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Questions Presented

1. Whether the Dune Unified School District Board's Policy on Human Sexuality Education, as applied to Petitioner Jane Boe, discriminates on the basis of sex in violation of Title IX of the Education Amendments Act of 1972.
2. Whether the Policy's classification of students into sex education classes based on their biological sex violates Boe's rights under the Equal Protection Clause of the Fourteenth Amendment.

Opinion Below

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

Constitutional Provisions and Rules

U.S. Const. amend. XIV

20 U.S.C. § 1681

20 U.S.C. § 1681(a)

20 U.S.C. § 1686

42 U.S.C. § 2000e-2(a)(1)

Introduction

This case requires the Court to evaluate the Title IX and Equal Protection implications of a middle school human sexuality education policy that requires boys and girls to attend separate sexual education classes based on their biological sex. The policy before the court, Resolution 2022-14, was passed

unanimously by Respondent Dune Unified School District Board in December 2022.

Resolution 2022-14 does not discriminate against Petitioner Boe based on her sex in violation of Title IX. Sex-separated sexual education classes are expressly permissible under the Title IX regulations, which Petitioner Boe has not challenged. Title IX's legislative history and the common meaning of the word "sex" in 1972 indicate that "sex" as used in Title IX refers to biological sex, and Boe is not being impermissibly discriminated against based on biological sex. Even if "sex" under Title IX also means "transgender status," "gender" or "gender identity" the regulations allow schools to classify student by their sex, therefore absolving the Board of any Title IX liability.

Resolution 2022-14 likewise does not discriminate against Boe on the basis of sex or transgender status in violation of the Equal Protection Clause of the Fourteenth Amendment. The Policy does not classify students according to transgender status, only according to biological sex. Even if it did, such classification would be subject only to rational basis review because transgender persons are not a wholly homogenous and disenfranchised group and therefore do not satisfy this Court's suspect classification test. The Policy is instead, on its face, a sex-based classification subject to heightened review. The

Policy has an exceedingly persuasive justification that satisfies heightened review because the Board has an important interest in supporting its student's health through accurate knowledge of their anatomies that is substantially related to the Board's decision to separate sexual education classes by biological sex.

Statement of the Case

In December 2022, the Dune Unified School District Board ("the Board") unanimously passed Resolution 2022-14 ("the Policy") "to protect and advance the individual and public health of young Dune residents" and remedy the "inconsistent" "provision of human sexuality education across Dune public schools." R. at 3-4. The Policy mandates that this education "shall be provided separately for male and female students . . . according to . . . biological sex as . . . recorded on [each student's] original birth certificate." R. at 3.

The Policy has four major provisions. First, "age-appropriate and evidence-based" human sexuality education is required at all Dune public schools for "grades seven through ten." R. at 3. Second, human sexuality instruction "must cover" "reproductive anatomy; puberty and the development of secondary sex characteristics; healthy relationships . . . safe sex practices and the use of contraceptives; HIV and other sexually transmitted infections; [and] reproductive health care,

including preventative care and self-screening for early detection of cancer and other conditions.” R. at 3. Third, Dune schools “must tailor instruction . . . according to anatomical and physiological characteristics, and the unique experiences and health care needs associated with these characteristics.” R. at 3-4. Information equally relevant to both sexes may be provided to both classes. R. at 4. Fourth, schools must “notify parents and guardians” before instruction begins and provide them an opportunity to opt-out. R. at 4.

The Board firmly believes that transgender students are important and valued members of the Dune community. In 2021, the Board passed a resolution designed to address some of the challenges that transgender students may face while at school. R. at 4. It requires all public schools in Dune to prohibit bullying of transgender students, allows transgender students use of the bathroom of their choice, and allows students through eighth grade to choose which athletic team to play for.

Petitioner Jane Boe, a transgender female assigned male at birth, claims that by assigning her to the boy’s sexual education class the Board has unlawfully discriminated against her under Title IX and the Equal Protection Clause. R. at 4. Boe “is not currently taking puberty blockers or any other form of gender-affirming medical care.” R. at 4. This means that twelve-year-old Jane, despite her gender identity and the support of

her parents, teachers, and friends, will soon begin to develop secondary sex characteristics. For Jane, those changes will be even more difficult and pronounced than for her cisgender peers, because she will begin to develop *male*, rather than female, secondary sex characteristics. Due to these impending physical changes, it is vital that Boe be provided education on male anatomy and physiology so she understands what changes are normal, and which are abnormal so that she may detect changes indicative of infections, viruses, or cancers. Dune's Policy aims to do just that, in compliance with the requirements of both Title IX and the Equal Protection Clause.

In October 2023, Jane Boe's father filed the present suit in the federal district court on her behalf, asserting the claims that (1) the School Board's policy for instruction on human sexuality violated Boe's rights under Title IX of the Education Amendments Act of 1972, and (2) the same Policy violates the Equal Protection Clause of the Fourth Amendment to the U.S. Constitution. The District Court rejected Boe's claims and granted summary judgment in favor of the Board. The United States Court of Appeals for the Thirteenth Circuit affirmed the district Court's judgment. The Court of Appeals held that Title IX refers to physiological differences between males and females, and that protecting and advancing the public health of

young Dune residents is an exceedingly persuasive justification. Boe appeals the judgment entered on both claims.

Argument

- I. **The Policy does not discriminate against Boe in violation of Title IX because sex-separated sex education classes are explicitly lawful, the term "sex" does not incorporate transgender status, and the Bostock opinion is not controlling because Title VII's "because of" language differs from Title IX's "on the basis of."**

Boe argues that Dune's Policy discriminates against her based on sex. For her to prevail on this claim, transgender persons must fall within the purview of "sex" as the term is used in Title IX. They do not, and the Board's Policy does not violate Title IX for three reasons. First, the Policy falls squarely within an unchallenged regulatory exception to Title IX. Second, Title IX's structure and historical context indicate that "sex" refers to "biological" sex, and because Boe is assigned to a sex education class in accordance with her biological sex, there is no sex discrimination. Third, *Bostock v. Clayton County's* reasoning is inapplicable here because Title IX's language precludes use of *Bostock's* but-for causation standard, and the question this court answered in *Bostock* (is discrimination because of transgender status sex discrimination) is the converse of the question presented in this case.

Title IX states "[n]o 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 assistance." 20 U.S.C. §1681(a). Title IX was enacted in 1972, following extensive hearings on discrimination in education during which over 1200 pages of testimony were gathered documenting "massive, persistent patterns of discrimination against women" in colleges and universities. See *Nat'l Wrestling Coaches Ass'n v. U.S. Dept. of Educ.*, 263 F. Supp. 2d 82, 87 (D.D.C. 2003), *aff'd sub nom. Nat'l Wrestling Coaches Ass'n v. Dept. of Educ.*, 366 F.3d 930 (D.C. Cir. 2004). Title IX has two objectives: "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704, (1979). Title IX's legislative history plainly shows it was passed to address discrimination against women.

- A. The Policy falls squarely within a Title IX regulation allowing sex-segregated instruction in secondary school human sexuality classes.

Dune's Policy complies with Title IX because sex-separated sexual education classes are expressly permitted by the Title IX regulations, which Boe has not challenged.

Although education programs and activities may not generally be carried out separately on the basis of sex, secondary school classes dealing primarily with human sexuality are exempt from this requirement. 34 C.F.R. § 106.34(a)(3). Elementary and

secondary schools are free to conduct human sexuality instruction using separate class sessions for "boys and for girls," and the Board has permissibly decided to do so. *Id.* Because Boe has not challenged the validity or constitutionality of Title IX's regulations, she may not now challenge them on appeal. *Puckett v. United States*, 556 U.S. 129, 134 (2009).

Dune's Sex Ed Policy complies with Title IX because Dune's Sex Ed Policy governs classes in elementary and secondary schools and the class content deals primarily with human sexuality. The Policy explicitly requires classes that offer "evidence based information about human sexuality to students in grades seven through ten." The topics covered in the class include "reproductive anatomy, puberty . . . sexual and emotional abuse, . . . safe sex practices and the use of contraceptives, HIV and other sexually transmitted infections, and reproductive healthcare, including preventative care and self-screening," all topics that deal with human sexuality. R. at 3. Thus, Dune's Policy falls plainly within an exception to Federal Regulation 106.34(a)'s general rule.

- B. Since Title IX was passed to remedy discrimination against women and girls in education, it made sense for Congress to use the word "sex" to mean "biological sex."

The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. *Robinson v.*

Shell Oil Co., 519 U.S. 337, 340. (1997). The plainness or ambiguity of statutory language is determined by references to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole. *Id.* at 341.

If a statute is ambiguous, a court engages in statutory construction. A fundamental canon of statutory construction is that words will be interpreted as taking their ordinary, contemporary, common meaning. *Perrin v. U.S.*, 444 U.S. 37, 42 (1979). To determine the "ordinary meaning" of an ambiguous word, courts frequently "look[] at dictionaries in existence around the time of enactment." *United States v. Chinchilla*, 987 F.3d 1303, 1308 (11th Cir. 2021) (quoting *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1026 (11th Cir. 2016)). Therefore, to interpret the ordinary meaning of "sex" as used in Title IX, the court must look to the dictionary definitions of "sex" when Title IX was enacted in 1972. See *Wis. Cent. Ltd. v. United States*, --- U.S. ---, 138 S. Ct. 2067, 2070, (2018).

Reputable dictionary definitions of "sex" from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of "sex" in education, it meant biological sex, i.e., discrimination between males and females. See *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022). Six dictionaries published between

1969 and 1980 clearly defined "sex" as biological sex in reference to reproductive function and made no mention of gender identity or an equivalent concept. See *Id.* The 1968 Black's Law Dictionary defined "sex" as: "the sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female." *Sex, Black's Law Dictionary* (4th rev. ed. 1968).

Furthermore, Black's Law Dictionary definitions of "sex discrimination" and "gender discrimination" demonstrate that the terms were synonymous until well into the twenty-first century. The words "sex" and "gender" were completely absent from Black's definition of "discrimination" in 1968. *Discrimination, Black's Law Dictionary* (4th rev. ed. 1968). In 1999, the Seventh Edition added a definition for "sex discrimination" which stated "[d]iscrimination based on gender, especially against women - also termed gender discrimination." *Discrimination, Black's Law Dictionary* (7th ed. 1999). It was not until 2014 that the definition added "[t]he terminology is gradually shifting. Increasingly in medicine and sociology, gender is distinguished from sex. Gender refers to the psychological and societal aspects of being male or female; sex refers to the physical aspects." *Discrimination, Black's Law Dictionary* (10th ed. 2014). Dictionaries around the time of enactment provide conclusive evidence that "sex" was biological regarding an organism's

reproductive function, and legal dictionaries did not distinguish between sex and gender discrimination either.

Further evidence that "sex" refers to "biological sex" is found within Title IX's statutory carve-outs. Title IX makes a statutory exception that allows for "separate living facilities for the different sexes." 20 U.S.C. §1686. This exception would be rendered meaningless if transgender persons were permitted to live in both facilities - one corresponding to their biological sex and the other corresponding to their gender identity. *Adams*, 57 F.4th at 813. The Adams court concluded that such a reading of Title IX "ignores the overall statutory scheme and purpose of Title IX [...]." *Id.*

Dune's Sex Ed Policy does not discriminate against Boe because Boe's biological sex is male, and she is being offered access to high-quality education based on her sex. By asking the court to add the protections of Title IX to a class for which it was not intended, Jane Boe asks the court to step into the shoes of Congress. Title IX was drafted as a result of "over 1200 pages of testimony", documenting "massive, persistent patterns of discrimination against women." Title IX was a statute written to protect women from discrimination in education. The statute's unambiguous language of the time combined with the statutory carve-outs reflect this purpose. At the time of Title IX's enactment, "sex" was understood to refer to "biological sex."

When Congress drafted Title IX's text, it intended this interpretation of the word. For "sex" to include our modern understanding of gender identity or transgender status would run counter to its ordinary meaning in 1972 and the overall statutory purpose of Title IX.

- C. The Court's opinion in *Bostock* does not help Boe's case because The Board's Policy separates students by biological gender and not transgender status, and thus does not in any way consider transgender status.

Although the Supreme Court has recently spoken on the meaning of "sex" in Title VII, that reasoning cannot be indiscriminately applied to "sex" in the Title IX context. The language of Title VII forbids certain employment action made "because of [...] sex," which this Court has interpreted as a but-for test (meaning that a defendant cannot cite some other reason to justify its discriminatory employment action). 42 U.S.C. § 2000e-2(a)(1); see also *Bostock v. Clayton County*, 590 U.S. ---, 140 S.Ct. 1731, 1739 (2020). Title IX, on the other hand, disallows discrimination "on the basis of sex," foreclosing the importation of the but-for analysis. By failing to acknowledge the different phrases Title VII and Title IX employ, the Court "would risk amending [the] statutes outside the legislative process reserved for the people's representatives." *Id.* at 1738.

In *Bostock*, the Supreme Court considered whether, under Title VII, an employer may fire someone for their sexual orientation or transgender status. *Id.* at 1737. This Court concluded “an employer violates Title VII when it intentionally fires an individual employee based in part on sex.” *Id.* at 1741 (emphasis added). *Bostock* did not explicitly decide whether or not “gender” or “gender identity” are synonymous with “biological sex,” but did conclude that “homosexuality and transgender status are inextricably bound up with sex.” *Id.* at 1739, 1742. In other words, if an entity discriminates on the basis of sexual orientation (homosexuality) or gender identity (transgender status), the employer necessarily discriminates based on sex.

The converse is not necessarily true, however. If an entity discriminates based on sex, it does not necessarily discriminate based on sexual orientation or gender identity. See *Adams*, 57 F.4th at 809. In *Adams*, the court considered whether the practice of separating school bathrooms based on biological sex violated Title IX. *Id.* at 796. The court pointed out that the bathroom policy divided students into two groups, both of which included transgender students. *Id.* at 809. This division resulted in a “lack of identity” between the policy and the transgender status because gender-neutral bathrooms are equivalent to those provided to all students of the same biological sex. *Id.*

Dune's Policy does not discriminate against Boe for being a transgender person because it divides students into two groups based on sex, and transgender students are present in both groups. A transgender student may be born as either male or female, and the Policy assigns them to the appropriate classroom. Regardless, the Policy ensures that all classes are given access to the same high-quality sex education.

If this court should find that Dune's Policy discriminates based on transgender status, then the Board would still not have violated Title IX because no impermissible sex discrimination has occurred. Unlike Title VII, Title IX is subject to numerous exceptions and regulations. In *Bostock*, this Court concluded that discrimination based on transgender status results in sex discrimination running afoul of Title VII. The same analysis is not applicable here, because the Board properly passed the Policy under Section 106.34(a)(3).

Since Boe cannot show that the meaning of "sex" incorporates "transgender persons" and because the Board properly crafted the policy to comply with Title IX and its regulations, Boe cannot prevail on her Title IX claim.

II. The Policy does not violate Boe's rights under the Equal Protection Clause because transgender persons are not a quasi-suspect class and the Board's permissible sex-based classification is related to an important government interest in students' physical health.

Boe's claim that Dune's Policy violates the Equal Protection Clause of the Fourteenth Amendment fails. The Policy does not intentionally classify students based on their transgender status, but even if it did, being transgender does not itself entitle Boe to heightened review. Transgender persons do not satisfy this Court's test for granting suspect or quasi-suspect status, and this Court has been increasingly reluctant to expand those classifications. Furthermore, the Policy easily passes both rational review and heightened scrutiny. The Board has a vital interest in providing high-quality sex education to its students to support their biologically-informed "unique experiences and health care needs," and that interest is intrinsically related to the Board's constitutionally valid separation of boys' and girls' sex education classes. R. at 4.

- A. Dune's Policy is not subject to intermediate scrutiny because transgender persons fail to meet this Court's suspect classification test, and the Policy passes rational basis review because sex-segregated classes are rationally related to the School Board's interest in providing anatomically accurate sexual education.

Boe contends that the Policy must be reviewed under intermediate scrutiny due to its discriminatory effect on her transgender status, but as both the District Court and Thirteenth Circuit correctly concluded, transgender people are not a quasi-suspect class under this Court's jurisprudence. R. at 8. The Policy is therefore subject to rational basis review

as to any discriminatory effect on transgender individuals and easily satisfies this standard because placing Boe, who was born male, in a male sex education class is rationally related to the Policy's objective of providing high quality and anatomical and physiologically relevant sex education to students.

- i. Boe's transgender identity does not entitle her to heightened scrutiny because transgender people fail to meet this Court's highly restrictive suspect classification test.*

Transgender people are not a quasi-suspect class because they do not have the characteristics required to satisfy this Court's suspect classification test, and this Court has declined to expand quasi-suspect classifications under heightened review. The Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Texas, v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Courts "allow[] the States wide latitude" "when social or economic legislation is at issue," and generally uphold governmental actions that treat individuals differently so long as the action satisfies rational basis review, i.e. its means are rationally related to a legitimate state interest. *Id.* (citing *United States R.R. Retirement Board v. Fritz*, 449 U.S. 166, 174

(1980)). However, there are two major exceptions. A law that discriminates against a suspect class—race, alienage, or national origin—must be narrowly tailored and in furtherance of a compelling state interest to survive strict scrutiny. *Id.* A law that discriminates against a quasi-suspect class—against nonmarital children or on the basis of sex—must be substantially related to an important state interest to satisfy heightened review, also called intermediate scrutiny. *Id.* at 440-41. Transgender individuals are not protected under heightened review. Boe contends that transgender people should be treated as a quasi-suspect class, but this argument misunderstands this Court's use of the suspect classification test and ignores the Court's increasing reluctance recognizing additional classes entitled to heightened review.

Although this Court has created a test for determining whether new classes should be considered suspect or quasi-suspect, it has not expanded either classification in decades. *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 487-88 (6th Cir. 2023) (citing *Ondo v. City of Cleveland*, 795 F.3d 597, 603 (6th Cir. 2015)). To qualify for heightened review, a class must meet five requirements. See *Cleburne*, 473 U.S. at 442-46. The class must have a defining, immutable characteristic, but that characteristic cannot impede a person's ability to contribute to society. *Id.* The class must also have a history of

discrimination without any mitigating legislative action and totally lack political power, as evidenced by the lack of mitigating legislative action. *Id.* Finally, a court may not conflate individuals' differing experiences to create a new, overbroad suspect or quasi-suspect class. *See Id.*

Several federal circuit courts have applied incomplete suspect classification tests, and arrived at different results, in attempting to determine whether transgender people are a quasi-suspect class. The Fourth Circuit, for example, has granted transgender people quasi-suspect status using a synthesized four-factor test based on historical discrimination, characteristic impeding contribution to society, immutability, and lack of political power. *Grimm v. Gloucester County School Board*, 972 F.3d 586, 611, 613 (4th Cir. 2020) (first citing *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), then *Cleburne*, 473 U.S. at 440-41). The Sixth Circuit, however, has refused to grant transgender persons quasi-suspect status using a similar test based on a class's immutability and political power, any animus in passing the challenged law, and whether the law was drawn on "constitutionally irrational lines." *See Skrmetti*, 83 F.4th at 487-88. These opposite conclusions highlight the necessity of adhering to the test articulated by this Court, rather than the incomplete circuit court tests.

The suspect classification test articulated in *Cleburne* is a difficult standard to meet even in instances of unlawful discrimination. The *Cleburne* court found that the denial of a special use permit to a group home for the mentally impaired unlawfully discriminated against those with mental illnesses, but expressly rejected an application of heightened review. *Cleburne*. at 441. Although this Court recognized mental illness as a defining, immutable characteristic, it also acknowledged the governmental interest in laws concerning the mentally impaired due to their limited ability to contribute to society. *Id.* at 441-42. The mentally ill have experienced a history of discrimination but have also benefited from "distinctive legislative response" and therefore are not bereft of political power. *Id.* at 443. Finally, and perhaps most importantly the *Cleburne* court concluded the mentally ill were too "large and amorphous" a group to grant quasi-suspect status without impermissibly conflating individual's experiences. *Id.* at 445-46. Despite the mentally ill satisfying some factors of the suspect classification test, this Court still refused expand quasi-suspect classification.

Additionally, this Court has repeatedly refused to expand suspect or quasi-suspect classification. Leading up to *Cleburne*, this Court rejected heightened review for laws discriminating against the elderly (*Massachusetts Bd. of Retirement v. Murgia*,

427 U.S. 307, 313-14 (1976)), families receiving child support payments (*Lyng v. Castillo*, 477 U.S. 635, 638 (1986)), and the impoverished (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). Since *Cleburne*, this Court has also declined to apply heightened review to laws discriminating based on sexual orientation. See *Romer v. Evans*, 517 U.S. 620, 626-28 (1996) (holding removal of judicial protections from homosexuals in Colorado violates the equal protection clause using a form of rational review) and *Obergefell v. Hodges*, 576 U.S. 644, 669-76 (2015) (determining that forbidding homosexual marriage is inherently unconstitutional, but declining to expand quasi-suspect classifications to homosexuals). This Court has, for decades, refused to enlarge quasi-suspect classes, and nothing suggests this trend will change.

Transgender people do not satisfy this Court's five-factor suspect classification test. Being transgender could likely be considered an immutable characteristic and does not impede an individual's ability to contribute to society. However, like the legislative efforts on behalf of the mentally ill discussed in *Cleburne*, recent state legislative action has made great strides to abrogate much of the historical discrimination faced by transgender individuals. Eleven states and the District of Columbia have passed laws protecting access to transgender

healthcare,¹ and twenty-three states, the District of Columbia, and the United States Virgin Islands have all passed laws prohibiting housing discrimination based on gender identity.² This extensive legislative action also demonstrates that transgender people, like the mentally ill in *Cleburne*, do not totally lack political power. Today, transgender individuals have political power not only in state legislatures, but also in the United States House of Representatives.³ Finally, transgender individuals make up too large and varied a class for this Court to grant quasi-suspect status without conflating one class member's experiences with another. Gender is extremely connected to an individual's identity, and, just as people with mental impairments have a broad variety of experiences, one person's experience with being transgender likely differs significantly from another transgender person's experience. This spectrum of

¹ MOVEMENT ADVANCEMENT PROJECT, TRANSGENDER HEALTHCARE "SHIELD" LAWS, https://www.lgbtmap.org/equality-maps/healthcare/trans_shield_laws (last visited Feb.13, 2024).

²MOVEMENT ADVANCEMENT PROJECT, NONDISCRIMINATION LAWS, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Feb.13, 2024).

³See H.R. 269. 118th Congress (2024) (proposing a Transgender Bill of Rights).

experiences consequently makes it nearly impossible to sort transgender individuals into discrete classifications. Thus, transgender people as a class lack the political impotence or near-identical life experiences necessary to satisfy the Court's suspect classification test.

Under this Court's precedents, Boe's transgender status does not entitle her to heightened review. Transgender people do not have the characteristics required to satisfy this Court's suspect classification test, and this Court has refuted recent attempts to expand quasi-suspect status to any new classes.

ii. Dune's Policy passes rational basis review due to sex-segregated classes being rationally related to the School Board's interest in providing high quality, anatomically accurate sex education.

Since transgender people are not a quasi-suspect class, laws discriminating against transgender individuals need only pass rational basis review. Under this low standard, courts give law-making bodies great deference; a classification "must be upheld" so long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (citing *Fed. Comm'n Comm'n v. Beach Communications*, 508 U.S. 307 at 313 (1993)). Such laws are "presumed constitutional," and opponents of the law must "negative every single conceivable

basis which might support it." *Id.* (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

Dune's policy unquestionably passes rational review. Boe has not challenged the legitimacy of the Board's interest in providing high-quality sex education, nor has she refuted every possible relationship between that interest and sex-segregated sex education classes. As it relates to transgender individuals like Boe, this Court must defer to the Board and uphold the Policy.

- B. The Policy withstands heightened scrutiny under the Equal Protection Clause because its physiological classification of students is substantially related to the important government objective of providing anatomically accurate sex education.

Dune's Policy passes intermediate scrutiny because its separation of students into sexual education classes based on biological sex is substantially related to the Board's important interest in protecting students' health and welfare through education on their "anatomical and physiological characteristics." R. at 4. Therefore, even if transgender persons are a quasi-suspect class and even if the Policy classifies transgender students in a manner inconsistent with their gender identities, but not their anatomical characteristics, it does not violate the Equal Protection Clause.

Sex-based classifications may unquestionably be “consistent with the constitutional guarantee of equal protection.” *Nguyen v. INS*, 533 U.S. 53, 59 (2001). Such classifications warrant heightened scrutiny, which requires an “‘exceedingly persuasive justification’ . . . established ‘by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’” *Id.* at 60, 70 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). So long as this important governmental interest and substantial relationship are present, however, “the [policy] under consideration” need not “be capable of achieving its ultimate objective in every instance.” *Id.* at 70. Because Dune’s Policy is justified by biological realities, serves an important governmental interest in student health and physiological awareness, and its sex-based classification of students is substantially related to that interest, the Policy does not violate Boe’s rights under the Equal Protection Clause.

- i. The Policy does not deprive one sex of an educational opportunity or rely on gender stereotypes and therefore has an exceedingly persuasive justification.*

Dune’s Policy has an exceedingly persuasive justification because it is based on biological realities, not gender stereotypes. Schools may categorize students based on sex but “must not rely on overbroad generalizations about . . . males

and females," "denigrat[e] the members of either sex," or place "artificial constraints on an individual's opportunity." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Classifications founded on "basic biological differences," however, are "not marked by misconception and prejudice, nor [do they] show disrespect for either" sex. *Nguyen*, 533 U.S. at 72. Dune's Policy contains no stereotyping generalizations and does not denigrate or constrain either sex. Instead, it permissibly separates male and female students in recognition of their biological differences to improve human sexuality education for both groups.

A policy that entirely deprives one sex of a unique educational opportunity cannot rely on gender stereotypes as "exceedingly persuasive" support. In *United States v. Virginia*, the Virginia Military Institute (VMI) refused entirely to admit female students, claiming its "adversative [instructional] method" was "inherently unsuitable" to women as a class. 518 U.S. at 520, 540-41. This Court dismissed such concerns as "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* at 524, 533. Any potentially legitimate governmental interest in single-sex education aside, VMI's generalizations left one sex, women, totally deprived of the particular, unique, and prestigious educational opportunities available only at VMI. *See Id.* at 526-

530. Because male and female "tendencies" simply could not be used to close the "gates to opportunity," VMI's admissions policy failed to afford capable female applicants "genuinely equal protection" and was struck down. *Id.* at 532-33, 541, 557. Single-sex education is not a *per se* impermissible interest, but a government cannot rely on stereotypes to exclude one sex from educational benefits.

A governmental interest impacted by a genuine, biological difference between males and females, however, has a compelling justification to classify based on sex. *Nguyen v. INS* addressed the "difficult context of conferring citizenship" on foreign-born, non-marital children with only one U.S. citizen parent. 533 U.S. at 59-60, 70. Fathers faced more stringent requirements to pass on their U.S. citizenship, which was permissible because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Id.* at 63. Because Congress' "use of gender specific terms [took] into account a biological difference between the parents," not "some stereotype . . . resulting from irrational or uncritical analysis," this Court upheld the requirements as constitutional. *Id.* at 64, 68. Failure "to acknowledge even our most basic biological differences" *Nguyen* cautioned, "risks making the guarantee of equal protection superficial," while the "mechanistic classification of all our differences as

stereotypes would operate to obscure those misconceptions and prejudices that are real." *Id.* at 72. When governmental concerns are unavoidably affected by biological realities, classification based on those realities is not only permissible, but persuasive.

Dune's Policy has an exceedingly persuasive justification because it does not entirely deprive one sex of an educational opportunity, it is not based on gender stereotypes, and the Board's interest in physiologically accurate sex education is impacted by genuine, biological differences between males and females. Unlike VMI's admissions policy in *Virginia*, the Dune Policy does not categorize based on generalized assumptions about the talents, capacities, preferences, or tendencies of male and female students, nor does it exclude one sex from the benefits of a unique educational opportunity. Rather, both sexes benefit from "tailor[ed] instruction" based on their "anatomical and physiological characteristics and the unique experiences and health care needs associated with these characteristics." R. at 4. Like the Congressional requirements in *Nguyen*, the Policy's classification results from biological differences that affect a governmental objective. Just as Congress sought to ensure foreign-born children had a sufficient connection to the United States and a parent-child relationship was a key part of that connection, the Board seeks to ensure Dune's students receive

comprehensive sex education and the “unique experiences and health care needs” of the sexes are a key part of that education. The Policy therefore has a justification sufficient to satisfy intermediate scrutiny, which is further bolstered by its substantial relation to the District’s important interest in education to advance student health and welfare.

ii. The Policy’s sex-based classification of students closely serves the Board’s interest in promoting student health, satisfying the requirements of heightened scrutiny.

The Board has an important interest, based on its custodial duty to support student health and welfare, in providing high-quality sex education tailored to its students’ physiological characteristics. This Court “has long recognized that local school boards have broad discretion in the management of school affairs.” *Bd. of Education, Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982) (citations omitted). Due to public schools’ unique “custodial and tutelary responsibility for children,” students, “[f]or their own good and that of their classmates, . . . are routinely required to submit to various” school policies and procedures focused on promoting student health, such as physical examination and vaccination requirements. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). A school’s interest in protecting student health and welfare can even justify activity, such as suspicionless urinalysis of student athletes, that might

otherwise encroach on a student's rights under the Fourth and Fourteenth Amendments. *Id.* at 660-64. Public schools therefore have a long-standing tradition of custodial responsibility for the individual and public health of their students, even when the exercise of this responsibility circumscribes the liberties those students otherwise enjoy beyond school walls.

Dune's Policy comports with that tradition, requiring the District to provide students with "accurate, age-appropriate, and evidence based information about human sexuality . . . according to [their] anatomical and physiological characteristics." R. at 3-4. By providing this education, the Policy serves to protect and strengthen public health and the welfare of Dune's students, an unquestionably important governmental objective. Indeed, the Policy declares appropriate human sexuality education "an essential part of a high-quality education and necessary to protect and advance the individual and public health of young Dune residents." R. at 3. The Policy's emphasis on topics such as "reproductive anatomy; puberty and the development of secondary sex characteristics; . . . safe sex practices and the use of contraceptives; . . . [and] reproductive health care, including preventative care and self-screening for early detection of cancer and other conditions," further emphasizes the Board's interest in student's physiological health. R. at 3. The Board's

important interest in supporting the sexual health of its students as set out in the Policy aligns with its custodial responsibility and is constitutionally appropriate.

The Policy's classification of students based on biological sex is substantially related to the Board's interest in providing anatomically accurate sex education. So long as a sex-based government action is "substantially related to the achievement of the governmental objective in question," equal protection is satisfied. *Nguyen*, 533 U.S. at 70 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). This Court has recognized that education "is not a 'one size fits all' business, *Virginia*, 518 U.S. at 542, and its precedents do not require "that the [policy] under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. Given the Policy's emphasis on anatomy, development, and health care needs, assigning students to human sexuality classes based on their biological sex is not just significantly, but necessarily related to the District's objectives. Dune's decision to tailor sexual education to the "unique experiences and health care needs associated with" students' "anatomical and physiological characteristics" is constitutionally appropriate even if not every single student is best served by such an arrangement. R. at 4.

Pragmatic classifications are substantially related to government interests affected by legitimate differences between the sexes. In evaluating the relationship between sex-based distinctions and government objectives related to parenthood and citizenship, this Court declared "it is almost axiomatic that a policy which seeks to foster the opportunity for meaningful parent child bonds to develop has a close and substantial bearing on the governmental interest in the actual formation of that bond." *Nguyen*, 533 U.S. at 70. Congress was not required to grapple with "the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie," but could instead "enact[] an easily administered scheme to promote" its interest in "ensuring at least an opportunity for a parent-child relationship to develop." *Id.* at 69. Even heightened scrutiny does not require a government to closely weigh every possible personal circumstance to the detriment of an important interest.

The Board has made a pragmatic classification that is substantially related to government interests affected by legitimate differences between the sexes. Dune's Policy, which seeks to foster the opportunity for meaningful education on "the unique experiences and health care needs" associated with each sex's "puberty and the development of secondary sex characteristics," has a close and substantial bearing on the

governmental interest in enabling that education. R. at 3-4. By separating sexual education classes by biological sex, the District permissibly avoids subjective, intrusive, and difficult inquiries into each student's gender expression in favor of an easily administered scheme that promotes its interest in providing students with the education needed to keep their bodies healthy. The Board need not evaluate every possible personal circumstance to comport with the requirements of equal protection.

Conclusion

For the foregoing reasons, Respondent Dune Unified School District Board respectfully requests this Court affirm the decision of the Thirteenth Circuit and hold that the Board's Policy on human sexuality education, as applied to Boe, violates neither Title IX of the Education Amendments Act of 1972 nor the Equal Protection Clause of the Fourteenth Amendment.

Respectfully Submitted,

/s/ [REDACTED]

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