THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 2024

DOCKET NO. 23-1234

JANE BOE, by and through her next friend

and father, JACK BOE,

Plaintiff-Appellant,

v.

DUNE UNIFIED SCHOOL DISTRICT

BOARD,

Defendant-Appellee

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

Brief for Respondent

Team 6

[redacted] (Title IX) [redacted],

[redacted] (Title IX and Equal Protection Clause)

[redacted], and

[redacted] (Equal Protection Clause) [redacted]

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Questions Presented

1. Does application of the Policy on human sexuality education violate Title IX of the Education Amendments Act of 1972?

2. Does the Policy on human sexuality education violate the Equal Protection Clause of the Fourteenth Amendment?

Opinion Below

Boe ex rel. Boe v. Dune Unified Sch. Dist. Bd., -- F. 7th. -- (2023).

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Introduction

This case concerns whether the Dune Unified School District Board's ("the Board") policy on human sexuality classes ("the Policy") violates Title IX or the Equal Protection Clause of the Fourteenth Amendment as applied to appellant Boe. Ultimately, it concerns a school board's ability to provide its students with instruction tailored to their sex-based anatomical and physiological differences by instituting sex-segregated classes. Boe, a transgender girl who has not yet begun gender-affirming care, challenges this Policy as applied to her. At bottom, the Policy violates neither Title IX nor the Equal Protection Clause.

While Title IX prohibits discrimination in education "on the basis of sex," an implementing regulation from the Department of Education explains that human sexuality courses may be taught "in separate sessions for boys and girls" without violating Title IX.

There are multiple other reasons why Title IX does not invalidate the Board's policy. First, the word "sex" as used in Title IX refers to biological sex, not gender identity. This conclusion is supported by the ordinary public meaning of the word "sex" when Title IX was enacted and the fact that Congress has denied many invitations to clarify whether "gender identity" is included in the word "sex" as used in Title IX. Additionally, the explicit carve-outs to Title IX demonstrate that "sex" refers to sex assigned at birth. Further, *Bostock v. Clayton County* does not apply to Title IX as *Bostock* interpreted Title VII only, and the significant differences between the two statutes counsel against assuming the role of Congress by applying *Bostock* to Title IX. Second, placing a transgender student in a sex education class consistent with their sex assigned at birth is not an action based on a "sex stereotype." The Policy differentiates based on biological differences, which is a permissible action. Outside of the context of sex education, the school district supports her gender expression by referring to her with her preferred name and pronouns, as well

as allowing her to join girls sports teams. The Policy is hence perfectly compliant with Title IX.

As to Boe's Equal Protection Clause argument, the Board agrees that its Policy triggers heightened scrutiny because it classifies students according to biological sex. However, it rejects Boe's assertion that its Policy classifies students according to transgender status because transgender students could be placed in both the male and female classes, separating sex education classes based on biological difference is not a proscribed sex stereotype, and because the definition of "sex" does not include gender identity. Even if the Policy does classify based on transgender status, the Policy would be subject only to rational basis review and would survive such review. Because the Policy classifies students according to biological sex but not transgender status, the Policy should be reviewed under intermediate scrutiny. Not only is the Policy's purpose – providing sex-appropriate health information to Dune students – important, but also, as a democratically elected body, the Board's identified interest holds special significance. Therefore, this Court should continue its tradition of allowing school boards latitude in the area of educational policy. Additionally, as the Thirteenth Circuit correctly held, the Board's important interest is furthered by the assignment of students according to their biological sex. By

classifying students according to biological sex, the board Policy ensures the delivery of evidence-based health information that corresponds to their students' distinct anatomy and physiology. Because the Policy is based on an important governmental interest and is substantially related to this interest, the Policy is constitutional as applied to Boe.

Statement of the Case

Passed unanimously, the Board crafted its 2022 human sexuality instruction policy to meet the educational needs and ensure the well-being of young Dune Residents. R. at 4; Dune Sch. Bd., Resolution 2022-14 (2022). The Board, an elected body of five members, oversees the Dune Unified School District and represents the town of Dune at large. R. at 3.

In December 2022, the Board recognized that the school district's provision of human sexuality education was inconsistent. *Id.* In turn, it passed a resolution mandating a comprehensive yet tailored curriculum designed to meet the needs of its students. *Id.* at 3-4; Dune Sch. Bd., Resolution 2022-14 (2022). In addition to covering a wide breadth of topics, the resolution requires that students attend the human sexuality classes that correspond with the biological sex recorded on their original birth certificate. Dune Sch. Bd., Resolution 2022-14 (2022). However, the Board also included an opt-out provision, allowing parents the discretion to exempt their

children from the otherwise mandatory classes. Dune Sch. Bd., Resolution 2022-14 (2022).

Boe, a 12-year-old transgender girl enrolled at Dune Junior High School, and her parents were dissatisfied with the Board's new Policy covering human sexuality classes. R. at 4. As they see it, the Policy discriminates against Boe because it requires her to attend the boys' human sexuality class unless her parents request to have her exempted from the instruction altogether. *Id.* Although Boe lives her life as a girl, she does not currently take puberty blockers or receive any other form of gender-affirming medical care. *Id.* At 12 years old, Boe is poised to begin endogenous puberty soon, meaning she will experience all the bodily changes typical of male puberty. *Id.* If the Board were to allow Boe to enroll in the girls' human sexuality class instead of the boys' class, she would receive health information equally relevant to both sexes but not health information regarding her male anatomy and physiology. *Id.* at 3-4.

Contrary to Boe's allegations of discrimination, the Board has unanimously issued extensive policies to accommodate transgender students in the past. *Id.* at 4; Dune Sch. Bd., Resolution 2021-4 (2021). Over a year before the Board enacted its recent human sexuality instruction Policy, the Board unanimously passed a policy requiring that Dune incorporate

gender identity into anti-bullying policies, grant transgender students restroom access matching their gender identity, and permit participation in sex-segregated athletics consistent with students' gender identity from kindergarten to eighth grade. Dune Sch. Bd., Resolution 2021-4 (2021).

In October 2023, Boe's father filed suit on her behalf in federal district court and argued that (1) the application of the Board's Policy violates Title IX of the Education Amendments of 1972 (Title IX) because it discriminates against Boe based on her sex and that (2) the Policy violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. R. at 5. After the parties filed cross-motions for summary judgment, the District Court rejected both of Boe's arguments. *Id.* On appeal, the Thirteenth Circuit affirmed the District Court's decision and held that the Board's Policy neither violated Title IX nor the Equal Protection Clause. *Id.* at 8.

Argument

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE POLICY DOES NOT VIOLATE TITLE IX.

The Dune District human sexuality Policy does not violate Title IX because the word "sex" as used in Title IX does not encompass gender identity. Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a). Further, this Court's ruling in *Bostock v. Clayton County* that discrimination based on gender identity is prohibited under Title VII does not apply to Title IX. Finally, the Policy does not violate Title IX because the separation of classes by sex assigned at birth does not constitute a sex stereotype.

A. The meaning of "sex" in Title IX does not include "gender identity."

The word "sex" as used in Title IX ("No person in the United States shall, on the basis of sex . . . .") refers to biological sex, not gender identity. 20 U.S.C. § 1681(a). Though Boe argues that "sex" as used in 20 U.S.C. § 1681(a) encompasses gender identity, the power to include gender identity in the scope of Title IX belongs to Congress, not the courts. *See Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676-77 (W.D. Pa. 2015) ("It is within the province of Congress—and not this Court—to identify those classifications which are statutorily prohibited."). At the time Title IX was enacted in 1972, "virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females—particularly with respect to their reproductive functions." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020) (Niemeyer, J. dissenting)

(collecting dictionary definitions). In 1970, the American College Dictionary defined sex as "the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished." *The American College Dictionary* 1109 (1970); *Bridge ex rel. Bridge v. Okla. State Dept. of Ed.*, Case No. CIV-22-00787-JD, 2024 WL 150598, at *7 (W.D. Okla. Jan. 12, 2024).

The explicit carve-outs to Title IX further support this conclusion. These carve-outs allow for sex-segregated living facilities, bathrooms, locker rooms, and shower rooms. R. at 6; 20 U.S.C. § 1686; 34 C.F.R. §§ 106.33, 106.32(b)(1) (2024). Further, a Department of Education implementing regulation on human sexuality courses states, "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" without violating Title IX. 34 C.F.R. § 106.34(a)(3) (2024). These carve-outs demonstrate that at the time Title IX was enacted, "the ordinary public meaning of 'sex' was understood to mean the biological, anatomical, and reproductive differences between male and female." *Bridge*, 2024 WL 150598 at *8. In the over fifty years since Title IX was first enacted, Congress has declined to accept numerous invitations to change that meaning. R. at 6. This Court should not subsume the role of Congress by doing so in this case. There are strong policy

considerations that counsel against interpreting "sex" to encompass gender identity in the context of Title IX. Congress's purpose in enacting Title IX was to establish equal educational opportunities for women and men. *Johnston*, 97 F. Supp. 3d at 677. Underpinning the Title IX carve-outs for sex-segregated living facilities, bathrooms, locker rooms, and shower facilities are significant privacy concerns. *See Grimm*, 972 F.3d at 633 (4th Cir. 2020) (Niemeyer, J. dissenting). These privacy concerns equally apply to human sexuality classes. There is strong scientific evidence that girls in sex-segregated human sexuality classes feel more comfortable speaking about sexual health and focus better on the course material than those in mixed gender classes. *See* Vicki Strange et al., Mixed-Sex or Single-Sex Sex Education: How Would Young People Like Their Sex Education and Why?, 15(2) Gender & Educ. 201, 203-05 (2003). Female students are more likely than male students to prefer sex-segregated classes when learning about sexual health content. *Id.*; India Rose et al., Key Factors Influencing Comfort in Delivering and Receiving Sexual Health Education: Middle School Student and Teacher Perspectives, 14(4) Am. J. Sex Educ. 466, 478 (2018). Boe's classmates assigned female at birth hence may feel uncomfortable speaking in class and have a more difficult time learning knowing they are sharing the class with someone who does not share their sexual characteristics. If this

Court were to find that "sex" includes gender identity here, that decision could have auxiliary effects on other spaces where Title IX allows for sex segregation, such as bathrooms and locker rooms. As the Thirteenth Circuit aptly stated, interpreting "sex" to encompass gender identity "would not only limit the educational opportunities of, but would also jeopardize the privacy and safety of, the very people Title IX was built to protect—women and girls." R. at 6 (citing *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818-21 (11th Cir. 2022)(Lagoa, J., concurring; *Neese v. Becerra*, 640 F. Supp. 3d 668 (N.D. Tex. 2022)).

This interpretation would not only frustrate the purpose of Title IX, it would defeat the very purpose of the human sexuality classes themselves. The curricula of such courses taught in the Dune Unified School District must be tailored "according to anatomical and physiological characteristics, and the unique experiences and health care needs associated with these characteristics." Dune Sch. Bd., Resolution 2022-14 (2022). When information is equally relevant to both sexes, schools are permitted to cover that material in both the boys' and girls' classes. *Id.* The topics required to be taught in the human sexuality classes make especially clear that the purpose of these courses would be frustrated by allowing someone assigned male at birth in the girls' class: instruction must

cover "reproductive anatomy; puberty and the development of secondary sex characteristics; . . . safe sex practices and the use of contraceptives; HIV and other sexually transmitted infections," and "reproductive health care, including preventative care and self-screening for early detection of cancer and other conditions." *Id*. At this time, Boe is not taking puberty blockers or any other form of gender-affirming medical care, and at twelve years of age, she will likely begin her endogenous puberty–male puberty–soon. R. at 4. The clear purpose of the sex-segregated human sexuality course, as demonstrated by the required curricula, is to prepare students for endogenous puberty and maturation.

The Supreme Court has long recognized that "physical differences between men and women . . . are enduring" and that "the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). Though developments in science have limited the "enduring" nature of *some* physical differences (e.g., levels of testosterone), these developments are not relevant here as Boe has no current plans to pursue gender-affirming care in the near future. Allowing Boe into the human sexuality course geared towards students assigned female at birth would frustrate the purpose of the course by

preventing her from learning information specific to those undergoing male puberty.

Bostock v. Clayton County does not mandate that the Court interpret "sex" as used in Title IX to encompass gender identity. This Court found in *Bostock* that discrimination against employees for being homosexual or transgender constitutes discrimination "because of" sex under Title VII. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1743 (2020). In *Bostock*, a transgender employee challenged her termination as unlawful discrimination because of sex under Title VII. *Id.* at 1738. This Court reasoned that the words "because of" create a but-for causation test for Title VII, meaning that a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. *Id.* at 1739. Hence, this Court held that when an employer discriminates on the basis of gender identity, two considerations based on sex play into that decision: the employee's sex assigned at birth and the sex with which they identify. *Id.* at 1741-42.

The decision in *Bostock* does not apply to Title IX because the Court was careful to limit its holding to solely the Title VII context. First, the majority opinion in *Bostock* states:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after

> our decision today. But *none of these other laws are before us*; we have not had the benefit of adversarial testing about the meaning of their terms, and *we do not prejudge any such question today.* The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex."

Id. at 1753 (emphasis added). *Bostock* hence only applies to Title VII, not to Title IX or any other statute. *See Neese*, 640 F. Supp. 3d at 676 ("*Bostock* does not purport to interpret . . . Title IX, or any other non-Title VII statute."); *see also Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he rule in *Bostock* extends no further than Title VII."); *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021)(reasoning that Title VII analysis does not apply to Title IX). Further, Title VII and Title IX are fundamentally different statutes with different language; Title VII prohibits discrimination in employment "because of sex[,]" whereas Title IX prohibits discrimination in education "on the basis of sex." *See Neese*, 640 F. Supp. 3d at 679. While this difference in wording may seem trivial, it is not appropriate for this Court to override Congress' intent by applying the same meaning to different words. *See id.* at 679 ("By failing to acknowledge the different phrases Title VII and Title IX employ, the Court 'would risk amending [the] statutes outside the legislative process reserved for the people's representatives.'" (citing *Bostock*, 140 S. Ct.

at 1738). The differences between Titles VII and IX extend beyond the statutory text: unlike Title VII, Title IX has specific carve-outs under which sex segregation is permitted–including for human sexuality classes like the ones at issue here. 34 C.F.R. § 106.34(a)(3) (2024).

This case is more like *Bridge ex rel. Bridge v. Oklahoma State Department of Education* than *Bostock v. Clayton County*. In *Bridge*, the District Court for the Western District of Oklahoma found that an Oklahoma law requiring that multiple occupancy restrooms and changing areas in public schools be separated based on students' biological sex did not discriminate against transgender students based on sex in violation of Title IX. *Bridge*, 2024 WL 150598 at *8. The law defined "sex" as "the physical condition of being male or female based on genetics and physiology, as identified on the individual's original birth certificate." *Id.* at *2. Plaintiffs, who were transgender students, argued that since the Supreme Court has concluded transgender status is "inextricably bound up with sex" when analyzing a sex discrimination claim under Title VII in *Bostock*, that excluding a transgender student from a restroom on the basis of biological sex is a violation of Title IX. *Id.* at *6. The District Court rejected the argument that *Bostock* was applicable, finding that Title VII and Title IX use fundamentally different language and that the definition of

"sex" under Title IX refers to biological sex, not gender identity. *Id.* at *7-8 (reasoning that at the time Title IX was enacted, "sex" was defined by biology and reproductive functions and that Title IX, unlike Title VII, has "narrow exceptions allowing schools to require that the different biological sexes use different living facilities such as restrooms").

Just as in *Bridge*, the present case involves a policy that mandates certain spaces in school be separated based on biological sex. R. at 3-4. If "sex" as used in Title IX refers to biological sex, then the policy at issue here is "perfectly in sync with Title IX" considering, as the Western District of Oklahoma did, that Title IX has explicit carve-outs for spaces such as bathrooms and human sexuality classes. *Bridge*, 2024 WL 150598 at *7; 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b)(1), 106.33, 106.34(a)(3) (2024). Further, this case is about the teaching of human sexuality curricula to schoolchildren, and "the school is not the workplace[,]" nor are schoolchildren employees. *Adams*, 57 F.4th at 808. *See also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) ("Courts, moreover, must bear in mind that schools are unlike the adult workplace."). The reasoning of *Bostock* hence does not apply here, meaning "sex" as used in Title IX refers to biological sex, not gender identity, and the Policy is perfectly consistent with Title IX.

B. Placing a transgender student in a sex education class consistent with their sex assigned at birth is not an action based on a "sex stereotype."

The Policy is further compliant with Title IX because it is not based on a sex stereotype. In *Bostock*, the employers were found to be in violation of Title VII for firing adult employees because the employees did not behave in line with stereotypes of how adult men or women dress or behave. *See L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 485 (6th Cir. 2023). But the Policy challenged in this case does not depend on how students behave, dress, or identify; rather, it separates students into separate classes based on biological sex. Policies that separate students based on biological sex, absent discrimination based on gender presentation, are not founded on impermissible sex stereotypes. *Johnston,* 97 F. Supp. 3d at 681.

In *Johnston*, a transgender student was not allowed to use the male locker rooms or restrooms at the University of Pittsburgh at Johnstown. *Id.* at 661. The District Court for the Western District of Pennsylvania found that the University did not violate Title IX by refusing to allow Johnston to use the male restrooms and locker rooms since the policy did not constitute impermissible sex stereotyping. *Id.* at 681. The District Court acknowledged that in *Price Waterhouse v. Hopkins*, a case in which Title IX was violated, an employee was discriminated against based on sex when expected to speak, walk,

and physically present in a "feminine" manner. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 268 (1989). It also cited *Prowel v. Wise Bus. Forms, Inc.*, in which the Third Circuit ruled that "a plaintiff must show that his harasser was acting to punish his noncompliance with gender stereotypes" to make a claim of sex stereotyping. *Johnston*, 97 F. Supp. 3d at 680 (citing *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009)). The District Court found that the University did not discriminate against Johnston based on sex stereotypes for two reasons: policies requiring that individuals use the restrooms that align with their birth sex are insufficient alone to prove sex stereotyping, and the University did not discriminate against him for presenting as a male. *Johnston*, 97 F. Supp. 3d at 680-681. On the contrary, the District Court cited evidence that the University did not preclude Johnston from presenting as a male:

> Plaintiff alleges that he presented as a male, and he does not allege that he was ever harassed or discriminated against by the University because he dressed, spoke, or behaved like a man, or because he did not dress, act, or speak like a woman. Likewise, Plaintiff avers that he was permitted to enroll in a men's weight training course; the University accepted his name change to a traditional male name and updated his student records to reflect the name change; and the University treated him in conformity with his male gender identity in all other respects.

Id. at 681.

Following the same analysis in *Johnston*, Dune School District has not discriminated based on a sex stereotype because

it does not take into account how a student performs gender when assigning students to sex education classes. The placement of a student in one class versus another is solely based on their biological sex. Dune Sch. Bd., Resolution 2022-14 (2022). The school also treats Boe as a female and does not preclude her from participating in female athletics. R. at 5. The Board has not separated students based on sex stereotypes and therefore did not violate Title IX.

II. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE POLICY DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment states that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause forbids discrimination based on sex unless there is an important government interest and the distinction is substantially related to that interest (a standard known as intermediate scrutiny). *Adams*, 57 F.4th at 801. While the Policy makes a distinction based on sex, it does so without violating the Fourteenth Amendment because the classification is substantially related to a governmental interest in providing medically accurate health information to students. Additionally, the Policy does not classify based on transgender status. But even if it did, the Policy would only be subject to rational basis review. Because the Policy plainly passes the more

stringent standard of intermediate scrutiny, it certainly passes rational basis review.

A. While the Policy classifies students based on sex, it survives intermediate scrutiny.

A straightforward application of intermediate scrutiny—the appropriate level of review here—makes plain that the Board's Policy separating students by biological sex does not violate the Equal Protection Clause of the Fourteenth Amendment. *Craig v. Boren*, 429 U.S. 190, 197 (1976). "To survive intermediate scrutiny, a state must show that its classification is substantially related to a sufficiently important interest." *Adams*, 57 F.4th at 801. Undoubtedly, the Board's goal of protecting and advancing the individual and public health of young Dune residents is not only important but also compelling. *Brown v. Town of E. Haddam*, 56 F. Supp. 2d 212, 214 (D. Conn. 1999), *aff'd*, 213 F.3d 625 (2d Cir. 2000) (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)) ("[T]he government itself has a compelling interest in the health, education, and welfare of children."). In pursuit of this important interest, the Board requires students to attend sex-segregated human sexuality classes according to their sex assigned at birth, ensuring that the students will receive instruction tailored to their specific anatomical and physiological characteristics. As the Thirteenth Circuit correctly noted, the Board's interest is indeed served

by this Policy. R. at 7. While the Policy treats students differently based on biological sex, the "strong presumption that gender classifications are invalid" is overcome because the Policy is "substantially related to an important government interest." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Thus, this Court should affirm the decision below and allow the students of Dune, Texington to receive the human sexuality instruction their local school board has deemed integral to a high-quality education. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)("[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.").

In recognition of the crucial role schools play in society, this Court has "traditionally reserved the 'daily operation of school systems' to . . . local school boards." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278-79 (1988) (Brennan, J., dissenting) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). In fact, because schools have a "custodial and tutelary responsibility for children[,]" this Court has further explained that even students' "Fourteenth Amendment rights . . . are different in public schools than elsewhere[.]" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)). Of course, students do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Nonetheless, "the nature of those

rights is what is appropriate for children in school." *Acton*, 515 U.S. at 656.

Here, the Board sought to "prepare [Dune public school students] for fulfilling, healthy, [and] successful lives" by mandating human sexuality instruction consistent with the students' biological sex. Dune Sch. Bd., Resolution 2022-14 (2022). Boe and her parents take issue with this Policy and allege that it effectively prevents Boe from receiving instruction consistent with her gender identity. While Boe's situation demands compassion, this Court should uphold its longstanding precedent by applying the appropriate level of review—intermediate scrutiny—and affirm the decision below.

First, as stated above, ensuring that students receive human sexuality instruction specific to their bodies is an important government interest. The students in grades seven through ten are relatively young and "on the threshold of awareness of human sexuality." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). It is well within the Board's prerogative and judgment to craft a policy that delivers to students not only health information universally relevant to both sexes but also information that is uniquely relevant to their biological sexes. *Bridge*, 2024 WL 150598 at *6 ("[I]f (biological) sex-based classifications . . . were deemed to be equal protection violations, no law recognizing the inherent

differences between male and female would pass constitutional muster. This is an untenable position."). Adolescents are a vulnerable group because of their impressionability and youth. *Lee v. Weisman*, 505 U.S. 577, 593 (1992). As such, this Court should respect the Board's important objective to provide all students with a carefully crafted human sexuality curriculum designed for their individual bodily needs and to prepare them for the challenges that puberty and adulthood will bring. Affirming the Thirteenth Circuit's decision will ensure that these young Dune students receive a focused and directly applicable educational experience.

Second, not only does the Board's Policy serve an important governmental interest, but the Policy also does so in a manner sufficiently related to this interest by ensuring that male and female students learn information pertinent to their distinct bodies. Notably, the Policy includes breathing room for parental choice by allowing parents to opt their children out of this human sexuality instruction by simply requesting that their child not participate. Dune Sch. Bd., Resolution 2022-14 (2022). Because this Policy must simply survive intermediate scrutiny, there need only be "enough of a fit" between the means and ends to comport with the Equal Protection Clause of the Fourteenth Amendment. *Nguyen v. I.N.S.*, 533 U.S. 53, 70 (2001). The fit here is sufficient. By providing instruction on human sexuality

separately for male and female students, the Board seeks to create learning environments that properly facilitate the discussion of health topics that are often unique to the experiences and health care needs associated with characteristics that are not shared by members of the opposite biological sex. Admittedly, this Policy is not the only way to accomplish the Board's goal. R. at. 7. However, the U.S. Constitution "does not require that the government design the best fit when it comes to sex-based classifications." *Id.*; see also *Nguyen*, 533 U.S. at 63-64 (explaining that the availability of sex-neutral alternatives does not conclusively render a government policy unconstitutional when assessed under intermediate scrutiny). While Boe seeks to participate in human sexuality classes reserved for biological females, her particular situation is, in fact, instructive as to why the Board's Policy should not be disturbed. While Boe lives her life as a girl—a decision the Board fully respects[1]—she is not

[1] Dune Sch. Bd., Resolution 2021-4 requires all public schools in Dune to include gender identity as an enumerated characteristic in their anti-bullying policies, requires all Dune public schools to allow transgender students to access restrooms consistent with their gender identity, and requires all Dune elementary and middle schools to allow transgender students to

currently taking puberty blockers or any form of gender-affirming medical care. R. at 4. Thus, as stated above, Boe will likely experience bodily changes unique to biologically male bodies in the near future, and it is incumbent on the Board to ensure that she is prepared for the experiences and healthcare needs she will soon face.

B. In this as-applied challenge, the Court is limited to the facts of the record and should disregard hypothetical situations.

So long as Boe's parents do not opt her out of the school's human sexuality instruction, Boe, like the rest of her peers, will receive health information applicable to her biologically male body. Although a transgender student with bodily features that do not correspond to the biological sex recorded on their original birth certificate may potentially frustrate the Board's Policy, Boe is not this hypothetical student.[2] *Solomon v. Cook*

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participate in sex-segregated school athletics consistent with their gender identity in grades kindergarten through eight. Dune Sch. Bd., Resolution 2021-4 (2021).

[2] The Seventh Circuit has raised concern that "the sex marker on a birth certificate [may not be] a true proxy for an individual's biological sex." *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1053 (7th Cir. 2017) (referring to intersex people). However, in this as-

Cnty. Bd. of Comm'rs, 559 F. Supp. 3d 675, 687 (N.D. Ill. 2021)("As Plaintiff falls into none of [the] categories [that fall squarely within the law's ambit], the Court would have to entertain [Plaintiffs] as hypotheticals—something it cannot do in an as-applied challenge."); *see also Hegwood v. City of Eau Claire*, 676 F.3d 600, 603 (7th Cir. 2012)("When [courts] are confronted with an as-applied challenge, [they] examine the facts of the case before [it] exclusively . . . ."). This Court should leave the resolution of this potential issue for another day when the Court is provided a complete and applicable factual record. A review appropriately limited to the facts at hand makes clear that the Policy at issue offers Boe access to professional teachers and counselors who can provide her with important and relevant human sexuality instruction consistent with her biological sex.

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applied challenge, the Court is limited to the particular facts at hand. The record here suggests that Boe is not intersex because her sex assigned at birth is consistent with her biological sex. R. at 4-5. Thus, this Court should not consider in its analysis any issues raised by the possibility of supposed misalignment between a student's body and the sex assigned at birth.

As an elected body, the Board has identified an important interest in fostering awareness and knowledge about human sexuality among its students. It does so against the backdrop of policies designed to engender respect for any transgender students and flexible policy carve-outs that acknowledge the sensitivity around the subject matter of human sexuality curricula. Therefore, when reviewed as an as-applied challenge, the Policy survives intermediate scrutiny and does not violate the Equal Protection Clause of the Fourteenth Amendment. For this reason, this Court should affirm the Thirteenth Circuit's decision below.

C. The Policy doesn't separate students based on cisgender and transgender status, and even if it did, the Policy would be subject to (and pass) rational basis review.

The Board did not discriminate based on transgender status because transgender students could be placed in both the male and female classes, separating sex education classes based on biological differences is not a proscribed sex stereotype, and because the definition of "sex" does not include gender identity. Even if the Board did discriminate based on transgender status, the Policy would be subject to—and pass—rational basis review, because transgender status is not a suspect class.

Since both the male and female sex education classes could include transgender students, there is a lack of identity between transgender status and the Policy necessary to claim that the Board discriminated against transgender students. If a policy creates two groups of people and both groups contain members of a certain class, a party cannot claim that the policy is a form of discrimination against that class. *See Adams*, 57 F.4th at 809. In *Adams*, the Eleventh Circuit Court of Appeals found that a school district's bathroom policy that separated based on biological sex did not discriminate against transgender students in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 811. In part of its reasoning, the Court cited *Geduldig v. Aiello*, which held that California did not classify based on sex when excluding coverage for disabilities related to pregnancy in an insurance policy because the policy split people into groups of pregnant people and non-pregnant people—both of which included women. *Id.* at 809 (citing *Geduldig v. Aiello*, 417 U.S. 484, 486 (1974)). The Eleventh Circuit argued that the bathroom policy at issue was similar to the insurance policy in *Geduldig* because it created two groups of individuals: people assigned female at birth and people assigned male at birth. *Id.* Both of those groups can include transgender individuals. *Id.* Since transgender people could be a

part of both groups, the policy was not discriminatory towards transgender individuals. *Id.*

Similarly to the policy in *Adams*, the Dune Policy places students assigned female at birth and assigned male at birth in separate groups—both of which can include transgender students. *See* Dune Sch. Bd., Resolution 2022-14 (2022). Since there is a lack of identity between the Policy and transgender status, the Policy does not discriminate against transgender students.

The Board did not engage in sex stereotyping because the Policy separates students based on anatomical differences. Distinctions made because of biological differences are permissible and do not run afoul of the Equal Protection Clause. *See Adams*, 57 F.4th at 809-810; *D.N. by Jessica N. v. DeSantis*, No. 21-cv-61344-ALTMAN/Hunt, 2023 WL 7323078, at *9 (S.D. Fla. Nov. 6, 2023). In *Adams*, the Eleventh Circuit Court of Appeals found that the school bathroom policy that separated based on sex assigned at birth did not create an impermissible sex stereotype. *Adams*, 57 F.4th at 809. It cited *Nguyen v. I.N.S.* and *United States v. Virginia* as evidence that the Supreme Court sees anatomical differences as valid bases for classification, without which intermediate scrutiny in sex discrimination cases would not exist. *Id.* at 809-810. Additionally, in *D.N.*, the District Court for the Southern District of Florida found that a Florida statute that prevented transgender girls from

participating in girls' sports did not violate the Equal Protection Clause of the Fourteenth Amendment. *See D.N.*, 2023 WL 7323078 at *10. Since the classification in *D.N.* was based on biological sex, the district court said that it was not based on a stereotype and that "ignoring those real differences would disserve the purpose of the Equal Protection Clause, which is to safeguard the principle that 'all persons similarly situated should be treated alike.'" *Id.* at *9 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 472 U.S. 432, 439 (1985)). The Dune Policy also classifies based on biological sex, thereby treating people assigned male at birth similarly and people assigned female at birth similarly. Dune Sch. Bd., Resolution 2022-14 (2022). While the Board could treat all students alike by creating one sex education class for all students, there does not need to be a perfect fit between the Policy and its justification. *See* Section II.A, *supra*, at 19. The Policy does not create an unlawful sex stereotype under the Equal Protection Clause.

Finally, since the definition of sex does not include gender identity, the Policy does not discriminate based on transgender status. *Bostock* did not change the meaning of the word "sex" as applied to protected status under the Fourteenth Amendment. *See Roe by and through Roe v. Critchfield,* No. 1:23-cv-00315-DCN, 2023 WL 6690596, at *6 (D. Idaho Oct. 12, 2023).

In *Critchfield*, the District Court of Idaho found that a bill that requires Idaho students to use the bathroom that corresponds with their sex assigned at birth did not classify based on gender identity because the Supreme Court has stated that "sex" refers to the "biological distinctions between male and female." *Id.* at *6 (citing *Bostock*, 140 S.Ct. at 1739). It therefore follows that distinctions made based on differences in biological sex (such as the Policy) classify based on sex and not gender identity.

Even if the Policy discriminated based on transgender status, it would be subject to—and pass—rational basis review. Transgender status is not a suspect class. *L.W.*, 83 F.4th at 486. Boe may argue that transgender people meet the four factors used to determine a quasi-suspect class, described in *Grimm v. Gloucester County School Board* as

> whether the class has historically been subject to discrimination . . . if the class has a defining characteristic that bears a relation to its ability to perform or contribute to society . . . whether the class may be defined as a discrete group by obvious, immutable, or distinguishing characteristics . . . and fourth . . . whether the class is a minority lacking political power.

Grimm, 972 F.3d at 611. Even if this Court concludes that transgender people meet those criteria, this Court has not "recognized any new constitutionally protected classes in over four decades, and instead has repeatedly declined to do so."

L.W., 83 F.4th at 486 (quoting *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015)) (internal quotation marks omitted). It is understandable why this Court has not done so. If transgender status were a suspect class, defining the class would be exceedingly difficult. For instance, would someone need a gender dysphoria diagnosis to be considered a member of the class? Questions like whether or when someone is entitled to gender-affirming care and what kind of care that should entail would be left to the courts. *See L.W.*, 83 F.4th at 486-487. These kinds of questions would be better addressed by legislatures, in a process where voters can participate and make their voices heard. *Id.* Even if this Court were to recognize a new quasi-suspect class, subjecting the Policy to intermediate scrutiny, the Policy would pass that heightened standard of review. *See* Section II.A, *supra*, at 19.

Assuming that transgender people are not a suspect class, rational basis review would apply. A policy would need to be the product of animus toward a non-suspect class to meet intermediate scrutiny; disparate impact is not sufficient. *Adams*, 57 F.4th at 810. There is no evidence that the Board created this Policy out of animosity toward transgender students. R. at 8. The school district has not prevented Boe from using the name and pronouns she prefers, as well as presenting as the gender with which she identifies. *Id.* at 5.

Since there is no evidence that the Policy was made with animus toward transgender individuals, rational basis review applies.

To pass rational basis review, a policy must "bear a rational relation to some legitimate end." *Johnston*, 97 F. Supp. 3d at 667. As mentioned in Section II.A, the Policy is related to the important (and therefore legitimate) end of providing accurate education to students. *See* Section II.A, *supra*, at 19. The Policy passes not only rational basis review but intermediate scrutiny as well, and therefore survives Boe's Equal Protection challenge.

Conclusion

For the foregoing reasons, the Respondent, Dune Unified School District Board, respectfully requests that the Supreme Court affirm the decision of the Thirteenth Circuit and hold that the Policy does not violate Title IX or the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

[redacted]
Partner 1

[redacted]
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