No. 23-1234

In the

Supreme Court of the United States

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

v.

DUNE UNIFIED SCHOOL DISTRICT BOARD, *Respondent.*

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

Brief for Respondent

TEAM 30

[redacted]

Counsel of Record on Behalf of Respondent Question 1

[redacted]

Counsel of Record on Behalf of Respondent Question 2

[redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

QUESTIONS PRESENTED

I. **Does the application of the Policy on Human Sexuality Education Violate Title IX of the Education Amendments Act of 1972 given that the term "sex" as used in Title IX refers only to biological sex, and Boe brings a sex discrimination case based on gender identity?**

II. **Does the Policy on Human Sexuality Education violate the Equal Protection Clause of the Fourteenth Amendment, given that it is substantially related to a legitimate government objective, and it does not classify based on transgender status?**

OPINION BELOW

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

CONSTITUTIONAL RULES AND PROVISIONS

I. 20 USC § 1681 *et seq*.

II. US Const. Amend. XIV, § 1

INTRODUCTION (SUMMARY OF ARGUMENT)

I. Whether application of the Policy on Human Sexuality Education Violate Title IX of the Education Amendments Act of 1972.

Boe's argument that the School Board's Policy ("the Policy") as applied amounts to sex-based discrimination against her fails because Title IX of the Education Amendments Act of 1972's protections apply only to biological sex, not gender identity. The vast majority of contemporaneous dictionary definitions support that "sex" unambiguously refers to biological sex. While Congress has the sole authority to amend Title IX and expand the definition of "sex" to include gender identity, it has not chosen to do so despite many opportunities.

Boe's argument that *Price Waterhouse v. Hopkins* and *Bostock v. Clayton County* apply to this case also fails. Regarding *Price Waterhouse*, *Boe* has produced no evidence of discrimination based on non-conformity with a gender stereotype. Boe's attempt to use the definition of "sex" found in *Bostock* likewise fails because there are intentional differences in language between Title VII and Title IX. Further, Boe's assertion that "sex" in Title IX also means gender identity is incorrect because it extends the

holding in *Bostock* to apply to Title IX when the court's language clearly indicates that it does not.

II. Whether the Policy on Human Sexuality Education violates the Equal Protection Clause of the Fourteenth Amendment.

The Policy of segregating students based on biological sex for human sexuality classes does not violate the Equal Protection Clause. The Policy's sex-based classification satisfies intermediate scrutiny because it is substantially related to the important government objective of protecting and advancing individual and public health.

The Policy does not classify based on transgender status, either facially or in effect. It applies consistently to all students, regardless of their gender identity. This Policy ensures that all students receive necessary and relevant health education specific to their biological bodies. The Policy is also not rooted in a discriminatory purpose. Instead, it stems from a legitimate goal of providing comprehensive human sexuality education. The School Board's previous policies, which are supportive of transgender students, make clear that the policy at issue is not driven by animus. Even if the Policy did classify based on transgender status, such a classification would survive rational basis review because it is rationally related to a legitimate government objective. Finally, if this

court were to find that transgender people as a quasi-suspect class, the Policy still satisfies intermediate scrutiny. The Policy does not rely on overbroad generalizations. Instead, the Policy is based on factual biological differences. Therefore, Policy effectively educates about human sexuality and does not violate the Equal Protection Clause.

STATEMENT OF THE CASE

A. FACTS

To advance and protect the public and individual health of young Dune residents, the Dune Unified School District Board ("Board") passed resolution 2022-14 ("the Policy"). R. at 3. The Policy intended to assure consistency of education on human sexuality across the Dune Unified School District. *Id.* To achieve consistency, the Policy required that all public schools within the strict provide accurate, age-appropriate, and evidence-based information about human sexuality. *Id.*

Section 1(C)of the Policy required that instruction on human sexuality be provided separately for male and female students. *Id.* Students are assigned to these separate classes based on their biological sex at birth, which is recorded on a student's original birth certificate. *Id.* Students are assigned by biological sex to account for "anatomical and physiological characteristics, and the

unique experiences and health care needs associated with these characteristics." R. at 4. Parents are given the ability to opt their child out of human sexuality instruction. *Id.*

Resolution 2022-14 was passed unanimously after a Board member read the Policy aloud—there was no other discussion or debate. *Id.* It is not uncommon for resolutions to pass like this, as Resolution 2021-4 (2021), a policy meant to improve the educational experience of students who identify as transgender, passed the same way. *Id.* Board membership has also been consistent, with the same members voting for both resolutions. *Id.*

Jane Boe ("Boe") moved to Dune in the summer of 2023 and started the seventh grade at Dune Junior High School in the fall. *Id.* Boe and her parents are uncomfortable with the School Board's Policy because she would be placed with biological males for classes on human sexuality. R. at 4–5. Boe's biological sex at birth was male, but she has identified as a girl since she was seven. R. 4. She is not currently taking puberty blockers or receiving any other gender-affirming care, but she is treated consistently with her gender identity at home and school. *Id.* Because most of her classmates are not aware she is transgender, Boe would rather stay at home than attend a sex-segregated class. R. at 5. Boe's parents, however, refuse to opt her out of human sexuality class because they allege it would be costly and burdensome for them to seek out

information on healthy and safe relationships, safe sex practices, and other similar topics on their own. *Id.*

B. PROCEDURE

In October, Boe's father filed suit on her behalf in federal court against the Board. *Id.* Boe argued that the application of the Policy violates Title IX of the Education Amendments of 1972 and violates the Fourteenth Amendment of the U.S. Constitution. *Id.* Although Boe argued that the Policy discriminates against her based on sex, the Board responded that Title IX permits schools to separate students based on biological sex for purposes of human sexuality instruction. *Id.* The Board also responded to Boe's argument that the Policy violated the Equal Protection clause of the Fourteenth Amendment by pointing out that there is an important, if not compelling, government interest in separating students according to their anatomy for human sexuality instruction. *Id.*

The parties filed cross-motions for summary judgment, and the District Court for the District of Texington found that the Policy did not violate Title IX and the Equal Protection Clause. *Id.* On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed the District Court's holding in favor of the Board. R. at 8. This appeal followed.

ARGUMENT

I. APPLICATION OF THE POLICY ON HUMAN SEXUALITY EDUCATION DOES NOT VIOLATE TITLE IX BECAUSE THE POLICY DOES NOT DISCRIMINATE AGAINST BOE ON THE BASIS OF SEX.

Congress's purpose in enacting Title IX was to establish equal educational opportunities for women and men. *Lothes v. Butler Cnty. Juvenile Rehab. Ctr.*, 243 F.App'x. 950, 955 (6th Cir. 2007). To establish a prima facie case of discrimination under Title IX, a plaintiff must allege (1) that she was subjected to discrimination in an educational program; (2) that the program receives federal assistance; and (3) that the discrimination was on the basis of sex. *See Bougher v. Univ. of Pittsburgh*, 713 F.Supp. 139, 143-44 (W.D.Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989).

Boe, who is biologically male but identifies as female, argues that being assigned to the boy's human sexuality class amounted to sex-based discrimination against her. This argument fails for four reasons. First, "sex," as used in Title IX unambiguously refers to biological sex, not gender identity. *Adams ex rel. Kasper v. Sch. Bd. of St. John's Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022). Second, the authority to revise Title IX and its implementing regulations to include gender identity rests with Congress. Congress has not yet chosen to exercise this authority, and it is not the job of the courts to do this

for them. *Id.* at 817. Third, Boe was not subjected to sex stereotyping because she has produced no evidence that she was discriminated against based on non-conformity with a gender stereotype. Fourth, any argument that the definition of "sex" in *Bostock* should control this case is incorrect because there are intentional differences in language between Title VII and Title IX. Although Boe points to *Bostock* to assert that "sex" should be read to include gender identity, it is against the holding of *Bostock* to use the Court's interpretation of Title VII to interpret Title IX.

A. "Sex" as used in Title IX unambiguously refers to biological sex, not gender identity.

Title IX's plain language should dictate the outcome of this case. When the statute's language is plain and unambiguous, it must be given effect. *B.M.C. Software, Inc. v. C.I.R.*, 780 F.3d 669, 674 (5th Cir. 2015) (quoting *Kelly v. Boeing Petroleum Servs., Inc.*, 61 F.3d 350, 362 (5th Cir. 1995)). "Sex" as used in Title IX unambiguously refers to biological sex. Dictionaries from the period in which Title IX was enacted support this reading. *See Adams*, 57 F.4th at 812. By reading "gender identity" into the definition of "sex," Boe reads the statute in isolation to reach a result inconsistent with its plain language.

When interpreting an undefined statutory term, the job of the court is to interpret words consistent with their ordinary meaning at the time Congress enacted the statute. *Perrin v. United States*, 444 U.S. 37, 42 (1979). Courts often look to dictionaries for guidance to ascertain the ordinary meaning of an undefined word. *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001). Reputable dictionary definitions of sex from the time of Title IX's enactment reveal that Congress meant "biological sex" when it banned sex discrimination in education. *See Adams*, 57 F.4th at 812.

The amount of consistent dictionary definitions also matters for interpretation purposes. After pointing to six dictionary definitions from the 1970s that defined "sex" in relation to biology and reproductive function, the Eleventh Circuit in *Adams* disagreed with the district court's conclusion that the definition of "sex" was unclear. *Id.* The district court was only able to cite one dictionary definition that defined "sex" as "the character of being male or female." *Id.* The mere fact that "sex" is an undefined term, and one dictionary offers a definition broader than biological sex, does not create a statutory ambiguity.

Boe's statutory construction argument fails because there is no ambiguity in the definition of "sex" as construed at the time

of Title IX's enactment. Additionally, this Court has declined to read gender identity into the definition of sex when it had the opportunity. The only way the Board could have violated Title IX is if "sex" as used in the statute had no connection to biological sex. Dictionary definitions during the time of enactment suggest otherwise.

B. Whether Title IX should be amended to include gender identity should be left to Congress, not the courts.

Title IX's implementing regulations became effective only after extensive Congressional review, including six days of House hearings to determine whether the regulations were "consistent with the law and intent of Congress in enacting the law." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 531–33 (1982). Title IX has also been amended repeatedly since its regulations were adopted. *See, e.g.*, *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286–87 (2d Cir. 2004). Although the matter has been the subject of some debate within Congress, Congress has chosen not to amend the regulations to include gender identity.

Where Congress knows how to say something but chooses not to, its silence is controlling for purposes of statutory interpretation. *United States v. Pate*, 84 F.4th 1196, 1202 (11th Cir. 2023). When an agency's statutory construction has been brought to Congress' attention, and Congress has

chosen not to alter that interpretation even though it has amended the statute in other ways, legislative intent is presumed to have been discerned. *Bell*, 465 U.S. at 535 (citations and quotation marks omitted). Congress is perfectly capable of amending Title IX and its regulations to include gender identity in addition to biological sex.

A fundamental principle of statutory interpretation is that absent provisions cannot be supplied by courts. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367, 2381 (2020). Therefore, we must give effect to the ordinary public meaning of the term "sex" at the time of enactment and construe "sex" to mean biological sex. Congress has the authority to rewrite Title IX and redefine its terms at any time. To date, it has chosen not to do so.

C. *Price Waterhouse* is irrelevant to this analysis because Boe was not discriminated against based on sex stereotypes.

As part of her Title IX claim, Boe borrows the doctrine of sex stereotyping from Title VII and argues that by being placed in the boys' human sexuality class, she has been discriminated against based on sex stereotypes. R. at 6. This Court first recognized sex stereotyping as a type of sex discrimination in *Price Waterhouse v. Hopkins*, 490 U.S. 228

(1989). Ann Hopkins, a candidate for partnership at Price Waterhouse, was denied promotion in part because she did not possess what her superiors saw as appropriate female traits. *Id.* at 255—58. Hopkins was described by male partners as "aggressive", and one partner recommended that she wear softer colors to appear more feminine. *Id*. At 256. The Court found that Hopkins had a cognizable claim for discrimination under Title VII. *Id*. at 258.

Boe feels that she was treated similarly to Hopkins by being assigned to a human sexuality class with members of her biological sex, but requiring students to learn about the anatomy they were born with is not based on any stereotypes associated with biological sex. Assuming that sex stereotyping applies to Title IX, Boe must sufficiently allege that she did not conform to her school's version of how she should look, speak, and act. *See Prowel v. Wise Business Farms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009). Sex stereotyping claims are based on mannerisms, behaviors, and appearances. *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F.Supp.3d 657, 680 (W.D.Pa. 2015). Courts have been reluctant to extend the sex stereotyping theory to instances where the plaintiff is discriminated against because of the plaintiff's transgender status

without any additional evidence related to gender stereotype non-conformity. *Eure v. Sage Corp.*, 61 F.Supp.3d 651, 661 (W.D. Tex. 2014).

Here, Boe is merely alleging that she is being refused the opportunity to attend a human sexuality class for girls. R. at 5. Unlike Hopkins, she has not alleged that she has been discriminated against because of the way she looks, acts, or speaks. Any analogies to *Price Waterhouse* accordingly fail.

Judge Bernstein's dissent cites cases that applied a sex stereotyping theory to situations where a transgender student was denied the opportunity to use the bathroom or locker room of their choice. R. at 9. For example, in *Whitaker ex rel Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017), the court found that a transgender male student was unlawfully discriminated against based on sex stereotypes when he was forbidden from using the boy's restroom at school. Citing several out-of-circuit Title VII cases brought by transgender plaintiffs, the court declared that a transgender person by definition does not conform to sex-based stereotypes, so banning them from their preferred restroom is per se sex stereotyping. *Id.* at 1048—50.

Whitaker and cases like it take too broad a view of sex stereotyping and leave no room for schools to utilize Title IX's carve-outs for sex-segregated facilities. To say that requiring students to use a restroom corresponding to their biological sex is sex stereotyping is stretching what happened to Ann Hopkins to an illogical extreme. Whatever the merits of requiring employees to speak or dress a certain way versus the merits of school bathroom rules or segregating human sexuality classes by biological sex, *Price Waterhouse* concerns only the former. However they dress or speak, male students remain male, and female students remain female. The *Price Waterhouse* line of cases has nothing to say about which class on human sexuality education class Boe should attend. Thus, Boes's allegations are insufficient to state a claim under a sex stereotyping theory.

D. *Bostock's* interpretation of the word "sex" is inapplicable to this case because there are intentional differences in language between Title VII and Title IX.

Judge Bernstein's dissent argues that the decision in *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020), which held that gender identity discrimination is prohibited under Title VII, controls Title IX jurisprudence as well. R. at 9. But using the

definition of "sex" in *Bostock*, a Title VII case, to interpret the meaning of "sex" in a Title IX case is flawed[1]. When conducting statutory interpretation, the Court must be careful not to apply rules applicable under one statute to another statute without careful and critical examination. *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 393 (2008).

There are two reasons why the Court cannot use *Bostock* to interpret a Title IX case. First, the language of Title IX differs from Title VII because it contains carve-outs for sex-segregated facilities and activities. Second, the cases cited by the Thirteenth Circuit dissent for the proposition that Title VII is often used to interpret Title IX deal with sexual harassment and hostile environment—not segregation based on biological sex. Because the language of Title VII cannot be appropriately used to interpret Title IX, *Bostock* is inapplicable in this case.

1. The language of Title VII and Title IX differ because Title IX has sex-specific carve-outs and Title VII does not.

Although Title VII and Title IX both prohibit discrimination, the language between the statutes differs. Title IX states, "No person in the United States shall, on the basis of sex, be

[1] The same is true of *Price Waterhouse*, another Title VII case.

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). Title VII similarly forbids classifying or referring for employment "any individual on the basis of…sex…". 42 U.S.C. § 2000e-2. Where Title IX differs is in its numerous exceptions authorizing or allowing sex-segregated activities and intimate facilities to be provided separately based on biological sex or for members of each biological sex. *See* 20 U.S.C. § 1681(a); 20 U.S.C. § 1686.

Title VII does not refer to sex in a way that suggests the term "sex" should be interpreted to mean only biological sex, but Title IX does. *See e.g.* 42 U.S.C. § 2000e-2; *compare with* 20 U.S.C. § 1681. Title IX uses phrases such as "only students of one sex" and "students of the other sex" which suggest that sex is thought of as biological sex—only male and female. *See* 20 U.S.C. § 1681. Meanwhile, Title VII does not provide for the separation of sexes. Title VII forbids the segregation or classification of employees because of sex. 42 U.S.C. § 2000e-2(a)(2).

Although Title IX was intended to provide equal educational opportunities for both sexes, the statute allowed for sex-segregated spaces in things such as bathrooms, locker rooms,

sports teams, and human sexuality classes. 34 C.F.R. § 106.33-.34. Congress created sex-specific carve-outs to protect students' privacy. *Adams ex rel. Kasper v. Sch. Bd. of St. John's Cnty.*, 57 F.4th 791, 803 (11th Cir. 2022). Thus, segregation based on sex was determined to be appropriate specifically for Title IX.

Applying *Bostock's* reasoning that "sex" includes gender identity would have adverse consequences when applied to Title IX. Although the Board is not unsympathetic to Boe's desire to have expanded freedom of choice, the costs must not be overlooked. If Boe were to prevail, then all sex-segregated human sexuality classes would have to be abolished. The logical endpoint of her argument would "establish dual protection under Title IX based on both sex and gender identity when gender identity does not match sex." *Adams*, 57 F.4th at 814. This is not what the language of Title IX stands for.

2. Cases that equate Title VII with Title IX for statutory interpretation purposes either misconstrue the holding in *Bostock* or are inapplicable to this case.

Judge Bernstein's dissent cites many cases for the proposition that courts routinely turn to Title VII case law to interpret Title IX. *See* R. at 9. The cases, however, either involve sexual harassment/hostile environment claims

or misconstrue *Bostock*. This case is about the segregation based on biological sex specifically provided for in Title IX, and *Bostock* never purported to address Title IX. For these reasons, the argument that this Court should use Title VII case law to interpret Title IX fails.

Before *Bostock*, some circuit courts look to Title VII to interpret Title IX. *See e.g.*, *Doe v. Univ. of Dayton*, 766 F. App'x 275, 282 (6th Cir. 2019); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996). Two examples directly cited by the dissent, *Univ. of Dayton* and *Kinman* dealt with sexual harassment and hostile environment cases. Sexual harassment and hostile work environment are claims that can be brought under Title VII. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). It follows then, that if Title VII could feasibly be applied to interpret Title IX, it would be in cases in which sexual harassment and hostile environments occur at schools. Title VII has no equivalent for segregation based on sex because it does not exist in the statute. Thus, the reasoning used by these cases that the actions are similar does not hold up here.

The cases cited by the dissent that refer to *Bostock* specifically are similar in claim to the present case but have incorrect reasoning. These cases that cite *Bostock* involve

bathroom segregation, an issue that the Court refused to address. *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1753 (2020). The Court specifically highlighted the difference between Title VII and Title IX by stating, "Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind." *Id.*

One final flaw with the reasoning of the circuit cases that applied *Bostock* to Title IX claims is that the *Bostock* opinion itself does not read gender identity into the definition of sex. *Bostock*, 140 S.Ct. at 1739. In the majority opinion, Justice Gorsuch stated,"[W]e proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female." *Id.*

Although Boe's frustration with the Policy is understandable, she fails to show that the Policy violates Title IX by discriminating against her on the basis of sex. The term "sex" in Title IX, written by Congress, refers only to biological sex. Neither *Price Waterhouse* nor *Bostock* can be used to interpret "sex" under Title IX in this case. The present case does not involve sex stereotyping like in *Price Waterhouse*, and both cases involve Title VII which cannot be used to interpret a Title IX case such as this. For these reasons, the Court should

affirm the Thirteenth Circuit's holding in favor of the Dune Unified School District Board.

II. THE POLICY OF SEGREGATING STUDENTS BASED ON BIOLOGICAL SEX FOR HUMAN SEXUALITY EDUCATION DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause of the Fourteenth Amendment requires the government to treat similarly situated people similarly, allowing for differential treatment only if it serves a sufficient government objective. U.S. Const. amend. XIV, § 1; *see also Reed v. Reed*, 404 U.S. 71, 75 (1971). To that end, this Court has specified different levels of scrutiny for laws that classify people. *See Reed*, 404 U.S. at 75. Laws are evaluated under strict scrutiny, intermediate scrutiny, or rational basis review based on the class of persons they target, with suspect classifications subject to the most stringent review. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 845 (11th Cir. 2022).

The Policy, which requires students who opt into the human sexuality education to attend a sex-segregated class according to their biological sex, does not violate Boe's right to equal protection under the law. The Policy satisfies intermediate scrutiny by being substantially related to the important government interest of protecting individual and public health. The Policy does not impermissibly classify based on transgender

status, either facially or in effect, and is not motivated by animus.

A. The Policy's sex-based classification satisfies intermediate scrutiny because it is substantially related to an important government interest.

The Policy facially classifies students according to sex. Dune Sch. Bd. Resolution 2022-14 (2022) (providing that, "Instruction of human sexuality shall be provided separately for male and female students."). Sex-based classifications are subject to intermediate scrutiny.[2] *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 532-33 (1996). Under intermediate scrutiny, a classification must be substantially related to an important government objective. *Id.* at 533 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). This Court has further clarified that the justification for sex-based classifications must be "exceedingly persuasive" and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.*

The Policy's sex-based classification survives intermediate scrutiny. First, the Policy serves the important government interest of protecting and advancing individual and public

[2] Both parties agree intermediate scrutiny is the correct level of scrutiny for this sex-based classification.

health. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 199 (1976). The human sexuality class does this by educating students about "reproductive anatomy; puberty and the development of secondary sex characteristics… self-screening for early detection of cancer and other conditions." Dune Sch. Bd. Resolution 2022-14 (2022). Second, the Policy is substantially related to achieving that important government interest. A Policy need not be the best fit possible, only a reasonable fit to satisfy intermediate scrutiny. *United States v. Staten*, 666 F.3d 154, 159 (4th Cir. 2011). By dividing students based on their sex, schools are better able to provide tailored instruction and thus better able to serve the important government objective of protecting and advancing individual and public health.

B. The Policy does not facially classify based on transgender status and is not an in-effect classification based on transgender status.

A law or policy makes a facial classification if its language explicitly categorizes people. *See Loving v. Virginia*, 388 U.S. 1, 7 (1967). Here, all biological males—including Boe, who self-identifies as female, and those who self-identity as male—are required to attend the human sexuality class for biological males unless they opt out. The policy of segregating based on biological sex affects transgender and cisgender students in the

same way. Therefore, the Policy does not facially classify based on transgender status.

This Court has recognized that a policy need not make a facial classification to impermissibly classify people. *See Wash. v. Davis*, 426 U.S. 229, 247 (1976). A law or policy may be facially neutral but classify in its effect. *See id.* A policy is an impermissible in-effect classification if it (1) disparately impacts a particular group of people, and (2) was designed with a discriminatory purpose. *See id.* Disparate impact alone does not rise to the level of in-effect classification. *See id.*

Additionally, discriminatory purpose requires more than just knowledge that a law or policy will have a disparate impact. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Instead, decision-makers must have known that their decision would have a disparate impact and "selected or reaffirmed a particular course of action at least in part *because of*, not merely *in spite of*, its adverse effects upon an identifiable group." *Id.* (internal quotation marks omitted, emphasis added). Discriminatory purpose may be inferred by considering (1) the impact of the decision; (2) whether a clear pattern of effects exists; (3) the sequence of events leading up to the decision in dispute; (4) the historical background; (5) whether the decision-making body made any departures from normal procedures;

and (6) the legislative or administrative history. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977).

Even though the Policy could create a disparate impact, it does not have a discriminatory intent. The Policy could create a disparate impact because transgender students are required to attend the human sexuality class that does not match their gender identity. However, there is no evidence that the school board proceeded with the Policy *because* it would have a disparate impact on transgender students. There is also no pattern of school board policies having a disparate impact on transgender students. In fact, in July 2021, the Board passed a policy that was indisputably beneficial to transgender students. Among other things, the July 2021 policy allows transgender students to play sports according to their gender identity. Further, there appears to be no departure from normal procedure as the policy in dispute was passed without discussion or debate, just as the Board's July 2021 policy was passed.

C. Even if the Policy did classify based on transgender status, such a classification would be subject to and satisfy rational basis review.

Although both a disparate impact and a discriminatory purpose are required for a policy to rise to the level of an in-effect classifications, some circuits have incorrectly held that a sex-

based classification was a transgender classification because it disparately impacted transgender students. *See, e.g.*, *Whitaker v. Kenosha Unified School District*, 858 F. 3d (7th Cir. 2017) (granting injunctive relief against a biological sex-based school bathroom policy based on likely success on equal protection claim). This approach to classifications is out of step with this Court's jurisprudence and should not be persuasive to this Court. However, if this Court finds that a policy's disparate impact on transgender students is enough to rise to the level of an in-effect classification, then the policy must only survive rational basis review. *See Adams ex rel. Kasper v. Sch. Bd. of St. John's Cnty.*, 57 F.4th 791, 845 (11th Cir. 2022).

Transgender people are not a suspect class or a quasi-suspect class. *See* Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 756 (2011). Therefore, laws and policies that classify based on transgender status are not subject to heightened scrutiny. Suspect and quasi-suspect classifications include those based on race, national origin, alienage, gender, and non-marital child status. *Id.* This Court has expanded the list of suspect and quasi-suspect classes in very limited circumstances. *L.W. v. Skrmetti*, 83 F.4th 460, 486 (6th Cir. 2023). In determining whether a group is entitled to heightened scrutiny,

this Court considers (1) whether the group has historically been subjected to discrimination, (2) the group's political powerlessness, and (3) whether the group exhibits "obvious, immutable, or distinguishing characteristics." *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

The School District does not dispute that transgender people have been subjected to discrimination in the past. However, Americans are becoming increasingly tolerant, even supportive, of transgender people. In a recent Pew Research survey, 64% of respondents said they would support laws or policies that would protect transgender people from discrimination.[3] Additionally, this Court has made clear that a history of discrimination alone does not qualify a group as a suspect or quasi-suspect class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 473 (1985) (applying rational basis review for classifications based on "feeble minded"-ness).

[3] Kim Parker et al., *Americans' Complex Views on Gender Identity and Transgender Issues*, PEW RESEARCH CENTER (June 28, 2022), https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/.

Transgender people are also not a politically powerless group. Transgender people have an active ally in the White House.[4] Transgender people have reached the highest levels of politics, with Rachel Levine, a transgender woman, currently serving as the Assistant Secretary for Health.[5] Finally, transgender people may serve openly in the United States Military and even transition while serving.[6]

Identifying as transgender is not an immutable characteristic. Unlike race or sex, transgender identity is not "ascertainable at the moment of birth." *Skrmetti*, 83 F.4th at 487 (internal quotes omitted). Furthermore, the ability to "detransition" or simply change one's gender expression makes clear that transgender status is neither permanent nor immutable. *See id.*

---

[4] *See* Brett Samuels, *Here are the History-Making LGBTQ Officials in the Biden Administration*, THE HILL (June 2, 2023), https://thehill.com/homenews/administration/4030255-here-are-the-history-making-lgbtq-officials-in-the-biden-administration/.

[5] *Id.*

[6] *See generally*, *DoD Instruction 1300.28 In-Service Transition for Transgender Service Members*, DEPARTMENT OF DEFENSE (Apr. 30, 2021), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130028p.pdf (noting transgender people must still serve with their biological sex).

Because transgender people are not a suspect or quasi-suspect class, laws or policies that classify based on transgender status are subject to rational basis review. Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 756 (2011). Under this deferential standard of review, a law or policy must be rationally related to a legitimate government objective. *Id.* The Policy serves a legitimate government objective. Public health and safety are legitimate government interests. *See Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 65 (2020)("Stemming the spread of COVID-19 is unquestionably a compelling interest[.]") The objective of the Policy is to protect and advance individual and public health of young Dune residents through human sexuality education. This is a legitimate public health interest.

The Policy is rationally related to the legitimate government objective of protecting and advancing individual and public health. A policy is rationally related to its objective if the means are reasonably related to the ends. *See Wash. v. Glucksberg*, 521 U.S. 702, 735 (1997). Here requiring transgender students to attend human sexuality education according to their biological sex, is reasonably related to the end objective because it ensures that students receive education that is pertinent to their biological bodies.

On occasion, this Court has enforced a more stringent form of rational basis review that has come to be known as "rational basis review with bite." Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 760 (2011). In *United States Department of Agriculture v. Moreno*, this Court held that a "bare… desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis preserved). As such, a law or policy driven by animus toward a particular group is subjected to and does not survive "rational basis review with a bite." *See id.*

The Policy should not be subjected to "rational basis review with a bite" because it is not motivated by a desire to harm transgender students. The Policy is driven by a desire to protect and advance the individual and public health of young Dune residents. It is important–and legitimate–that young Dune residents understand the development of their biological bodies, how sexually transmitted infections manifest differently depending on their biological sex, and biological sex-specific reproductive health care. Further, the School Board's July 2021 policy regarding transgender students reflects a clear desire to respect and include transgender students. This Policy is not animus-driven, it is based on a desire to educate students

accurately. Therefore, the Policy should not be reviewed under "rational basis with a bite review."

D. Even if the Policy classified based on transgender status and this court finds transgender people are a quasi-suspect class, the Policy satisfies intermediate scrutiny.

Classifications based on quasi-suspect categories, like those based on sex, are subjected to an intermediate level of judicial scrutiny. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Under intermediate scrutiny, a classification must be substantially related to an important government objective. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). This Court has further clarified that the justification for sex-based classifications must be "exceedingly persuasive" and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. To be "substantially related" to a government objective, the disputed policy must have a strong and direct connection to its proposed objective. *See Craig*, 429 U.S. at 204.

If this Court finds that the Policy is an in-effect classification *and* that transgender people are a quasi-suspect class, the Policy still survives because it is substantially related to an important government interest, that does not rely

on overly broad generalizations, and instead relies on biological differences. This Court made clear that public health is an important government interest in *Craig v. Boren*. *Craig*, 429 U.S. at 199-200 (stating that alcohol laws related to the protection of public health and safety). Further, we see laws that protect individual and public health in environmental law, food and drug regulation, and occupational health and safety regulations. *Wooster Community Hosp. v. Anderson*, 108 Ohio App. 3d 290, 294 (Ohio Ct. App. 1996).

Here, requiring transgender students to attend the human sexuality class according to their biological sex protects and advances individual and public health by educating students about sexually transmitted diseases, reproductive health care, and cancer screening–among other things. Any transgender-based classification that this Court may find is based on biology not overly broad generalizations or stereotypes. Requiring Boe and other biological males to attend the male human sexuality class does not punish Boe for her gender-nonconformity, instead it seeks to ensure that she is knowledgeable about the development of her biologically male body.

The Policy is also substantially related to achieving the stated objective because there is a direct and strong connection between requiring students attend human sexuality in accordance

with their biological sex and protecting and advancing individual and public health. Although this important government interest may be better served by a non-segregated human sexuality class, intermediate scrutiny does not require that a policy be the best fit possible. *Staten*, 666 F.3d at 159. Allowing a biological male to attend the female human sexuality class would not advance the important government interest of protecting and advancing individual and public health. Boe, and other biological males, would not receive relevant information in such a class. For example, in a female human sexuality class, Boe would not learn how to screen herself for testicular cancer. The School District's means of providing human sexuality education is substantially related to its objective of protecting and advancing individual and public health.

The policy of segregating students based on biological sex for human sexuality education is consistent with the Equal Protection Clause. This sex-based classification satisfies intermediate scrutiny, and the Policy does not classify based on transgender status. Therefore, this Court should uphold the holding of the Thirteenth Circuit and find in favor of the School District Board of Dune.

III. Conclusion

For the foregoing reasons, the Dune Unified School District Board respectfully asks that this Court affirm the decision of the Thirteenth Circuit holding that the Policy does not violate Title IX or the Equal Protection Clause.

Respectfully submitted,

[redacted]

Partner 1

[redacted]

Partner 2

[redacted]

Partner 3

Attorneys for Respondent