

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-Appellee.

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

Brief for Petitioner

Team 19

████████████████████ ██████████
Title IX Issue
████████████████████

██
Equal Protection Issue
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Questions Presented

1. Whether the Dune Unified School Board's Policy on Human Sexuality Classes unlawfully institutes gender-based discrimination against transgender students in violation of Title IX of the Education Amendments Act of 1972?
2. Whether the Dune Unified School Board's Policy on Human Sexuality Classes unconstitutionally discriminates against transgender students in violation of the Equal Protection Clause of the Fourteenth Amendment?

Opinion Below

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

Constitutional Rules and Provisions

U.S. CONST. amend. XIV, § 1.

20 U.S.C. § 1681(a).

42 U.S.C. § 2000e-2.

34 C.F.R. § 106.34.

Introduction

Appellant Jane Boe requests that this Court reverse the Thirteenth Circuit's grant of summary judgment in favor of the Dune Unified School Board ("the Board"). *Boe v. Dune Unified Sch. Dist. Bd.*, - F.7th - (13th Cir. 2023). The Board's Policy on Human Sexuality Classes ("the Policy") violates both Title IX and the Fourteenth Amendment's Equal Protection Clause.

First, this Court should find that the Policy violates Title IX. The Policy relies on a narrow and outdated interpretation of "sex" as not including gender and as such discriminates against gender-nonconforming students. Next, this Court's tradition of applying Title VII jurisprudence to Title IX demonstrates that the Policy specifically discriminates based on transgender status. Thus, the Policy violates Title IX. Finally, because Title IX carve-outs provide for separation of *boys and girls* in classes, and not separation of classes by sex, the carve-outs do not provide a safe harbor for the Policy.

Second, this Court should find the Policy unconstitutional under the Fourteenth Amendment. The Policy classifies students by transgender status, a quasi-suspect classification. It subjects transgender students to disparate treatment in a manner unrelated to an important governmental interest, thus failing the requisite heightened scrutiny. Further, even if this Court found that the Policy does not target transgender people as a quasi-suspect class, the Policy's mandates still do not rationally relate to a legitimate governmental purpose. Finally, the Policy classifies students by sex, which is also a quasi-suspect class, and subjects the sexes to disparate treatment in a manner unrelated to an important governmental interest without an exceedingly persuasive justification, thus failing the requisite heightened scrutiny analysis once again.

Statement of the Case

The Board enacted the Policy in December 2022 requiring mandatory human sexuality education in Dune schools for grades seven through ten. R. at 3. The human sexuality classes cover a range of topics including reproductive anatomy and health care, healthy relationships, and safe sex practices. R. at 3. The Policy mandates that the classes are taught to groups of students segregated by their sex assigned at birth. R. at 3.

Prior to implementing the Policy, the Board issued a statement in July 2021 that pertained to transgender students in particular. R. at 4. This statement required all Dune schools to include transgender status as an enumerated characteristic in their anti-bullying policies, allow transgender students to use the bathrooms that align with their gender, and allow transgender students through grade eight to participate in sports in accordance with their gender identity. R. at 4.

Ms. Boe is a transgender girl who told her parents she was a girl around the age of seven and is now in seventh grade at Dune Junior High School. R. at 4. Under the Policy, Ms. Boe would be assigned to the boys' human sexuality class. R. at 2. Teachers and students at Dune Junior High School treat Ms. Boe as a girl in accordance with her gender, and most do not know that she is transgender. R. at 5. Ms. Boe goes by her grandmother's name, uses female pronouns, plays women's sports

and uses girls' bathrooms at school. R. at 5. She does not spend much time with the boys in her school and is afraid of being placed in the boys' class. R. at 5. Ms. Boe has said that, if forced to attend the boys' human sexuality class, she would feel uncomfortable and humiliated. R. at 5. She has also voiced concerns about boys asking why a girl is in their class. R. at 5. The Policy provides for an option to opt-out of human sexuality classes entirely. R. at 4. Ms. Boe and her parents consider this an insufficient alternative, arguing that it would be costly and burdensome for them to seek out sexual health education for Ms. Boe if she were not to receive that information at school. R. at 5.

Argument

I. THE BOARD'S POLICY VIOLATES TITLE IX BECAUSE IT DISCRIMINATES BASED ON SEX.

Title IX of the Education Amendments Act of 1972 (Title IX) provides that "[n]o person . . . 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). When determining whether a law's application constitutes discrimination under Title IX, courts look to the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment

discrimination “because of” race, color, religion, sex, or national origin. 42 U.S.C. § 2000e; see *Tingley-Kelley v. Trs. of Univ. of Pa.*, 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010). Like Title VII, which provides employees with a private right of action against their employers, Title IX provides individuals with a private right of action to recover damages where they have been excluded from educational programs on the basis of their sex. See, e.g., *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979); *Fekete v. U.S. Steel Corp.*, 424 F.2d 331, 336 (3d Cir. 1970); *Preston v. Com. of Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994). Sex is defined by many factors, only one of which is outward-presenting physical characteristics. See *Hecox v. Little*, 79 F.4th 1009, 1016 (9th Cir. 2023). Gender is often considered a sex-related characteristic, as are hormones and internal sexual organs. See *id.* Both Title IX and Title VII are anti-discrimination laws and should be read broadly in light of their purpose. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 492-93 (1954) (noting that “[w]e must consider public education in the light of its full development and its present place in American life throughout the Nation”).

This Court should reverse the Thirteenth Circuit’s holding that the Policy does not violate Title IX for three reasons. First, under this Court’s reading of Title IX as relying on

Title VII, "sex" discrimination includes gender stereotyping. Second, excluding students from sex-segregated classes on the basis of sex assigned at birth harms transgender students and violates Title IX. Third, the Policy does not fall within Title IX's carve-outs.

A. The Policy's Gender-Based Stereotyping Constitutes Sex-Based Discrimination Under Title IX.

In determining whether Title IX's prohibition of sex discrimination encompasses discrimination based on gender stereotyping, courts look to Title VII's interpretation of "sex."¹ In *Price Waterhouse v. Hopkins*, this Court found that sex discrimination includes decisions based on behavior conforming—and not conforming—to traditional notions of gender. 490 U.S. 228, 251 (1989). This expanded the interpretation of Title VII beyond mere physiological sex and set a precedent for future cases. *Id.*; see also *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351-52 (7th Cir. 2017) (holding that a gay plaintiff may state a claim for sex-based discrimination under Title VII under a sex stereotyping theory).

Courts have read *Price Waterhouse* to establish that, under Title VII, discrimination based on one's failure to conform with

¹ See David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 226 (2005).

“socially prescribed gender roles” constitutes sex discrimination. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Finkle v. Howard Cnty., Md.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (holding that “Plaintiff's claim that she was discriminated against ‘because of her obvious transgendered status’ is a cognizable claim of sex discrimination under Title VII”). The Eleventh Circuit went on to specify in *Glenn*, that discrimination against transgender people because of their gender-nonconformity constitutes sex discrimination, regardless of whether that distinction is described in terms of sex or gender. 663 F.3d at 1317.² “By definition, a transgender individual, like the one in *Glenn*, does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.” *Whitaker*, 858 F.3d at 1048.

In *Whitaker*, the Seventh Circuit ruled that a transgender student could file a sex-discrimination claim based on sex

² See also *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004) (finding that discrimination against a transgender individual is sex-based discrimination under Title VII because transgender individuals are gender nonconforming); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020) (same); *Hecox*, 79 F.4th at 1026 (same); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1041 (7th Cir. 2017) (same).

stereotyping under Title IX, where a student assigned "female" at birth identified as a boy, presented as male, and requested teachers and classmates use male pronouns. 858 F.3d at 1040. There, the court stated that "experts opined that use of the boys' restrooms is integral to [the student's] transition and emotional well-being." *Id.* at 1045.

Like access to gender-affirming bathrooms, receiving gender-affirming human sexuality instruction is integral to transgender students' transition and mental health. The Policy here, like the bathroom policy in *Whitaker*, identifies Ms. Boe "as transgender and therefore, 'different,'" and risks causing serious psychological distress. *Id.* at 1045. Ms. Boe goes by her grandmother's name, uses female pronouns, plays women's sports, and uses girls' bathrooms, all of which illustrate how her life is structured around her female identity. R. at 5. Nevertheless, the Board requires Ms. Boe to attend a sexual health class based on her sex assigned at birth, which, as in *Whitaker*, punishes her for failing to conform to societal assumptions about gender and sex.³ R. at 5. This refusal to respect Ms. Boe's gender identity constitutes sex discrimination.

³ See *Smith*, 378 F.3d at 574 (explaining that "[i]t follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also

Moreover, all of Ms. Boe's friends, teachers, and classmates recognize her as a girl, meaning that her participation in a boys' human sexuality class risks a potentially uncomfortable and humiliating situation, contravening the purpose of Title IX. R. at 5. This risk is confirmed by Ms. Boe's own fears of being placed in a class of boys, with whom she rarely spends time. R. at 5. In requiring all public schools to list transgender status as an enumerated characteristic in their anti-bullying policies, the Board itself acknowledged that being transgender puts students at social and psychological risk. R. at 4. By placing a student who presents and identifies as a girl in a setting designated exclusively for boys, the School will out Ms. Boe as a transgender girl and risk subjecting her to bullying and psychological distress. See *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 523 (3d Cir. 2018) (finding that policies that segregate transgender students into single-user restrooms or facilities matching their sex assigned at birth could intensify mental health issues and could cause "severe psychological distress often leading to attempted suicide").

engaging in sex discrimination, because the discrimination would not occur but for the victim's sex").

The Policy only provides one alternative: opting out of instruction. R. at 4. This offers transgender students only two options: either enter an uncomfortable environment in which they are surrounded by peers of the opposite gender identity or miss out on a critical part of their education. R. at 4. Both of these options run contrary to the spirit of Title IX, which is aimed at providing equal education opportunities to students regardless of their sex.

B. The Policy's Separation of Students on the Basis of Sex Assigned at Birth, As Applied, Discriminates Against Transgender Students in Violation of Title IX.

This Court expanded upon *Price Waterhouse in Bostock v. Clayton County*, making clear that discrimination based on sexual orientation or transgender status is a form of sex discrimination under Title VII. 140 S. Ct. 1731, 1741 (2020). This Court found that an employer violates Title VII by firing an individual for being gay or transgender. *Id.* Therefore, discrimination against a person for being transgender is discrimination "on the basis of sex." *Id.*

Since the *Bostock* decision, courts have explained that Title IX follows Title VII and protects transgender students from discrimination based on gender identity in educational settings. See *Grimm*, 972 F.3d at 616-17 (holding that a school board impermissibly discriminated against a transgender male student "on the basis of sex" in violation of Title IX because

the phrase "on the basis of sex" in Title IX is interpreted in the same manner as similar language in Title VII).⁴

Here, the Policy enforces sex discrimination in schools by placing students in human sexuality classes based on their sex assigned at birth. Such a distinction explicitly singles out transgender students because they do not identify with their sex assigned at birth. R. at 3.

As the dissent in the decision below states, "[c]isgender girls are assigned to the girls' human sexuality class, and transgender girls are not; cisgender boys are assigned to the boys' human sexuality class, and transgender boys are not." *Boe*, - F.7th - (Bernstein, J., dissenting). So, for example, a 12-year-old student assigned-*female-at-birth* who attends Dune Junior High, identifies as a girl, uses female pronouns, uses the girls' bathroom and changing facilities at school, and wants to participate on the girls' sports teams will attend the *girls'* human sexuality class under the Policy. R. at 3. Now take Ms. Boe. Ms. Boe is a 12-year-old student assigned-*male-at-birth* who

⁴ See also *B.P.J. v. W. Va. State Bd. of Educ.*, 2021 WL 3081883, at *7 (S.D.W. Va. July 21, 2021); *Koenke v. Saint Joseph's Univ.*, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); *Doe v. Univ. of Scranton*, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020).

attends Dune Junior High, identifies as a girl, uses female pronouns, uses the girls' bathroom and changing facilities at school, and wants to participate on the girls' sports teams. R. at 4-5. Under the Policy, Ms. Boe must attend the *boys'* human sexuality class. R. at 3. The only difference between these two students is their sex assigned at birth, making clear that the Policy discriminates purely on the basis of sex and thus, violates Title IX.

C. The Policy's Discrimination Against Transgender Students Does Not Fall Under A Title IX Carve-Out.

The majority mistakenly held that the Policy falls within the exceptions, or carve-outs, of Title IX. This reading misinterprets the regulation's language and, thus, enables discrimination on the basis of gender identity. The relevant provision of the regulation at issue states, "[c]lasses or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for *boys and girls*" without violating the statute. 34 C.F.R. § 106.34(a)(3) (2023) (emphasis added). In the same provision, the regulation lists three other carve-outs, all of which specify exceptions for segregation in school environments by sex. 34 C.F.R. § 106.34(a)(1) (2023) (refraining from prohibiting "separation of students *by sex* within physical education classes or activities . . . which involve[] bodily

contact.") (emphasis added); 34 C.F.R. § 106.34(a)(2) (2023) (same where "grouping of students in physical education classes and activities by ability . . . without regard to sex.") (emphasis added); 34 C.F.R. § 106.34(a)(4) (2023) (same where "requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.") (emphasis added).

The regulation's meaningful variation in word choice indicates that the term "boys and girls" must mean something other than "sex." See *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 457-58 (2022) ("[W]here [a] document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.") (quoting A. SCALIA & B. GARNER, *READING LAW* 170 (2012)). This differential language emphasizes a significant distinction: where "sex" might refer to biological attributes, "boys and girls" can be understood to encompass gender identity specifically. Here, Ms. Boe and her parents have repeatedly iterated that her gender identity is female; thus, the carve-out does not compel her to attend a boys-only class. R. at 5. The regulation allows for human sexuality classes to be segregated by "boys and girls" and Ms. Boe wishes to attend the girls' human sexuality class because Ms. Boe is a girl. R. at 5. Her

position complies with the exact wording of the Title IX carve-out.

II. THE BOARD'S POLICY VIOLATES THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

The Fourteenth Amendment's Equal Protection Clause establishes that a State may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Lawmaking, especially regarding social or economic issues, frequently requires classifying specific groups of people who the law will affect. *See Romer v. Evans*, 517 U.S. 620, 631 (1996). While courts typically defer to the legislature to rectify any impermissible differential treatment, this Court has recognized that some classifications in and of themselves provide reason to infer a discriminatory purpose and thus require heightened judicial scrutiny. *See Pers. Adm'r of Mass v. Feeney*, 442 U.S. 256, 272 (1979). Suspect classifications, like those based on race and national origin, and quasi-suspect classifications, like those based on sex and gender stereotypes, are therefore subject to greater judicial scrutiny regardless of whether the law implicates fundamental rights or evinces invidious discriminatory intent. *See, e.g., Brown*, 347 U.S. at 483; *United States v. Virginia ("VMI")*, 518 U.S. 515, 556 (1996). Courts will presume other classifications to be valid, provided those classifications are rationally related to a

legitimate state interest. See *Heller v. Doe*, 509 U.S. 312, 320 (1993). Such classifications that are facially neutral may, however, be subject to heightened scrutiny if they were implemented with the intention to—and do in fact—discriminate against protected groups. See *Feeney*, 442 U.S. at 272.

This Court should overturn the Thirteenth Circuit's holding that the Policy does not violate the Fourteenth Amendment's Equal Protection Clause for three reasons. First, should this Court find that transgender status amounts to a quasi-suspect classification, the Policy fails heightened scrutiny. Second, should this Court instead find that transgender status does not amount to a quasi-suspect class, the Policy fails rational basis review. Finally, regardless of the Policy's classification by transgender status, it explicitly classifies students based on sex, and fails the requisite heightened scrutiny.

A. The Policy Classifies Based on Transgender Status, a Quasi-Suspect Classification, and is thus Subject to Heightened Scrutiny which it Fails.

The Policy subjects transgender students to differential treatment because it classifies students based on their sex assigned at birth. Because transgender students do not identify with their sex assigned at birth, the Policy will impact transgender students differently from cisgender students. R. at 3. Specifically, the Policy will prohibit transgender students

from taking human sexuality classes that align with their gender identity while permitting cisgender students to do so. R. at 3.

1. Transgender Status is a Quasi-Suspect Classification.

Several courts have held that transgender status is a quasi-suspect basis for classification.⁵ Courts consider four factors to determine whether a classification is quasi-suspect and therefore subject to heightened scrutiny. See *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013).

Courts first consider whether the class has historically been discriminated against. See *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). Transgender people as a class have suffered and continue to suffer severe and pervasive discrimination at all levels of society. See *Grimm*, 972 F.3d at 610-11; see also *Brocksmith v. United States*, 99 A.3d 690, 698 (D.C. 2014); Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1429-30 (2023). The prevalence of such discrimination

⁵ See, e.g., *Glenn*, 663 F.3d at 1316-18; *Hecox*, 79 F.4th at 1026; *Whitaker*, 858 F.3d at 1051; *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Bd. of Educ. v. U.S. Dep't of Educ. ("Highland")*, 208 F. Supp. 3d 850, 872 (S.D. Ohio 2016); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 285 (W.D. Pa. 2017).

incentivizes transgender individuals to hide or minimize their identities, often forcing them to live in accordance with their sex assigned at birth, rather than with their gender. See *Adkins*, 143 F. Supp. 3d at 139. In the field of education alone, transgender students frequently experience harassment and assault, perpetrated both by other students and by staff. See Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 553 (2016).

Next, courts look to whether the class has a defining characteristic and whether that characteristic seriously impacts their ability to function in or contribute to society. See *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973). The defining characteristic of transgender individuals, that their gender does not align with their sex assigned at birth, has no bearing on their ability to contribute to society. See Eyer, *Transgender Constitutional Law*, *supra*, at 1430; Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, *supra*, at 558.

Even when transgender individuals experience debilitating gender dysphoria, which may interfere with their day-to-day lives, it is not a universal experience that makes all transgender people less productive. See *M.A.B. v. Bd. Of Educ.*

of Talbot Cnty., 286 F. Supp. 3d 704, 720 (D. Md. 2018).⁶

Further, gender dysphoria's impact on any individual's ability to contribute to society is largely attributable to societal misperceptions, stigmatization, and mistreatment of the transgender community. See Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, *supra*, at 554.

Third, courts consider whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Bowen*, 483 U.S. at 603. Transgender people have a gender identity that is inconsistent with the sex they were assigned at birth. See Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, *supra*, at 514. One's gender identity is an immutable characteristic; it is not something that an individual can change at will or through intentional processes. See *Evancho*, 237 F. Supp. 3d at 288. Like sexual orientation, race, or national origin, it is not a choice. See Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, *supra*, at 560; *Eyer*,

⁶ See also *Grimm*, 972 F.3d at 612; *Evancho*, 237 F. Supp. 3d. at 288; *Highland*, 208 F. Supp. 3d at 874; *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1104 (N.D. Cal. 2015); *Adkins*, 143 F. Supp. 3d at 139.

Transgender Constitutional Law, supra, at 1429. Transgender people can elect to undergo gender-affirming surgeries that bring their external physical characteristics (what we usually think of as "sex") in line with their gender identity. See Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause, supra*, at 561. Transgender identity remains the same even if someone is later able to change the physical characteristics that led to them being assigned a given sex. *Id.*

Finally, courts consider whether the class is a minority lacking in political power. See *Bowen*, 483 U.S. at 603. This inquiry requires a showing that the "group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 443-44 (1985). Transgender individuals as a group lack power in the political arena. See *Adkins*, 143 F. Supp. 3d. at 140. They constitute less than one percent of the U.S. population and severely lack political representation. See *Grimm*, 972 F.3d at 613. No openly transgender politicians currently serve in the U.S. Congress, and a transgender person had never served in a state legislature before 2017. See Eyer, *Transgender Constitutional Law, supra*, at 1429. Transgender people as a class must therefore rely on the work and advocacy of other, more privileged groups to affect any sort of change or progress against discriminatory government

action. See Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, *supra*, at 508-09.

These four factors demonstrate that transgender status is a quasi-suspect classification.

2. *The Policy Fails Heightened Scrutiny.*

Quasi-suspect classifications are subject to intermediate, or heightened, scrutiny. See, e.g., *Cleburne*, 473 U.S. at 440; *Lalli v. Lalli*, 439 U.S. 259, 265 (1978). Heightened scrutiny analysis entails a review that is more exacting than that “normally accorded economic and social legislation.” *Cleburne*, 473 U.S. at 441-42. This analysis requires that a statutory classification be directly and substantially related to an important governmental objective and should not rely on generalizations about protected groups. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *VMI*, 518 U.S. at 533.

In *Tuan Anh Nguyen v. INS*, this Court held that the legislative means— “the imposition of certain additional requirements upon an unwed father” —were substantially related to the governmental objective and upheld the policy at issue. 533 U.S. 53, 68 (2001). On the other hand, this Court held in *Reed v. Reed* that the means adopted by the policy at issue, which used sex as a tiebreaker in granting administration of a deceased child’s estate to one parent or the other, did not

advance the State's objective of reducing the burden on probate courts. 404 U.S. 71, 76 (1971).

The Board here asserts a governmental objective "to protect and advance the individual and public health of young Dune residents." R. at 7-8. Although this objective may be sufficiently important, the Policy nonetheless fails because the means the Board has adopted have neither a close nor substantial bearing on the accomplishment of that objective. In fact, because the Policy requires transgender students to take human sexuality classes with students of a different gender, it actively disrupts such goals and works against them. R. at 7-8. Although the Policy allows students to opt out of its human sexuality education, this insufficient alternative targets transgender students for differential treatment because they are the only group of students required to take classes with members of a different gender. R. at 5. Further, it forces transgender students to choose between receiving a holistic education and living in accordance with their gender, perpetuating the precise kind of arbitrary discrimination against which the Equal Protection Clause is meant to protect.

B. Even If This Court Finds that Transgender Status Is Not a Quasi-Suspect Class, the Policy Fails Rational Basis Review.

Should this Court find that transgender status is not a quasi-suspect classification, the Policy would be subject to

rational basis review which it nonetheless fails. See *Cleburne*, 473 U.S. at 447. Rational basis review demands that the relevant classification be rationally related to a legitimate government interest. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). The presence or absence of transgender students in a classroom is not rationally related to the legitimate government interest of facilitating human sexuality education because transgender status has no bearing on a student's ability to learn, or the ability of that student's peers to learn. See *Cleburne*, 473 U.S. at 447 (holding that the residents' mental disabilities were not rationally related to the City's denial of a permit to build a home). Here, the Policy implies a need to restrict its human sexuality curriculum to information only about students' own bodies. Such a restriction does not serve the Board's articulated goal of improving the public and individual health of Dune's youth.

C. The Policy Classifies Based on Sex and Fails Heightened Scrutiny Analysis.

The Policy's classification of students by sex assigned at birth, as applied, treats transgender and cisgender students differently, amounting to sex-based discrimination. *Supra* I.B.

1. *Sex is a Quasi-Suspect Classification and Must Be Supported by an Exceedingly Persuasive Justification.*

Classifications based on sex are subject to heightened scrutiny,⁷ and as such must be supported by an exceedingly persuasive justification. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Both the governmental objective and the classification used should not rely on generalizations or stereotypes about sex and gender. *Id.* at 724-25. Where certain classifications have historically been accepted, courts should be aware of how societal understandings have changed and whether new forms of discrimination have come to light. *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015).

2. *The Policy, in Classifying by Sex, Fails Heightened Scrutiny.*

Quasi-suspect classifications must survive heightened scrutiny. *Supra* II.A.2. Separating classes based on sex assigned at birth does not have a close enough relationship to improving the public health of young people in Dune to survive heightened scrutiny. The Thirteenth Circuit erred in deferring to the Board's contention that segregation of this kind advanced its interest in providing Dune youth with accurate, age-appropriate,

⁷ See, e.g., *Frontiero*, 411 U.S. at 682 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 642 (1975); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

evidence-based information regarding human sexuality and anatomy. *Boe*, - F.7th -.

Like the classification at issue in *VMI*, the Board's decision to segregate human sexuality classes based on sex assigned at birth relies on overbroad generalizations regarding sex and gender, how they relate, and how they should inform human sexuality education. *VMI*, 518 U.S. at 533-41. The Policy assumes that sex and gender are separate and that one's sex can be accurately identified with reference to their sex assigned at birth or by the sex marker on their birth certificate. R. at 3.

The range of topics covered by Dune human sexuality classes further illustrates that classification based on sex assigned at birth is unnecessary and harmful. R. at 3. The Board is interested in educating young people in Dune to improve public health. The topics covered are relevant to *all* students. As such, providing information to students of one sex and not the other is discriminatory under the Equal Protection Clause and limits education and health.

In upholding bathroom segregation based on sex assigned at birth, some courts have looked to the privacy concerns of students as an "exceedingly persuasive justification" for the classification. *See, e.g., Adams v. Sch. Bd. Of St. Johns Cnty.*, 57 F.4th 791, 802 (11th Cir. 2022); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 639-41 (M.D.N.C. 2016); *Johnston v. Univ. of*

Pittsburgh of the Commonwealth Sys. Of Higher Educ., 97 F. Supp. 3d 657, 669-70 (W.D. Pa. 2015). However, the privacy of cisgender young girls would not be threatened by the presence of transgender girls in their class. In fact, requiring a transgender girl to attend human sexuality classes with cisgender boys, as the Policy does, presents a real threat to the legitimate privacy rights of both the boys and the girl in their class. For instance, the Policy ignores the fact that students may be uncomfortable learning and asking questions about their bodies with members of different genders present. Additionally, the Policy would out Ms. Boe as transgender to the class of boys, risking her humiliation, violating her privacy, and even creating a potentially dangerous situation. *Supra* II.A.1.

Other courts have recognized that privacy concerns advanced in support of bathroom sex segregation are based on misconceptions and prejudices about transgender people. See, e.g., *Grimm*, 972 F.3d at 608; *Highland*, 208 F. Supp. 3d at 875; *Evancho*, 237 F. Supp. 3d at 278. In fact, the Board has acknowledged the importance of permitting transgender students to use bathrooms that align with their gender and has chosen to not segregate bathrooms based on sex assigned at birth. R. at 4. This demonstrates the Board's understanding that misconceptions and prejudices cannot validly support government segregation.

