

No. 23-1234

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In the Supreme Court of the United States

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JANE BOE, by and through her next friend  
and father, JACK BOE, *Plaintiff-Petitioner,*

v.

DUNE UNIFIED SCHOOL DISTRICT  
BOARD, *Defendant-Respondent.*


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

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**BRIEF FOR PETITIONER**

**TEAM 29**

  
Issue #1 Title IX



  
  
Issue #2 Equal Protection

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## **QUESTIONS PRESENTED**

1. Whether a school policy preventing a transgender girl from attending health class with other girls violates Title IX's prohibition of discrimination on the basis of sex.
2. Whether a school policy excluding a transgender girl from attending health class with other girls violates the Equal Protection Clause given it determines "sex" based on sex designated at birth contrary to accepted medical definitions.

## **OPINION BELOW**

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

## **CONSTITUTIONAL RULES AND PROVISIONS**

U.S. Const. amend. XIV, §1.

## **INTRODUCTION**

The Dune School District Board (the "Board") violated Title IX of the Education Amendments of 1972 and the Equal Protection Clause of the Fourteenth Amendment when its policy (the "Policy") excluded Jane Boe ("Jane"), a transgender girl, from attending a sex-segregated health class with other girls based on the sex designated to her at birth, rather than reference to her medically defined sex characteristics, like gender identity.

*First*, the Policy violates Title IX. Title IX prevents schools that receive federal funding from discriminating "on the basis of sex." Since Dune is a public school, it receives federal funding and is subject to Title IX. Jane is harmed by

the Policy because she is forced to choose between social stigma in the boys' class or denied health class altogether. The Policy discriminates based on transgender status, which the Supreme Court has determined is discrimination "on the basis of sex" under civil rights statutes. Further, the Policy's discrimination against Jane violates Title IX and does not fall under Title IX's living facilities exception or the Department of Education's sex-segregated classroom exception. A health class is not a living facility and does not pose similar privacy concerns. The Department of Education's exception uses the terminology "boys and girls," signifying gender identity rather than sex. Under its rules, Jane should be permitted to enroll in the girls' class because that conforms with her gender identity. Therefore, the Policy violates Title IX.

*Second,* the Policy violates the Equal Protection Clause because it determines which health class students must attend based on their "original birth certificate," necessarily prohibiting transgender students from attending the class that matches their gender identity. This is an express classification based on sex *and* transgender status that warrants heightened scrutiny. Since the Policy cannot be implemented without reference to Jane's sex, it classifies based on sex designated at birth. By failing to account for gender identity in the definition of "biological sex" and practically forcing Jane to



enroll in the boys' class, the Policy penalizes her for the incongruence between her gender identity and sex designated at birth. Also, classification based on transgender status triggers heightened scrutiny because being transgender is an immutable trait that does not affect one's capabilities, and the United States has a history of persistent discrimination against its politically powerless transgender minority. Separate from its facial classifications, the Policy warrants heightened scrutiny because it was enacted for the *purpose* of counteracting transgender students' gender identity. Next, the Policy fails heightened scrutiny because the Board's purported goal of advancing individual and public health is not substantially and directly related to it. The Board undermines its goal by preventing Jane from accessing pertinent health information, humiliatingly outing her, and inhibiting other students' learning experience in sex-segregated health class. The Policy is drastically underinclusive because its "original birth certificate" requirement leaves out students with the physiological characteristics for which the Board hopes to tailor instruction. The Policy even fails rational basis review because it rests on speculative assertions, counter to medical evidence. Thus, the Policy violates the Equal Protection Clause.

## STATEMENT OF THE CASE

Jane is a twelve-year-old transgender girl in the seventh grade at Dune Junior High School. *Boe v. Dune Unified Sch. Bd.*, 123 F.7th 45, 2, 4 (13th Cir. 2023). She *lives* as and is *treated* as a girl; she chose to take on her grandmother's middle name as her first name, she uses the girls' bathroom and changing facilities at school, she regularly spends time with a small group of girlfriends and does not typically interact with boys, and her teachers and classmates call her by her correct pronouns and name. *Id.* at 4-5. Jane has lived as a girl since she was seven, consistent with her "deeply felt, inherent sense" of being a girl, her "gender identity."<sup>1</sup> Gender identity is a key part of one's "sex" and is not a voluntary choice.<sup>2</sup> *Id.* at 4.

Being a "transgender girl" means that Jane's female gender identity does not match the male sex assigned to her at birth.<sup>3</sup> "Cisgender" refers to people whose sex assigned at birth matches

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<sup>1</sup> See Am. Psychological Ass'n ("APA"), *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychol. 832, 862 (2015), <https://www.apa.org/practice/guidelines/transgender.pdf>.

<sup>2</sup> Brief of Am. Acad. of Pediatrics et al., as Amici Curiae for Respondents, *Grimm v. Gloucester*, 971 F.3d 586 (4th Cir. 2020).

<sup>3</sup> See APA, *supra* note 1, 832, 862-63.

their gender identity.<sup>4</sup> One's "sex assigned at birth" is typically based on the appearance of external genitalia; these are not always consistent with someone's other sex characteristics, such as internal reproductive organs, hormones, chromosomes, and secondary sex characteristics, and are sometimes ambiguous at birth and develop over time, as in the case of intersex people.<sup>5</sup> Gender refers to socially constructed characteristics, expectations, and norms of girls and boys.<sup>6</sup>

Despite accepted medical definitions, in December 2022, the Board unanimously passed, without any public debate, a sex-segregated health class policy, which excludes Jane from enrolling in the girls' health class because her "biological sex as determined by a doctor at birth" and recorded on her "original birth certificate" is male. Dune Sch. Bd., Res. 2022-14 §1(c) (2022); *Boe*, 123 F.7th at 4. The Board claims that the Policy is "necessary to protect and advance the individual and public health of young Dune residents" and that schools must

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<sup>4</sup> See APA, *supra* note 1, 833, 862.

<sup>5</sup> See, e.g., Nat'l Ctr. for Transgender Equal., *FAQs About Transgender People*, <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

<sup>6</sup> See APA, *supra* note 1, at 835-36.

provide “accurate, age-appropriate, and evidence-based information” about topics such as puberty and safe sex practices in a manner that is tailored “according to anatomical and physiological characteristics, and the unique experiences and health care needs associated with these characteristics.” *Id.* Preamble, §1(c). Schools, however, are not prohibited from “providing the same information to male and female students” where it would be “equally relevant.” *Id.* §1(c)(a). The same members passed another policy in July 2021, requiring schools to include gender identity in their anti-bullying policies, allowing transgender students access to restrooms consistent with their gender identity, and permitting transgender students to participate in sex-segregated school athletics consistent with their gender identity. Dune Sch. Bd., Res. 2021-4 (2021).

While parents may remove their children from health class altogether, the Board does not allow parents of transgender children to enroll them in the class that matches their gender identity, as Jane’s parents tried to do, nor does the Policy provide any alternatives. *Boe*, 123 F.7th at 5. For Jane’s parents, it will be costly and burdensome for them to obtain health instruction elsewhere. *Id.* Alternatively, if Jane enrolls in the boys’ class, she would be outed since only a small circle of girlfriends know she is transgender. *Id.* Jane would rather

stay home from school than face the ostracism, harassment, and stigma that would come from being a girl in a boys' class. *Id.*

Unable to persuade the Board to admit his daughter to the girls' class, Petitioner Jane's father commenced this suit against the Board on her behalf, asserting Title IX and equal protection violations against Respondent the Board. The District Court of Texington granted Respondent's summary judgment motion, and the Thirteenth Circuit affirmed. Petitioner now appeals.

### ARGUMENT

By excluding Jane, a transgender girl, from attending a sex-segregated health class with other girls, the Policy violates (I) Title IX and (II) the Equal Protection Clause.

#### **I. Excluding Jane from the Girls' Health Class on the Basis of Her Transgender Status Violates Title IX.**

The Policy excludes Jane from health classes that are consistent with her gender identity, subjecting her to ostracism or forcing her to forgo this critical education entirely. The Policy discriminates against Jane and other transgender students "on the basis of sex" and thus violates Title IX. Title IX states, "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." The Education Amendments of 1972, 20 U.S.C. § 1681(a) (1972). While the Supreme Court has not explicitly ruled whether Title IX's

"on the basis of sex" includes discrimination based on transgender status, it defined discrimination against transgender people as discrimination "because of sex" in the Title VII context. Due to Title VII and Title IX's similar goals and language, Title VII interpretations have been applied to Title IX.

There are four elements to a Title IX claim. First, the school receives federal funding. Jane attends a public school, and therefore, it is subject to Title IX. Second, Jane is harmed by the Policy because she is denied a benefit provided to all other students and faces either social stigma or has to opt out of the human sexuality class entirely. Third, Jane is discriminated against because she is a transgender girl, according to the reasoning in both *Bostock* and *Price Waterhouse*. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Finally, The Title IX analysis then turns to whether the sex discrimination Jane faces violates Title IX. It does. The Policy's discrimination against Jane does not meet any of Title IX's exceptions, either in the text of the statute or in the Department of Education's regulations, and therefore it violates Title IX. 20 U.S.C. § 1681; 34 C.F.R. § 106.34 (2020). The Court should reverse the Thirteenth Circuit and hold that the Policy violates Title IX.

**(A) THE POLICY HARMS JANE BECAUSE IT DISCRIMINATES AGAINST HER AND DENIES HER A BENEFIT.**

Jane is clearly harmed by the Policy because she faces either stigma and ostracism or must forego human sexuality class entirely. The Policy requires that Jane attend human sexuality class with the boys because she was assigned male at birth despite that she is a transgender girl. Department of Education regulations define discrimination for the purposes of Title IX as "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic...program." 34 C.F.R.

§ 106.31(a) (emphasis added). The Policy exposes Jane to discrimination and denies her a benefit afforded to others.

1. The Policy harms Jane by discriminating against her.

Title IX prevents discrimination on the basis of sex. Discrimination "refers to distinctions or differences in treatment that injure protected individuals." *Burlington N. and Santa Fe Ry. Co v. White*, 548 U.S. 53, 59 (2006). The Policy would clearly injure Jane by distinguishing her based on her transgender status. Forcing Jane to attend the boys' class simply because she was assigned male at birth would cause immense stigma, ostracism, and humiliation. Students outside of Jane's close friends are unaware that she is transgender, and forcing her to attend class with the boys would "out" her

transgender status to the community. Middle school is uncomfortable enough for young people without having to reveal something as personal as being transgender to the whole community. Additionally, children can be unkind and marginalize those who are different. Transgender children who are “out” during K-12 education face staggering rates of violence and harassment; 54% are verbally harassed, 24% are physically attacked, and 13% are sexually assaulted.<sup>7</sup> 17% of transgender students left school because of this treatment.<sup>8</sup> Social ostracism and harassment lead to severe mental health problems. 40% of transgender people have attempted suicide in their lifetime (nearly nine times the rate of the general U.S. population).<sup>9</sup> It is undeniable that forcing Jane to attend the boys’ class discriminates against her and causes immense harm.

## 2. The Policy denies Jane benefits afforded to other students.

Since Jane and her parents do not wish for her to face this marginalization, their only other option is to remove her from the human sexuality class entirely. This denies her a benefit on the basis of sex. Specifically, Jane would be denied the

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<sup>7</sup> Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat’l Ctr. for Transgender Equality, 4 (2016).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 5.



opportunity to have an age-appropriate human sexuality class taught by professional teachers and counselors at her school. Furthermore, Jane's parents have explained that opting out of the class is not "a suitable option for their family." *Boe*, 123 F.7th at 5. If Jane's family is forced to opt out, they will bear the costly burden of seeking out a proper sexual education for Jane. *Id.* If Jane's parents are forced to remove her from the class altogether, she is denied a benefit afforded to her peers because of her sex, which violates Title IX.

**(B) JANE WAS DISCRIMINATED AGAINST ON THE BASIS OF SEX.**

Discriminating against transgender students for their failure to comply with traditional femininity or masculinity is discrimination "on the basis of sex." This court held in *Bostock* that discrimination against transgender people is discrimination "because of...sex" under Title VII. 140 S. Ct. at 1744; 42 U.S.C. § 2000e-2 (1991). Additionally, in *Price Waterhouse*, this court held that discrimination "because of...sex" includes discrimination based on gender identity. 490 U.S. at 251. Either or both of these interpretations of Title VII should also apply to Title IX. This court and many circuits have held that similarly situated statutory language and interpretation will inherently influence the interpretation of other statutes. See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) ("Title IX was modeled after Title VI of the Civil Rights Act of

1964...and passed Title IX with the explicit understanding that it would be interpreted as Title VI was.") (internal citations omitted); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) ("Although *Bostock* interprets Title VII...it guides our evaluation of claims under Title IX.") (internal citations omitted); *Kasper ex rel. Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022) ("Title IX was passed as part of the Education Amendments of 1972 and 'patterned after' the Civil Rights Act of 1964."); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1034 (7th Cir. 2017) (holding that interpretations of Title VII influence that of Title IX, and thus Title IX's prohibition on sex discrimination likely includes transgender status). Jane was discriminated against "on the basis of sex," according to *Bostock* and *Price Waterhouse*.

1. The Policy discriminates against Jane "on the basis of sex," according to *Bostock*.

Discrimination "on the basis of sex" includes discrimination against transgender people for their gender identity. In *Bostock*, this Court held that when someone discriminates against a transgender person, they "necessarily and intentionally discriminate against that individual in part because of sex." 590 U.S. at 1744. Discrimination against transgender students is discrimination because of the incorrect

assumption that people's sex assigned at birth and their gender identity should match. By treating Jane differently than other girls in her class due to her gender identity, the Policy treats Jane differently "on the basis of sex." Additionally, the Board cannot escape liability "by demonstrating that it treats males and females comparably as groups" because, just like Title VII, Title IX concerns the treatment of individuals, not groups. *Id.* at 1744. Since the Policy harms Jane because of her gender identity, it discriminates on the basis of sex.

2. The Policy discriminates against Jane "on the basis of sex," according to the sex stereotyping theory of *Price Waterhouse*.

Prior to *Bostock*, in *Price Waterhouse*, the Supreme Court held that "sex" includes gender. 490 U.S. at 251. *Price Waterhouse* involved a woman who was discriminated against for not being feminine enough and for being perceived as too masculine. *Id.* at 231-35. The Court stated, "We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251. By assuming how a person assigned male at birth should act, dress, and be addressed and discriminating against a transgender girl for her refusal to conform to those assumptions, the Board inherently discriminates against Jane on the basis of sex. Following this reasoning, circuits have recognized that discrimination against transgender people is

discrimination on the basis of sex. *E.g.*, *Whitaker*, 858 F.3d at 1048-49; *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574-80 (6th Cir. 2018) (applying reasoning to Title VII). By discriminating against Jane for her failure to comply with societal expectations of how someone assigned male at birth should act, the Policy discriminates against her on the basis of sex. Therefore, under *Bostock* or *Price Waterhouse*, the Policy discriminates against her on the basis of sex.

**(C) DISCRIMINATING AGAINST TRANSGENDER STUDENTS ON THE BASIS OF SEX VIOLATES TITLE IX.**

The heart of the instant case is whether the discrimination Jane faces on the basis of her sex violates Title IX. Title IX prohibits people from being “excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program” on the basis of sex. 20 U.S.C. § 1681. The text of Title IX explicitly allows for separate living facilities based on sex. 20 U.S.C. § 1686 (1972). However, a human sexuality class is not a living facility, and the same privacy concerns that justify the living facility exemption do not support exempting sex-segregated human sexuality classes that differentiate between transgender and cisgender students. The Department of Education regulations do explicitly permit human sexuality classes to be separated between “boys and girls.” 34 C.F.R. § 106.34(a)(3). Crucially, though, “boys and

girls" typically refers to gender identities, not sex designated at birth. Therefore, neither exception supports the Policy.

1. There is no textual Title IX exception permitting the discriminatory policy.

Title IX prohibits discrimination on the basis of sex but explicitly exempts separate living facilities. Title IX's exceptions have been evaluated in the context of laws that prevent transgender students from using the bathroom that matches their gender identity. See *Grimm*, 972 F.3d at 618 n.16; *Whitaker*, 858 F.3d at 1047; *Adams*, 57 F.4th at 811. In these cases, courts are split on whether bathrooms fall within the "living facilities" exception because, feasibly, bathrooms could raise some of the privacy concerns that justify the exception. Compare *Grimm*, 972 F.3d at 618 n.16 (holding that bathrooms did not fall under the exception) and *Whitaker*, 858 F.3d at 1047 (same) with *Adams*, 57 F.4th at 811 (holding that bathrooms do fall into the statutory carve-out). No such argument can be made here. A human sexuality class is not a living facility and implicates no privacy concerns. No one will be undressing in class, and thus, the privacy argument cannot be sustained. Additionally, it would be a substantial violation of Jane's privacy to force her to attend class with the boys because it would "out" her as transgender against her and her parents' wishes. Because the Policy does not fall within Title IX's one

textual exception, it violates Title IX by discriminating against Jane on the basis of sex.

2. The Department of Education's rules permit human sexuality classes to be separated by gender, not sex designated at birth.

The Department of Education has promulgated rules that allow elementary and secondary schools to have human sexuality classes "conducted in separate sessions for boys and girls," but this is explicitly different than the Policy here. 34 C.F.R. § 106.34(a)(3). This Department of Education rule uses the terminology "boys and girls" to imply gender identity whereas "sex" usually refers to male and female. Elsewhere, in the rules, the Department does use the word "sex," but here, it uses the terminology associated with gender identity. Compare 34 C.F.R. § 106.34(a)(3) with 34 C.F.R. § 106.34(a)(1). If the Policy separated human sexuality classes into boys and girls, as the rules allow, rather than based on students' sex designated at birth, the Policy would fall under this exception. As it is written, the Policy fails to meet any of the Title IX exceptions outlined in the Department of Education's regulations (e.g., sports teams and other inapplicable exceptions). Because the Policy discriminates against Jane on the basis of sex and does not fit into any Title IX exceptions, it violates Title IX.

## **II. Excluding Transgender Students from a Health Class that Matches Their Gender Identity Violates Equal Protection.**

The Policy excludes Jane from the health class that matches her gender identity and relegates her to humiliation in the boys' class or complete removal from her peers. It denies Jane, a transgender girl, "the equal protection of the laws" by treating her differently from "all persons similarly situated," cisgender girls. U.S. Const. amend. XIV, §1; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). This inequality "produces a vicious and ineradicable stigma" that "deeply and indelibly scar[s] the most vulnerable among us—the children who simply wish to be treated as equals at one of [their] most fraught development moments..." *Grimm*, 972 F.3d at 586, 621 (4th Cir. 2020) (Wynn, J., concurring).

In evaluating Jane's equal protection claim, the Court must (A) subject the Policy to heightened scrutiny because it facially classifies students based on sex *and* transgender status and implies purposeful discrimination, (B) determine that the Policy fails that standard of review because the Board has not carried its "demanding" burden of proffering an "exceedingly persuasive" justification for such differential treatment, (C) and hold that the policy would even fail Rational Basis Review. *United States v. Virginia*, 518 U.S. 515, 524, 533 (1996) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

**(A) THE BOARD'S POLICY TRIGGERS HEIGHTENED SCRUTINY.**

The Court subjects "quasi-suspect" classifications, including "gender-based classifications," to "heightened scrutiny." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135-36 (1994) (explaining that gender-based classifications warrant heightened scrutiny due to "[o]ur Nation[\'s]...long and unfortunate history of sex discrimination"); *City of Cleburne*, 473 U.S. at 442. Before applying heightened scrutiny, (1) Petitioner will clarify the discrimination at issue, the differential treatment of transgender and cisgender students, (2) explain the reasons why this classification triggers heightened scrutiny, and (3) discuss how the Board's discriminatory purpose also warrants heightened scrutiny.

1. The Policy facially classifies transgender students.

On its face, the Policy divides transgender students from cisgender students. The lower court incorrectly accepted the Board's assertion that the only classification at issue is the division of "two groups of people (boys and girls)" and that the policy defining "biological sex" applies equally to all students. *Boe*, 123 F.7th at 8. This argument rests on three significant misunderstandings.

*First*, the Thirteenth Circuit did not question the Board's inaccurate definition of "biological sex" as that assigned at birth and indicated on one's "original birth certificate." Yet,



"among other biological components, 'biological sex' includes gender identity," and therefore, a transgender student's original birth certificate does not reflect this essential sex characteristic.<sup>10</sup> *Adams*, 57 F.4th at 857 (Pryor, J., dissenting).

*Second*, the Policy's "specific classification of 'biological sex' has been carefully drawn to target transgender [students], even if it does not use the word 'transgender' in the definition." *Hecox v. Little*, 79 F.4th 1009, 1024-1025 (9th Cir. 2023); *see also Latta v. Otter*, 771 F.3d 456, 467-78 (9th Cir. 2014) (holding that a same-sex marriage ban discriminates based on sexual orientation, even though it classified couples based on "procreative capacity" rather than "sexual orientation"). Because of the inaccurate "biological sex" definition, the Thirteenth Circuit misconstrues the classification at issue as between "boys and girls," lumping in cisgender girls and transgender boys on one side of the division and cisgender boys and transgender girls on the other. *Boe*, 123 F.7th at 8. However, Jane's challenge concerns whether the Board may exclude a *transgender* girl from enrolling in a class with other girls. Whether sex-segregated classes are permissible has never been the issue. Jane's challenge actually "depends on the existence of sex-separated [human sexuality classes]" because

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<sup>10</sup> See APA, *supra* note 1, 832, 862-63.

she would feel more comfortable attending the girls' class.  
*Adams*, 57 F.4th at 842 (Pryor, J., dissenting).

*Third*, "equal application" of a policy that contains sex-based or transgender status-based classifications does not immunize the classification from heightened scrutiny. *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967) (holding that miscegenation statutes punishing white and Black participants equally did not remove such racial classification from heightened scrutiny). In *Grimm*, the Fourth Circuit evaluated a policy requiring students' sex designated at birth to match that of the bathroom and locker room they used or, alternatively, to use a gender-neutral facility. *Grimm*, 972 F.3d at 608. That court rejected the argument that "all students [were] treated the same, regardless of sex, because the policy applie[d] to everyone equally." *Id.* at 609. Rather, the board's flawed reasoning was akin to claiming that "racially segregated bathrooms treated everyone equally, because everyone was prohibited from using the bathroom of a different race" and "providing a 'race neutral' bathroom option would [not] have solved the deeply stigmatizing and discriminatory nature of racial segregation." *Id.* Like the policy in *Grimm*, the Policy here discriminates against transgender students because it prohibits Jane from attending a class that aligns with her gender identity while allowing any cisgender girl to attend a class matching her gender identity.

2. Facial classification of transgender and cisgender students warrants heightened scrutiny.

The Board's classification between transgender and cisgender students triggers heightened scrutiny for a multitude of reasons: it facially classifies students based on (1) the sex designated to them at birth, (2) their nonconformity with the sex designated to them at birth, and (3) transgender status.

***i. The Policy classifies based on sex designated at birth.***

The Policy's explicit definition of "biological sex" creates a sex-based classification, triggering heightened scrutiny. If a school district's policy "requires reference to a person's sex to determine whether some activity is permitted or prohibited," it expressly classifies based on sex designated at birth. *Williams ex rel. L.W. v. Skrametti*, 83 F.4th 460, 498-99 (7th Cir. 2023) (White, J., dissenting) (citing *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485 (1982)). For instance, when schools "decide[] which bathroom a student may use based upon the sex listed on the student's birth certificate, the policy necessarily rests on a sex classification." *Grimm*, 972 F.3d at 608 (internal quotation marks omitted); *Whitaker*, 858 F.3d at 1052; see also *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 669-70 (8th Cir. 2022) (finding a sex-based classification when "[t]he biological sex of the minor patient [was] the basis on which the law

distinguishe[d] between those who [could] receive certain types of medical care and those who [could] not"). Similar to the laws at issue in the Fourth, Seventh, and Eighth Circuit cases, the Policy here does not *incidentally* mention sex. Instead, the Policy *requires* reference to Jane's "biological sex as determined by a doctor at birth and recorded on [her] original birth certificate" to decide whether she may enroll in one class or the other. Dune Sch. Bd., Res. 2022-14 §1(c). If Jane's original birth certificate declared that she was "female," the outcome of the Policy's "biological sex" requirement as applied to her would be reversed. "On that ground alone, heightened scrutiny...appl[ies]." *Grimm*, 972 F.3d at 608.

***ii. The Policy classifies based on the incongruence between gender identity and sex designated at birth.***

The Policy discriminates against Jane for the inconsistency between her gender identity and sex designated at birth. If a school's policy "punish[es] transgender [students] for gender non-conformity, thereby relying on sex stereotypes," it warrants heightened scrutiny. *Id.* at 608. Reasoning that discrimination based on transgender status constitutes discrimination "on the basis of sex" under Title VII because it is "inextricably bound up with sex," the *Bostock* Court asserted that penalizing gender nonconformity is a type of sex-based discrimination. 140 S. Ct. at 1742. Although *Bostock* concerned Title VII, the Court did not

“prejudge” the statute’s possible extension. *Id.* at 1753. Moreover, such statutory interpretation extends to equal protection analysis because if sex stereotyping is sufficient to constitute a *classification* under Title IX, it would not follow that the same law could be neutral under equal protection. See *M.C. ex rel. A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 768–71 (7th Cir. 2023) (reaffirming that “denying gender-affirming bathroom access can violate both Title IX” and equal protection after *Bostock*). Although Jane has been treated consistently with her gender identity by people at school until now, only her close friends know she is transgender. Altering her behavior by enrolling in a boys’ class will counteract her attempt to express her gender identity by “penaliz[ing]” her, humiliating her, forcibly outing her, and preventing her from learning health information pertinent to living as a girl, for seeking the same educational opportunity that Dune “tolerates” for cisgender girls whose gender identity matches their sex designated at birth. *Bostock*, 140 S. Ct. at 1741. Like the policies struck down in *Grimm* and *Martinsville*, which required transgender students to conform their use of bathrooms and locker rooms according to sex assigned at birth, the Policy here “necessarily rests on a sex classification” because it forces Jane to conform her enrollment and learning to the sex designated to her at birth. *Grimm*, 972 F.3d at 608.

***iii. Transgender status is a quasi-suspect class that triggers heightened scrutiny.***

In addition to its sex-based classifications, the Policy facially classifies Jane based on her transgender status. Courts across the country have determined that transgender people constitute a quasi-suspect class. See *Id.* at 607-11; *Karnoski v. Trump*, 926 F.3d 1180, 1200-1201 (9th Cir. 2019) (same); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 287 (W.D. Pa. 2017) (same); *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (same); see also *Brandt*, 47 F.4th at 670 n.4 (holding that lower court did not err in ruling that transgender people constitute a quasi-suspect class). But see *Skrmetti*, 73 F.4th at 487; *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1230 (11th Cir. 2023). A quasi-suspect class (1) “has historically been subject to discrimination,” (2) has no “defining characteristic that bears a relation to its ability to perform or contribute to society,” (3) “may be defined as a discrete group by obvious, immutable, or distinguishing characteristics,” and (4) “is a minority lacking political power.” *Grimm*, 972 F.3d at 611 (citing *Bowen v. Gillard*, 483 U.S. 587, 602 (1987); *City of Cleburne*, 473 U.S. at 440-41)).

*First*, the United States has a long and well-documented history of discrimination, stereotyping, harassment, and violence against transgender people. Being transgender has,

until recently, been categorized as a “disorder” and “clinical problem” by the medical community, Congress has denied certain benefits to transgender people despite conditions that would otherwise constitute eligibility, and the National Transgender Discrimination Survey has shown that transgender people “suffer[] high rates of employment discrimination, economic instability, and homelessness.” *Id.* at 611-12. Transgender youth are especially vulnerable; 54% of those who are “out” during K-12 education are verbally harassed, 24% are physically attacked, and 13% are sexually assaulted.<sup>11</sup> *Whitaker*, 858 F.3d at 1051. This factor weighs in favor of a quasi-suspect finding.

*Second*, being transgender has no bearing on one’s ability to contribute to society. *See Grimm*, 972 F.3d at 612. Transgender people “have the same capacity for happiness, achievement, and contribution” and “live in every state, serve in our military, and raise our children.” *Adams*, 57 F.4th at 849 (Pryor, J., dissenting) (internal quotation marks omitted). This factor clearly pushes the Court toward a quasi-suspect finding.

*Third*, “being transgender is not a choice...[I]t is as natural and immutable as being cisgender.” *Grimm*, 972 F.3d at 612-13. Even if the immutability of being transgender was not medically proven, transgender people constitute a “discrete

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<sup>11</sup> James et al., *supra* note 7.

group" with "distinguishing characteristics," particularly that "their gender identity does not align with the gender they were assigned at birth." *Id.* (citing *Bowen*, 483 U.S. at 602); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 703, 704 (D. Md. 2018). Again, this factor leans toward transgender people being considered a quasi-suspect class.

*Fourth*, transgender people are a "powerless" political minority that cannot "meaningfully vindicate their rights through the political process." *Grimm*, 972 F.3d at 613. Not only are they a small portion of the population, making up a mere 0.6% of adults, but they are also "underrepresented in every branch of government." *Id.* The Thirteenth Circuit rejected the idea that transgender people are a quasi-suspect class because the Supreme Court has only recognized five suspect or quasi-suspect classes and has not recognized a new one in many years. *Boe*, 123 F.7th at 8 n.1. Yet, this case is markedly different from those where the Court rejected quasi-suspect findings. *City of Cleburne* held that people with intellectual disabilities are not a quasi-suspect class, in large part, because federal legislation outlawed discrimination against them and afforded them affirmative rights or "special treatment." 473 U.S. at 443-44. Such legislation "negates any claim that [they] are politically powerless" because this type of "legislative response...could hardly have occurred and survived without



public support.” *Id.* at 445. In contrast, the current legislative landscape *targets* transgender people. Notably, there are currently 449 anti-trans bills proceeding through states and 43 on the federal level.<sup>12</sup> Transgender people’s political powerlessness solidifies that they are a quasi-suspect class deserving heightened scrutiny.

3. The Board’s purpose of preventing gender nonconformity warrants heightened scrutiny.

Even if the policy is deemed facially neutral as to transgender students, it still warrants heightened scrutiny since it was enacted “because of,” not “in spite of,” its disparate impact on transgender students. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). The Board *hoped* to encourage students to conform with their sex designated at birth by placing them in classes that aligned with their original birth certificate. Although the same Board enacted policies a year before the health class policy that allowed all students to access restrooms and participate in athletics consistent with their gender identity and included gender identity in anti-bullying rules, the Board added the “biological sex” requirement *exclusively* to its health class policy. Whereas there is much

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<sup>12</sup> *2024 Anti-trans Bills Tracker*, Trans Legislation Tracker, <https://translegislation.com/> (last visited Feb. 10, 2024).

less opportunity for the Board to inculcate students about gender identity in sports or restrooms, a class where students learn about "anatomical and physiological characteristics" does provide such a platform. Thus, it is implied that the Board wrote the Policy's definition of "biological sex" because of its effect of placing transgender students in classes that do not align with their gender identity in the hopes that the class would influence them to conform.

**(B) THE BOARD'S POLICY FAILS HEIGHTENED SCRUTINY BECAUSE INDIVIDUAL AND PUBLIC HEALTH IS UNDERMINED BY DENYING TRANSGENDER STUDENTS FROM RECEIVING RELEVANT HEALTH INFORMATION.**

The policy fails heightened scrutiny because the Board has not met its "demanding" burden of demonstrating "its justification for [the] policy" is "exceedingly persuasive" and that its discriminatory means are "substantially related to the achievement of those objectives." *Hecox*, 79 F.4th at 1028 (quoting *VMI*, 518 U.S. at 516, 533). While "advanc[ing] the individual and public health" of students is undeniably important, the Board does not achieve that goal, but rather, "undermine[s] its own purported objectives" by excluding students from the class that matches their gender identity and relying on "arbitrary" classifications to do so. *Id.* at 1033, 1036; *Whitaker*, 858 F.3d at 1051.

*First*, excluding transgender students from a class matching their gender identity undermines the Board's asserted health

goal by not providing transgender students with adequate health education. See *J.A.W. v. Evansville Vanderburgh Sch.*, 323 F. Supp. 3d 1030, 1038–39 (S.D. Ind. 2018) (explaining that a bathroom policy forcing a transgender boy to use a girls’ bathroom causes the disruption that the policy seeks to avoid). In *Hecox*, an Idaho law barring transgender girls from participating in girls’ sports ran contrary to its objective of ensuring “women’s equality and opportunities in sports” because its sex verification process, allowing anyone to dispute and inspect a girl’s gender, would “discourage” female students from engaging in athletics altogether. *Hecox*, 79 F.4th at 1035. Just as the *Hecox* law discouraged rather than encouraged female student athletics, the Policy here inhibits rather than promotes student health. By forcibly outing and humiliating Jane in a boys’ health class, the school rejects modern medical protocols which teach that treating transgender children consistent with gender identity, enhancing social and peer support, and alleviating internalized transphobia are crucial for mental health.<sup>13</sup> And, causing a transgender girl to opt out of class or

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<sup>13</sup> See generally APA, *supra* note 1; E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, Int’l J. of Transgender Health 55 (2022), <https://doi.org/10.1080/26895269.2022.2100644>.

"out" herself discourages others from self-exploration and conveys state-sponsored stigma about transgender people.

Also, the Policy does not provide a comparable alternative program to ensure that Jane receives a health education. See *Whitaker*, 858 F.3d at 1049-50 (discussing that even "providing a gender-neutral alternative is not sufficient" when the policy itself is unlawful); see also *VMI*, 518 U.S. at 545-46 (holding that a sex-segregated military academy did not provide a comparable alternative for women because their program paled in its "faculty stature, funding, prestige, alumni support and influence"). If Jane's parents remove her completely from health class, she will not receive the same education as other students due to the financial burden, and she will not experience important social aspects of health class. Since the Policy permits each class to learn overlapping material and does not prohibit any specific material for either, Jane could just as easily learn all the same information in the girls' class as the boys' without being ostracized or seeking education elsewhere.

*Second*, using students' "original birth certificate" to determine their sex is "drastically underinclusive" and thus "arbitrary." *Adams*, 57 F.4th at 852 (Pryor, J., dissenting); see *Whitaker*, 858 F.3d at 1053. In *Whitaker*, the use of a student's birth certificate to determine sex, and consequently which bathroom could be used, was underinclusive because it did "not

adequately account for or reflect one's biological sex" for students whose chromosomal makeup, external genitalia at birth, or gender identity did not align with their birth certificate. *Id.* at 1053. In comparison with that policy, which at least afforded students some opportunity, albeit an ineffective one, to change their legal or medical documents to reflect their gender identity and still was underinclusive, here the Policy's reliance on Jane's "original birth certificate" suffers an even greater flaw. Using one's sex designated at birth to "tailor[] instruction...according to anatomical and physiological characteristics," is an underinclusive mechanism because it excludes students with some of the anatomical and physiological characteristics (e.g., genitalia, chromosomal structure, gender identity) of that sex. For example, a student who has completed gender-affirming surgery, now having female genitalia, would still be required to join the boys' class. Thus, dividing students by sex assigned at birth is not substantially related to achieving healthy students because it separates students who need information about their sex characteristics from the health class that would actually teach them about those such topics.

**(C) EVEN IF RATIONAL BASIS APPLIES, THE POLICY IS NOT RATIONALLY RELATED TO ITS ASSERTED INTERESTS.**

The Policy even violates equal protection under Rational Basis Review. A policy is not "rationally related to a

legitimate state interest" when it "rests on mere negative attitudes and fear." *Bd. of Educ. of the Highland Loc. Sch. Dist. v. Dep. of Educ.*, 208 F. Supp. 3d 850, 877 (S.D. Ohio 2016) (citing *City of Cleburne*, 473 U.S. at 440, 448). In *Highland*, a policy was not rationally related to its interests in privacy and safety because there were only "speculative assertion[s]" that those interests would be impaired if transgender students could use bathrooms matching their gender identity. *Id.* at 877. In *Ray v. McCloud*, where a law prohibited transgender people from changing the sex on their birth certificates, it was irrational and deemed to be "born out of animosity." 507 F. Supp. 3d 925, 939-40 (S.D. Ohio 2020). Here, the Policy rests on speculative assertions about what student health requires, contrary to medical evidence. Without public debate before passing the policy, the Board proffered no rational connection and left room to assume that the Policy was based on negative attitudes towards transgender people.

#### **CONCLUSION**

As a parent, who hopes his transgender daughter will be provided an equal education and accepted for who she is, Petitioner urges the Court to reverse the Thirteenth Circuit in favor of Petitioner's Title IX and Equal Protection Claims.

Respectfully submitted,

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