No. 25A__

In the Supreme Court of the United States

STATE OF SOUTH CAROLINA; SOUTH CAROLINA STATE BOARD OF EDUCATION; SOUTH CAROLINA DEPARTMENT OF EDUCATION; BERKELEY COUNTY SCHOOL DISTRICT; ELLEN WEAVER, IN HER OFFICIAL CAPACITY AS SOUTH CAROLINA SUPERINTENDENT OF EDUCATION; ANTHONY DIXON, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF BERKELEY COUNTY SCHOOL DISTRICT,

Applicants,

v.

JOHN DOE, A MINOR, BY HIS PARENTS AND NEXT FRIENDS; JIM DOE, PARENTAL NATURAL GUARDIAN; JANE DOE, PARENTAL NATURAL GUARDIAN,

Respondents.

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

APPLICATION FOR A STAY OF INJUNCTION PENDING APPEAL IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND FURTHER PROCEEDINGS IN THIS COURT

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PARTIES TO THE PROCEEDING BELOW

Applicants (Defendants-Appellees below) are the State of South Carolina; South Carolina State Board of Education; South Carolina Department of Education; Berkeley County School District; Ellen Weaver, in her Official Capacity as South Carolina Superintendent of Education; and Anthony Dixon, in his Official Capacity as Superintendent of Berkeley County School District (collectively, "Applicants").

Respondents (Plaintiffs-Appellants below) are John Doe, a Minor, by his Parents and Next Friends; Jim Doe, Parental Natural Guardian; and Jane Doe, Parental Natural Guardian (collectively, "Respondents").

RELATED PROCEEDINGS

This application arises from these proceedings:

Doe v. *State of South Carolina*, C.A. No. 2:24-6420-RMG, ECF No. 92 (D.S.C. Jul. 8, 2025) (order staying case pending the Supreme Court's decision in *West Virginia* v. *B.P.J.*, No. 24-43 and denying pending motions without prejudice and with leave to restore and/or supplement after a decision in *B.P.J.* or the end of the Supreme Court's 2025–2026 term, whichever is sooner);

Doe v. *State of South Carolina*, C.A. No. 2:24-6420-RMG, ECF No. 93 (D.S.C. Jul. 8, 2025) (reference order denying pending motions without prejudice and with leave to restore and/or supplement);

Doe v. *State of South Carolina*, C.A. No. 2:24-6420-RMG, ECF No. 103 (D.S.C. Jul. 23, 2025) (order denying Respondents' motion for preliminary injunction pending appeal);

Doe v. *State of South Carolina*, No. 25-1787, Dkt. 42 (4th Cir. Aug. 12, 2025) (order granting Respondents' motion for injunction pending appeal);

Doe v. *South Carolina*, No. 25-1787, Dkt. 43, 2025 WL 2375386 (4th Cir. Aug. 15, 2025) (amended order granting Respondents' motion for injunction pending appeal); and

Doe v. *South Carolina*, No. 25-1787, Dkt. 47 (4th Cir. Aug. 25, 2025) (order denying Applicants' motion to reconsider or stay the injunction pending appeal).

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

INTRODUCTION

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. § 1651, the Applicants respectfully apply to stay the injunction pending appeal entered on August 12, 2025, by a panel of the United States Court of Appeals for the Fourth Circuit, see App. 32a–33a, and explained more fully in its order of August 15, 2025, see App. 3a–31a.

This case involves "the unremarkable—and nearly universal—practice of separating school bathrooms based on biological sex." *Adams by & through Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 796 (11th Cir. 2022). In recent years, a growing judicial consensus has recognized that this practice of "separating school bathrooms based on biological sex passes constitutional muster and comports with Title IX." *Id.* The Fourth Circuit disregarded that growing consensus and enjoined a South Carolina budget proviso prohibiting the use of opposite-sex multi-occupancy restrooms in public schools as applied to the minor Respondent pending appeal. In doing so, it reverted to its discredited outlier opinion in *Grimm* v. *Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), *cert. denied* 141 S. Ct. 2878 (2021).

As Judge Agee urged in his reluctant concurrence below, "*Grimm* was wrongly decided" and "[o]ne can only hope that the Supreme Court will take the opportunity with all deliberate speed to resolve these questions of national importance." App. 30a-31a (Agee, J., concurring) (cleaned up). This Court should stay the injunction pending appeal because the exceedingly high burden for relief was not met.

An emergency stay of the Fourth Circuit's injunction is warranted not only because *Grimm* was wrongly decided and should (and may soon) be overturned, but because in the absence of this Court's immediate intervention, the State, the school district, and its students are suffering actual, ongoing, material harms—all from a mandatory injunction that disrupts the status quo in a preliminary posture in a case where the Plaintiffs are unlikely ultimately to prevail. Start with the State.[1] In our federal system, States have a vital, sovereign interest in preserving their plenary authority against unwarranted federal incursions. And "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (cleaned up).

And consider the school district that the Fourth Circuit enjoined. It's now stuck between an impossible rock and hard place. On the one hand, the Executive Branch demands, on pain of loss of federal funding, that schools apply Title IX as originally understood. See U.S. DEP'T OF ED., *U.S. Dep't of Ed. Finds Five Northern Virginia School Districts in Violation of Title IX* (July 25, 2025) (https://tinyurl.com/bv97zrdd). On the other hand, the Fourth Circuit has required Applicant Berkeley County School District to do exactly the opposite. Other schools within the Fourth Circuit are already pointing to the Fourth Circuit's injunction in this case as a basis for refusing

[1] Of course, most Respondents, including the State, shouldn't be parties to this proceeding as they are immune from suit under the Eleventh Amendment and/or qualified immunity. *Doe* v. *State of South Carolina*, C.A. No. 2:24-6420-RMG, ECF No. 51 at 21–23, 42–43. Respondents have preserved and not waived those arguments.

to protect sex-designated intimate areas. See Alexandria City Public Schools letter to U.S. Department of Education, at 2 n.1, Aug. 15, 2025 (https://tinyurl.com/yexer5s3).

And what of other students (or their parents) who are classmates of Minor Respondent but who, as a matter of their long-recognized privacy interests, cannot share intimate spaces with a member of the opposite sex? "That some students in a state of partial undress may experience embarrassment, shame, and psychological injury in the presence of students of a different sex is neither novel nor implausible." *Roe* v. *Critchfield*, 137 F.4th 912, 925 (9th Cir. 2025) (cleaned up) (citing *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996) ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.")). These harms are real, material, and unnecessary, especially in a preliminarily postured case under the backdrop of this Court's review of *B.P.J.* v. *West Virginia*, 98 F.4th 542 (4th Cir. 2024), *cert granted* No. 24-43, 2025 WL 1829164 (U.S. July 3, 2025). See, *e.g.*, *Students & Parents for Priv.* v. *Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891, 894–96 (N.D. Ill. 2019) (students required to share facilities with transgender identifying students reported suffering "embarrassment, humiliation, anxiety, fear, apprehension, stress," and "loss of dignity," leading to "avoid[ance of] getting undressed in locker rooms" and wearing "soiled, sweaty gym clothes under ... school clothes.").

This Court should stay the injunction pending appeal.

STATEMENT

A. Background

"[I]t has been commonplace and universally accepted—across societies and throughout history—to separate on the basis of sex those public restrooms, locker rooms, and shower facilities that are designed to be used by multiple people at a time." *Grimm*, 972 F.3d at 634 (Niemeyer, J., dissenting). As both this Court and the Fourth Circuit have acknowledged, a primary reason for this biology-rooted convention is the promotion of privacy. See *United States* v. *Virginia*, 518 U.S. 515, 533, 550 n.19 (1996) (recognizing the "enduring" "[p]hysical differences between men and women" and acknowledging, when ordering an all-male Virginia college to admit female students, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex" (cleaned up)); *Faulkner* v. *Jones,* 10 F.3d 226, 232 (4th Cir. 1993) (noting "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns").

Privacy is "especially important for school-aged children who are still developing mentally, physically, emotionally, and socially." *Roe* v. *Critchfield*, 137 F.4th 912, 924 (9th Cir. 2025). "No one questions that students have a privacy interest in their body when they go to the bathroom." *Grimm*, 972 F.3d at 613. "[A]sking them to expose their bodies to students of the opposite sex (or to be exposed to the bodies of the opposite sex) brings heightened levels of stress." *Critchfield*, 137 F.4th at 924 (cleaned up).

But recent social developments have sought to change that. Over the past fifteen years, the number of children and adolescents experiencing gender dysphoria

has skyrocketed. In fact, "recorded prevalence of gender dysphoria in people aged 18 and under increased over 100-fold between 2009 and 2021." H. Cass, Independent Review of Gender Identity Services for Children and Young People: Final Report 87 (Apr. 2024) (https://tinyurl.com/mry83mm6).

Because "the concept of gender dysphoria as a medical condition is relatively new," treatments for the condition are "subject to a rapidly evolving debate that demonstrates a lack of medical consensus over their risks and benefits." *United States* v. *Skrmetti*, 145 S. Ct. 1816, 1841 (2025) (Thomas, J., concurring) (cleaned up).

"Under these conditions, it is imperative that courts treat state legislation with a strong presumption of validity" and "protect States' ability to enact high-stakes" legal provisions in this arena "in which compassion for the child points in both directions." *Id.* (cleaned up).

In the wake of the recent surge of gender dysphoria among children and adolescents, states have pumped the brakes on efforts to facilitate pediatric gender transition. For example, 28 states have proscribed *medical* gender transition for children and adolescents. MOVEMENT ADVANCEMENT PROTECTION, "Equality Maps," accessed Aug. 15, 2025 (https://tinyurl.com/39ae2uza). And in *Skrmetti*, this Court recently upheld their right to do so. 145 S. Ct. at 1837. Additionally, 19 states have enacted legislation to prevent *social* gender transition in public schools and promote student privacy by preserving the biology-based designation of public-school multi-occupancy bathroom use by sex. MOVEMENT ADVANCEMENT PROJECTION, "Equality Maps," accessed Aug. 15, 2025 (https://tinyurl.com/y6cz7nhs). South Carolina is one of them.

Over a year ago, South Carolina's General Assembly ratified a General Appropriations Bill for Fiscal Year 2024–2025. The bill included a proviso—Proviso 1.120—that conditioned a portion of each public school district's state funding on the district's compliance with a requirement that it designate its multi-occupancy public school restrooms for use only by members of one sex, and that it limit entry into such restrooms to members of the designated sex. See H. 5100, General Appropriations Bill for Fiscal Year 2024–2025, Part IB § 1.120(B)–(C)(1) (https://tinyurl.com/yr6asnw7). That Proviso expired on June 30, 2025.

In June 2025, the South Carolina General Assembly passed a General Appropriations Bill for Fiscal Year 2025–2026. See H. 4025, General Appropriations Bill for Fiscal Year 2025–2026 (https://tinyurl.com/y429yczf). It contained a new proviso—Proviso 1.114—with language that mirrored Proviso 1.120 from the prior fiscal year. *Id.* at Part IB § 1.114. That new proviso took effect on July 1, 2025. *Id.*

B. Proceedings Below

Respondents, styled "John Doe, a minor, by his parents and next friends; Jim Doe, parental natural guardian; Jane Doe, parental natural guardian," App. 1a, sued Applicants on November 12, 2024, alleging "the restroom-related provision" of Proviso 1.120 violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. *Doe*, C.A. No. 2:24-6420-RMG, ECF No. 1 at 18–21.

Two days after filing suit, Minor Respondent filed a motion for preliminary injunction as to Proviso 1.120, along with a motion for class certification. *Id.* at ECF

No. 9 at 1; *id.* at ECF No. 10 at 6–8. After limited discovery, Defendants responded to the Complaint, the motion for preliminary injunction, and the motion for class certification. *Id.* at ECF Nos. 38, 39, 51, 61, 73.

On June 25, 2025, due to the impending expiration of Proviso 1.120 and enactment of Proviso 1.114, Respondents moved for leave to amend their Complaint to allege purported facts and claims relating to Proviso 1.114. *Id.* at ECF No. 85. Respondents' motion to amend the Complaint hasn't been granted. Respondents also realized they needed a new motion for preliminary injunction if they wanted to seek an injunction as to the new proviso. So, on June 26, 2025, Minor Respondent filed a motion for leave to amend the motion for preliminary injunction or, alternatively, to expedite briefing on a new motion. *Id.* at ECF No. 86. Rather than wait for a ruling on the motions for leave, Minor Respondent filed a new motion for preliminary injunction five days later. *Id.* at ECF No. 88.

Against this backdrop, this Court decided *United States* v. *Skrmetti*, 145 S. Ct. 1816 (2025) on June 18, 2025. In that case, this Court declined to apply heightened scrutiny to Tennessee's prohibition on the use of certain medical procedures for gender transition of minors, reasoning that the law classified "on the basis of age …[and] medical use" and was thus subject only to rational basis review. *Id.* at 1829.

On June 30, 2025, this Court vacated the Fourth Circuit's decision in *Kadel* v. *Folwell*, 100 F.4th 122 (4th Cir. 2024) (*en banc*), which had applied intermediate scrutiny in holding that limitations on the use of medical procedures for gender transition by persons covered by certain health plans violated the Equal Protection Clause and

Title IX. *Folwell* v. *Kadel*, No. 24-99, 2025 WL 1787687 (U.S. June 30, 2025). This Court remanded the case for further consideration in light of *Skrmetti*. *Id.*

On July 3, 2025, the Supreme Court granted certiorari in *West Virginia* v. *B.P.J.*, No. 24-43, 2025 WL 1829164 (U.S. July 3, 2025), which had held that a state statute designating participation in public school sports by biological sex violated the rights of transgender students under the Equal Protection Clause and Title IX. See *B.P.J.* v. *West Virginia*, 98 F.4th 542 (4th Cir. 2024).

The Fourth Circuit's decisions in *Kadel* and *B.P.J.* applied heightened scrutiny for state enactments that mention sex and allegedly discriminated against transgender individuals. That standard was first set forth in *Grimm*. Respondents in the present case have relied upon *Kadel*, *B.P.J.*, and *Grimm* throughout the litigation.

Considering this Court's recent decisions, the district court stayed this case due to "considerable overlap regarding the proper legal standard to be applied to claims of transgender minors" in "challenges to school policies relating to bathroom access and school sports participation under the Equal Protection Clause and Title IX." App. 43a–44a n.2. The district court also denied "pending" motions "without prejudice and with leave to restore and/or supplement once the United States Supreme Court rules in *B.P.J.* or the Supreme Court's 2025-2026 term ends, whichever is sooner." App. 42a n.3; see also App. 37a (same).

On July 9, 2025, Minor Respondent appealed those orders to the Fourth Circuit, *id.* at ECF No. 94. The next day, Minor Respondent asked the district court for an injunction of Proviso 1.114 pending appeal as applied to Minor Respondent. *Id.* at

ECF No. 95. On July 15, 2025, without waiting for the district court to rule on the requested injunction, Minor Respondent moved the Fourth Circuit for an injunction pending appeal. *Doe*, No. 25-1787, Dkt. 14-1.

On July 23, 2025, the district court denied the motion for injunction pending appeal because Minor Respondent was "unable to meet" the "demanding standard" of making a "clear showing" of likelihood of success on the merits. App. 37a. That's "in light of the significant recent legal developments in the Supreme Court which have brought into question the proper legal standards to apply when addressing the rights of transgender students under the Equal Protection Clause and Title IX." *Id.*

On August 12, 2025, the day before the start of school, the Fourth Circuit granted an injunction pending appeal as applied to Minor Respondent. App. 32a–33a. On August 15, 2025, the Fourth Circuit entered an amended order that provided its reasoning for the August 12 order. App. 3a–31a. Rather than preserve the status quo, the injunction upsets the status quo that has existed in South Carolina for over a year (or as a practical matter, "throughout history," *Grimm*, 972 F.3d at 634 (Niemeyer, J., dissenting)). On August 22, 2025, Applicants moved the Fourth Circuit to reconsider or stay the injunction pending appeal. *Doe*, No. 25-1787, Dkt. 46. On August 25, 2025, the Fourth Circuit denied that motion. App. 1a–2a.

To restore the pre-injunction status quo, the Applicants now ask this Court to stay the Fourth Circuit panel's extraordinary injunction. See *Trump* v. *CASA, Inc.*, 145 S. Ct. 2540 (2025) (granting applications for partial stays of injunctions pending appeal in the First, Fourth, and Ninth Circuits); *McHenry* v. *Texas Top Cop Shop*,

Inc., 145 S. Ct. 1 (2025) (granting application for stay of an injunction pending appeal in the Fifth Circuit); *Labrador* v. *Poe by & through Poe*, 144 S. Ct. 921 (2024) (granting application for partial stay of an injunction pending appeal in the Ninth Circuit).

ARGUMENT

When considering stay applications, this Court applies a "familiar" and "traditional" stay test by asking: "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure other parties interested in the proceedings, and (4) where the public interest lies." *Labrador*, 144 S. Ct. at 922–23 (Gorsuch, J., concurring) (citing *Nken* v. *Holder*, 556 U.S. 418, 434 (2009)). Those factors overwhelmingly support a stay here.

An injunction "is an extraordinary remedy never awarded as of right." *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (cleaned up). A court may issue an injunction only "upon a *clear showing* that the plaintiff is entitled to such relief." *Id.* at 22 (cleaned up) (emphasis added). Even more so when the plaintiff seeks to enjoin the "enforcement of a presumptively valid state statute." *Brown* v. *Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers). Such a request "demands a significantly higher justification than that required for a stay"; the plaintiff's right to relief must be "indisputably clear." *Lux* v. *Rodrigues*, 561 U.S. 1306, 1306–07 (2010) (Roberts, C.J., in chambers) (cleaned up). That's because an injunction of that sort "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld" by a lower court. *Respect Maine PAC* v. *McKee*, 562

U.S. 996, 996 (2010) (cleaned up). Put another way, in cases like these, courts afford states the "widest latitude." *Rizzo* v. *Goode*, 423 U.S. 362, 378–79 (1976) (cleaned up).

I. *Skrmetti*, not *Grimm*, controls the outcome of this case.

The Fourth Circuit based its injunction on its prior opinion in *Grimm*, 972 F.3d 586. In that case, a public school in Virginia prohibited Grimm (a biological female) from using boys' restrooms. *Id.* at 597–600. Relying on standards of care promulgated by the World Professional Association for Transgender Health (WPATH), the Fourth Circuit held that the school policy violated the Equal Protection Clause and Title IX because the policy allegedly discriminated "on the basis of sex." *Id.* at 593–95. In so doing, *Grimm* also created a quasi-suspect classification for transgender persons and held that the bathroom policy failed heightened scrutiny. *Id.* at 607. But *Skrmetti* rejected *Grimm*'s view of discrimination "on the basis of sex," 145 S. Ct. at 1829–35; applied rational basis rather than heightened scrutiny to a law that mentioned but did not classify or discriminate on the basis of sex, *id.* at 1835–37; and refused to defer to WPATH's discredited standards, *id.* at 1825; see also *id.* at 1843–49. *Grimm* is irreconcilable with *Skrmetti*. Even if *Grimm* were precedential for the Fourth Circuit, the facts and science underlying *Grimm* are not analogous to this case, nor are they persuasive. This Court should not allow the Fourth Circuit to apply *Grimm* here.

A. *Skrmetti* undercuts *Grimm*'s precedential value.

1. *Kadel* and *B.P.J.*, both of which rely on *Grimm*, have been called into question by this Court in light of *Skrmetti*.

Days after *Skrmetti* was decided, this Court vacated and remanded *Kadel* and granted certiorari in *B.P.J.* See *Kadel*, 2025 WL 1787687; see also *B.P.J.*, 2025 WL

1829164. What do *Kadel* and *B.P.J.* have in common? Both are extensions of the Fourth Circuit's misguided reasoning from *Grimm*: that transgender individuals form a quasi-suspect class, that classifications mentioning sex fail to satisfy heightened scrutiny by impermissibly discriminating against transgender individuals under the Equal Protection Clause, and that classifications mentioning sex discriminated against transgender individuals on the basis of sex. This Court's grant of certiorari in *B.P.J.* and its remand of *Kadel* for reconsideration in light of *Skrmetti* materially undercuts the *Grimm* decision upon which *Kadel* and *B.P.J.* are based.

2. Unlike *Grimm*, *Skrmetti* declined to create a quasi-suspect classification based on transgender status or gender identity.

Grimm invented a quasi-suspect classification based on transgender status for purposes of Equal Protection claims. *Grimm*, 972 F.3d at 607. *Skrmetti* declined to recognize such a classification. *Skrmetti*, 145 S. Ct. at 1832–33. Instead, *Skrmetti* considered the nature of the law's classification before deciding the appropriate level of scrutiny to apply. *Id.* at 1829–33. That approach prevents premature assumptions regarding the appropriate level of scrutiny. And it defuses *Grimm*'s assumption that laws impacting transgender individuals are subjects to heightened scrutiny because they compose a quasi-suspect class. A law that prohibits both sexes from accessing an opportunity intended for the other sex doesn't implicate transgender status even if it were a legally cognizable status. *Id.* at 1832–34.

While it was not necessary in *Skrmetti* to reach the question of whether a transgender classification exists, *id.* at 1832–33, the obsolescence of *Grimm* is further highlighted by the concurring opinions in *Skrmetti*. Consider Justice Alito's

concurrence: "[N]either transgender status nor gender identity should be treated as a suspect or 'quasi-suspect' class." *Id.* at 1860 (Alito, J., concurring). And as Justice Alito further noted, what this Court's "equal protection precedents" have "always meant by 'sex' is the status of having the genes of a male or female." *Id.* at 1856 (Alito, J., concurring). As a result, "a party claiming that a law violates the Equal Protection Clause because it classifies on the basis of sex cannot prevail simply by showing that the law draws a distinction on the basis of gender identity." *Id.* (cleaned up).

Or consider Justice Barret's concurrence, joined by Justice Thomas: "The Equal Protection Clause does not demand heightened judicial scrutiny of laws that classify based on transgender status. Rational-basis review applies, which means that courts must give legislatures flexibility to make policy in this area." *Id.* at 1855 (Barret, J., concurring). Transgender status doesn't comprise a quasi-suspect class.

3. *Skrmetti* corrected *Grimm*'s erroneous definition of discrimination "on the basis of sex" and applied rational basis.

Grimm mistakenly asserted that *Bostock*'s interpretation of "on the basis of sex" under Title VII applies in the Title IX context. *Grimm*, 972 F.3d at 616. In doing so, the Fourth Circuit reasoned that a school policy prohibiting Grimm from using an opposite-sex restroom necessarily discriminated "on the basis of sex" because it was enforced by "referencing" the sex marker on Grimm's birth certificate. *Id.* In the Equal Protection context, *Grimm* concluded that "Grimm was similarly situated to other boys, but was excluded from using the boys restroom facilities based on his sex-assigned-at-birth." *Id.* at 610. But *Skrmetti* corrected *Grimm*'s mistakes.

In *Skrmetti*, SB1 prevented healthcare providers from administering to biological boys drugs for medical conditions experienced by biological girls, and vice versa. *Skrmetti*, 145 S. Ct. at 1830–31. The Court held that the law did not classify on the basis of sex for purposes of the Equal Protection clause because "changing a minor's sex or transgender status does not alter the application of SB1." *Id.* at 1834. And the Court applied rational basis because, even though the law mentioned sex, the effect of the law was to classify based on medical use and age rather than on sex. *Id.* at 1829. And the law satisfied rational basis. *Id.* at 1835–37.

In so holding, *Skrmetti* declined to apply *Bostock* to claims of transgender discrimination under the Equal Protection Clause. Instead, *Skrmetti* clarified that discrimination "on the basis of sex" is not implicated by a law's reference to sex but only if the law "prohibit[s] conduct for one sex that it permits for the other." *Skrmetti*, 145 S. Ct. at 1831. And the Court held that even applying *Bostock* to a law that merely referenced sex would not result in a finding of discrimination because "sex is simply not a but-for cause of" the law's operation. *Id.* at 1835. That contradicts *Grimm*, which took for granted that a policy separating school bathrooms by biological sex discriminates "on the basis of sex" and is thus entitled to heightened scrutiny. *Dep't of Educ.* v. *Louisiana*, 603 U.S. 866, 867 (2024) (declining to apply *Bostock* to Title IX).

4. Unlike *Grimm*, *Skrmetti* declined to substitute WPATH's discredited opinions for a state's legislative judgment.

Grimm deferred to the WPATH Standards of Care over the judgment of policymakers. 972 F.3d at 595. But this Court declined to do so in *Skrmetti*. Instead, the Court highlighted basic problems with WPATH's standards, including WPATH's

recent recognition of "known risks associated with the provision of sex transition treatments to adolescents, including potential adverse effects on fertility and the possibility that an adolescent will later wish to detransition." *Skrmetti*, 145 S. Ct. at 1825 (cleaned up). Additionally, the Court noted the limitations on WPATH's data regarding "the optimal timing of sex transition treatments or the long-term physical, psychological, and neurodevelopmental outcomes in youth." *Id.* (cleaned up).

Further, "[r]ecent revelations suggest that WPATH, long considered a standard bearer in treating pediatric gender dysphoria, bases its guidance on insufficient evidence and allows politics to influence its medical conclusions." *Id.* at 1847 (Thomas, J., concurring) (cleaned up). "States are never required to substitute expert opinion for their legislative judgment, and, when the experts appear to have compromised their credibility, it makes good sense to chart a different course." *Id.* at 1849. Indeed, "whether 'major medical organizations' agree with the result of [a state]'s democratic process is irrelevant. To hold otherwise would permit elite sentiment to distort and stifle democratic debate under the guise of scientific judgment, and would reduce judges to mere spectators in construing our Constitution." *Id.* at 1840 (cleaned up). As the premises of *Grimm*'s decision have been undercut, so too have its conclusions.

B. *Grimm* is distinguishable from this case.

Even if *Grimm* were viable, this case is materially distinguishable. Precedent only requires a court to "act alike in all cases of like nature." *LaShawn A.* v. *Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996). It doesn't require a court to act alike in cases

with different facts, arguments, or legal issues. See *Webster* v. *Fall*, 266 U.S. 507, 511 (1925); *Lowe* v. *Raemisch*, 864 F.3d 1205, 1209 (10th Cir. 2017).

Start with the factual and procedural distinctions between *Grimm* and this case. The policy in *Grimm* did not apply to all students equally; it purportedly singled out Grimm. 972 F.3d at 619. The Proviso did no such thing. The Proviso and its exceptions apply equally to all students, regardless of their gender identity. And, unlike *Grimm*, the restrooms made available to Minor Respondent weren't constructed explicitly for students with gender incongruity. Further, the plaintiff in *Grimm* was "medically confirmed" and "clinically diagnosed with gender dysphoria," and the plaintiff's "treatment provider identified using the boys' restrooms as part of the appropriate treatment." *Grimm*, 972 F.3d at 610, 619. Those facts aren't alleged in this case.

The legal arguments in *Grimm* differed as well. In that case, the school board primarily argued that the policy was valid because it did not discriminate based on sex and because the plaintiff was not similarly situated to gender congruent boys. 972 F.3d at 608–10. While Applicants maintain these arguments here and suggest that intervening legal developments have bolstered them, Applicants have also presented new arguments. For one, Applicants argue that Minor Respondent's claims aren't true discrimination claims under the Equal Protection Clause or Title IX. Minor Respondent doesn't appear to challenge—and, in fact, endorses—the notion that public schools may provide separate facilities for male and female students. Minor Respondent instead challenges a school's recognition of Minor Respondent as one sex versus the other. Such "parameters of the beneficiary class" are typically examined under

rational basis review. *Hoohuli* v. *Ariyoshi*, 631 F. Supp. 1153, 1159 (D. Haw. 1986).

Additionally, Applicants in this case offer different—and substantiated—government interests. Not only does Proviso 1.114 protect the safety and privacy of gender-congruent students, but it also protects the safety and privacy of gender-incongruent students. Single-stall gender-neutral bathrooms are the best choice for vulnerable students with gender incongruence and gender dysphoria. See App. 92a–95a (Expert Witness Declaration of Dr. Geeta Nangia, M.D.). *Grimm* didn't address that argument and thus cannot be viewed as precedential towards it.

Further, as the scientific evidence has come into clearer view, the legal tide has changed. When *Grimm* was decided, the Fourth Circuit alluded to a "growing consensus of courts" that have struck down single-sex school bathroom policies under the Equal Protection Clause and Title IX. *Grimm*, 972 F.3d at 593. But today, *Grimm* is the outlier, joined only by the Seventh Circuit. In contrast, the Eleventh Circuit, Ninth Circuit, and courts in the Sixth and Tenth Circuits take the view that single-sex bathrooms and locker rooms do *not* violate the Equal Protection Clause or Title IX. *Adams by & through Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022); *Critchfield*, 137 F.4th at 926 (Ninth Circuit); *D.H.* v. *Williamson Cnty. Bd. of Educ.*, No. 3:22-CV-00570, 2024 WL 4046581 (M.D. Tenn. Sept. 4, 2024); *Bridge* v. *Oklahoma State Dep't of Educ.*, 711 F. Supp. 3d 1289 (W.D. Okla. 2024).

In sum, *Grimm* is neither factually analogous nor analytically persuasive. It doesn't establish that Minor Respondent is likely to succeed on the merits, particularly when this Court's recent rulings have undermined *Grimm*'s reasoning.

II. Applicants will likely prevail on appeal.

A. This Court has traditionally applied a strong presumption in favor of allowing challenged legislative acts to remain in force pending final review in this Court.

When considering the constitutionality of state legislative enactments, this Court starts with the "presumption that the state statute is valid." *Pharm. Rsch. & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 661 (2003) (plurality); *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 153 (1944). The presumption of constitutionality is "a factor to be considered in evaluating success on the merits." *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). In reviewing emergency applications, this Court has traditionally applied a strong presumption that legislative enactments "should remain in effect pending a final decision on the merits by this Court." *Turner Broadcasting System, Inc.* v. *FCC*, 507 U.S. 1301 (1993) (Rehnquist, C.J., in chambers) (cleaned up).

Such is the case here. In its order granting the injunction pending appeal, the Fourth Circuit acknowledged that no fact finding has occurred in this case and that its decision doesn't turn on resolution of any disputed facts. App. 4a n.1. Despite the lack of factual findings, and without making any factual findings of its own, the Fourth Circuit took the extraordinary step of issuing an injunction by blindly relying on *Grimm* and bypassing the "presumption that the state statute is valid." *Walsh*, 538 U.S. at 661. That presumption of constitutionality weighs in favor of likelihood of success on the merits, and Respondents failed to overcome that presumption, especially considering this Court's decision in *Skrmetti*.

B. The Proviso doesn't violate Equal Protection.

As in *Skrmetti*, Respondents argue that a state enactment violates the Equal Protection Clause of the Fourteenth Amendment by subjecting Minor Respondent to discrimination "on the basis of sex and transgender status." *Doe*, C.A. No. 2:24-6420-RMG, ECF No. 1 at 19, ¶ 92. And as in *Skrmetti*, those arguments should be rejected.

1. Rational basis applies to the Proviso and is satisfied.

"The rational basis inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Skrmetti*, 145 S. Ct. at 1835 (cleaned up). "Under this standard, [the Court] will uphold a statutory classification so long as there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (cleaned up). "Where there exist plausible reasons for the relevant government action, our inquiry is at an end." *Id.* (cleaned up). Indeed, "a classification neither involving fundamental rights nor proceeding along suspect lines … cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour* v. *City of Indianapolis*, 566 U.S. 673, 680 (2012) (cleaned up).

a. The Proviso doesn't classify or discriminate on the basis of sex.

As the Ninth Circuit acknowledged three months ago, schools have an "interest in protecting students' bodily privacy," which is "especially important for school-aged children, who are still developing mentally, physically, emotionally, and socially." *Critchfield*, 137 F.4th at 924 (cleaned up). The text, history, and tradition of the Equal

Protection Clause permit the designation of restroom use by sex. Indeed, "[a]cross societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females." *G.G. ex rel. Grimm* v. *Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 734 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part), *vacated and remanded*, 580 U.S. 1168 (2017).

Such practices were recorded in the Ancient Roman, Greek, Japanese, and Egyptian baths. W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 YALE L. & POL'Y REV. 227, 259–60 (2018). The restroom has long been treated as a "unique public space, not as space just like any other. The key reason for the separation was safety and privacy." *Id.* at 288.

Separating restrooms by biological sex has been an accepted practiced throughout United States history as well. *Id.* at 271–72. State laws separating bathrooms by sex "were among the earliest state-wide attempts to protect women from workplace sexual harassment." *Id.* at 279. One of the "leading reasons behind women's demands for separate restrooms" was that "women needed a physically safe public space." Kevin Stuart & DeAnn Barta Stuart, *Behind Closed Doors: Public Restrooms and the Fight for Women's Equality*, 24 TEX. REV. L. & POL. 1, 28 (2019).

More fundamentally, "[t]he desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *York* v. *Story*, 324 F.2d 450, 455 (9th Cir. 1963);

see also *Brannum* v. *Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (recognizing constitutional right to "shield one's body from exposure to viewing by the opposite sex" in school locker rooms); *Forts* v. *Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980) (noting privacy interest "entitled to protection concerns the involuntary viewing of private parts of the body by members of the opposite sex"); *Strickler* v. *Waters*, 989 F.2d 1375, 1387 (4th Cir. 1993) ("[W]hen not reasonably necessary, exposure of a prisoner's genitals to members of the opposite sex violates his constitutional rights.").

Public school is no different. "That some students in a state of partial undress may experience embarrassment, shame, and psychological injury in the presence of students of a different sex is neither novel nor implausible." *Critchfield*, 137 F.4th at 925 (cleaned up) (citing *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996)).

As with SB1, Proviso 1.114 "does not prohibit conduct for one sex that it permits for the other." *Skrmetti*, 145 S. Ct. at 1831. Under the Proviso, both sexes are equally prohibited from using restrooms of the opposite sex, and both sexes are equally permitted to use restrooms that are designated for use by their sex. See General Appropriations Bill for Fiscal Year 2025–2026, Part IB § 1.114 (https://tinyurl.com/y429yczf). As with SB1, Proviso 1.114 *mentions* sex but doesn't *discriminate* on the basis of sex. That distinction matters. The Supreme Court "has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny." *Skrmetti*, 145 S. Ct. at 1829. Accordingly, to the extent Respondents' Equal Protection claim rests on alleged discrimination based on sex, the claim necessarily fails because the "application of [the Proviso] does not turn on sex." *Id.* at 1831.

The Proviso also lacks an "invidious discriminatory purpose." *Skrmetti*, 145 S. Ct. at 1832 (cleaned up). The South Carolina General Assembly continued historical precedent, motivated by longstanding concerns about the need for privacy and safety in restrooms, by enacting the Proviso. The very title of the Proviso section in question is "Student Physical Privacy." See General Appropriations Bill for Fiscal Year 2025–2026, Part IB § 1.114 (https://tinyurl.com/y429yczf). And the language of the Proviso provides that public schools are to "take reasonable steps to ensure that all restrooms and changing facilities provide its users with *privacy from members of the opposite sex*." *Id.* at § 1.114(C)(1) (emphasis added); see also *id.* at § 1.114(C)(3) (referring repeatedly to the need for and protection of "private areas" of schools). Importantly, this Proviso "does *not* prohibit districts from providing reasonable accommodation to a student when the student's parent has requested on the student's behalf, such as access to a single-occupancy staff restroom." See Memorandum, *Guidance on Budget Proviso 1.120* (July 23, 2024) (https://tinyurl.com/3j9wcmr7).

Even Minor Respondent admits that legislators who spoke in favor of the Proviso on the Senate Floor "explained the purpose of Proviso 1.120" as being "safety and privacy."[2] *Doe*, C.A. No. 2:24-6420-RMG, ECF No. 9-1 at 11. Clearly, privacy is at the

[2] Minor Respondent later claimed such statements were rooted in "baseless gender-based, anti-transgender stereotypes." *Doe*, C.A. No. 2:24-6420-RMG, ECF No. 9-1 at 25. But as in *Skrmetti*, the statements "to which the plaintiffs point do not themselves evince sex-based stereotyping." *Skrmetti*, 145 S. Ct. at 1832. Even if the Court agrees with Minor Respondent's characterization of individual legislators' comments on the Proviso, the statements of a few individuals do not show animus more broadly throughout the state legislature. *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 263 (1986). They certainly cannot show that the reason for the law's passage was the "bare desire" to harm transgender people. *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 535 (1973).

heart of the Proviso. And protecting students' privacy in school bathrooms is a reasonable (and important) governmental objective.

b. The Proviso doesn't discriminate on the basis of transgender status.

"[B]eyond the treatment of gender dysphoria, transgender status implicates several other areas of legitimate regulatory policy," including "access to restrooms." *Skrmetti*, 145 S. Ct. at 1852–53 (Barret, J., concurring). "[L]egislatures have many valid reasons to make policy in these areas, and so long as a statute is a rational means of pursuing a legitimate end, the Equal Protection Clause is satisfied." *Id.* at 1853.

Just as SB1 applied to all minors in Tennessee, *id.* at 1829, so, too, Proviso 1.114 applies to all students in South Carolina public school districts, regardless of their sex or gender identity. Proviso 1.114 prevents all biological boys—regardless of their gender identity—from going into girls' restrooms, and vice versa. It is designed to protect the privacy and safety of all students in a space that has historically been recognized as intimate and vulnerable. See *supra* at 19–23. That transgender individuals are incidentally affected by this restriction doesn't alter the analysis because "there is a 'lack of identity' between transgender status and the" Proviso's restroom restrictions. *Skrmetti*, 145 S. Ct. 1833.

Consistent with *Skrmetti*, the Proviso validly prohibits a form of gender transition as a treatment for gender dysphoria. Respondents' expert witness stated in her expert witness declaration that social gender transition is a form of treatment for gender dysphoria and often includes using restrooms that align with gender identity. *Doe*, C.A. No. 2:24-6420-RMG, ECF No. 9-3 at 12–13, ¶ 35. But just as states can

prohibit *medical* gender transition as a treatment for gender dysphoria, *Skrmetti*, 145 S. Ct. at 1831, they can also prohibit *social* gender transition (including multi-occupancy single-sex restrooms) as a treatment for gender dysphoria in public schools.

Specifically, *Skrmetti* found that a "prohibition on the prescription of puberty blockers and hormones to '[e]nabl[e] a minor to identify with, or live as, a purported identity inconsistent with the minor's sex,' is simply a prohibition on the prescription of puberty blockers and hormones to treat gender dysphoria, gender identity disorder, or gender incongruence." *Id*. at 1831 (cleaned up). Importantly, SB1 "does not exclude any individual from medical treatments on the basis of transgender status but rather removes one set of diagnoses—gender dysphoria, gender identity disorder, and gender incongruence—from the range of treatable conditions." *Id.* at 1833.

In the same way, Proviso 1.114 does not exclude any individual from using multiple occupancy single-sex bathrooms on the basis of transgender status but rather removes a use of bathrooms—social gender transition—from the range of appropriate uses. The state has wide latitude to do so.

Even if the Court finds that Proviso 1.114 classifies on the basis of biological sex, only the parameters of that classification are under review here, and such parameters are rationally related to a legitimate governmental interest. Indeed, an under-inclusiveness challenge to the contours of the Proviso's purported sex classifications warrants rational basis review. Minor Respondent does not dispute the ability of the South Carolina legislature to classify on the basis of biological sex. Minor Respondent merely disputes a particular designation as belonging to one sex or the

other. *Doe*, C.A. No. 2:24-6420-RMG, ECF No. 9-3 at 17–18. Where a court "is not asked to pass on the constitutionality of [a classification] itself," but is asked instead "to examine the parameters of the beneficiary class," the court engages in "a traditional 'rational basis' inquiry as applied to social welfare legislation." *Hoohuli* v. *Ariyoshi*, 631 F. Supp. 1153, 1159 (D. Haw. 1986).

And this Court has always taken a biological understanding of sex for granted. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 533 (1996); *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality op.); *Bostock* v. *Clayton Cnty., Georgia*, 590 U.S. 644, 655 (2020). That should be enough. *Cf. F.C.C.* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993) ("Where there are plausible reasons for Congress' action, our inquiry is at an end. This standard of review is a paradigm of judicial restraint." (citation and quotation marks omitted)). The Proviso satisfies rational basis review.

2. The Proviso survives even heightened scrutiny.

Even if this Court subjects the Proviso to heightened scrutiny, it easily passes. It does so by "advanc[ing] the important governmental objective of protecting students' privacy in school bathrooms and do[oing] so in a manner substantially related to that objective." *Adams*, 57 F.4th at 803; see also *Critchfield*, 137 F.4th at 924 ("[T]he State's interest in protecting students' bodily privacy is an important objective for purposes of intermediate scrutiny."). Indeed, "school policies that allow access to gender neutral single occupancy bathrooms are appropriate and provide a reasonable and compassionate solution to the bathroom needs of both gender congruent and gender incongruent students," including privacy for both. App. 109a (Expert Witness

Declaration of Dr. Geeta Nangia, M.D.).

The Proviso "does not include any of the hallmarks of sex discrimination. It doesn't prefer one sex over the other; include one sex and exclude the other; provide benefits to one sex and not the other; or apply one rule to one sex and not the other. It distinguishes between the two sexes, but it does not advantage, or disadvantage, either." *Roe* v. *Critchfield*, 2023 WL 6690596, at *7 n.11 (D. Idaho Oct. 12, 2023). It doesn't stop schools from making accommodations for transgender students, such as gender-neutral single-occupancy restrooms, as at Minor Respondent's middle school. As such, "there is no evidence of purposeful discrimination against transgender students" by the legislature, and "any disparate impact that the bathroom policy has on those students does not violate the Constitution." *Adams*, 57 F.4th at 811.

This Proviso resoundingly reflects the will of the South Carolina General Assembly, and therefore the will of the people of South Carolina, due to near unanimous approval in both chambers of the legislature. When Proviso 1.120 was introduced as Amendment 48 to the final budget bill (H. 5100) and was debated in the Senate, it survived a motion to table by a decisive vote margin of 30-7. South Carolina Legislature, "Vote History: H 5100 - Session 125 (2023-2024)" (https://tinyurl.com/zt3769bb). Immediately thereafter, the Senate held a third reading of the Budget Bill that passed without any votes in objection. *Id.* The conference report including Proviso 1.120 passed the Senate with a vote of 41-0 and the House with a vote of 96-13. *Id.*

Ultimately, this policy choice is one in which the Court must defer to the appropriate legislative body. "[W]e leave questions regarding its policy to the people,

their elected representatives, and the democratic process." *Skrmetti*, 145 S. Ct. at 1837. Otherwise, "[t]he prospect of courts second-guessing legislative choices in this area should set off alarm bells." *Id.* at 1852 (Barrett, J. concurring).

C. The Proviso comports with Title IX.

1. Title IX does not prohibit the Proviso.

Under Title IX, "[n]o 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) (emphasis added). And as this Court observed in *Skrmetti*, a law "clearly does not classify *on the basis of sex*" when it "does not prohibit conduct for one sex that it permits for the other." *Id.* at *9–10 (emphasis added). Proviso 1.114 does not prohibit conduct for one sex that it permits for another (both sexes are equally permitted to use restrooms designated for their respective sex), so Proviso 1.114 clearly does not discriminate or even classify on the basis of sex under Title IX.

But even if the Proviso classified on the basis of sex, Section 1686 of Title IX expressly permits educational institutions to "maintain[] separate living facilities for the different sexes." 20 U.S.C. § 1686. Respondents do not dispute that Title IX allows schools to maintain separate restrooms for different sexes; they only dispute the parameters of what "sex" means. Yet "from the time of the enactment of Title IX and its implementing regulations, the scheme has authorized schools to maintain sex-segregated facilities, and contemporary dictionary definitions commonly defined 'sex' in terms that refer to students' sex assigned at birth." *Critchfield*, 137 F.4th at 929; see

also *Bridge*, 711 F. Supp. 3d at 1299 ("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. It is up to Congress to change that meaning, not this Court.").

Because "Title IX funding is distributed to the states pursuant to the Spending Clause of the Constitution," Congress must attach any conditions to the acceptance of such federal funds "unambiguously." *Critchfield*, 137 F.4th at 928–29 (cleaned up). To the extent any Applicants received any Title IX funds, they did not have "adequate notice, when they accepted federal funding, that Title IX prohibits the exclusion of transgender students from restrooms, locker rooms, shower facilities, and overnight lodging corresponding to their gender identity." *Id.* at 929.

Applicants' reasonable understanding of Title IX is supported by recent actions of the current presidential administration. Since January 20, 2025, the Executive branch has issued Executive Orders and actions putting federal funding at risk if schools do not designate such facilities for use based on biological sex or "sex assigned at birth."[3] Applicants plain reading of the statutory language was reasonable.

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[3] See, *e.g.*, "U.S. Department of Education Finds Five Northern Virginia School Districts in Violation of Title IX," U.S. Department of Education Press Release, July 25, 2025 (where "OCR determined that the Divisions' policies, which allow students to access intimate, sex-segregated facilities based on the students' subjective 'gender identity,' violate Title IX of the Education Amendments of 1972.") (https://tinyurl.com/bv97zrdd) (last visited August 18, 2025); see also Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025) ("Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government") (concluding that Title IX doesn't "require[] gender identity-based access to single-sex spaces" and instructing that "Federal funds shall not be used to promote gender ideology.") (https://tinyurl.com/bdet337y) (last visited August 25, 2025).

2. The Fourth Circuit's view of Title IX has been widely rejected by other federal courts, including this Court.

In its order enjoining the Proviso as to Minor Respondent pending appeal, the Fourth Circuit asserted that Title IX prevents South Carolina from separating bathrooms based on biological sex and that the Proviso violates Title IX by unlawfully discriminating on the basis of sex. App. 10a. But most federal courts to consider that issue disagree. The Eleventh Circuit affirmatively held that a single-sex bathroom policy did not violate Title IX. *Adams by & through Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022). A court in the Tenth Circuit recently came to the same conclusion. *Bridge*, 711 F. Supp. 3d at 1299. As did a court in the Sixth Circuit. *Williamson Cnty. Bd. of Educ.*, 2024 WL 4046581, at *5. And the Ninth Circuit recently affirmed a lower court's denial of a preliminary injunction under Title IX as to a state statute requiring single-sex bathrooms and locker rooms in public schools. *Critchfield*, 137 F.4th at 932. The Fourth and Seventh Circuits are outliers. See *Grimm*, 972 F.3d 586; see also *A.C. by M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023), *cert. denied sub nom. Metro. Sch. Dist. of Martinsville* v. *A. C.*, 144 S. Ct. 683 (2024). Yet even those circuits are currently facing appeals that call their outlier positions into question. *Doe*, No. 25-1787 (4th Cir.); *D.P. by A.B. v. Mukwonago Area Sch. Dist.*, No. 23-2568, 2025 WL 1794428, at *1 (7th Cir. June 30, 2025) (granting rehearing to consider whether Seventh Circuit caselaw similar to *Grimm* should be overturned in light of *Skrmetti*).

Additionally, the U.S. Department of Education previously attempted to require all public schools to abandon single-sex bathroom policies under its

interpretation of Title IX. But earlier this year, that requirement was vacated by court order, making the agency rule invalid nationwide. *Tennessee* v. *Cardona*, 2:24-cv-00072-DCR-CJS, ECF No. 143 (E.D. KY Jan. 9, 2025). Even before that order, the Title IX rule was already enjoined in every state where it was challenged. See *Alabama* v. *U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *7 n.8 (11th Cir. Aug. 22, 2024); *Oklahoma* v. *Cardona*, No. CIV-24-00461-JD, 2024 WL 3609109 (W.D. Okla. July 31, 2024); *Arkansas* v. *DOE*, No. 4:24-cv-636, Doc. 54 (E.D. Mo. July 24, 2024); *Tennessee* v. *Cardona*, Doc. 41-1, No. 24-5588 (6th Cir. July 17, 2024); *Louisiana* v. *DOE*, No. 24-30399 (5th Cir. July 17, 2024); *Texas* v. *USA*, No. 2:24-cv-86, Doc. 48, Op. at 8–15 (N.D. Tex. July 11, 2024); *Carroll Indep. Sch. Dist.* v. *DOE*, No. 4:24-cv-461, Doc. 43, Op. at 4-11 (N.D. Tex. July 11, 2024); *Kansas* v. *Dep't of Educ.*, No. 5:24-cv-04041, Docs. 53-54 (D. Kan. July 2, 2024).

In its opinion enjoining the Title IX rule in South Carolina and other states pending appeal, a reason given for granting the injunction was the existence of state bathroom laws that would conflict with the rule. *Alabama*, 2024 WL 3981994, at *7 n.8. And even the U.S. Department of Education historically "has interpreted 'sex' in Title IX to mean biological sex and has allowed schools to have separate bathrooms based on biological sex for five decades." *Id.* at *7.

Further, this Court has said the gender-identity-based bathroom provision of the Title IX Rule is likely unlawful. "Importantly, all Members of the [Supreme] Court today accept that the plaintiffs were entitled to preliminary injunctive relief as to

three provisions of the rule," including § 106.31(a)(2) of the Rule addressing Title IX's application in sex-separated spaces. *Louisiana*, 603 U.S. at 867.

Other courts have considered the scope of Title IX outside of the bathroom context and still concluded that it does not apply to gender identity. See, *e.g.*, *Texas* v. *Becerra*, 739 F. Supp. 3d 522, 533 (E.D. Tex. 2024), *modified on reconsideration*, No. 6:24-CV-211-JDK, 2024 WL 4490621 (E.D. Tex. Aug. 30, 2024);*Tennessee* v. *Becerra*, 739 F. Supp. 3d 467, 482 (S.D. Miss. 2024). Title IX does not cover gender identity.

3. *Skrmetti* provides further support for Title IX's moorings in biological sex.

Skrmetti also informs the analysis of Minor Respondent's Title IX claim. The Court reaffirmed that sex is distinct from gender identity—biologically and legally. Indeed, this Court has consistently recognized that "sex" refers to biological sex and not gender identity. See, *e.g.*, *Louisiana*, 603 U.S. at 867 (unanimously agreeing to preliminarily enjoin a federal agency rule that "newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity."); *Bostock*, 590 U.S. at 669 ("We agree that homosexuality and transgender status are distinct concepts from sex."). *Skrmetti* agreed. The Court defined "transgender" to mean that a person's "gender identity does not align with their biological sex." 145 S. Ct. at 1824. Thus, "a transgender boy" refers to an individual "whose biological sex is female but who identifies as male," and a "transgender girl" is an individual "whose biological sex is male but who identifies as female." *Id.* at 1830 n.2.

Skrmetti's analysis of *Bostock* is in accord. As the Court explained, SB1 allowed a biological girl to pursue medical treatment for a diagnosis consistent with the needs

associated with her biological sex, and changing the patient's sex to biological male does not change the analysis. *Skrmetti*, 145 S. Ct. at 1834. That's because, under SB1, a biological male can pursue medical treatment for a diagnosis consistent with the needs associated with his biological sex. *Id.* So too here. Proviso 1.114 permits a biological female student to use a multi-occupancy public school restroom in a manner that promotes privacy consistent with her sex, and changing the student's sex to male doesn't change the analysis. Even "[u]nder the logic of *Bostock*, then, sex is simply not a but-for cause of [Proviso 1.114's] operation." *Id.* at 1835.

III. The equities warrant a stay.

A. The injunction unjustifiably disrupts the status quo.

Minor Respondent sought an "injunction pending appeal"—not a stay. *Doe*, No. 25-1787, Dkt. 14-1. A stay "suspend[s] judicial alteration of the status quo," while an injunction judicially alters the status quo. *Nken* v. *Holder*, 556 U.S. 418, 430 (2009) (cleaned up). And the district court's earlier denial of motions without prejudice pending the outcome of *B.P.J.* did not set the status quo, state law did. After all, "it is the state's action—not any intervening federal court decision—that establishes the status quo." *Wise* v. *Circosta*, 978 F.3d 93, 98 (4th Cir. 2020) (*en banc*) (citing *Andino* v. *Middleton*, 141 S. Ct. 9 (2020) (mem.)). As lower courts have recognized, "[i]njunctions that alter the status quo are not granted unless extreme or very serious damage will result and are not issued in doubtful cases." *Roman* v. *Wolf*, 977 F.3d 935, 941 (9th Cir. 2020) (cleaned up); see also, *e.g.*, *Att'y Gen. of Okla.* v. *Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) (requiring a "heightened showing"). That's especially true when, as here, the district court has already refused an injunction pending appeal—

in such cases, the movant's request becomes one for a "partial summary reversal." *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235, 1235 (1972) (Rehnquist, J., in chambers) (refusing injunction even for statute later found unconstitutional).

This application seeks to *restore* the status quo, thereby preserving voters' will and protecting the privacy of South Carolina public school students while this case is litigated on appeal. Indeed, because Applicants have been ordered to affirmatively allow Minor Respondent to use opposite-sex restrooms, the Fourth Circuit's order constitutes a disfavored "mandatory" injunction. *Id.* at 1235. In addition to what was already a heavy burden for Minor Respondent, this type of injunction issues properly "only in the most unusual case," where "the applicants' right to relief [is] indisputably clear." *Id.*; see also *Turner Broad. Sys., Inc.*, 507 U.S. at 1301 (Rehnquist, J., in chambers) ("By seeking an injunction, applicants request that I issue an order *altering* the legal status quo. Not surprisingly, they do not cite any case in which such extraordinary relief has []been granted, either by a single Justice or by the whole Court.") (emphasis added). This case does not hit that mark. The Fourth Circuit had no basis to upend the status quo pending appeal.

B. The injunction intrudes upon the sovereignty, will, and public interest of South Carolina citizens.

Any injunction is an "extraordinary" event. *Winter*, 555 U.S. at 24. It should be even rarer when the injunction prevents a state from enforcing a validly enacted law. Indeed, courts are rightly hesitant to enjoin the "enforcement of a presumptively valid state statute." *Brown*, 533 U.S. at 1301. That's because "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it

suffers a form of irreparable injury." *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (cleaned up). The result here is that South Carolina voters suffer every day the Proviso is enjoined for no lawful reason. *Va. Ry. Co.* v. *Sys. Fed'n No. 40*, 300 U.S. 515, 551 (1937) (explaining how legislation is "the judgement" of elected representatives as "deliberately expressed in [the challenged] legislation").

And it overlooked that the Proviso, like similar presumptively constitutional state laws, reflects the policy preferences of the people on a challenging and sensitive issue. See *supra* at 22–23 (highlighting the privacy concerns explicitly addressed by the Proviso); see also *Adams*, 57 F.4th at 806–07 (highlighting public concerns addressed by bathroom restrictions).

The bottom line: the Proviso is a validly enacted law representing the people of South Carolina's considered judgment about the harms of allowing male students to use female restrooms and vice versa. After much debate, lawmakers chose to protect privacy and safety for students. The Fourth Circuit ignored the people's judgment and failed to defer to the public interest in favor of the preferences of one student.

C. The balance of harms supports staying the injunction.

"Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only to prevent irreparable injury which is clear and imminent." *Am. Fed'n of Lab.* v. *Watson*, 327 U.S. 582, 593 (1946) (cleaned up). Here, evidence of purported harm *supporting* the injunction largely focused on fear of not having the opportunity to use the restroom Minor Respondent prefers. *Doe*, No. 25-1787, Dkt. 14-1 at 11–12. But not being permitted to use a preferred public-school facility

is not an irreparable harm.[4] See, *e.g.*, *McGee* v. *Va. High Sch. League, Inc.*, 801 F. Supp. 2d 526, 531 (W.D. Va. 2011) (noting lower courts "have routinely rejected the notion that a student suffers irreparable harm by not being permitted to participate in interscholastic athletics."). The district court was right in declining to tinker with South Carolina law because of Minor Respondent's fears of that harm.

Even without an injunction, Minor Respondent has access to multi-occupancy girls' restrooms at school. And the accommodation of a single-stall restroom mitigates claims of irreparable harm. *Adams*, 57 F.4th at 810 ("The School Board sought to accommodate transgender students by providing them with an alternative—i.e., sex-neutral bathrooms," which "did not place a special burden on transgender students."). Potential stigma is also not a valid ground for an injunction. See, *e.g.*, *Peeples* v. *Brown*, 444 U.S. 1303, 1305 (1979) (Rehnquist, J., in chambers) (holding that fear of being "stigmatized" and "traumatic rejection" did not establish "the necessary irreparable injury" for an injunction); *Sampson* v. *Murray*, 415 U.S. 61, 91 (1974) (holding that "humiliation" and other alleged harms did not support injunction). So, even if Minor Respondent demonstrated a likelihood of success on the merits, the claim of irreparable harm was not enough for an injunction, either.

On the other hand, consider the harm the injunction causes to the privacy of opposite-sex students who must share a restroom with Minor Respondent.[5] After all,

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[4] Minor Respondent also failed to demonstrate that any alleged harassment or distress experienced at a prior school on account of gender identity was caused by the Proviso. See App. 51a-63a; see also App. 102a-109a.

[5] Enjoining the Proviso also conflicts with parents' ability to direct the upbringing of their children. "Due to financial and other constraints, … many parents have no

"courts have long found a privacy interest in shielding one's body from the opposite sex in a variety of legal contexts." *Adams*, 57 F.4th at 805. Protecting "students' privacy interest in school bathrooms" is "an important governmental objective." *Id.*

Additionally, students required to share facilities with transgender identifying students have reported suffering "embarrassment, humiliation, anxiety, fear, apprehension, stress," and "loss of dignity"—so much so that they have "avoid[ed] getting undressed in locker rooms" and worn "soiled, sweaty gym clothes under ... school clothes." *Students & Parents for Priv.* v. *Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891, 894–96 (N.D. Ill. 2019); see also, *e.g.*, *Parents for Priv.* v. *Barr*, 949 F.3d 1210, 1219 (9th Cir. 2020) ("As a consequence of their fear of exposure to [a biological girl identifying as a boy], some cisgender boys began using the restroom as little as possible while at school."); *Doe No. 1* v. *Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 3:22-cv-337, 2023 WL 5018511, at *5 (S.D. Ohio Aug. 7, 2023) (to avoid encountering members of the opposite sex in school bathrooms, a female student "avoid[ed] using the bathroom," which "cause[ed] her anxiety and emotional distress.").

Moreover, students who dare to express discomfort with sharing a restroom with members of the opposite sex face possible discipline, which could follow them on

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choice but to send their children to a public school." *Mahmoud* v. *Taylor*, 145 S. Ct. 2332, 2351 (2025). As a result, "the right of parents to direct the religious upbringing of their children would be an empty promise if it did not follow those children into the public school classroom." *Id.* That's why this Court has "recognized limits on the government's ability to interfere with a student's religious upbringing in a public school setting." *Id.* Here, the injunction "present[s] as a settled matter a hotly contested view of sex and gender that sharply conflicts with the religious beliefs that [many] parents wish to instill in their children." *Id.* at 2354. For this additional reason, the Court should stay the injunction pending appeal.

their academic records. For example, just this past week, two teen boys in the Fourth Circuit were reportedly suspended from a public high school after questioning why a female student who identifies as male was in the boys' locker room. FOX NEWS, Michael Dorgan, "Virginia teens suspended for questioning transgender student about being in boys locker room," Aug. 19, 2025 (https://tinyurl.com/bp64xp9r). And another school district in the Fourth Circuit recently cited the injunction pending appeal in this case to support its enforcement of Title IX as understood by *Grimm*. Alexandria City Public Schools letter to U.S. Department of Education, at 2 n.1, Aug. 15, 2025 (https://tinyurl.com/yexer5s3). Such fears are not hypothetical.

And while Minor Respondent asks for a lone exception, the underlying rule has no limiting principle. See *Elgin* v. *Dep't of Treasury*, 567 U.S. 1, 15 (2012) (declining to adopt a rule that depended on "amorphous distinctions" between "facial and as-applied challenges"). If this Court does not stay the injunction, what should schools say to a male student who identifies as female but takes no other steps to reflect that identity? The injunction offers no reason to exclude such students if Applicants must offer an exception to Minor Respondent. And given the injunction, other schools may be driven to allow students to use opposite-sex restrooms. Choices like these could in turn deter gender congruent students from using the restroom *anywhere* in public schools. This Court should consider all "the public consequences" that leaving the injunction in place would bring. *Winter*, 555 U.S. at 24 (cleaned up). The best balance comes from applying the Proviso consistently to everyone while the appeal is pending.

Moreover, "the presumption of constitutionality" of legislative enactments is "an equity to be considered in favor of applicants in balancing hardships." *Walters*, 468 U.S. at 1324 (Rehnquist, J., in chambers). And this Court's "ordinary practice" "[w]hen courts declare state laws unconstitutional and enjoin state officials from enforcing them … is to suspend those injunctions from taking effect pending appellate review." *Strange* v. *Searcy*, 574 U.S. 1145 (2015) (Thomas, J., dissenting from denial of the application for a stay). Yet the Fourth Circuit gave no weight to how States "take care" to "comply with the Constitution … when they enact their laws." *Id.* (cleaned up). This Court should correct that error.

IV. This Court is likely to grant review.

A stay is also warranted to the extent the Court considers whether there is "a reasonable probability" that it would grant certiorari if the lower court's judgment were affirmed on appeal. *Merrill* v. *Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring, joined by Alito, J.). In the past four years, this Court has twice declined to grant certiorari in challenges to school policies designating restroom use by biological sex. *Gloucester Cnty. Sch. Bd.* v. *Grimm*, 141 S. Ct. 2878 (2021); see also *Metro. Sch. Dist. of Martinsville* v. *A. C.*, 144 S. Ct. 683 (2024). But in *Grimm*, Justices Thomas and Alito would have granted cert. *Grimm*, 141 S. Ct. at 2878. And Justice Barrett's recent concurrence in *Skrmetti* (joined by Justice Thomas) voiced the belief that transgender "access to restrooms" is an area of "legitimate regulatory policy" that should be subject to rational basis review. *Skrmetti*, 145 S. Ct. at 1852–53. More fundamentally, the logic of the majority opinion in *Skrmetti* is irreconcilable with

Grimm, making this Court's review of the Fourth Circuit's holding in *Grimm* timely. Certiorari will ultimately grant clarity to school districts that refuse to comply with the U.S. Department of Education's guidance on Title IX. See, *e.g.*, *supra* at 39.

Moreover, a circuit split warrants this Court's ultimate review on the merits. As of this date, the courts of appeals are split 2-2 as to whether policies that separate sex-specific spaces by biological sex violate Equal Protection and Title IX. See *Adams*, 57 F.4th 791 (Eleventh Circuit found no violation); *Critchfield*, 137 F.4th at 932 (Ninth Circuit found no violation); *Martinsville*, 75 F.4th 760 (Seventh Circuit found violation); *Grimm*, 972 F.3d 586 (Fourth Circuit found violation). The two outliers are both facing current challenges at the Fourth Circuit and the Seventh Circuits, respectively. *Doe*, No. 25-1787 (Fourth Circuit); *D.P. by A.B.*, 2025 WL 1794428, at *1 (Seventh Circuit). And district courts in the Sixth and Tenth Circuits found no violation. *Bridge*, 711 F. Supp. 3d at 1299 (Tenth Circuit); *Williamson Cnty. Bd. of Educ.*, 2024 WL 4046581, at *5 (Sixth Circuit).

Additionally, seven months after declining to grant cert in *Martinsville*, this Court unanimously enjoined a provision of a federal agency rule that "newly defines sex discrimination [under Title IX] to include discrimination on the basis of sexual orientation and gender identity." *Louisiana*, 603 U.S. at 867. The *Martinsville* and *Grimm* holdings (indeed, the Fourth Circuit's ruling in this case), conflict with this Court's view of Title IX. And it conflicts with other federal courts that enjoined the Title IX rule before it even reached this Court, including the Fifth, Sixth, and Eleventh Circuits, and district courts in the Eighth and Tenth Circuits. See *supra* at 30.

This Court should restrain the Fourth Circuit to the lawful exercise of its equitable power with a stay pending appeal. Doing so would protect South Carolina's sovereignty, the privacy of public school students in South Carolina, and the public interest of those whose voiced was heard by passage of the Proviso. If the Fourth Circuit later rules for Respondents on the merits of their claims, then this case—on a developed testimonial record that includes expert testimony—would present an optimal vehicle for the Court to resolve the important constitutional questions at issue.

* * * *

This case implicates a question fraught with emotions and differing perspectives. That is all the more reason to defer to state lawmakers pending appeal. *Andino*, 141 S. Ct. at 10 (Kavanaugh, J., concurring). The decision was the South Carolina legislature's to make. The end of this litigation will confirm that it made a valid one. In the meantime, the Court should set aside the Fourth Circuit's injunction and allow South Carolina's validly enacted law to go back into effect.

The role of judges "is not 'to judge the wisdom, fairness, or logic' of the law before [them], but only to ensure that it does not violate" protections under the law. *Skrmetti*, 145 S. Ct. at 1837 (cleaned up). Because Proviso 1.114 does not, this Court should "leave questions regarding its policy to the people, their elected representatives, and the democratic process." *Id.*

CONCLUSION

The Court should stay the Fourth Circuit's injunction pending appeal.

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