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 18

[redacted]

Attorney for Issue I (Title IX)

[redacted]

Attorney for Issue II (Equal Protection)

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Questions Presented

1. Whether the application of the Policy on Human Sexuality Education violates Title IX of the Education Amendments Act of 1972 when it provides comprehensive human sexuality instruction in classrooms separated by sex?
2. Whether the Policy on Human Sexuality Education violates the Fourteenth Amendment's Equal Protection Clause when it provides accurate, age-appropriate, and evidence-based human sexuality instruction to classes separated by sex?

Opinion Below

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

Constitutional Rules and Provisions

U.S. CONST. amend. XIV.

Introduction

Our legal institutions have long recognized public schools' vital role in shaping our youth's beliefs, hearts, and minds. An underappreciated facet of public education is human sexuality. High-quality education on human sexuality encourages positive health outcomes by instructing young students about their bodies, healthy relationships, safe sex, and other related topics. Human sexuality education is crucial for preparing students to develop sexual maturity and navigate the adult world.

To effectuate this goal, the Dune Unified School District Board of Texington enacted the Policy on Human Sexuality Education (Policy). The Policy separates students by their assigned-at-birth sex to foster private and educational spaces to explore sexual topics with their peers. Petitioner, a transgender student, challenges the Policy because she is uncomfortable attending class with peers who share her assigned-at-birth sex. However, the Policy is legally permissible under Title IX of the Education Amendments Act of 1972 and the Fourteenth Amendment's Equal Protection Clause.

First, applying the Policy to Petitioner does not violate Title IX of the Education Amendments Act of 1972. Title IX only protects against discrimination or denial of educational benefits "on the basis of sex." The ordinary meaning of "sex" equates to biological sex, not gender identity, a distinct concept. Title IX's statutory purpose and regulatory carveouts align with the ordinary meaning and expressly permit schools to teach human sexuality in sex-separated classrooms identical to the Policy. Furthermore, Title VII does not impact Title IX's unambiguous language. Petitioner's claim lacks statutory merit because Title IX does not protect gender identity. As such, the Policy does not discriminate against Petitioner's biological sex or deny her the high-quality human sexuality education the Policy provides for.

Second, the Policy survives heightened scrutiny under a sex-based classification; thus, it does not violate the Equal Protection Clause of the Constitution. The Policy establishes an exceedingly persuasive reason that substantially relates to the important government objective to provide students with accurate, age-appropriate, and evidence-based information about their biological sex. Moreover, the Policy advances the public interest in promoting health, safety, and privacy. Because the Policy survives heightened scrutiny, qualifying transgender status as a quasi-suspect class is both unnecessary and unwarranted and does not alter the equal protection analysis.

This Court should affirm the Thirteenth Circuit's holding for these reasons and the reasons below.

Statement of the Case

Dune Unified School District Board. The Dune Unified School District Board of Texington (Board) is an elected body of five members, each representing the town of Dune at-large. *R.* at 3. Board members may introduce new school policies at Board meetings subject to floor debate, public comment, and a final vote. *Id.* at 4.

To foster an inclusive and diverse student body, the Board issued a policy (2021 Policy) specifically related to transgender students. Dune Sch. Bd., Resol. 2021-4 (2021). The 2021 Policy, made by the same five Board members that currently

serve, unanimously passed a transgender-focused policy without debate or discussion. *R.* at 4. Under the Board's 2021 Policy, Dune's anti-bullying policies include gender identity, and transgender students may use their preferred bathroom and participate in sex-separated school athletics from grades kindergarten through eight. *Id.* Importantly, the 2021 Policy does not address sex or gender identity in human sexuality classes. *Id.*

The Policy on Human Sexuality Education. Though Dune was making strides in modernizing its education, the Board determined that human sexuality education across Dune public schools was inconsistent. *R.* at 3. To address this instructional gap, in 2022, the Board enacted the Policy on Human Sexuality Education (Policy) that requires students to attend sex-segregated human sexuality classes according to their assigned-at-birth sex or to opt-out of such instruction. Dune Sch. Bd., Resol. 2022-14 (2022). The Policy passed unanimously without debate or discussion from the Board and the public. *R.* at 4.

The Policy mandates that young Dune residents receive accurate, age-appropriate, and evidence-based information on human sexuality. Dune Sch. Bd., Resol. 2022-14 (2022). Instruction on human sexuality is an essential part of high-quality education and is necessary to protect the individual and public health of young Dune residents. *Id.* The Policy directs

that instruction on human sexuality classes separate students by sex, determined by a doctor at birth, and recorded on their original birth certificate. *Id.* § 1(c).

Dune schools must tailor the human sexuality classes according to anatomical and physiological characteristics, but schools may provide the same information to male and female students when equally relevant. *Id.* Topics that human sexuality courses must cover include, but are not limited to, reproductive anatomy, puberty and the development of secondary sex characteristics, and reproductive health care, such as preventive care and self-screening for cancers and other medical conditions. *Id.* § 1(b). The Policy faced no opposition in its first year of enactment.

Enter Petitioner. Jane Boe (Petitioner) is a 12-year-old attending the seventh grade at Dune Junior High School. *R.* at 4. Petitioner is a transgender girl whose assigned-at-birth sex is male. *Id.* Currently, she is not on puberty blockers or any other form of gender-affirming medical care, per her doctor's recommendations. *Id.* Petitioner is not originally from Dune; she moved into town in June 2023 and began her schooling in September 2023. *Id.* Upon Petitioner and her family's move, they became aware of the Policy and immediately became concerned that Petitioner would attend the boys' human sexuality class, not the girls'. *Id.* After the school confirmed that Petitioner would be

assigned to the boy's human sexuality class, her family elected not to opt-out of the Policy. *Id.* at 5.

Petitioner is not the only student in Dune but is the only one challenging the Policy. She fears the social consequences of learning medical information in a boy's classroom because she is only "out" to her close friends. *Id.* As her family recognizes, the human sexuality classes teach important subjects relevant to Petitioner, including healthy relationships, safe sex practices, and information on HIV and other STIs. *Id.* Despite the sex-neutral information provided in both classrooms, in addition to sex-specific information, Petitioner initiated suit.

Procedural History. In October 2023, Petitioner's father filed suit on her behalf in federal district court against the Board regarding the Policy on two grounds: (1) Title IX of the Education Amendments of 1972 and (2) the Equal Protection Clause of the Fourteenth Amendment. *Id.* The parties filed cross-motions for summary judgment, agreeing that no disputes of fact required a trial. The District Court granted the Board's motion for summary judgment, concluding that the Policy does not violate Title IX or the Equal Protection Clause. *Id.* Petitioner unsuccessfully appealed to the Thirteenth Circuit, which affirmed the lower court's holding on both claims. *Id.* at 8. In a final effort, Petitioner appealed again to the Supreme Court, asserting the same arguments.

Standard of Review. Courts review the granting of summary judgment *de novo*. *Stiles ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834, 847 (6th Cir. 2016). Summary judgment is appropriate when there is no genuine dispute of material fact, drawing all reasonable inferences in favor of the nonmoving party, and the nonmoving party is entitled to judgment as a matter of law. *Id.* (citing Fed. R. Civ. P. 56(a)).

Argument

I. THE POLICY ON HUMAN SEXUALITY EDUCATION DOES NOT VIOLATE TITLE IX OF THE EDUCATION AMENDMENTS ACT OF 1972, AS TITLE IX PROTECTS STUDENTS FROM DISCRIMINATION ON THE BASIS OF SEX, NOT GENDER IDENTITY.

Pursuant to Title IX of the Education Amendments Act of 1972 (Title IX), "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a). This landmark protection was "designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity." 34 C.F.R. § 106.1 (2023).

Within Title IX's carveout for human sexuality classes, by unanimous vote, the Dune Unified School District Board (Board) passed the Policy on Human Sexuality Education (Policy). The Policy requires that "[i]nstruction on human sexuality shall be

provided separately for male and female students." Dune Sch. Bd., Resol. 2022-14 § 1(c) (2022). Respondent maintains that (1) Title IX only protects students from discrimination on the basis of sex, not gender identity; (2) Title IX's purpose and regulatory carveouts allow classrooms to be separated by sex; and (3) Title VII's language does not apply to Title IX. Thus, the Policy to separate the students on the basis of biological sex remains permissible under Title IX.

A. The ordinary meaning of Title IX unambiguously protects discrimination on the basis of sex.

Title IX and its implementing regulations frequently mention sex yet do not define it. "When a term goes undefined in a statute, give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (citing *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin*, 444 U.S. at 42).

i. Sex and gender identity are associated but distinct concepts.

The ordinary meaning of sex is clear: sex refers to biological sex, not gender identity.

> The concept of sex must be distinguished from that of gender. "Sex" refers mainly to biological characteristics, while "gender" refers mainly to sociological characteristics. Gender is based on how persons define themselves in terms of self-preservation and expression, i.e., behavior, clothing, haircut, voice[,] and other features of presentation, and also how other persons define them. Sex is determined biologically in five ways.

Dudley L Posten Jr., *Age and Sex*, *in* HANDBOOK OF POPULATION 21 (Dudley L. Posten Jr. ed., 2d ed. 2019) (cleaned up). Sex and gender are distinct concepts.

The etymology of sex, in its original historical context dated back to the 14th century, is defined as a "category of living things according to reproductive roles." *Sex*, MERRIAM-WEBSTER DICTIONARY (2024). By the time Congress enacted Title IX in the 20th century, the ordinary understanding and application of discriminatory acts on the basis of sex still referred to the biological differences between men and women. *See, e.g.*, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979) (holding that Title IX creates a private cause of action for intentional sex discrimination claims); *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 523 (1982) (extending Title IX protections to women suing educational employers for intentional sex discrimination). Importantly, early Title IX cases involved intentional sex discrimination based on biological sex, not gender identity.

Dictionary definitions further support the ordinary meaning of sex around Title IX's enactment, which is defined by the

biological and physiological differences between the sexes. *See, e.g.*, *Sex*, 9 OXFORD ENG. DICTIONARY 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these."); *Sex*, WEBSTER'S THIRD NEW INT'L DICTIONARY 2081 (1971) ("The sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction[.]"); *Sex*, BLACK'S L. DICTIONARY (5th ed. 1979) ("The sum of the peculiarities of structure and function that distinguish a male or female organism; the character of being male or female."). Notably, these dictionary definitions of sex do not mention gender identity. The ordinary meaning of sex, contextualized within the enactment of Title IX,[1] directs that sex and gender identity are two distinct concepts, with the former referring to biological sex.

The modern conception of sex also aligns with the historical definition. Modern dictionaries restrict sex to biological and physiological aspects, not including gender

[1] *See N. Haven Bd. of Ed.*, 456 U.S. at 523 n.13 ("Title IX grew out of hearings on . . . discrimination [against women] in education[.] . . . Much of the testimony focused on discrimination against women in employment.").

identity. *Compare Sex*, MERRIAM-WEBSTER DICTIONARY 1a (2024) ("Either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures.") *with Gender Identity*, MERRIAM-WEBSTER DICTIONARY (2024) ("A person's internal sense of being male, female, or some combination of male and female, or neither male nor female."). The modern distinction between sex and gender identity is clear. Sex refers to one's biological characteristics, whereas gender identity refers to a person's internal sense of gender identity and expression.

Knowing that the definition of sex, distinct from gender identity, has stayed consistent from the 14th century through today, the Court should effectuate the meaning of the term at the time of the statute's enactment. *See, e.g.*, *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) (comparing dictionary definitions at the time of the statute's enactment with modern dictionaries to determine that the statutory terms had the same meaning in both periods; thus, the ordinary meaning of the word applied). "On the basis of sex" means "on the basis of biological sex."

ii. The application of the Policy does not violate Title IX's ordinary meaning.

Title IX does not protect students from discrimination on the basis of gender identity; instead, it protects students from discrimination on the basis of sex. 20 U.S.C. § 1681(a). If Congress wanted to protect students from discrimination on the basis of gender identity, Congress would have written Title IX to do so. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (Amy Gutmann ed., 1997) ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."). Therefore, if a claimant brings a Title IX suit based on gender identity as opposed to sex, then the claim must fail for lack of statutory merit. The Policy mandating separate human sexuality classes, as written, does not violate Title IX. Instead, it merely creates educational benefits based on one's sex. 20 U.S.C. § 1681(a). As a result, Petitioner's challenge fails.

Petitioner asserts that the Policy denies her educational benefits (high-quality human sexuality education) because she must attend the boy's classroom even though she identifies as a

transgender girl,[2] but her assigned-at-birth sex is male. *R.* at 4. Notably, Petitioner is not on puberty blockers or any form of gender-affirming medical care, per her doctor's orders. *Id.*

So, while it is true that Petitioner is a transgender girl, it is also true that Petitioner's biological sex is male. If Petitioner elects to attend human sexuality classes, as she did so here, it follows that Petitioner should attend the boy's class according to their biological sex. *Id.* at 5. Attending the boy's class does not deny Petitioner educational benefits or discriminate against her on the basis of her sex. Though Petitioner may be unhappy with this determination, it is permissible under Title IX. 20 U.S.C. § 1681(a); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005) (noting that an odd result does not make an absurd result).

Courts should not "freely invest old statutory terms with new meanings" at the risk of judicially amending legislation outside of constitutional procedure and violating the separation of powers. *Oliveira*, 139 S. Ct. at 539 (citing *Immigr.*

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[2] Am. Psych. Ass'n, *A glossary: Defining transgender terms*, 49 MONITOR ON PSYCH. 32, 32 (2018) ("An umbrella term encompassing those whose gender identities or gender roles differ from those typically associated with the sex they were assigned at birth.").

Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983)). The separation of powers doctrine reminds courts that "high walls and clear distinctions" are drawn between the three branches of government. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). In respecting the separation of powers, the Judiciary must plainly "say what the law is." *Id.* at 218 (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

Title IX protects students from biological sex discrimination, not gender identity. 20 U.S.C. § 1681(a). "To find otherwise would not only limit the educational opportunities of, but would also jeopardize the privacy and safety of," Title IX's protected classes. *R.* at 6 (citing *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818-21 (11th Cir. 2022) (Lagoa, J., concurring)).

The inquiry begins and ends with unambiguous statutory text. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Because sex and gender identity are two distinct concepts, the Policy to separate students by biological sex for human sexuality education is permissible under Title IX.

B. The Policy aligns with Title IX's purpose and regulatory carveouts.

Although Title IX's language is clear, "any lingering doubt[s]" regarding its construction may be resolved by examining its statutory purpose. *United States v. Clark*, 454

U.S. 555, 561 (1982). Title IX's purpose aligns with the ordinary meaning of sex. Congress enacted Title IX to accomplish two related but distinct objectives. First, avoid wasting federal resources that support discriminatory acts on the basis of sex. *Cannon*, 441 U.S. at 704. Second, it effectively protects individual citizens against discriminatory acts on the basis of sex in education. *Id.* Congress enacted Title IX to prevent discriminatory acts on the basis of sex, not on gender identity.

Title IX's regulations go one step further by implicitly excluding gender identity from protection. The implementing regulations have specific carveouts for unique instances where separating students by biological sex is not discriminatory by law, namely human sexuality education.[3] Human sexuality classes "may be conducted in separate sessions for boys and girls." 34 C.F.R. § 106.34(a)(3) (2023). Human sexuality education provides a crucial and unique exploration into one's biological sex.

[3] 34 C.F.R. § 106.34(a) (2023) (permitting single-sex groupings for: (1) contact sports in physical education classes, (2) ability grouping assessed by objective standards of individual performance in physical education, (3) human sexuality classes in elementary and secondary schools, and (4) groupings within a chorus based on vocal range or quality).

The Policy creates such an opportunity. *See* Dune Sch. Bd., Resol. 2022-14 § 1(c) (2022) (covering topics including reproductive anatomy, puberty, and the development of secondary sex characteristics). Respondent's unanimous adoption of the Policy to separate students on the basis of biological sex is not, in turn, discriminatory against Petitioner's transgender status. The regulatory carveout is clear: Respondent may separate students by biological sex for human sexuality education without violating Title IX. Holding otherwise would deny Dune students of accurate, age-appropriate, and evidence-based human sexuality education and undermine Title IX's purpose.

C. Title VII of the Civil Rights Act of 1964 is inapplicable to Title IX.

Petitioner attempts to circumvent Title IX by relying on Title VII of the Civil Rights Act of 1964's (Title VII) inclusion of "because . . . of sex." *R.* at 6; 42 U.S.C. § 2000e-2(a)(1). Such a comparison is irrelevant for two reasons.

First, Congress' adoption of Title IX as an expansion to Title VI is relevant to Title IX's interpretation. *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). "Title IX was modeled after Title VI of the Civil Rights Act of 1964, . . . which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination[.]" *Gebser v. Lago Vista*

Indep. Sch. Dist., 524 U.S. 274, 286 (1998). Title VI, not Title VII, was the modeling act for Title IX—emphasizing that Title IX's inclusion of sex holds a specific meaning within this statutory scheme. Accordingly, Title VII holds little persuasive weight in determining the meaning of sex under Title IX.

Second, the Court can harmonize Title VII and Title IX within the statutory scheme. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). "Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Id.*

Congress enacted Title IX to fill the void left by Title VII: protecting students from discrimination on the basis of sex. *Compare* 42 U.S.C. § 2000e-2(a)(1) (protecting employees from intentional discrimination "because . . . of sex"), *and Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (protecting employees from Title VII discrimination based on sex stereotypes), *and Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (protecting homosexual and transgender employees from intentional discrimination under Title VII), *with* 20 U.S.C. § 1681(a)(protecting students from intentional discrimination on the basis of sex).

Applying *generalia specialibus non derogant*, the more specific act—Title IX—controls. *Nitro-Lift Techs., LLC v.*

Howard, 568 U.S. 17, 21 (2012). Title VII applies to employers, whereas Title IX applies to all educational programs receiving federal funds. Incidentally, *Bostock* did not breach the issue of "bathrooms, locker rooms, or anything else of this kind" under Title VII. *Bostock*, 140 S. Ct. at 1753. If the Court did not address the issue in the general statute (Title VII), it should not be addressed through the specific statute (Title IX). Subsequently, the ordinary definition of sex under Title IX applies over the definition of sex under Title VII.

No matter where the Court stops its statutory interpretation analysis, the outcome is the same. Respondent's Policy, separating students by biological sex for human sexuality education, is not discriminatory as written or applied against Petitioner, a transgender woman and biological male, on the basis of sex. Thus, this Court should reject Petitioner's argument and affirm the Thirteenth Circuit's holding.

II. THE POLICY ON HUMAN SEXUALITY EDUCATION COMPLIES WITH THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

Pursuant to the Fourteenth Amendment, no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (explaining how the Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike"). When

considering an equal protection claim, the Court must first determine the appropriate level of scrutiny, whereas here, both parties agree that heightened scrutiny applies but differ on the reasoning and application. *R.* at 7. Respondent maintains that (1) the Policy survives heightened scrutiny based on its sex classification and (2) identifying transgender status as a quasi-suspect group receiving heightened scrutiny is inappropriate. Regardless of why heightened scrutiny applies, the Policy remains constitutional under Equal Protection.

A. The Policy survives heightened scrutiny; the standard of review that both parties agree affirmatively applies to sex-based classifications.

The Supreme Court has well established that sex-based classifications receive heightened scrutiny. *See United States v. Virginia (VMI)*, 518 U.S. 515, 532 (1996) (requiring heightened scrutiny for official actions "that closes a door or denies opportunity to women (or to men)"); *Cleburne*, 473 U.S. at 440–41 (requiring heightened scrutiny because sex "frequently bears no relation to the ability to perform or contribute to society"); *see also Clark v. Jeter*, 486 U.S. 456, 461 (1988) (establishing that heightened scrutiny applies only to sex and illegitimacy).

As the Thirteenth Circuit correctly recognized, the Policy creates a sex-based classification that is reviewed under heightened scrutiny. *R.* at 7. Respondent's Policy establishes

that "[i]nstruction on human sexuality shall be provided separately for male and female students." Dune Sch. Bd., Resol. 2022-14 (2022); *see also Adams ex rel. Kasper*, 57 F.4th at 801 (upholding a school bathroom policy that separated "biological boys" and "biological girls" because it created a constitutional sex-based classification that survived heightened scrutiny). Like in *Adams ex rel. Kasper*, here, the Policy's instruction to teach students according to their biological sex also triggers heightened scrutiny.

For the Policy to withstand heightened scrutiny, its sex-based classification must be substantially related to an important governmental objective. *Clark*, 486 U.S. at 461. Under this standard, Respondent 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)).

Which Respondent does. The Policy establishes the justification: "to protect and advance the individual and public health of young Dune residents." Dune Sch. Bd., Resolution 2022-14 (2022). The Policy's purpose aligns with Texington's responsibility to nourish public health and safety. *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002) (noting that "in a public school environment[,] . . . the State is responsible for maintaining discipline, health, and safety"). To further justify

the Policy's passage, the Board sought to unify their previously inconsistent human sexuality education classes across the district. Dune Sch. Bd., Resol. 2022-14 (2022) *accord VMI*, 518 U.S. at 533 (explaining how the justification must be genuine, not hypothesized or invented post hoc in response to litigation). The Board's interest is "exceedingly persuasive," as educating young people on human sexuality prepares them for "fulfilling, healthy, successful lives," and the Policy does not "rely on overboard generalizations about the different talents, capacities, or preferences of males and females." Dune Sch. Bd., Resol. 2022-14 (2022); *VMI*, 518 U.S. at 533.

Additionally, for the Policy's means to substantially relate to the Respondent's government objective, there must be "enough of a fit" between the means and the asserted justification. *Danskine v. Mia. Dade Fire Dep't*, 253 F.3d 1288, 1299 (11th Cir. 2001).

Providing students with accurate, age-appropriate, and evidence-based information specifically related to their biological sex serves the Board's interest in improving the health of its young residents. Dune Sch. Bd., Resolution 2022-14 § 1(a) (2022). These topics include, but are not limited to, reproductive anatomy; puberty and the development of secondary sex characteristics; healthy relationships; safe sex practices; sexually transmitted infections; and reproductive health care,

including preventative care and self-screening for conditions like cancer. *Id.* § 1(b). Educating on these topics is best achieved by separating students according to their biological sex and tailoring instruction to students' anatomical and physiological characteristics to match their unique experiences and healthcare needs. *Id.* § (1)(c). Notably, the Policy does not prohibit a school from teaching the same information to both male and female classes when it is equally relevant to them. *Id.* § 1(c)(a). There is "enough of a fit" between the Policy's means and objective because the separation of students specifically allows Dune schools to best educate students on human sexuality.

Respondent's Policy further protects and advances young Dune residents' individual health and aligns with the government's objective to safeguard public health and safety. Thus, it follows that the Policy furthers an important government interest in promoting public health and safety by means that are substantially related to the interest. Because the Policy creates a sex-based classification that is substantially related to an important governmental objective, the Policy survives heightened scrutiny.

B. Qualifying transgender status as a quasi-suspect class is inappropriate and does not change the constitutional analysis.

Petitioner proposes that transgender status constitutes a quasi-suspect class distinct from sex, which also receives

heightened scrutiny. This argument is unnecessary for the reasons above, as the Policy creates a constitutional sex classification. Yet, for the argument's sake, if Respondent assumes that transgender status is a unique classification, then this Court should decline inappropriately altering the longstanding jurisprudence on equal protection and sex. Even if this Court were to apply heightened scrutiny to the Policy through Petitioner's lens, the Policy remains constitutional under the Equal Protection Clause.

i. Naming transgender status as a quasi-suspect class is unnecessary, as the Policy creates a sex-based classification.

We stumble upon a rabbit hole: this core dispute stems from the distinction between sex and gender identity. Recognizing that sex and gender identity are different does not mean referring to either inherently creates a separate classification. The mere presence of a classification is constitutional; however, it is unconstitutional if the Policy's means are not substantially related to an important government interest. *Hogan*, 458 U.S. at 723. Petitioner will attend the male human sexuality class because her assigned-at-birth sex is male, not because she is transgender. Though Petitioner disagrees with the Policy, it still constitutes a sex-based classification analyzed under heightened scrutiny. If the Policy did not, as the Thirteenth Circuit recognized, rational basis

would apply. *R.* at 7–8. However, neither party agrees rational basis is the appropriate standard. *Id.*

ii. Alternatively, creating a new quasi-suspect class is unwarranted as it speaks against the Equal Protection Clause and the balance of power between the legislature and judiciary.

Respondent will enter the rabbit hole. Suppose the Policy is not a sex-based classification that separates students on their assigned-at-birth sex. In that case, this Court should maintain that transgender status does not qualify as a quasi-suspect class deserving of heightened scrutiny.

The Equal Protection Clause, as written and applied, does not "guarantee equal results for all, or suggest that the law may never draw distinctions between persons in meaningfully dissimilar situations—two possibilities that might themselves generate rather than prevent injustice." *SECSYS, LLC v. Vigil*, 666 F.3d 678, 684 (10th Cir. 2012) (internal quotations and citation omitted). "Instead, the Equal Protection Clause is a more particular and profound recognition of the essential and radical equality of all human beings." *Id.* Equal Protection allows the government to create classifications if those classifications survive judicial review. It does not mean every person qualifies for heightened constitutional protections based on their unique characteristics. *See Nguyen v. Immigr. Naturalization Serv.*, 533 U.S. 53, 70 (2001) ("None of our

gender-based classification equal protection cases have required that the [policy] under consideration must be capable of achieving its ultimate objective in every instance.").

Because of these constitutional principles, the Supreme Court has been reluctant to expand the scope of quasi-suspect classifications. Since adding illegitimacy in 1977, the Supreme Court has declined every opportunity to recognize a new quasi-suspect class. Selene C. Vázquez, *The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants*, 51 U. MIA. INTER-AM. L. REV. 63, 75 (2020); *see, e.g., Obergefell v. Hodges*, 576 U.S. 644, 673–74 (2015) (avoiding the question of whether a classification based on sexual orientation merits heightened scrutiny).

Lower courts have been further reluctant to qualify transgender status as a quasi-suspect class. *See, e.g., Eknes-Turner v. Governor, of the State of Ala.*, 80 F.4th 1205, 1230 (11th Cir. 2023) (quotation and citation omitted)("We have grave 'doubt' that transgender persons constitute a quasi-suspect class, distinct from sex, under the Equal Protection Clause."); *Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015) (holding that a transgender plaintiff is not a member of a protected suspect class); *Johnston v. Univ. of Pittsburgh of the Comm. Sys. Of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015) (declining to recognize transgender status as a class

entitled to heightened scrutiny because neither the Supreme Court nor the Third Circuit have ruled otherwise).

Furthermore, prematurely designating a suspect classification would disrupt the balance between the judicial branch and the democratic process. *Fowler v. Stitt*, No. 22-cv-115-JWB-SH, 2023 WL 4010694, at *21 (N.D. Okla. June 8, 2023). Justice Powell once noted: "democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes." *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring); *see also Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) ("[T]he separation of powers is designed to preserve the liberty of all the people.").

At a time when states, including Texington, are enacting a broad array of legislation to address the subject of transgender rights, it is vital to grant legislatures flexibility to shape policies without restrictive judicial oversight. *See, e.g.*, *Fowler*, 2023 WL 4010694, at *21 (providing examples of ongoing transgender legislation nationwide); *see also L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 420 (6th Cir. 2023) (emphasizing that a constitutional democracy does not work when it shifts addressing evolving social norms from the fifty state

legislatures to the one Supreme Court). Qualifying transgender status as a quasi-suspect class would infringe on the separation of powers between the judiciary and the legislature.

Therefore, the Court should decline to name transgender status as a quasi-suspect class and evaluate the Policy as a sex-based classification under heightened scrutiny.

iii. Even if the Court recognized transgender status as a quasi-suspect class, the Policy survives heightened scrutiny.

Let us assume the Policy creates a transgender classification under heightened scrutiny—the rabbit hole leads us back to where we began—the analysis is unchanged and still favors the Respondent.

First, there is an important government objective for teaching human sexuality in classes separated by students' cisgender and transgender identities. The Policy is "necessary to protect and advance the individual and public health of young Dune residents." Dune Sch. Bd., Resol. 2022-14 (2022). Aside from the important government interest in promoting youth public health, another core aspect of this goal is allowing students to learn about human sexuality in a private environment where educators can tailor lessons to a student's needs. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 872 F.3d 586, 636 (4th Cir. 2020) (Niemeyer, J., dissenting) (noting that children "are still developing, both emotionally and physically"). At a time when

youth's bodies and minds are growing, and many will start exploring sexual topics, the Policy is a crucial tool to uniformly help students understand how their bodies function and will change.

Maintaining separate spaces for people of different sexes for privacy reasons is constitutional under Equal Protection. *See VMI*, 518 U.S. at 550 n.19 (recognizing that admitting women to VMI "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements"); *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) (permitting sex-based preferences in the healthcare setting and noting that "the law tolerates same-sex restrooms or same-sex dressing rooms . . . to accommodate privacy needs. . . ."); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)) (recognizing a constitutional right to "bodily privacy because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating'"). Protecting the right to privacy is an important government objective, whether in hospitals, bathrooms, or schools.

Second, the Policy's means are substantially related to the Board's objective. Maintaining separate classrooms protects

student's privacy and fosters robust human sexuality education. The Policy entitles students to high-quality, "accurate, age-appropriate, and evidence-based information about human sexuality." Dune Sch. Bd., Resol. 2022-14 (2022); *see* Stacy Stockard, *Is Abstinence Still the Best Policy? Modernizing Human Sexuality Instruction in Texas Public Schools*, 10 TEX. TECH ADMIN. L. J. 315, 323–324 (2008) (discussing how effective sexual education curricula include age, medically, and culturally appropriate sexual health information). Reproductive anatomy, healthy relationships, sexually transmitted diseases, and preventive care are essential topics for all students. Students can better explore these topics in separate classrooms where they can feel comfortable asking questions in front of their peers, and teachers can tailor information to their needs.

The Equal Protection Clause does not require the Policy to achieve its ultimate objective in every instance. *Nguyen*, 533 U.S. at 70. Nor does it "demand a perfect fit between means and ends when it comes to sex." *Danskine*, 253 F.3d at 1299. Like a student that opt-outs of the instruction entirely, a transgender student may not receive their personally desired human sexuality curriculum, but that does not mean the Policy is unconstitutional. Petitioner's concerns may not even come to light, as the Policy does not restrict a school from teaching topics related to transgender health issues or their unique

experiences; it explicitly allows each school to include other topics as deemed appropriate. Dune Sch. Bd., Resol. 2022-14 § 1(b) (2022).[4] Regardless, the Policy's means of separating students based on biological sex is substantially related to providing students with accurate, age-appropriate, and evidence-based information about human sexuality to protect and advance the public health of young Dune residents.

At most, Petitioner's challenge amounts to a claim that the Policy has a disparate impact on transgender students in Dune, which alone does not violate the Constitution. Instead, a disparate impact on a group motivated by "purposeful discrimination" would violate the Constitution. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979).

Here, there is no purposeful or intentional discrimination. The Supreme Court has long held that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences." *Id.* at 279 (quoting *United Jewish*

[4] What the Policy does not address, Respondent has attempted to remedy through other avenues. For example, the Board has an inclusive transgender policy integrating gender identity into anti-bullying policies, restroom access, and school athletics through grades kindergarten through eight. Dune Sch. Bd., Resol. 2021-4 (2021).

Orgs. v. Carey, 430 U.S 144, 180 (1977) (Stewart, J., concurring in the judgment)). Thus, if Petitioner claims that the Policy would negatively impact transgender students, it will need to be resolved under an intentional discrimination claim, not under heightened scrutiny.

Even if the Court recognized transgender status as a quasi-suspect class, the Policy still survives review under heightened scrutiny. The Policy furthers an important government interest by means substantially related to that interest: teaching accurate, age-appropriate, evidence-based sexual health.

Accordingly, the Policy does not violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Conclusion

For the foregoing reasons, Respondent, the Dune Unified School District Board, respectfully requests that the Supreme Court affirm the decision of the Thirteenth Circuit and hold that the Policy on Human Sexuality does not violate Title IX of the Education Amendments Act of 1972 or the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

[redacted]

Attorneys for Respondent

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