

THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 2024

DOCKET NO. 23-1234

JANE BOE, by and through, JACK BOE

Plaintiff-Petitioners

v.

DUNE UNIFIED SCHOOL DISTRICT BOARD,

Defendant-Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

Brief for Respondent

Counsel

Team 16

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Issue 1

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Issue 1&2

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Questions Presented

1. Does Dune's Policy on Human Sexuality Education violate Title IX of the Education Amendments Act of 1972 and unlawfully discriminate against Boe, a transgender boy, on the basis of sex, when there is an explicit Title IX carve-out allowing sex-segregated human sexuality classes?
2. Does Dune's Policy on Human Sexuality Education violate the Equal Protection Clause of the Fourteenth Amendment when Dune separates students based on their anatomical sex to provide a learning environment for sex-education that is accurate to their needs to further protect and advance the health of Dune students?

Opinion Below

Boe v. Dune Unified School District Board, -- F.7th-- (13th Cir. 2023).

Constitutional Rules and Procedures

U.S. Const. amend. XIV

20 U.S.C. § 1681(a)

Introduction

This case is about the implementation of a human sexuality education policy based on biological sex and how the policy

functions under Title IX and the Equal Protection Clause of the Fourteenth Amendment. The issues can be simplified to whether assigning students to their biological sex for sexual education discriminates against transgender students. The policy was enacted by the Dune Unified School District so that their students could be educated based on their own physiological characteristics.

Dune follows Title IX requirements in the application of this policy. The Dune Unified School District must comply with Title IX because it is a federally funded public school. Second, the basis of the policy has to do with biological sex and not gender identity. Third, the policy does not unlawfully discriminate against transgender students. Congress passed Title IX so that individuals would not be discriminated against in an educational setting based on their sex. Sex in Title IX refers to that of biological sex based on reproductive organs. The standard of the education both sexes get is comparable; it only differs in that the class is tailored based on the student's anatomical characteristics to provide accurate information regarding the unique experiences associated with those characteristics.

The policy put in place by the School Board directly impacts an important government policy of educating students about the biological features of their body. The Equal

Protection Clause of the Fourteenth Amendment ensures that all people are protected equally by the government. A sex-based classification requires a higher standard of review. The school board must show its policies are substantially related to the achievement of a sufficiently important governmental interest, and the Dune School Board does make this showing. The government's means of segregating students by sex is tailored to its goal of advancing the public health by providing sexual education. The policy was created so students may receive tailored education to their own anatomical characteristics. In a case where a student has not taken any medical transitional steps, they can only be adequately informed if they partake in the class that teaches them about their biological sex.

Statement of the Case

Dune Unified School District in Texington provides human sexuality classes to all students between seventh and tenth grades. R. at 3. Dune Unified School District began providing these classes after the Dune School Board ("Board") passed a policy at a school board meeting in December 2022. R. at 3. This policy is where the dispute in the cases arises. The Board enacted its Policy on Human Sexuality Education ("Policy") so that the Dune Unified School District "must offer accurate, age-appropriate, and evidence-based information about human

sexuality.” Dune Sch. Bd., Resolution 2022-14 (2022). Classes are separated by their biological sex as determined at birth and on their original birth certificate. *Id.* The 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.” *Id.*

The resolution also includes an opt-out mechanism. R. at 3. To opt-out, students must notify their parent or guardian fourteen days prior to the first day of human sexuality instruction, and their parent or guardian then must provide in writing that their child will not participate in the class. R. at 3-4. The policy passed unanimously and without discussion-.

That same Board issued guidance relating to transgender students in July 2021. R. at 4. That guidance stated that gender identity was a protected characteristic in Dune’s anti-bullying policies. R. at 4. Additionally, the Board directed Dune public schools to allow transgender students to use bathrooms conforming with their gender identity. R. at 4. Lastly, transgender students between kindergarten and eighth grade may participate in school athletics that is consistent with their gender identity, when it concerns sex-segregated sports. R. at 4.

Jane Boe, aged 12, is a seventh-grade student at Dune Junior High School. R. at 4. She is transgender; she was assigned "male" at birth but now identifies as female. R. at 4. Boe came out as transgender five years prior. R. at 4. Boe has taken steps to affirm her gender identity such as using female pronouns and assuming a traditionally feminine name. R. at 4. At the time of the lawsuit's filing, Boe has not begun taking puberty blockers nor has she undergone other gender-affirming medical procedures. R. at 4.

Boe uses the girls' bathroom and changing facilities at school. R. at 5. Boe's teacher and classmates refer to her in line with her gender identity. R. at 5. Only a few of her friends know she is transgender. R. at 5.

Dune provides a packet of information related to school policies and procedures at the start of the year. R. at 4. Boe is assigned to the boys' human sexuality class because her birth certificate states she is a male. R. at 4. The school confirmed this based on the Boards's policy. R. at 5. Boe does not wish to attend the boys' human sexuality class because it is inconsistent with her gender identity, and most of her peers do not know she is transgender. R. at 5. Boe's parents do not wish to opt-out of the course. R. at 5. Boe is also afraid that the boys will tell her that she doesn't "belong" in the class. R. at 5. She also stated that instead of going to the boys class, she

"would rather just stay home." R. at 5. Upon learning that Boe would be assigned to the boy's human sexuality class Boe's father filed suit. R. at 2. The District Court held that the Policy did not violate Title IX or the Equal Protection Clause. R. at 5.

The Court of Appeals for the Thirteenth Circuit ruled on December 8, 2023, in favor of the Dune Unified School District. R. at 2. This writ follows.

Argument

I. THE DUNE SCHOOL BOARD DOES NOT VIOLATE TITLE IX, BECAUSE EDUCATION BASED ON BIOLOGICAL SEX IS NOT DISCRIMINATION BASED ON SEX.

Title IX, subject to a few exceptions, reads, "No 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 purpose of the text is clear: to prevent discrimination "on the basis of sex" in the education context. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022). To achieve this goal, Congress incentivized States by conditioning financial resources on this general prohibition. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 2 (1981).

To establish a Title IX violation, a plaintiff must show "(1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused [plaintiff] harm." *Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir. 2016).

In the present case, Dune Junior High School is a public school governed by the Dune Unified School District Board, and thus, this fact satisfies the second requirement of Title IX. R. at 4. The question is whether Boe was excluded from the human sexuality class on the basis of her sex. *Grimm*, 822 F.3d 709, 718. She was not. Therefore, this Court does not need to determine whether Dune's Policy regarding sex education caused harm. *Id.* Even if this Court determines that Boe was excluded from the human sexuality class on the basis of her sex, there was no harm. *Id.* The school gives students the option to opt-out of classes with the approval of their parents. Dune Sch. Bd., Resolution 2022-14.

The U.S. Department of Education has specifically provided a carve-out allowing sex-segregated human sexuality classes, reading: "(3) Human sexuality classes. 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. The Dune Board enacted the

Policy requiring separate human sexuality classes for male and female students determined by their biological sex, in accordance with the law, and did not violate Title IX. Dune Sch. Bd., Resolution 2022-14.

- A. The Dune School Board does not violate Title IX, because it does not discriminate against Boe on the basis of sex.

In interpreting statutes, courts routinely read words to hold meanings as they would at the time of the statute's adoption. A. Scalia & B.A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012) (discussing various canons, including the fixed meaning canon). The word "sex" in 1972, when Title IX was adopted, meant "biological sex, i.e., discrimination between males and females." *Adams*, 57 F.4th at 812. The *Adams* court reviewed multiple dictionaries from around the time when the statute was enacted and concluded that "sex" should be construed as "on the basis of biology and reproductive function." *Id.*

Courts also assume a consistent meaning of the words in different but related sections of an act. See e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 536 (2013). Reading "sex" to include "gender identity" would render Title IX and its protections meaningless. *Adams*, 57 F.4th 791, 813. Ignoring the express carve-out for human sexuality classes would open the door

to undermining the importance of sex segregation in other carve-outs such as "living facilities, locker rooms, and showers..." *Id.* at 816; *Id.* at 818 (Lagoa, J., concurring).

Adams serves as an example of the carve-out's application. In *Adams*, the plaintiff was a transgender boy (female to male). *Id.* at 796. In line with his identity, the plaintiff dressed as a boy, used male pronouns, and used male bathrooms in public. *Id.* at 797. The plaintiff changed his government documents to reflect his identity and underwent gender-affirming care such as hormone therapy and a "double-incision mastectomy." *Id.* at 798. Yet, the court held that the school's decision did not violate Title IX when it refused Adam access to the male bathroom because there was an express carve-out for sex-segregated bathrooms. *Id.* at 815.

In the present case, the Policy states that students are assigned to the human sexuality classes "according to biological sex as determined by a doctor at birth and recorded on their original birth certificate." Dune Sch. Bd., Resolution 2022-14. The Board is expressly allowed to conduct separate human sexuality classes for elementary and secondary schools under 34 C.F.R. § 106.34. See 34 C.F.R. § 106.34. Boe is currently in secondary school, and, applying the same logic as *Adams*, it follows that the Board and school did not violate Title IX in requiring separate human sexuality classes for boys and girls.

- B. The Board aims to provide students with appropriate sexual health education based on their unique experiences associated with their biological sex.

The Board aims to provide students with "accurate, age-appropriate, and evidence-based information about human sexuality to students in grades seven through ten." Dune Sch. Bd., Resolution 2022-14. To advance this purpose, the Policy requires schools in the district to "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." *Id.*

Unlike in *Adams*, Boe has not undergone any gender-affirming care. R. at 4. Thus, Boe's physical anatomy and physiological characteristics are developing like a boy's. R. at 4. To provide Boe with accurate information regarding the impact that these developments can have, the school requires Boe to take the male's class.

Dune does not treat Boe inconsistently by requiring her to attend the male class on sexuality. R. at 4. Dune allows her to partake in activities that conform with her gender identity such as school athletics or use the girls' bathroom, but as the Department of Education has recognized, see e.g., 34 C.F.R. § 106.34, sex-education is different.

The dissent's argument that, "a human sexuality class is not an environment where anyone goes to shit, shower, shave, shampoo, or shine" is misplaced here. *Boe v. Dune Unified Sch. Bd.*, 123 F.7th 45, 9 (13th Cir. 2023) (Bernstein, J., dissenting) (internal quotation marks removed). Title IX aims to protect individual's rights in their bodily privacy. *Neese v. Becerra*, 640 F. Supp. 3d 668, 681 n.9 (N.D. Tex. 2022). This bodily privacy right is also evident from the language of § 106.33 "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex..." 34 C.F.R. § 106.33. The facilities bundled together are those where one typically expects privacy. The dissent is correct in assuming that one does not indeed go to "shit, shower, shave, shampoo, or shine" in a human sexuality class. *Dune*, 123 F.7th 45,9 (Bernstein, J., dissenting) (internal quotation marks removed). However, adolescents, as the Dune students are, may consider the topic of sexual health as private. R. at 3-4. Talking about sexual health necessarily requires discussing one's private parts, which would be a place of privacy. For young kids, discussing such matters in front of the opposite sex would perhaps cause them to not take the subject seriously or become shy. Even if there isn't an expectation of privacy in the sense that § 106.33 requires, the § 106.34 carve-out allows for this sex-segregation in human sexuality classes. See 34 C.F.R. § 106.34.

C. The Board complies with Title IX by having comparable education programs for both sexes, and an opt-out opportunity.

Furthermore, when facilities are separated on the basis of sex, "such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. The Dune Board complies with this regulation as well. The classes only differ in so far as "the unique experiences and health care needs [of the different biological sexes]." Dune Sch. Bd., Resolution 2022-14.

Moreover, like the *Adams* case where the plaintiff had the option to use gender-neutral bathrooms, Boe has the option to opt-out of the classes with her parents' approval. *Adams*, 57 F.4th 791, 803; Dune Sch. Bd., Resolution 2022-14. Boe faces no harm if her parents approve her opting-out of the class. Boe herself has stated in regards to opting out, "I would rather just stay home instead of going to school." R. at 5. It is unlikely that she would be the only student in the school to opt-out of the class. Some parents may not feel comfortable allowing their children to receive sexual education due to personal reasons such as religion. Boe's parents, however, claim that it is not a suitable option for them. R. at 5. They state that this would be a costly burden on them to seek this information out. R. at 5. It can be appreciated that it would perhaps take out of their time

to seek that information for Boe, but it would not be entirely costly or burdensome. Most doctor's offices and nurses freely provide that information upon visits. Boe and her family have indicated that they intend to use Boe's doctors' recommendations regarding medical care in the long-term. R. at 4. Boe could ask and learn from her doctor in those visits. Lastly, with the advent of the internet and modern technology, it is extremely easy to get information on a plethora of topics, including human sexuality. Boe's parents could search for this information and share it with her.

- D. This Court should apply interpretations of Title IX, and not Title VII when looking at the application of the policy.

Courts have looked towards other civil rights case law, such as Title VII in interpreting provisions of Title IX. See e.g., *Doe v. Univ. of Dayton*, 766 F. App'x 275 (6th Cir. 2019). However, the two statutes remain "vastly different" in key areas and guidance may not always be appropriate. *Kadel v. Folwell*, 446 F. Supp. 3d 1, 12 (M.D.N.C. 2020) (citing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175(2005)). "Title IX is a broadly written general prohibition on discrimination ... [while] Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute." *Jackson*, 544 U.S. at 175.

Relying on this Court's decision in *Bostock* is not appropriate because the Court refused to "address bathrooms, locker rooms, or anything else of the kind." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1753 (2020). *Bostock* also crucially varies from the present case; here the issue is about sexual health classes in a school, whereas *Bostock* answered the question of employer discrimination. *Adams*, 57 F.4th 791, 808 (noting the same regarding the bathroom policy at school that was at issue in the case).

The Texas Northern District Court also provided numerous reasons to not apply *Bostock* to Title IX interpretations. See *Neese*, 640 F. Supp 3d 668, 675-76 (N.D. Tex. 2022). The languages in Title VII and Title XII differ. *Id.* at 679. ("Title IX is not Title VII, and 'on the basis of sex' is not 'because of sex.'").

The Supreme Court has established that transgender discrimination is sex discrimination based on Title VII. *Bostock*, 140 S. Ct. at 1744. The Seventh Circuit then widened the reasoning in *Bostock* to apply to Title IX. *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023). The Fourth Circuit also demonstrates that transgender discrimination is a sex-based discrimination in *Grimm*, but the Eleventh Circuit in *Adams* did not arrive at the same conclusion despite a similar factual background. *Id.* at 771.

This Court does rule that discrimination is when someone treats a person intentionally worse because of sex when applying Title VII. *Bostock*, 140 S. Ct. at 1740. If this Court applies Title VII discrimination standards to Title IX, then it would also have to increase the scienter requirement to intentional discrimination. The dissenting Justice below argued that the Supreme Court case *Bostock v. Clayton Cty.* which concerned the application of Title VII, and not the application of Title IX, which is the question presented here. *Boe*, 123 F.7th 45 (13th Cir. 2023) (Bernstein, J., dissenting) *Bostock*, 140 S. Ct. at 1737. Title VII uses the language "because of sex" while Title IX prohibits discriminated "based on sex." See *Neese*, 640 F. Supp. 3d at 679-80. Thus, the meanings of the phrases differ. *Id.*

Bostock also presented clear discrimination because the employees were fired with the sole cause of being transgender or homosexual. *Id.* This Court explains that sex refers only to biological distinctions *Id.* at 1739. Clayton County in this case also fired these employees after they came out as either homosexual or transgender and were fired with no purpose besides this. *Id.* at 1737-1738. This Court ruled that it was sex discrimination because they were fired based on their actions, and people of the differing sex could do the same thing and were not fired upon. This case differs from these, which directly

concern education and not employment discrimination under Title VII. Also, there was a general policy that applied equally to both biological sexes. Dune's Policy did not seek to treat anyone differently but instead was enacted to ensure that high quality science-based education was delivered to students based on their biological sex so that it could deliver the education effectively. Dune Sch. Bd., Resolution 2022-14. Thus, it would not be appropriate to apply Title VII case law to Title IX.

Because this Court should not apply Title VII interpretations to Title IX actions, *Price Waterhouse* is unavailing. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). This is opposite what the Maryland District Court did in *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 715-16 (D. Md. 2018). There, the court concluded M.A.B. had properly stated a gender-stereotyping theory under Title IX. *Id.* at 715. M.A.B. was a transgender male student unable to access the boys' locker room. *Id.* at 708. The Maryland District Court reasoned that because this Court did "not suggest a limitation on the possible way of proving that stereotyping" affected an outcome, *Price Waterhouse*, 490 U.S. at 251-52, the District Court was free to "find other forms of stereotyping." *M.A.B.*, 286 F. Supp. 3d at 715. However, that is the incorrect result due to the significant factual and legal differences described above. In this case the Court should apply when applying title IX that the sex-based discrimination

that must be looked at in terms of biological sex. In this case, the school receives federal funds. The school district did not unlawfully discriminate against Boe. The school treated Boe in the same manner it treated every other biological boy. The school board has implemented comparable education classes, and facilities for both sexes. It did not target Boe in any manner, and the Board has demonstrated an understanding of allowing gender conforming opportunities with bathrooms, and school activities. The Policy that the school board enacted for the betterment of the community and did not unlawfully discriminate under Title IX. Thus, this Court should affirm the Thirteenth Circuit's decision.

II. DUNE SCHOOL DISTRICT DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE IN THE FOURTEENTH AMENDMENT BECAUSE DUNE HAS AN IMPORTANT GOVERNMENT INTEREST IN THE SEXUAL EDUCATION OF THE YOUNG STUDENTS AT DUNE JUNIOR HIGH.

Dune Unified School District did not violate the Fourteenth Amendment and the Equal Protection Clause because it had an important government interest in educating students based on their biological sex and their specific anatomical characteristics.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV. The Equal Protection Clause of the Fourteenth Amendment directs states to ensure all persons have equal protection under the law and are treated as such. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). All people that are similarly situated should be treated alike. *Id.*

The Equal Protection Clause prohibits unlawful discrimination by the government. *Rondigo, LLC v. Township of Richmond*, 641 F.3d 673, 681-82 (6th Cir. 2011). A sex-based classification calls for a heightened standard of review. *Id.* at 441. The government must show its actions and policies are substantially related to the achievement of a sufficiently important governmental interest. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020). Dune is interested in giving accurate, age-appropriate, and evidence-based information about human sexuality. Dune Sch. Bd., Resolution 2022-14. Dune does so through separating human sexuality classes by sex. *Id.*

A. The Board used a sex classification when it separated students according to anatomical sex.

Dune has segregated by sex and not based on gender identity. The Supreme Court has explicitly considered the biological differences between male and female individuals. See *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 64, 73 (2001).

The classification must not use overbroad generalizations about genders' roles or abilities. *Grimm*, 972 F.3d at 586, 610. Our case differs from *Grimm*, where the court ruled that the school board violated the Equal Protection Clause. *Id.* at 610. This was a case in which *Grimm*, a transgender boy, wanted to use the boy's bathroom, but the school would not allow it. *Id.* The school wanted to protect the privacy of all students, so *Grimm* was excluded from using the boys' restroom. *Id.* at 599-00. Yet in that case, the court found it persuasive that the school installed privacy screens in the restroom following *Grimm's* ban. *Id.* at 614. Here, there is no comparable fact, making this appeal distinguishable from *Grimm*.

The instant appeal concerns a sex-segregated educational program. It is not about the gender identity of Boe but about the biological reproductive organs that each sex possesses, and that is why Boe was assigned to the boy's class. The assigning of students to their classes was so they could learn about the anatomical and physiological characteristics that their body possesses. See Dune Sch. Bd., Resolution 2022-14.

Other cases have concerned the Equal Protection Clause and separating students based on their anatomy. Their reasoning proves instructive. In *Adams*, the appeal considered whether allowing students to use the bathroom that was consistent with their anatomical sex while simultaneously providing sex-neutral

bathrooms for transgender students violated the Equal Protection Clause in the Fourteenth Amendment. *Adams*, 57 F.4th at 791, 801. The Eleventh Circuit held that the school's policy neither unlawfully discriminated against students based on biological sex nor transgender status. *Id.* at 808-09.

Here, Dune does not facially discriminate based on transgender status, nor does Dune discriminate as the policy is applied. The resolution passed by the Board mentions "male" and "female," but "transgender" is "wholly absent." Dune Sch. Bd., Resolution 2022-14; *Adams*, 57 F.4th at 791, 808. The resolution is also void of the term "gender identity." Dune Sch. Bd., Resolution 2022-14. The section at issue is specifically titled "Sex Segregation." *Id.* Thus, this Court cannot hold Dune discriminated against transgender status.

Even if the statute facially discriminated by sex, *Adams* further supports that facially discriminating by sex does not discriminate against transgender status. There, the Court concluded "there is a 'lack of identity' between the policy and transgender status" because both male and female students potentially contain transgender students. *Adams*, 57 F.4th at 808-09. Since both groups may have transgender students, the transgender status is irrelevant to the administration of the Dune's policy.

The *Adams* Court's conclusion mirrors the Supreme Court's conclusion in *Geduldig v. Aiello*, 417 U.S. 484 (1974). There, plaintiffs challenged California's state disability insurance program, arguing it violated the Equal Protection Clause because the program did not pay out to individuals who became disabled due to complications occurring during pregnancy. *Id.* at 488-89. The majority concluded that because not all women can be pregnant, the discrimination is not sex-based. The differential treatment at issue falls under rational basis review because the means are based on ability to be pregnant. *Id.* at 495. The dissent in *Geduldig* argued the statute targeted "a gender-linked disability peculiar to women." *Id.* at 501 (Brennan, J., dissenting). Here, Dune does not dispute that heightened or intermediate scrutiny is the proper standard, but the logic of *Geduldig* squashes the notion of facial discrimination based on transgender status. *Id.* at 495. Transgender students would fall under male and female students at Dune, so there has been no explicit discrimination based on transgender status.

- B. The Board wants to protect and advance the public health as it specifically relates to young Dune residents, constituting an important governmental objective.

Courts have recognized that public schools have a right to provide information relating to sex. See *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (2005). Under an appeal concerning

the First Amendment, the Second Circuit recognized that promoting and protecting the public health was an important government interest. *Brokamp v. James*, 66 F.4th 374, 398 (2d Cir. 2023). Thus, in this context, the Board demonstrates that implementing the policy serves the important government objective of providing proper sexual health education about the reproductive organs that an individual student may possess.

Dune's Board established this policy to administer age-appropriate, and evidence-based information about human sexuality. Dune Sch. Bd., Resolution 2022-14. This policy was necessary to protect and advance the individual and public health of young Dune residents, and that was the basis of the policy. These topics included topics that would deal with an individual's reproductive organs. Therefore, the school finds it essential that students are taught information based on their anatomical sex. *Id.* Even Boe's parents understand the importance of sexuality instruction, but the instruction most applicable is that instruction based on the biological sex class. R. at 5.

Dune's interest in protecting and advancing the public health of Dune students will be furthered by the policy. Dune Schools are required to cover important sexual-health topics including sexually transmitted infections, reproductive health care, and self-screening methods for detecting cancer. *Id.* Providing this knowledge to students allows them to take an

active role in protecting their health. Moreover, the Board's policy directly addresses the problem uncovered by the Board-inconsistency in human sexuality education across Dune's public schools. *Id.*

While another court has rejected segregating spaces by sex because of their impact on transgender students, see e.g., *Grimm*, 972 F.3d at 614, the instant facts merit a different outcome. In *Grimm*, the Board instituted a policy which required students to use the bathroom matching their biological or anatomical sex as opposed to their gender identity. *Id.* at 597. *Grimm* challenged that policy, but the school board asserted the policy enhanced allowed the school "to protect the privacy of all students." *Id.* at 599. That school board presented no evidence "that a transgender student, let alone *Grimm*, [was] likely to be a peeping tom" *Id.* at 614. Furthermore, there was no indication of privacy increasing *after* the ban. *Id.*

- I. The Board's Policy to Provide Sexuality Education Based on Their Anatomical Characteristics Advances the Board's Goal to Protect the Public Health of Young Dune Residents.

The discriminatory means must be "substantially related" to the State's policy. *Virginia*, 518 U.S. at 533. The fit between the means used to further a policy needs to be close but not perfect. *Sessions v. Morales-Santana*, 582 U.S. 47, 68 (2017) ("One cannot see in this driven-by-gender scheme the close

means-end fit required to survive heightened scrutiny.”); *Adams*, 57 F.4th at 801. “[T]he existence of wiser alternatives than the one chosen” will not “invalidate the policy here [if] it is substantially related to the goal.” *Clark v. Ariz. Interscholastic Asso.*, 695 F.2d 1126, 1132 (9th Cir. 1982).

II. Single-sex education has classroom benefits for all students.

The single-sex segregation is appropriate and substantially related to the State’s policy. Dune wants to provide accurate and age-appropriate information to its students. Dune Sch. Bd., Resolution 2022-14. The Supreme Court agreed almost 30 years ago that “[s]ingle sex education affords pedagogical benefits to at least some students.” *Virginia*, 518 U.S. at 535.

These pedagogical benefits can allow students to flourish and be curious. One scholar has noted that segregating by sex can eliminate classroom distractions. See Isabelle Katz Pinzler, *Separate but Equal Education in the Context of Gender*, 49 N.Y.L.S. L. Rev. 785, 796 (2004). Single-sex education has previously helped male and female students improve academically. See e.g., Kay Bailey Hutchison, *The Lesson of Single-Sex Public Education: Both Successful and Constitutional*, 50 Am. U. L. Rev. 1075, 1076-77 (2001). In a single-sex classroom, Dune students will be able to learn about the sexuality curriculum in a safe environment.

Single-sex educations also allows students to not be overwhelmed with information about anatomical characteristics they do not have. It allows students to ask questions about their body and its functions in a setting whether other students have those same characteristics. These are exceedingly persuasive justifications when compared to other examples of legislation affecting transgender individuals. See *Koe v. Noggle*, No. 1:23-CV-2904-SEG, 2023 U.S. Dist. LEXIS 147770, at *55 (N.D. Ga. Aug. 20, 2023).

In *Koe*, that court held Georgia's ban on hormone therapy used to treat gender dysphoria must be enjoined. The evidence demonstrated the broad ban was not "substantially likely to serve the state's interest in protecting children." *Id.* The Supreme Court, however, has recognized the "pedagogical benefits" single-sex education provides "to a least some students." *Virginia*, 518 U.S. at 535.

The school policy best enacts sexual education in a way so that students are separated by biological sex. They learn about their anatomical characteristics and are not distracted by information not immediately important to them.

III. Boe must be in the male classroom because only there will Boe receive accurate information about her anatomical characteristics.

Governmental bodies do not have to have a perfect fit with the ends and means used to justify sex-based classifications.

Sessions, 582 U.S. at 68. Here, Dune wants to separate students based on biological sex to provide accurate and tailored information corresponding to anatomical and physiological characteristics. Boe has not taken affirmative steps to change her anatomy, so it would be inappropriate for Boe to be placed with cisgender girls. The sexuality education provided to cisgender girls is not currently relevant to Boe.

Courts have sustained sex-based classifications based on a "reasonable" fit. See e.g., *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 640 (M.D.N.C. 2016) (citing *United States v. Staten*, 666 F.3d 154, 162 (4th Cir. 2011)). In *Carcaño*, plaintiffs sought a preliminary injunction against the enforcement of North Carolina's law which segregated individuals based on biological sex. *Carcaño*, 203 F. Supp. 3d at 621. North Carolina wanted to protect bodily privacy interest by separating individuals with different physiologies in spaces. *Id.* at 641. The transgender plaintiffs' Equal Protection argument failed because the North Carolina law "classified individuals with 99.7% accuracy," which was a reasonable fit. *Id.* at 644. ([B]y Plaintiffs' own estimate, only 0.3% of the national population is transgender."). Similarly, the school's classification works for every student except for Boe. Boe being the only exception, however, is not enough to find the Board's resolution violates the Equal Protection Clause. See *id.*

As the Thirteenth Circuit noted below, perhaps it would be easier to advance public health if Dune were required to provide a more comprehensive human sexuality education. *Boe v. Dune Unified Sch. Bd.*, -- F.7th -- (13th Cir. 2023). Yet, the Board cannot be penalized for choosing a policy that disadvantages a particular party, unless this appeal was reviewed under a strict scrutiny standard. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84 (1986) (holding that a school board's firing of nonminority teachers to reach racial equality was "too intrusive" of a burden and consequently not narrowly tailored). Intermediate scrutiny provides the Board with some leeway in furthering its policy. See *Cohen v. Brown Univ.*, 101 F.3d 155, 184 (1st Cir. 1996) ("Intermediate scrutiny does not require that there be no other way to accomplish the objectives"). Therefore, Dune's chosen means to further its policy must stand.

C. This Court should reject disparate impact arguments in accordance with *Adams*.

Boe cannot argue that assigning students to a human sexuality class based on their birth certificate is a proxy for discrimination based on transgender status. This theory arises from the dissenting opinion in *Hecox v. Little*, 79 F.4th 1009, 1043 (9th Cir. 2023), but it fails for several reasons. Again, the policy at issue states students will be segregated by sex

but that "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.**" Dune Sch. Bd., Resolution 2022-14 (emphasis added). There is no evidence presented by Boe that she currently seeks treatment or other gender-affirming care, so this provision cannot apply. Moreover, other policies passed by the Board demonstrate that the Board has no animus towards transgender students. In 2021, the Board passed a resolution protecting transgender status in their anti-bullying policies and allowing transgender students to use bathrooms and participate in school athletics in the manner it is consistent with their gender identity.

Dune has acted consistently with the Equal Protection Clause of the Fourteenth Amendment. Dune's Policy on sexuality education presents a sufficiently important governmental interest that is substantially related to the means it employs to further its interest. Therefore, this Court should affirm the Thirteenth Circuit's decision.

Conclusion

For the forgoing reasons, the Respondent, Dune Unified School District Board, asks the Supreme Court to uphold the decision of the Thirteenth Circuit, holding that Respondent has not violated Title IX nor the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

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Attorneys for Respondent