No. 23-1234

IN THE

Supreme Court of The United States

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

PLAINTIFF-APPELLANT,

v.

DUNE UNIFIED SCHOOL DISTRICT.

DEFENDANT-APPELLEE.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF OF DEFENDANT-APPELLEE DUNE UNIFIED SCHOOL DISTRICT

ISSUE ONE

[redacted]

ISSUE TWO

[redacted]

Counsel for Defendant-Appellee

SPRING TERM 2024

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Questions Presented

I. Under Title IX of the Civil Rights Act, which prohibits sex discrimination in education, is a school board's policy on human sexuality education lawful when the policy separates grade-school children on the basis of biological sex for the purpose of comprehensive sex education?

II. Under the Equal Protection Clause of the Fourteenth Amendment, which allows the government to distinguish on the basis of sex when it serves a legitimate, valid purpose, does a school board's policy on human sexuality education violate transgender students' rights when the policy separates grade-school children on the basis of biological sex for the purpose of comprehensive sex education?

Opinion Below

This case was appealed from the U.S. District Court for the District of Texington. The U.S. Court of Appeals for the Thirteenth Circuit granted Appellant's request for rehearing. The U.S. Court of Appeals issued its opinion on December 9, 2023. *Boe v. Dune Unified Sch. Dist. Bd.*, 123 F.7th 45 (13th Cir. 2023).

Constitutional Rules & Other Provisions

"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).

"No State shall deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV, §1.

Introduction

Issue One

First, the lower court correctly ruled that the Policy on Human Sexuality Education does not violate Title IX. Title IX protects against sex discrimination in education. The language "on the basis of sex" must be interpreted to mean the two biological sexes, and not gender identity. *See generally* 20 U.S.C. § 1681(a). The School Board's Policy does not

discriminate against Boe because she has only changed her gender identity and not her biological sex.

Second, this Court is clear that *Bostock* does not apply to Title IX. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020). *Bostock* only discusses employment discrimination under Title VII.

Issue Two

First, the lower court correctly held that express sex-based classifications receive heightened scrutiny. R. at 7. The Policy is constitutionally permissible because it separates grade-school children on the basis of the biological differences between males and females necessitated by the public health crisis in womens healthcare post-*Dobbs*.

Second, transgender classifications are reviewed under rational basis because it is not a suspect or quasi-suspect class. However, this Policy would pass heightened scrutiny because it is substantially related to the important interest of public healthcare.

Statement of the Case

Summary of the Case

Petitioners, ("Boe") filed suit against the Dune Unified School District Board ("Dune") after the passage of the Policy on Human Sexuality Education ("the Policy"). R. at 2-3. The Policy provides that students in the grades Seventh to Tenth

grade should have access to sex-education that is "accurate, age-appropriate, and evidence-based." R. at 3. This Policy includes the instruction "shall be provided separately for male and female students...according to biological sex as determined by a doctor at birth and recorded on their original birth certificate." R. at 3. Furthermore, the Policy allows for parents to opt-out. R. at 4.

Procedural History

Boe filed suit in October 2023 stating that the Policy discriminates against Boe's sex under Title IX. R. at 5. Further, the complaint alleged that the Policy "violates the Equal Protection Clause of the Fourteenth Amendment...by treating transgender and cisgender students differently without a justifiable basis for doing so." R. at 5. The District Court granted Dune's motion for summary judgement on both claims, which Boe timely appealed. R. at 5.

ARGUMENT

I. The Policy does not violate Title IX because its protection against sex-based discrimination applies to biological sex, not gender identity.

The Thirteenth Circuit correctly held that the Policy does not violate Title IX because the plain meaning of "on the basis of sex" does not include gender identity. 20 U.S.C. § 1681(a). The word "sex" is defined as "one's biological status as either male or female, and is associated with...chromosomes, hormone

prevalence, and external and internal anatomy". *Transgender People, Gender Identity and Gender Expression,* available at https://www.apa.org/topics/lgbt/transgender. However, gender is defined as, "socially constructed roles, behaviors, activities, and attributed that a given society considers appropriate for boy and men or girls and women." *Id*. Gender and sex are two distinct classifications that share similarities but should be protected differently. Gender is not a protected class under Title IX, because it does not fall under sex definitionally. Also, Congress has not added an amendment to protect gender. To argue that gender identity and sex are the same definitionally, is a linguistic nightmare which would have drastic implications on laws that protect against sex-based discrimination.

Boe's argument would require this Court to overextend their power, specifically the courts limitation "[to not] make a moral judgment." *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000)(citing *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999)).

A. Congress intended for Title IX to protect against discrimination between the biological sexes.

This Court has held "if judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outsides the legislative process reserved for

the people's representatives." *Bostock*, 140 S. Ct. at 1738. Further, courts must "interpret the words consistent with their ordinary meaning...at the time Congress enacted the statute." *Adams v. Sch. Bd. Of St. Johns*, 57 F.4th 791, 812 (11th Cir. 2022) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

In *Neese*, the court held that Title IX did not apply to transitioning individuals, instead "sex" referred only to biological sex not "gender identity." *Neese v. Becerra*, 640 F. Supp. 3d 668, 680 (N.D. Tex. 2022). The Judiciary is not permitted to legislate from the bench, they are required to interpret statutes "consistent with the legislative purpose" when written, not an "absurd result[.]" *Id.* at 683. (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)). Title IX protects the "differences between the two biological sexes," and it's "ordinary public meaning remains intact until changed by Congress[.]" *Id.* at 683-84. This Court added in *Bostock's* appendix the definitions of the word "sex," which is applicable in this case, not because of the ruling of *Bostock*, but because they are the same dictionary definitions used for the word "sex" today. *Id.* at 1784-91.

Boe asserts because the Policy separates based on biological sex, it discriminates against transgender students. R. at 5. However, Boe's gender identity does not fall within Title IX's definition of sex. R. at 4-5. The plain definition of

sex discusses the biological differences between the two sexes and has never included one's gender identity. The Alliance for Freedom has demonstrated the correct interpretation of "sex" in Title IX: "provisions like this speak of 'the' other sex or 'both sexes,' rather than 'another' sex or 'all sexes,' but they also use terms like 'fahter-son' and 'mother-daughter' which are rooted in biology." Christina Kiefer, *Redefining 'Sex' Threatens Title IX,* ALLIANCE DEFENDING FREEDOM (March 20, 2023) https://adflegal.org/article/redefining-sex-threatens-title-ix. While Title VII is similar to Title IX in language, the application of the respective statutes-in their individual situations-requires courts to continue to interpret sex as they have in the past for the original intent of Title IX to remain intact.

The school board in *Adams* enacted a policy that required students to use the bathroom that aligned with their sex assigned at birth. *Adams*, 57 F.4th at 796-97, 810. Transitioning students were provided sex neutral bathrooms to make them comfortable throughout their transitioning period. *Id*. at 798. The bathroom policy the appellant sought to change did not violate Title IX because it classified the bathroom restrictions using biological sex and not gender identity. *Id*. at 808. The court concluded that based on the language Congress used, transgender students were not discriminated against because they

were included in the two classifications within the policy, biological males and biological females. *Adams*, 57 F.4th at 808. The court in *Adams* emphasized that "[t]here is simply no alternative definition of 'sex' for transgender persons as compared to nontransgender persons under Title IX." *Id.* at 814. Similarly, Boe has the option to enroll in the class based on her sex at birth. R. at 3-4.

To hold as Boe requests, would require that *all* policies that classify by sex necessarily discriminate based on transgender status. This would completely prohibit states from drafting laws that protect men and women and would unravel Congress' intent as well as decades of this Court's precedent to protect the two sexes from discrimination. While a disparate impact may be present in a Title IX case, it alone will be insufficient because "[a] plaintiff's Title IX claim must be based on intentional discrimination, not disparate impact." *Poloceno v. Dall. Indep. Sch. Dist.*, 826 Fed. Appx. 359, 363 (5th Cir. 2020). For intentional discrimination, a plaintiff must show "(1) actual knowledge of the intential discrimination by an 'appropriate person' and (2) 'an opportunity for voluntarily compliance." *Id.* at 362. (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)).

The Policy does not discriminate based on gender identity, nor is there a specific carveout within Title IX for gender

identity. *See generally* 20 U.S.C. § 1681(a). The exclusion of gender identity under Title IX is purposeful and "is not an issue for this Court to remedy. It is within the province of Congress–and not this Court–to identify those classifications which are statutorily prohibited." *Johnston v. Univ. of Pittsburgh of the Commw. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676-77 (W.D. Penn. 2015). Boe has not provided any evidence to the lower court nor in their appeal of any harm that Boe has suffered. Further, Dune's intention is not to exclude Boe under the Policy "because of" her transition, but teaches her about her current reproductive system and functions. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

B. Although Boe identifies as a girl, she has not medically or legally transitioned, therefore she cannot use the language of Title IX to protect against separation based on her gender identity.

Boe is a young transgender girl who is not taking any prescribed puberty blockers or any further steps to fully transition into her desired sex. R. at 4. Boe has argued that Title IX is supposed to protect her, but the plain language and intent behind Title IX is for sex-based discrimination alone. R. at 5. Social transitioning refers to the changing of one's name, pronouns, and appearance to match their gender identity. NOVIA SCOTIA HEALTH LIBRARY, https://library.nshealth.ca/TransGenderDiverse/SocialTransition

(last visited Jan. 20, 2024). In addition, a legal transition is "the process of officially updating your government and identity documents..." NOVA SCOTIA HEALTH LIBRARY, https://library.nshealth.ca/TransGenderDiverse/LegalTransition (last visited Jan. 20, 2024). A medical transition completes the transition process to an individual's desired sex by undergoing medical treatments which changes the individual's sex characteristics to match their new gender identity. TRANSGENDER SERVICES, https://www.transgenderservices.org/transition (last visited Jan. 20, 2024). These three distinct phases of transitioning reflect the individual's intention to change their sex to coincide with their gender identity. Boe has not taken the necessary steps to confirm she wishes to partake in a full transition. R. at 4.

In *Grimm v. Gloucster Cty. Sch. Bd.*, the plaintiff brought a claim against their school for requiring the plaintiff to use a bathroom in line with their sex assigned at birth, or a unisex bathroom in the nurse's office. *Grimm v. Glouctser Cty. Sch. Bd.*, 972 F.3d 586, 593-94 (4th Cir. 2020). The plaintiff suffered cognizable harm due to the location of the remote unisex bathroom and the plaintiff felt unwelcome due to the new bathroom policy. *Id.* at 617-18. Due to the harm, the court held the plaintiff was treated worse than similarly situated students. *Id.* at 618. The plaintiff also changed their birth

certificate and started the process of medically transitioning. *Id.* at 619. Due to the plaintiff receiving treatment for their gender dyshoria and their legal transition, his sex has changed to receive protection under the confines of Title IX. *Id.*

Grimm is distinguishable from this case because Boe has not begun the legal or medical transition, just as the plaintiff in *D.H. v. Williamson*. *D.H. v. Williamson*, 2023 WL 6302148, at *5 (M.D. Tenn. 2023). In *D.H. v. Williamson*, the court held that because the plaintiff was biologically female and her sex at birth was still the same, there was no violation of Title IX. *Id.* at *5. Title IX protects sex-based discrimination, not gender identity, and here the plaintiff "contends only that her gender is female." *Id.* The court was not persuaded by the plaintiff's argument that sex encompasses gender identity and cited *Grimm* that "absent indication that 'sex,' as it was used in the statute, means something more expansive than 'biological sex,' the Court presumes 'sex' has its ordinary meaning." *Id.* (citing *Grimm*, 972 F.3d at 632). 20 U.S.C. §1686 states "that educational institutions are not prohibited from 'maintaining separate living facilities for the different sexes.'" *D.H.*, 2023 WL 6302148, at *5(citing 20 U.S.C. §1686). Because the plaintiff's biological sex and her sex at birth were the same at the time this action was brought, she did not have a cognizable legal claim under Title IX. *Id.* at 15.

Boe has contended she is not taking any steps towards medically transitioning. R. at 5. The court was correct in *Williamson* to recognize that gender identity and sex are vastly different and as such are awarded different protections. *D.H.*, 2023 WL 6302148, at 14. Thus Boe does not have a legal claim under Title IX. R. at 4-5.

C. *Bostock* is not applicable standard for Title IX as it prescribes only to Title VII employment discrimination, not grade school sex-based separation for comprehensive sex-education.

In *Bostock* this Court was clear "[t]he only question before us is whether an employer who fires someone simply for being homosexual or transgender has disharded or otherwise discriminated against that individual..." *Adams*, 57 F.4th at 808. (citing *Bostock*, 140 S. Ct. at 1753). The Court specifically declined to further their inquiry past Title VII, even if their "terms mirror Title VII's," and the case in front of them. *Id.* at 1779; *see e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 248 (1989)(holding that only Title VII's use of sex as it pertains to employment discrimination and gender stereotyping would be decided by the Court); *Neese*, 640 F.Supp.3d at 676. Here, the Policy allows sex-separation for comprehensive sex education classes taught by education professionals who understand the complexities of such curriculum and the necessity of single-sex classrooms. R. at 3-4.

The court in *Parents Defending Education* reasoned that Title IX is modeled after Title VII, not vice-versa. *Parents Defending Educ. V. Olentangy Local Sch. Dist. Bd. Of Educ.*, No. 2:23-cv-01595, 2023 U.S. Dist. LEXIS 131707, at *21 (S.D. Ohio July 28, 2023). To determine if there is sex discrimination it must include "all biological markers that comprise an individual's 'biological sex' – including *inter alia* their organs, their chromosomes, their hormones..." *Id.* at *22-23. The Sixth, Seventh, and Eighth Appellate Circuits, Maryland and the Southern District of Indiana were incorrect in using this Court's language in the ruling of *Bostock* as they clearly went against this Courts precedent by doing so. These courts incorrectly applied *Bostock* to their set of facts that were outside the purview of *Bostock*. This Court should not make that mistake here. *Doe v. Univ of Dayton*, 766 F.App'x 275 (6th Cir. 2019); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *A.C. ex rel M.C. v. Metro Sc. Dist. of Martinsville*, 75 F.4th 760 (7th Cir.); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *M.A.S. v. Board of Ed. Of Talbot Cnty.*, 286 F.Supp.3d 704 (D. Md. 2018); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F.Supp.3d 833 (S.D. Ind. 2018).

Here, Boe wrongfully relies on *Bostock*. R. at 5, 9. While both statutes protect against sex discrimination, their terms are not mirror images. No court should extend their judicial

power to apply Title VII interpretations to Title IX as the situations which the protections are afforded apply to two different classes of individuals. This appeal centers on a wholly different issue than *Bostock*, whether the separation of sex necessarily discriminates based on transgender status. *Bostock* only answered the narrower question of whether "discrimination based on homosexuality and transgender status necessarily entails discrimination based on sex[.]" *Bostock*, 140 S.Ct. at 1747. Here, Dune is educating grade-school students on their biological bodies and systems. R. at 3-4. If there was ever a situation to exclude the language of *Bostock*, it would be here where Dune is discussing curriculum and the students best interests. The grade-school setting is very different than the employment office setting because "the school is not the workplace." *Adams*, 57 F.4th at 808. (citing)(*Davis v. Monroe Cnty. Bd of Educ.*, 536. U.S. 629, 651 (1999) (holding that schools are unlike the workplace).

The Policy does not separate the sex education classes based on whether studens "walk more femininely, talk more femininely, dress more femininely..." *Price*, 490 U.S. at 235. Rather, the Policy separates sex education classes "based on biological sex which is not a stereotype." *Adams*, 57 F.4th at 809; see *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). The separation includes both transgender and cisgender students and

teaches them evidence-based education regarding that assignment. R. at 3.

Dune is simply protecting the interests of students in their school district while educating them about necessary information that they need to make informed healthcare decisions and lead a healthy lifestyle. R. at 3-4. The court in *Johnston* held that sex-separated activities are permissible under Title IX when concerning private activities to protect the students and their well-being. *Johnston*, 97 F. Supp. 3d at 678.

When the lower court cited Ruth Bader Ginsburg's statement, which correctly identified the need for sex-separation, they created a powerful comparison of the need in *Adams* and the need for Dune here to separate based on sex: "'Separate places to disrobe, sleep, [and] perform bodily functions are permitted, in some situations required, by the regard for individual privacy.'" R. at 6. (citing *Adams*, 57 4th at 804). Further, the Code of Federal Regulations allows for sex-separation for human sexuality classes. 34 C.F.R. §106.34 (a)(30). The Policy does not discriminate and is permissible under this regulation.

II. The Policy does not violate the Equal Protection Clause because it is based on the scientific differences between men and women to address an ongoing public health crisis.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike," and keeps governmental decisionmakers from treating differently

persons who are in all relevant respects alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). As such, a plaintiff asserting a violation of the Equal Protection Clause must "demonstrate that he has been treated differently from others with whom he is similarly situated, and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). It is well established that sex-based classifications receive heightened scrutiny. *United States v. Virginia*, 518 U.S. 515 (1996).

The Policy separates male and female students based on the biological reality that girls and boys have different reproductive anatomy, as such they require a lesson plan that addresses those differences. Boe's gender identity is not dispositive of her claims. A policy can lawfully classify based on the biological differences between the sexes without unlawfully discriminating based on transgender status. Post *Dobbs*, women have been suffering a public health crisis due in part to the spread of misinformation. Dune has stepped in, despite not being statutorily or constitutionally required, to offer a comprehensive sex education course that dispels the spread of misinformation to grade-school students, empowering them to make informed medical decisions. This Court should uphold the decision of the lower court and hold that heightened

scrutiny applies because the Policy classifies based on sex. And applying that standard, the Policy easily passes muster.

A. Sex classifications based on biological reality are constitutionally permissible because they treat similarly situated individuals equally, in accordance with the intended purpose of the Equal Protection Clause.

The Policy does not classify students based on transgender status or cisgender status, instead the Policy creates two-groups of people, boys and girls. When policies divide students into two groups, both of which include transgender students—as is the case here—there is a "lack of identity" between the policy and transgender status, as the single-sex health classes are "equivalent to th[ose] provided [to] all" students of the same biological sex. *Geduldig v. Aiello*, 417 U.S. 484, 496-97(1974); *see also Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 235-36 (2022) (reaffirming the reasoning in *Geduldig* when the Court asserted that claims that abortion regulations were sex-selective were "squarely foreclosed [] by precedent []"). This is especially true considering this Courts recognition that the inherent biological differences between men and women at times necessitates separation of the two.

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1. Biological differences between men and women are the driving force behind sex classification jurisprudence, as this Court interprets "sex" to mean "biological sex" not gender identity."

The Equal Protection Clause does not explicitly refer to sex or gender identity. U.S. Const. amend. XIV, §1. However, this Court consistently interprets "sex" to mean "biological sex." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (holding that "sex, like race and national origin is an immutable characteristic determined solely by the accident of birth."). The Court's rationale for subjecting sex-based classifications to heightened scrutiny is tied explicitly to physiology. *Adams* 57 F.4th at 805. Heightened scrutiny is applied in recognition of the "inherent" "[p]hysical differences between men and women" that are "enduring". *Virginia*, 518 U.S. at 533.

Heightened scrutiny is easily met where the classification is made based on biological differences between men and women. *Id.* at 533 (holding that heightened scrutiny ensures that States do not legislate based on "overbroad generalizations about the different talents, capacities, or preferences of males or females"—generalizations that do not have a basis in biology); *Adams*, 57 F.4th at 809(describing biological differences as "the driving force behind the Supreme Court's sex-discrimination jurisprudence"). Indeed, "[t]o fail to acknowledge even our most basic biological differences * * * risks making the guarantee of

equal protection superficial and disserving it." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73(2001). Such classifications pass constitutional muster when "sex represents a legitimate, accurate proxy." *Craig v. Boren*, 429 U.S. 190, 204 (1976). As such, there are times when differential treatment based on sex is not only justified, but necessary.

In *United States v. Virgina* ("VMI"), this Court recognized that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements" *Virginia*, 518 U.S. at 550. Instead of holding that "separate but comparable" was constitutionally impermissible, the Court engaged in a meticulous point-by-point comparison of VWIL and VMI thus implying that "separate but comparable" is constitutionally permissible when women are educated separately than men. *Virginia*, 518 U.S. at 515)(holding that VMI was constitutionally impermissible when there were fewer curricular choices, physical training facilities, less financial support, and a lack of prestige at the all-female institution); Uerling, Donald F. and Hall, Gretchen, *Single-Sex Schools and Classrooms: Is "Separate but Comparable" Legally permissible?*, 1 J. of Educ. Leadership (Apr. 2003), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1095&context=jwel. This should not be confused with the

unconstitutional "separate but equal". *Brown v. Board of Education*, 347 U.S. 483 (1954)(holding that racial segregation is grounded in racist stereotypes and ideologies, causing irreparable harm to students despite the absence of meaningful differences among races.) *Id.* To equate concerns about public health "with unlawful complaints about racial segregation…is a false equivalent" because this Court acknowledges the legitimate and substantial biological distinctions between men and women. *Adams*, 57 F.4th at 806.

Accordingly, in *Nguyen*, a federal statute distinguishing between unwed fathers and mothers was upheld. *Nguyen*, 533 at 56. This Court justified this by asserting that "fathers and mothers are not similarly situated with regard to the proof of biological parenthood," making the statute permissible. *Nguyen*, 533 at 56; *Contra Sessions v. Morales-Santana*, 512 U.S. 47, 49 (2017)(holding that a similar law was unconstitutional because it relied on the "stereotype" that "unwed citizen fathers…would care little about, and have scant contact with, their nonmarital children.") However, the rulings this Court opposes are primarily influenced by antiquated stereotypes about men or women. *See e.g.*, *Kirchberg v. Feenstra*, 450 U.S. 455, 459-60(1981)(holding a husband solely controlling material property was based on stereotypical gender roles).

The enduring biological distinctions between men and women persist independently of an individual's gender identity. Thus, Boe is not similarly situated to the biologically female students at Dune Junior High; critically Boe "remains anatomically different from" women. *Grimm*, 972 F. 3d at 636 (Niemeyer, J., dissenting). Yet, Boe contends that she should be allowed to attend the all-girls sex education class, asserting that anatomy and biology carry no meaningful differences—ignoring the decades of Supreme Court precedent that say otherwise. If anatomy and biology are deemed inconsequential, what grounds exist for sex-classification in the first place?

2. Nevertheless, transgender classifications are reviewed under rational basis because they are not a suspect class or quasi-suspect class.

This Court has set an extremely high-bar for recognizing a new quasi-suspect class and has declined to do so for more than forty years. *See e.g.*, *Cleburne*, 473 U.S. at 442 (holding that mental disability is not a quasi-suspect class); *see Obergefell v. Hodges*, 576 U.S. 644 (2015)(declining to address whether gay individuals qualify as a suspect class). Courts analyze four factors to determine whether a group qualifies as a suspect class: (1) immutable characteristics (2) a discrete group, (3) historical discrimination, and (4) political powerlessness. *Grimm*, 972 F.3d at 611.

Immutable characteristic & Discrete Group. Boe must demonstrate that "transgender individuals' exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.'" *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). An immutable characteristic is one in which its possessors are powerless to escape or set aside. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265,360(1978). What constitutes transgender identity lacks a clear definition and it cannot be determined using objective criteria—making the class far too broad and amorphous. *See* Sandy E. James et al., Nat'l Ctr. For Transgender Equal., The Report of the 2015 U.S. Transgender Survey (2015), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf; HRC Found., Understanding the Transgender Community, Hmm. Rts. Campaign, https://www.hrc.org/resources/understanding-the-transgender-community (last visited Jan. 19, 2024). Thus, transgender identity is neither an immutable or a discrete characteristic.

Historical discriminations & Political Powerlessness. Concerns about a 'political[ly] powerless[]" group and dysfunctional political process" is insufficient to require heightened review. *L.W. v. Skrmetti*, 83 F.4th 460, 487(6th Cir. 2023) (quoting *San Antonion Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). The political landscape has significantly changed thus it is "difficult to maintain that our democratic

process remains broken". *Id.* Transgender individuals are supported by: the United States government; politically powerful advocacy organizations; and a majority of states have legislated in support of the transgender population. This Court has warned that courts should be reluctant to create new suspect classifications. And here, there is no justification for creating one. Thus, rational basis applies.

B. The Policy passes heightened scrutiny regardless of whether it classifies based on transgender status because the policy is substantially related to the important interest of public health.

Both parties cocede that heightened scrutiny applies to the Policy. Heightened scrutiny requires that the classification serves "important governmental objectives," and the discriminatory means employed are "substantially related to the achievement of those objectives," it can stand. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150(1980)). The governments' interest cannot "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. Substantial relationship requires "enough of a fit between' the policy "and its asserted justification." *Danskine v. Miami Dade Fire Dept.*, 253 F.3d 1288, 1299 (11th Circ. 2001). But sex classifications do not have to be a perfect fit. *Adams*, 57 F.4th

at 801. "No protection cases have required that the [policy] under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70.

1. The Policy serves an important governmental interest because it provides comprehensive sex-education to promote public health.

The Policy serves the important interest of safeguarding and promoting the public health of grade-school students in response to the public health crisis affecting women in the United States. This Court has consistently allowed school board's to step in and act in the interest of public health. *See Veronica Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995)(holding that the school district could constitutionally require student athletes to submit to random drug testing);*Zucht v. King*, 260 U.S. 174, 175 (1922)(upholding an ordinance allowing city officials to exclude a student from school for failing to comply with compulsory vaccination). This Court's decision in *Dobbs* returned the right to legislate abortion provisions to the states. *Dobbs*, 597 U.S. at 223. When legitimate concerns exist regarding women's health, comprehensive sex education curriculum can alleviate the health disparities caused by such misinformation. *See Johnson v. Genesee County, Mich., E.D. Mich. 1964*, 232 F.Supp. 567 (E.D. Mich.1964) (finding that legislation or action which tends to fulfill duty of protecting public health falls within state

police power and is not violative of this amendment if there is a real and substantial relationship between the action and purpose of protecting public health). Because the biological differences between men and women are undeniable, it easily follows that the topics in sex-education will apply to the sexes differently.

Dobbs "pushed access to essential care farther and farther away for millions of Americans." U.S Senator Elizabeth Warren, One Year After Dobbs, REPORTS, (June 23, 2023), senate. gov. Healthcare providers across the U.S. assert that women in America "have been suffering through a healthcare crisis ever since…the Supreme Court overturned *Roe v. Wade*." *Id*. "Health misinformation is a serious threat to public health. It can cause confusion, sow mistrust, harm people's health, and undermine public health efforts." Rueters, *Misinformation is a 'serious threat to public health,'* NBC News,(Dec. 8, 2020, 9:58 AM), https://www.nbcnews.com/tech/tech-news/misinformation-serious-threat-public-health-surgeon-general-warns-rcna1428, (addressing the harmful effects of misinformation spread during COVID-19). States rapid implementation of anti-abortion laws has led to broad and ambiguous policies, creating challenges for healthcare providers in delivering essential services to their female patients. Melissa Brown, *Three women sue Tennessee over abortion law they say causes 'catastrophic' risks,* THE TENNESSEAN,

(Sept. 12, 2023, 3:44 PM), https://www.tennessean.com/story/news/politics/2023/09/12/tennessee-abortion-ban-three-women-two-doctors-sue-over-catastrophic-risks/70829400007/ (reporting on women who experienced crises pregnancies, including one sent home to miscarry until she was at serious risk for sepsis).

"For much of documented history, women have been excluded from medical and science knowledge production, so essentially we've ended up with a healthcare system…that has been made for men," the legal landscape will only worsen this reality. Gabrielle Jackson, *The female problem: how male bias in medical trials ruined women's health*, THE GUARDIAN,(Nov. 3, 2019, 12:08 PM,),https://www.theguardian.com/lifeandstyle/2019/nov/13/the-female-problem-male-bias-in-medical-trials. When the government bans or enacts laws that so drastically impact the healthcare rights of women, it is essential that the government step in to educate that same population of people, as Dune has. Considering classifications based on sex may be used to remediate past wrongs against women, the Policy's evidenced based sex education classes are constitutionally permissible. *See e.g.*, *Califano v. Webster*, 430 U.S. 313, 317 (1977); R. at 3. It would be detrimental to leave grade-school students with misinformation regarding their access to essential healthcare. Dune cuts through the red tape and provides a policy that creates a

consistent provision of comprehensive sex-education across Dune Public Schools. R. at 3. Providing students with a safe and healthy learning environment is necessary to "prepare them for fulfilling, healthy, successful lives." R. at 3. It would be irresponsible to limit comprehensive sex education solely to reproductive anatomy when effects of misinformation and negative health outcomes permeate every aspect of a woman's life.

2. The Policy is substantially related to the important governmental interest of public health.

The Equal Protection Clause does not impose a one-size-fits-all approach on schools across the nation. Under heightened scrutiny, Dune is free to choose an "easily administered scheme" that substantially promotes its important interest. *Nguyen*, 533 U.S. at 69. "Sex-based decisions are easily administrable because they are objective, unchanging, and unburdensome." *See* James et al., *supra* page 24. However, policies based on gender identity are more difficult to administer because subjective "identity" can change or be fluid over time. *Id.* Not even the existence of wiser alternatives than the one chosen serves to invalidate a legislative classification under heightened scrutiny. *Clark by and through Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1132 (9th Cir. 1982).

Schools remain free to limit access to sex-separated facilities or classrooms based on biological sex when there is a

legitimate policy reason. *See e.g., Veronia Sch. Dist. 47J v. Acton*, 515 U.S. at 656. Fourteenth Amendment rights are different in public schools then elsewhere" because of "the schools' custodial and tutelary responsibility for children."). Local control is particularly important to protect student privacy and safety—a core function of the public education system. *See e.g., Board of Educ. Of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 830 (2002) ("[I]n a public-school environment [,] * * * the State is responsible for maintaining discipline, health, and safety.") Given schools' responsibilities, this Court has afforded deference to their decisions even when examining certain constitutional issues. *See, e.g., Acton*, 515 U.S. at 665 (Fourth Amendment); *Morse v. Federick*, 551 U.S. 393, 403-08 (2007)(First Amendment). While this does not give schools complete control, it is to say that "when school authorities have prudently assessed and addressed an issue that affects student welfare, we should pay attention[.]" *Adams*, 57 F.4th at 802.

To rule in favor of Boe would deny young girls the education necessary to navigate the healthcare system, a landscape that biological men will not have to traverse. As such, young women should be provided with a safe and comfortable space to not only learn but discuss "the unique experience and healthcare needs associated with these characteristics." R. at

3. Dune saves school time and resources by separating the sexes because it allows educators to designate significant time for topics that are more relevant to one sex than the other. Therefore, the Policy is substantially related to the interest of public health because it lessens the negative effects of misinformation by providing a single-sex comprehensive sex-education course to Dune students in response to a public health crises.

3. Boe cannot prove animus because there is no evidence of purposeful discrimination.

Boe would have this Court assume that every sex-based classification results in animus toward transgender persons, simply because those policies affect transgender people differently than cisgender people. To plead animus Boe must raise a plausible inference that an "invidious discriminatory purpose was a motivating factor" in the relevant decision. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1981, 1915 (2020). "Purposeful discrimination" requires more than "intent as awareness of consequences" and requires that the decision maker selected a particular course of action "at least in part 'because of,' not merely in spite of, its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 274, 279.

The record is devoid of any evidence that Dune enacted the Policy, in whole or in part, "because of" the adverse effects it would have on students such as Boe. In fact there is evidence to the contrary, Boe concedes she has been treated "consistent with her gender identity in every other way at Dune Junior High." R. at 5. A year prior, the school passed a gender inclusive policy that: "1)requires all public schools in Dune to include gender identity as an enumerated characteristic in their anti-bullying policies; 2)It requires all Dune public schools to allow transgender students to access restrooms consistent with their gender identity; and 3) It requires all Dune elementary and middle schools to allow transgender students to participate in sex-segregated school athletics consistent with their gender identity in grades kindergarten through eight." Dune Sch. Bd., Resolution 2021-4 (2021) R. at 4. Boe has failed to meet the high-bar required to prove that Dune acted with animus.

Further, in recognition of the fact that parents and students may have "moral disagreements" with Dune's choice of subject matter or class requirements, Dune provides an opt-out provision. R. at 4. This Court recognizes that a school board cannot be subjected to the direction of parents with respect to the curriculum they offer or how they administer it. *Brown v. Hot, Sexy & Safer Prods*, 68 F.3d 524, 534(1st Cir. 1995). If schools were forced to cater for each individual student "whose

parents had genuine moral disagreements with the school's choice of subject matter" it would create chaos. *Id.* Although parents have a right to inform their children as they wish on the subject of sex, they have no constitutional right to stop a public school from dispersing information as the school finds it appropriate to do so. *See Brown*, 68 F.3d at 534; *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2018). Thus, Dune may enact an opt-out provision with respect to sex education to satisfy the demands of multiple students and parents wishes. *See Brown*, 68 F.3d at 534. This case is not about making an intentional decision to discriminate, it is about making an objective decision to educate which requires Dune to speak with one consistent voice. Therefore, the Policy is constitutionally permissible because the Policy is not purposefully discriminatory and there is an alternative to attending the sex education course.

Conclusion

For the foregoing reasons, Dune respectfully requests that this Court uphold the decision of the Thirteenth Circuit. First, the Policy does not violate Title IX because the Policy does not discriminate against Boe's biological sex. Second, the Policy does not violate the Equal Protection Clause because the Policy separates students based on the biological differences between the sexes and satisfies heightened scrutiny.

Respectfully submitted,

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Attorneys for Appellees