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-Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

Brief for Petitioner

Team 5 – Attorneys for Petitioner

[redacted]

Issue: 14th Am.

[redacted]

Issue: Title IX & 14th Am.

[redacted]

Issue: Title IX

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QUESTIONS PRESENTED

1. Does the Education on Human Sexuality Policy violate Title IX by excluding Boe from equal participation in an educational program because of her transgender status, and therefore because of sex, where no statutory carve-outs permit such discrimination?
2. Does the Education on Human Sexuality Policy violate the Equal Protection Clause of the Fourteenth Amendment by discriminating based on transgender status — which is a form of classification based on sex and a quasi-suspect class — and failing all levels of scrutiny?

OPINION BELOW

Boe v. Dune Unified School District Board, -- F.7th -- (13th Cir. 2023).

CONSTITUTIONAL RULES AND PROVISIONS

U.S. Const. amend. XIV

20 U.S.C. § 1681

INTRODUCTION

This case concerns Jane Boe's right secured by Title IX and the Equal Protection Clause to be free from discrimination based on her transgender identity. Put simply, this case involves Boe's legal right to access the same education her cisgender peers receive. The Board's Education on Human Sexuality Policy

("Policy") at issue deprives Petitioner of that equal access to education simply because she is transgender.

The Policy violates Title IX because it denies Boe the opportunity to learn in a sex-segregated setting that affirms her gender identity. The Policy's discrimination against Boe as a transgender student is "because of sex" and detrimental to her well-being. Limited statutory carve-outs allowing the administration of sex-segregation do not absolve the Board of Title IX liability, because these carve-outs do not permit the Board to impose a discriminatory definition of sex. The Policy tosses aside the privacy and safety of women and girls when it disregards the privacy and safety of Boe.

The Fourteenth Amendment provides equal protection under the law to all persons regardless of their identity. The Policy violates the Equal Protection Clause because it prohibits transgender students from attending the human sexuality class that affirms their gender identity while granting cisgender students access to the same. Under intermediate scrutiny, and even rational basis review, the Board can offer no justification sufficient to uphold the Policy.

STATEMENT OF THE CASE

At seven years old, Boe informed her parents that despite being assigned "male" at birth, she is a girl. *Boe v. Dune Unified Sch. Dist. Bd.*, -- F.7th --, 4 (13th Cir. 2023). From

that point on, Boe has used she/her pronouns in her personal life and in public and chose her grandmother's middle name as her first name. *Id.* Now a twelve-year-old seventh-grade student at Dune Junior High School, Boe's family, friends, and teachers treat Boe in a manner consistent with her gender identity. *Id.* Because Boe's gender identity is not in alignment with her sex assigned at birth, she is "transgender."

In December 2022, the Dune Unified School District Board ("Board") adopted the Policy requiring students in seventh to tenth grade to enroll in human sexuality class according to their "biological sex," which it defines as the sex "determined by a doctor at birth and recorded on their original birth certificate." *Id.* at 3. Under the Policy, Boe would receive human sexuality instruction not in the girls' class, affirming her gender identity, but rather, in the boys' class. *Id.* at 4.

Per the Policy, human sexuality classes must "tailor instruction" on topics including "healthy relationships . . . ; safe sex practices and the use of contraceptives; [and] HIV and other sexually transmitted infections" to the "anatomical and physiological characteristics, and the unique experiences and health care needs associated with these characteristics." *Id.* at 3–4. Instructors may provide the same information to both classes, even on topics such as "puberty and the development of secondary sex characteristics." *Id.*

Although the Policy allows parents and guardians to request "in writing that their child not participate in [human sexuality class] instruction," this option is not acceptable to Boe's parents who believe that Boe is entitled to the same gender-affirming instruction as her peers. *Id.* at 5. Forcing Boe to enroll in the boys' class would be humiliating and inconsistent with her gender identity, as most of Boe's classmates and teachers do not know that Boe is transgender. *Id.* Boe has fully socially transitioned at school as she uses the girls' bathroom and intends to play on girls' sports teams in accordance with district policy, and she has only disclosed her transgender status to a few close friends. *Id.* If enrolled in the boys' human sexuality class, Boe fears her classmates would say she does not belong. *Id.* Boe would rather stay home than face this prospect, but forcing her to find human sexuality instruction outside of school would be costly and burdensome. *Id.*

Boe alleges that, as applied, separation based on "biological sex" discriminates against her as a transgender girl in violation of Title IX and the Fourteenth Amendment's Equal Protection Clause. The Thirteenth Circuit Court of Appeals erroneously affirmed summary judgment for the Board, finding no Title IX or Equal Protection Clause violation. Petitioner hereby requests that this Court find the Policy unlawful.

ARGUMENT

I. THE POLICY AS APPLIED TO JANE BOE VIOLATES TITLE IX BECAUSE IT EXCLUDES HER FROM EQUAL PARTICIPATION IN AN EDUCATIONAL PROGRAM BECAUSE OF HER TRANSGENDER STATUS, AND THEREFORE BECAUSE OF SEX, WHERE NO STATUTORY CARVE-OUTS PERMIT SUCH DISCRIMINATION.

Boe will establish "(1) that she was excluded from participation in an education program because of her sex; (2) that the educational institution received federal financial assistance at the time of the exclusion; and (3) that the discrimination harmed her," proving that the Board violated Title IX. *Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 865 (S.D. Ohio 2016); *see* 20 U.S.C. § 1681. The Policy denies Boe the benefits of learning about human sexuality in a safe and inclusive environment, causing her to suffer emotional, physical, and educational harm.[1]

A. In Prohibiting Boe From Attending A Sex-Segregated Class In Accordance With Her Gender Identity, the Board Engaged In Exclusion, Denial Of Benefits, And Discrimination.

[1] The parties agree that the Board receives federal funding, and that the human sexuality class is a qualifying educational program, establishing the second element of the Title IX claim.

Title IX's regulations prohibit schools from engaging in differential treatment on the basis of sex. Such treatment is defined as: "providing different benefits, or services, or providing aid, benefits, or services in a different manner," "denying . . . such aid, benefit, or service," "subjecting any person to separate or different rules of behavior, sanctions, or other treatment," or "otherwise limiting . . . the enjoyment of any right, privilege, advantage, or opportunity." 34 C.F.R § 106.31(b). The Policy provides cisgender and transgender students services in different manners by creating barriers to and effectively denying educational benefits to transgender students. Separating students into sex-segregated classes per "biological sex," the Policy forces transgender students, like Boe, into a class that does not affirm their gender identities, creating an environment where it will be difficult for them to focus and feel safe.[2] Thus, the Board tailors education *against* Boe's unique health care needs, resulting in discrimination.

[2] A study addressing educational stressors for transgender adolescents found that "cisnormative lessons on human bodies, on puberty, or on reproductive health exacerbated and made it harder [for students] to cope with [gender] dysphoria." Carl Horton, *Gender Minority Stress in Education: Protecting Trans*

The Policy also denies Boe the opportunity to receive a "high-quality education" as it forces her to choose between opting out or an uncomfortable and unsafe classroom. This "choice" is hollow. The Board admits that the curriculum is "necessary" to Boe's public health yet bars her from it by forcing her to seek costly and burdensome private education. As such, the Policy imposes barriers to and effectively denies a "high-quality education" to transgender students.

B. Examining the Plain Text of the Statute, Historical Context, and Overall Purpose of Title IX, the Board's Discrimination Is "Because of Sex."

Though Title IX and related regulations do not explicitly define "sex," the discrimination "because of sex" that they cover clearly encompasses the Board's discrimination against Boe. In interpreting the plain text of Title IX, this Court has held that "if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982) (holding the court must err on the side of protection to find Title IX protection extends to employees though the statute does not "expressly nor impliedly" exclude them). Thus, where the text of

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Children's Mental Health in UK Schools, INT'L J. TRANSGENDER HEALTH, June 2022, at 204.

Title IX reads that "no person" shall be subjected to discrimination "on the basis of sex," this term should be read to protect on the basis of "gender" or "transgender status." 20 U.S.C. § 1681. What matters is not whether Title IX explicitly or implicitly protects on these bases, but whether the statutory language explicitly or implicitly *excludes* them. Since there is no statutory language to suggest Title IX excludes transgender individuals from protection, the statute should be read to include them. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020) ("[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.").[3]

The Thirteenth Circuit erred in finding the definition of "sex" at the time Congress enacted Title IX referred only to "physiological distinctions." *Boe*, -- F.7th at 6 (citation

[3] Although *Bostock* concerns Title VII, courts have held overwhelmingly that precedent concerning Title VII applies to the Title IX context as well. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023), *cert. denied*, No. 23-392, 2024 WL 156480 (U.S. Jan. 16, 2024); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017); *Brine v. Univ. of Iowa*, 90 F.3d 271, 275–76 (8th Cir. 1996).

omitted). This definition ignores the reality that understanding of "sex" and "gender" as separate concepts gained mainstream acceptance only recently.[4] Since sex was understood to encapsulate gender at the time of the statute's enactment, an absence of the term "gender" in Title IX does not signify its exclusion. Thus, recognition of gender identity protection does not require Congressional amendment of Title IX. *See Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Ed.*, 858 F.3d 1034, 1049 (7th Cir. 2017) ("[C]ongressional inaction 'lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.'" (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

[4] The term "transgender" was not popularized until the 1990s, before which "transsexual" was commonly used to refer to transgender individuals. *See Glossary of Terms Related to Transgender Communities*, STANFORD VARDEN HEALTH SERVS., https://vaden.stanford.edu/medical-services/lgbtqia-health/glossary-terms-related-transgender-communities#:~:text=Transsexual%3A%20A%20term%20that%20was,is%20no%20longer%20considered%20affirming (last visited Feb. 13, 2023).

Nor is there any statutory text to support the Policy's definition of sex as "determined by a doctor at birth and recorded on [an] original birth certificate." Resolution 2022-14 § 1(c). A purely "biological" definition of sex ignores "the factual complexities that underlie human sexual identity . . . [that] stem from real variations in how the different components of biological sexuality . . . interact with each other, and in turn with social, psychological, and legal conceptions of gender." *Schoer v. Billington*, 424 F. Supp. 2d 203, 212–13 (D.D.C. 2006). Birth certificate designations do not currently account for the numerous indicators of sex nor the roughly one in 2,000 children who are intersex and do not fit neatly into a binary sex designation.[5] The Policy requires looking at a student's "original" birth certificate, nullifying corrected or updated certificates that more accurately reflect a

[5] *Frequently Asked Questions About Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people.

student's sex and straying not only beyond the statutory text, but also accepted definitions of sex.[6]

Finally, the Thirteenth Circuit erred in reasoning that because, "[i]n 1972, Congress could not have imagined, much less intended" Title IX to cover discrimination against transgender individuals, the statute does not protect them. To capture Title IX's definition of "sex", the Court must look beyond the "ordinary public meaning" that serves only as a "starting point."[7] *Bostock*, 140 S. Ct. at 1739. The 1972 Congress would

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[6] *See AMA Announced Policies on Final Day of Special Meeting*, AM. MED. ASS'N (June 16, 2021), https://www.ama-assn.org/press-center/press-releases/ama-announced-policies-adopted-final-day-special-meeting (recommending removal of "sex" from birth certificates because the designation "fails to recognize the medical spectrum of gender identity.").

[7] Respondent may argue that if the Court construes the word "sex" as ambiguous, it must construe Title IX to allow the Policy to give the Board "fair notice," but the Fourth Circuit has explicitly rejected this argument. *See Grimm*, 972 F.3d at 619 n.18 (finding Supreme Court precedent under Bostock "forecloses that 'on the basis of sex' is ambiguous" because "Congress's key drafting choices . . . virtually guaranteed that unexpected applications would emerge over time.").

likely not have imagined or intended that a law to remove higher education barriers and boost employment potential for women would reach K-12 students, sex harassment, and athletics, yet Title IX's protections in these contexts are now commonplace. Finding a more expansive view of Title VII in *Oncale v. Sundowner Offshore Services*, Justice Scalia, writing for a unanimous Court, declared that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. 75, 79 (1998); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("Discrimination [as used in Title IX] is a term that covers a wide range of intentional unequal treatment," illustrating Congress' intent to "g[ive] the statute a broad reach."). Title IX thus reaches transgender discrimination as it is a "reasonably comparable evil" to the gender disparities Title IX was originally enacted to combat.

C. The Board's Discrimination is "Because of Sex" Because Boe's Sex Is a But-For Cause of Her Assignment to the Boys' Class.

By specifying that students would be separated according to "biological sex," the Policy targets transgender students because it treats a transgender girl differently than a cisgender girl. As this Court explained, since sex is a but-for

cause of transgender discrimination, it is discrimination "because of sex":

> It is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex. . . . [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.

Bostock, 140 S. Ct. at 1741. Many courts have applied this reasoning to Title IX. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020); *A.C. ex rel. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023); Koenke v. Saint Joseph's Univ., No. CV 19-4731, 2021 WL 75778 (E.D. Pa. Jan. 8, 2021); Doe 1 v. Nat'l Collegiate Athletic Ass'n, No. 22-CV-01559-LB, 2023 WL 105096 (N.D. Cal. Jan. 4, 2023). Boe would have been treated the same as cisgender girls in her class, but-for her sex assigned at birth. As such, the Policy discriminates against Boe for being transgender, which is discrimination "because of sex."

D. The Board's Discrimination is "Because of Sex" Because it Stems From Sex-Based Stereotypes.

The Board discriminates on the basis of sex because its discrimination stems from sex-based stereotypes, which are unlawful under Title IX. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (holding sex discrimination includes

discrimination motivated by "stereotypical notions" about how people act "on the basis of gender"), *overruled on other grounds by Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Colieries*, 512 U.S. 267 (1994). The Board prescribes upon Dune students what constitutes girlhood: an *original* birth certificate listing "female." Resolution 2022-14 § 1(c). Since individual manifestations of gender expression have no bearing on a students' gender identity in the Board's eyes, the Board relies on the stereotype that a student's sex assigned at birth is the sole determinant of a student's sex. Where the Board grants students who exhibit the same actions and traits as Boe access to the girls' human sexuality class merely because they were assigned a different sex at birth than Boe, it necessarily relies on sex-based stereotypes to "treat transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently." *Whitaker*, 858 F.3d at 1051.

The Thirteenth Circuit erroneously reasoned that "requiring students to learn health information related to their anatomy is not based on any stereotypes associated with a student's biological sex." Boe, -- F.7th at 6. The Policy's assumption that human sexuality education can be "tailor[ed]. . . according to anatomical and physiological characteristics" presupposes that sex exists on an anatomical or physiological

binary that carries "unique experiences and health care needs" in and of itself. Resolution 2022-14 § 1(c). Relying on this false narrative to segregate students based on "biological sex," the Board propagates the notion that there is one experience of maleness or femaleness, and that sex assigned at birth is determinative of health care needs related to such experiences. Forcing Boe to enroll in the boys' human sexuality class based on her sex assigned at birth perpetuates this stereotype and thus discriminates against her as a transgender student because of sex.

E.Boe Will Suffer Immediate and Long-Term Harm From This Discrimination.

Boe's Title IX claim prevails because she will suffer demonstrable harm, the degree of which need not be precisely calculated. *Grimm*, 972 F.3d at 619. Even "inconvenience" produces adequate harm under Title IX. *Id.* at 717.

This harm is not speculative: assignment to the boys' class will result in her being outed as transgender at her new school. This forced outing will expose Boe to intrusive questions, bullying, and feelings of stigmatization and isolation likely resulting in long-term health impacts. *See Boe*, -- F.7th at 5; Sandy E. James et al., *Early Insights: A Report of the 2022 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. 17, 22 (2024),

https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf.

Additionally, barring Boe from gender-affirming spaces deprives her of a critical component of social transitioning for transgender youth, likely causing her to experience the recognized medical condition of gender dysphoria. Many courts recognize the inherent emotional and physical injuries resulting from schools' discrimination against transgender students. *See Grimm*, 972 F.3d at 617–18; *Whitaker*, 858 F.3d at 1044–46, 1049–50; *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016) (describing "substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old" transgender girl due to unequal treatment).

Finally, Boe will experience harm by being denied high-quality education. If forced to opt out of health class, she will fail to learn important topics related to her health.[8] If

[8] This is especially damaging considering that research suggests the health risks discussed in the course, such as sexually transmitted infections, are more pronounced for transgender youth. Erin C. Wilson et al., *Sexual Risk Taking Among Transgender Male-to-Female Youths With Different Partner Types*, AM. J. OF PUB. HEALTH, Aug. 2010, at 1500 (suggesting condom use among transgender youth is inconsistent).

forced to attend the boys' health class, Boe's focus and well-being will be impaired by a hostile classroom environment.

F. Statutory Title IX Carve-outs Do Not Save the Board From Violating Title IX.

The Thirteenth Circuit misinterpretation of two Title IX carve-outs — §§ 106.33–34 — cannot help the Board escape Title IX liability. *Boe*, -- F.7th at 6.

While the Board may legally conduct "classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality" in "separate sessions for boys and girls," under § 106.34(a)(3), the Board cannot exclude Boe from the sex-segregated class that matches her gender identity because of the designation on her birth certificate. 34 C.F.R. § 106.34(a)(3) (2024). Creating a statutory exception allowing segregation of "boys and girls" in human sexuality classes, § 106.34(a)(3) invokes terminology that typically designates gender identity.[9] Boe is a girl; she should be placed in the girls' class under the plain language of this carve-out. Where the other subsections of § 106.34 invoke words related to biology or

[9] *Transgender FAQ*, GLAAD, https://glaad.org/transgender/transfaq/ (last visited Feb. 13, 2024) ("Transgender identity is a person's internal, personal sense of being a man or a woman (or boy or girl).").

physiology – including "bodily contact," "ability," and "vocal range" – the exclusion of such descriptors in the human sexuality classes exception suggests an intentional choice to bar sex-based exclusion on the basis of "biological or physiological" indicators as utilized in the Policy. *See Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1209 (11th Cir. 2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section . . . it is generally presumed that Congress acts intentionally . . . in the disparate . . . exclusion.").

Secondly, § 106.34 as a whole provides evidence that "sex," as used in Title IX and in this statutory carve-out, encompasses gender. If we substitute "boys and girls" for the qualifier, "gender," this section essentially says Title IX prohibits discrimination on the basis of *sex*, except where schools conduct human sexuality classes in separate sections on the basis of *gender*. If a gender-based separation in this context is an exception to typically prohibited sex-based classifications, gender-based separations in all other contexts must be considered prohibited sex-based classifications. Thus, sex discrimination encompasses discrimination on the basis of gender identity or transgender status.

Finally, the Thirteenth Circuit erroneously invokes § 106.33 — which permits sex-segregated facilities such as

bathrooms, showers, and locker rooms, 34 C.F.R. § 106.33 (2024) — quoting concern for individual privacy where people "disrobe, sleep, and perform bodily functions." *Boe*, -- F.7th at 6 (quoting *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 804 (11th Cir. 2022)). Extending the privacy concerns underlying statutory carve-outs for separate facilities to curriculum contexts where no one will disrobe or perform a bodily function would permit illogical erosion to Title IX. Schools could enact policies discriminating because of sex in circumstances that do not raise bodily privacy concerns, such as in anatomical medical education or in art classes studying nude figures. This statutory carve-out and rationale is limited and inapplicable to shield the Board from Title IX infringement.

The Policy violates Title IX because it discriminates on the basis of sex by assigning Boe to a sex-segregated classroom in opposition to her gender, resulting in grave harm.

II. THE POLICY VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT DISCRIMINATES BASED ON TRANSGENDER STATUS — WHICH IS A FORM OF CLASSIFICATION BASED ON SEX AND A QUASI-SUSPECT CLASS — AND FAILS ALL LEVELS OF SCRUTINY.

The Policy facially discriminates against Boe based on her transgender status because it subjects her to different treatment than her cisgender peers by barring her from the human sexuality class that affirms her gender identity. As

such, the Policy is subject to intermediate scrutiny because discrimination based on transgender status is inherently sex-based discrimination and transgender people are a quasi-suspect class. The Policy cannot survive intermediate scrutiny, but even under rational basis review, the Policy violates the guarantees of the Equal Protection Clause.

A. The Board's Education on Human Sexuality Policy Discriminates Against Boe Because She Is Transgender.

The Equal Protection Clause requires that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. It is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). A government policy may violate the Equal Protection Clause when it exhibits discriminatory "intent or purpose" and "disproportionate impact" against a protected class. *Vill. of Arlington Heights. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). When a law discriminates against a protected class on its face, "no inquiry into legislative purpose is necessary" to establish discriminatory intent. *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

The Policy facially discriminates against transgender students because it uses "biological sex" as a proxy for

transgender status. *See* Resolution 2022-14 § 1(c). Such a proxy term serves as facial discrimination against the classification that the proxy attempts to hide. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (holding that a Hawaiian voting law used "ancestry" as a proxy to discriminate based on "race"). The necessary implication from the Policy's separation of students "according to biological sex" is that "[c]isgender girls are assigned to the girls' human sexuality class and transgender girls are not . . . ." Boe, -- F.7th at 9 (Berstein, J., dissenting). As such, the Policy uniquely discriminates against transgender students like Boe because it subjects them to a rule that in effect does not apply to their cisgender peers. *See Grimm*, 972 F.3d at 609; *Hecox v. Little*, 79 F.4th 1009, 1025 (9th Cir. 2023) ("The [a]ct's specific classification of 'biological sex' has . . . been carefully drawn to target transgender women and girls, even if it does not use the word 'transgender' in the definition.").

Contrary to the Thirteenth Circuit's finding that the Policy "classifies students according to sex," the Policy discriminates between cisgender and transgender students. *Boe*, -- F.7th at 7. The Policy is distinguishable from the state-administered disability insurance program in *Geduldig v. Aiello* that the Court found did not discriminate on the basis of sex because it denied coverage of pregnancy to all persons

equally. 417 U.S. 484, 496–97 (1974). Unlike the *Geduldig* policy, the Policy does not bar all students equally from attending the human sexuality class that affirms their gender identity. Rather, the Policy discriminates between cisgender and transgender students by permitting only cisgender students to attend the class that affirms their gender identity. Since Boe challenges her "exclusion from the [girls' human sexuality class] based on [her] status as a transgender girl, it is necessary to view this case through that lens . . . ." *Adams*, 57 F.4th at 847 (Pryor, J., dissenting).

B. Classification Based on Transgender Status Is A Classification Because of Sex/Gender, So Heightened Scrutiny Applies.

As applied, the Policy using "biological sex" to bar transgender students from a gender-affirming human sexuality class, "is inherently a sex-classification," *Whitaker*, 858 F.3d at 1051, necessitating intermediate scrutiny. *United States v. Virginia*, 518 U.S. 515, 555 (1996). As described above, whereas Boe is known to her family, friends, peers, teachers, strangers, and herself as a girl, the Board relies upon stereotypes about sex to assign her to the boys' human sexuality class. The Board prescribes universal stereotypes about gendered experiences based solely on sex assigned at birth. Since the Board relies on sex stereotypes to exclude

Boe, the Policy amounts to sex discrimination warranting intermediate scrutiny. *See Price Waterhouse*, 490 U.S. at 250.

Further, the Thirteenth Circuit erred in holding *Bostock* does not provide "a route to heightened scrutiny in this case," *Boe*, -- F.7th at 8, because the Policy discriminates between transgender and cisgender students. *See supra* Part I.C. Since the Board discriminates against Boe because her sex assigned at birth does not conform to her gender identity, Boe's sex assigned at birth is a but-for cause of the Board's discrimination against Boe. *See Bostock*, 140 S. Ct. at 1741–42; *see also Grimm*, 972 F.3d at 616 (finding that when a person discriminates against a transgender individual, they "necessarily refer[] to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause of the discriminator's actions."). As such, the Policy is subject to intermediate scrutiny.

C. The Policy Is Subject To Heightened Scrutiny Because It Discriminates Based on Transgender Status Which Is A Quasi-Suspect Class.

Certain classifications are "so seldom relevant to the achievement of any legitimate state interest" that discrimination on their basis necessitates heightened scrutiny. *Cleburne*, 473 U.S. 432, 440 (1985). Heightened scrutiny reflects the need for a "more searching judicial

inquiry" of laws that present the risk of "prejudice against discrete and insular minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). For this reason, strict scrutiny applies to race, *Loving v. Virginia*, 388 U.S. 1 (1967), national origin, *Oyama v. California*, 332 U.S. 633 (1948), and alienage, *Graham v. Richardson*, 403 U.S. 365 (1971), and intermediate to sex, *VMI*, 518 U.S. 515, and nonmarital parentage, *Trimble v. Gordon*, 430 U.S. 762 (1977).

Following the Fourth and Ninth Circuits, transgender status should be recognized as a quasi-suspect class that merits intermediate scrutiny. *See Grimm*, 972 F.3d at 611; *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019); *see also Brandt v. Rutledge*, 47 F.4th 661, 670 n.4 (8th Cir. 2022) (discerning "no clear error in the district court's factual findings underling" its conclusion that transgender people are a suspect class); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015). To identify a quasi-suspect classification, the Court considers whether (1) the class has experienced a history of discrimination, (2) the class lacks political power, (3) the defining characteristic of the class "bears [any] relation to ability to perform or contribute to society," or (4) an immutable characteristic defines the class. *See Cleburne*, 473 U.S. at 440–46.

The long and well-documented history of discrimination "in almost all aspects of life, including employment, housing, education, public accommodations, and access to government services" that transgender individuals, and transgender youth in particular, have faced highlights the need to recognize transgender status as a quasi-suspect class.[10] In its 2023 survey of over 28,000 LGBTQ youth aged 13 to 24 in the United States, the Trevor Project revealed that "27% of transgender and nonbinary young people reported that they have been physically threatened or harmed in the past year due to their gender identity" and 64% "reported that they have felt discriminated against in the past year due to their gender identity."[11] Recognizing transgender as a quasi-suspect class would mitigate against this discrimination by setting aside policies that perpetuate it. *See Califano v. Goldfarb*, 430 U.S. 199, 211 (1977) (finding that when a law's use of a classification

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[10] Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 552 (2016).

[11] The Trevor Project, *2023 U.S. National Survey on the Mental Health of LGBTQ Young People* 15–16 (2023), https://www.thetrevorproject.org/survey-2023/assets/static/05_TREVOR05_2023survey.pdf.

"rest[s] upon 'old notions' and 'archaic and overbroad' generalizations," the law should be "found to offend the prohibitions against denial of equal protection of the law.")

Transgender individuals also confront a political system and politicians that have failed to protect them. When the Court recognized a need to apply heightened scrutiny to sex classifications, Congress had already enacted the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973). The need to establish transgender status as a protected class is more poignant in a legislative landscape that seeks to deprive transgender individuals of their rights[12] and severely lacks transgender representatives.[13] The lack of political

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[12] *See* Christy Mallory & Elana Redfield, *The Impact of 2023 Legislation on Transgender Youth* 2 (2023), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Legislation-Summary-Oct-2023.pdf (noting twenty-two states have laws that ban access to gender-affirming care for transgender youth, nineteen of which were passed in 2023).

[13] *See Running for Congress, Sarah McBride Would Be 1st Transgender Member of Congress*, PBS (June 26, 2023, 4:30 PM), https://www.pbs.org/newshour/politics/running-for-congress-

representation for and active legislative efforts against the rights of transgender individuals as a class exemplify the need to recognize transgender status as a protected class.

Finally, transgender status is a defining characteristic with no bearing on ability to contribute to society. To determine if a classification warrants heightened scrutiny, courts consider if laws discriminate against individuals based on "obvious, immutable, or distinguishing characteristics that define them as a discrete group . . . ." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). As the Fourth Circuit explained, "gender identity is formulated for most people at a very early age" and being transgender is "as natural and immutable as being cisgender." *Grimm*, 972 F.3d at 612–13. Further, just as "sex" is distinguishable from other classes because it "bears no relation to ability to perform or contribute to society," transgender status similarly does not present any impairment. *Frontiero*, 411 U.S. at 686. Thus, transgender status is a distinguishing characteristic that defines the class without implicating individuals' ability to contribute to society.

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sarah-mcbride-would-be-1st-transgender-member-of-congress (discussing that there has yet to be an openly transgender member of U.S. Congress).

Failing to examine the precedent through which the Court designates quasi-suspect classes, the Thirteenth Circuit erroneously pointed to the Court's reluctance to recognize a new class to reject designating transgender status as a quasi-suspect class. *Boe*, -- F.7th at 8 n.1. A quasi-suspect class may develop through gradual precedent that reflects society's changing perception of and attitudes toward the protected class. *Compare Reed v. Reed*, 404 U.S. 71 (1971) *with Frontiero*, 411 U.S. 677, and *Craig v. Boren*, 429 U.S. 190 (1976). Given the weight of the described factors and precedent reflecting society's awareness of the need to recognize transgender status as a quasi-suspect class, discrimination based on transgender status warrants intermediate scrutiny. *See Grimm*, 972 F.3d at 611.

D. Under Intermediate Scrutiny, The Policy Cannot Survive Because Discrimination Against Boe for Her Transgender Status Does Not Substantially Further Any Exceedingly Persuasive Government Interest.

To survive intermediate scrutiny, the Board must prove that the Policy serves an important government interest and is substantially related to that interest. *VMI*, 518 U.S, at 524. Since the Board "seek[s] to defend [trans]gender-based government action," it "must demonstrate an 'exceedingly persuasive justification'" for the Policy. *Id.* at 531.

While protecting and advancing the health of young Dune residents might be an important government interest, the Thirteenth Circuit erred in finding this interest sufficiently "exceedingly persuasive" to justify depriving Boe of a gender-affirming education. *Boe*, -- F.7th at 7–8. The Policy purports to advance the health of young residents via instruction tailored for each class "according to anatomical and physiological characteristics" as indicated by "biological sex." Resolution 2022-14 § 1(c). Many topics that the Policy requires, however, cannot pretend to be connected to these characteristics (i.e., "healthy relationships . . .; safe sex practices and the use of contraceptives; [and] HIV and other sexually transmitted infections") and all may be taught to both classes. *Id.* § 1(b). It is thus difficult to fathom what purpose segregating Boe to the boys' human sexuality class serves. By and through investigation into a student's "biological sex," the Board prescribes a binary understanding of "anatomical or physiological characteristics." The Policy's prescription cannot substantially further the Board's interest in students' health. Instead, it invites an "invasive [biological] sex verification" of any questioned student seeking access to a sexual health class that does not further the Board's purported interest in protecting and advancing the

health of young Dune students. *See Hecox v. Little*, 79 F.4th 1009, 944, 1034–35 (9th Cir. 2023).

Further, discriminating against Boe because she is transgender does not substantially further the Board's interest in providing a "high-quality education" on human sexuality to young Dune residents. Enrolling Boe or any other transgender student in a class that does not affirm their gender identity will deprive them of the highest-quality education available to them. Boe would face humiliation in the boys' human sexuality class and fears the boys would tell her or the teacher that she does not belong in the class. Boe, -- F.7th at 5. This environment will make it near impossible for Boe to learn the information necessary to "protect and advance [her] individual . . . health." Resolution 2022-14, Preamble; *see also* Horton, *supra* note 2. The notion that students' education is best served by assigning them to a human sexuality according to their "biological sex" is thus based on "generalizations" and prejudices that do not substantially further any government interest. *See VMI*, 518 U.S. at 541 ("[R]eviewing courts [should] take a 'hard look' at generalizations or 'tendencies'" the State uses to discriminate against a protected class).

Furthermore, the Policy's opt-out scheme cannot save it under intermediate scrutiny. As applied, the opt-out scheme

forces transgender students like Boe to forgo human sexuality class altogether when access to gender-affirming education carries the insurmountable cost and burden of obtaining this education outside of school. When the alternative that the Policy presents is so unequal as to deprive transgender students of a human sexuality education, the Policy cannot be remotely related, much less substantially related, to the stated interest of protecting and advancing the health of young Dune students. *See A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 772–73 (7th Cir. 2023) (granting a preliminary injunction for the district's ban on gender-affirming facility access where the unisex facilities that the district offered in lieu of granting access to gender-affirming facilities harmed transgender students).

E.Even if Scrutinized Under Rational Basis Review, The Board's Discriminatory Policy Violates the Equal Protection Clause.

Even if rational basis review applies, the Policy cannot survive because it is not rationally related to any legitimate government interest. *See Cleburne*, 473 U.S. at 440. Since the Policy targets a vulnerable group, "careful consideration" is necessary to determine if this "discrimination[] of an unusual character" is "obnoxious" to the Equal Protection Clause. *Romer v. Evans*, 517 U.S. 630, 633 (1996).

The Policy fails rational basis review because it arbitrarily discriminates against transgender students in a manner that bears no relationship to the Board's interest in protecting and advancing the health of Dune youth. Since the Policy arbitrarily uses "biological sex" to force Boe to choose between a class that stigmatizes and humiliates her or forgo human sexuality instruction, the Policy actively works against its stated interest of protecting and advancing Boe's health. Resolution 2022-14 at Preamble. Nothing in the record suggests that cisgender students face the same choice nor that discrimination against their transgender peers improves the quality of their education. Accordingly, the Policy cannot survive because the relationship between discrimination based on transgender status and the Board's "asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446.

CONCLUSION

For the foregoing reasons, the Petitioner, Jane Boe, by and through her next friend and father, Jack Boe, respectfully requests that the Supreme Court reverse the decision of the Thirteenth Circuit and find the Policy unlawful.

Respectfully submitted,

/s/ [redacted]
Partner 1

/s/ [redacted]
Partner 2

/s/ [redacted]
Partner 3

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