IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Charleston Division

JOHN DOE, a minor, by his parents and next friends, JIM DOE and JILL DOE, et al., Plaintiffs, v. STATE OF SOUTH CAROLINA, et al., Defendants.	No. 2:24-cv-06420-RMG

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF JOHN DOE'S MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

This is a textbook case for class certification under Rule 23(b)(2): a suit to enjoin a state law that applies uniformly to every public school in South Carolina, hurts thousands of school children across the state, and will harm more if not enjoined.

Proviso 1.120 categorically bars all transgender public school students from using school restrooms that match their gender identity. It "requires that all South Carolina public schools" "must designate multi-occupancy restrooms . . . for use only by members of one sex and prohibits students of the opposite sex from using the same bathrooms." Declaration of Patrick Archer ("Archer Decl.") Ex. J, at 2.[1] The Proviso "under no circumstance permits a student [to] use a designated single-sex restroom other than one which correlates to the student's biological sex at birth." *Id.* The South Carolina Department of Education (the "Department") "stands ready to enforce" the law against any school district that violates it. *Id.*

Proviso 1.120 violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, because it facially discriminates based both on sex and transgender status with no justification. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 606-615 (4th Cir. 2020). It violates Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*., because it facially discriminates based on sex and harms every transgender student in South Carolina's public school system. *See id.* at 616-19. Plaintiff John Doe is among the many students harmed by the law. John is a thirteen-year-old transgender student who, until this fall, attended a public middle school in Berkeley County, South Carolina. This fall, administrators at John's school told him that Proviso 1.120 required them to exclude John from the boys' restroom and punished him for using

[1] The declarations of John Doe, Jim Doe, and Stelphanie L. Budge referenced in this motion are attached to John Doe's memorandum in support of his motion for a preliminary injunction.

it. John withdrew from the school as a result, and he now takes online classes from home. He seeks to enjoin the law's enforcement so that he can return to school with his classmates—without having to endure the discrimination, stigma, and other harms to which the Proviso subjects him and thousands of other transgender students across the State.

John seeks to certify the following Class under Federal Rule of Civil Procedure 23(b)(2):

> All current and future transgender students who seek or will seek to use a single-sex restroom corresponding to their gender identities in a South Carolina public school.

John easily meets the requirements for injunctive class certification under Rules 23(a) and 23(b)(2)—numerosity, commonality, typicality, adequacy, and the appropriateness of class-wide declaratory or injunctive relief. As to numerosity, reliable estimates indicate that there are over three thousand transgender students in South Carolina public schools. *See* Expert Report Declaration of Stephanie L. Budge ("Budge Decl.") ¶ 54. As to commonality and typicality, John's challenge to Proviso 1.120 turns on the same legal issues as the Class's claims: for Title IX, whether the law discriminates based on sex, and for the Equal Protection Clause, whether the law discriminates based on sex and/or transgender status, and whether that discrimination substantially relates to an important government objective. As to adequacy, John has every reason to vigorously pursue the requested injunction, has retained counsel experienced in litigating Title IX, transgender students' rights, and class action cases, and has no conflict with the rest of the Class. And as to Rule 23(b)(2), in seeking to enforce a discriminatory law that applies statewide, the Defendants have "acted on grounds that apply generally to the class," which warrants injunctive and declaratory relief for the Class as a whole.[2]

[2] Plaintiff Alliance for Full Acceptance does not seek appointment as a class representative.

For those reasons, John respectfully requests that the Court certify the Class under Rule 23(b)(2) and appoint his counsel as class counsel under Rule 23(g).

STATEMENT OF FACTS

I. Proviso 1.120 Applies to All School Districts in South Carolina.

Passed earlier this year, Proviso 1.120 excludes every transgender student in South Carolina from using public school restrooms that match their gender identity. H. 5100, Appropriation Bill 2024-2025, Part IB § 1.120 (Act No. 226, 2024 S.C. Acts), https://perma.cc/3SXF-8JPG ("Proviso 1.120"). The law provides that "[m]ulti-occupancy public school restrooms and changing facilities shall be designated for use only by members of one sex." Proviso 1.120(C)(1). "Any public school restrooms and changing facilities that are designated for one sex shall be used only by members of that sex," and "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." *Id.* As defined in the Proviso, "'[s]ex' means a person's biological sex, either male or female, as objectively determined by anatomy and genetics existing at the time of birth." Proviso 1.120(A)(3). The law applies to "all South Carolina school districts." Archer Decl. Ex. H, at 2.

Before the law was passed, several state legislators voiced without rebuttal that Proviso 1.120 discriminates against transgender students and violates the Equal Protection Clause of the Constitution and Title IX of the Education Amendments of 1972. *Id.*, Ex. F, at 4; *id.*, Ex. D, at 2-4; *Grimm*, 972 F.3d at 606-619 (holding that policy barring transgender students from bathrooms matching their gender identity violated Title IX and the Equal Protection Clause).

Nonetheless, the Proviso requires the Department to enforce it against any school district in South Carolina that fails to comply. Proviso 1.120(B) ("A school district that violates any portion of this provision shall be penalized twenty-five percent of the funds appropriated by this

act that are used to support the school district's operations."). The Department has committed to do so. Archer Decl. Ex. J, at 2 ("SCDE stands ready to enforce this proviso where noncompliance by passage of a conflicting policy or inconsistent implementation occurs."). To drive that threat home, the Department has pledged to publish a table showing how much money "each district" will lose if it violates the Proviso. *Id.*

II. Proviso 1.120 Harms Transgender Students Across the State.

Over three thousand children who attend public school in South Carolina are transgender, meaning they have a "pervasive, consistent, persistent, and insistent sense of being a sex different from the sex assigned to them" at birth. Budge Decl. ¶ 22. South Carolina's ban inflicts serious harm on all of them. As the Fourth Circuit observed in *Grimm*, "[t]he stigma of being forced to use a separate restroom . . . invite[s] more scrutiny and attention' from other students, 'very publicly brand[ing] all transgender students with a scarlet 'T'.'" 972 F.3d at 617-18 (quoting *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018)).

Additionally, excluding transgender students from sex-specific restrooms that correspond to their gender identity inflicts severe emotional and psychological harm, including "feelings of rejection, invalidation, isolation, shame, and stigmatization, as well as depression, anxiety, and suicidal ideation." Budge Decl. ¶¶ 55-60. It interferes with accepted protocols for the treatment of gender dysphoria, "a condition that is characterized by debilitating distress and anxiety resulting from the incongruence between an individual's gender identity and birth-assigned sex." *Grimm*, 972 F.3d at 594–95 (citation omitted); *see* Budge Decl. ¶¶ 34-37, 61-63 (explaining that social transition, which includes the use of sex-designated facilities that align with the transgender person's gender identity, is an accepted treatment for gender dysphoria, and exclusion from gender-appropriate facilities interferes with this process). 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." Budge Decl. ¶ 60. "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." *Id.*

Bans like Proviso 1.120 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 (citing Br. of Amici Curiae the Nat'l PTA, GLSEN, Am. Sch. Counselor Ass'n, and Nat'l Assoc. of Sch. Psychologists in Support of Pl.-Appellee 5); *accord* Budge Decl. ¶ 69. "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." Budge Decl. ¶ 69. They "may also avoid eating certain foods (or restrict food in general)," "leading to constipation and muscle damage/weakness." *Id.* 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.* ¶ 60.

Banning transgender students from restrooms that match their gender identities also increases the risk of harassment and violence, which transgender people already face at disproportionate rates. *See* Budge Decl. ¶ 59. "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.* Partially for this reason, transgender and gender non-conforming people "regularly face harassment and victimization in restrooms corresponding with their sex assigned at birth." *Id.* 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 known him as a boy, *id.* ¶¶ 64-65, and it sends an "unmistakable message" to other students "that their transgender classmates are not suitable to be among them," *id.* ¶ 66. "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.* ¶ 67.

These forms of discriminatory treatment of transgender students interfere with their 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." Budge Decl. ¶ 70. 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 by being outed because of restroom policies at their schools." *Id.*

III. Plaintiff John Doe is Among the Many Transgender Students Harmed by the Law.

Plaintiff John Doe's experiences are typical of those experienced by transgender students across South Carolina. Until recently, John was a student at Cane Bay Middle School in the Berkeley County School District. Declaration of John Doe ("John Doe Decl.") ¶¶ 5-8. This fall, before school officials enforced Proviso 1.120, John used the boys' restrooms, which are consistent with his gender identity. *Id.* ¶ 8. No students raised objections to John using the boys' restrooms. *Id.* ¶¶ 8, 17. But teachers—who do not use student restrooms—reported to the school's administrators that John was using the boys' restrooms. *Id.* ¶ 9. Citing Proviso 1.120, school officials told John he could no longer use the boys' restrooms, and when he continued to do so, they suspended him for a day. *Id.* ¶¶ 10, 15, 18-19. When John returned to school, the School

District instructed teachers to monitor his use of the restroom. *Id.* ¶ 22. More than once, a teacher yelled at John for trying to use the boys' restrooms. *Id.* As a result, he held his bladder for the rest of the school day, which caused extreme discomfort and made it hard to focus on classes. *Id*. The monitoring spurred on John's peers to harass him about his gender identity. *Id.* ¶ 23.

This all caused John severe psychological distress. *Id.* ¶¶ 22-24. He missed several days of school and eventually withdrew from the school entirely. *Id.* ¶¶ 24-25. John now takes classes from home through an online program run by the District. *Id.* ¶ 26. John does not like the online program, which offers fewer educational opportunities than Cane Bay Middle School and isolates him from classmates. *Id.* If the law were enjoined and he were allowed to use the boys' bathrooms there, he would return to school with his classmates. *Id.* ¶ 27.

ARGUMENT

"Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical ... of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). When the case meets these basic qualifications, the court may certify a plaintiff class "for injunctive or declaratory relief when the defendant 'has acted or refused to act on grounds generally applicable to the class.'" *Id.* (quoting Fed. R. Civ. P. 23(b)(2)); *accord Berry v. Schulman*, 807 F.3d 600, 608-09 (4th Cir. 2015) (same).

"Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples in which class certification is proper under Rule 23(b)(2)." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 329-30 (4th Cir. 2006) (quoting *Amchem*, 521 U.S. at 614)

(cleaned up); *accord* Fed. R. Civ. P. 23(b)(2) advisory committee note to the 1966 amendments, (collecting such cases). Courts regularly certify such class actions when they challenge rules or practices that discriminate against an entire group of people. *See, e.g.*, *Kadel v. Folwell*, 100 F.4th 122, 160 (4th Cir. 2024) (affirming certification of class of transgender people who sought to enjoin discriminatory statewide policies that denied Medicaid coverage for gender-affirming care); *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 780 (4th Cir. 2023) (affirming grant of class certification where plaintiffs challenged state law as unconstitutionally vague); *Brown v. Nucor Corp.*, 785 F.3d 895, 916-17, 922 (4th Cir. 2015) (directing district court to certify class where plaintiff showed companywide policy and practice of discrimination).

Class certification is equally appropriate here.

I. The Class is Sufficiently Numerous that Joinder is Impractical.

First, joinder of all transgender students in South Carolina who use public school restrooms would be "impracticable." Fed. R. Civ. P. 23(a)(1). "[A] class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone." 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 3:12 (6th ed. 2022) ("Newberg"). But "[n]o specified number is needed"—the Fourth Circuit has affirmed certification of a class as small as eighteen people, *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967), and "other courts have certified proposed classes consisting of a similar number of members." *Berry v. Wells Fargo & Co.*, No. 3:17-CV-00304, 2018 WL 9989754, at *6 (D.S.C. Oct. 9, 2018). John "need not allege the exact number or specific identity of proposed class members"; a "good faith estimate" suffices: that is, he need only provide "enough evidence of the class's size to enable the court to make commonsense assumptions regarding the number of putative class members." Newberg § 3:13.

Plaintiffs' expert, Dr. Stephanie Budge, estimates that more than 3,000 transgender students attend South Carolina public schools. Budge Decl. ¶ 54. That number comports with reliable studies. Based on data collected by the U.S. Centers for Disease Control, researchers at the University of California estimated that there are approximately 3,700 transgender children between the ages of 13-17 in South Carolina. Jody L. Herman *et al*., Williams Inst., *How Many Adults and Youth Identify as Transgender in the United States* 10 (June 2022), https://perma.cc/3YZS-F6EQ; *see Roe ex rel. Roe v. Herrington*, No. 20-CV-00484, 2023 WL 5759590, at *2 (D. Ariz. Aug. 10, 2023) (noting that courts have found Williams Institute's survey data "sufficiently reliable to estimate the number of transgender individuals" in a state for class certification). Over 90% of children in South Carolina attend public school. Nat'l Ctr. For Educ. Statistics, Digest State Dashboard: South Carolina, https://perma.cc/F7JL-LND7 (last updated May 2024). This means that over 3,000 transgender students between ages 13 and 17 alone attend public school in South Carolina. Even if the Class were a fraction of that size, these numbers show that it would be impractical to name all its members as plaintiffs.

Joinder is especially impractical here because "all potential plaintiffs are not yet known"—the Class's composition will fluctuate as more transgender students enroll in South Carolina public schools—and its members "reside all over the state." *Fain v. Crouch*, 342 F.R.D. 109, 114 (S.D. W. Va. 2022), *aff'd sub nom. Kadel*, 100 F.4th at 160-61. Those factors favor certification as well. Rule 23(a)(1) turns not just on numbers, but also on "the ease of identifying" class members and "their geographic dispersion." *Moodie v. Kiawah Island Inn Co., LLC*, 309 F.R.D. 370, 376 (D.S.C. 2015) (quoting *Baltimore v. Laborers' Int'l Union of N. Am.*, 67 F.3d 293, 1995 WL 578084 at *1 (4th Cir. 1995)). "[C]lasses including future claimants generally meet the numerosity requirement due to the 'impracticality of counting such class members, much less joining them.'"

J.D. v. Azar, 925 F.3d 1291, 1322 (D.C. Cir. 2019) (quoting 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 3:12 (5th ed. 2019)). And "geographic dispersion of class members cuts in favor of certification as joinder of all members of a dispersed class is likely less practicable." Newberg § 3:12.

Finally, transgender students face significant obstacles to filing their own lawsuits. *See* Newberg § 3:12 (explaining that courts generally consider class members' "financial resources" and "the ability of claimants to institute individual suits"). As the Fourth Circuit has explained, "[t]he transgender community . . . suffers from high rates of employment discrimination, economic instability, and homelessness." *Grimm*, 972 F.3d at 611. Transgender students already "frequently experience harassment" and "physical assault" in school (at rates of 78% and 35%, respectively), and are "more likely to be the victim of violent crimes." *Id.* at 612; *see* Budge Decl. ¶ 47 (explaining that "[t]ransgender children and adolescents experience a great deal of victimization in the school environment, including bullying, physical assault, sexual assault, maltreatment, property victimization, and witnessing/indirect victimization" and "experience significantly higher rates of victimization at school than their cisgender peers"). Many class members would understandably fear more stigma or even violent backlash if they came forward to file a lawsuit. Such "[f]ear of retaliation" supports class treatment because it "might deter potential plaintiffs from suing individually, making a representative action especially pertinent." Newberg § 3:12. What is more, to bring suit, transgender children must rely on parents or guardians, who may not support the child's transition or who may lack the motivation or resources to retain an attorney to sue on the child's behalf. *See* Jack Andrzejewski *et al.*, *Perspectives of Transgender Youth on Parental Support: Qualitative Findings From the Resilience and Transgender Youth Study*, 48 Health Educ. & Behav. 47 (Oct. 2020), https://perma.cc/R252-

W84D (explaining that "transgender youth report lower levels of parental support than cisgender youth and many face parental rejection related to their gender identity").

These realities make transgender children less likely to litigate their own cases and best served by class-wide proceedings. *See, e.g.*, *Flack v. Wis. Dep't of Health Servs*., 331 F.R.D. 361, 368 (W.D. Wis. 2019) (finding class of transgender people satisfied Rule 23(a)(1) "because of the sensitive nature of the claims, the plaintiffs' limited financial means, and their varied locations across the state"); *N.B. v. Hamos*, 26 F. Supp. 3d 756, 769 (N.D. Ill. 2014) (finding numerosity met in part because class of minors with disabilities "consist[] of an extremely vulnerable population because of their youth," "would need an adult next friend to initiate suit," had "limited financial means," and were "scattered throughout the state").

For these reasons, the Class meets Rule 23(a)(1)'s numerosity element.

II. John's Claims Raise Common Issues and are Typical of the Class's Claims.

John also meets the commonality and typicality requirements: His claims present "questions of law or fact common to the class" and "are typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(2)-(3). Those requisites are "not high" bars and "tend to merge." *Brown v. Nucor Corp.*, 576 F.3d 149, 152-53 (4th Cir. 2009) (citations omitted). A case presents a common question if it "will resolve an issue that is central to the validity of each one of the claims in one stroke," as is true when the defendant has "operated under a general policy of discrimination." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 353 (2011). The plaintiff's claims are "typical" if he is "part of the class" and has the "same interest and suffer[s] the same injury as the class members," such that the facts that prove his claims will also advance the class's claims. *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006) (citation omitted). "The typicality requirement is met if a plaintiff's claim arises from the same event or course of conduct that gives

rise to the claims of other class members and is based on the same legal theory." *Moodie*, 309 F.R.D. at 378 (quoting *Parker v. Asbestos Processing, LLC*, No. 0:11-CV-01800–JFA, 2015 WL 127930, at *7 (D.S.C. Jan. 8, 2015)); Newberg § 3:29 (same).

John's claims turn on the same questions as the Class's: whether Proviso 1.120 violates Title IX and the Equal Protection Clause because it bans transgender students from using restrooms consistent with their gender identity. The Title IX claim asks whether the law discriminates "on the basis of sex" and harms transgender students as a class. *Grimm*, 972 F.3d at 607. As the court held in *Grimm*, a law or policy does so if it bans transgender students from using restrooms that correspond to their gender identity. *Id.* at 616-18 ("The stigma of being forced to use a separate restroom is . . . sufficient to constitute harm under Title IX, as it 'invite[s] more scrutiny and attention' from other students, 'very publicly brand[ing] all transgender students with a scarlet 'T'.'" (citation omitted)). The Equal Protection claim also turns on common questions about the Proviso 1.120 itself: whether the law classifies people based on sex and/or gender identity and, if so, whether that classification is "substantially related to a sufficiently important governmental interest." *Id.* at 607 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985)).

These questions are central to John's claims and will all generate class-wide answers, not individualized ones. If John prevails on either of his claims, it will mean that Proviso 1.120 "invidiously discriminates against [him] as much as it would other members of the class" and entitles him to relief "identical to other class members—the declaration of the exclusion's unlawfulness and an injunction precluding the enforcement of it." *Fain*, 342 F.R.D. at 115 (holding that challenge to state law that excluded Medicaid coverage for gender-affirming care for transgender people raised common questions and was typical of the class's claims); *see Flack*, 331 F.R.D. at 369 (same); *see also Robinson v. Labrador*, No. 1:24-CV-00306, 2024 WL 4027946, at

*9-10 (D. Idaho Sept. 3, 2024) (certifying class of transgender people for challenge to statewide ban on gender-affirming care). Accordingly, John's claims satisfy Rules 23(b) and (c).

III. John is an Adequate Class Representative and has Retained Qualified Counsel.

John is an appropriate class representative because he and his counsel "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy "inquiry involves two issues: (i) whether plaintiffs have any interest antagonistic to the rest of the class, and (ii) whether plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation." *Thomas v. Louisiana-Pac. Corp.*, 246 F.R.D. 505, 509 (D.S.C. 2007) (quoting *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 325, 329–30 (D.S.C.1991)). Both are met here.

A. John is an Adequate Class Representative.

John shares a strong common interest with the entire Class: He needs to access school restrooms that align with his gender identity. John Doe Decl. ¶¶ 11-13, 27. He and his parents are committed to enjoining the law so that he can go to school free from discrimination and so that other students may do so as well. *Id.* ¶ 28; Declaration of Jim Doe ¶ 18. John has no interest that conflicts with the Class's. He and his parents have obtained experienced counsel, and they intend to vigorously prosecute this case through final judgment.

B. John's Counsel are Qualified and Experienced.

John's counsel are well-equipped to represent the Class under Rule 23(g). Collectively, they have decades of experience in civil rights and class action litigation, expertise in Title IX, the Equal Protection Clause, and the rights of LGBTQ+ students, and will commit necessary resources to represent the Class.

Joseph Wardenski of Wardenski P.C., a civil rights law firm that focuses on students' rights, LGBTQ+ rights, and fair housing, has over seventeen years of experience litigating

complex civil cases in federal court, including fifteen years of experience in civil rights litigation, including class actions. Declaration of Joseph J. Wardenski ("Wardenski Decl.") ¶¶ 2, 5-8. He was lead counsel in two major transgender rights cases—*Whitaker v. Kenosha Unified School District*, No. 2:16-cv-943, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016), *aff'd*, 858 F.3d 1034 (7th Cir. 2017), which established in the Seventh Circuit that public school policies that discriminate against transgender students violate Title IX and the Constitution, and *Flack v. Wisconsin Department of Health Services*, 395 F. Supp. 3d 1001 (W.D. Wis. 2019), a class action that invalidated a law that denied Medicaid coverage for transgender people who sought gender-affirming care. Wardenski Decl. ¶¶ 5-6. He recently obtained a preliminary injunction requiring a Wisconsin school district to provide a transgender girl access to girls' restrooms at school. *Id.* ¶ 7. He previously served as a Trial Attorney in the U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section, where he litigated and investigated civil rights cases across the country. *Id.* ¶ 8.

Public Justice's Students' Civil Rights Project specializes in impact litigation concerning civil rights in schools, including litigation to protect the rights of LGBTQ+ students. *See* Declaration of Adele P. Kimmel ¶¶ 5-6. The attorneys who would serve as class counsel, Adele Kimmel, Alexandra Brodsky, and Sean Ouellette, have special expertise in Title IX and the Equal Protection Clause and have represented parties and amici in numerous successful cases brought under those statutes. *See id.* ¶¶ 6-7; Declaration of Alexandra Brodsky ("Brodsky Decl.") ¶¶ 5-6; Declaration of Sean Ouellette ("Oullette Decl.") ¶¶ 6-7; *see also, e.g.*, *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257 (4th Cir. 2021), *Brown v. Arizona*, 82 F.4th 863, 866 (9th Cir. 2023) (en banc); *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1113 (9th Cir. 2023). Ms. Kimmel and Ms. Brodsky have authored academic articles on Title IX and LGBTQ discrimination, and Ms. Brodsky

taught a course on Title IX at Yale Law School. Kimmel Decl. ¶ 8; Brodsky Decl. ¶ 2. Mr. Ouellette has served as class counsel in numerous other cases. Ouellette Decl. ¶ 9.

Harper Segui is a senior partner at Milberg Coleman Bryson Phillips Grossman, PLLC ("Milberg") who has spent most of her eighteen-year career litigating complex class actions. Declaration of Harper Segui ¶ 4. She has also co-authored several publications and has spoken at multiple national legal education conferences on complex class action topics. *Id.* ¶ 8. Milberg is a large AV-rated international law firm that regularly engages in class action litigation. *Id.* ¶¶ 2-3.

Together, John's counsel are well-equipped to represent the Class.

IV. The Defendants Have Acted on Grounds that Apply Generally to the Class

Finally, class-wide declaratory or injunctive relief is "appropriate" because the Defendants have "acted . . . on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) certification is justified "when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc.*, 564 U.S. at 360. And it is "well settled" the challenged conduct "need not be directed or damaging to every member of the class" to certify an injunctive class. Newberg § 4:28. An action may have "general application" to the entire class—and so justify class-wide relief—"even if it has taken effect or is threatened only as to one or a few members." Fed. R. Civ. P. 23(b)(2) advisory committee note to the 1966 amendments.

Like other discriminatory laws, Proviso 1.120 applies generally to the Class: It bans all transgender students in South Carolina public schools from restrooms that align with their gender identity. State officials have made clear that they plan to enforce the statute across the South Carolina public school system. As a result, a statewide injunction is appropriate. *See, e.g.*, *HIAS, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021) (holding that even "a nationwide injunction may be appropriate when the government relies on a 'categorical policy' and when the facts would not

require different relief for others similarly situated to the plaintiffs"); *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 672 (8th Cir. 2022) (upholding facial injunction against state law banning gender-affirming care). Such relief would benefit the whole Class because it would prevent the Defendants and those under their control from enforcing the law, allowing class members to use the appropriate restroom at school without fear of punishment.

For those reasons, this case warrants Rule 23(b)(2) certification, just as in other challenges to rules that excluded transgender people from public spaces or benefits. *See, e.g.*, *Fain*, 342 F.R.D. at 115 (certifying class to enjoin rule that excluded Medicaid coverage for gender-affirming care for transgender people exclusion because "the exclusion affects all proposed class members, and the declaratory and injunctive relief sought would benefit all class members. "); *Flack*, 331 F.R.D. at 370 ("[C]ertification of the Proposed Class is warranted under Rule 23(b)(2) because the categorical coverage ban on gender-confirming care under the Challenged Exclusion is generally applicable to the class, making a final injunction and corresponding declaratory judgment appropriate to the full class."); *Robinson*, 2024 WL 4027946, at *11 (certifying class to enjoin statewide ban on gender-affirming care).

CONCLUSION

John respectfully requests that the Court (1) certify a class of all current and future transgender students who seek or will seek to use a single-sex restroom corresponding to their gender identities in a South Carolina public school, and (2) appoint his counsel, Joseph Wardenski and Wardenski P.C.; Adele Kimmel, Alexandra Brodsky, Sean Ouellette, and Public Justice; and Harper Segui and Milberg Coleman Bryson Phillips Grossman, PLLC, as Class counsel.

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Respectfully submitted,

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** Pro hac vice motions forthcoming*

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2024, the foregoing was filed using the Court's CM/ECF service, which will send notification of such filing to all counsel of record.

/s/ Harper T. Segui
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