

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-Petitioner

V.

DUNE UNIFIED SCHOOL DISTRICT BOARD
Defendant-Respondent

ON WRIT OF CERTIORARI TO THE U.S. SUPREME COURT

Brief for Respondent

████████████████████ Title IX Argument: Definition of Sex

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14th Amendment Argument

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Questions Presented

1. Whether the Thirteenth Circuit correctly affirmed that Dune Unified School District Board Resolution 2022-14 did not violate Title IX by separating students by sex in human sexuality classes.

2. Whether the Thirteenth Circuit correctly affirmed that Dune Unified School District Board Resolution 2022-14 did not violate the Equal Protection Clause of the Fourteenth Amendment by separating and tailoring human sexuality instruction based on students' anatomy and physiology.

Opinion Below

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

Constitutional Rules and Provisions

20 U.S.C. § 1681

20 U.S.C. § 1686

42 U.S.C.A. § 2000e-2

34 C.F.R. § 106.33

34 C.F.R. § 106.34

Introduction

This case concerns the legality and constitutionality of Dune Unified School District Board Resolution 2022-14 (the "Policy") which separates instruction of human sexuality classes by biological sex. Petitioner contends that Respondent's Policy violates Title IX and the Equal Protection Clause of the Fourteenth Amendment. Neither the Thirteenth Circuit nor the District Court were convinced, as they both held that Boe was not discriminated against "on the basis of sex" and that the Policy legally separated students in human sexuality classes by their anatomical differences.

The Policy does not violate Title IX. Title IX regulations illustrate the legislative intent to define "sex" as biological sex and argue against the definition in *Bostock v. Clayton County*. *Bostock* itself limited its holding to Title VII. Title VII has only been imported into Title IX when the language, legislative intent, and regulations were in line with that interpretation, which does not apply here. Petitioner also argues that the case can proceed under *Price Waterhouse v. Hopkins*. However, *Price Waterhouse* discusses gender stereotypes involving how someone appears, talks, or behaves, none of which is at issue here. Even if this argument were allowed to proceed,

it has still been held that the existence of sex-separated spaces in accordance with the regulations does not uphold a sex-stereotyping violation case. Therefore, Petitioner cannot prove discrimination on the basis of sex and the Policy should be upheld under Title IX.

On the question of Equal Protection, the Policy classifies students based only on sex and therefore requires intermediate scrutiny. The Policy easily meets this standard, which requires the Policy to be related enough to an important government interest. Even if the Court were to find that transgender individuals constitute a quasi-suspect class warranting intermediate scrutiny, and that the Policy classifies based on gender identity, the Policy is still constitutional as transgender individuals are not similarly situated to their cisgender peers in the context of human sexuality classes.

In reviewing arguments for both sides and case law from this Court and numerous circuit and district courts, the Thirteenth Circuit affirmed summary judgment, and Respondent requests this Court to uphold the decision affirming summary judgment by the Thirteenth Circuit and let the Policy stand.

Statement of the Case

In December 2022, the Dune United School District Board (the "Board") enacted Resolution 2022-14 (the "Policy") which

requires all public schools within the District to offer accurate, age-appropriate, and evidence-based information about human sexuality to all students in grades seven through ten. Dune Sch. Bd., Resolution 2022-14 (2022). Instruction on human sexuality must include important topics such as reproductive anatomy, puberty and secondary sex characteristics, reproductive health care, and other related sexual health topics and must be conducted in classes separated by biological sex so that instruction may be tailored according to students' anatomical and physiological characteristics. *Id.* Schools may choose to provide the same information to male and female students where that information is equally relevant to both sexes. *Id.* Students may also opt-out of the instruction with parent or guardian permission. *Id.* Over one year before the Resolution was passed, the Board issued a three-part policy that (1) included gender identity as an enumerated characteristic in their anti-bullying policies, (2) required all Dune public schools to allow transgender students to access restrooms consistent with their gender identity, and (3) required all Dune elementary and middle schools to allow transgender students to participate in sex-separated athletics consistent with their gender identity. *Boe v. Dune Unified Sch. Bd.*, - F.7th - , 4* (13th Cir. 2023).

Jane Boe is a 12 year old seventh-grade student at Dune Junior High School. *Id.* Boe began to socially transition her

gender around the age of seven, but she is currently not taking any puberty blockers nor is she receiving any gender-affirming medical care. *Id.* When Boe began attending school in Dune, she and her parents learned of the human sexuality classes and learned that Boe would be assigned the boys' class. *Id.* Most of Boe's fellow students are unaware she is transgender, and while Boe would prefer to stay home rather than join the boys' human sexuality class, her parents want her to attend so that she can have access to the same professional teachers and counselors available to her peers. *Id.* at 5.

Jane Boe (Petitioner), by and through Jack Boe, challenged the Policy in District Court, claiming that it discriminated against her in violation of Title IX and that it violates the Equal Protection Clause of the Fourteenth Amendment. *Id.* When the District Court granted the Board summary judgment on these issues, Petitioner appealed to the Thirteenth Circuit. *Id.* The Thirteenth Circuit also upheld the Policy as a necessary and beneficial measure to ensure the privacy and health of Dune's students. *Id.* at 8.

Argument

I. THE THIRTEENTH CIRCUIT COURT OF APPEALS DECISIONS SHOULD BE UPHELD AS RESPONDENTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The Thirteenth Circuit's grant of summary judgment for Respondents was proper. Under *Celotex Corp v. Catrett*, the court must grant a motion for summary judgment against a party who fails to make a showing sufficient to establish an essential element of their case for which they bear the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Respondents have illustrated that they are entitled to judgment as a matter of law, as the Policy is included in the Title IX regulations allowing for human sexuality classes separated by sex and the legislative intent as well as ordinary meaning clarifies that the definition of "sex" is biological sex. *See generally*, 34 C.F.R. § 106.34(a)(3)(2023). Therefore, Petitioner cannot prove that she faced discrimination "on the basis of sex". Turning to the Equal Protection Clause, the Board's Policy lawfully discriminates on the basis of sex. However, if the Court determines that transgender individuals constitute a quasi-suspect class, the Board's Policy still survives intermediate scrutiny because Petitioner is not similarly situated to her cisgender peers in the context of a human sexuality course. Petitioner failed to establish essential elements of both claims. Accordingly, Respondents request that the Court uphold summary judgment.

II. APPLICATION OF THE POLICY TO BOE DOES NOT VIOLATE TITLE IX OF THE EDUCATIONAL AMENDMENTS OF 1972.

- a) While the Dune Unified School District is an Educational Institution that Receives Federal Financial Assistance, as The Policy Has Not Excluded Boe from Participation In an Educational Program "On the Basis of Sex" and Has Not Engaged in Improper Discrimination that Caused Boe Harm

In order for Boe to prove all essential elements of her Title IX claim, she must show that 1) she was excluded from participation in an education program "on the basis of sex"; 2) that the educational institution was receiving federal financial assistance at the time; and 3) that improper discrimination caused her harm. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020). As Dune Unified School Board is an educational institution that receives federal financial assistance, the case turns on whether Boe was discriminated against "on the basis of sex". As "sex" under Title IX does not include gender identity and the regulations allow sex separated human sexuality classes, Boe is not subject to discrimination "on the basis of sex". 34 C.F.R. § 106.34.

- b) The Policy is in Compliance with Title IX Carve-Out Regulations Allowing Separation Based on Sex in Human Sexuality Classes and Holding Otherwise Would Render an Essential Purpose of Title IX Moot.

Under the regulations it is not a violation of Title IX to carry out human sexuality classes separated by sex. The Policy states that instruction shall be separated for "male and female students", and further states that this means "biological sex" according to "anatomical and physiological differences". Dune

Sch. Bd., Resolution 2022-14 (2022). Since male and female here denotes anatomical differences, the Policy permissibly separates based on sex. The plain language of the relevant regulation states that “[c]lasses... that deal primarily with human sexuality may be conducted in separate sessions for boys and girls.” 34 C.F.R. § 106.34(a)(3). Title IX itself only ever mentions “sex”, and never mentions “gender” or “gender identity”.

Interpretations of sections 106.33 and 34 all agree that differences between the sexes have to do with anatomical and physiological differences, not internally felt gender identity. *See, e.g. Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty*, 57 F.4th 791, 812 (11th Cir. 2022). *See also, e.g. D.H. by A.H. v. Williamson Cnty. Bd. of Educ.*, 638 F. Supp. 3d 821, 835 (M.D. Tenn. 2022). In analyzing Title IX claims, multiple courts have used the words “man” and “woman” interchangeably with the word “sex”, thereby legally equating the definition of “man” or “woman” to mean anatomically or physiologically male or female people. *See, e.g. Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 675 (W.D. Pa. 2015); *Neese v. Becerra*, 640 F. Supp. 3d 668, 680 (N.D. Tex. 2022). As courts have often used the words “man” and “woman” to discuss the anatomical and physiological distinctions between the sexes, the regulation’s use of the phrase “boys and girls” should receive the same treatment.

While Petitioner alleges that it is not the separation of sexes in human sexuality classes that she is challenging but her exclusion from the girls' sexuality class based on her gender identity. However, that argument would render the purpose of the carve-outs detailed above as moot. *Boe v. Dune Unified Sch. Bd.*, – F.7th –, 8*-9* (13th Cir. 2023). The argument itself also relies on the definition of sex in Title IX and the regulation at issue including gender identity.

As stated above, the exceptions listed in the Title IX statute and regulations that allow sex separation all invoke the need for privacy or the biological differences between the sexes: such as in living facilities, bathrooms, locker rooms, sports teams, choruses, and human sexuality. 20 U.S.C. § 1686; 34 C.F.R. § 106.33-.34. In the above spaces, people may be in states of undress and require privacy, or need separate spaces due to biological differences. Human sexuality classes invoke both these concerns as the classes involve educating students on their reproductive anatomy. Biological differences and privacy concerns are permissible reasons to justify disparities between the sexes under the law in limited circumstances. *Johnston*, 97 F. Supp. 3d at 676-77 (upholding 34 C.F.R. § 106.33 as there are differences between the sexes that justify a disparity in law).

By granting Boe's request and holding that the definition of sex incorporates gender identity therefore allowing her to attend the girl's human sexuality class, the essential purposes behind these statutes would become moot. While Boe accepts that schools can have sex separated spaces, accepting her theory of the case would prevent schools from regulating who is able to enter those spaces which has been held to be untenable and contradictory to the purpose of allowing the existence of those spaces. *D.H. by A.H.*, 638 F. Supp. 3d at 835; *Adams*, 57 F.4th at 814-817. The common purpose of these regulations illustrates why the definition of "sex" within the context of Title IX was intended to be biological sex by the legislature and courts have looked to them to decide similar Title IX cases. In similar cases involving the sex separated space of bathrooms, the courts held that allowing protection based on gender identity would create a greater protection on the basis of gender identity over sex as schools could not regulate sex separated spaces when a conflict with gender identity arose. *Id.* As protecting from discrimination on the basis of sex is one of the fundamental purposes of Title IX, allowing for greater protection under gender identity is untenable. *Id.*

While one could argue that Boe's request does not carry the same weight as a request to use living facilities such as bathrooms or locker rooms that the other gender uses, privacy is important in the human sexuality class environment. Students will be talking about their reproductive organs, sexuality, and puberty which can be very sensitive topics that they may have privacy concerns discussing with someone of another sex who does not share that same anatomy in the room. Additionally, there is no guarantee that the changes would end only at human sexuality classes and not expand to the other carve-outs mentioned above as all of these groups are tied together through the common thread of biological differences between the sexes. See *Adams*, 57 F.4th at 816-817.

c) The Definition of "Sex" at the Time Title IX Was Enacted Refers to Biological Sex

Title IX itself reads "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.A. § 1681. The relevant regulation reads "a) General standard. Except as provided for in this section or otherwise in this part, a recipient shall not

provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex." and "(3) Human sexuality classes. Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls." 34 C.F.R. § 106.34. Both the statute and the regulation turn on the phrase "on the basis of sex" and specifically the word "sex".

There are a few well-recognized rules in the area of statutory interpretation that are used to guide courts. First and foremost, as the statute itself does not define the word sex, the first place the court is to look is at the text itself for insight. *Neese*, 640 F. Supp. 3d at 678-79. The definitions of the text should match what the historical context and ordinary public meaning was at the time the statute was enacted. *Id.* at 681-82. The definitions should consider the entire statute as a whole, as well as its overarching purpose. *Id.*

The Spending Clause must also come into consideration when defining "sex" in Title IX, as private damages actions such as Boe's action under Title IX are available only where recipients of federal funding had adequate notice that they could be liable

for the conduct at issue. *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). In addition to having adequate notice, Congress must a clear statement in order to impose conditions on federal funds because "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). In regards to Title IX, the clear statement and notice requirement of the Spending Clause means that Congress must have defined clearly that "on the basis of sex" includes gender identity or that something beyond the common assumption that it encompasses only biological sex to allow states to be on notice that a Title IX claim under a gender identity theory could be brought against a State. *Adams*, 57 F.4th at 815-16 (11th Cir. 2022). As schools across the country regularly engage in the practice of separating bathrooms, locker rooms, sports teams, and human sexuality classes by biological sex and not gender identity, it is unclear how States could be on notice that the statute requires them to allow students to enter those spaces based on their gender identity. *Id.* There is still uncertainty in the law even among the courts as evidenced by a circuit split on these issues.

As referenced above, we will be starting with the text itself. Primarily the definition of "sex" in its ordinary public meaning and historical context when passed in 1972. There is ample evidence to support that the definition of "sex" at the time invoked biological sex. In *Grimm v. Gloucester County School Board*, the dissent goes through 5 dictionaries from the time period and finds that virtually every entry indicates that sex was largely defined as biological sex in the 1970s. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020), as amended (Aug. 28, 2020). Though this was a dissent, it has been cited in several decisions as a key factor in determining the definition of sex. *D.H.*, 638 F. Supp. 3d at 835-36; *Adams*, 57 F.4th at 812-13. Even if Boe produces some definitions from the time period that are less clear, ordinary common meaning along with statutory context prevails. *Id.*

Statutory context can be determined by reviewing historical context and legislative intent when the statute was passed. The stated legislative intent behind Title IX was to "prohibit sex discrimination in education". *Adams*, 57 F. 4th at 811. As discussed above, the intended definition of sex can be inferred from the existence of the carve-outs that allow for the separation of the sexes in living facilities, locker rooms,

bathrooms, sports teams, human sexuality classes, and choruses. 20 U.S.C.A. § 1686; 34 C.F.R. § 106.33-34. Additionally, the fact that the legislature has had plenty of time and opportunity to update the statute to include gender identity in the definition of sex, and in fact has attempted to but failed, speaks to legislative intent as well. *Neese*, 640 F. Supp. 3d at 683. As legislative intent, historical context, and ordinary meaning favors the definition of being biological sex, it would be inappropriate for this Court to rewrite legislation and take that power away from the body with which it belongs: Congress. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1753 (2020).

d) Reliance on *Bostock* or *Price Waterhouse* is Misplaced as There are Clear Distinctions Between Title VII and Title IX

Boe argues that the ruling in *Bostock v. Clayton County*, should be applied in a Title IX context. In *Bostock*, the court held that under Title VII sex discrimination in employment includes discrimination based on sexual orientation and gender identity. *Bostock*, 140 S. Ct. at 1737. However, there are clear differences in statutory language and purpose between Title VII provision at issue in *Bostock* and the Title IX that makes importing this decision into the Title IX context inappropriate. To begin with, Title VII defines discrimination under the

statute as "because of sex" while Title IX defines it as "on the basis of sex". 42 U.S.C.A. § 2000e-2(a); 20 U.S.C.A. § 1681(a). While in *Bostock*, the terms may have been used interchangeably by the Court, it has been held that that alone is not enough to assume that there is no difference between the two phrases and the drafters of the statutes intentionally chose different phrases here to indicate different standards. *Neese*, 640 F. Supp. 3d at 677-80. Title IX also has several regulations that carve-out spaces where differential treatment based on sex is acceptable, while Title VII does not. In *Adams*, the court found that this difference changes the analysis on these issues and requires that the statute be interpreted in line with the regulations, which requires sex to be defined as biological sex. *Adams*, 57 F.4th at 811-12. Additionally, *Bostock* itself limited its holding purely to the Title VII case at hand and stated that it was not speaking to bathroom or locker room issues that may come up in a Title IX context. *Bostock*, 140 S. Ct. at 1753; *D.H.*, 638 F. Supp. 3d at 830. This presumably extends to all the carve-outs of Title IX, including the human sexuality class. The court stated that these issues would have to be examined individually by the court by analyzing each statute's individual texts and historical contexts, the Court should hold to that

standard and not import in Title VII holdings in a Title IX case. *Id.*

One could argue that Title VII has been imported into Title IX before. However, those cases largely invoke the hostile environment theory covering sexual harassment that was imported from Title VII to Title IX or private damages causes of action that were imported from Title VII to Title IX. See *Murray v. New York Univ. Coll. of Dentistry*, 57 F.3d 243, 248-49 (2d Cir. 1995); see *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74-75 (1992). In the case of the hostile environment theory, both Title VII and Title IX's legislative history and regulations support the idea that Congress had in mind that there would be crossover between the two in this regard. *Doe v. Claiborne Cnty., Tenn. By & Through Claiborne Cnty. Bd. of Educ.*, 103 F.3d 495, 514 (6th Cir. 1996). In this case, we have the opposite as Title IX's regulations and legislative history directly contradict what Boe is arguing to impose through Title VII. *Johnston*, 97 F. Supp. 3d at 678; *Neese*, 640 F. Supp. 3d at 683. In the case of private damages causes of actions, cases acknowledge that there are textual differences between Title IX and Title VII and that there are limited circumstances in which private damages are available due to those differences in

language. *Neese*, 640 F. Supp. 3d at 677-78; *Davis Next Friend*, 526 U.S. at 643-44. Courts also rely on regulations that put Title IX schools on notice that they may be liable for private actions for failure to respond for discriminatory conduct and the common law that put schools on notice that they may be held liable for their failure to protect students from tortious acts of third parties. *Davis Next Friend*, 526 U.S. at 643-44. In Title IX, as discussed above the regulations are in fact carve-outs that allow sex separation and do not put schools adequately on notice. Additionally, there is no common law to turn to in this case as there is a circuit split on this issue and it is a novel concept. These key differences illustrate that the same reasoning that was used to import the hostile environment theory and private damages causes of action cannot be used to import Title VII's definition of sex into Title IX.

Boe also argues that a sex-stereotyping theory should be imported into Title IX cases under *Price Waterhouse v. Hopkins*. A sex-stereotyping theory would declare it discrimination if someone faced adverse action, in a Title IX context being excluded from participation in an educational activity, as a result of their non-conformity with their biological sex. *Johnston*, 97 F. Supp. 3d at 680. In *Price Waterhouse*, the

plaintiff was not promoted to partner at her firm in part because several of her reviews stated that her demeanor was not befitting of a female partner and discussed how she did not act, talk, or dress in accordance with stereotypes associated with her biological sex. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989). However, several courts have held that sex itself is not a stereotype and gender identity or transgender status in and of itself does not automatically result in an assumption of sex-stereotyping. *Adams*, 57 F.4th at 813-14; *Johnston*, 97 F. Supp. 3d at 674. This has been held to be especially true in cases where the student in question was allowed and even supported to live in accordance with their gender identity in other aspects, as Boe is under the current Dune Unified School District policies. Dune Sch. Bd., Resolution 2021-4 (2021); Dune Sch. Bd., Resolution 2022-14 (2022); *Johnston*, 97 F. Supp. 3d at 681 (holding that a plaintiff who was supported in all other aspects of his gender identity besides being able to enter sex-segregated bathrooms did not have a cognizable claim of sex-stereotyping). Even if the Court finds that the standards from *Bostock* and *Price Waterhouse* apply here and allow Boe to bring her claim under gender identity and her transgender status, the courts in *Johnston* and *D.H.* still found that policies separating

spaces based on biological sex in accordance with the implementing regulations such as Dune Unified School District Board's to be in line with Title IX. See generally, *D.H.*, 638 F. Supp. 3d at 835 (holding that even if discrimination on the basis of being transgender is discrimination on the basis of sex that separation of restrooms by biological sex is not a violation of Title IX).

III. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT THE POLICY DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT SURVIVES INTERMEDIATE SCRUTINY REVIEW.

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 goal of the Fourteenth Amendment is to "keep[] government decisionmakers from treating differently persons who are in all relevant respects alike." *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty*, 57 F.4th 791, 800 (11th. Cir. 2022) (citing *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). To determine whether a government action actually violates the Equal Protection Clause by classifying certain groups of constituents unconstitutionally, this Court has held up that government action to a certain level of scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The first step in this

determination, then, is to decide which level of scrutiny applies. *Johnston v. Univ. of Pittsburgh of the Commw. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 667 (W.D.Penn. 2015) (citing *Donatelli v. Mitchell*, 2 F.3d 508, 513 (3d Cir.1993)). Some classifications fall into one of the two extremes of scrutiny, either the lenient rational basis review standard or the exacting strict scrutiny standard, and some classifications fall somewhere between those extremes at an intermediate, heightened level of scrutiny. *Clark* 486 U.S. at 461; Maxwell L. Sterns, *Obergefell, Fisher, and the Inversion of Tiers*, 19 UNIV. PA. J. CONST. L. 1043, 1046 (2017). Sex-based classifications have routinely been examined by the Supreme Court under this intermediate level of scrutiny. *Clark* 486 U.S. at 461; *Nguyen v. INS*, 533 U.S. 53, 60-1 (2001); *United States v. Virginia (VMI)*, 518 U.S. 515, 532-33 (1996).

Regardless of the level of scrutiny, the Court should grant the Board deference when evaluating Petitioner's Equal Protection claim because of the Board's in loco parentis role. Because of this special role, the Supreme Court has given deference to public schools in primary and secondary education settings for certain constitutional issues. See *Morse v. Frederick*, 127 S.Ct. 2618, 2625 (2007); *Ingraham v. Wright*, 97 S.Ct. 1401, 1412 (1977); *Vernonia Sch. Dist. 47J v. Acton*, 115

S.Ct. 2386, 2396 (1995). Accordingly, the Court should grant the Board deference when evaluating Boe's Equal Protection claim.

1. The Board's Policy Classifies Students Based On Their Sex,
Not Gender Identity

Here, the Policy explicitly classifies students based on their sex, and thus should be analyzed under intermediate scrutiny. The Policy specifically calls its separation "sex segregation". Dune Sch. Bd., Resolution 2022-14 (2022), at Art. 1 sec. 1(c). The Policy states that instruction shall be provided separately for male and female students. *Id.* To clarify itself, the Policy further says that "students shall be assigned to human sexuality classes according to biological sex as determined by a doctor at birth and recorded on their original birth certificate." *Id.* The Policy even defines sex here when it requires that instruction is tailored for male and female students according to "anatomical and physiological characteristics." *Id.* Due to these explicit classifications by sex, the Policy should be held to an intermediate scrutiny.

Courts are split on the question of whether or not transgender individuals constitute a quasi-suspect class entitled to intermediate scrutiny. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020) (holding that transgender individuals constitute a quasi-suspect class); *Adams*

57 F.4th at 803 (expressing doubt that transgender individuals constitute a quasi-suspect class). While the lower courts are split, historically, the Supreme Court has rarely created new quasi-suspect classes: notably, it would not do so on the basis of sexual orientation. *Romer v. Evans*, 116 S.Ct. 1620, 1631 n.1 (1996) (Scalia, A., dissenting).

2. The Policy Survives Intermediate Scrutiny Analysis

Regardless of the Classification

The Board's Policy withstands intermediate scrutiny review. To survive intermediate scrutiny, a state "must show 'at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *United States v. Virginia* (VMI), 518 U.S. 515, 533 (1996). Important government objectives include providing education (*see id.*) protecting individual's privacy (*see Adams*, 57 F.4th 791), and protecting the public health (*see Flack v. Wisconsin Dep't of Health Servs.*, 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018)). To meet the "substantially related" aspect of intermediate scrutiny, there just has to be "enough of a fit between the...[policy] and its asserted justification." *Danskine v. Mia. Dade Fire Dep't*, 253 F.3d 1288, 1299 (11th Cir. 2011). The Equal Protection Clause does not demand a perfect fit

between the means and ends, it just needs to be a reasonable fit. *Carcaño v. McCroy*, 203 F. Supp. 3d 615, 640 (M.D. N.C. 2016); *Adams* 57 F.4th at 801. Also, the rule under consideration in an intermediate scrutiny analysis is not required to meet its ultimate objective in every single instance. *Nguyen*, 533 U.S. at 70. Indeed, even where the validity of the government's actions is in question, and where the government action in question was deemed impractical and unachievable by the court, the action's constitutionality has still been affirmed. *Danskine*, 253 F.3d at 1301.

A. The Policy's Separation of Students by Sex is
Constitutional

The Policy serves important government interests. The Preamble of the Policy lays out the reasons for the Policy's existence. First, the Policy is aimed at providing students with "high-quality education that will prepare them for fulfilling, healthy, successful lives." Resolution 2022-14. It also aims to provide "accurate, age-appropriate...information about human sexuality" as "an essential part of a high-quality education and necessary to protect and advance the individual and public health of young Dune residents." *Id.* The Policy's language illustrates the government's legitimate interest here in protecting the health and wellness of its youth through accurate

and relevant sexual education. The 13th Circuit calls these interests not just important, but “compelling”. *Boe v. Dune Unified Sch. Bd.*, – F.7th –, 5* (13th Cir. 2023).

To further these interests, the government has chosen to enact the Policy, which is substantially related to its goals. The Policy requires that male and female students are taught separately according to biological sex. Resolution 2022-14. This requirement allows the instruction provided for each group to be anatomically and physiologically accurate, which advances the government’s interest in providing sexual education that is “accurate”. Also the Policy provides a general protection of individual privacy for their young students through separate classrooms. *Carcaño*, 203 F. Supp. 3d at 643 (explaining that Supreme Court cases have found that privacy interests that justify sex-segregation by a state are based upon physiological differences as opposed to gender identity) (citing *VMI*, 518 U.S. 515, and *Nguyen*, 533 U.S. 53).

Unlike in *VMI* where the education of students was harmed by separation by sexes, the Policy here does not create a better educational experience for either sex. *VMI*, 518 U.S. at 547-8. Instead, the Policy actually allows the same material to be provided to both female and male students in their separate classes. Resolution 2022-14. Petitioner argues that separating the sexes is immaterial to the educational or public health

benefits gained through the classes, and even that separation could marginally reduce the educational and public health benefits gained from the classes. It's true that the Board may find through administering the classes that they can be improved in some way. However, the only question before the Court today is whether the sex separation in the Policy is constitutional, not whether there are better pedagogical methods available to the Board. Petitioner's argument therefore mistakes efficacy for constitutionality here. The Policy does not need to be perfectly effective or even meet its ultimate objectives in every instance to still be deemed constitutional. *Danskine*, 253 F.3d at 1301; *Nguyen*, 533 U.S. at 70. Since the Policy allows for better tailoring of education for students and creates more private, comfortable classes through its sex separation, it is related enough to the advancement of student's education and public health, and thus does not violate the Equal Protection Clause.

B. The Policy's Separation of Students by Gender Identity
is Also Constitutional

Boe, as a transgender girl, is treated differently from cisgender girls because doing so is substantially related to an important government purpose.

The Board has an extremely important interest in protecting and advancing the individual and public health of young Dune

residents by providing accurate, age-appropriate, and evidence-based sexual education. Resolution 2022-14 (2022), at pmb1.

Sexual education classes must include information about “reproductive anatomy,” “puberty and the development of secondary sex characteristics,” “safe sex practices and the use of contraceptives,” and “HIV and other sexually transmitted infections.” Resolution 2022-14 (2022), at Art. 1 sec. 1(b). This education is an important state interest because it furthers ends that have already been deemed “important” by the Supreme Court: advancing public health and preventing teen pregnancy. *Craig v. Boren*, 97 S.Ct. 451, 458 (1976) (finding public health an important state interest). *Michael M. v. Super. Ct. of Sonoma Cnty.*, 101 S.Ct. 1200, 1205 (1981) (finding preventing teen pregnancy an important state interest).

Access to accurate, age-appropriate, and evidence-based sexual education advances public health by helping young Dune identify certain cancers, and identify and prevent the spread of sexually transmitted infections. This information is necessarily specific to a student’s own anatomy. Additionally, the Board’s policy prevents teen pregnancy by informing young Dune residents how to properly use contraceptives. Condoms are a contraceptive specific to male anatomy, and birth control pills, IUDs, and other contraceptives are specific to female anatomy. Therefore, granting Boe and other transgender students access to

information about their own anatomy furthers important interests of advancing public health and preventing teen pregnancy.

Further, this is the Board's true purpose, and not a benign purpose created for litigation or a proxy for animus. *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F.Supp.3d 833, 843 (S.D. Ind. 2019). The Board has no animus towards its transgender students, which is shown by its many other policies that actively protect and enhance the rights of transgender students. For example, the Board allows transgender students to use bathrooms and locker rooms and join sports teams that align with their gender identity. Additionally, the Board has strict anti-bullying policies that explicitly prohibit bullying on the basis of a student's transgender status. Resolution 2021-4 (2021).

Separating the students according to their anatomy is substantially related to the end of protecting and advancing the individual health of young Dune residents. This is evident because it protects and advances Boe's individual health.

First, without access to information about her anatomy, Boe's gender dysphoria may worsen. Boe is twelve years old and a seventh grade student, meaning that she is at the age of puberty. *Grimm v. Gloucester County School Board* explains that "puberty is a particularly difficult time for transgender children, who often experience intensified gender dysphoria and worsening mental health as their bodies diverge further and

further from their identity.” *Grimm*, 972 F.3d at 595. The sexual education course will provide information on “reproductive anatomy, puberty, and the development of secondary sex characteristics.” Resolution 2022-14 (2022), at Art. 1 sec. 1(b). Without access to this information, Boe will likely be surprised and confused as her body increasingly starts to develop male anatomical characteristics, and this may worsen her gender dysphoria. Thus, providing information about male anatomy is critical to protect and advance Boe’s individual health.

Second, having access to information about male puberty and the development of secondary sex characteristics will allow Boe to make informed decisions about whether or not to receive gender-affirming care. While Boe has already socially transitioned, she is not currently receiving any form of gender-affirming care. See *J.A.W.*, 323 F.Supp.3d at 1034 (explaining that the primary treatment for gender dysphoria is transition, including gender-affirming care like hormone therapy). The sexual education course will provide information on “puberty” and “the development of secondary sex characteristics.”

Resolution 2022-14 (2022), at Art. 1 sec. 1(b). In other words, Boe will be taught about the changes she can expect to see in her body during puberty. Without this information, Boe will be unable to make informed decisions about preventing or altering these changes (by taking puberty-blockers or receiving hormone

replacement therapy, for example). Thus, information about male puberty and the development of secondary sex characteristics will help Boe make informed decisions about whether or not to receive gender-affirming medical care, and as such, is critical to protecting and advancing her individual health.

Separating students according to their anatomy advances and protects the public health of young Dune residents besides Boe: specifically, any sexual partners she may have in the future. Preventing teen pregnancy and avoiding the spread of sexual infection (a public health concern) is different for those with male anatomy and female anatomy. The Board's policy mandates education on "reproductive healthcare," "safe sex practices and the use of contraceptives," and "HIV and other sexually transmitted infections." Resolution 2022-14 (2022), at Art. 1 sec. 1(b). Thus, providing Boe with information that is tailored "according to anatomical and physiological characteristics" and "the unique experiences and health care needs associated with those characteristics" is substantially related, if not necessary, to achieve the Board's important interest in protecting and advancing the public health of young Dune residents. Resolution 2022-14 (2022), at Art. 1 sec. 1(c). This includes any sexual partners Boe may have in the future who are capable of getting pregnant, or sexual partners who may spread sexual infection or have sexual infection spread to them.

Additionally, the Board understands and is sympathetic to the concern that assigning Boe to the boys' sexual education class may lead to distinct harms. For example, Boe's presence in the boys' class may result in her being "outed" to classmates, and embarrassment for Boe. The Board recognizes this risk, and accordingly gives Boe's parents the choice to opt-out of the human sexuality course. In *Adams*, the 11th Circuit upheld a school board's policy of assigning students to bathrooms according to their anatomy, in part because transgender students had the option to use a gender neutral bathroom, and thus exempt themselves from using a bathroom that didn't align with their gender identity. *Adams*, 57 F.4th at 810. Here, the Board's opt-out policy is similar: transgender students have the option to exempt themselves from a human sexuality course that doesn't align with their gender identity. Therefore, as the 11th Circuit found in *Adams*, this Court should similarly find that the Board's Policy does not violate Boe's Equal Protection rights.

III. The Policy Also Survives Under Rational Basis

If the Court determines that transgender individuals do not constitute a quasi-suspect class or otherwise subject to intermediate scrutiny, a rational basis standard will be used. "A classification 'must be upheld against equal protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification.'"

Heller v. Doe, 509 U.S. 312, 320 (1993). Here, the Board has an interest in advancing the individual and public health of its students by providing accurate, age-appropriate, and evidence-based sexual education to its students. Because there is a rational basis for separating students according to their anatomy to further this purpose, the Policy survives.

Conclusion

For the foregoing reasons, the Respondent, Dune Unified School District Board, respectfully requests that the Supreme Court uphold the Thirteenth Circuit decision.

Respectfully submitted,

/s/ _____

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/s/ _____

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/s/ _____

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Attorneys for Respondent