No. 25A234

IN THE
Supreme Court of the United States

STATE OF SOUTH CAROLINA, et al.,

Applicants,

v.

JOHN DOE, et al.,

Respondents.

On Emergency Application for Stay from the
United States Court of Appeals for the Fourth Circuit

BRIEF OF INDIANA, 23 OTHER STATES, AND THE ARIZONA LEGISLATURE AS AMICI CURIAE IN SUPPORT OF APPLICANTS

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No child who attends public school should have to worry about whether she can safely and privately use the toilet, change her clothes, or shower after practice. As this Court has recognized, public educational institutions must be able to adopt measures "necessary to afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (Ginsburg, J.). Amici States, all of which have schools and universities, have a strong interest in ensuring that their institutions can adopt such sensible policies to protect student welfare.

In the last decade, however, the Fourth Circuit began mandating policies that deprive schoolchildren of privacy during vulnerable moments. In *Grimm v. Gloucester County School Board,* 972 F.3d 586 (4th Cir.), *reh'rg denied*, 976 F.3d 399 (4th Cir. 2020), *cert denied,* 141 S. Ct. 2878 (2021), a sharply divided panel of the Fourth Circuit required a school to let a girl access a multi-occupancy restroom reserved for the opposite sex because the student, though female, identified as a boy. And the Fourth Circuit has since expanded *Grimm*, wielding its logic to invalidate regulations on gender-transition procedures and providing for sex-separated sports teams. *See Kadel v. Folwell*, 100 F.4th 122, 143 (4th Cir. 2024), *cert. granted, judgment vacated*, Nos. 24-90, 24-99 (U.S. June 30, 2025); *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 556 (4th Cir. 2024), *cert. granted.*, No. 24-43 (U.S. July 3, 2025).

From the start, *Grimm* was wrongly decided. As Judge Niemeyer explained, the *Grimm* majority disregarded well "established principles" and Title IX's text to "advance[] policy preferences." *Grimm,* 976 F.3d at 401 (Niemeyer, J., concurring in

the denial of rehearing en banc). Intervening developments confirm as much. In *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), this Court rejected *Grimm*'s view that any rule referencing sex-related concepts contains a sex-based classification, even if the rule applies equally to all children. In *Department of Education v. Louisiana*, 603 U.S. 866 (2024) (per curiam), this Court let stand injunctions that blocked the federal government from forcing States to adopt the very type of bathroom-access policies that *Grimm* requires schools to adopt. And, of course, this Court recently granted certiorari to review another Fourth Circuit decision adopting *Grimm*'s logic. *See B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, No. 24-43 (U.S. July 3, 2025).

Other courts increasingly understand *Grimm* cannot be reconciled with this Court's precedents. Both the Ninth and Eleventh Circuits have held that public schools may maintain separate bathrooms for boys and girls and require students to use the bathroom corresponding to their sex. *See Roe v. Critchfield*, 137 F.4th 912 (9th Cir. 2025); *Adams v. Sch. Bd. of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (en banc). And just recently, the Seventh Circuit granted rehearing to consider whether it should overrule its own version of *Grimm* in light of this Court's decision in *Skrmetti*. *See D.P. by A.B. v. Mukwonago Area Sch. Dist.*, No. 23-2568, 2025 WL 1794428, at *1 (7th Cir. June 30, 2025). Clearer signs that *Grimm*'s days are numbered are hard to imagine. And yet the Fourth Circuit majority in this case acted as if nothing has changed, declining even to consider whether *Skrmetti* impacts *Grimm*'s analysis. The Fourth Circuit's conclusion that the plaintiffs here are likely to succeed on the merits cannot be squared with the current state of the law.

This Court should grant the requested stay. The Fourth Circuit's reliance on *Grimm* is wrong and risks endangering schoolchildren while placing schools themselves in an untenable position. If schools allow boys who identify as girls to use restrooms and changing facilities reserved for girls, (or vice versa) schools will risk liability for compromising privacy and safety. And if schools attempt to preserve girls' spaces for girls, and boys' spaces for boys, schools in the Fourth Circuit will risk liability under *Grimm*.

SUMMARY OF THE ARGUMENT

South Carolina's General Appropriations Bill requires schools to provide multi-use restrooms and locker rooms designated for either boys or girls. H. 4025, General Appropriations Bill for Fiscal Year 2025–2026, § 1.114, https://tinyurl.com/y429yczf. "Any public school restrooms and changing facilities that are designated for one sex shall be used only by members of that sex." § 1.114(C)(1). The plaintiff here, John Doe, has not challenged South Carolina's policy of maintaining "sex-specific school restrooms," Dist. Ct. Dkt. 1 at 20. Rather, Doe takes issue with the fact that South Carolina's law generally provides that "no person shall enter a restroom or changing facility that is designated for one sex unless he or she is a member of that sex." H. 4025, § 1.114(C)(1). Put another way, Doe challenges *the absence of an exception* for transgender-identifying students who would prefer to "us[e] sex-specific school restrooms consistent with their gender identities." Dist. Ct. Dkt. 1 at 20. But neither the Equal Protection Clause nor Title IX requires South Carolina to make such an exception.

Under the Equal Protection Clause, this should be a simple case. The Fourth Circuit agrees that schools can maintain separate bathrooms for boys and girls. It thus follows that schools can enforce policies providing for single-sex bathrooms against students who would prefer to use a bathroom designated for the opposite sex. The Fourth Circuit claims that enforcing such policies against all students offends heightened scrutiny. As this Court's decision in *Skrmetti* explains, however, a policy that applies to boys and girls alike does not classify on sex or transgender identity. South Carolina did not draw any impermissible lines when it decided that no one should be able to use a bathroom designated for the opposite sex.

Title IX does not condemn South Carolina's choice either. Title IX expressly permits schools to maintain separate living facilities, including bathrooms, for the sexes. The Fourth Circuit stumbled over the meaning of "sex," suggesting it might refer to gender identity. But Title IX's text refutes such a notion. Moreover, as this Court's decisions again make clear, the challenged portion of South Carolina's law does not classify based either on sex or gender identity. And even if the meaning of "sex" were debatable, a putative ambiguity cannot be wielded to enjoin South Carolina's law. Title IX is Spending Clause legislation, which means only unambiguous statutory mandates are enforceable. Suffice it to say that, when Congress enacted Title IX in 1972, no one had notice that schools accepting federal funds would have to allow a subset of students to access bathrooms reserved for the opposite sex.

The Court should not delay in granting relief. South Carolina's law furthers important state interests. Students must have private spaces that allow them to use

the toilet, change, and shower without exposing themselves to the opposite sex—something that the Fourth Circuit's injunction undermines. Leaving the injunction intact will place South Carolina schools in an impossible position. Schools will have to choose between risking the loss of federal funding under Title IX and exposing themselves to liability under Fourth Circuit precedent. The Court should stay the Fourth Circuit's latest attempt to impose its preferred policies on the States.

ARGUMENT

I. The Equal Protection Clause Permits Schools To Protect Students' Safety and Privacy by Maintaining Sex-Specific Facilities

It is common ground that the Equal Protection Clause permits sex-separated bathrooms, locker rooms, and overnight accommodations "to afford members of each sex privacy from the other sex." *Virginia*, 518 U.S. at 550 n.19. That principle should be dispositive here. As this Court recently reminded lower courts, "'[n]o axiom is more clearly established in law, or in reason, than that . . . wherever a general power to do a thing is given, every particular power necessary for doing it is included.'" *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2306 (2025) (quoting The Federalist No. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961)). Thus, if the Constitution permits a school to direct boys to use one bathroom and girls another, a school must be able to enforce its policy against girls who would prefer to use a boys' bathroom and boys who would prefer to use a girls' bathroom. Using sex to determine who can access a bathroom reserved for a single sex is "the ordinary and appropriate means of enforcing" a policy of maintaining sex-separated bathrooms. *Id.* at 2307.

A. Under *Skrmetti*, South Carolina need not make additional exceptions to its policy of maintaining sex-specific facilities

Not so fast, the Fourth Circuit says: Under *Grimm*, South Carolina law discriminates on the basis of sex because the law "cannot be stated without referencing sex." *Grimm*, 972 F.3d at 608 (quoting *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017)). But traditional equal-protection principles establish that a policy classifies on the basis of sex, and thus triggers heightened scrutiny, only where the policy "place[s] a benefit within reach of one sex and out of reach of the other" or "burden[s] one sex in a way it ha[s] not burdened the other." *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, 121 F.4th 604, 616 (7th Cir. 2024); *see Skrmetti*, 145 S. Ct. at 1831. South Carolina's law does not create such uneven burdens. Simply put, the law applies to all students the same regardless of sex or gender identity.

This Court's decision in *Skrmetti* makes that conclusion inescapable. In *Skrmetti*, this Court decided that a Tennessee law—which barred "certain medical treatments" for minors "to treat gender dysphoria, gender identity disorder, or gender incongruence"—did not contain a sex-based classification because none of the law's limitations "turn[ed] on sex." 145 S. Ct. at 1829, 1830–31. Rather, the law prohibited "healthcare providers from administering puberty blockers and hormones to *minors* for certain *medical uses*, regardless of a minor's sex." *Id.* at 1829. True, Tennessee's law referenced "sex" in describing those medical uses. *Id.* But "mere reference to sex," the Court explained, is not "sufficient to trigger heightened scrutiny." *Id.* For

heightened scrutiny to apply, the law must "prohibit conduct for one sex that it permits for the other." *Id.* at 1831. Tennessee's law, however, applied equally to all minors.

By the same token, South Carolina's law does not classify by sex. The law references "sex." But it does not "prohibit conduct for one sex that it permits for the other." *Skrmetti*, 145 S. Ct. at 1831. No student—boy or girl—is permitted to use a bathroom or changing room inconsistent with his or her sex. Every student at every school is subject to the same restriction. Similarly, none of the law's limited exceptions turn on sex. What triggers those exceptions is the purpose for which a person seeks access, permitting a person to access a bathroom for "custodial or maintenance work," to "render[] medical assistance," or "during a natural disaster, emergency," or "serious threat to good order or student safety." H. 4025, § 1.114(C)(1)(a)–(c).

That the challenged portions of South Carolina's law are gender neutral holds true even if one embraces the notion that gender identity is bound up with sex. No classifications based either on sex or gender identity appear in the portion of the law challenged here. Whatever a student's gender identity, South Carolina's law subjects the student to the same rule: "no person shall enter a restroom or changing facility that is designated for one sex unless he or she is a member of that sex." H. 4025, § 1.114(C)(1). A boy who identifies as transgender, no gender, or some other identity can no more access a multi-occupancy girls' bathroom than a boy who identifies as a boy (unless of course the boy is seeking shelter from a natural disaster or invoking

another sex-neutral exception). Policies that subject all minors to the same set of rules do not offend the Equal Protection Clause. *See Skrmetti*, 145 S. Ct. at 1833–34.

B. *Grimm*'s contrary mandate cannot be squared with *Skrmetti*

In issuing an injunction against South Carolina's law, the Fourth Circuit majority did not address *Skrmetti* or the traditional equal-protection principles it applied. The majority treated *Grimm* as "the law." App.018a–019a. One panel member wrote separately to state that he thought this "Court's decision in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), has little to say about the issues *Grimm* addressed." App.023a (Diaz, C.J., concurring). That could not be more wrong.

To start, *Skrmetti* directly rejects *Grimm*'s premise that "mere reference" to sex triggers heightened scrutiny. *Skrmetti*, 145 S. Ct. at 1829. Under *Skrmetti*, a law triggers heightened scrutiny only if the law "prohibit[s] conduct for one sex that it permits for the other." *Id.* at 1831. The portion of the South Carolina law challenged here does not include such a prohibition; it applies "regardless of whether the [student] is a boy or a girl." *K.C.*, 121 F.4th at 617. Under it, all students must use the bathroom consistent with their sex unless one of a handful of sex-neutral exceptions applies. Saying that South Carolina's law requires schools to have separate boys' and girls' bathrooms confuses the issue. Doe does not seek to have all school bathrooms made coed; Doe accepts that bathrooms should be separated by sex. What Doe challenges is the provision of South Carolina's law providing that "no person shall enter a restroom or changing facility that is designated for one sex unless he or she is a

member of that sex." H. 4025, § 1.114(C)(1). As explained above, however, that provision does not classify by sex. It imposes the same rule of conduct on boys and girls.

Skrmetti also undercuts *Grimm*'s sex-stereotyping rationale. *Grimm* asserted that requiring all students to use the bathroom consistent with their sex "reflect[s] 'stereotypic notions." 972 F.3d at at 610. In *Skrmetti*, however, this Court explained that "a law that *classifies on the basis of sex* may fail heightened scrutiny if the classifications rest on impermissible stereotypes." 145 S. Ct. at 1832 (emphasis added). "But where a law's classifications are neither covertly nor overtly based on sex . . . we do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose." *Id.* Thus, where as here a law applies equally to both sexes, the law cannot be invalidated for supposedly perpetuating some stereotype. That makes sense. The Equal Protection Clause exists to guard against impermissible "legislative classifications"—not to enshrine particular policy outcomes. *Id.* at 1828.

Moreover, laws like South Carolina's that refuse to make special exceptions for transgender-identifying students do not rest upon outmoded stereotypes. It is axiomatic that "[p]hysical differences between men and women . . . are enduring," making the need for sex-separated spaces enduring as well. *Virginia*, 518 U.S. at 533; *see id.* at 550 n.19 (noting that the admission of women would entail the need for sex-separated spaces). Multi-use bathrooms in public schools are designated for a single sex precisely because it is "especially important for school-aged children who are still developing" to have the ability to shield their "bodies" from "students of the opposite

sex." *Roe*, 137 F.4th at 924. Even *Grimm* conceded that "students have a privacy interest in their body when they go to the bathroom." 972 F.3d at 613.

Nor is it constitutionally impermissible to recognize that sex is distinct from gender identity. *Contra Grimm*, 972 F.3d at 609–10. Recognizing that there is a "basic biological difference[]" between someone who is a boy and a girl who identifies as a boy is not "stereotyp[ing]." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001). Again, *Skrmetti* drives the point home. It rejected the argument that Tennessee engaged in sex stereotyping by prohibiting minors from accessing medications that would enable a minor to express an "identity inconsistent with the minor's sex." 145 S. Ct. at 1831 (quoting Tenn. Code Ann. § 68-33-103(a)(1)). Sex, the Court understood, is a biological reality independent of identity. *Grimm* simply misapprehended what constitutes a stereotype—and more importantly *when* courts should conduct a stereotyping analysis—in suggesting that a sex-neutral rule is somehow guilty of stereotyping.

Skrmetti also forecloses any notion that laws like South Carolina's are inherently "'marked by misconception and prejudice'" towards transgender-identifying students. *Grimm*, 972 F.3d at 615. Again, laws like South Carolina's do "not classify on the basis of transgender status." *Skrmetti*, 145 S. Ct. at 1833. South Carolina's law does not turn on gender identity any more than it turns on sex: "no" student—regardless of gender identity—may "enter a restroom or changing facility that is designated for one sex unless he or she is a member of that sex." H. 4025, § 1.114(C)(1). Indeed, that across-the-board rule distinguishes South Carolina's law from the practice challenged in *Grimm*. In *Grimm*, the school "did not create a policy" that applied the same

to all transgender-identifying students. 972 F.3d at 615. But South Carolina did exactly that by ensuring that every person is granted a private, single-sex space in which to use the bathroom, change their clothes, and shower. Prohibiting all boys from accessing girls' bathrooms, and all girls from accessing boys' bathrooms, is precisely what a school must do to create single-sex spaces.

There is also no reason to suppose that laws like South Carolina's represent a "mere pretext" for covert classifications based on sex or gender identity. *Skrmetti*, 145 S. Ct. at 1833. As this Court explained in *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974), when a policy divides people into two groups, the question is whether women (or men) are part of both groups. If men and women are both part of one group, the law is not based on sex. *See Skrmetti*, 145 S. Ct. at 1833. Like the law at issue in *Skrmetti*, the law challenged here creates a category that contains both sexes and more than one gender identity. South Carolina's law generally bars all students—boys, girls, students who identify as transgender, and students who identify as something else—from accessing bathrooms reserved for the opposite sex. And the law's only exceptions apply to everyone. Any student—regardless of sex or gender identity—can enter a bathroom reserved for the opposite sex if a tornado strikes. So the law equally burdens and benefits students belonging to different sexes and identities, demonstrating that the law does not classify based on sex or gender identity.

II. Title IX Authorizes Schools To Protect Students' Safety and Privacy by Maintaining Sex-Specific Facilities

Just as the Fourth Circuit's equal-protection analysis in *Grimm* cannot survive *Skrmetti*, neither can its Title IX analysis. The central error running through

Grimm's analysis is its assumption that any legal document referencing "biological gender" classifies based on sex. 972 F.3d at 616–17. As *Skrmetti* demonstrates, that assumption cannot survive contact with reality. The law challenged in *Skrmetti* regulating gender-transition procedures for minors, and in describing what it regulated, referenced sex. Yet this Court held that the law did not classify based on sex, whether one analyzed it using equal-protection principles or the logic employed in cases like *Bostock v. Clayton County*, 590 U.S. 644 (2020). *See Skrmetti*, 145 S. Ct. at 1834.

Grimm fails as a matter of first principles too. *Grimm* faulted a school for requiring a transgender-identifying student to use the bathroom associated with the student's sex because that meant the student "could not use the restroom[s] corresponding with [the student's] gender." 972 F.3d at 618. But Title IX forbids discrimination "on the basis of sex"—not gender identity. 20 U.S.C. § 1681(a). When Title IX was enacted in 1972, the term "sex" referred to the "two divisions" of organisms, "designated male and female," classified "according to their reproductive functions." Sex, *The American Heritage Dictionary of the English Language* 1187 (1980); *see Adams* 57 F.4th at 812 (collecting definitions). "Sex" did not refer a subjective, changeable identification with an unbounded number of possible identities. Thus, a school does not violate Title IX by refusing to create exceptions to otherwise valid policies—exceptions that benefit only students who identify as transgender.

Section 1686 removes any doubt. That provision expressly authorizes schools to have "separate living facilities for the different sexes," 20 U.S.C. § 1686, which necessarily entails that schools may maintain "separate toilet, locker room, and

shower facilities on the basis of sex," 34 C.F.R. § 106.33. And if Title IX authorizes schools to maintain separate toilets, showers, and locker rooms for the sexes, it necessarily authorizes schools to "enforce[]" policies that direct students to use the bathroom, shower, or changing area designated for members of their sex. *Free Speech Coal.*, 145 S. Ct. at 2307. It would make a mockery of Title IX to bar schools from enforcing policies necessary to preserve the sanctity of single-sex quarters.

Grimm attempted to sidestep this problem by saying that schools may not "rely on [their] own" interpretations "of what 'sex' means" because the true question is whether a student may use "the sex-separated restroom matching [the student's] gender identity." 972 F.3d at 618. But schools do not "invent[] [a] classification" when they sort students based on sex (or, as the Fourth Circuit put it, their "biological gender"). *Id.* at 619. Sex is precisely how Title IX says students may be sorted. *See* 20 U.S.C. §§ 1681, 1686. As explained, contemporaneous dictionaries establish that "sex" in Title IX refers to a binary, biological characteristic rather than one of many possible identities that someone might declare over a lifetime. *See* p. 12, *supra*.

Statutory context reinforces the point. Repeatedly, Title IX speaks of institutions, organizations, and activities open to "only students of one sex" and those open to "students of both sexes." 20 U.S.C. § 1681(a)(2); *see* § 1681(a)(5), (a)(6), (a)(7), (a)(8), (a)(9), (b). And as examples of organizations and activities open only to "one sex," Title IX lists the "Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls," "father-son" activities, "mother-daughter" activities, and "beauty pageants." § 1681(a)(6)(B), (a)(8), (a)(9). Against the

backdrop of society in 1972, it is impossible to understand "sex" as referring to anything but the biological trait of being male or female.

Any suggestion that "sex" is ambiguous faces yet another problem: Congress enacted Title IX pursuant to its Spending Clause authority. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). "[L]egislation enacted pursuant to the spending power is much in the nature of a contract"—"in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The "legitimacy" of any condition "thus rests on whether the State[s] voluntarily and knowingly accept[] the terms of the 'contract.'" *Id.* "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* Consequently, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.*; *see Medina v. Planned Parenthood of S. Atl.*, 145 S. Ct. 2219, 2232 (2025).

Suffice it to say Congress never gave States and schools "adequate notice" in 1972 that accepting federal monies would compel schools to let males enter girls' "restrooms, locker rooms, shower facilities, and overnight lodging" whenever a male does not subjectively identify as a male. *Roe*, 137 F.4th at 929; *see Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *3 (6th Cir. July 17, 2024). Sex-separated bathrooms "preceded the nation's founding." *Adams*, 57 F.4th at 805 (quoting W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol'y Rev. 227, 229 (2019)). Yet Congress nowhere stated that it would penalize schools for having sex-segregated facilities or adhering to a

traditional, biologically based understanding of "sex." Indeed, it was not until more than half a century after Title IX's enactment that the federal government first adopted regulations that sought to redefine "sex" to include "gender identity"—and those regulations were promptly enjoined and ultimately vacated for exceeding the government's statutory authority. *See Dep't of Educ. v. Louisiana*, 603 U.S. 866, 867 (2024); *Tennessee v. Cardona*, 762 F. Supp. 3d 615, 622–24, 627–28 (E.D. Ky. 2025).

Bostock cannot rescue *Grimm*'s Title IX analysis either. In *Bostock* itself, this Court declined to "prejudge" whether "sex-segregated bathrooms, locker rooms," or "anything else of the kind" are permissible under Title VII. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 681 (2020). And this Court has never held that "*Bostock*'s reasoning reaches beyond the Title VII context." *Skrmetti*, 145 S. Ct. at 1834. There are, moreover, reasons that *Bostock* cannot be extended to Title IX that *Grimm* never considered. *See Skrmetti*, 145 S. Ct. at 1838–39 (Thomas, J., concurring) (explaining why *Bostock*'s Title VII analysis cannot be "import[ed]" into the Equal Protection Clause); *Tennessee*, 762 F. Supp. 3d at 623–24 (explaining Title IX "use[s] materially different language," "serve[s] different goals," and has "distinct defenses"). Among those reasons is that Title IX is Spending Clause legislation. This means that courts cannot impose any mandates on States or their schools that Congress itself did not clearly articulate when it enacted Title IX in 1972. *See Roe*, 137 F.4th at 928–29. Whatever else might be said, States and schools had zero notice of how this Court would interpret Title VII in 2020 and how lower courts might extend that ruling.

Besides, the Fourth Circuit's assumption that *Bostock* "guides [the court's] evaluation of claims under Title IX," *Grimm*, 972 F.3d at 616, cannot survive *Skrmetti*. In *Skrmetti*, this Court highlighted that *Bostock* contains important limits. Under *Bostock*, "an employer who fires a homosexual male employee for being attracted to men while retaining the employee's straight female colleague has discriminated on the basis of sex because it has penalized the male employee for a trait (attraction to men) that it tolerates in the female employee." *Skrmetti*, 145 S. Ct. at 1835. Even so, this Court explained, *Bostock*'s logic could not be used to condemn Tennessee's law regulating gender-transition procedures for minors because changing a minor's sex would not "automatically change" the operation of that law. *Skrmetti*, 145 S. Ct. at 1835. *Bostock* requires sex to be the "but for" cause of an outcome, not merely a factor "at play." *Skrmetti*, 145 S. Ct. at 1835.

There is no automatic change of outcomes here. This case does not challenge South Carolina's policy of maintaining separate bathrooms for boys and girls. Rather, the challenge is to South Carolina's policy against making exceptions. And just as in *Skrmetti*, changing the sex of a student requesting an exception does not change whether the exception might be granted. "[N]o" person—boy or girl—may "enter a restroom or changing facility that is designated for one sex unless he or she is a member of that sex." ." H. 4025 § 1.114(C)(1). If a male student wishes to use a multi-use bathroom, he must use the bathroom consistent with his sex. Switch the male student to female student and the same rule applies—she too must use a bathroom consistent with her sex. South Carolina's law does not "penalize[]" male students for a trait—

wishing to use the bathroom associated with the opposite sex—"that [South Carolina] tolerates in [] female" students. *Skrmetti*, 145 S. Ct. at 1835. Thus, even if one is inclined to apply *Bostock* outside of the Title VII context, "sex is simply not a but-for cause of" the policy's operation. *Id. Skrmetti* requires *Grimm* to be abandoned.

Grimm argued that the student was "treated worse than" similarly situated students because "he alone could not use the restroom corresponding with his gender," 972 F.3d at 618. Here, the Fourth Circuit relied on that reasoning to grant the injunction below. App.019a, 022a. But that is not true under South Carolina's law. All students are subject to the same treatment. No boy may use a bathroom designated for girls, and no girl may use a bathroom designated for boys. That is true whether a student identifies as transgender or not. A boy who identifies as a girl can no more use a girl's bathroom than a boy who identifies as a boy but feels more comfortable around girls or who seeks access for voyeuristic purposes. Simply put, students who identify as transgender are treated no better and no worse than students who identify differently. Just as in *Skrmetti*, all students are subject to the same across-the-board rule. South Carolina's law does not violate Title IX.

III. The Equities Strongly Favor a Stay

Although the strong likelihood that South Carolina will prevail on the merits provides ample justification for granting a stay, there are practical reasons as well. Allowing South Carolina's law to remain in effect serves to protect students while ensuring that schools do not find themselves in an impossible situation.

It is "not difficult" to understand why schools have long provided different bathrooms, showers, locker rooms, changing facilities, and overnight lodgings for

members of each sex—students of all ages have a legitimate interest in "shielding their bodies from the opposite sex." *Adams*, 57 F.4th at 804; *see Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (having "one's naked body viewed by a member of the opposite sex" is an "invasion" of privacy). The law tolerates sex-segregated "restrooms" and "dressing rooms . . . to accommodate privacy needs." *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010); *see Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) ("society's undisputed approval of separate public rest rooms for men and women" rest on "privacy concerns"). If schools were required to make all bathrooms or showers co-ed, it is not difficult to imagine what would happen: Many schoolchildren would be so uncomfortable that they would prefer suffering physical discomfort to using the bathroom or showering during the school day.

For the same reason, the Fourth Circuit's rule forcing students to share facilities with members of the opposite sex who identify as transgender is not costless. *Contra* App.029a (Diaz, C.J., concurring). "Public school locker rooms . . . are not notable for the privacy they afford." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995). School "locker rooms and restrooms are spaces where it is not only common to encounter others in various stages of undress, it is expected." *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 531 (3d Cir. 2018). So forcing schools to admit girls' to boys bathrooms, and boys to girls' bathrooms, compromises privacy and safety while raising a variety of other concerns. Religious students, for example, may object to sharing a bathroom with a member of the opposite sex. *See, e.g.*, *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) (describing how "Muslim parents contend that it is a sincere part of their faith to raise their children in a manner that does not put them in contact with members of the opposite biological sex in school bathrooms").

Real-world experience bears this out. Students forced 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, 1218 (9th Cir. 2020) (similar report from boys forced to share a locker room with a girl who identified as transgender); *Doe No. 1*, 2023 WL 5018511, at *1 (similar report from a girl forced to share restroom with a boy); Dkt. 21-5, Declaration of A.C. ¶¶ 51–69, *Tennessee v. Cardona*, No. 2:24-cv-72 (E.D. Ky.) (student describing how she was sexually harassed by a transgender-identifying student in the locker room). And there are doubtless other students suffering in silence, fearful to voice concerns lest school administrators or others "view them as bigoted." *Students & Parents for Privacy*, 377 F. Supp. 3d at 895.

Just as students must bear consequences under *Grimm*, so too must schools. Schools like those in South Carolina adopting common-sense policies sanctioned by Title IX to protect student privacy and safety are being sued under *Grimm*. On the flip side, schools that adopt the policies *Grimm* mandates are exposed to liability as well. After the Seventh Circuit issued a decision similar to *Grimm*, an Illinois district

court held that girls forced to share bathrooms and changing rooms with boys who identified as girls had a plausible claim against a school under Title IX for sexual harassment. *See Students & Parents for Privacy*, 377 F. Supp. 3d. at 899–900.

Schools in the Fourth Circuit are caught in a similar tension. The U.S. Department of Education has found Virginia schools in violation of Title IX for "allow[ing] students to access intimate facilities based on their 'gender identity' rather than their sex." 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://www.ed.gov/about/news/press-release/us-department-of-education-finds-five-northern-virginia-school-districts-violation-of-title-ix. Those same schools have declined to change their policies because there is a "direct tension between federal agency guidance and binding judicial authority," ostensibly referring to *Grimm*. Karina Elwood, *Loudoun schools to maintain gender policy despite Education Dept. order*, Wash. Post, Aug. 13, 2025. One school specifically cited the Fourth Circuit's order in this case as evidence that it is still bound by *Grimm*. *See* Letter from John F. Cafferky on behalf of the Alexandria City School Board and Alexandria City Public Schools to U.S. Department of Education, Office for Civil Rights at 2 n.1 (Aug. 15, 2025), https://resources.finalsite.net/images/v1755274371/acpsk12vaus/mjsctjsxiorcxjaokn1h/2025-08-15-ResponsetoLOAandVRA.pdf.

These developments leave schools between a rock and a hard place. Should schools risk lawsuits and federal investigations by allowing students to decide based on their internal feelings which restrooms and locker rooms they would like to use?

Or should schools risk being sued for damages and injunctive relief under *Grimm* for maintaining the sex-separated facilities that Title IX and implementing regulations expressly allow? The Court should stay the injunction now.

CONCLUSION

The Court should grant a stay.

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