THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 2024

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

Plaintiff-Petitioners,

v.

DUNE UNIFIED SCHOOL DISTRICT BOARD,

Defendant-Respondents.

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

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BRIEF OF PETITIONERS

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Counsel for Petitioners - Team 9

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Questions Presented

1. Under Title IX of the Civil Rights Act of 1964, which prohibits sex-based discrimination in education, does a public-school district policy that requires a student to either participate in- or opt out of human sexuality instruction according to natal sex violate a transgender student's rights when this policy excludes the student from instruction that aligns with the student's gender identity and that contravenes existing district policies?
2. Under the Equal Protection Clause in the Fourteenth Amendment to the U.S. Constitution, which prohibits a state from denying equal protections under the law, does a public-school district policy violate a transgender student's rights when it prohibits transgender students from attending human sexuality instruction that aligns with their gender identities and instead requires students either to participate in- or opt out of such instruction according to natal sex?

Opinions Below

This case commenced in the District of Texington in October 2023 and the district court rendered summary judgment for the Respondents. The United States Court of Appeals for the Thirteenth Circuit granted the Petitioner's request for a rehearing and affirmed summary judgment for the Respondents on December 9, 2023. *Boe v. Dune Unified Sch. Dist. Bd.*, 123 F.7th 45 (13th Cir. 2023). The Petitioner timely appeals in this Court.

Constitutional Rules and 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) (2020).

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

Introduction

The Thirteenth Circuit erred in rendering summary judgment for the Respondent because the Board is not insulated from sex-based discrimination claims by a transgender student as a matter of law. The omission of gender from Title IX and its analogues has not prevented increasing expansions for gender protections from taking hold in Title VII and echoing in Title IX for

decades, providing transgender individuals with recognition and recourse for discrimination in the workplace and schools alike.

Additionally, the Policy discriminates against Boe on the basis of her transgender status under the authoritative *Bostock* standard that commands application in the Title IX context. Application of *Bostock* reveals that the Policy discriminates outside the parameters of the implementing regulations to treat Boe differently on the basis of sex in violation of Title IX.

With regard to Equal Protection, the Thirteenth Circuit again improperly held that Boe's rights were not violated. As a member of the transgender community, Boe qualifies as a member of a quasi-suspect class. This classification commands the proper level of intermediate scrutiny for this Court to find that the Policy does not advance a legitimate government interest of public health, and instead puts Boe at a heightened risk of irreparable harm as exacerbated by her gender dysphoria.

Furthermore, where a public school has undertaken the duty to provide an education, they must uphold this duty equally amongst students or provide a substantively comparable alternative. The Policy not only robs Boe and other transgender students of an equal education opportunity, but it also fails to provide a remotely comparable alternative.

Statement of the Case

The Dune Unified School District Board ("the Board") has been unilaterally instituting policies affecting transgender students since 2021. R. at 4. In July 2021 with identical composition, the five-member Board unanimously passed Resolution 2021-4 that mandated gender-affirming facility access for Dune students of all ages, required inclusion of gender identity under district anti-bullying policies, and authorized K-8 schools to allow transgender students to participate in sex-segregated school athletics consistent with their gender identity. *Id.*

Over a year later, the same Board enacted Resolution 2022-14 ("the Policy"), which created a human sexuality education program that mandated sex-segregated curriculum tailored to male and female characteristics in terms of anatomy, physiology, and health care. R. at 3. The Policy assigns students into distinct sections according to their natal sex as provided at enrollment— 'biological sex,' according to the Board's policy— and the district has confirmed that Boe will be assigned to the boys' class. R. at 4. This resolution emphasized the importance of high-quality education to prepare students for "fulfilling, healthy, and successful lives" of which the human sexuality course is an "essential part…necessary to protect and advance

the individual and public health of young Dune residents," but did feature a parental opt-out. R. at 3, 4.

Both of the Board's policies directly affect seventh grader Jane Boe ("Boe"), a twelve-year-old-transgender girl at Dune Junior High School. *Id*. For the past five years and in her time as a student in Dune, Boe has been treated consistently with her gender identity by peers and teachers alike and, per Dune policy, participates in school athletics and uses facilities in alignment with her gender identity. R. at 5. Knowledge of Boe's transgender status has previously been limited to her family, doctors, teachers and administrators, and a select group of close friends. *Id*. In anticipation of the Policy's inevitable application, and finding the opt-out inadequate, Boe sued to challenge her exclusion under the Policy from instruction aligned with her gender identity as discriminatory under Title IX and the Equal Protection clause. *Id*.

Argument

I. The Policy violates Title IX because the Board's operative definition of "biological sex" is parasitic to protected sex characteristics.

The Thirteenth Circuit erred in finding no Title IX violation because application of the ostensibly sex-based policy to Boe will "exclude [her] from participation in" and "subject [her] to discrimination in" an education program on the basis of her transgender status that is "inextricably bound up with" sex.

See 20 U.S.C. § 1681(a); *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1742 (2020). Interpreting sex so narrowly as to preclude gender identity as an integral part ignores the inseparable nature of sex and gender and departs from this Court's decades-long course of expanding protections for individuals to eliminate sex discrimination regardless of "how it manifests or labels may attach." *Id.* at 1747.

A. Title IX inquiry mirrors interpretation of analogous civil rights provisions under Title VII that have unequivocally linked sex and gender.

Both Title IX and its implementing regulations fail to define sex for purposes of the statute. § 1681(a); 34 C.F.R. §106.30 (2020). However, the statute broadly prohibits sex-based discrimination in education and the language of the statute is read expansively to effectuate that purpose. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005). The success of Boe's Title IX claim is determined by whether the Policy (1) violates Title IX's prohibition on sex discrimination, (2) whether an exception to the general prohibition applies, and (3) whether the unlawful discrimination caused harm. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020); *Carcaño v. McCrory*, 203 F.Supp.3d 615, 635 (M.D. N.C. 2016).

Analogous provisions under Title VII of the Civil Rights Act of 1964 provide a framework to determine what constitutes sex-based discrimination under Title IX. *Olmstead v. L.C. ex*

rel. Zimring, 527 U.S. 581, 616 n.1 (Thomas, J., dissenting)(1999); *Smith v. Metropolitan Sch. Dist. Perry Tp.*, 128 F.3d 1014, 1023 (7th Cir. 1997). The statutes' paralleled language, private right of action, subject matter, history, and proximity in time of enactment create a strong presumption that their interpretations proceed on the same definition of sex. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694 (1979); *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 863 (7th Cir. 2018). Thus, analogizing the scope of Title VII's sex-based protections in the Title IX context is appropriate and necessary to advance their mutual objective: to "strike at the entire spectrum" of sex-based discrimination. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998).

Definitional parity between these provisions with similar language and purpose has consistently led this Court to extend statutory prohibitions beyond the "principal" evil legislators intended to address to include protections against "reasonably comparably" forms of gender-based discrimination. *Id.* at 79. (endorsing same-sex harassment claims under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (recognizing sex-stereotyping claims); *Bostock*, 140 S. Ct. at 1754 (encompassing sexual orientation and gender identity claims). Courts have even applied Title VII principles in the context of Title IX merely because of the practical futility in attempting

to distinguish sex, gender identity, and sexual orientation for interpretive purposes. *See Hively v. Ivy Tech Cmty. Coll. Of Ind.*, 853 F.3d 339, 342 (7th Cir. 2017) (noting the "gossamer-thin" line between gender nonconformity and sexual orientation claims); *M.A.B. v. Bd. of Educ.*, 286 F.Supp.3d 704 (D. Md. 2018)("analytically impossible" to separate sex from transgender status under Title VII.).

Bostock represents the most recent augmentation of Title IX gender protections when this Court unequivocally asserted that transgender status fell within the scope of sex because on these grounds a discrimination "unavoidably" treats differently "persons with one sex identified at birth and another today." *Bostock*, 140 S. Ct. at 1742. This Court consolidated three factually similar appeals in which an employer terminated a long-time employee following the revelation of their homosexual or transgender status in the workplace. *Id.* at 1737-38. In affirming the Second and Sixth Circuits and reversing the Eleventh Circuit, the majority prioritized "plain statutory commands" over "suppositions about [Congressional] intentions or guesswork about expectation" to encompass protections for gender characteristics under Title VII. *Id.* at 1754. *Bostock* conclusively interpreted sex beyond the Respondent's binary definition as a "necessary consequence" of Congress' broad language. *Id.*

The incremental, paralleled expansion of protections within the plain, unchanged language of Title VII and Title IX indicates that sex is more comprehensive than the Respondent would suggest, and comparable forms of discrimination are more numerous than Congress could have anticipated. Extending protections to Boe, and to transgender students similarly situated under Title IX, is simply a natural consequence of Congress' broad terms and marks the most recent of many iterations of the law's efforts to eliminate sex discrimination in its' many forms. Purported Congressional intent is wholly insufficient overcome the well-established principle that *Bostock*'s broad interpretation of sex should apply with equal force in the Title IX context. Reliance on amorphous Congressional intent and selected dictionary definitions is as useful for framing the scope of the law's protections as Boe's birth certificate is a measure of her biological sex. This level of deference to legislators' imaginative shortcomings in a time where sex discrimination was pervasive enough to draw the attention of Congress would only perpetuate the very harm Title IX seeks to address and expose Boe and other transgender students similarly situated to severely adverse social, emotional, and physical outcomes as a result of school policies.

As this Court recognized decades ago, sex characteristics that merit the protection of federal law exist beyond just the

male and female binary and increased safeguards under the unchanged language of the statutes reflect that. The Board argues that its unilateral policies affecting transgender students do not give rise to a reasonably comparable evil under Title IX's purview. Yet, Boe may change in the girls' locker room, be compelled to participate with the boys in sex education, and then return to the girls' locker room before volleyball practice and maintain compliance with these policies. *See* R. at 4. This sort of discrimination that disparately affects a transgender student like Boe alone and no cisgender students, is a comparable evil and Title IX's efficacy commands intervention against it. The Policy unavoidably violates Title IX because it endeavors to accomplish an analytically impossible task: to discriminate by gender without considering in any way the individual's sex.

B. Bostock provides the appropriate standard for Boe's claim because neither the decision itself nor the language of the statute precludes its' application in other contexts.

Quelling "worry that [*Bostock*] will sweep beyond Title VII to other…laws that prohibit sex discrimination," this Court ostensibly curtailed its holding to the employment context and preserved the opportunity for a case like Boe's to elucidate the meaning of sex under Title IX. *Bostock*, 140 S. Ct. at 1753. Even so, inclusive principles have echoed throughout this Court and

many others to rebuff a narrow interpretation of sex in which "resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group" and thus asserting that sex can include gender identity. *Id.* at 1752; *see E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 579 (6th Cir. 2018) ("nothing precludes" duality of transgender status' link to both sex and gender identity); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1337 (9th Cir. 2020) ("nowhere does the statute explicitly state or even suggest" proscribing transgender students from facility access); *Whitman-Walker Clinic, Inc. v. United States HHS,* 485 F.Supp.3d 1 (C. D.C. 2020) ("no apparent reason why [*Bostock*] would remained cabined to Title VII and not extend to other statutes prohibiting sex discrimination.").

The Seventh Circuit even prior to *Bostock* also obliged plain statutory commands and prohibited discrimination against transgender individuals under Title IX because these individuals "by definition" fail to conform to gender and sex stereotypes. *Whitaker v. Kenosha Unified Sch. Dist. No 1. Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *cert.* denied, *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 538 U.S. 1165 (2018); *A.C. v. Metro Sch. Dist. of Martinsville,* 75 F.4th 760, 769 (7th Cir. 2020) ("*Bostock* strengthens *Whitaker*'s conclusion that discrimination against transgender individuals is a form of" unlawful discrimination.) The Fourth Circuit followed, rejecting a

restroom policy that utilized sex assigned at birth to preclude a transgender boy's bathroom access in violation of Title IX because the discriminator necessarily referred to an individual's sex to determine the "incongruence between" their sex and gender. *Grimm*, 972 F.3d 586 at 616.

The Eleventh Circuit alone has refused to equate gender with sex and upheld a policy preventing gender-affirming facility access on the basis of "biological sex." *See Adams v. Sch. Bd. of St. John's Cnty.,* 57 F.4th 791 (11th Cir. 2022). The circuit originally affirmed the district court post-*Bostock* to hold that the regulations' language did not shield the district from sex discrimination claims arising out of Drew Adams' exclusion from gender-affirming bathroom access under district policy. *Adams v. Sch. Bd. of St. John's Cnty.*, 968 F.3d 1286, 1308 (11th Cir. 2020). The opinion was later vacated, *Adams v. Sch. Bd. of St. John's Cnty.*, 3 F.4th 1299, 1304 (11th Cir. 2021), and the court reissued to address only Equal Protection, reversing its stance to hold that gender does not equate to sex and "biological sex" was a permissible sorting criterion under Title IX. *Adams v. Sch. Bd. of St. John's Cnty.*, 9 F.4th 1369, 1378 (11th Cir. 2021). However, the *en banc* Eleventh Circuit granted the district's petition for rehearing, vacated the revised opinion, and ultimately sustained the Policy solely on

Equal Protection grounds, prompting five vehement dissents. *Adams*, 57 F.4th at 821-80.

Boe's claim presents an opportunity to reconcile the circuit split between the Fourth and Seventh Circuit's expansive, gender-inclusive interpretation of sex and the Eleventh Circuit's narrow, reductive interpretation under Title IX. *Grimm* first applied *Bostock*'s principles to extend Title IX protections to transgender students, and this Court declined the district request to review the Fourth Circuit's decision. *Gloucester Cnty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878 (2021). On the other hand, greatly undermining *Adams*' persuasive appeal is the Eleventh Circuit's impertinent persistence in echoing the same reductive meaning of sex in the Title IX context that was explicitly rejected in *Bostock*, which previously arose out of the same circuit. What remains of *Adams*' interpretive value is further diminished by its tumultuous procedural history indicating increasing dissents and diminished holdings. Such a trajectory reflects discord in the panel and a legal landscape in flux, as well as emphasizing the ripeness of Boe's claim for resolution by this Court.

C. The Policy exceeds the scope of the narrow, permissive carveouts and its application causes cognizable harm to Boe regardless of the outcome.

Applying the Policy to Boe inherently references her natal sex to ascertain whether she "satisfies [a] requirement or

condition" for the provision of instruction aligned with her gender identity and "treat[s] [Boe] differently from" her cisgender peers by stigmatizing and excluding her. *See* 34 C.F.R. § 106.31(b)(1) (2020). Boe's exclusion from gender-affirming instruction is sex-based discrimination because the Policy, as the "discriminator," necessarily operates by reference to Boe's birth certificate to determine the "incongruence between" her sex and gender. *Grimm*, 872 F.3d 586 at 616.

The regulations provide for human sexuality instruction to be conducted in "separate sessions for boys and girls" on a permissive basis. 34 C.F.R. § 106.34(a)(3) (2020). However, absent from the regulations is any indication of "how…we sort by gender" within the bounds of Title IX. *A.C.*, 75 F.4th 760 at 770 (noting the statute and regulations do not answer "who counts as a 'boy'…and 'girl'?"). As such, the Board's choice to implement its own criteria is inherently discriminatory because the regulations do not and cannot authorize reliance on arbitrary definitions like "biological sex." *See Grimm*, 872 F.3d 586 at 618.

In *Grimm*, the school "relied on its own classification, 'biological gender,'" to proscribe transgender boy Gavin Grimm's boys' bathroom access, and the court struck down the policy as discriminatory on the basis of sex. *Id.* at 616. The court supported Grimm's contention that his exclusion from the boys'

bathroom and accommodations that led to negative social, emotional, and health outcomes violated Title IX by "publicly brand[ing] transgender students with a scarlet 'T.'" *Id.* at 625 (Winn, J., concurring) (quoting *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3rd Cir. 2018)). Although Grimm's initial claim arose years prior, this Court's decision in *Bostock* led to Grimm's successful interlocutory appeal challenging the scope of the carveouts, ultimately rendering summary judgment for Grimm on both Title IX and Equal Protection claims as a result. *Grimm*, 872 F.3d 586 at 602. The court rejected the district's attempts to rely on the regulations' providing for sex-segregated restrooms, noting that Grimm challenged the district's "discriminatory exclusion" from facilities aligned with his gender, not merely a policy of sex-segregated facilities. *Id.* at 618; *but see* 34 C.F.R. § 106.33 (2020).

Several federal courts have similarly held that policies that dictate gender-based access constitute sex-based discrimination because they require "different rules, sanctions, and treatment" for transgender students by requiring facility use that does not conform with their gender identity. *Whitaker*, 858 F.3d 1034 at 1049. See *Boyertown*, 897 F.3d 518 at 533 (barring transgender students' access "would itself pose a Title IX violation."); *A.H. v. Minersville Area Sch. Dist.*, 408

F.Supp.3d 536 (M.D. Pa. 2019) (the "mere fact" that a policy dictates access to bathrooms reveals impermissible sex-based "control over" a transgender student's conduct.).

Here, the Policy violates Title IX because it conditions Boe's access to comprehensive sex education on the requirement that her gender align with her sex. Boe, like Grimm, does not challenge sex-segregated instruction under the Policy, but rather her exclusion from the girls' section despite being treated as a girl in every other way at school. Like the transgender plaintiff in *Whitaker*, Boe by definition cannot satisfy the terms of the Policy as a transgender individual and is excluded from federally protected benefits as a result.

There is no conceivable basis for Boe's exclusion, and the Respondents does not seek to establish one, other than the incongruence between her sex and gender. Instead, much like the school district in *Grimm*, the Board attempted to conceal impermissible sex discrimination behind the gossamer-thin veil of the 'biological' modifier. R. at 4. Boe, and all transgender individuals similarly situated, are biological entities. Were this modifier afforded the weight the Respondents assert, Title IX protections could be sidestepped by the placement of an adjective. As such, the Board's decision to develop and institute its own tailored curriculum and a mechanism for

assigning students into discrete sections inherently violates Title IX.

II. The Policy fails to provide an equal educational opportunity to transgender students, without advancing a legitimate government interest, while subjecting them to irreparable harm.

The Equal Protection Clause in the Fourteenth Amendment prohibits States from "denying to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. *See generally, City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). The purpose of this clause is to protect individuals from both intentional and arbitrary discrimination. Grimm, 972 F. 3d at 586. Simply put, the clause directs that all persons similarly situated be treated alike. *Cleburne*, 473 U.S. at 439. When determining whether an Equal Protection claim is valid, the Court will first determine the proper level of scrutiny. *Grimm*, 972 F. 3d at 606. In order to do this, the court will look at the basis of the discrimination between the classes of person. *Id.* at 607. After determining the proper level of scrutiny, the Court will then determine whether the merits of the claim presented will succeed and whether the plaintiff will likely face irreparable harm. *Evancho v. Pine-Richland School District*, 237 F.Supp. 3d 267 (W.D. Pa. 2022).

The facts of Boe's claim establish the inseparability of gender and sex discrimination that qualify the class as a quasi-

suspect. The Court will then be compelled to apply a heightened level of scrutiny. In doing so, in the absence of an exceedingly persuasive justification or important government interest that is advanced by the enforcement of the Policy, and the denial of Boe's equal education, finding the Policy incompatible with the Fourteenth Amendment. Furthermore, the enforcement of the discriminatory policy will, undoubtedly, have irreparable harm on Boe. For these reasons, the Court will find that the Board's policy is arbitrarily discriminatory and violates the Equal Protection Clause.

A. As a member of the transgender community, Boe qualifies for a quasi-suspect classification.

Quasi-suspect classifications encompass classes of people who are discriminated against in law and policy based on sex. *Cleburne,* 473 U.S. at 440-41. This type of classification rarely relates to a person's ability to perform or contribute to society and are typically based on stereotypical notions. *U.S. v. Virginia*, 518 U.S. 515, 534 (1996). Courts have historically held that various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection clause. See, e.g., *Grimm,* 972 F. 3d at 608 (finding that many courts, such as the Seventh and Eleventh Circuits, have held various forms of discrimination against transgender people constitute sex discrimination because such

policies punish the person for gender non-conformity, thereby relying on sex stereotypes.”). When determining whether a group of people are considered a quasi-suspect class, four factors are considered: (1) the group must have been historically discriminated against, (2) the class must have a defining characteristic that bears a relation to their ability to perform or contribute to society, (3) they must be defined as discrete group by obvious, immutable, or distinguishable characteristics, and (4) the class must lack political power. *Id.* at 611.

All factors are met in *M.A.B. v. Board of Education*, a case where a fifteen-year-old transgender boy was prohibited from using the locker room that aligned with his gender identity. *M.A.B.*, 286 F.Supp. 3d at 704. The court satisfied the first factor because the transgender community has historically been subjected to discrimination. *Id.* at 720. This finding was supported by reports that transgender individuals suffer at higher rates of violence due to their identity. *Id.* For the second factor, the court found that an individual’s transgender status does not bear relation to their ability to contribute to society. *Id.* Regarding the third factor, the court concluded that it was obvious that transgender individuals exhibit distinguishing characteristics that define them as a discrete group, mainly, that their gender identity does not align with their assigned birth sex. *Id.* Lastly, the court held that the

fourth factor was evident in many courts' continuous efforts to block the enforcement of policies by the federal government that support transgender rights. *Id.* at 721.

In the case at hand, this Court will certainly find that seven years later, the transgender community still meets all four factors required to support Boe's quasi-suspect classification. Not only has the transgender community been historically subjected to discrimination, as shown in M.A.B., but research has found that, specifically regarding grades K-12, 78% of the students who identify as transgender or gender non-conforming, experience harassment by students, teachers, or staff. Jamie M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Center for Transgender Equality, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf. Secondly, an individual's transgender status bears no effect on their ability to contribute to society or participate fully in an educational program. Third, as M.A.B. mentioned, the fact that an individual does not identify with their natal sex is a clear and distinguishing quality. And lastly, unfortunately, the transgender community is still a political minority, as shown by rich breadth of recent case law arising out of proposed and passed policies targeting the transgender community.

B. The Policy fails to advance the legitimate government interest of public health and intentionally and arbitrarily discriminates against transgender students, including Boe.

A court determines a policy is intentionally and arbitrarily discriminatory by applying the proper standard of scrutiny for the classification. There are three categories of scrutiny that apply to Equal Protection claims. The lowest level of security is rational basis, which requires that, at a minimum, a statutory classification be rationally related to a legitimate government interest. *Clark v. Jeter*, 486 U.S. 456 (1988). The highest level of scrutiny is strict scrutiny. *Id.* at 481. Strict scrutiny requires the defendant show that their discrimination, based on race or national origin, are narrowly tailored to further a compelling interest. *Ray v. McCloud*, 507 F.Supp. 3d 925 (S.D. Ohio 2020). Lastly, resting in middle, is intermediate scrutiny, which applies to quasi-suspect classes who experience discrimination from policies on the basis of sex. *Id.* at 938. This heightened level of scrutiny requires the defendant to prove their discrimination was substantially related to advancing an important government objective. *Id.*

Members of the transgender community are considered members of a quasi-suspect class as a result of experiencing sex-based discrimination, thus requiring a heightened scrutiny analysis. *See Adkins v. City of New York*, 143 F.Supp. 3d 134 (S.D.N.Y.

2015) (explaining that because this Court has found transgender people to be a quasi-suspect class, they are required to apply intermediate scrutiny). To survive this level of scrutiny, the burden rests on the defendant to show that the policy advances a legitimate government interest and is substantially related to the advancement in a specific way. *Virginia*, 518 U.S. at 524. This requires a showing greater than both a hypothesized justification created in response of litigation and an overbroad generalization of sex. *Id*. Furthermore, an interest being legitimately recognized does not end this Court's inquiry and it must also be considered within the context of the facts and stated as a precise goal. *Evancho*, 237 F.Supp. 3d at 290.

The opinion below expresses that that the Policy was clearly created to protect and advance the individual health of the youth. Although public health is typically used as a term of art, it is important, for the sake of clarity and consistency, to define what is encompassed in this term. Public health is the science of protecting and improving the health of people and is overall, concerned with protecting the health of entire populations. *What is Public Health*, CDC Foundation, https://www.cdcfoundation.org/what-public-health. When public health is claimed as a concern, the policy must be genuine and applicable, regardless of an individual's gender identity. *Poe*

v. Labrador, 1:23-CV-00269-BLW, 2023 WL 8935065 (D. Idaho Dec. 26, 2023). "If the State's health concerns were genuine, the State would prohibit these procedures for all patients under 18 regardless of gender identity. The State's goal in passing [the challenged Act] was not to ban treatment. It has to be an outcome that the State deems undesirable." *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 892 (E.D. Ark. 2021).

A policy that meets a government interest of public health is shown in *United Enterprise v. Dubey. United Enterprise v. Dubey*, 128 F.2d 843 (5th Cir. 1942). In this case, the appellant bought an action against the appellee due to a statute that regulates the practice of beauty culture claiming it violated their Fourteenth Amendment right. *Id.* at 844. The appellee claimed that the section of the statute in question, prohibiting the administration of certain treatment, was created to protect and promote public health. *Id.* at 845. The court in this case found that the legislature plainly and specifically intended to prevent the spread of contagious disease, to induce cleanliness, sanitation, and to insure the adoption of healthful standards throughout the industry in the interest of public welfare. *Id.* at 845. Furthermore, the court concluded that the provision is appropriate to the attainment of the claimed interest and not arbitrary. *Id.*

Another policy that advances the government interest of public health can be seen in *E.B. Elliott Adv. Co. v. Metro. Dade Cnty*, 425 F.2d 1141 (5th Cir. 1970). Here, the appellant bought an action on the basis of a policy that prohibited commercial advertising within 200 feet of any expressway right of away and regulated within 600 feet of the right of way. *Id.* at 1151. The appellee claimed that the regulation was created to promote highway safety on the expressway and to improve the surrounding area. *Id.* Specifically, because the purpose of advertising signs that are adjacent to highway is to attract the public, at least long enough to convey a message, the eye movement required to look at the sign can improve the alertness of an expressway driver. *Id.* at 1152. Furthermore, the court found that the speed and density of traffic, coupled with the braking limitations of the modern car, can conceivably make even the slightest difference. *Id.* Because of this, the court was able to conclude that the policy in question was clearly and specifically related to the advancement of the government interest. *Id.*

Here, the policy claims to be concerned with the protection and advancement of both the individual and collective public health of Dune residents while simultaneously excluding from the public the health of those whose gender identity does not align with their natal sex. To begin, the Board's claim that the

Policy is concerned with public health of the Dune youth is invalidated by the fact that it creates an increased risk for gender dysphoria. Gender dysphoria is experienced where there is a feeling of substantial distress as a result of an individual's natal sex being different from their gender identity. *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020). When gender dysphoria is left untreated, individuals can suffer from severe mental health issues such as anxiety, depression, and suicidality. *Id.* To prevent an individual from experiencing dysphoria, medical associations such as the American Medical Association, the American Academy of Pediatrics, and the American Psychiatric Association encourage the alleviation of distress by allowing transgender individuals to live consistently within their gender identity. *Doe v.* Horne, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831, at *1 (D. Ariz. July 20, 2023). Alleviation is accomplished when an individual socially transitions and is effective when the individual is correctly identified and respected across all aspects of their life. *Id.*

The Policy the Board has instituted places a tremendous amount of distress on Boe. If she were to be compelled into the human sexuality course that does not align with her gender identity, she will carry the burden of being questioned in a community of her peers, who know her as a girl, as to why she alone is in their class. This exposes her to bullying from

students, staff, social ostracization, and more. In a study conducted by the National Transgender Discrimination Survey, 78% of students who express themselves as transgender or gender non-conformity, report experiencing harassment by peers or staff members of the school. Grant et al., *supra* at 36. Currently, only a handful of Boe's friends are aware that she is transgender, allowing her to evade harassment based on her gender identity. By forcibly outing Boe and increasing the likelihood she will experience harassment, isolation, or even physical danger, the Policy results in Boe's suffering from extreme mental health issues such as depression, anxiety, or suicidal ideations that lead to dysphoria. Garima Garg et all., *Gender Dysphoria*, National Library of Medicine (July 11, 2023), https://www.ncbi.nlm.nih.gov/books/NBK532313/. If Jane decides to opt out of the class, she is disadvantaged by losing out on sexuality education related to relationships, sexual health, and other critical information. *Id*.

C. The Policy subjects Boe to a substantial amount of irreparable harm and exacerbates this harm in a way that cannot be rectified after it occurs.

When a transgender individual suffers a harm that cannot be prevented or fully rectified by the final judgment after trial, courts will recognize irreparable harm. *Whitaker*, 858 F.3d at 1042. The standard for irreparable harm requires more than the mere possibility of the claimed harm; however, it does not

require that the actual harm occurred. *Id.* at 1045. Where there is the presence of deprivation of constitutional rights it is unquestionable whether irreparable harm has occurred. *Hecox*, 79 F.4th at 1009. (Finding "therefore, as the Act is likely unconstitutional it follows inexorably… that [Hecox] ha{s} carried [her] burden as to irreparable harm.").

A clear example of irreparable harm is found in *Evancho*, where transgender students were limited to bathroom use of either a single user stall or a bathroom that did not match their gender identity. *Evancho*, 237 F.Supp. 3d at 272. The court found that after being permitted to use facilities that aligned with their gender identity, it is credible that the sudden bar would subject the students to feelings of marginalization leading to genuine distress, anxiety, discomfort, and humiliation. *Id.* at 294. The court further found that the student's harm was intangible and therefore cannot later be remedied by monetary relief, making it even more evident that irreparable harm would be suffered. *Id.* Irreparable harm can also be seen in *Whitaker*. In this case, a transgender student was also prevented from using the bathroom that aligned with their gender identity. *Whitaker*, 858 F.3d at 1038-39. The Seventh Circuit here found that that the student's different treatment would cause significant psychological distress and place him at risk for experiencing lifelong diminished well-

being and life-functioning. *Id.* at 1045. The court further found that the school district exacerbated the harm because dismissing him to a separate bathroom further stigmatized him and clearly indicated to others that he was different because he was a transgender boy. *Id*.

Here, it is clear that the Board's policy will inflict and exacerbate a substantial amount of harm to Boe. Similar to *Evancho*, Boe has been living a life that identifies with her gender identity through her entire time in Dune. This has resulted in her unquestioned social acceptance amongst her fellow peers, so much so that everyone was under the impression that she was a cisgender girl. If she were to be the only girl in a boys' human sexuality course it would exacerbate the harm by not only indicating she is different than the other girls, like in *Whitaker*. Being the only student amongst her peers to opt out of the class would likely subject to her feelings of anxiety and distress and would increase the likelihood she would suffer from harassment and result in life-long harm from diminished well-being and esteem at such a critical developmental time.

D. Boe is deprived of the fundamental right of an equal education where the Board has taken up the duty to provide education but fails to do so equally.

Education has been established as the most important function of state and local governments. *Brown v. Bd. Of Ed. Of*

Topeka, 347 U.S. 483 (1954). It naturally follows that due to its importance, it is doubtful that a child would be able to succeed if denied this opportunity. *Brown*, 347 U.S. at 493. Despite the importance of education, the Supreme Court ruled in *San Antonio Independent School District v. Rodriguez*, that there is no fundamental right to education. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding there is no fundamental right to education, express nor implied, under the constitution.). However, underneath the Equal Protection clause, where the state has undertaken the responsibility of providing an education, it has a duty to make the opportunity of education available to all on equal terms. *Brown*, 347 U.S. at 493. In circumstances where an Equal Protection claim has succeeded and a remedial program is proposed, it must directly address the violation and provide a comparative opportunity to that which they are deprived. *Virginia*, 518 U.S. at 547-48. When determining whether an educational opportunity is equal, it is essential to acknowledge the tangible and intangible qualities it presents. *Brown*, 347 U.S. at 493. *See Sweatt v. Painter*, 339 U.S. 629 (1950) ("this Court relied in large part on 'those qualities which are incapable of objective measurement, but which make for greatness in a law school.").

In *U.S. v. Virginia*, the court found that the curative program the Virginia Military Institute ("VMI") offered was not

sufficiently comparable and did not survive the Equal Protection evaluation. *Virginia*, 518 U.S. at 546. In this case, in response to the court finding VMI's policy discriminatory against women, they attempted to create a similar program at Mary Baldwin College. *Id.* at 526. However, this Court found that this program failed to offer the rigorous training for which VMI is known, did not provide the military style residence, nor did it provide the leadership training in their seminars, externships, and speaking series. *Id*. at 548. This Court also found that the school failed to provide the qualities that are incapable of objective measurement such as the reputation of the faculty, the experience of administration, standing in the community, tradition, and prestige. *Id*. at 554.

The Dune Board further violated Boe's Equal Protection rights by failing to provide an equitable level of education or a comparable alternative to the unconstitutional denial of the opportunity. The Board has undertaken the responsibility of providing comprehensive sex education to all the students in their district, Boe included. This duty cannot be carried out in such a way as to discriminate against any students in the provision of instruction. As previously stated, this quality of education is measured by the tangible and intangible elements. Studies have shown that a comprehensive sexual health education increase sexual health knowledge and decreases adverse health

outcomes, sexually transmitted infections, HIV, etc. Maureen Rabbitte, *Sex Education in School, are Gender and Sexual Minority Youth Included?: A Decade in Review*, Am J. Sex Educ., 1 (2021).

The opt-out alternative robs Boe of this educational opportunity. If she were to opt out, she would be in a significantly lesser position to make educated and healthy decisions related to her own physical and sexual health. Furthermore, neither the opt-out nor the all-boys' alternative is comparable for the education that is provided for the other class of students. While the all-boy class may provide similar tangible qualities, the intangibles are too substantial to overlook. In a class where all students have the same gender identity, there is a level of safety and comfort between the students that allows them to be candid. This level of comfortability is not only essential to student's well-being, in a human sexuality course, it can foster better discourse and understanding, and result in better outcomes that truly do improve the public health outcome of all young Dune residents, not just those politically favored by the Board. Therefore, the alternatives provided by the Board in absence of an equal education are not comparable, thus violating Boe's Equal Protection rights.

Conclusion

For the foregoing reasons, the Petitioner, Jane Boe, by and through her father Jack Boe, respectfully request that this Supreme Court reverse the decision of the Thirteenth Circuit and hold that the Dune Unified School District Board Resolution 2022-14 infringes on Jane's rights provided by Title IX and by the Equal Protection Clause of the United States Constitution.

Signature

Respectfully submitted,

[redacted]

[redacted]

Counsel for Respondent