

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,
Petitioner,

v.

DUNE UNIFIED SCHOOL DISTRICT
BOARD,

Respondent,

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

Brief for Petitioner

Team 25

Partner 1

Partner 2

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Questions Presented

1. Title IX of the Education Amendments Act of 1972 is violated when a policy discriminates against a student on the basis of sex. Sex is a multi-faceted concept that includes biological sex assigned at birth and gender identity. Title IX protects transgender students from discrimination on the basis of their sex. Does Application of the Policy on Human Sexuality Education Violate Title IX of the Education Amendment Acts of 1972?
2. The Human Sexuality Education Policy separates students of the same gender based on transgender or cisgender status for the purpose of human sexuality instruction. If a transgender student does not wish to attend one class or the other because it is incongruent with their gender identity, the only other option is to opt out of the instruction entirely. Does application of the Policy violate the Equal Protection rights of transgender students?

Opinion Below

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

Constitutional Rules and Provisions

U.S. Const. amend. XIV, § 1

20 U.S.C. § 1681(a)

18 U.S.C. §249(a) (2)

34 C.F.R. §106.34(a)-(b) (2023)

42 U.S.C. § 2000e-2(a)

42 U.S.C. §13925(b)(13)(A)

Introduction

This case concerns the level of protection Title IX and the Equal Protection Clause provides to transgender students across the United States. At its heart, the nature of this case is the Dune Unified School District Board's ("Board") failure to treat Jane Boe ("Boe") as a female like any other student under their Policy on Human Sexuality Education ("the Policy").

The Policy violates Title IX. Title IX prohibits discrimination on the basis of sex. Sex, while not specifically defined by Congress, should be interpreted broadly to protect gender identity and transgender status under this term because discrimination based on gender identity is a form of discrimination based on sex. The Policy would not violate Title IX if it segregated students to human sexuality classes in accordance with their gender identity and not their sex as determined at birth.

The Policy also violates the Equal Protection Clause of the Fourteenth Amendment. The Policy is subject to heightened scrutiny because it discriminates on the basis of sex and transgender status. The Policy classifies and discriminates against students based on transgender status because it excludes

all transgender individuals from attending the human sexuality class that affirms their gender identity and forces them to choose between taking a class that is incongruent with their gender identity or missing out on human sexuality instruction altogether. Classification based on transgender status is classification based on sex and thus, the Policy is subject to heightened scrutiny.

Independently, the Policy is subject to heightened scrutiny because transgender individuals constitute, at the very least, a quasi-suspect class. The four factors necessary for determining quasi-suspect status are easily met and as a result, the Policy, is subject to heightened scrutiny.

The Policy fails to survive heightened scrutiny because the discriminatory means it employs in prohibiting transgender students from attending the human sexuality class that affirms their gender identity, is not substantially to the Board's interest in protecting and advancing the health of young Dune residents. As a result, the Policy violates Boe's Equal Protection rights under the Fourteenth Amendment.

Statement of the Case

Boe is a 12-year-old seventh-grade student at Dune Junior High School. R. at 4. Jane Boe was assigned "male" at birth but at seven years old, told her family that she was a girl. *Id.*

With her family's support, Boe changed her name to Jane and began using female pronouns both at home and at school. *Id.* In 2023, Boe moved to Dune and began attending school at Dune Junior High School. *Id.* At school, Boe uses the girls' bathroom and locker-room in accordance with her gender identity. R. at. 5. Her teachers and classmates all refer to her using her correct name and pronouns. *Id.* In fact, most students and teachers at Dune are unaware that Boe is transgender. *Id.* In all aspects of Boe's life, including at home, school, and in public, Boe is treated in a manner consistent with her gender identity. R. at. 4.

In July 2021, the Board unanimously passed a policy specifically related to transgender students. R. at 4. The policy's three components supports affirming a transgender students identity by requiring: 1) all public schools in Dune include gender identity as an enumerated characteristics in their anti-bullying policies; 2) all public schools in Dune allow transgender students access to restrooms consistent with their gender identity; and 3) all Dune elementary and middle schools allow transgender students to participate in sex-segregated school athletics consistent with their gender identity in grades kindergarten through eight. Dune Sch. Bd., Resolution 2021-4 (2021). *Id.* This policy does not address human sexuality classes. *Id.* This policy continues to be in effect and

the Board has certified all Dune Unified schools are in compliance. *Id.*

In December 2022, the Board enacted the Policy that requires students to attend sex-segregated human sexuality classes according to “biological sex as determined by a doctor at birth and recorded on their original birth certificate” or opt-out of instruction all together. *R.* at 3-4. To opt-out, parents must request in writing that their child not participate in the instruction. *Id.* The Board enacted the Policy because they found “all students in Dune public schools are entitled to high-quality education that will prepare them for fulfilling, healthy, successful lives.” The Policy’s philosophy is to provide “accurate, age-appropriate, and evidence-based information about human sexuality as an essential part of a high-quality education.” *Id.* The Board found such an education is necessary to “protect and advance the individual and public health of young Dune residents.” *Id.* The human sexuality classes should 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. The Policy requires human sexuality class instruction be tailored for male

and female student according to anatomical and physiological characteristics, however, clarifies it does not "prohibit a school from providing the same information to male and female students where that information is equally relevant to students of both sexes." *Id.* at 3-4.

Boe was informed she would be assigned to the boys' human sexuality class per the Policy. For Boe, attending the boys' human sexuality class would be humiliating to her. R. at. 5. She worries that the boys would make fun of her and tell her that she doesn't belong. *Id.* Boe would rather opt out of the class than face such humiliation, but her family does not believe that is a suitable option for them. *Id.* Boe's family believes their daughter is like any other student at Dune Junior High and deserves to receive the same education that other students do. *Id.* They have stated that seeking out this information elsewhere would be costly and burdensome. *Id.*

Boe and her family argue the Policy discriminates against her based on sex in violation of Title IX and in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* Respondent argues Title IX permits schools to segregate students based on sex for purposes of human sexuality instruction. *Id.* Respondent further argues the Policy does not discriminate against transgender students or violate the Equal Protection

Clause because it offers separate instruction based on a student's anatomy which is an important governmental interest.
Id.

Argument

I. APPLYING THE POLICY ON HUMAN SEXUALITY VIOLATES TITLE IX OF THE EDUCATION AMENDMENTS ACT OF 1972.

Title IX of the Education Amendments Act of 1972 prohibits discrimination against both cisgender persons and transgender persons on the basis of sex. Discrimination against a transgender student occurs when an educational institute treats that "individual worse than others who are similarly situated." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020). When considering what Congress meant by "sex," this Court should adopt a broad interpretation to include gender identity in the definition of sex. Just like being cisgender, being transgender is natural and not a choice. *Grimm*, at 594. Transgender students are entitled to the very same protections under Title IX as cisgender students.

A. Title IX prohibits discrimination on the basis of sex

Over fifty years ago, Congress passed and President Nixon signed an omnibus education bill called The Education Amendments Act of 1972 which contained the following provision, known as Title IX: "[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 financial assistance. . . .” 20 U.S.C. § 1681(a). Despite the broad language, Title IX also contains a number of exclusions and exemptions. One exemption permits educational institutions to segregate by sex in certain classes and extracurricular activities in elementary and secondary education. 34 C.F.R. §106.34(a)-(b) (2023). Title IX itself does not define “sex.” Title IX should be interpreted broadly to prohibit discrimination on the basis “sex,” including prohibiting discrimination on the basis of gender identity and transgender status. Reading Title IX to only prohibit discrimination on the basis of “sex” to mean as assigned at birth only benefits cisgender persons. There is no need to interpret Title IX narrowly, to only prohibit discrimination on the basis “sex” as it was understood at the time of enactment in 1972.

Other federal laws such as the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevent Act and the Violence Against Women Reauthorization Act expressly prohibit gender identity discrimination and not just discrimination based on sex as assigned at birth. See 18 U.S.C. §249(a)(2); 42 U.S.C. §13925(b)(13)(A).

B. Discrimination based on gender identity and transgender status is a form of discrimination based on sex.

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an individual “because of

such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Title VII itself also does not define "sex." This Court, decades ago, established that discrimination based on "sex stereotypes" was prohibited under Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). More recently, this Court clearly adopted a broad interpretation of "sex" in clarifying that discrimination based on gender identity is a form of discrimination "based on sex" because "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex" and therefore prohibited under Title VII. *Bostock v. Clayton County*, 140 S.Ct. 1731, 1741 (2020). Because Title IX contains language similar to that of Title VII, courts interpret the provisions of Title IX through parallel language in Title VII. See, e.g., *Murray v. N.Y. Univ. Coll. Of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995). Justice Gorsuch mentioned "[t]hose who adopted the Civil Right Acts might not have anticipated their work would lead to this particular result" in establishing that firing someone simply for being homosexual or transgender was a violation under Title VII. *Bostock*, 140 S.Ct. 1731, 1737 (2020). Even if this interpretation was not anticipated, that does not prevent Title VII-and Title XI-from protecting transgender persons from discrimination in employment and education context. Harassment is a form of discrimination that is familiar to both

employment and education context, so it is natural that precedent defining "because of sex" in one context would apply in the other. Erin Buzuvis, *On the Basis of Sex: Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS.J.L. GENDER & SOC'Y 219 (2013). This Court should clearly establish that discrimination based on gender identity is prohibited under Title IX and Title VII.

Lower courts have questioned if "sex" under Title IX includes protection based on gender identity. Several circuits and district courts have relied on *Bostock* and *Price Waterhouse* to strike down policies barring transgender students from accessing sex-segregated bathrooms or sports teams consistent with their gender identity, despite exceptions permitting sex segregation in those spaces. *E.g.*, *A.C. ex rel. M.C. v. Metro. Sch. Dist. Of Marinsville*, 75 F.4th 760 (7th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *M.A.B. v. Board of Ed. of Talbot Cnty.*, 286 F. Supp. 3d 704 (D. Maryland 2018); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d. 833 (S.D. Ind. 2019).

The Fourth Circuit found that a school board's policy denying transgender students access to gender-affirming bathrooms while attending school constituted discrimination on the basis of

sex and violated Title IX. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020). The *Grimm* policy prevented transgender students from affirming their gender and was later overturned because a preliminary and permanent injunction required transgender students be allowed to use restrooms at school in accordance with their gender identity. *Id.* The *Grimm* policy was overturned despite the Title IX statute expressly permitted bathrooms be segregated by sex.

The Seventh Circuit affirmed a consolidation of cases where the lower courts granted preliminary injunctions to transgender students who sought injunctions allowing them to utilize the bathroom in accordance with their gender identity. *A.C. ex rel. M.C. v. Metro. Sch. Dist. Of Marinsville*, 75 F.4th 760 (7th Cir. 2020); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017). This was also despite the Title IX statute expressly permitted bathrooms be segregated by sex. There is no reason to depart from the growing practice of supporting transgender students in affirming their gender at school.

The Eleventh Circuit found no violation of Title IX based on substantially similar facts because it was permissible to segregate by sex under the Title IX exception. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty*, 57 F.4th 791 (11th Cir. 2022) (en banc). The majority in *Adams* feared that transgender

girls participation in “girls” sports would undermine the experience and benefits of sports to cisgender girls, but the dissent correctly points out “there is no empirical data supporting this fear.” *Id.* at 856 (Pryor, J., dissenting). Permitting transgender girls in human sexuality classes based on their gender identity would also not undermine the experience and benefits of cisgender girls. Fearing that affirming the gender of transgender girls by attending a human sexuality class would undermine the benefits of the class to cisgender girls is also unsupported. Additionally, the dissent rejects the sex assigned at birth bathroom policy because it is based on the presumption that “biological sex is accurately determinable as birth and that it is a static or permanent biological determination” which is “both medically and scientifically flawed.” *Id.* at 821-21 (Wilson, J., dissenting). Biological sex is not static and not permanent. Policies that presume biological sex is accurately determinable at birth are both medically and scientifically flawed.

Respondent and the Thirteenth Circuit argues that finding for Boe “would not only limit the educational opportunities of, but would also jeopardize the privacy and safety of, the very people Title IX was built to protect—women and girls.” *Boe v. Dune Unified Sch. Bod.*, 123 F.7th 45 (13th Cir. 2023) (citing *Adams ex rel. Kasper v. Sch. Bd. Of St. Johns Cnty.*, 57 f4.th

791, 812-21 (Lagoa, J., concurring)). However, Boe is the very person Title IX was built to protect. Her biological sex as assigned at birth is irrelevant to assigning her to a sex segregated human sexuality class. Boe—a transgender girl—is a girl. The Policy as written threatens to jeopardize the privacy and safety of Boe and her education.

Boe does not argue the Policy violates Title IX because it seeks to teach human sexuality classes segregated by sex. Boe argues all students should be able to attend the human sexuality class according to their gender identity. Assigning Boe to the boys' human sexuality class on the basis of her sex as determined by a doctor at birth would prevent her from affirming her gender. Boe has been treated according to her gender identity consistently in her time at Dune Junior High. Boe's teachers and classmates all refer to her by her correct name and pronouns. *R. at 5*. Assigning Boe to the boys' human sexuality class would out Boe as transgender to her teachers and classmates. Dune cannot be allowed to out Boe as a transgender person for the sake of following the Policy.

C. The Policy could comply with Title IX if students were assigned to a human sexuality class according to their gender identity.

The Policy violates Title IX because it would assign students to the human sexuality class according to their biological sex as determined by a doctor at birth. This

discriminates against transgender students and intersex students but not because it segregates students by sex. The Policy treats transgender students worse than similarly situated cisgender students. A regulation implementing Title IX issued by the U.S. Department of Education states, in part, “[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). The Thirteenth Circuit held that nothing in the statute itself prohibits school districts from assigning students to sex-segregated human sexuality classes based on their biological sex assigned at birth. *Boe v. Dune Unified Sch. Bod.*, 123 F.7th 45 (13th Cir. 2023). However, nothing in the statute itself *requires* school districts from assigning students to sex-segregated human sexuality classes based on their biological sex assigned at birth. The Board could amend the Policy and offer sex-segregated human sexuality classes without discriminating against transgender students and intersex students.

The Board is aware of the importance of implementing policies that affirm the gender identity of transgender students in Dune. The Board unanimously passed a policy specifically related to affirming the identity of transgender students in July 2021. R. at 4. This policy has three components requiring: 1) all

public schools are to include gender identity as an enumerated characteristic in anti-bullying policies; 2) all public schools must allow transgender students access restrooms consistent with their gender identity; and 2) all elementary and middle schools are to allow transgender students to participate in sex-segregated school athletics consistent with their gender identity in grades kindergarten through eight. *Id.* Dune is capable of and already takes steps to affirm Boe's gender identity. All of this would be lost if the Policy allows Dune to discriminate against Boe because of her gender identity and out her transgender status to her school. The Policy fails to treat Boe as any other female student based on her sex and therefore violates Title IX.

The Policy is based on the outdated presumption that all students are cisgender and follow a binary gender system. However, the Board is not *required* to rely on such outdated presumptions under the Policy. Of course, there are other gender-expansive youth who may identify as nonbinary, youth born intersex who do or do not identify with their sex-assigned-at birth, and other whose identities belie gender norms. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 596 (4th Cir. 2020). The Policy requires students to attend sex-segregated human sexuality classes according to their sex assigned at birth or to opt-out of such instruction altogether. The Policy tells transgender students to chose between participating in the human sexuality

class that disaffirms their gender identity or be denied the benefits of a human sexuality class altogether. Because this discriminates against transgender students on the basis of their sex, it violates Title IX. Applying the Policy, as written, to other gender-expansive youth based on their sex assigned at birth again subjects them to discrimination in violation of Title IX. Allowing students-cisgender, transgender, or gender-expansive students-to attend human sexuality class based on their gender identity would not violate Title IX.

II. THE POLICY ON HUMAN SEXUALITY EDUCATION VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1. The goal of the Equal Protection Clause is to protect individuals from state action that "creates arbitrary or irrational distinctions between classes of people out of a bare desire to harm a politically unpopular group." *City of Cleburne v. Cleburne Living Ctr.*, 47 U.S. 446-47, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). When considering an Equal Protection claim, the first step is to determine what level of scrutiny applies and then decide whether the policy at issue survives such scrutiny. *Hecox v. Little*, 79 F.4th 1009, 1021 (9th Cir. 2023). This Court should reverse the Thirteenth Circuit's holding and find that

heightened scrutiny applies to Boe's claim because the Policy discriminates based on transgender status and because transgender people constitute a quasi-suspect class. This Court should then find that the Policy does not survive heightened scrutiny because classification based on transgender status is not substantially related to the Dune School Board's objectives.

A. Heightened scrutiny applies because the policy classifies students on the basis of transgender status.

The Policy classifies students on the basis of transgender status and because classification based on transgender status is classification based on sex, the Policy is subject to heightened scrutiny.

i. The Policy discriminates on the basis of transgender status.

The Policy obviously classifies based on sex, but what Respondent fails to recognize is that it also classifies students based on transgender status. Boe and other transgender students in the Dune School District are being "distinguished by governmental action from those whose gender identities are congruent with their assigned sex." *Evancho v. Pine-Richland Sch. Dist.*, 237 F.Supp.3d 267, 285 (W.D. Pa. 2017). The policy requires that male and female students be assigned to human sexuality classes based on their "biological sex as determined by a doctor at birth and recorded on their original birth certificate". R. at 4. On its face the policy is exclusive in

that *only* those assigned female at birth may attend the female class and *only* those assigned male at birth may attend the male class. Transgender people, however, are those who “consistently, persistently, and insistentlly express a gender that, on a binary, most would think of as opposite to their assigned sex.” *Grimm v. Gloucester County School Board*, 972 F.3d 586, 594 (4th Cir. 2020). It follows then, that a transgender student who was assigned male at birth, would necessarily identify as female and vice versa. See *Adams ex rel. Kasper v. Sch. Bd. Of St. Johns Cnty*, 57 F.4th 791, 845-46 (Pryor, J., dissenting). As a result, the Policy precludes *all* transgender students from attending the human sexuality class that is consistent with their gender identity. Conversely, *all* cisgender students are permitted to attend the human sexuality class that is consistent with their gender identity. Per the policy, cisgender students are entitled to the benefit of a human sexuality education that affirms their gender identify whereas transgender students are not.

Respondent relies on *Adams ex rel. Kasper v. School Bd. Of St. Johns Cnty* to support its argument that the Policy does not discriminate against transgender students. 57 F.4th 791(11th Cir. 2022). There, the Eleventh Circuit rejected an Equal Protection challenge to a school policy that required male students to use male-designated bathrooms, female students to use female-designated bathrooms, and accommodated transgender students with

sex-neutral bathrooms. The Eleventh Circuit held that the policy did not discriminate against transgender students. Even if this Court agrees with the Eleventh Circuit, that case is not applicable here because the bathroom policy in *Adams* is not analogous to the Policy enacted by the Dune School Board. Here, the human sexuality education policy goes one step further than the policy in *Adams*. Not only does it segregate students by sex, but it leaves transgender students who do not wish to attend the class that is incongruent with their gender identity, no other option but to opt-out of human sexuality instruction altogether. In *Adams*, transgender students were prohibited from using bathrooms that were consistent with their gender identities but were permitted to use the gender-neutral bathroom. Those students were not forced to choose between using a bathroom incongruent with their gender identity or opting out of bathroom use altogether. Although not ideal, the students in *Adams* were able to use the gender-neutral restrooms without fear of bullying, harassment, or humiliation. *Id.* Unfortunately, under the Dune Policy, Boe is not entitled to the same.

Here, the Policy forces transgender students to make the difficult and uncomfortable decision between attending the class that is incongruent with their gender identity or missing out on human sexuality instruction altogether. Boe and her family have stated that opting out of human sexuality instruction is not an

option for them. *Id.* They fear opting out would cause Boe to miss out on necessary and important information related to development. Thus, as the current Policy stands, if Boe wishes to access this information, she must attend the "male" class. But unlike every other student, Boe would have to attend class where she is "wholly unlike everyone else in appearance, manner, mode of living, and treatment at school." *Evancho v. Pine-Richland Sch. Dist.*, 237 F.Supp.3d 267, 285 (W.D. Pa. 2017). For Boe and transgender students like her, this could have devastating mental health effects. The Policy imposes an incredibly difficult choice on transgender students and their families and no matter what choice is made, there are lasting consequences. The Policy places no such burden or consequences on cisgender students.

Respondent and the Thirteenth Circuit argue that the Policy does not discriminate based on transgender status because the classification is based entirely on sex, including both transgender and cisgender students. R. at 8. However, Boe is not challenging the fact that the Policy permits segregation of human sexuality instruction by sex. Boe is challenging the Policy's exclusion of transgender students from human sexuality classes that match their gender identity. Additionally, just because a policy appears facially neutral, does not mean it is not discriminatory. *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 64 121 S.Ct. 2053, 2061, 150 L.Ed.2d 115 (2001). Neutral sounding terms

such as “biological sex” can mask discrimination that is unlawful. *Id.* What Respondent and the Thirteenth Circuit overlook is that under this seemingly neutral policy, *only* transgender students are denied the benefit of attending a human sexuality class that affirms their gender identity and *only* transgender students are faced with the decision to either attend a class that disaffirms their gender identity or to opt out of human sexuality education altogether. The Policy’s use of the term “biological sex” acts as a form of “proxy discrimination”. *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). The Policy’s specific classification of “biological sex” inherently targets transgender students even though it does not use the word “transgender” in the definition. As a result, this Court should find that the Policy does classify and discriminate on the basis of transgender status.

ii. Heightened scrutiny applies because classification based on transgender status is classification based on sex.

Just as in the Title IX context, under the Equal Protection Clause, discrimination against transgender individuals is discrimination based on sex. Laws that discriminate against transgender people are sex-based classifications and, as such, warrant heightened scrutiny. *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019). Respondent argues that even if the Policy does classify students on the basis of transgender

status, transgender status is only subject to rational basis review. This is not accurate. As discussed at length in the context of Title IX above, classification on the basis of transgender status *is* classification on the basis of sex and therefore subject to heightened scrutiny. *Id.* Under the framework of *Price Waterhouse*, discrimination against someone because they are transgender is inherently discrimination based on sex stereotypes. *Norsworthy v. Beard*, 87 F.Supp.3d 1104, 1119 (N.D. Cal. 2015). “A person is defined as transgender precisely because of the perception that his or her behavior contradicts stereotypes of gender-appropriate appearance and behavior.” *Id.* at 1316, (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007)). By definition, a transgender individual does not conform to the sex-based stereotypes that he or she was assigned at birth. *Id.* Thus, there is a congruence between discriminating against transgender individuals and discrimination on the basis of gender-based stereotypes. *Grimm*, 972 F.3d 586, 608.

Additionally, as discussed above, under *Bostock*, it is impossible to discriminate against a person for being transgender without discriminating against that individual based on sex. *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1741 (2020). For instance, when an employer fires an employee because she is transgender both the individual's sex and the sex with which the

individual identifies are at play. *Id.* As in the Title IX context, *Bostock* is applicable under the Equal Protection Clause because Boe's exclusion from the girls' class is either because 1) her biological sex at birth was male or 2) her biological sex at birth was not female. Boe is prohibited from attending the girls' class based on reasons "inextricably bound up with sex". *Id.* For the foregoing reasons, discrimination based on transgender status is discrimination based on sex and the Policy is subject to heightened scrutiny.

B. Heightened scrutiny applies because transgender people constitute a quasi-suspect class.

Independent from the reasoning above, the Policy is also subject to heightened scrutiny because it classifies students on the basis of transgender status and transgender individuals are, at a minimum, a quasi-suspect class. *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F.Supp.3d 704, 719 (D.Md. 2018). In determining whether a new class is suspect or quasi-suspect, this Court looks to four factors: (1) whether the class has been historically subjected to discrimination, *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S.Ct. 2727, 91 L.Ed.2d 527 (1986), (2) whether the class has a defining characteristic that "frequently bears no relation to ability to perform or contribute to society," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); (3) whether the class exhibits "obvious, immutable, or distinguishing

characteristics that define them as a discrete group," *Lyng*, 477 U.S. at 638, 106 S.Ct. 2727; and (4) whether the class is "a minority or politically powerless." *Id.* All four factors are met here and justify treating transgender individuals as a quasi-suspect class.

First is whether the class has been historically subjected to discrimination. "There is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence and discrimination in education, employment, housing, and healthcare access". *Grimm v. County School Board*, 972 F.3d 586, 611, 612 (4th Cir. 2020). Studies have found that transgender people are much more likely to experience unemployment, to have a household income of less than \$10,000 per year, and to experience homelessness. *Id.* Additionally, transgender people frequently experience harassment in places such as schools, medical settings, and retail stores. *Id.* at 612. Particularly relevant here is discrimination against transgender students in the context of K-12 education. In a 2022 survey of transgender individuals, "more than three-quarters of adult respondents (80%) and nearly two-thirds of 16- and 17-year-old respondents (60%) who were out or perceived as transgender in K-12 experienced one or more forms of mistreatment or negative experience, including verbal harassment, physical attacks,

online bullying, being denied the ability to dress according to their gender identity/expression, teachers or staff refusing to use chosen name or pronouns, or being denied the use of restrooms or locker rooms matching their gender identity." Sandy E. James et al., Nat'l Ctr.for Transgender Equal., Early Insights: A Report of the 2022 U.S. Transgender Survey (2024), https://transequality.org/sites/default/files/202402/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf. These statistics make evident that as a class, transgender people have been historically subjected to discrimination. This factor weighs in favor of concluding that transgender individuals constitute a quasi-suspect class.

Next is whether the class has a defining characteristic that "frequently bears no relation to ability to perform or contribute to society". *Cleburne*, 472 U.S. at 440-41, 105 S.Ct. 3249. Transgender people are no less capable of contributing value to society than others and there is nothing to suggest a "transgender person is any less productive than any other member of society". *M.A.B.*, F.Supp.3d at 720. This factor also points to treating transgender individuals as a quasi-suspect class.

Third is whether transgender individuals exhibit "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Lyng v. Castillo*, 477 U.S. 635, 638, 106

S.Ct. 2727, 91 L.Ed.2d 527 (1986). It is clear that they do. For most, gender identity is formulated at a very early age. *Grimm v. Gloucester, County School Board*, 972 F.3d 596, 613 (4th Cir. 2020). For transgender individuals, gender identity is not “a choice” and it is not “voluntary.” See *Adams ex rel. Kasper v. Sch. Bd. Of St. Johns Cnty*, 57 F.4th 791, 845-46 (Pryor, J., dissenting). Being transgender “is as natural and immutable as being cisgender.” *Grimm* at 613. Transgender individuals also have distinguishing characteristics that define them as a discrete group because unlike most of the population, their gender identity is not congruent with the gender they were assigned at birth. *M.A.B.*, F.Supp.3d at 721. As a result, this factor is in favor transgender individuals constituting a quasi-suspect class.

Last is whether transgender individuals are a minority class lacking in political power. This factor is also clearly met. Among U.S. adults, approximately 0.5% identify as transgender. Among U.S. youth, approximately 1.4% identify as transgender. Jody L. Herman, et al., *How Many Adults and Youth Identify as Transgender in the United States?*, UCLA Sch. Of L. Williams Inst., <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/>, (June 2022). Comprising such a small amount of the adult population in the United States, transgender individuals are certainly a minority. Transgender

people are also underrepresented in every branch of government. There were no transgender judges until 2010, see *First Two Openly Transgender Judges in the U.S. Appointed Last Month*, Women's Law Project (Dec. 7, 2010), <https://www.womenslawproject.org/2010/12/07/first-two-openly-transgender-judges-in-the-u-s-appointed-last-month/>, and as of now, there are no openly transgender federal judges. "There is similar scarcity of openly transgender persons serving in the executive and legislative branches". *Grimm*, 972 F.3d 586, 613. In addition, transgender people are politically powerless. Courts have had to block enforcement of policies or laws because they violated the rights of transgender individuals. *Id.* For example, in 2017, this Court enjoined enforcement of a memorandum issued by President Trump that permitted discrimination against transgender members of the military because it likely violated their rights under the Equal Protection Clause. *Stone v. Trump*, 280 F.Supp.3d 747, 767-71, 2017 WL 5589122, at *14-17 (D.Md. 2017). It is clear that transgender individuals represent a politically powerless minority and this factor supports treating transgender individuals as a quasi-suspect class.

All four factors weigh heavily in favor of treating transgender individuals as a quasi-suspect class. Discrimination against quasi-suspect classes is subject to heightened scrutiny.

As a result, the Policy, which discriminates against a quasi-suspect class, is subject to heightened scrutiny.

C. The Policy does not survive heightened scrutiny.

The Policy cannot survive heightened scrutiny because classification based on transgender status is not substantially related to the Board's interest in providing human sexuality education to Dune students. Policies that discriminate on the basis of quasi-suspect classifications, including sex, need to withstand heightened scrutiny. *Cleburne*, 473 U.S. at 440-41, 105 S.Ct. 3249. To withstand heightened scrutiny, classification by sex or transgender status "must serve important governmental objectives." *Id.* The state must demonstrate that the "discriminatory means employed are substantially related to the achievement of those objectives." *U.S. v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). Heightened scrutiny is a "demanding standard that requires the government to demonstrate an "exceedingly persuasive" justification for its differential treatment. *Hecox*, 79 F.4th at 1028 (citing *U.S. v. Virginia*, 518 U.S. at 533, 116 S.Ct. 2264). Heightened scrutiny is an extremely fact-bound test, which requires the Court carefully consider the resulting inequality to ensure that "our most fundamental institutions neither send nor reinforce messages of stigma or second-class status". *SmithKline Beecham v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014).

Here, Respondent's stated purpose in enacting the Policy is to protect and advance the individual and public health of young Dune residents by offering separate instruction based on students' anatomy. R. at. 4. It claims that offering separate instruction based on anatomy is an important - if not compelling - government interest. R. at. 5. While the protection and advancement of individual and public health of young people is an important objective, the Policy is not substantially related to it. Excluding transgender individuals from attending the human sexuality class that is consistent with their gender identity does not infringe on any other student's right to receive accurate and informative human sexuality instruction. For other students, attending one human sexuality class or the other depending on the sex they were assigned at birth carries no stigma whatsoever. Whereas for the transgender students, attending that same human sexuality class is tantamount to humiliation, embarrassment, and a continuing mark of difference among fellow students. Additionally, instead of protecting the individual health of transgender students, the Policy undermines it. Prohibiting Boe from attending the girls' human sexuality class harms her mental health and well-being. This is in direct opposition to the stated purpose of the policy. Boe's only other choice if she wishes to protect her mental well-being is to miss out on human sexuality instruction altogether. This is also in

direct opposition to the Board's proffered reasoning for the policy.

The Board argues that segregation of human sexuality classes is necessary so students can receive instruction based on anatomical and physiological differences. But this doesn't justify the exclusion of transgender students from attending the class that affirms their gender identity. The human sexuality class provides more than just instruction on anatomy and physiological traits. The class also provides instruction on puberty and the development of secondary sex characteristics, healthy relationships, including the signs of sexual and emotional abuse within intimate relationships, safe sex practices and the use of contraceptives, HIV and other sexually transmitted infections, reproductive health care, including preventative care and self-screening for early detection of cancer and other conditions. This kind of instruction goes far beyond physical anatomy and is tailored to provide important information specific to young girls as they turn into young women. Denying Boe the opportunity to learn about things such as safe sex and healthy relationships as a young woman is to deny her of a necessary education vital to her development. Furthermore, as mentioned previously, Boe's presence in the class would not deprive any other student from receiving

information and education that is specific to their own gender identity.

Respondent argues that allowing transgender students to attend the class that is consistent with their gender identity would infringe on the education rights of other students and cause discomfort or distraction. This argument falls short. In Boe's case, most students and teachers do not even know she is transgender. She is referred to as and regarded as a girl in all respects. It would be very normal for Boe to attend the girls' class because by all accounts she is a girl. Conversely, if Boe were forced to attend the boys' class as the only girl, distraction and discomfort would undoubtedly ensue. Excluding Boe from the girls' class and forcing her to attend the boys' class does not further any governmental interest in promoting the health of young people by giving separate instruction based on anatomical differences.

For the foregoing reasons, it is clear that banning transgender students from attending human sexuality classes that affirm their gender identity is not substantially related to protecting and advancing the individual and public health of young Dune residents. In fact, the Policy and its treatment of transgender students directly undermines this objective and as a result, the Policy cannot survive heightened scrutiny.

Conclusion

For these reasons, the Petitioner respectfully requests this Court reverse the decision of the Thirteenth Circuit and find application of 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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Partner 1

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Partner 2

Attorneys for Petitioner