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-Appellant-Petitioner,

v.

DUNE UNIFIED SCHOOL DISTRICT BOARD,

Defendant-Appellee-Respondent.

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

Brief for Respondent

Team 26

Issue I: [redacted]

[redacted]

Issue 2: [redacted]

[redacted]

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Questions Presented

1. Does the Policy on human sexuality education that separates students into human sexuality classes based solely on biological sex—not on any gender or sex stereotypes—comply with Title IX of the Education Amendments Act of 1972 as applied to Boe?
2. Does the Policy on human sexuality education that separates students based on anatomical and physiological differences comply with the Equal Protection Clause of the Fourteenth Amendment?

Opinion Below

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

Constitutional Rules and Provisions

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Introduction

This case involves a Title IX and constitutional challenge to Dune Unified School District Board's ("the Board") policy on human sexuality classes ("the Policy") by Petitioner, Jane Boe ("Boe") by and through her next friend and father, Jack Boe.

Application of the School Board's Policy to Boe, a transgender girl, does not violate Title IX of the Education Amendments of 1972 ("Title IX") because (A) Title IX prohibits sex discrimination; it does not mandate sex blindness; (B) Title

IX does not provide an avenue of relief for a discrimination claim based on transgender status or gender identity; (C) Even if Title IX's protections do extend to gender identity or transgender status, the Policy does not discriminate based on either of those classifications; and (D) the Policy requires students to learn health information related to their anatomy; it is not based on any sex stereotypes.

The Policy also does not violate the Equal Protection Clause of the Fourteenth Amendment. Under intermediate scrutiny, the sex-based Policy passes constitutional muster because (1) the Board has an important government interest in protecting and advancing the individual and public health of its young residents and (2) the Policy of separating students based on their anatomy to learn about their anatomy is sufficiently related to that interest. Further, the Policy does not classify based on transgender status, but even if it did, it would still comport with the Fourteenth Amendment under either rational basis review or, if transgender people are deemed a quasi-suspect class, intermediate scrutiny.

Statement of the Case

This case arises out of the Dune Unified School Board's enactment of a policy that requires students to attend human sexuality classes according to their biological sex as assigned

at birth or to opt-out of such instruction altogether ("the Policy"). Boe v. Dune Unified Sch. Bd., -- F.7th -- (13th Cir. 2023). Recognizing that the provision of human sexuality education across Dune public schools was inconsistent, the Board (an elected five-member body) enacted the Policy, Resolution 2022-14, in December 2022. Id. at 3 (see PREAMBLE).

The Policy provides that "[a]ll 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." Id. (Section 1(a) of the Policy). Instruction must cover all topics covered in the Policy, including reproductive anatomy, the use of contraceptives, and preventative care and self-screening for early detection of cancer and other conditions, among others. Id. (Section 1(b) of the Policy).

The Policy further requires that instruction on human sexuality "shall be provided separately for male and female students." Id. (Section 1(c) of the Policy). Under the Policy, students are assigned to human sexuality classes "according to biological sex as determined by a doctor at birth and recorded on their original birth certificate." Id. (Section 1(c) of the Policy). Schools are mandated to "tailor instruction for male and female human sexuality classes according to anatomical and physiological characteristics, and the unique experiences and

health care needs associated with these characteristics." Id. at 3-4 (Section 1(c) of the Policy). However, "[n]othing in th[e] [Policy] prohibits a school from providing the same information to male and female students where [it] is equally relevant to . . . both sexes." Id. at 4 (Section 1(c)a. of the Policy).

Students are permitted to opt-out of such instruction altogether by having their parent(s) or guardian(s) request in writing that their child not participate in the instruction. Id. (Section 1(d) of the Policy). The Policy ensures that this opportunity to opt-out be offered to all students by requiring schools "to notify parents and guardians a minimum of 14 days prior to the first day of human sexuality instruction" to provide them this option. Id. (Section 1(d) of the Policy).

In July of 2021, over one year before the Policy was enacted, the Board (composed of the same 5 members) issued a policy related to transgender students. Id. The policy, which passed unanimously and without debate, required three things: (1) all Dune public schools must include gender identity as an enumerated characteristic in their anti-bullying policies; (2) all Dune public schools must allow transgender students to access restrooms consistent with their gender identity; and (3) all Dune elementary and middle schools must allow transgender students to participate in school athletics consistent with their gender identity. Id. The 2021 policy did not address human

sexuality classes. Id. The 2021 policy is still in effect and the Board has certified that all Dune schools are complying with the policy. Id.

Jane Boe is a 12-year-old student in the seventh grade at Dune Junior High School ("DJHS"). Id. While she was assigned "male" at birth, Boe is a transgender girl. Id. DJHS is accepting of Boe's identity. Her teachers and classmates all refer to her by her correct name and pronouns, she is permitted to use and uses the "girls'" bathroom and changing facilities, and she is permitted to participate in sex-separated school athletics consistent with her gender identity. Id. at 4, 5.

Boe and her parents became aware of the Policy when they were reading through a packet of information related to school policies and procedures that the school provided to all parents at the start of the year. Id. at 4. Although the seventh-grade class had not yet started its human sexuality unit at the time the present suit was filed, Boe and her parents learned that Boe would be assigned to the class designated for biological males. The school confirmed that, per the Policy, it would assign Boe to the class designated for biological males. Id.

In October 2023, Boe's father filed suit against the Board on her behalf in the United States District Court for the District of Texington. Id. at 5. The District Court rejected Boe's claims, concluding that the Policy does not violate Title

IX or the Equal Protection Clause, and granted the Board's motion for summary judgment. Id. Boe filed a timely appeal. Id. On December 8, 2023, the United States Court of Appeals for the Thirteenth Circuit issued an opinion, written by Judge Sandoval, affirming the grant of summary judgment for the Board. Id. at 2.

Argument

I. Application of the School Board's Policy to Boe does not violate Title IX of the Education Amendments of 1972.

Because the Board's policy of conducting its human sexuality classes in separate sessions for male and female students (as defined by biological sex) is expressly permitted under the statute, see 34 C.F.R. § 106.34(a)(3) (2023); the sex-based separation is based solely on biological sex as assigned at birth—not on any gender or sex stereotypes; and the Policy furthers the educational purpose of providing relevant human sexuality instruction, this Court should affirm the Thirteenth Circuit's holding that application of the Policy to Boe does not violate Title IX's prohibition against discrimination "on the basis of sex." 20 U.S.C. § 1681(a); Boe, -- F.7th at 6–7.

A. Title IX prohibits sex discrimination; it does not mandate sex blindness.

Title IX provides that, subject to certain exceptions: "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....” 20 U.S.C. § 1681(a). The statute’s plain meaning and purpose are to prohibit sex-based discrimination in educational programs.[1] But Title IX does not prohibit schools from noticing sex. Instead, the statute’s implementing regulations recognize that, in some contexts, biological differences justify separating students on the basis of biological sex. See 34 C.F.R. § 106.34.

1. Title IX’s original, ordinary meaning is about prohibiting disparate treatment based on biological sex.

To interpret the word “sex” within the meaning of Title IX, this Court looks to “the ordinary public meaning of [the] term[] at the time of its enactment.” Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1738 (2020). Judges must not “add to, remodel, update, or detract from old statutory terms” to fit “[their] own imaginations,” or “[they] would risk amending statutes outside the legislative process reserved for the people’s representatives”, and “would deny the people the right

[1] “Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities.” McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 286 (2d Cir. 2004); see also 118 Cong. Rec. 5803–04 (1972).

to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." Id.

One method of determining the ordinary meaning of a statutory term is by looking at dictionary definitions of the term around the time the statute was enacted. United States v. Chinchilla, 987 F.3d 1303, 1308 (11th Cir. 2021); id. ("[W]e orient ourselves to the time of the statute's adoption.").

When Congress enacted Title IX in 1972, the term "sex" was commonly understood to refer to physiological differences between males and females, particularly with respect to their reproductive functions. Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 812 (11th Cir. 2022) (citing see, e.g., Sex, Female, Male, Webster's Seventh New Collegiate Dictionary (1969) (defining "sex" as "either of two divisions of organisms distinguished respectively as male or female," "female" as "an individual that bears young or produces eggs as distinguished from one that begets young," and "male" as "of, relating to, or being the sex that begets young by performing the fertilizing function")); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 632–33 (4th Cir. 2020), as amended (Aug. 28, 2020) (C.J. Niemeyer, dissenting).

Accordingly, "[r]eputable 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." Adams, 57 F.4th at 812.

Even today, the word "sex" continues to be defined based on physiological distinctions between males and females. According to the Webster dictionary, "sex" refers to "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures." Sex, Merriam-Webster's Dictionary, available at https://www.merriam-webster.com/dictionary/sex (last visited Feb. 11, 2024); see also id. (providing a "Usage Guide" that describes the differences between the words "sex" and "gender").

Similarly, the American Psychological Association defines sex as "the characteristics and traits of biological sex," adding that "[s]ex refers especially to physical and biological traits, whereas gender refers especially to social or cultural traits." Sex, American Psychological Association, available at https://dictionary.apa.org/sex (last visited Feb. 11, 2024).

This Court, too, has defined sex based on physical and biological differences between males and females. Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Bostock, 140 S. Ct. at 1739. Just after Congress passed Title IX, this Court stated that sex is an "immutable" trait, "determined solely by the accident of birth." Frontiero, 411 U.S. at 686. And, most

recently, this Court relied on the same understanding of the word "sex" in its Bostock decision, where the analysis proceeded on the assumption that (in 1964) the term "sex" "referr[ed] only to biological distinctions between male and female" (and did not include "norms concerning gender identity"). 140 S. Ct. at 1739.

It is clear, then, based on the definition of "sex" at the time of the statute's enactment, that Title IX prohibits schools from treating one (biological) sex worse than the other (biological) sex when it comes to the full and equal enjoyment of educational opportunities. See 20 U.S.C. § 1681(a).

2. Title IX does not prohibit all sex distinctions.

Title IX does not deem all sex-based distinctions as discriminatory. Instead, Title IX's regulations recognize that the biological sexes are sometimes differently situated. See, e.g., 34 C.F.R. § 106.34.

As the Thirteenth Circuit stated in its decision below, "Nothing in [Title IX] itself, or the regulation, prohibits school districts from assigning students to sex-segregated human sexuality classes based on their biological sex as assigned at birth." Boe, -- F.7th at 6. In fact, separating the sexes for purposes of sex-education is expressly permitted. 34 C.F.R. § 106.34(a)(3).

Not all sex distinctions are harmful or treat one sex worse than the other, as sometimes the sexes are differently situated.

Persons with male reproductive organs (i.e., biological males) are not physiologically the same as persons with female reproductive organs (i.e., biological females). See generally Ivan Szadvári et al., Sex differences matter: Males and females are equal but not the same, Physiology & Behavior, Volume 259 (2023), http://tinyurl.com/sciencedirect-sexdifferences. Thus, Title IX's implementing regulation allowing sex-separated human sexuality classes acknowledges that sex-specific educational programming can be valuable. See 34 C.F.R. § 106.34(a)(3).

B. Title IX does not provide an avenue of relief for a discrimination claim on the basis of gender identity or transgender status.

Given that (1) the plain language of Title IX says nothing about gender identity or transgender status, (2) this Court's Bostock decision is inapplicable to Title IX, and (3) Congress' intention to cover gender identity (and, thus, transgender status) under Title IX is not "unmistakably clear in the language of the statute," Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)(quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)), Boe fails to state a cognizable claim for relief under Title IX as a matter of law.

1. The plain language of the statute does not mention the terms gender identity, gender expression, gender transition, or transgender.

Title IX is concerned with discrimination based on biological sex, not on any gender-based classifications. For

one, the statute says nothing about gender identity or transgender status. 20 U.S.C. § 1681(a). Further, Title IX's regulations reinforce that "sex" refers only to biology. For example, some regulations speak of "one sex" and "the other sex", see, e.g., 34 C.F.R. § 106.33 (2023), and others "members of each sex" and "members of both sexes," compare 34 C.F.R. § 106.41(b) (2023), with 34 C.F.R. § 106.41(c) (2023). These regulations lose their meaning if the statute is interpreted to contemplate gender—a fluid rather than "immutable" trait—as the statute would lose its binary, biological backdrop. Frontiero, 411 U.S. at 686.

But above all, this Court is not the legislature. "Whether Title IX should be amended to equate 'gender identity' and 'transgender status' with 'sex' should be left to Congress—not the courts." Adams, 57 F.4th at 817.

2. Bostock does not apply to Title IX.

Bostock held that gender identity discrimination in the employment hiring and firing context violates Title VII. 140 S. Ct. 1731 (2020). While it is true that courts routinely look to Title VII caselaw when interpreting Title IX, see, e.g., Doe v. Univ. of Dayton, 766 F. App'x 275 (6th Cir. 2019), Bostock is inapplicable in this context for three reasons: (1) Bostock does not change the original, ordinary meaning of "sex" under Title IX; (2) This Court explicitly limited its holding in Bostock to

employment decisions; and (3) Bostock's analysis does not work under Title IX because Title IX does not prohibit all sex distinctions.

First, Bostock did not change the meaning of the term "sex" in Title IX. Rather, in Bostock, this Court recognized that transgender status and gender identity are "distinct concepts" from sex. 140 S. Ct. at 1746–47.

Second, this Court explicitly limited its holding in Bostock to employment decisions. Id. at 1753 ("[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind."). Because Title IX deals with educational opportunities, "it does not follow that [the] principles announced in [Bostock's] Title VII context automatically apply [or should apply] in the Title IX context." Meriwether v. Hartop, 992 F.3d 492, 510 n.4 (6th Cir. 2021).

Third, Bostock's analysis is inapplicable to Title IX because Title IX does not prohibit all sex distinctions. Instead, "Title IX, unlike Title VII, includes express statutory carve-outs for differentiating between the sexes." Adams, 57 F.4th at 811. Title IX's express regulatory carve-out for human sexuality classes, 34 C.F.R. § 106.34(a)(3), makes Bostock's reasoning inapplicable here. This is because "[w]hile Title VII makes sex 'not relevant to the selection, evaluation, or compensation of employees,' the Title IX framework expressly

allows" a school to conduct human sexuality classes in separate sessions on the basis of biological sex without violating the statute. See Soule v. Connecticut Ass'n of Sch., Inc., 90 F.4th 34, 63 (2d Cir. 2023) (Menashi, C.J., dissenting) (citing Bostock, 140 S. Ct. at 1741); 34 C.F.R. § 106.34(a)(3).

Importantly, while sex is irrelevant to hiring or firing decisions, Bostock 140 S. Ct. at 1741, this Court declined to extend its Bostock holding to "bathrooms, locker rooms, or anything else of the kind," id. at 1753, because these are areas where sex *is* relevant. Sex is certainly relevant to the assignment of students to human sexuality classes, as classroom instruction is tailored "to anatomical and physiological characteristics, and the unique experiences and health care needs associated with these characteristics," so that children learn about their own bodies. Boe, -- F.7th at 3–4.

In sum, applying Bostock to Title IX would contradict the statute's plain text and purpose. Several federal courts have acknowledged this and, accordingly, have interpreted Bostock's rule and reasoning to be limited only to Title VII itself. See, e.g., Neese v. Becerra, 640 F. Supp. 3d 668, 676 (N.D. Tex. 2022) (citing Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he rule in Bostock extends no further than Title VII."); Adams v. Sch. Bd. Of St. James Cnty., Fla., 3 F.4th

1299, 1336 (11th Cir. 2021) (Pryor, C.J., dissenting) (stating Bostock's reasoning applies to Title VII, not Title IX)).

3. The federalism canon compels a narrow interpretation of Title IX.

Aimed at protecting our system's separation of powers, the "federalism cannon" of statutory interpretation disfavors broad interpretations of federal regulatory statutes. See, e.g., Bond v. United States, 572 U.S. 844, 857–59 (2014); Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–74 (2001).

This Court has recently reiterated that it "require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." Sackett v. Envtl. Prot. Agency, 598 U.S. 651, 679 (2023) (alteration in original). Public education and health fall squarely within the states' historic police power. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905); see Wisconsin v. Yoder, 406 U.S. 205, 213 (1972). Therefore, this Court should demand a clear statement for "[a]n overly broad interpretation" of Title IX that encroaches on traditional areas of state regulation. Sackett, 598 U.S. at 680.

Further, Congress passed Title IX pursuant to its authority under the Spending Clause. U.S. Const. art. I, § 8, cl. 1; Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S.

629, 640 (1999). And "if Congress intends to impose a condition on the grant of federal moneys [under its Spending Clause authority], it must do so unambiguously." Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). The requirement of a clear statement of conditions from Congress, "enable[s] the States to exercise their choice [to accept federal funds] knowingly, cognizant of the consequences of their participation." M.K. by & through Koepp, 2023 WL 8851661, at *8 (citing Pennhurst, 451 U.S. at 17) (alterations in original).

These federalism concerns both call for a "clear statement" rule in this case, Bond 572 U.S. at 858, such that Congress' intention to cover gender identity (and, thus, transgender status) under Title IX must be "unmistakably clear in the language of the statute." Gregory, 501 U.S. at 460. But because it is not, even if this Court determines that Title IX does protect against discrimination on the basis of gender identity or transgender status, the Board could not have been on notice that its policy of separating students into human sexuality classes based on biological sex violates Title IX.

C. Even if Title IX's protections do extend to gender identity or transgender status, the Policy does not discriminate on the basis of either of those classifications.

The Policy does not discriminate against Boe on the basis of her transgender status or gender identity. Instead, the

Policy makes a purely sex-based distinction for purposes of providing relevant human sexuality education. The Policy, which is concerned with "anatomical and physiological characteristics, and the unique experiences and health care needs associated with these characteristics," Boe, -- F.7th at 4, is based solely on the physiological characteristics of students as identified by a doctor at birth (and as recoded on their original birth certificate). Id. Accordingly, under the Policy, Boe, a biological male with male reproductive organs,[2] will be assigned to the human sexuality class at Dune Unified School that provides instruction tailored to biological males. Id. The Policy treats Boe the same as all other similarly situated individuals (i.e., those with male reproductive organs) as a means of carrying out the core objective of educating students on their anatomy.[3] Id. at 3–4.

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[2] Boe is not a biological female and has presented no evidence that she has the reproductive organs of a female. Boe, -- F.7th at 4 ("Boe is not currently taking puberty blockers or any other form of gender-affirming medical care.").

[3] Many transgender youths retain their natal reproductive organs, as surgery under the age of 18 is rare. Aryn Fields, ICYMI: AP Debunks Extremist Claims About Gender Affirming Care, The Human

A policy that discriminates on the basis of gender identity would take a student's transgender status into account where it has no relation to the program or activity. For example, a school discriminates on the basis of gender identity where it implements a policy providing that students whose gender identity matches their biological sex can use the school computer science labs, but those that identify with a sex other than their biological sex cannot. Here, the Board's policy on human sexuality classes is fundamentally different. The Board's assignment of students to classes based on their biological sex has a logical relation to the objective of the educational programming—to teach students about their own anatomy and physiology. Boe, -- F.7th at 3–4.

While Boe may prefer to be in the "girls'" human sexuality class, id. at 5, the Board does not discriminate against Boe under Title IX by assigning her to the "boys'" class based on her biological sex. In fact, Boe would be entirely worse off and would be denied the benefits of this educational programming if she were assigned to the "girls'" class, as she would completely

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Rights Campaign (April 25, 2023), http://tinyurl.com/hrc-genderaffirming; Helen Santoro, Gender-affirming care for trans youth: Separating medical facts from misinformation, CBS News (June 28, 2023), http://tinyurl.com/CBS-genderaffirming.

miss out on learning about the reproductive organs she has and how those body parts function.

D. The Policy requires students to learn health information related to their anatomy; it is not based on any sex stereotypes.

Wholly lacking in this case is any evidence that the Board treated Boe with any animus because she identified as transgender. In Price Waterhouse, this Court held that a woman who was denied a promotion because she failed to conform to gender stereotypes had a cognizable claim for discrimination under Title VII because she was discriminated against "because of sex." 490 U.S. 228 (1989). The Court reasoned that it was impermissible for the plaintiff's employer to condition her promotion on such stereotypical factors as the plaintiff's ability to "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 235.

Here, Boe cannot show that the Board discriminated against her because of the way she looked, acted, or spoke. See Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, 680 (W.D. Pa. 2015). The Board has invited Boe to "live in conformance with [her] [female] gender identity in all

material respects,"[4] id. at 681, with the one outlier being the Policy regarding human sexuality classes. Nevertheless, the Policy is not based on an "oversimplified opinion, prejudiced attitude, or uncritical judgment," of Boe's gender identity. Stereotype, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/stereotype (last accessed Feb. 11, 2024). By contrast, it is based solely on her reproductive organs and their functions, as determined by her biological sex as assigned at birth. Boe, -- F.7th at 3.

In enacting the Policy, the Board was not acting to punish Boe's noncompliance with sex stereotypes. Instead, the Policy makes reasonable, and explicitly lawful, distinctions based purely on sex, it is aimed at "protect[ing] and advanc[ing] the individual and public health of young Dune residents," and it is equally applied to all students. Id. at 3.

II. The School Board's Policy does not violate the Equal Protection Clause of the Fourteenth Amendment.

[4] "Her teachers and classmates all refer to her by her correct name and pronouns," she is permitted to use and uses the "girls'" bathroom and changing facilities, and she is permitted to participate in sex-separated school athletics consistent with her gender identity. Boe, -- F.7th at 4, 5.

Under the Equal Protection Clause of the Fourteenth Amendment, no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause requires that all persons similarly situated be treated alike. F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). That said, under some circumstances, separating individuals is appropriate and remains consistent with the Equal Protection Clause.

A court must first determine what level of scrutiny applies in an Equal Protection claim. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 607 (4th Cir. 2020), as amended (Aug. 28, 2020). In making this determination, courts look to the basis of the distinction between the classes of persons. Id. (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)). Here, intermediate scrutiny is the most appropriate standard of review.[5]

A. Intermediate scrutiny is appropriate because the Policy involves a sex-based classification.

This Court has identified five suspect or quasi-suspect classes for purposes of equal protection review: race, national origin, alienage, sex, and non-marital parentage. Boe, -- F.7th

[5] Both parties have agreed that intermediate review is appropriate, but for different reasons. Boe, -- F.7th at 7.

at 8 (citing Kenji Yoshino, The New Equal Protection, 124 HARVARD L. REV. 747, 756 (2011)). For those that are quasi-suspect (sex and parentage), intermediate scrutiny is applied. See, e.g., Grimm, 972 F.3d at 607–608 (citing City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985)).

Classifications based on sex assigned at birth on a birth certificate are sex-based classifications. Grimm, 972 F.3d at 608 ("We agree with the Seventh and now Eleventh Circuits that when a 'School District [implements a policy] based upon the sex listed on the student's birth certificate,' the policy necessarily rests on a sex classification."). Thus, the Policy here that classifies students based on their "biological sex as determined by a doctor at birth and recorded on their original birth certificate," Boe, -- F.7th at 3, is a sex-based classification reviewable under intermediate scrutiny.

B. The Policy satisfies intermediate scrutiny.

Under intermediate scrutiny, a sex-based classification passes constitutional muster so long as it (1) advances an important governmental objective and (2) is substantially related to that objective. Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980). In other words, there must be an "exceedingly persuasive justification" for a classification. See United States v. Virginia (VMI), 518 U.S. 515, 534 (1996). Here, the Policy satisfies both prongs because (1) the Board has an

important government interest in protecting and advancing the individual and public health of its residents, and (2) the Board's Policy is related to its objective of protecting and advancing the health of its students. Boe, -- F.7th at 3.

1. The Board has an important government interest in protecting and advancing the individual and public health of its young residents.

As one of the primary sources of information for children, schools have a strong interest in providing their students with "accurate, age-appropriate, and evidence-based information about human sexuality" Boe, -- F.7th at 3 (see PREAMBLE).

Moreover, schools play a particular role in setting policies for students. Adams, 57 F.4th at 801. And, as this Court has recognized, "Fourteenth Amendment rights are different in public schools than elsewhere because of the schools' custodial and tutelary responsibility for children." Id. (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995)). This is because "in a public school environment[,] ... the State is responsible for maintaining discipline, health, and safety." Id. (quoting Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002)). Thus, the Board clearly has an interest in providing students with appropriate information on human sexuality to advance the health of those students.

2. The Board's Policy is related to its objective of protecting and advancing the health of its young residents.

The Policy provides for instruction on human sexuality for students, covering topics including reproductive anatomy, the use of contraceptives, and preventative care and self-screening for early detection of cancer, to reach the Board's objective of protecting and advancing the health of its young residents. Boe, -- F.7th at 3. More specifically, the Policy's separation of students based on their biological sex is related to the Board's interest because the instruction is tailored to "anatomical and physiological characteristics and the unique experiences and health care needs associated with [those] characteristics." Id. It is most appropriate for students to be separated according to their anatomy to (1) ensure the students learn information most applicable to their bodies, and (2) allow students to discuss what their body is going through with students whose bodies are going through the same things.

Weighing the facts of this case against the Board's interest shows that the justification is genuine. The Board has an interest in educating its students, including Boe, and any other transgender student, on their anatomy alongside their peers whose bodies have the same organs and functions.[6]

[6] Fields, supra note 1 (explaining that many transgender youths retain their natal reproductive organs).

3. A perfect fit is not required for intermediate scrutiny.

While there must be "enough of a fit between the . . . [policy] and its asserted justification," the Equal Protection Clause does not demand a perfect fit between means and ends when it comes to sex. Danskine v. Mia. Dade Fire Dep't, 253 F.3d 1288, 1299 (11th Cir. 2001)); See Nguyen v. INS, 533 U.S. 53, 70 (2001) ("None of our gender-based classification equal protection cases have required that the [policy] under consideration must be capable of achieving its ultimate objective in every instance.").

Thus, although the Board may have been able to devise a better policy for its education on human sexuality, it is not constitutionally required to. Even if the Policy has the potential to result in a disparate impact on Boe, "a disparate impact alone does not violate the Constitution." Adams, 57 F.4th at 810. A disparate impact only "offends the Constitution when an otherwise neutral policy is motivated by 'purposeful discrimination.'" Id. (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979); accord Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–66 (1977)).

Here, there is no purposeful discrimination. The Board's intent was to create and implement human sexuality instruction

for its students about their bodies to foster the individual and public health of the students. Boe, -- F.7th at 3.

The record demonstrates that the Board has, in multiple respects, been inclusive towards transgender students through other policies (i.e., including gender identity as an enumerated characteristic in anti-bullying policies, allowing transgender students to access restrooms consistent with their gender identity, and allowing transgender students to participate in sex-segregated athletics consistent with their gender identity). Id. at 4 (citing Dune Sch. Bd., Resolution 2021-4 (2021)). The record is void of any evidence of purposeful discrimination and instead includes multiple instances of purposeful inclusion.

Thus, there is a sufficiently close fit between the Policy and the Board's important objective such that the Policy satisfies intermediate scrutiny.

C. The Policy does not classify students based on their transgender status.

As discussed in II.A., policies that classify based on sex assigned at birth are sex-based classifications. They are not transgender based. Although its opinion is not binding on this court, the Eleventh Circuit in Adams provides a helpful analysis of a similar issue. 57 F.4th at 808. The court in Adams agreed that a school's policy separating students based on sex assigned at birth is a classification based on biological sex, not

transgender status. Id. The court reached this conclusion because (1) the policy facially classified students based on biological sex, and (2) the policy did not rely on impermissible stereotypes associated with transgender status. Id. at 808–09.

On the first point, the court noted that transgender status and gender identity are absent from the policy, and to say that the policy singles out transgender students would be a mischaracterization of how the policy operates. Id. at 808. To take it a step further, the court acknowledged that Bostock, 140 S. Ct. 1731 (2020), does not require a different result. Id. Recognizing that "[w]hile Bostock held that 'discrimination based on . . . transgender status necessarily entails discrimination based on sex' . . . a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the bases of transgender status." Id. (quoting Bostock, 140 S. Ct. at 1747).

On the second point, the court stated that the policy does not rely on how students act or identify, but rather separates purely based on biological sex, which is not a stereotype. Id. at 809. Moreover, the court stated, "[t]o say that the bathroom policy relies on impermissible stereotypes because it is based on the biological differences between males and females is incorrect." Id. at 801 (citing Nguyen, 533 U.S. at 73 ("Mechanistic classification of all our differences as

stereotypes would operate to obscure those misconceptions and prejudices that are real.")).

Here, the same is true for both points. First, like the policy in Adams, the Policy separates based on physiological anatomy. Transgender status is not mentioned in the Policy, and it would be a mischaracterization of how the Policy operates to say that it singles out transgender students, because the instruction is based on physiological anatomy. Second, the Policy depends in no way on how a student behaves or identifies. It depends entirely on biological sex as indicated on a birth certificate, which is not a stereotype. Thus, like the policy in Adams, the Policy here lawfully classifies on the basis of biological sex, and not transgender status.

In Hecox v Little, the Ninth Circuit held that a statute that banned transgender women and girls from participating in women's athletics did discriminate based on transgender status. 79 F.4th 1009, 1016 (9th Cir. 2023). Importantly, the court reached this holding specifically because there was evidence suggesting the Board enacted the policy *because of* its adverse effect on transgender students. Id. at 1025 ("The Act . . . has [] been carefully drawn to target transgender women.").

The Ninth Circuit contrasted the case before it with Adams and recognized that, in Adams, there was no such evidence, and, instead, the school in Adams "enacted policies that

affirmatively accommodated transgender students." Id. Even though the Board in Adams was aware that their policy may apply differently to transgender students, "discriminatory purpose" requires more than awareness of consequences. Id. at 810 (quoting Feeney, 442 U.S. at 279). Instead, a discriminatory purpose implies that the decisionmaker chose a particular course of action "because of," not merely "in spite of," its adverse impacts. Id. (quoting Feeney, 442 U.S. at 279).

The situation before this Court is much more akin to Adams. Unlike the Board in Hecox, the Board here did not enact this policy *because of* transgender students. The policy was enacted to further the health of all students and provide them with information related to their anatomy. While the Policy may incidentally impact Boe or another transgender student, it was not designed to target transgender students, and the purposes of the Policy apply to both cisgender and transgender students.

Indeed, the Board here, like the board in Adams, has demonstrated its commitment to the inclusion of transgender students. Boe, -- F.7th at 4. It would be odd, to say the least, for the Board to enact multiple policies in favor of inclusivity (discussed in II. A.), only to be followed by a policy designed to exclude transgender students. In sum, there is no evidence of discriminatory intent, solidifying that the policy classifies based on biological sex, not transgender status.

D. Even if the Policy did classify students based on transgender status, the Policy would then be subject to rational basis review, which it would survive.

Transgender classifications are subject to rational basis review because this Court has never held that transgender people are a suspect or quasi-suspect class entitling them to higher scrutiny. Vasquez v. Iowa Dep't of Hum. Servs., 990 N.W.2d 661, 669 (Iowa 2023). That said, there is disagreement among district courts as to whether transgender status is or should be a quasi-suspect classification. Compare Jamison v. Davue, No. S–11–cv–2056 WBS, 2012 WL 996383, at *3 (E.D. Cal. Mar. 23, 2012) ("transgender individuals do not constitute a 'suspect' class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review"), with Evancho v Pine-Richland Sch. Dist., 237 F.Supp.3d 267, 288 (W.D. Pa. 2017) (concluding that transgender status is a classification requiring heightened scrutiny).

Notably, there is a high bar for recognizing new classes and this Court has been reluctant to expand the scope of quasi-suspect classifications. L. W. by & through Williams v. Skrmetti, 73 F.4th 408, 420 (6th Cir. 2023). In fact, this Court has declined *every opportunity* to recognize a new quasi-suspect class in the last four decades. Ondo v. City of Cleveland, 795 F.3d 597, 609 (6th Cir. 2015); Cleburne, 473 U.S. at 442 (holding that mental disability is not a quasi-suspect class);

Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (holding that age is not a quasi-suspect class).

If this Court holds that transgender people are a quasi-suspect class, the Policy would still be reviewed under intermediate scrutiny, which it can survive. In sum, even if transgender people are a quasi-suspect class and even if separating based on biological sex (i.e., anatomy) incidentally separates based on transgender status, the goal of providing accurate health education to students remains the same and the separation would still be substantially related to that goal. It is therefore unnecessary to conduct the four-factor analysis[7] to determine whether transgender people indeed constitute a quasi-suspect class, as the outcome would be the same.

Because transgender people currently do not constitute a suspect or quasi-suspect class, a policy classifying based on transgender status would be examined under rational basis

[7] Factors: whether the class (1) has historically been subject to discrimination, Lyng v. Castillo, 477 U.S. 635, 638 (1986); (2) has a defining characteristic that bears a relation to its ability to contribute to society, Cleburn, 473 U.S. at 440-413; (3) may be defined as a discrete group by obvious, immutable, or distinguishing characteristics, Lyng, 477 U.S. at 638; and (4) is a minority or politically powerless. Id.

review. Doe v. Pennsylvania Bd. of Prob. & Parole, 513 F.3d 95, 107 (3d Cir.2008) ("If state action does not burden a fundamental constitutional right or target a suspect class, the challenged classification must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). Rational basis review simply requires that a policy be "rationally related to a legitimate state interest." Cleburne, 473 U.S. at 440.

Minimal analysis is necessary here to show the Board's Policy meets this burden. The Policy separates students based on their physiological anatomy for purposes of instruction on anatomy. Such a policy bears a rational relationship to the legitimate goal of educating students on their anatomy, thereby furthering the health of the students. Thus, even if this Court holds the Board's Policy classifies students based on transgender status, the Policy would be subject to rational basis review, which it would certainly survive.

Conclusion

For the foregoing reasons, this Court should affirm the Court of Appeals for the Thirteenth Circuit and deny Petitioner's motion for summary judgment.

Respectfully submitted,

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