary. *Peltier*, 37 F.4th at 129. Policies that have segregated students based on sex assigned at birth have taken emotional, dignitary, and

physical tolls on students. *See Whitaker*, 858 F.3d at 1041. Students have commonly experienced depression, anxiety, and suicidal thoughts under such policies. *Grimm*, 972 F.3d at 600; *A.C.*, 75 F.4th at 772. Transgender students also feared being marked as an "other" because they could simply not engage in the same activities as other boys or girls. *See Grimm*, 972 F.3d at 600; *A.C.*, 75 F.4th at 772.

Here, Ms. Boe is experiencing emotional harm because of this policy. R. at 5. Ms. Boe is experiencing anxiety and fear of how students in her all-boys class will respond to her presence. R. at 5. This fear caused a girl, who was excited to enjoy all school has to offer, to want to remain home. R. at 5.

Only four students in the school know that Ms. Boe is transgender. R. at 5. By requiring Ms. Boe to attend the all-boys classes, the school district will out her as trans. During a time at which LGBTQ+ hate crimes are on the rise, forcibly outing Ms. Boe is extremely dangerous.[6] Furthermore, bullying of

[6] Delphine Luneau, *FBI's Annual Crime Report — Amid State of Emergency, Anti-LGBTQ+ Hate Crimes Hit Staggering Record Highs*, Hum. Rts. Campagin,(Oct 16, 2023) https://www.hrc.org /press-releases/fbis-annual-crime-report-amid-state-of-emergency-anti-lgbtq-hate-crimes-hit-staggering-record-highs.

LGBT students is commonplace in schools.[7] Thus, Ms. Boe will be at an increased risk of physical, emotional, and mental harm caused by other students and possibly community members. These harms are of great magnitude. This policy, which discriminates against Ms. Boe on the basis of her gender identity and causes her harm, should be found to be in violation of Title IX.

C. The Sexual Education Class Policy Does Not Comport with Federal Regulations for Sex-Segregated Classes.

While single-sex classes may sometimes be permissible under Title IX, there are several requirements for these classes. *See* 34 C.F.R. §§ 106.34(b)(1)(i)-(iv). One requirement is that all single-sex educational experiences be "completely voluntary." §§ 106.34(b)(1)(iii). Here, the school board's policy which contains an opt out option fails to meet this requirement.

In *Doe v Wood County Board of Education*, a middle school had a policy where core classes such as math and reading were taught in single-sex classes. 888 F. Supp. 2d 771, 774 (S.D. W. Va. 2012). This program had an opt out option, allowing for students to take co-educational classes. *Id.* at 777. A parent of three middle school girls (the Does) sought an injunction

[7] *Bullying and Suicide Risk Among LGBTQ Youth*, Trevor Project (Oct 13, 2022), https://www.thetrevorproject.org/research-briefs/bullying-and-suicide-risk-among-lgbtq-youth/.

claiming this policy violated Title IX. *Id.* at 774. The Court found that the policy was not "completely voluntary" as it did not require affirmative assent by the parents for the students to be placed in sex-separated classes. *Id.* at 776. Students were mandated to be in single-sex class unless their parents objected, thus this program was not completely voluntary in nature. The Court found that the Does were likely to succeed on the merits of their Title IX claim. *Id.* at 777.

The sexual education class policy at issue in this case has a similar opt out provision. Ms. Boe, and all other students, will be mandated to take single-sex sexual education class unless their parents opt the student out in writing. As no affirmative assent by parents is required, this class policy fails the voluntariness requirement of § 106.34(b)(1)(iii). This policy fails to ensure educational equality for Ms. Boe and all other students, thus should be found to be a violate Title IX.

II. The School Board's Policy Violated the Equal Protection Clause of the Fourteenth Amendment by Requiring a Transgender Girl to Take a Boys-Only Sex Education Class.

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. State action is unconstitutional when it creates "arbitrary or irrational" distinctions between classes

of people out of "a bare . . . desire to harm a politically unpopular group." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). When considering equal protection claims, courts must first determine the level of scrutiny that applies, and then decide whether the policy at issue passes that level of scrutiny. *Hecox v. Little*, 79 F.4th 1009, 1021 (9th Cir. 2023).

A. The School Board's Policy Should be Reviewed Under at Least an Intermediate Scrutiny Analysis.

Here, the Dune School Board's policy should be subject to heightened scrutiny for two reasons. First, the policy expressly segregates students on the basis of sex. Second, the policy classifies students based on their transgender status.

1. The School Board's Policy Constitutes a Sex-Based Classification that Requires the Application of Intermediate Scrutiny.

Clearly established Supreme Court precedent requires that all sex-based classifications are subject to heightened scrutiny. *United States v. Virginia (VMI)*, 518 U.S. 515, 555 (1996) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)). Additionally, as this Court recently held in the context of Title VII, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." 140 S. Ct. at 1741.

School policies that segregate students based on the sex listed on their birth certificate constitute sex-based classifications, which alone require the application of intermediate scrutiny. *See, e.g.*, *Grimm*, 972 F.3d at 608; *Whitaker*, 858 F.3d at 1051; *Adams*, 57 F.4th 797. In *Grimm*, a transgender student and his parents sued his school district over its policy that required students to use bathrooms that corresponded with their "biological genders" and required students with "gender identity issues" to use "an alternative appropriate private facility." 972 F.3d at 599. The student argued that the school violated his rights under the Equal Protection Clause by prohibiting him from using school restrooms that affirmed his gender identity. *Id.* at 601. The Fourth Circuit recognized that the school's policy created sex-based classifications and "[o]n that ground alone" found that heightened scrutiny applied. Similarly, in *Whitaker*, the Seventh Circuit found that a school policy that required students to use restrooms that corresponded with the sex listed on their birth certificates was inherently a sex-based classification that required the application of heightened scrutiny. 858 F.3d at 1051.

In the present case, the Dune School Board's policy classifies students on the basis of sex. School policy provides that "[s]tudents 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." R. at 3. Similar to the policies in *Grimm,* 972 F.3d at 599; *Whitaker,* 858 F.3d at 1041; and *Adams*, 57 F.4th at 797, the Dune School Board policy expressly classifies students based on the sex designated on their birth certificate, R. at 3. Therefore, as the Fourth, Seventh, and Eleventh circuits have found, this policy is a sex-based classification, which alone demands the application of intermediate scrutiny.

2. Transgender Individuals Constitute at Least a Quasi-Suspect Class, Which Requires the Application of Intermediate Scrutiny.

Numerous courts, including the Fourth and Ninth Circuits, have recognized transgender individuals as members of a quasi-suspect class, which warrants the application of heightened scrutiny.[8] In determining whether a group of people constitute a quasi-suspect class, courts consider four factors. *Grimm*, 972

[8] *See, e.g., Grimm*, 972 F.3d 586, 610-13; *Hecox*, 79 F.4th at 1026; *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Adkins v. City of New York*, 143 F. Supp 3d 134, 140 (S.D.N.Y. 2015); *Bd. of Educ. of the Highland Sch. Dist. v. U.S. Dept. of Educ.*, 208 F. Supp 3d 850, 874 (S.D. Ohio 2016); *M.A.B.*, 286 F. Supp. 3d at 718; *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018).

F.3d at 611. First, courts consider whether the class has historically been subjected to discrimination. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). Second, courts look to whether the class has defining characteristics that "bears a relation to its ability to perform or contribute to society." *Cleburne*, 473 U.S. at 440-41. Third, courts consider whether the class may be defined by "obvious, immutable, or distinguishing characteristics." *Bowen,* 483 U.S. at 602. Finally, courts must consider whether the class is a minority that lacks political power. *Id.*

First, as articulated by the court in *Flack v. Wisconsin Department of Health Services*, "one would be hard-pressed to identify a class of people more discriminated against historically . . . than transgender people." 328 F. Supp 3d. 931, 953 (W.D. Wis. 2018). Historically, transgender people have not only been discriminated against, but pathologized. Until the DSM-5 was published in 2013, one could still be diagnosed with "transexualism" or "gender identity disorder." *See* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 509–10, 517 (2016). Over the past thirty years, trans people have also been excluded from four federal civil rights laws: the Fair Housing Act of 1988, the Americans with Disabilities Act of 1990, the

Rehabilitation Act of 1973, and the ADA Amendments Act of 2008. *Id.* at 556-57.

Even today, trans people still face significant discrimination in nearly every aspect of public life. *See* Sandy E. James et al., *2015 U.S. Transgender Survey: Executive Summary* 2 (2016). In K-12 education, 77% of students who were out as or perceived as trans reported experiencing some form of mistreatment. *Id.* at 9. Specifically, 54% of students were verbally harassed, 24% were physically attacked, 13% were sexually assaulted, and 17% faced such severe mistreatment that they left the school. *Id.* Even in higher education, 24% of students reported verbal, physical, or sexual harassment. *Id.*

Trans individuals continue to face employment discrimination even after Title VI was extended to include gender identity in *Bostock*. *See generally* Brad Sears, *LGBT People's Experiences of Workplace Harassment and Discrimination* (2021). 65.7% of transgender survey participants indicated that they had experienced harassment or discrimination in employment. *Id.* The unemployment rate is three times higher for transgender people (15%). James, *supra*, at 10. Additionally, 23% of transgender people report facing housing discrimination and 30% report that they have experienced homelessness at some point in their lives. *Id.* at 11.

Second, transgender people participate in and contribute to society. Trans individuals have the same ability to be productive as cisgender individuals. Some trans people experience gender dysphoria, or the psychological distress that results from one's gender identity conflicting with their sex assigned at birth. Barry, *supra*, at 518. However, gender dysphoria is largely "the product of a long history of persecution forcing transgender people to live as those who they are not." *Adkins*, 143 F.Supp.3d at 139. While some particularly severe cases of gender dysphoria could limit one's ability to work, "[t]he mere fact that some members of a suspect class may sometimes experience impairment does not diminish their status as a suspect class . . ." Barry, *supra*, at 559.

Turning to the third factor, one's status as transgender is an immutable characteristic. Being transgender, like being cisgender, is not a choice. *Grimm*, 972 F.3d at 612-13. While people may choose to come out as trans at any age, evidence suggests that children start to form their gender identity within the first two years of life. *Barry*, *supra*, at 560. Additionally, one's transgender status is not "correctable" through conversion therapy and attempts to do so have resulted in "severe psychological damage." *Id.* at 561. Furthermore, trans individuals retain their status as transgender even if they reach a point where their outward appearance matches their

gender identity. *Id.* Although transitioning may allow some trans people to "pass" as cisgender, they do not lose the immutable characteristic that makes one transgender: an inconsistency between their gender identity and sex assigned at birth. *Id.*

Fourth, transgender people constitute a minority lacking political power. In the United States, only 0.6% of adults identify as transgender.[9] Though they make up a small percentage of the population, the transgender community is underrepresented in every branch of government. *Grimm*, 972 F.3d at 613. Until 2010, no openly transgender person had served as a judge or as a political appointee of any presidential administration.[10] Until 2017, there had been no openly transgender state legislators in

[9] Jody L. Herman et al., How Many Adults and Youth Identify as Transgender in the United States? 1 (2022).

[10] Matthai Kuruvila, *Kolakowski is First Transgender Elected Judge*, (Nov. 16, 2010), https://www.sfgate.com/bayarea/article/kolakowski-is-first-transgender-elected-judge-3166048.php; Alex Spillius, *First Transgender Woman Appointed to Senior U.S. Government Post*, (Jan. 4, 2010, 11:03 PM), https://www.telegraph .co.uk/news/worldnews/northamerica/usa/6933669/First-transgender-woman-appointed-to-senior-US-government-post.html.

American history.[11] There has never been an openly transgender President, Governor, or member of Congress.[12] Today, transgender people constitute a mere .0002% of elected officials in the United States.[13]

Given their low percentage of the population, transgender Americans are clearly a minority group. Additionally, the few transgender elected officials have been unable to remedy past discrimination or prevent the recent rise of anti-trans legislation. *Adams*, 57 F.4th at 850 (Pryor, J., dissenting). As the Fourth Circuit concluded in *Grimm*, transgender people have "not yet been able to meaningfully vindicate their rights through the political process." 972 F.3d at 613. Therefore, because all four factors weigh in favor of trans people constituting a quasi-suspect class, this Court should apply intermediate scrutiny.

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[11] Patrick Fort, *Election of Transgender Lawmaker in Virginia Makes History*, NPR (Nov. 7, 2017, 11:51 PM), https://www.npr.org/2017/11/07/562679573/election-of-transgender-lawmaker-in-virginia-makes-history.

[12] LGBTQ+ Victory Institute, *Out for America 2023*, (June 7, 2023), https://victoryinstitute.org/out-for-america-2023/.

[13] Id.

B. The School Board's Policy of Segregating Students by Their Sex Assigned at Birth is not Substantially Related to its Objective of Protecting and Advancing the Individual and Public Health of its Students.

Under intermediate scrutiny, "a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification. *VMI*, 518 U.S. at 524 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). The demanding burden of justification rests entirely on the State. *Id.* at 533. To satisfy intermediate scrutiny, the State must prove that the "classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of the objectives.'" *Id.* (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

A justification is not exceedingly persuasive if a policy is likely to hinder rather than advance the purported goal. *See Hecox*, 79 F.4th at 1048. In *Hecox*, female athletes sued to challenge a statute that categorically banned transgender women from competing in female scholastic sports. *Id.* at 1019. The statute required any student whose sex was disputed to be subjected to a physical genital exam or undergo genetic testing. *Id.* The Ninth Circuit found that the categorical ban provision was not substantially related to its goal of increasing opportunities for female athletes. *Id.* at 1030. The court also

found that the State failed to provide an exceedingly persuasive justification for the sex verification process. *Id.* at 1033. In fact, the court recognized that such invasive procedures would likely discourage women from participating in scholastic sports, which impeded the State's goal of increasing the number of women in sports. *Id.* at 1048.

Furthermore, a school's justification for treating transgender students differently is not exceedingly persuasive if its solution fails to directly address the goal. *See Grimm*, 972 F.3d at 614. In *Grimm*, a trans student sued his school, claiming that its policy segregating bathrooms by biological sex violated his equal protection rights. *Id.* at 599, 601. The student had used the boys bathroom without incident for weeks. *Id.* at 614. When the school found out, it installed privacy strips and screens between the urinals, out of concern for privacy. *Id.* The Fourth Circuit found that the bathroom policy was not substantially related to its interest in protecting student privacy. *Id.* The court found that removing the student from the bathroom had no cognizable effect on increasing student privacy. *Id.* The court specifically noted that the school had no evidence that a trans student is likely to be a peeping tom and that the trans student's presence actually *increased* privacy with the addition of the privacy screens. *Id.*

A policy that ignores the reality of the problem it seeks to remedy is not substantially related. *See Whitaker*, 858 F.3d at 1052. In *Whitaker*, the Seventh Circuit considered whether a school's bathroom policy that segregated students based on biological sex was substantially related to its purported interest in protecting student privacy. *Id.* at 1040-41, 1051. It found that the policy did nothing to protect the privacy rights of students from those who share similar anatomy. *Id.* at 1052. Additionally, it noted that the bathroom policy "ignore[d] the practical reality" of how trans students use the bathroom: "by entering a stall and closing the door." *Id.* Therefore, it found that the school failed to provide an exceedingly persuasive justification for its bathroom policy. *Id.* at 1053.

Here, the School Board's sex-segregated sexual education policy is not substantially related to its goal of protecting and advancing the individuals and public health of its students. First, while the policy purports to teach evidence-based sexual education, R. at 3, it fails to incorporate *current* evidence-based practices. Currently, the American Academy of Pediatrics recommends that schools provide comprehensive sexual education, which gives all children developmentally accurate, evidence-

based knowledge to build healthy relationships and make informed choices about their sexuality and sexual health.[14]

This policy does not constitute comprehensive sexual education because it fails to provide students with necessary information about other sexes. The policy allows co-ed education regarding topics that are equally relevant. R. at 3. However, allowing sex-integrated education in this limited circumstance, similar to the policy in *Whitaker*, 858 F.3d at 1052, ignores the practical reality that preparing students for healthy sexual relationships means educating students on the sexual anatomy of their future partners, who may have different sex characteristics. Limiting sexual and anatomical education may advance the school's goal of promoting a student's individual health, R. at 3, but it fails to address its wider goal of improving public health. Studies suggest that sexuality education is more effective when children of all genders are both educated on similar topics, such as the use of contraceptives to prevent pregnancy.[15] Similar to the policy in

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[14] Cora C. Breuner & Gerri Mattson, *Sexuality Education for Children and Adolescents*, 138 Pediatrics 1, 4 (2016).

[15] Brooke Whitfield et al., *Sex Ed Programs for Young Men Can Promote Gender Equity in Preventing Unintended Pregnancy* 4 (2021).

Grimm, which was not effective in increasing privacy in bathrooms, 972 F.3d at 614, the Dune School Board's policy does not meet its goals of protecting public health and preparing students for future relationships.

Additionally, the sex-segregated sexual education policy marginalizes students, like Ms. Boe, who do not fit into the school's binary concept of sex. Generally, sexual education programs in the United States are not tailored to the educational needs of transgender students.[16] However, the Dune School Board's sex-segregation policy is especially insidious as it opens transgender students like Ms. Boe up to the kind of discrimination that 77% of trans students in K-12 education face. James, *supra*, at 9.

Ms. Boe is a girl and is treated as such by her peers and teachers. R. at 5. Opting out of the class is the only option she has to avoid the humiliation and discrimination that come with being outed. R. at 3, 5. Similar to the statute in *Hecox*, which impeded, not advanced, the state's goal of increasing female participation in sports, 79 F.4th 1048, this policy does the opposite of ensuring that students learn about evidence-based sexuality education. Rather, it incentivizes any students

[16] Hum. Rts. Campaign, 2018 LGBTQ Youth Report 15 (2018).

that are uncomfortable with binary sex-segregation to avoid taking the class entirely.

Finally, separate educational opportunities for children in public schools are inherently unequal. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). In *Brown*, this Court held that the racial segregation of children in public schools violated the Equal Protection Clause of the constitution, even though all tangible factors of the schools were equal. *Id.* at 493. Here, similar to the school in *Brown*, 347 U.S. at 487-88, the School Board segregates students on the basis of a protected characteristic, R. at 3. As in *Brown*, the School Board claims to provide equal education for male and female students separately. *Id.* However, as Chief Justice Warren concluded in *Brown*, "in the field of public education the doctrine of 'separate but equal' has no place." 347 U.S. at 495. There is no way to ensure that children receive the same quality and content of information when school policy explicitly limits their education on other sexes to when the school deems it "relevant." R. at 3. Thus, this policy is impermissible under this Court's holding in *Brown* and is not substantially related to the School District's goal of protecting and advancing the individual and public health of its students.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment of the Thirteenth Circuit.

Respectfully submitted,

[redacted]

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