

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

TEAM 1 Petitioner

1. [REDACTED] Title IX
2. [REDACTED] Title IX and Equal
Protection Clause
3. [REDACTED] Equal Protection
Clause

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QUESTION PRESENTED

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

PRELIMINARY STATEMENT

This case concerns an alleged discrimination against the Petitioner, a middle school student enrolled at a federally funded middle school, based on her transgender status. At its heart, it involves the question of whether a federally funded middle school can assign students to male- and female-tailored human sexuality classes based on their biological sex without violating Title IX and the Equal Protection Clause.

The Board's Policy violates Title IX of the Education Amendments Act of 1972 because the Petitioner establishes a prima facie case of discrimination under Title IX by showing that she was subjected to sex discrimination in an educational program that receives federal assistance. Furthermore, the harm she received from the Policy is imminent, certain, and great.

The Board's Policy also violates the Equal Protection Clause of the Fourteenth Amendment. The Policy is considered as "sex-based discrimination" under the EPC and should be subjected to heightened scrutiny for judicial review. As the policy fails

the “exceedingly persuasive” standard under the heightened scrutiny review, the petitioner's EPC violation claim is reasonably likely to succeed.

STATEMENT OF FACTS

Boe and her family moved to the Dune district in June 2023. She is 12 years old and was enrolled at Dune Junior High School (“the school”), a federally funded middle school, as a seventh grader in September 2023. Boe was born with male biological traits and at the age of seven, she told her parents that she was a girl despite being assigned “male” on her birth certificate. Boe’s parents espoused Boe’s feelings and regarded Boe as a girl ever since. As of today, Boe is not currently taking puberty blockers or any other form of gender-affirming medical care. However, Boe and her parents plan to follow her doctor’s recommendations regarding future medical care.

In July 2021, the Dune District Board (“the Board”) unanimously passed a policy (“the 2021 policy”) that was specifically designed to curb discrimination against transgender students enrolled in the Dune district. However, the enacted policies did not address the question of whether transgender students can compete in athletic programs or participate in human sexuality classes in accordance with their gender identity. In December 2022, the Board enacted a policy (“the 2022 policy”) mandating all public schools within the Dune

Unified School District must offer accurate, age-appropriate, and evidence-based information about human sexuality to students in grades seven through ten. The 2022 policy also requires that instruction on human sexuality be provided separately for male and female students. Despite the 2021 policy requiring all Dune public schools to allow transgender students to access restrooms consistent with their gender identity, the 2022 policy showcased inconsistency with the Board's 2021 enactment and seems to deviate from the spirit of Title IX. The 2022 policy mandates students to be assigned to human sexuality classes according to the biological sex recorded on their original birth certificate.

At the school, Boe uses the girl's bathroom and changing facilities and is permitted to do so under the 2021 policy. Boe's classmates and teachers at the school refer to her by her correct pronouns and most of Boe's fellow students are unaware of her transgender status. However, Boe enrolled at the school after the 2022 policy was enacted and she was assigned as a "male" on her birth certificate. Consequently, she was assigned to the human sexuality classes designed for male students and must take the class with other fellow biologically male students enrolled at the school. Boe's parents are concerned with Boe's education, and more importantly, her health as a transgender female. Although the 2022 policy provides an opt-out option where parents can request in writing that their children do not

wish to participate in the human sexuality class, Boe's parents have stated that opting out of human sexuality instruction is not a suitable option for their family. Boe's parents firmly believe that Boe, like every other student at the school, should have access to professional teachers who can provide her with accurate and age-appropriate education on human sexuality. Also, they have claimed that it would be costly and burdensome for them to seek out alternatives to school-administered human sexuality education.

In October 2023, Boe's father filed suit on Boe's behalf against the Board. Boe's father first argued that the 2022 policy violated Title IX of the Education Amendments of 1972. The Board responded by arguing that Title IX allows federally funded schools to segregate students based on their biological sex for human sexuality education. Boe also argued that the 2022 policy violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by treating transgender students differently without affirmatively showing a compelling basis. The Board responded by citing the importance of student privacy and how providing separate instructions based on students' biological sex would best serve the government's interest. The District Court ruled that the 2022 policy does not violate Title IX or the Equal Protection Clause. Boe appealed, making the same arguments before the Thirteenth Circuit Court.

The Thirteenth Circuit affirmed the District Court's decision and the Petitioner appealed.

ARGUMENT

I. The Application of the Policy on Human Sexuality Education Violates Title IX of the Education Amendments Act of 1972

Title IX provides: "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", see 20 U.S.C. § 1681(a). Congress enacted Title IX for two main purposes: to avoid the use of federal resources to aid educational programs with discriminatory practices and to protect individuals against such practices, see *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979). To establish a prima facie case of discrimination under Title IX, a plaintiff must show that "(1) that he or she was subjected to discrimination in an educational program, (2) that the program receives federal assistance, and (3) that the discrimination was on the basis of sex", see *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 295 (W.D. Pa. 2017).

A. Boe Was Subjected to Discrimination in an Educational Program Based on Sex

The Majority of the Court of Appeals argues that the term "sex," at the time Title IX was enacted "referred to *physiological* distinctions between males and females -

particularly with respect to their reproductive functions.”
Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 632 (4th Cir. 2020). Title IX carve-outs allow sex-segregated living facilities such as locker rooms, toilets, and shower facilities, see 20 U.S.C. § 1686. Therefore, if “sex” were ambiguous enough to include “gender identity,”, then this carve-out, as well as the various carve-outs under the implementing regulations, would be rendered meaningless as *Adams* suggests and the appellate court ultimately concluded. See *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 813 (11th Cir. 2022). Based on this logic, the Majority says that the inclusion of a specific exception for sex-segregated living facilities within Title IX suggests a clear understanding by the statute's authors that “sex” refers to biological and reproductive distinctions. According to them, introducing ambiguity into the term “sex” would contradict the statute's intent and the common definition found in numerous dictionaries, which align “sex” with biological characteristics. *Id.*

However, the Majority’s opinion is flawed because Title IX does not provide its readers with a definition of the term “sex”. When a term is not defined by the statute, courts typically look at dictionary definitions to figure out its meaning, see *State v. Corcilius*, 294 Or. App. 20, 23, 430 P.3d 169, 171 (2018). Since dictionaries at the time when Title IX

was enacted defined "sex" in various ways, the definition of sex is ambiguous and cannot just be limited to "biological sex" or "sex assigned at birth", see *Bd. of Educ. of the Highland Loc. Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 866 (S.D. Ohio 2016). Although courts first look at the text of a statute to interpret its meaning, they also consider its relationship with existing legislation when the text is ambiguous, see *Brocuglio v. Thompsonville Fire Dist. #2*, 190 Conn. App. 718, 736, 212 A.3d 751, 763 (2019). Title IX's prohibition of sex discrimination is "generally viewed as being parallel to the similar proscriptions contained in Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of "sex" in the employment context", see *Evancho* 237 F. Supp. 3d at 296. Since the Supreme Court has found Title IX and Title VII cases to be analogous, Title VII cases are instructive, see *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534 (3d Cir. 2018).

A review of landmark Title VII cases shows that discrimination based on transgender status is sex discrimination in violation of Title VII. In 1989, the U.S. Supreme Court held that sex stereotyping can be used as a basis for sex discrimination. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 1791, 104 L. Ed. 2d 268 (1989) ("we are beyond the day when an employer could evaluate employees by

assuming or insisting that they matched the stereotype associated with their group"). The term "sex" in *Price Waterhouse* includes both biological sex and gender identity, see *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). Therefore, the Majority's argument against reliance on *Price Waterhouse*, which limits "sex" to biological sex, fails. Because transgender people, by definition, do not fit the stereotypes of their gender, discrimination against transgender people is a Title VII violation based on *Price Waterhouse*, see *Finkle v. Howard Cnty.*, Md., 12 F. Supp. 3d 780, 788 (D. Md. 2014). In 2020, the U.S. Supreme Court also held that discrimination against transgender people is sex discrimination in violation of Title VII, see *Bostock v. Clayton Cnty.*, Georgia, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

Since then, courts have been applying the holding in *Bostock* to Title IX cases. For example, the Seventh Circuit held that denying a transgender student's gender-affirming bathroom access violates Title IX because it is sex discrimination based on *Bostock*, see *M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023). In the present case, the 2022 Policy denies Boe from having access to gender-affirming human sexuality classes. Based on the similarity of the facts, the holding of *M.C. v. Metro. Sch. Dist. of Martinsville* should apply to the present case as well. The Majority states that

allowing access would put the privacy and safety of girls at risk, without providing any evidence showing that Boe's access to female human sexuality classes poses such risks, see *Boe v. Dune Unified Sch. Bd.*, 123 F.7th 45 (13th Cir. 2023). Without such evidence, other courts have rejected this argument, see *Hobby Lobby Stores, Inc. v. Sommerville*, 2021 IL App (2d) 190362, ¶ 40, 186 N.E.3d 67, 83 (rejecting the argument that banning transgender women from women's bathroom was necessary for the protection of women as baseless). Furthermore, there is no reason to believe that the privacy and safety of girls would be more at risk from allowing access to gender-affirming human sexuality classes than bathrooms. See *Hoover v. Meiklejohn*, 430 F. Supp. 164, 170 (D. Colo. 1977) ("If the purpose of the exclusionary rule is the protection of health, safety, and welfare of the students, it is arbitrary to consider only the general physiological differences between males and females as classes without any regard for the wide range of individual variants within each class"). On the other hand, by making Boe feel unwelcome and putting him under scrutiny from other students, the 2022 Policy threatens Boe's safety, see *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 617-18 (4th Cir. 2020), as amended (Aug. 28, 2020). Boe was subject to sex discrimination based on her transgender status in an educational

program because of the 2022 Policy. Therefore, the first and the third prongs of discrimination under Title IX are satisfied.

B. The Board's 2022 Policy Receives Federal Assistance

The Board is an elected body that represents the town of Dune. It oversees the educational policy of the town and its public school system. Public schools are funded by local, state, and federal governments. Since the Board receives federal assistance, the second prong of discrimination under Title IX is satisfied.

Since all three elements of discrimination under Title IX are satisfied, a prima facie case has been established, and the application of the Policy on Human Sexuality Education violates Title IX of the Education Amendment Acts of 1972.

C. Boe Suffers from Certain, Great, and Imminent Harm from the 2022 Policy

To prevail in a Title IX claim, the plaintiff must demonstrate, in a school setting, that (1) she was excluded from an educational program based on sex; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that improper discrimination caused her harm. See *B. P. J. v. W. Virginia State Bd. of Educ.*, 649 F. Supp. 3d 220 (S.D.W. Va. 2023). To demonstrate harm suffered in (3), the plaintiff "must show that the harm is certain and great and of such imminence that there is a clear and present need for

equitable relief." *Iowa Util. Bd. v. Federal Comm Commn*, 109 F.3d at 425. See also *S. A. v. Sioux Falls Sch. Dist.*, No. 4:23-CV-04139-CBK, 2023 WL 6794207, at *3 (D.S.D. Oct. 13, 2023). Furthermore, in *S.A. v. Sioux Falls Sch. Dist.* the Eighth Circuit held that athletes suffer irreparable harm when they cannot participate in their sport while Title IX litigation is ongoing. See *S.A. v. Sioux Falls Sch. Dist.*, No. 4:23-CV-04139-CBK, 2023 WL 6794207, at *3 (D.S.D. Oct. 13, 2023). To demonstrate harm in Title IX cases, the plaintiff needs to demonstrate that the harm must be irreparable and that there exist no alternative remedies other than injunctive relief. *Id.*

One could argue that the Court should distinguish *S.A. v. Sioux Falls Sch. Dist.* from the present case because the timing of Boe's litigation is different, and that such difference is crucial to render Boe's case resulting in lower degrees of urgency. In *S.A. v. Sioux Falls Sch. Dist.*, the athletes were barred from participating in competitions and filed a lawsuit *after* the tournaments began. Consequently, the athletes suffered immediate harm as they were actively barred from accolades and were deprived of the right to participate in athletic competitions when the litigation was ongoing. By contrast, Boe's situation, while also involving an exclusion based on gender identity, does not present the same degree of urgency or immediate harm as Boe's lawsuit was filed before the first

session of the human sexuality course. Concededly, even if Boe's lawsuit was filed after the human sexuality course had started, her chance of proving harm is tenuous. Boe, despite being identified as a female, did not take any anti-puberty medication or undergo gender-affirming treatment in the past. From this, Boe had not yet affirmatively changed her reproductive functions as a biological male. The facts presented in Boe's case confirmed that the purpose of Dune District's human sexuality education is to teach students the "topics of reproductive anatomy; puberty and the development of secondary sex characteristics", see *Boe*, 123 F.7th 45. It is unpersuasive for the Petitioners to argue that Boe, who possesses masculine reproductive traits and has no plan to undergo gender-affirmative treatment in the near future, will suffer detriments from studying with fellow students who also possess masculine reproductive traits. Thus, one could argue that Boe's situation, though framed as exclusion based on gender identity, lacks the substantive urgency and direct harm that necessitated relief in *S.A. v. Sioux Falls Sch. Dist.*

However, Boe suffers from imminent, certain, and direct harm from the 2022 Policy regardless of whether her complaint is filed before or after the start of the human sexuality class. Because of the Policy, Boe has to decide between participating in the male human sexuality class or opting out before the start

of the human sexuality class. Even before she has to make a decision, Boe has filed her complaint because she was discriminated against and her gender identity was rejected. She is already stressed and afraid of the possibility of having to attend male human sexuality classes. It was earlier established that Boe is a victim of sex discrimination based on her transgender status. To claim that a victim of discrimination did not suffer from imminent and certain harm is simply absurd. In fact, discrimination based on transgender status increases the chances of PTSD, depression, and suicidal thoughts, see Wilson et al., *The impact of discrimination on the mental health of trans*female youth and the protective effect of parental support*, National Library of Medicine, 2016, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5025345>.

After the start of the human sexuality class, the harm Boe would receive increases even more. Opting out would lead to Boe missing out on learning necessary information for her health, such as contraceptives and safe sex practices, as alternate options are too costly and burdensome. The fact that she is not currently going through gender-affirming medical care and could also learn something from male human sexuality classes does not erase the direct harm she would receive by not being able to learn about female-specific human sexuality information. Although such information would be even more useful to her in

the long-term, she still imminently benefits from it by learning more about her gender identity, which she is currently affected by. Furthermore, participating in the male human sexuality class would reveal Boe's transgender status to her fellow students, who are currently unaware. Being outed without consent leads to deterioration in mental health and a higher risk of substance abuse and being a victim of violence, see Kristen Fischer, *What Is Outing?*, WebMD, Dec. 5, 2022, <https://www.webmd.com/sex-relationships/what-is-outing>.

II. The Application of the Policy on Human Sexuality Education Violates the Equal Protection Clause of the Fourteenth Amendment

The Equal Protection Clause provides: "No State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1. The Equal Protection Clause essentially prevents "intentional and arbitrary discrimination". *Sioux City Bridge Co. v. Dakota Cnty., Neb.*, 260 U.S. 441, 445, 43 S. Ct. 190, 191, 67 L. Ed. 340 (1923). The Supreme Court has long established that gender stereotyping is a form of sex discrimination. See *Price Waterhouse*, 490 U.S. 228, 251, 109 S. Ct. at 1791. The first, sixth, ninth, and eleventh circuits have all held that discrimination based on transgendered status falls under the category of sex discrimination. See *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 714 (D. Md. 2018).

Respondent's policy of deciding which human sexuality class a student may enroll in is based on the sex assigned to the student at birth. Transgender students who fail to conform to sex-based stereotypes are treated differently. Therefore, the school denying Boe her enrollment in the human sexuality class due to her transgender status is, without question, a sex-based classification. Discrimination against Boe's gender non-conformity is considered "sex discrimination" under the Equal Protection Clause.

A. Heightened Scrutiny Should be Applied Because Transgender Individuals are Considered to be a Quasi-suspect Class

Heightened Scrutiny should be applied in this case due to sex-based discrimination against a quasi-suspect class. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. at 440-41, 105 S.Ct. 3249. To judge whether a state action is lawful, courts often ruled that classifications are lawful as long as they are rationally related to state interest. *Id.* at 440, 105 S.Ct. 3249. This process often uses a rational basis review. See *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). As both the petitioner and respondent have conceded, however, heightened scrutiny, or intermediate scrutiny, should be applied. See *Boe*, 123 F.7th 45. Under the Equal Protection Clause, policies that target a suspect or a quasi-suspect class are subjected to heightened scrutiny. See *Cleburne*, 473 U.S. at

440-41, 105 S.Ct. 3249. The Majority made an incorrect statement regarding transgender not constituting a quasi-suspect class. See *Boe* 123 F.7th 45 (13th Cir. 2023). Whether a group is identified as a quasi-suspect class is determined by a four-factor test established by the Supreme Court. See *M.A.B.* 286 F. Supp. 3d at 719. Many courts have held that the transgendered community does meet all four factors and is considered a quasi-suspect class. See *M.A.B.* 286 F. Supp. 3d at 721. See also *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 952 (W.D. Wis. 2018). See also *Ray v. McCloud*, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020). See also *Bd. of Educ. of the Highland Loc. Sch. Dist.* 208 F. Supp. 3d at 872.

The first factor is whether the class has been historically "subjected to discrimination," *Bowen v. Gilliard*, 483 U.S. 587, 602, 107 S.Ct. 3008, 97 L.Ed.2d 485 (1987). Transgender people are a group that has faced such discrimination historically. See *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017). Individuals in this class report "high rates of discrimination in education, employment, housing, and access to healthcare". *M.A.B.*, 286 F. Supp. 3d 704, 720 (D. Md. 2018).

The second factor is whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society," *Cleburne*, 473 U.S. at 440-41,

105 S.Ct. 3249. Here, courts have not found any evidence suggesting that transgender individuals or persons experiencing dysphoria are less productive to society. See *M.A.B.* 286 F. Supp. 3d 704, 721. See also *Bd. of Educ. of the Highland Loc. Sch. Dist.* 208 F. Supp. 3d at 874.

The third factor asks whether the class exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group;” *Bowen*, 483 U.S. at 602. As many courts have concluded, transgendered status is obvious and immutable, and their defining characteristic is that their gender identity is different from the gender assigned at birth. See *M.A.B.* 286 F. Supp. 3d 704, 721; *Evancho*, 237 F.Supp.3d at 288; *Norsworthy v. Beard*, 87 F.Supp.3d 1104, 1120 (N.D. Cal. 2015); *Adkins v. City of New York*, 143 F.Supp.3d 134, 139 (S.D.N.Y. 2015).

The fourth factor is whether the class is “a minority or politically powerless.” *Bowen*, 483 U.S. at 602. Transgender individuals are considered a minority as they are only a small fraction of the American population, making up only 0.6% of the American Population. *M.A.B.*, 286 F. Supp. 3d at 721. (quoting *Doe 1 v. Trump*, 275 F.Supp.3d 167, 209 (D.D.C. 2017)). Therefore, Transgender individuals should be considered as a quasi-suspect class, and heightened scrutiny (or intermediate scrutiny) is the appropriate standard.

B. The 2022 Policy Does Not Meet the "Exceedingly Persuasive" Standard Set By Heightened Scrutiny.

The heightened Scrutiny standard would require the respondent to demonstrate that its policy on sex classification in its human sexuality classes must be "exceedingly persuasive". *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). The exceedingly persuasive justification requires that the respondent demonstrate that enforcement of such discriminatory policy will further significant government interests and that such justification must be genuine. *Id.* at 533, 116 S.Ct. 2264.

a. Advancing the Health of Young Students is Not a Genuine Justification.

Advancing the health of young students is likely a legitimate governmental interest. *Boe*, 123 F.7th 45. The board would argue that they are furthering this interest by providing students with accurate, age-appropriate, evidence-based information specifically related to their anatomical characteristics. *Id.* *Boe*, despite being identified as a female, did not take any anti-puberty medication or undergo gender-affirming treatment in the past. From this, *Boe* has not yet affirmatively changed his reproductive functions as a biological male. The 2022 policy aims to enhance sexual health awareness in the Dune School District and sexual health is more closely related to biological traits than gender identity. *Boe Bd.*, 123

F.7th 45. Therefore, the 2022 policy embodies a strong government interest to provide tailored human sexuality education to all students with respect to their masculine and feminine sexuality traits. However, it is important to note that Boe is only twelve years of age. She is too young to receive puberty blockers, Hormone Therapy, and gender-affirming surgeries. See HHS Office of Population Affairs, *Gender Affirming Care and Young People*, 2023, <https://opa.hhs.gov/sites/default/files/2023-08/gender-affirming-care-young-people.pdf>.

Even if the policy is furthering the government's interest in advancing the health of the student, the justification is not genuine. A justification that is "based upon sheer conjecture and abstraction" will not satisfy this requirement. *Whitaker*, 858 F.3d at 1052. The board provided no evidence on how this governmental interest is limited by not allowing Boe to enroll in the female human sexuality class. Since Boe has the intention to take medical care conforming to her gender identity, it would be beneficial to her health that she receives information regarding female anatomical characteristics. While it is true that there is no concrete evidence suggesting that enrollment in the female sexuality class is more beneficial to Boe's health than the male sexuality class, there is no evidence to suggest the opposite either. It is not necessary to prove that

enrollment in female sexuality classes is better; the appellant simply needed to show that the government's interest is not genuine.

In addition, Boe's health is actually undermined when the 2022 policy is enforced. By prohibiting Boe from attending the female human sexuality class, she is likely to suffer genuine educational and/or emotional harm. If Boe decides to opt out of the instruction altogether, she would be missing out on important information regarding sexuality topics. This is not suitable for her family and does not further the government's interests. On the other hand, if Boe is forced to enroll in the male sexual class, she might suffer emotional damage. Currently, the policy related to transgender students enacted in July 2021 allows transgender students to access bathrooms and participate in sex-aggregated school athletics. In other words, the 2021 policy allows Boe to live her entire school life according to her gender identity besides attending the human sexuality class. There are only a few students in the class that are aware of Boe's transgender status. By enforcing the human sexuality policy, every one of Boe's classmates will become aware of Boe's gender identity. As stated in the undisputed facts, Boe is not prepared for her entire class to know her status as a transgender individual. This would make the seventh grader uncomfortable, likely causing emotional pain and other distress.

Evancho, a transgender female student, felt “unsafe, depressed, marginalized and stigmatized by, among other things, the School's requirement that she use only either the boys' restrooms or the single-user restrooms at the High School”.

Evancho 237 F. Supp. 3d at 274. Compared to Evancho who is 17 years old, Boe is only 12 years of age, implying a weaker emotional capacity. *Id.* Moreover, the 2021 policy also included gender identity as an enumerated policy in the district's anti-bullying policies. The specific purpose of the 2021 policy directly contradicts the human sexuality instruction policy. The 2021 policy has actually encouraged bullying against transgender students, though likely as an unintended consequence. By making it easier to identify transgendered students through the mismatch between human sexuality class enrollment and their gender identity, immature middle school students are more likely to have a target for bullying. See Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Center for Transgender Equal., at 33, 2011, http://www.transequality.org/sites/default/files/docs/resources_/NTDS_Report.pdf (Students who identify as transgender or gender non-conforming in grades K-12 reported a harassment rate of 78%, a physical assault rate of 25%, and a sexual assault rate of 12%).

b. Protecting Students' Safety and Privacy Rights is Also Not a Genuine Justification

Respondent may argue that another legitimate governmental interest is to protect students' safety and privacy rights. See *Whitaker*, 858 F.3d 1034, 1052. Similarly, this justification, though legit, is not genuine. Courts have held that denying transgendered students locker room or bathroom access based on their current sexual orientation is not exceedingly persuasive and not substantially related to safety or privacy rights. See *Whitaker*, 858 F.3d 1034, 1052 ("A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions"). See also *M.A.B.* 286 F. Supp. 3d at 721. See also *Evancho*, 237 F. Supp. 3d 267, 274. Considering the lack of adult supervision and the principal function of these locations, bathrooms and locker rooms pose much greater concern for students' safety and privacy than classrooms. Especially with the presence of teachers and/or other adults, the threat for safety or privacy in a classroom setting should be minimal. Students are simply sitting down in a chair, in front of a desk, and learning about sexuality topics. Physical contact, privacy invasion, or even interactions between students are much less likely in the classroom than in bathrooms

or locker rooms. It is pure conjecture that the presence of Boe in the classroom poses any sort of threat to other students enrolled in the class.

CONCLUSION

Considering the facts and the law stated above, the Petitioner, Jane Boe, respectfully asks the U.S. Supreme Court to reverse the decision of the Thirteenth Circuit and hold that the Policy violates both Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

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