No. 25A234

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA, ET AL.
Applicants,

v.

JOHN DOE, BY HIS NEXT FRIENDS AND PARENTS, JIM DOE AND JANE DOE,
Respondents.

On 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

RESPONSE OF JOHN DOE IN OPPOSITION TO THE APPLICATION FOR A STAY

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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

This application for emergency relief concerns one ninth-grader's restroom use. Last month, the U.S. Court of Appeals for the Fourth Circuit required the government applicants to allow John Doe, a transgender student in South Carolina, to use boys' restrooms while his appeal proceeds. The injunction at issue only applies to John. It does not otherwise prohibit the government from continuing to enforce its state-wide ban on transgender students' use of public school restrooms while John's appeal proceeds at the Fourth Circuit.

That is hardly an emergency warranting a stay from this Court, an extraordinary intervention in an ongoing appeal. "There's zero evidence that [John's] use of boys' restrooms presents even a remote possibility of harm to anyone." App. 29a (Diaz, C.J., concurring). Indeed, no student has ever complained about sharing boys' restrooms with John, who has dressed and presented as a boy since he was a young child. The only time classmates raised questions was when, earlier in his schooling, John used girls' restrooms, and classmates wondered what he was doing there. When his middle school suspended him for entering boys' restrooms last year, John's principal told him she did not care which facilities he used. She only punished him because she was compelled to do so by state law.

It is little wonder, then, that the government is unable to identify a single concrete injury it would suffer absent a stay from this Court. By contrast, John

desperately needs the Fourth Circuit's injunction "to perform a basic bodily function at school without the state's interference." App. 29a (Diaz, C.J., concurring).

The government's lack of injury is dispositive. But this Court should deny the stay for other reasons, too. The government's application tries to force this Court to prejudge substantive questions that this Court has carefully reserved for proper consideration in two granted cases, *West Virginia* v. *B.P.J.* and *Hecox* v. *Little*. The Court should refuse the government's and its amici's invitation to provide "a merits preview . . . on a short fuse without benefit of full briefing and oral argument." *Does 1-3* v. *Mills,* 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

As another threshold matter, the government failed to preserve its leading argument: that *United States* v. *Skrmetti*, 145 S. Ct. 1816 (2025), forecloses the Fourth Circuit's injunction. This Court has rightly denied relief under similar circumstances.

The government is also unable to meet the remaining stay factors. This Court is unlikely to grant certiorari because this appeal is a terrible vehicle to consider the merits questions and the disagreement among the circuits is limited and may resolve itself. And the government cannot make the necessary strong showing that it is likely to succeed on the merits. Although it insists *Skrmetti* ensures its success, that case does not speak to the questions here, and it does not stand in the way of John's claims. The appeals courts are in agreement that a ban like the proviso classifies based on sex, and the government cannot show in this posture and on this record that this law will survive heightened scrutiny. John's constitutional claim is enough to entitle him to relief. But the government has also failed to make a strong showing that John will

not succeed on his claim under Title IX, whose text prohibits the exclusion of students on the basis of sex, like the one the proviso threatens here. This Court should deny the government's application.

STATEMENT OF THE CASE

I. Factual background

A. Since 2020, Fourth Circuit law has allowed transgender students to use restrooms that match their gender identities

Years before the South Carolina legislature passed the ban at issue here, the Fourth Circuit required school districts in the state to allow transgender students to use restrooms consistent with their gender identities. *Grimm* v. *Gloucester County School Board* held that, if a school prohibits transgender students from doing so, it violates both Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, which prohibits sex discrimination in education, and the Equal Protection Clause of the U.S. Constitution. *See* 972 F.3d 586, 606-19 (4th Cir. 2020). *Grimm* also recognized that, when transgender students are excluded from gender-appropriate restrooms, they predictably and regularly experience significant harms with potential lifelong consequences. *See id.* at 617-18. These include medical complications, such as urinary tract infections, missed class time, and substantial emotional, psychological, and dignitary injuries. *See id.*; *accord* Suppl. App. 81a-83a.[1] This Court denied a cert petition asking it to review *Grimm*. *Gloucester Cnty. Sch. Bd.* v. *Grimm*, 141 S. Ct. 2878 (2021).

[1] "Suppl. App." refers to Respondents' Supplemental Appendix.

B. Disrupting this status quo, South Carolina banned transgender students from using gender-appropriate restrooms

Despite *Grimm*, starting last summer South Carolina has required schools to exclude transgender students from gender-appropriate restrooms. After multiple unsuccessful attempts to codify an independent statute, South Carolina included this ban in its budget for Fiscal Year 2024-2025, which began July 1, 2024. *See* H. 5100, Appropriation Bill 2024-2025, Part IB § 1.120 (Act No. 226, 2024 S.C. Acts), https://perma.cc/3SXF-8JPG [hereinafter "Proviso 1.120"]; S.C. Code Ann. § 11-9-80 (2024); *see* Dist. Ct. Dkt. No. 1 ¶¶ 20-30. The law, called Proviso 1.120, forbade transgender students from using restrooms that aligned with their gender identities, and promised to withhold state funding from South Carolina public K-12 schools that violated that ban. *See* Proviso 1.120.

Legislators advocating for the proviso and its predecessor bills vaguely cast transgender students as "crazy" and as threats to the "innocence of [non-transgender] children." *See, e.g.*, Suppl. App. 19a. But the legislature did not reference any evidence suggesting that a ban would protect students. When considering the proviso, the legislature did not hear from "the public" or "medical professionals." *Id.* at 15a. It did, however, hear repeated warnings that its ban would violate *Grimm*, *id.* at 12a-15a, and "put [] schools in a bind" of being forced to follow a state law directly contrary to that court ruling or "risk losing [state] funds." *Id.* at 15a.

After the proviso passed, the South Carolina School Boards Association advised its members that the ban "conflicts with federal law," citing *Grimm*. *Id.* at 190a. Yet the South Carolina Department of Education issued a series of memos that made

clear it would enforce the proviso should any school districts defy its directive to discriminate against transgender students. *Id.* at 36a-37a, 39a, 42a-43a.

South Carolina has now renewed the ban for Fiscal Year 2025-2026. The ban contained in the new budget is identical to last year's except that it is now called Proviso 1.114. *See* H. 4025, Appropriation Bill 2025-2026, Part IB § 1.114 (Act No. 69, 2025 S.C. Acts), https://perma.cc/3RJ3-AV8L [hereinafter "Proviso 1.114"]; Suppl. App. 221-222a. This renewed ban took "effect July 1, 2025." *See* H. 4025, Appropriation Bill 2025-2026 (Act No. 69, 2025 S.C. Acts), https://perma.cc/3RJ3-AV8L.

C. Bans like the proviso hurt transgender students

The proviso, and bans like it, inflict serious harm on transgender students. Suppl. App. 76a-83a. Excluding transgender students from gender-appropriate restrooms inflicts severe emotional and psychological harm, including "feelings of rejection, invalidation, isolation, shame, and stigmatization, as well as depression, anxiety, and suicidal ideation." *Id.* at 77a-80a. And it risks lives. In one study, 85% of transgender youth who were prevented or discouraged from using a restroom that matched their gender identity reported experiencing depression, "and 60% seriously considered suicide." *Id.* at 79a. "Those who avoided bathrooms had twice the odds of attempting suicide in the past year compared with transgender youth who did not avoid using the bathroom." *Ibid.*

Restroom bans like the one contained in the proviso also cause other physical injuries. "When being forced to use a special restroom or one that does not align with their gender, more than 40% of transgender students fast, dehydrate, or find ways not to use the restroom." *Grimm*, 972 F.3d at 597; *accord* Suppl. App. 82a-83a. "Even

if transgender individuals do not avoid fluid intake, they will often hold urine in their bladders to avoid using the restroom," which can cause physical disorders such as "urinary tract or kidney infections." Suppl. App. 82a. In one study, 67% of transgender youth reported holding their urine to avoid using restrooms for fear of discrimination, "and 38% indicate that they avoid drinking liquids to avoid using the restroom." *Id.* at 79a.

Banning transgender students from gender-appropriate restrooms also raises the risk that those students will experience gender-based harassment and violence, which transgender people already face at disproportionately high rates. *See id.* at 72a, 79a. "Most transgender individuals begin using restrooms consistent with their identity after completing other aspects of social transition (wearing clothing associated with their gender, changing their hair, etc.)." *Id.* at 79a. For this reason, among others, transgender people "regularly face harassment and victimization in restrooms corresponding with their sex assigned at birth." *Ibid*. Moreover, forcing a transgender student who presents as a boy to use the girls' restroom may "out" that student as transgender to his peers who only know him as a boy. *Id.* at 81a. It also sends an "unmistakable message" to other students "that their transgender classmates are not suitable to be among them." *Ibid*. "Requiring transgender individuals to use facilities that do not correspond to their gender identity following a social transition thus subjects those individuals to increased risk of actual victimization as well as to the realistic fear of such victimization, with the accordant harms resulting from that stress." *Id.* at 82a.

These forms of discrimination interfere with transgender students' ability to learn and adversely affect their educational opportunities. The severe psychological distress, anxiety, dehydration, physical discomfort from holding in urine, and associated harassment all "mak[e] it harder for students to concentrate in their classes and learn." *Id.* at 83a. Indeed, "transgender students may stop going to school because of the disaffirmation they are experiencing by not being able to use the restroom that fits their gender identity and subsequent bullying they experience when they are outed due to restroom policies at their schools." *Ibid.*

D. The law seriously harms John Doe

John Doe lives with his parents in Berkeley County, South Carolina. *Id.* at 135a. John is transgender: Although John was assigned female at birth, he identifies and presents as male in all aspects of his life. *Ibid.* John has "always known [he is] a boy." *Ibid.* And, since early childhood, he has "dressed and presented as a boy." *Id.* at 140a. When he was "around nine or ten years old," he asked his parents "to stop correcting people when they assumed he was a boy." *Id.* at 140a-141a. So, John's parents were not surprised when, a couple years later, he told them he was transgender. *Id.* at 141a.[2]

John started the 2024-2025 academic year as an eighth grader at Cane Bay Middle School, part of the Berkeley County School District. *Id.* at 136a. In the fall 2024 semester, while at Cane Bay, John used boys' restrooms. *Ibid.* No students complained. *Ibid.* Indeed, the only time students had ever raised concerns about John's

[2] The district court granted John's motion to proceed under pseudonym. *See* Dist. Ct. Dkt. No. 25.

restroom use were when, years before, John had used girls' restrooms and classmates wondered what a boy was doing in there. *Id.* at 137a. Nonetheless, after receiving reports from teachers that John was using boys' restrooms, the School District suspended John for doing so, citing the proviso, and threatened to expel him if he continued. *Id.* at 142a. In doing so, John's principal told him she did not care which facilities he used and was not angry with him, but had no choice but to follow the law. *Ibid.*

In September 2024, John's parents decided to withdraw John from Cane Bay because of the school's refusal to permit John to use boys' restrooms, combined with peer harassment exacerbated by the proviso. *Ibid.* John then enrolled in an online school, which offered fewer educational and social opportunities than Cane Bay. *Id.* at 142a-143a. He became increasingly academically disengaged and socially isolated. *Ibid.* As a result, John stopped attending school. *Id.* at 145a. In January 2025, the online school withdrew John because of these absences. *Ibid.* John's parents then homeschooled John for the remainder of the 2024-2025 school year using an online curriculum. *Id.* at 223a. Homeschooling was "no replacement for the educational and social opportunities of attending a public school in person." *Ibid.*

After leaving the School District, John wanted to return, if only he could use the boys' restrooms. *Id.* at 138a-139a. John and his parents therefore faced an "impossible" choice as the 2025-2026 school year approached. *Id.* at 224a. John's parents were "desperate" for him to return to in-person education, given its social and academic benefits. *Ibid.* But they knew that, so long as the proviso was in effect, John

would face "intolerable discrimination" at school, including suspension or expulsion for using boys' restrooms. *Ibid.* After multiple family discussions, John and his parents made the "heart-wrenching" decision to re-enroll him in a School District high school for the 2025-2026 academic year. *Ibid.*

II. Procedural background

1. On November 12, 2024, John filed this lawsuit along with the Alliance for Full Acceptance ("AFFA"), a Charleston-based advocacy group, against the State of South Carolina, its Board of Education and Department of Education, its Secretary of Education, the School District, and the School District's superintendent (collectively, "the government"). *See generally* Dist. Ct. Dkt. No. 1. The case asserts that the proviso violates both Title IX and the Equal Protection Clause. Dist. Ct. Dkt No. 1 ¶¶ 85-94. As soon as the case was docketed, John filed a motion for a preliminary injunction, as well as a motion to certify a class. *See* Dist. Ct. Dkt. No. 9; Dist. Ct. Dkt. No. 10. After discovery, those motions were fully briefed by the end of January 2025. *See* Dist. Ct. Dkt. No. 48; Dist. Ct. Dkt. No. 49. Months later, the school year ended—foreclosing John's hope of returning for eighth grade—and the court still had not ruled.

In early June, South Carolina renewed the bathroom ban for the new fiscal year starting July 1. *See* Suppl. App. 225a-226a, 228a, 230a-231a. So, John and AFFA sought a status conference to discuss, before that date, how the district court would like the parties to proceed given this legislative development. *See* Dist. Ct. Dkt. No. 80. When the court had not ruled on that motion by the last week of June, John and

AFFA sought leave to amend their complaint to reflect the renewal of the law. *See* Dist. Ct. Dkt. No. 85. In a separate motion, John also proposed two paths for resolution of the pending motion for a preliminary injunction before the rapidly approaching start of the new school year: John could amend his motion to reflect the extension of the ban and the parties could submit supplemental briefing, or John could file a renewed motion for a preliminary injunction and the parties could engage in full expedited briefing. *See* Dist. Ct. Dkt. No. 86. When, on July 1, the new fiscal year started, and still without guidance from the Court, John then filed a renewed motion for a preliminary injunction. Dist. Ct. Dkt. No. 88.

Around the same time, this Court granted certiorari in *West Virginia* v. *B.P.J.*, No. 24-43, and *Little* v. *Hecox*, No. 24-38. *West Virginia* v. *B.P.J. ex rel. Jackson*, No. 24-43, 2025 WL 1829164, at *1 (July 3, 2025); *Little* v. *Hecox*, No. 24-38, 2025 WL 1829165, at *1 (July 3, 2025). The questions presented there are whether Title IX or the Equal Protection Clause prohibit schools from banning transgender students from joining school sports teams that align with their gender identities. *See, e.g.*, Pet. at I-II, *West Virginia* v. *B.P.J. ex rel. Jackson*, No. 23-43 (July 11, 2024).

On July 8, the district court *sua sponte* stayed the case "until the Supreme Court enters an order on the merits in *B.P.J.* or the Supreme Court's October 2025-June 2026 term ends, whichever is sooner." App. 44a. In the same order, and in a subsequent entry, the Court then "denied without prejudice" "[a]ll pending motions . . . with leave to restore and/or supplement" once the stay lifts. *Id.* at 44a, 39a.

2. The next day, John noticed an appeal to the U.S. Court of Appeals for the Fourth Circuit. Dist. Ct. Dkt. No. 94. On July 10, John filed a motion for an injunction pending appeal with the district court, asking for a decision by July 15 at 1:00 p.m. Dist. Ct. Dkt. No. 95 at 1-2. When the district court had not ruled on the motion by that time, John filed a motion with the appeals court seeking an injunction pending appeal. *See* C.A. Dkt. No. 14-1. In its opposition to that motion, the government moved to dismiss the appeal for lack of jurisdiction based on a laundry list of reasons. Suppl. App. 245a-253a; *see infra* pp. 25-26 (describing jurisdictional arguments). On July 23, the district court denied the motion for an injunction pending appeal. App. 34a.

On August 12—the day before John started high school—Judge Agee, on behalf of a unanimous Fourth Circuit panel, granted John's motion for an injunction pending appeal and denied the government's motion to dismiss. *See id.* at 32a-33a. Soon after, the panel issued an unpublished order explaining its decision. *See id.* at 3a-22a. Most of that explanation concerned its rejection of the government's many jurisdictional arguments. First, it rejected the government's contention that the appeals court lacked jurisdiction over the district court's July 8 order under 28 U.S.C. § 1292(a)(1) because, in the government's telling, the order did not expressly or effectively deny a preliminary injunction. *Id.* at 10a-13a. The court also held it can exercise pendent jurisdiction to review the stay because it was "inextricably intertwined" with the denial of the preliminary injunction. *Id.* at 13a-14a. The appeals court then rejected the government's arguments that John lacked standing to sue and to appeal. *Id.* at 14a-18a. The court also acknowledged the government's argument that it

lacked jurisdiction because the original complaint did not name the current version of the proviso, but deferred that question to the merits panel. *Id.* at 15a n.10.

Turning to John's motion for an injunction pending appeal, the court held that John is likely to succeed on the merits based on *Grimm*. That case, it explained, "held that a school board policy that was in all material respects identical to the Proviso violated Title IX and the Equal Protection Clause." *Id.* at 18a-19a. The Fourth Circuit reaffirmed that "*Grimm* remains the law of this Circuit," and that the cert grant in *B.P.J.* "does not alter" *Grimm*'s "binding force." *Id.* at 19a, 21a. Because the ban would "infring[e] [John's] constitutional rights," the court found that "'irreparable injury is likely in the absence of an injunction.'" *Id.* at 19a (quoting *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). And "the balance of equities and public interest support upholding the rule of law." *Id.* at 20a. Here, the appeals court held, that meant "preventing the State from enforcing a policy that directly contradicts *Grimm*—a prior, binding decision of [the Fourth Circuit]." *Ibid.*

After the Fourth Circuit's order, the government publicly emphasized the narrowness of the injunction. The South Carolina Department of Education released a statement highlighting that "[t]his injunction from the 4th Circuit applies only to one individual. All other South Carolina schools remain bound by current law." Jason Ryan, *SC school must let transgender teen use boys' bathroom, federal court orders*, The Post and Courier (Aug. 13, 2025), https://perma.cc/5PV4-PGJW. The state's attorney general reiterated that "[t]he bathroom proviso is still in effect for almost the entire State of South Carolina." *Ibid.* Senator Climer, the proviso's champion, was

"disappoint[ed]" by the ruling but expressed relief that "at least it is narrow in its application." Skylar Laird, *Transgender SC student can use bathroom of choice, appeals court rules*, South Carolina Daily Gazette (Aug. 19, 2025 6:14 PM), https://perma.cc/6Z5R-9HLX.

3. Ten days after the appeals court's order, the government asked the Fourth Circuit to either reconsider its decision or stay the injunction. C.A. Dkt. No. 46. The next business day, August 25, the panel unanimously denied the motion. App. 1a-2a. On August 26, the government filed a motion to file its stay application in this Court under seal.

Proceedings at the appeals court are ongoing. On August 27, 2025, John filed his opening brief. *See* C.A. Dkt. No. 48. The government's response is due September 26, 2025. *See* C.A. Dkt. No. 45.

STANDARD OF REVIEW

"When a matter is pending before a court of appeals," this Court will "grant stay applications only upon the weightiest considerations." *Packwood* v. *Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers) (citation modified). As a general matter, an applicant seeking a stay from this Court must show "(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Ohio* v. *EPA*, 603 U.S. 279, 291 (2024). In addition, an applicant must establish a "reasonable probability" that this Court will eventually grant certiorari. *Teva*

Pharms. USA, Inc. v. *Sandoz, Inc.*, 572 U.S. 1301, 1301 (2014) (Roberts, C.J., in chambers). Moreover, in seeking to lift an interim order from a court of appeals in a pending matter, rather than merely a stay pending disposition of a writ of certiorari, applicants bear "an especially heavy burden." *Packwood*, 510 U.S. at 1320 (Rehnquist, C.J., in chambers); *accord Little* v. *Reclaim Idaho*, 140 S. Ct. 2616, 2618 (2020) (Roberts, C.J., concurring).[3]

ARGUMENT

I. The Court should not prejudge questions properly presented in *B.P.J.* and *Hecox*

"A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case" *Nken* v. *Holder*, 556 U.S. 418, 433 (2009) (citation modified). Here, a prudential consideration militates against exercising that discretion to grant a stay. This Court has warned against allowing applicants to "use the emergency docket to force the Court to give a merits preview . . . on a short fuse without benefit of full briefing and oral argument." *Mills,* 142 S. Ct. at 18 (Barrett, J., concurring). That is what the government and its amici try to force here, despite the fact that this Court has carefully reserved for consideration in *B.P.J.* and *Hecox* the issues the government urges it to address now.

[3] The government wrongly says that the Fourth Circuit should not have entered the injunction unless John's right to relief was "indisputably clear." Stay Application 10 (quoting *Lux* v. *Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers)). That would have been the standard if John were asking this Court for an injunction in the first instance pursuant to the All Writs Act. *Lux*, 561 U.S. at 1307 (Roberts, C.J., in chambers). But, for an injunction from the Fourth Circuit, John only needed to meet the ordinary preliminary injunction factors. *See Winter*, 555 U.S. at 22; App. 18a.

The questions in the government's stay application significantly overlap with those presented in *B.P.J.* and *Hecox*. For example, here, the government's lead statutory argument (at 13-14) is that *Grimm* is wrong because this Court's reasoning in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), does not translate to Title IX. Amici press the same argument (at 15). That issue is also central to *B.P.J*. *See, e.g.*, Pet. at 21-22, *B.P.J.*, *supra* (No. 24-43); *see also* Pet. Suppl. Br. at 1-2, *West Virginia* v. *B.P.J. ex rel. Jackson*, No. 24-43 (June 23, 2025) (urging this Court to grant cert because *Skrmetti* did not resolve the question of whether *Bostock* applies to Title IX).

The government and amici also press arguments about *Skrmetti*'s meaning that are likely to arise in *B.P.J.* and *Hecox*—for example, that *Skrmetti* means a "law that prohibits both sexes from accessing an opportunity intended for the other sex doesn't implicate transgender status." Stay Application 11-12; *see* Amicus Br. at 4 (arguing that, under *Skrmetti*, "a policy that applies to boys and girls alike does not classify on . . . transgender identity"); Pet. Suppl. Br. at 27, *B.P.J.*, *supra* (No. 24-43) (characterizing appeals court decision in *B.P.J.* as wrongly assuming "distinctions drawn with an eye towards biological sex . . . target those who self-identify with a different gender").

In *B.P.J.* and *Hecox*, this Court will have the opportunity to address these questions in the normal counsel with the "benefit of full briefing and oral argument." *Mills,* 142 S. Ct. at 18 (Barrett, J., concurring). And it has purposely declined to answer them any earlier. Although the government and its amici contend that *Skrmetti* resolved the questions in this case, this Court instead expressly declined to reach

those. *See, e.g.*, *Skrmetti*, 145 S. Ct. at 1834 ("We have not yet considered whether *Bostock*'s reasoning reaches beyond the Title VII context, and we need not do so here."). After carefully saving these questions for *B.P.J.* and *Hecox,* this Court should not allow the government and its amici—who, notably, include the petitioner-states in those two pending cases—to "force . . . a merits preview . . . on a short fuse." *Mills,* 142 S. Ct. at 18 (Barrett, J., concurring).[4]

II. The government waived its primary argument

The government's stay application fails for another threshold reason: The government failed to preserve its central argument. The government's lead argument for a stay, which starts and permeates its brief (at 11-15, 19-24, 27), is that the Fourth Circuit's interim order is wrong because of *United States* v. *Skrmetti*, 145 S. Ct. 1816 (2025), this Court's recent decision about a Tennessee ban on certain medical treatments for gender dysphoria for transgender minors. But the government has waived that argument. In his motion for an injunction pending appeal, John argued that *Skrmetti* did not abrogate *Grimm* or otherwise foreclose his arguments that he was likely to succeed on the merits of his claims. *See* C.A. Dkt. No. 14-1 at 17-19. In its opposition, the government did not press any argument to the contrary. *See generally* Suppl. App. 234a-262a. Indeed, it only cited *Skrmetti* in its background section

[4] It is hard to imagine what the amici states' interest in this application might be, besides hope for a merits preview. Amici say (at 1) that their "interest" is in "ensuring their institutions can adopt" their preferred policies regarding school restrooms. But the Court's disposition of this application will not determine the law. *See Merrill* v. *Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring) (noting a "stay order is not a ruling on the merits"). It will only determine if John can continue to use boys' restrooms at his South Carolina school while his appeal proceeds. And Indiana is not plausibly affected by an out-of-state student's school restroom access.

describing the case's procedural posture. *See id.* at 243a. The case was entirely absent from the government's merits argument. *See id.* at 254a-262a. The government therefore failed to give the Fourth Circuit the opportunity to consider the argument that *Skrmetti* foreclosed John's requested injunction pending appeal. Unsurprisingly, then, the unanimous panel decision did not reach that question. *See* App. 3a-22a.

Only after the Fourth Circuit granted the injunction pending appeal did the government raise *Skrmetti*, but that was too little too late. In its application to the Fourth Circuit for a stay—which it gave the appeals court only one business day to consider—the government asserted in a single, conclusory sentence that *Skrmetti* abrogated *Grimm*. *See* C.A. Dkt. No. 46 at 1-2.

"[A] request for extraordinary equitable relief is certainly undermined when the central argument pressed was only mentioned by applicants in passing in the court below." *Stroup* v. *Willcox*, 549 U.S. 1501, 1501 (2006) (Roberts, C.J., in chambers); *see also Thompson* v. *United States*, 145 S. Ct. 821, 828 (2025) (noting this is "a court of review, not of first view"). And the government did not even do that in its opposition to the motion for an injunction. The government will have the opportunity, if it likes, to make its *Skrmetti* argument in its forthcoming merits brief before the Fourth Circuit. That court will then have the opportunity, for the first time, to consider *Skrmetti*'s implications for *Grimm*. Once the Fourth Circuit rules on the availability of a preliminary injunction, the government can seek review from this Court on that basis. But the government has not preserved the argument for the purposes of its application to stay the injunction pending appeal.

III. The government has not shown it will suffer irreparable injury, or any injury, without a stay

Now, to the stay factors. One of the "most critical" is "whether the applicant will be irreparably injured absent a stay." *Nken*, 556 U.S. at 434. "The authority to grant stays has historically been justified by the perceived need to prevent irreparable injury to the parties or to the public pending review." *Id.* at 432 (citation modified). Accordingly, irreparable injury must be demonstrated by an applicant for a stay; "simply showing some possibility of irreparable injury" is not enough. *Id.* at 434-35 (citation modified); *see Winter*, 555 U.S. at 22. If an applicant fails to meet this burden, the request for a stay must be denied. *See, e.g.*, *Teva Pharms. USA, Inc.*, 572 U.S. at 1301 (Roberts, C.J., in chambers) (denying stay for lack of irreparable harm even though there was reasonable probability of granting certiorari and fair prospect of reversal).

Here, the government does not suffer any injury at all, let alone an irreparable one. The Fourth Circuit's injunction pending appeal only applies to one student at one school. App. 3a-4a. And "[t]here's zero evidence that [his] use of boys' restrooms presents even a remote possibility of harm to anyone." *Id*. at 29a (Diaz, C.J., concurring). No student has ever complained about sharing a boys' restroom with John. Suppl. App. 136a. John's school district permitted transgender students to use restrooms that align with their gender identities starting in 2016. *See, e.g.*, Thomas Lanahan, *Berkeley County settles debate to transgender bathroom use*, Wach Fox 57 (May 11, 2016, 5:48 AM), https://perma.cc/JTA5-893W; *see also* Suppl. App. 137a (school administrators confirming school had no policy prohibiting John's use of boys'

restrooms). Like all other districts in the Fourth Circuit, it was required to do so by *Grimm* starting in 2020. *See* 972 F.3d at 593. Yet the government can cite no complaints, in all this time, about students using School District restrooms that align with their gender identities. When John's middle school suspended him last year for using boys' restrooms, the principal told him she did not care which facilities he used; instead, she was only suspending him because the proviso now required her to do so. Suppl. App. 137a-138a. So, the School District is not injured by the injunction, let alone irreparably.

As to the state government, it has no valid interest in enforcing a discriminatory law. *See, e.g.*, *Leaders of a Beautiful Struggle* v. *Baltimore Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021). But even if it did, it can continue to enforce the proviso with respect to every other transgender student in the state, as it has repeatedly reminded the public. *See supra* pp. 12-13. South Carolina's attorney general is right that "[t]he bathroom proviso is still in effect for almost the entire State of South Carolina." Ryan, *supra*. The government cannot identify a single concrete, irreparable harm it has experienced, or will experience, as a result of the narrow, temporary injunction allowing John to use boys' restrooms again. It cannot even identify a single harm attributable to any other South Carolina student's use of school restrooms aligned with his or her gender identity, even though schools in the state have been required by circuit precedent to permit that access for years.

Despite the government's insistence to the contrary (at 32-33), it is the proviso, not the injunction, that disrupted the status quo: Years after *Grimm* set out the law,

and years after the School District started to allow transgender students to use restrooms consistent with their gender identity, the ban instructed it and other South Carolina public schools to change course. The government was not hurt by *Grimm* for the years before the proviso, and it will not be hurt by the Fourth Circuit's narrow, temporary injunction.[5]

The narrowness of the injunction here cuts a sharp contrast to the cases South Carolina relies upon. For example, the government cites (at 9-10) three recent cases in which this Court has granted applications for stays. But all three of those cases concerned universal injunctions. *See Trump* v. *CASA, Inc.*, 145 S. Ct. 2540, 2548-49 (2025); *McHenry* v. *Texas Top Cop Shop, Inc.*. 145 S. Ct. 1, 1 (2025) (Gorsuch, J., concurring); *Labrador* v. *Poe ex rel. Poe*, 144 S. Ct. 921, 921 (2024) (Gorsuch, J., concurring). And in two of those, the challenged injunctions remained in place as to the plaintiffs. *CASA*, 145 S. Ct. at 2563-64; *Labrador*, 144 S. Ct. at 921. This case does not require intervention from this Court because the Fourth Circuit's injunction is already tailored, in that way, to ensure the relief John needs while limiting the effect on the government. *Cf. West Virginia* v. *B.P.J.*, 143 S. Ct. 889 (2023) (denying stay of injunction permitting one transgender student to play school sports).

IV. A stay will irreparably harm John and is against the public interest

In sharp contrast to the minimal stakes for the government, a stay would irreparably harm John, for whom "school is the central organizing feature of his day-

[5] Besides, this Court has recently recognized the limited utility of judging relief by whether it preserves "the status quo," which "is a tricky metric" subject to no "settled" definition. *United States* v. *Texas*, 144 S. Ct. 797, 798 n.2 (2024).

to-day life," and whose education and wellbeing depend on his ability to use boys' restrooms there. App. 27a (Diaz, C.J., concurring). A stay is against the public interest, too. Because the government fails to "demonstrate[] that the balance of harms and equities favors it at this time," it is not entitled to a stay. *NetChoice, LLC* v. *Fitch*, No. 25A97, 2025 WL 2350189, at *1 (Aug. 14, 2025) (Kavanaugh, J., concurring) (concurring in denial of stay application, even though applicant was "likely to succeed on the merits," because the harms and equities did not weigh in its favor).

1. If this Court stays the Fourth Circuit's injunction, John will suffer irreparable injuries. The School District has previously enforced the proviso against John and has threatened to continue to enforce it. Suppl. App. 137a-138a. It did so under threats from the state that it will pull funding from schools that do not enforce the proviso. *Id.* 36a, 39a, 43a. That past and threatened enforcement demonstrates that, if this Court stays the Fourth Circuit's injunction pending appeal, John is likely to be punished again—even expelled—when he uses boys' restrooms. *See* App. 15a (noting John "alleged that the State was actively seeking to enforce the Proviso, which demonstrates a likelihood of an ongoing or future injury in fact"); *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 164 (2014) ("Past enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical." (citation modified)).

Absent an injunction, John will also likely to experience other harms he faced at school last year due to his exclusion from those restrooms. These include trouble concentrating during class when he is forced to hold his urine. Suppl. App. 138a.

"Then there's the shame and indignity [John] will face for being singled out based on his transgender status." App. 26a (Diaz, C.J., concurring). "To bar [John] from boys' restrooms for most of his waking hours is to demean him, day-in and day-out, with no end in sight. [Staying] relief in these circumstances would subject [John] to humiliation by a thousand cuts." App. 27a (Diaz, C.J., concurring). If the government can again enforce the ban against John, he will again have to go to school wearing "a scarlet 'T'," *Grimm*, 972 F.3d at 617-18. "That's a harm that can't possibly be remedied with money damages." App. 26a (Diaz, C.J., concurring).[6]

The government never acknowledges the harms that the proviso has caused John, and would cause him again if this Court stays the injunction. The government only asserts (at 35) that "the accommodation of a single-stall restroom mitigates claims of irreparable harm." Its passive voice elides that it has provided no evidence John has access to such a restroom at his high school. But, regardless, forcing transgender students to use single-stall restrooms is "stigmatizing," draws "unwanted attention from peers and adults," and can "out [students] to others as transgender," inviting "bullying and harassment." Suppl. App. 206a; *see, e.g.*, *Grimm*, 972 F.3d at 617-18 (explaining that having to use separate restrooms "brand[s] . . . transgender students with a scarlet 'T'"). It does not cure the government's discrimination any more than offering a "'race neutral' bathroom option would have solved the deeply stigmatizing and discriminatory nature of" "racially segregated

[6] John is currently enrolled in and attending an in-person high school in the School District. He has faced harassment at school and his parents are exploring potential solutions. His parents' hope is to keep him in his current school placement or, if he has to temporarily move to online courses, to return him to an in-person School District school soon after.

bathrooms." *Grimm*, 972 F.3d at 609. And single-stall restrooms are often infeasible options for students. For example, the single-stall nurse's restroom available to John in middle school was further from John's classes than boys' restrooms, so he would have had to miss class time to use it. Suppl. App. 136a; *see also Grimm*, 927 F.3d at 600 (noting evidence that the single-stall option was far from the plaintiff's classes).

2. A stay would not serve the public interest, either. As noted, no classmate has ever complained about John's use of boys' restrooms, and there is no other evidence that his presence "presents even a remote possibility of harm to anyone." App. 29a (Diaz, C.J., concurring). And, as noted, the only time a classmate raised a concern about John's restroom use was when he previously used girls' restrooms. Suppl. App. 136a-137a. The evidence, then, is that if the narrow injunction has any effect on other School District students, it is positive.

The government's speculation about potential harms to other students is baseless. For example, it contends (at 36) that "students who dare to express discomfort with sharing a restroom with [transgender classmates] face possible discipline." But that is a risk entirely within the School District's power to avoid, with or without a stay: Nothing about the injunction requires such discipline, and the School District can simply choose not to punish any hypothetical student who complains. It asserts (at 36) that students might be uncomfortable changing clothes in a locker-room shared with a transgender classmate, but the injunction applies only to John's use of restrooms. *See* App. 33a.

The government also muses (at 37) that, even though the injunction applies only to John, other schools may take cues from the Fourth Circuit's order and increase transgender students' access to restrooms—to unspecified deleterious effect. That makes little sense. The unpublished, non-precedential order did not change the state of the law in the Fourth Circuit. Rather, it applied five-year-old binding precedent. A school attuned to Fourth Circuit developments will have known since at least 2020, when that court published *Grimm*, that it is required to permit transgender students to use restrooms consistent with their gender identities. *See supra* p. 3. The government wrings its hands about questions of application, unanswered by *Grimm*, that may arise for schools as they comply with that rule. But that has nothing to do with the Fourth Circuit's recent narrow injunction applying that settled precedent. And a stay of the injunction pending appeal in this case would not abrogate *Grimm*, so would not prevent the injuries the government imagines. *See, e.g.*, *Merrill*, 142 S. Ct. at 879 (Kavanaugh, J., concurring) (noting a "stay order is not a ruling on the merits").

V. The government has not shown a reasonable probability that this Court will grant certiorari

This Court has recently and repeatedly denied cert petitions asking it to review constitutional and statutory challenges to bans like the proviso. The Court rejected one such request last year. *See Metro. Sch. Dist. of Martinsville* v. *A.C ex rel. M.C.*., 144 S. Ct. 683 (2024). And this Court similarly declined to hear *Grimm* in 2021. *Gloucester Cnty. Sch. Bd.* v. *Grimm*, 141 S. Ct. 2878 (2021). The Court likely will, and should, do the same here.

A. This appeal is riddled with vehicle problems

1. By the government's account, this Court lacks jurisdiction to hear this appeal. At the Fourth Circuit, the government filed a motion to dismiss this case for lack of jurisdiction. *See* Suppl. App. 234a-253a. There, it asserted that the appeals court lacks jurisdiction for at least six independent reasons, including that John lacks standing to file this suit; John lacks standing to appeal; the appeals court lacked statutory jurisdiction to review the district court's interlocutory order; the requested injunction is insufficiently tethered to the operative complaint, which speaks only to the now-expired Proviso 1.120; the scope of the requested injunction is so overbroad as to divest courts of jurisdiction; and John's first motion for a preliminary injunction is still pending. *See ibid*. The government also raised concerns sounding in mootness, though it did not use that term. *See* App. 27a (Diaz, C.J., concurring).

The Fourth Circuit motions panel agreed with John that these objections are misplaced. *Id*. 9a-17a. But if this Court were to grant review, it would have to address each of these arguments to satisfy its independent obligation to ensure its jurisdiction. *See, e.g.*, *Collins* v. *Yellen*, 594 U.S. 220, 242 (2021) (noting this Court "ha[s] an obligation to make sure that [it] ha[s] jurisdiction to decide [a] claim"); *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 499 (2009) ("[I]t is well established that the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties."). If any one of them has merit, the Court will be unable to reach the question presented.

2. The government also says this appeal does not concern whether, or when, public schools can ban transgender students from restrooms that match their gender

identities, but instead turns on the district court's case management in light of "the unique procedural posture of this case," including the "peculiar procedural state of the pleadings." C.A. Dkt. No. 28 at 6. That is, in the government's view, "the questions to be decided by [the Fourth Circuit] on appeal are . . . *first*, [whether] the district court abuse[d] its direction by staying this case" until this Court decides *B.P.J.* or concludes its next term and "s*econd*, [whether] the district court abuse[d] its discretion when it denied [John's] renewed motion for a preliminary injunction without prejudice and with leave to restore" once the stay lifted. *Id.* at 7 (citation modified). Neither of those procedural questions, specific to the "unique" and "peculiar" posture of this case, *id.* at 6, are worthy of this Court's review.

B. The disagreement among the circuits is limited

Only four appeals courts—the Fourth, Seventh, Ninth, and Eleventh Circuits—have heard Equal Protection Clause or Title IX challenges to bans on transgender students using school restrooms that match their gender identities. Their disagreement is limited, and may shrink, and the Fourth Circuit is not the outlier the government says it is.

1. There is no circuit split on the constitutional question. The three courts that have addressed the question agree that bans on transgender students using restrooms facially classify on the basis of sex and so trigger heightened scrutiny. *See Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 (11th Cir. 2022) (en banc); *Grimm*, 972 F.3d at 607-09; *Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *see also Roe* v. *Critchfield*, 137 F.4th

912, 922 (9th Cir. 2025) (noting the "parties agree that intermediate scrutiny applies" to a ban on transgender students' access to restrooms, among other facilities).

The Fourth and Seventh Circuits have concluded that the bans before them did not satisfy that standard because, in those cases, the defendants provided no evidence that they advanced the stated privacy interests. *Grimm*, 972 F.3d at 613-15; *Whitaker*, 858 F.3d at 1052-54. In *Whitaker*, the Seventh Circuit rested its conclusion in part on the layout and usage of the school restrooms at issue: Students with "true privacy concerns [were] able to utilize a stall," and "[n]othing in the record suggest[ed] that the bathrooms" in question were otherwise insufficient to protect student privacy. 858 F.3d at 1052. Later, in *Martinsville*, the Seventh Circuit concluded that the student-plaintiffs were likely to succeed on similar claims in light of *Whitaker* and the layout of the school facilities in question. *See A.C. ex rel. M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 772-73 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 683 (2024). Likewise, in *Grimm*, the Fourth Circuit noted the significant privacy protections installed in the public school restrooms, including "privacy strips and screens between the urinals," and noted that the school board's "Rule 30(b)(6) deposition witness could not identify any other privacy concerns." 972 F.3d at 614.

The Eleventh Circuit held that a different school ban on a different factual record satisfied the same heightened scrutiny standard. According to the Eleventh Circuit, the school's physical privacy protections were not adequate because of "the undisputed fact" that students at the school changed clothes outside the restroom stalls and there were no dividers between urinals. *Adams*, 57 F.4th at 806. Regardless

of whether the Eleventh Circuit's decision was correct, the fact that the different courts reached different results while applying "a properly stated rule of law" to different facts does not constitute a split warranting review. Sup. Ct. R. 10.

Even if it did, it is not yet clear whether John's case will implicate the question of whether and when a ban can be justified on privacy interests. The government insists (at 15-18) that even if *Grimm* remains binding, the ban is still lawful, in part because the governments purports (at 17) to have identified a new governmental interest unaddressed in *Grimm* (or any other case): protecting the safety of transgender students. Whatever the Fourth Circuit says about that issue of first impression could not create or deepen a split.

Contrary to the government's telling, the Ninth Circuit has not addressed the constitutionality of school bathroom bans like the proviso. Earlier this year, that court rejected a facial challenge to an Idaho statute that excluded transgender public school students from "locker rooms, changing rooms, [] shower rooms," and "multi-occupancy restrooms." *Critchfield*, 137 F.4th at 919. In its decision, the court made clear it was not foreclosing a challenge to the restroom ban. The court "acknowledge[d] . . . that the use of" these various facilities "do not present uniform risks of bodily exposure." *Id.* at 924. The court did "not presume that [the statute's] application to each type of facility will be substantially related to the State's objective of protecting student privacy." *Id.* It reasoned, however, that because the plaintiff had mounted a facial challenge to the full statutory scheme, "its equal protection claim fails if [the statute's] application to any of the covered facilities survives intermediate

security." *Id.* And, in the court's view, the statute permissibly applied to "locker rooms and communal shower rooms that lack curtains or stalls." *Id.* at 925. Accordingly, the Ninth Circuit's constitutional holding does reach the question of whether or when a bathroom ban like the proviso might survive heightened scrutiny, and it does not conflict with that of any other circuit.

2. The government tries to manufacture deeper disagreement by half-heartedly contending (at 39) that the Fourth and Seventh Circuit's rulings conflict with the Fifth and Sixth Circuit's unpublished decisions concerning Administrative Procedure Act challenges to Title IX regulations promulgated by the U.S. Department of Education in 2024. Not so. The Fifth and Sixth Circuit appeals did not concern the portion of the regulation that addressed restroom access for transgender students, because that provision was not the subject of the partial stay requests at issue. *See Tennessee* v. *Cardona,* No. 24-5588, 2024 WL 3453880, at *2 (6th Cir. July 17, 2024) (noting that the Department had not sought a stay of the district court's injunction of the restroom-related provision, among others); *Louisiana ex rel. Murrill* v. *United States Dep't of Educ.*, No. 24-30399, 2024 WL 3452887, at *1 (5th Cir. July 17, 2024) (describing scope of requested stay). (The same was true when those cases reached this Court. *See infra* p. 39.)[7]

3. The government engages in some funny math (at 17 and 39) to paint the Fourth and Seventh Circuits as "outliers." It characterizes the appellate split (at 39)

[7] The government also points to the Eleventh Circuit, but its unpublished opinion only reiterated its Title IX holding from *Adams* in granting an injunction pending appeal. *See Alabama* v. *U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *4 (11th Cir. Aug. 22, 2024).

as an even "2-2." But it then selectively adds district court decisions to its count, identifying only those that agree with the government's view of the law. There are district court decisions on both sides of the ledger: Plenty have held that bans like the proviso may violate transgender students' constitutional or statutory rights. *See, e.g.*, *A.H. ex rel. Handling* v. *Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 332 (M.D. Pa. 2017); *Evancho* v. *Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 295 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Loc. Sch. Dist.* v. *United States Dep't of Educ.*, 208 F. Supp. 3d 850, 865 (S.D. Ohio 2016).

4. No appellate court has yet decided what, if anything, *Skrmetti* might mean for these questions. Throughout its brief, the government says that *Skrmetti* abrogates *Grimm* and forecloses John's arguments. In its upcoming merits brief, the government will have the chance to try to persuade the Fourth Circuit of that for the first time. *See supra* pp. 16-17. The Seventh Circuit is poised to consider the same issue in a pending case. *See A.C. ex rel. M.C.* v. *Metro. Sch. Dist. of Martinsville*, No. 25-1094 (7th Cir.). John believes *Skrmetti* does not limit the rights of transgender student to access restrooms aligned with their gender identities. *See infra* pp. 31-40. But, if the Fourth or Seventh Circuits disagree, the results of these cases may reduce, or eliminate, whatever limited disagreement exists between the circuits. The government acknowledges as much. *See* Stay Application 29 (noting the "those circuits are currently facing appeals that call their . . . positions into question"). (And, of course, if the Fourth Circuit agrees, the government will have no reason to seek review from this Court.)

VI. The government fails to make the required strong showing of likely success on the merits under existing law

The government has failed to make a "strong showing that [it] is likely to succeed on the merits" in this appeal. *Nken*, 556 U.S. at 434. To carry this burden, the government would need to make a strong showing on both claims, since John is entitled to interim relief so long as he is likely to succeed on one. *See, e.g.*, *Roe* v. *Dep't of Def.*, 947 F.3d 207, 212, 234 (4th Cir. 2020). The government falls short, in part because *Skrmetti* does not "control[] the outcome of this case" in the way it claims. Stay Application 11. Accordingly, the government is not entitled to a stay.

A. The proviso is not entitled to a presumption of validity

As a preliminary matter, the government (at 18) starts its merits argument urging this Court to presume the proviso is valid. The presumption that state laws are legal is never a guarantee of their success. *See*, *e.g.*, *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021) (enjoining state law pending appeal). But that presumption loses force "when a State has enacted legislation creating classes based upon. . . immutable human attributes," such as sex. *Parham* v. *Hughes*, 441 U.S. 347, 351 (1979) (citing *Reed* v. *Reed*, 404 U.S. 71 (1971)); *see also J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) ("[O]ur case law does reveal a strong presumption that gender classifications are invalid."). Every court of appeals to address a ban like the proviso has held that it classified based on sex. *See supra* pp. 26-27. So, the proviso is not entitled to a presumption of validity.

B. The government has not made a strong showing of success on the merits of John's Equal Protection claim

Under the Equal Protection Clause, "sex-based classifications warrant heightened scrutiny." *Skrmetti*, 145 S. Ct. at 1828. So do laws that target "discrete and insular minorities." *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). The proviso triggers heightened scrutiny for both those independent reasons: It classifies based on "biological sex," Stay Application 1, and it discriminates against transgender people. Moreover, even in the absence of heightened scrutiny, a law must "bear a rational relationship to an independent and legitimate legislative end." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). This law does not.

1. The ban triggers heightened scrutiny

First, the proviso facially classifies based on sex. It requires schools to designate multi-occupancy restrooms for use "'only by members of one sex,'" "'determined by anatomy and genetics existing at the time of birth,'" and it "prohibits students of the opposite sex from using the same bathrooms." Suppl. App. 36a (quoting Proviso 1.120). The proviso thus "prohibit[s] conduct for one sex that it permits for the other," *Skrmetti*, 145 S. Ct. at 1831: "[B]iological" males may use the boys' restrooms, "biological" females may not. Proviso 1.114(A)(3), (C)(1). Indeed, the government concedes that the proviso classifies "based on biological sex." Stay Application 1. This conclusion is unavoidable. It is no surprise that the courts of appeals are unanimous that bans like the proviso trigger heighted scrutiny. *See supra* pp. 26-27.

Against this consensus, the government argues (at 19-21) that, per *Skrmetti*, the ban's sex-based distinction escapes heightened scrutiny simply because it

prohibits "both sexes" from using opposite-sex restrooms. But just as a law that prohibits both black and white people from marrying people of different races still "turns on a race-based classification," even though it restricts black and white people alike, *Skrmetti*, 145 S. Ct. at 1831, a law that excludes both boys and girls from restrooms of the other "biological sex" still warrants heightened scrutiny, *Grimm*, 972 F.3d at 609; *cf. Bostock*, 590 U.S. at 659, 672-73 (explaining that because Title VII protects "individuals rather than groups," it is "no defense" under the statute "for an employer to say it discriminates against both men and women because of sex").

Second, the proviso facially discriminates against transgender people, "a quasi-suspect class." *Grimm*, 972 F.3d at 610-13. By excluding transgender males from the definition of "male," and transgender females from the definition of "female," the proviso excludes transgender boys from spaces open to non-transgender boys, and likewise for transgender girls. Proviso 1.114(A)(3). In doing so, it targets a "class *of persons*" for different treatment. *Skrmetti*, 145 S. Ct. at 1834 n.3. That class has all the hallmarks of a quasi-suspect class: Transgender people make up approximately 0.6% of the population, lack political power, and have suffered (and continue to suffer) both de jure and de facto discrimination based on an immutable trait, their gender identities. *Grimm*, 972 F.3d at 612-13; *see also Skrmetti*, 145 S. Ct. at 1831 (Sotomayor, J., dissenting). For this independent reason, then, it requires heightened scrutiny.

The government is flat wrong (at 23-24) that the proviso does not classify based on transgender status because, in its telling, it "prohibits a form of gender transition as a treatment for gender dysphoria" like the law in *Skrmetti*. The proviso does not

turn on the reason a transgender student seeks access to restrooms that match their gender identity. It categorically bans all transgender students, whatever their purpose.

Third, even if the proviso did not facially discriminate, it would still trigger heightened scrutiny because it was motivated by anti-transgender discriminatory intent. When a facially neutral policy has a disproportionate impact on a protected class, it triggers heightened scrutiny when "a discriminatory purpose" was "*a* motivating factor" behind the policy, even if it was not the "sole" or even the "primary" motive. *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (emphasis added). A discriminatory motive need not be "malevolent"; the standard only requires a purpose "directed specifically" at the targeted class. *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

South Carolina likely had such a discriminatory purpose here. The ban's "inevitable," and only, real-world effect is to exclude transgender boys from boys' restrooms and transgender girls from girls' restrooms, so "a strong inference that the adverse effects were desired can reasonably be drawn." *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 n.25 (1979). And here, the overwhelming evidence undermines the proviso's purported justification—that transgender students' mere presence in a restroom poses a threat to their classmates' privacy. *See infra* pp. 35-36. Instead, the legislative record reflects stereotypes and biases against transgender people, including that transgender people are "crazy" and a threat to "innocen[t] . . . children." *See supra* p. 4. Finally, the proviso was "rush[ed] . . . through" the budget

process, Suppl. App. 15a, with less than fourteen minutes of debate, *id.* at 225a, after it repeatedly failed to pass through the normal process, *see supra* p. 4. That "provides another compelling piece of the puzzle of the [legislature's discriminatory] purpose." *N.C. State Conf. of NAACP* v. *McCrory*, 831 F.3d 204, 228-29 (4th Cir. 2016).

2. The ban fails heightened scrutiny

For a law to survive heightened scrutiny, the government must establish "an exceedingly persuasive justification for the classification." *United States* v. *Virginia*, 518 U.S. 515, 524 (1996) (citation modified). The bar is high: A government-defendant's reasons must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* And the reasons must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* at 533.

The government has not met this burden. In defense of the law, the government invokes a students' privacy interest in not having to "expose their bodies to students of the opposite sex." Stay Application at 4 (quoting *Critchfield*, 137 F.4th at 924). But the ban is not substantially related to furthering that interest. The government's argument "ignores the reality of how a transgender child uses the bathroom: 'by entering a stall and closing the door.'" *Grimm*, 972 F.3d at 613 (quoting *Whitaker*, 858 F.3d at 1052). It ignores that any student who has "privacy concerns," for any reason, is also "able to utilize a stall." *Whitaker*, 858 F.3d at 1052. It does "not present any evidence that a transgender student . . . is likely to be a peeping tom, rather than minding their own business like any other student." *Grimm*, 972 F.3d at 614; *see also* Suppl. App. 84a (explaining no such evidence exists). Tellingly, in debating the

proviso and its predecessor bills, the legislature could not identify any evidence at all that transgender students harm classmates when they use restrooms aligned with their gender identities—even though, by that point, *Grimm* had been law for years. *See supra* pp. 3, 19. Nor does the government have any evidence-based reason to exclude John, specifically, from boys' restrooms.

The government next offers an excuse the legislature never articulated: its expert's unsupported claim that "[s]ingle-stall gender-neutral bathrooms are the best choice for vulnerable students with gender incongruence and gender dysphoria." Stay Application at 17; *see id.* at 25. The government cannot rely on that "*post hoc*" rationale. *Virginia*, 518 U.S. at 533. Nor could it support the proviso even if the legislature had cited it. The proviso does not even mention "single-occupancy restrooms, gender-neutral or otherwise," let alone not require schools to offer them. App. 25a (Diaz, C.J., concurring). So it cannot "possibly be adequately tailored to th[at putative] interest." *Ibid.*

For all these reasons, the government's asserted justification for the proviso cannot satisfy heightened scrutiny, and the government cannot make a strong showing of success on the merits of John's Equal Protection claim.

3. The ban fails any level of scrutiny

The ban could not survive even rational basis review. Even when a law does not trigger heightened scrutiny, the distinctions it draws must "bear a rational relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633. Accordingly, a law may not be "drawn for the purpose of disadvantaging the group burdened by the law." *Id.* As explained, there is no evidence that the ban furthers the

government's putative interest in student privacy. *See supra* pp. 35-36. And the record also indicates the law is likely motivated by stereotypes about, and biases against, transgender people. *See supra* pp. 4, 34-35. The distinction the proviso draws thus "lacks a rational relationship to legitimate state interests" and violates the Equal Protection Clause under any level of review. *Romer*, 517 U.S. at 632.

C. The government has not made a strong showing of success on the merits of John's Title IX claim

1. "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Its "broad" language "prohibits a funding recipient from subjecting any person to 'discrimination' 'on the basis of sex.'" *Id.* at 173 (quoting 20 U.S.C. § 1681(a)). The term "discriminat[ion]" typically "refers to distinctions or differences in treatment that injure protected individuals." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 59 (2006).

Even assuming that "sex" in Title IX means "sex assigned at birth," Stay Application 27, the proviso indisputably treats students differently on that basis. John's birth-assigned sex is the only reason he cannot use the boys' restrooms in school. That the proviso's sex classification affects both boys and girls does not, as the government says (at 21), change the analysis. In *Bostock*, this Court held that it was "no defense" under Title VII "for an employer to say it discriminates against both men and women" based on sex. 590 U.S. at 659. The same reasoning applies to Title IX. Both statutes focus on the discriminatory treatment of individuals, rather than groups: Title VII protects "any individual," 42 U.S.C. § 2000e-2(a)(1), while Title IX protects any

"person," 20 U.S.C. § 1681(a). And, as demonstrated, the proviso also injures John. *See supra* pp. 21-23. This separate and unequal treatment "excluded" John "from participation in," "denied" John "the benefits of," and "subjected" John "to discrimination under an[] education program or activity receiving Federal financial assistance," in violation of the plain text of Title IX. 20 U.S.C. § 1681(a).

2. There is no statutory "donut hole" to Title IX that allows schools to use sex-based restroom policies to injure particular students or to deny them equal educational opportunity. *Bostock*, 590 U.S. at 669. Although the statute's prohibition on discrimination is subject to a list of exceptions, the exceptions do not include restrooms. The government (at 27) pins its hopes on the exemption concerning dormitory "living facilities." But restrooms in public school buildings are classic public accommodations, not living facilities, which "are, literally and in common understanding, facilities in which a person lives." Katie Eyer, *Title IX in the Age of Textualism*, 86 Ohio S. L. J. 335, 377 (2025). And "even if a court *were* to conclude that nonresidential restroom . . . facilities are 'living facilities,' the statutory 'living facilities' provision [is] . . . limited—by its own terms—to circumstances where it does not cause discrimination, *i.e.*, harm." *Ibid.* The proviso plainly does harm John.

The government also points to an implementing regulation that authorizes schools to "provide separate toilet . . . facilities on the basis of sex," if the separate facilities are "comparable." 34 C.F.R. § 106.33 (2024). But the regulation does not exempt restrooms from section 1681(a)'s prohibition on discrimination and does not allow schools to "injure protected individuals" on the basis of sex whenever restrooms

are at issue. *Burlington*, 548 U.S. at 59. Nor could it: A regulation cannot trump a statute's protections. *See Grimm*, 972 F.3d at 618.

3. The government asserts (at 39), without argument, that John's view of the law is foreclosed by *U.S. Department of Education* v. *Louisiana*, in which this Court declined the federal government's request for an emergency partial stay permitting portions of a 2024 Title IX regulation to go into effect. 603 U.S. 866, 867-68 (2024). But the portion of the regulation concerning restrooms was not at issue in that matter. *See, e.g.,* Application for Partial Stay at 4, *U.S. Dep't of Educ.* v. *Louisiana*, 603 U.S. 866 (2024) (No. 24A78), 2024 WL 3510278, at *4 (noting the government had not sought "to stay the injunction insofar as it covers . . . Section 106.31(a)(2)," the provision related to restroom access). Nor, for that matter, did *Louisiana* resolve the question of whether Title IX, like Title VII, prohibits discrimination based on gender identity. *See, e.g.*, *Skrmetti*, 145 S. Ct. at 1834 ("We have not yet considered whether *Bostock*'s reasoning reaches beyond the Title VII context . . . .").

4. That Title IX is a Spending Clause statute does not change the answer here. The Spending Clause does not require that every potential violation be "specifically identified and proscribed in advance," *Bennett* v. *Ky. Dep't of Educ.*, 470 U.S. 656, 666 (1985), in a manner "resembling qualified immunity," *Soule* v. *Conn. Ass'n of Sch., Inc.*, 90 F.4th 34, 61 (2d Cir. 2023) (en banc) (Menashi, J., concurring). And "the text of Title IX gives recipients notice that intentional discrimination will result in liability." *Hall* v. *Millersville Univ.*, 22 F.4th 397, 404 (3d Cir. 2022). "It is for this reason that the Supreme Court has, throughout its Title IX jurisprudence, rejected

arguments that [the Spending Clause clear notice requirement] bars a particular plaintiff's cause of action after finding that a funding recipient's conduct constituted an intentional violation of Title IX." *Ibid.*; *see Jackson,* 544 U.S. at 182-83 (similar). For example, although Title IX does not mention either retaliation or deliberate indifference to sexual harassment, this Court has held that the Spending Clause poses no obstacle to liability for such forms of intentional sex discrimination. *See Jackson*, 544 U.S. at 182-83. The government has not made the necessary strong showing of success on the merits.

CONCLUSION

This Court should deny the application to stay the Fourth Circuit's injunction pending appeal.

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Respectfully submitted,

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