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 JANE 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 PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Bills, and Constitutional Provisions

Other Authorities

INTRODUCTION

This past summer, in willful defiance of federal law, the State of South Carolina enacted Budget Proviso 1.120. The law requires all South Carolina public schools to ban transgender students from using restrooms that correspond to their gender identities. The U.S. Court of Appeals for the Fourth Circuit has already held that such bans violate the Constitution and Title IX of the Education Amendments of 1972. Yet Proviso 1.120 threatens to withhold state funding from school districts that refuse to comply with its illegal directive—a threat South Carolina has repeatedly emphasized it intends to follow through on. As a result, transgender students suffer. One of those students, John Doe, brings this lawsuit on behalf of himself and all similarly situated students, alongside the Alliance for Full Acceptance, a nonprofit organization. They ask this Court to apply the Fourth Circuit's 2020 decision in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), to rule that Proviso 1.120's prohibitions on transgender students' restroom access violates Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV.

Plaintiff John Doe now moves, on his own behalf and on behalf of a putative class of transgender students who are or will be affected by the policy ("the Class"), for a preliminary injunction prohibiting Defendants—a range of state and local entities and officials—from enforcing or complying with Proviso 1.120 with respect to school restrooms. This Court should grant the requested injunction because John and the Class fulfill all the requirements for a preliminary injunction.[1]

First, John is likely to succeed on the merits of his claims because Proviso 1.120's restroom ban is materially identical to the one the Fourth Circuit already invalidated in *Grimm*. In that case,

[1] Plaintiffs move for class certification concurrently with this motion for a preliminary injunction.

the Fourth Circuit held that schools violate Title IX and the Equal Protection Clause when they forbid transgender students from using restrooms that correspond with their gender identities. By requiring that all public schools in South Carolina systematically exclude all transgender students from such restrooms, Proviso 1.120 squarely defies *Grimm*.

Second, Proviso 1.120 is causing and will continue to cause severe, escalating, and irreparable harm to John and all other transgender students in South Carolina public schools if it remains in effect. Because of Proviso 1.120, John, a transgender thirteen-year-old boy, was suspended by his middle school in Defendant Berkeley County School District for using the boys' restrooms at school. And because of Proviso 1.120, John is now attending an online homeschool program, since he cannot use boys' restrooms at his school without suffering discipline and other adverse consequences. The restroom ban has also taken a toll on John's mental and emotional health. And Proviso 1.120 is causing similar injuries to the thousands of other transgender students in South Carolina public schools.

Third, the public interest and balance of equities both weigh heavily in favor of the enforcement of established civil rights protections for transgender students. John and transgender students across the state will suffer irreparable harm absent an injunction, which would not harm the defendants or any other student. And enforcing those students' constitutional and statutory civil rights serves the public interest.

STATEMENT OF FACTS

I. In 2020, the Fourth Circuit Held that Schools Violate Federal Law if they Exclude Transgender Students from Using Restrooms that Match their Gender Identities.

In 2020, the U.S. Court of Appeals for the Fourth Circuit decided *Grimm v. Gloucester County School Board*, a Title IX and Equal Protection case brought by a transgender boy, Gavin Grimm, whose Virginia school forbade him from using boys' restrooms at school. 972 F.3d 586

(4th Cir. 2020). *Grimm* held that, if a school bans transgender students from restrooms that correspond to their gender identity—what this brief will refer to as "gender-appropriate restrooms"—it violates both Title IX, which prohibits sex discrimination in education, and the Equal Protection Clause of the U.S. Constitution. *See id.* at 606-19. *Grimm* also recognized that, when transgender students are excluded from gender-appropriate restrooms, they predictably and regularly experience significant educational, psychological, and physical harms, with potential lifelong consequences. These include medical complications, such as urinary tract infections, missed class time, and significant emotional, psychological, and dignitary interests. *See id.* at 617-18.

II. South Carolina Banned Transgender Students from Gender-Appropriate School Restrooms Anyway.

The South Carolina legislature knew about *Grimm*. Yet it has openly flouted federal law by including in its most recent budget Proviso 1.120, which requires schools, at the threat of lost state funding, to exclude transgender students from gender-appropriate restrooms. *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"].

Proviso 1.120 is the culmination of a nearly year-long effort by some South Carolina legislators to prohibit transgender students from using restrooms that correspond with their gender identities. Starting in November 2023, a group of South Carolina legislators "pre-filed" and then introduced several bills, all titled the "South Carolina Student Physical Privacy Act." Declaration of Patrick Archer ("Archer Decl.") Ex. A; *id.*, Ex. B; *id.*, Ex. C. These bills all sought, in nearly identical terms, to ban transgender students from public school restrooms that corresponded to their gender identity. H. 4538, 125th Gen. Assemb. (S.C. 2024); S. 1213, 125th Gen. Assemb.

(S.C. 2024); H. 5407, 125th Gen. Assemb. (S.C. 2024). None made it out of committee. Archer Decl. Ex. A; *id.*, Ex. B; *id.*, Ex. C.

Undeterred, the legislators turned to the state budget process to push through the legislation. On April 24, 2024, South Carolina State Senators Wes Climer and Josh Kimbrell introduced Amendment 48 to the state's annual budget appropriations bill. *See* S. Journal No. 62, 125th Session (S.C. Apr. 24, 2024), https://perma.cc/32KW-859R. Amendment 48—which eventually became known as Proviso 1.120—was substantially similar to House Bill 4538, Senate Bill 1213, and House Bill 5407. Much like those earlier bills, Proviso 1.120 sought to prohibit transgender students from using gender-appropriate restrooms. It reads, in relevant part:

> "Sex" means a person's biological sex, either male or female, as objectively determined by anatomy and genetics existing at the time of birth. Evidence of a person's biological sex includes, but is not limited to, any government-issued identification document that accurately reflects a person's sex as listed on the person's original birth certificate issued at or near the time of birth. . . .
>
> A school district supported in part by funds appropriated by this act, shall not permit any public school within the district to use any funds to maintain or operate any restroom or changing facility on its premises that is not in compliance with this provision or facilitate any public-school authorized activity or event involving overnight lodging that is not in compliance with this provision. 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. . . .
>
> Multi-occupancy public school restrooms and changing facilities shall be designated for use only by members of one sex. Any public school restrooms and changing facilities that are designated for one sex shall be used only by members of that sex; 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; and the public school with authority over that building shall take reasonable steps to ensure that all restrooms and changing facilities provide its users with privacy from members of the opposite sex.

Proviso 1.120(A)(3), (B), (C)(1).

Citing no evidence, state legislators advocating for Proviso 1.120 and its predecessor bills vaguely claimed that transgender students' use of gender-appropriate restrooms posed a threat to

other, non-transgender students. For example, in explaining the purpose and intended impact of House Bill 4538, Representative April Cromer – one of that bill's co-sponsors – stated that the bill was "common sense legislation – boys are boys, girls are girls, and you have to use the bathroom and locker room that lines up with your gender." Archer Decl. Ex. E, at 2. Another one of House Bill 4538's co-sponsors, Representative Melissa Oremus, remarked that the bill's purpose was to "protect the innocence of our children." *Id.* at 3. Representative Oremus framed that goal of protecting innocent children in contrast to "catering to a crazy." *Id.*

Senators Wes Climer and Josh Kimbrell echoed these statements about safety and privacy of non-transgender students when they explained the purpose of Proviso 1.120 on the senate floor. In introducing the bill, Senator Climer explained, "The amendment before us here stipulates in school settings that a boy will use the boys' bathroom, the boys' locker room, the boys' changing room. That a girl will use the girls' bathroom, the girls' locker room, the girls' changing room." Archer Decl. Ex. D, at 1. Senator Climer then referenced an unverified story about an unidentified transgender girl—whom the state senator referred to as "an 18-year-old man"—using the girls' restroom at a particular South Carolina high school and noted that Proviso 1.120 was intended to "rectify that very obvious problem." *Id.*

South Carolina state legislators understood that the proposed amendment would directly flout federal law. Senator Climer, for instance, acknowledged in an April 25 press interview that Proviso 1.120 would likely face a legal challenge and would probably be struck down as unconstitutional by a lower court; he expressed hope that the U.S. Supreme Court *might* come to a different result. Archer Decl. Ex. F, at 4. Opponents of the proviso in the state senate also highlighted its direct conflict with existing federal law in statements on the senate floor. Senator Tameika Isaac Devine stated, "We know that this amendment will be a violation of constitutional

law. We could be sued; the state could be sued. . . . This will clearly subject our state to legal action. We are willfully wasting taxpayer dollars to defend against something that will be found unconstitutional." *Id.*, Ex. D, at 2. Senator Deon T. Tedder, also speaking from the senate floor, expressed concern that the provision discriminated against students "that may have transitioned and identify as another sex." *Id.* at 3. In response, Senator Devine again referenced the Fourth Circuit's holding in *Grimm*, explaining that the court had found a similar restroom policy in that case to be discriminatory and therefore unconstitutional. *Id.* And Senator Tedder highlighted the treacherous circumstances that the amendment created for school districts across the state. As he explained, "[Proviso 1.120] really puts the school in a bind. . . . Now the school has to decide what they're going to do. Do we violate the Constitution, or do we risk losing funds?" *Id.* at 4.

Nonetheless, on June 26, 2024, the South Carolina House and Senate each voted in favor of the state budget bill, which included Proviso 1.120. *Id.*, Ex. G. Governor Henry McMaster signed the appropriations bill, *see id.*, Ex. H, at 1 ("On June 26, 2024, Governor McMaster signed South Carolina's FY 2024-2025 budget into law."), and Proviso 1.120 went into effect on July 1, 2024, *see* H. 5100, Appropriation Bill 2024-2025 (Act No. 226, 2024 S.C. Acts), https://perma.cc/3SXF-8JPG ("Except as otherwise specifically provided, this act takes effect July 1, 2024.").

The South Carolina Department of Education has made it clear that it will enforce Proviso 1.120. In a July 23 memorandum to district superintendents, Deputy State Superintendent John E. Tyler—writing on behalf of the state Department of Education—noted that Proviso 1.120 "requires" the Department of Education to "withhold 25% of state funds" from school districts that allow transgender students to use restrooms that correspond with their gender identities. Archer Decl. Ex. H, at 1. One week later, Deputy Superintendent Tyler circulated a second memorandum

that reiterated this threat of withholding funds. Archer Decl. Ex. I, at 1. And one month after that, on August 27, Deputy Superintendent Tyler issued a third memorandum instructing school districts to comply with Proviso 1.120. Archer Decl. Ex. J, at 2. This final memorandum warned schools that the agency "stands ready to enforce this proviso where noncompliance by passage of a conflicting policy or inconsistent implementation occurs." *Id.*

III. Proviso 1.120 Inflicts Irreparable Harm on Students Across South Carolina.

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. *See* Expert Witness Declaration of Stephanie L. Budge ("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 branding 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 identities 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; *see* Budge Decl. ¶¶ 34-37, 61-63 (explaining that social transition, including the use of sex-designated facilities that align with a person's gender identity, is an accepted treatment for gender dysphoria, and that exclusion from gender-appropriate restrooms interferes

with this social transition 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.*

Restroom 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 (quoting Br. of Amici Curiae the Nat'l PTA, GLSEN, Am. Sch. Couns. Ass'n, and Nat'l Ass'n. of Sch. Psychs. in Supp. 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 identity also raises the risk of harassment and violence, which transgender people already face at above-average 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 know him as a boy, and it sends an "unmistakable message" to other students "that their transgender classmates are not suitable to be among them." *Id.* ¶¶ 64-66. "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 they experience when they are outed due to restroom policies at their schools." *Id.*

As a result of Proviso 1.120 and fears that their transgender children will not be able to use appropriate restrooms, some South Carolina families are keeping their children out of public schools. One mother, for example, is paying for her transgender child, "Timmy," to attend private schools despite the significant financial burden. Declaration of Lisa Johnson ("Johnson Decl.") ¶¶ 5-6. She would like to send Timmy to public schools, but knew she could not do so this year because of Proviso 1.120, which would "out" him to new classmates and expose him to anti-transgender harassment and other harms. *Id.* ¶¶ 7-8. Another South Carolina family is homeschooling their child to avoid discriminatory restroom policies. *Id.* ¶ 9. And another family is moving out of state. *Id.*

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

John Doe is a thirteen-year-old middle school student who lives with his parents in Berkeley County, South Carolina. Declaration of John Doe ("John Doe Decl.") ¶ 2. John is transgender. *Id.* ¶ 3. That is, although John was assigned female at birth, he is a boy, his gender identity is male, and he now identifies and presents as male in all aspects of his life. *Id.*

John started this academic year as an eighth-grade student at Cane Bay Middle School ("Cane Bay"), part of Berkeley County School District (the "School District"). *Id.* ¶¶ 6-7. This fall semester, while at Cane Bay, 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. However, teachers—who do not use student restrooms—reported to the school's administrators that John was using the boys' restrooms. *Id.* ¶ 9.

On or around August 27, 2024, Kamelio Johnson, an assistant principal at Cane Bay, told John that he would need to use the girls' restrooms. *Id.* ¶ 10. John explained that it would be very upsetting for him to use the girls' restrooms, which are inconsistent with his gender identity, and other students would likely feel uncomfortable as well, since he is and looks like a boy. *Id.* ¶ 11. When Assistant Principal Johnson told John that he could use the single occupancy restroom in the nurse's office as an alternative, John explained that he would not be comfortable using the nurse's restroom as it would single him out and put a target on his back for harassment. *Id.* Also, the nurse's office was further from John's classes than boys' restrooms, so he would have had to miss class time to use the single occupancy alternative. *Id.* ¶ 12.

After telling John he would need to use the girls' restrooms, Assistant Principal Johnson spoke on the phone with Jim Doe, John's father. Declaration of Jim Doe ("Jim Doe Decl.") ¶ 6. Assistant Principal Johnson told Mr. Doe that John would need to use the girls' restrooms "for

everyone's protection." *Id.* Mr. Doe told Mr. Johnson that he would support John in using the restroom that corresponded with his gender identity. *Id.* He said he hoped that Cane Bay administrators would be his allies. *Id.* After those conversations, John continued to use the boys' restrooms at school. John Doe Decl. ¶ 14.

Later in August or in early September, Mr. Doe, John, and Assistant Principal Johnson met at Cane Bay. *Id.* ¶ 15. Citing his use of the boys' restrooms, Assistant Principal Johnson announced that he was going to suspend John for a day. *Id.* When John asked what rule in the school handbook he was violating, Assistant Principal Johnson said he was being punished for refusing to obey his direction not to use the boys' restrooms. *Id.* ¶ 16. Assistant Principal Johnson acknowledged that the school had no written policy prohibiting John from using the boys' restrooms. *Id.* He said vaguely, when pressed, that "people at the district office" had "communicated to" him that transgender students cannot use restrooms that correspond to their gender identities. *Id.* Assistant Principal Johnson also acknowledged that no students had complained about John's use of the boys' restrooms. *Id.* ¶ 17.

After further discussion, the Cane Bay principal, Carol Beckmann-Bartlett, joined the meeting. *Id.* ¶ 18. She explained that the school was "dealing with . . . a state law," which she also referred to as "a proviso"—an obvious reference to Proviso 1.120—and that the School District had adopted a policy consistent with that law over the summer. *Id.* She repeatedly told John that she did not have any personal objection to him using the boys' restrooms and was not angry at him. *Id.* ¶ 19. But she explained the school could not change the law and was expected to follow it. *Id.* She repeatedly expressed that she and Assistant Principal Johnson were merely following a directive from Berkeley County School District, which was in turn following the directive of state law. *Id.* Principal Beckmann-Bartlett told John that if he continued to use the boys' restrooms after

he returned from his suspension, his punishment would escalate, and he would risk expulsion. *Id.* ¶ 20. The next day, John served his suspension. *Id.* ¶ 21. When he returned to school, the School District instructed teachers to closely monitor John's use of the restrooms. *See id.* ¶ 22. Teachers began, for the first time, leading their classes of middle school students to the restroom in lines to monitor who was using which restroom. *Id.* More than once, a teacher yelled at John for trying to use a boys' restroom and prevented him from relieving himself. *Id.* As a result, in those instances, John spent the rest of the school day feeling physically uncomfortable from a full bladder and having trouble focusing on his classes. *Id.* The monitoring also spurred on John's peers to harass him about his gender identity. *Id.* ¶ 23.

In September 2024, John's parents decided to withdraw John from Cane Bay. Jim Doe Decl. ¶ 15. Their reason for doing so was the school's refusal to permit John to use the boys' restrooms, combined with peer harassment he faced at the school. *Id.* On October 14, 2024, John enrolled in an online homeschool program, which offers fewer educational and social opportunities than Cane Bay Middle School. *Id.* ¶ 16. If Cane Bay permitted John to use restrooms that correspond with his gender identity, John would like to re-enroll, and his parents would support his decision. *Id.* ¶ 17; John Doe Decl. ¶ 27.

ARGUMENT

I. The Court Should Grant the Requested Injunction.

A court should grant a preliminary injunction if a plaintiff shows that "(1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm" without an injunction, "(3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest." *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The balancing of the harm and the public interest factors "merge when the

Government is the opposing party." *Miranda v. Garland*, 34 F.4th 338, 365 (4th Cir. 2022) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

John meets each of the requirements for a preliminary injunction enjoining Defendants' enforcement of, and compliance with, Proviso 1.120's restroom provision on a class-wide basis. Under *Grimm*, Proviso 1.120's restroom ban violates both the Equal Protection Clause and Title IX as applied to the entire Class; Proviso 1.120 inflicts irreparable harm on John and the entire Class because it violates the civil rights of all class members and inflicts grave dignitary, emotional, and educational injuries that money alone will not cure; and, because Defendants cannot point to any state interest that justifies those harms, the balance of equities and public interest strongly favor a statewide injunction.

A. John is Likely to Succeed on the Merits of His Claims.

John contends that the defendants' continued or future enforcement of, or compliance with, Proviso 1.120 with respect to school restrooms would violate Title IX and the Equal Protection Clause of the Fourteenth Amendment as applied to him and the rest of the Class. Class Action Compl. ¶¶ 85-95. Based on a straightforward application of the Fourth Circuit's controlling precedent in *Grimm*, John has shown a strong likelihood of success on the merits of these claims, both on his own behalf and on behalf of the Class. Indeed, his victory is far more certain than is required to satisfy this element of the preliminary injunction standard. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("While plaintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits, they 'need not show a certainty of success.'" (quoting *Pashby*, 709 F.3d at 321)).

1. Proviso 1.120's Restroom Provision Violates Title IX.

John has a strong likelihood of success on his Title IX claim against the State of South Carolina, the State Board of Education, the State Department of Education, and Berkeley County

School District (the "Institutional Defendants") because all are subject to Title IX and Proviso 1.120 is nearly identical to the policy *Grimm* held violated Title IX.

i. The Institutional Defendants Are Subject to Title IX.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). "[P]rogram or activity" is separately defined to include "all the operations of . . . a department, agency, . . . or other instrumentality of a State or of a local government," or of "a local educational agency . . . or other school system." 20 U.S.C. § 1687.

An entity is subject to Title IX if it "operates an education program or activity which receives [federal financial] assistance." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 127 (4th Cir. 2022) (en banc). "[T]he statute also covers organizations that 'control[] and manage[]' . . . funding recipients." *B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 554 (4th Cir. 2024) (quoting *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (4th Cir. 1994), *petitions for cert. filed*, Nos. 24-43, 24-44 (July 16, 2024)).

All four Institutional Defendants meet this standard. At a minimum, the State Department of Education and the School District are themselves federally funded education programs or activities. *See* 20 U.S.C. § 1687 (defining "program or activity" to include state and local departments and agencies as well as any "school system"); S.C. Code Ann. § 59-3-30 (1976) (providing that the State Superintendent of Education, through the Department, administers the state school system and manages funds provided by the State and federal government); Archer Decl. Ex. L, at 80-82, 98 (demonstrating the State Department of Education receives federal funding); *id.*, Ex. K (demonstrating the School District receives federal funding). And the State and State Board of Education "control[]" one or more federally funded education programs or

activities. *See* S.C. Code Ann. § 59-5-65 (1976) (providing that the State Board sets policy that governs the State's public schools and detailing the Board's other oversight responsibilities).

ii. Proviso 1.120's Restroom Provision Discriminates on the Basis of Sex.

Given that the Institutional Defendants are subject to suit under Title IX, "[t]he only remaining question" is whether enforcing Proviso 1.120 "exclude[s]" students from, "den[ies] [them] the benefits of," or "'subject[s] [them] to discrimination" in school facilities. *B.P.J,* 98 F.4th at 563 (quoting 20 U.S.C. § 1681(a)). "In the Title IX context, discrimination 'mean[s] treating that individual worse than others who are similarly situated.'" *Grimm*, 972 F.3d at 618 (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 657 (2020)). In 2020, the Supreme Court recognized that discrimination against someone for being transgender is a form of sex discrimination under Title VII of the Civil Rights Act of 1964. *Bostock*, 590 U.S. at 662. Later that same year, in *Grimm*, the Fourth Circuit held that *Bostock* also "guides . . . evaluation of claims under Title IX." 972 F.3d at 616. Under Title IX, just as under Title VII, "discrimination against a person for being transgender is discrimination 'on the basis of sex.'" *Id.* "That is because the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions." *Id.*

Most important for the present case, *Grimm* held that a school discriminates against transgender students in violation of Title IX when it forbids them from using restrooms consistent with their gender identities. *See id.* at 616-19. There, a transgender student, Gavin Grimm, brought a Title IX claim challenging his school's requirement that students use restrooms corresponding to their "biological sex" assigned at birth—a policy that excluded him from using the boys' restroom. *Id.* at 598-601. "Unlike the other boys, he had to use either the girls restroom or a single-stall option." *Id.* at 618. The Fourth Circuit concluded that, "the Board could not exclude Grimm

from the boys bathrooms without referencing his 'biological gender' under the policy, which it has defined as the sex marker on his birth certificate," and so "the Board's policy excluded Grimm from the boys restrooms 'on the basis of sex.'" *Id.* at 616-17. And that exclusion caused Grimm physical, education, emotional, and dignitary harms. *Id.* at 617-18. Accordingly, the challenged policy violated Title IX. *Id.* at 619.

The same is true here. In support of the present motion, John has offered evidence to show that Proviso 1.120—as enforced by the Institutional Defendants—denies him and other transgender students access to restrooms corresponding to their gender identities, and that he is suffering injuries as a result. John Doe Decl. ¶¶ 22-24; Budge Decl. ¶¶ 53-70; Johnson Decl. ¶¶ 8-9. That is enough to show the requisite likelihood of success on his Title IX claims in this Circuit.

2. Proviso 1.120's Restroom Provision Violates the Equal Protection Clause.

John is also likely to succeed on his constitutional claim. Under the Equal Protection Clause, a state may not discriminate based on "sex" or "gender identity" unless it satisfies "heightened scrutiny"—that is, unless the discrimination "serves important governmental objectives" and "substantially relate[s] to the achievement of those objectives." *Kadel v. Folwell*, 100 F.4th 122, 156 (4th Cir. 2024); *see B.P.J.*, 98 F.4th at 556 (same); *Grimm*, 972 F.3d at 608 (same). The burden to justify such a law "rests entirely on the State," *United States v. Virginia*, 518 U.S. 515, 533 (1996), including at the preliminary injunction stage, *see Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006) ("[T]he burdens at the preliminary injunction stage track the burdens at trial.").

To meet that burden, the government must establish an "exceedingly persuasive justification" for the sex or gender-identity-based distinction. *Kadel*, 100 F.4th at 156 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). The bar is high: government

defendants' reasons must be "genuine," not a "post-hoc" "response to litigation." *Id.* (quoting *Virginia*, 518 U.S. at 533). And the defendants must "present[ ] sufficient probative evidence" to support those reasons—evidence that shows the challenged distinction "rests on evidence-informed analysis rather than on stereotypical generalizations." *Id.* at 156 (citation omitted).

i. Proviso 1.120's Restroom Provision Triggers Heightened Scrutiny.

In *Grimm*, the Fourth Circuit held that a policy materially identical to Proviso 1.120 discriminated based both on sex and transgender status, and so was subject to heightened scrutiny. 972 F.3d at 607. First, the Court held that, because the policy determined "'which bathroom a student may use based upon the sex listed on the student's birth certificate,' the policy necessarily rest[ed] on a sex classification." *Id.* at 608 (quoting *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017)). That alone was enough to trigger heightened scrutiny. Second, *Grimm* held that the policy treated transgender people—a quasi-suspect class—worse than non-transgender students by providing that, for example, non-transgender boys could use the boys' restrooms, while transgender boys could not. *Id.* at 610-13. In doing so, the school discriminated on the basis of "gender identity[,] . . . a protected characteristic under the Equal Protection Clause." *Kadel*, 100 F.4th at 143 ("reiterating [the Fourth Circuit's] holding in *Grimm*"). For both those "independent[ ]" reasons, the Court held the policy triggered heightened scrutiny. *Grimm*, 972 F.3d at 613; *accord B.P.J.*, 98 F.4th at 555-56 (explaining that, under *Grimm*, a state law triggers heightened scrutiny when it excludes transgender girls from a school facility or activity that is open to non-transgender girls).

So too here. Like the policy in *Grimm*, Proviso 1.120 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." Archer Decl. Ex. H, at 1 (quoting Proviso 1.120); *see also id.* at 2 (reaffirming that "the Proviso under no circumstance permits a student use a restroom other than that designated by biological sex at birth."). And like the policy in *Grimm*, Proviso 1.120 excludes transgender students from restrooms (and other facilities) open to non-transgender students. *Id.* So, like the policy in *Grimm*, South Carolina's law discriminates based on both sex and gender identity and triggers heightened constitutional scrutiny. *See* 972 F.3d at 607.

ii. Proviso 1.120's Restroom Provision Fails Heightened Scrutiny.

Per *Grimm*, Proviso 1.120's restroom ban fails heightened scrutiny. As in *Grimm*, the question is not whether providing separate restrooms for boys and girls is constitutional. 972 F.3d at 618 & n.17 ("Grimm does not think that sex-separated restrooms are unconstitutional, and neither do we."). Instead, the question is whether South Carolina can ban John and other transgender boys from boys' restrooms, and transgender girls from girls' restrooms, based on their "anatomy and genetics existing at the time of birth," Proviso 1.120(A)(3). To satisfy heightened scrutiny, that decision must be "substantially related" to an "important governmental objective[]," based on "evidence-informed analysis" rather than "stereotypical generalizations." *Kadel*, 100 F.4th at 156. The government cannot show that it is.

As the Court held in *Grimm*, excluding transgender students from gender-appropriate restrooms does not serve any "interest in protecting student privacy." *Grimm*, 972 F.3d at 607, 613-14. To claim otherwise "ignores the reality of how a transgender child uses the bathroom: 'by entering a stall and closing the door.'" *Id.* at 613 (quoting *Whitaker*, 858 F.3d at 1052). Of course, transgender children are no more likely to be "peeping tom[s]" than their peers. *Id.* at 614; Budge Decl. ¶ 72. "[T]ransgender people are not any more likely to pose a threat to safety" or violate other students' privacy than are non-transgender students. Budge Decl. ¶¶ 71-72.

To the contrary, a "growing number of school districts across the country . . . are successfully allowing transgender students . . . to use the bathroom matching their gender identity, without incident." *Grimm*, 972 F.3d at 614. Those nationwide experiences "put the lie to supposed legitimate justifications for restroom discrimination: preventing students who pretend to be transgender from obtaining access to opposite-gender restrooms and protecting privacy." *Id.* (quoting Br. of Amici Curiae the Nat'l PTA, GLSEN, Am. Sch. Couns. Ass'n, and Nat'l Ass'n of Sch. Psychs. in Supp. of Pl.-Appellee 6); *see Whitaker*, 858 F.3d at 1052 ("A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions."); *see also Doe ex rel. Doe v. Elkhorn Area Sch. Dist.*, No. 24-CV-354, 2024 WL 3617470, at *20 (E.D. Wis. Aug. 1, 2024) (noting that even where some students were uncomfortable with a transgender student using a restroom, the "availability of [several] nondiscriminatory alternatives shows that the [school district's] policy is not substantially related to the achievement of its privacy objectives").

John's experience illustrates the point. No student ever complained about John using boys' restrooms at school. John Doe Decl. ¶¶ 8, 17. Cane Bay had no policy that kept transgender students from using gender-appropriate restrooms, and, until the passage of Proviso 1.120, neither did the School District. *Id.* ¶¶ 16, 18. Even Cane Bay's principal, Ms. Beckmann-Bartlett, told John she had no personal objection to his using that restroom; she only punished him because the state law required her to. *Id.* ¶ 19.

So, far from justifying discrimination against transgender students, then, State legislators' conjecture about threats to non-transgender students only exposes the baseless gender-based, anti-transgender stereotypes that infect the proviso. As Judge Wynn explained in *Grimm*, the claim that

transgender children pose unique dangers to privacy and safety "perpetuates a harmful and false stereotype about transgender individuals; namely, the 'transgender predator' myth, which claims that students (usually male) will *pretend* to be transgender in order to gain access to the bathrooms of the opposite sex—thus jeopardizing student safety." 972 F.3d at 625 (Wynn, J., concurring) (emphasis added). That "myth—although often couched in the language of ensuring student privacy and safety—is no less odious, no less unfounded, and no less harmful" than similar "scare tactics" used to exclude gay and black people from public spaces and facilities. *Id.* at 626 (Wynn, J., concurring). As the majority agreed, the experiences of schools "across the country" that have trans-inclusive restroom policies have shown such "hypothetical fears . . . as the 'predator myth' were merely that—hypothetical"—and reflect no more than "unfounded prejudices" against transgender people. *Id.* at 620. Those prejudices cannot justify a discriminatory law that jeopardizes the health and lives of thousands of children across South Carolina.

For these reasons, John and the putative class have a strong likelihood of success on their equal protection claim. Indeed, *Grimm* demands it.

B. Proviso 1.120's Restroom Provision Will Irreparably Harm John and the Class Absent an Injunction.

John and the Class will be irreparably harmed without an injunction. A plaintiff suffers "irreparable harm" when his injuries are hard to quantify or when money will not fully cure them. *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994). That is certainly true here. The State Department of Education has made clear that the State intends to enforce the law. *See, e.g.*, Archer Decl. Ex. H, at 2; *id.*, Ex. I, at 1; *id.*, Ex. J, at 2. And the District has already forced John out of school because of it. John Doe Decl. ¶¶ 21, 25-26. If Defendants are allowed to continue enforcing and complying with Proviso 1.120, John

and other transgender students will continue to suffer dignitary, emotional, and physical harms that money alone cannot heal.

First, "[b]ecause there is a likely constitutional violation, the irreparable harm factor is satisfied." *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021); *see Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) ("[T]he denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction."); *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960) ("The District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right."); *B. P. J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 357 (S.D. W. Va. 2021) ("When a party has shown a likelihood of a constitutional violation, the party has shown an irreparable harm").

That is especially true when the government engages in invidious discrimination. In barring transgender students from restrooms open to their non-transgender peers, Proviso 1.120 sends a clear message to transgender students that the State endorses "unfounded prejudices" that cast them as "predator[s]," *Grimm*, 972 F.3d at 620, and rejects their identities. In doing so, it inflicts profound "[d]ignitary wounds [that] cannot always be healed with the stroke of a pen." *Obergefell v. Hodges*, 576 U.S. 644, 678 (2015); *see also Grimm*, 972 F.3d at 617-18 (explaining that "[t]he stigma of being forced to use a separate restroom" causes harm in that "it 'invite[s] more scrutiny and attention' from other students" and "'very publicly brand[s] all transgender students with a scarlet "T"'" (citation omitted)); *Doe v. Wood Cnty. Bd. of Educ.*, 888 F. Supp. 2d 771, 777 (S.D. W. Va. 2012) (holding that segregating students into single-sex classes based on sex, in violation of Title IX, inflicted irreparable harm).

Beyond these dignitary harms, the ban will, predictably, continue to inflict serious psychological and physical harm on transgender students across the state. Excluding transgender students from gender-appropriate restrooms inflicts severe emotional distress, contradicts treatment protocols for gender dysphoria, leads to physical pain and risks urinary tract and kidney infections when students hold their urine because they cannot go to the restrooms, outs students as transgender without their consent, and invites harassment and violence toward transgender students. Budge Decl. ¶¶ 53, 64-69. It detracts from students' education when they cannot focus in class and miss school as a result. *Id.* ¶ 70.

For John, the harms were so serious that he was too upset to attend school and was finally forced to withdraw to avoid further harm. John Doe Decl. ¶¶ 23-25. He is now enrolled in an inferior online homeschooling program that he dislikes, and he wishes that the School District would allow him to use boys' restrooms so he could return to in-person learning. *Id.* ¶¶ 26-27. Other families have kept their children out of South Carolina public schools because of the ban. Johnson Decl. ¶¶ 5-9.

These injuries—the severe distress, stigma, and mental and physical health problems that ensue when transgender children cannot access gender-appropriate facilities—are also irreparable harms that justify a class-wide preliminary injunction. *See Whitaker*, 858 F.3d at 1040-42, 1045-46 (holding that a restroom ban's impacts on a student's mental health and well-being, physical health effects resulting from his restricted water intake, and stigma were all irreparable injuries); *Grimm ex rel. G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 728 (4th Cir. 2016) (Davis, J., concurring) (finding, earlier in the same *Grimm* case that led to landmark opinion, that preliminary injunction was warranted based on testimony that "treating a transgender boy as male in some situations but not in others is 'inconsistent with evidence-based medical practice and detrimental

to the health and well-being of the child'"); *Grimm ex rel. G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-CV-54, 2016 WL 3581852, at *1 (E.D. Va. June 23, 2016) (granting a preliminary injunction "for the reasons set forth in [Judge Davis's] concurrence"); *Doe v. Hanover Cnty. Sch. Bd.*, No. 24-CV-493, 2024 WL 3850810, at *17 (E.D. Va. Aug. 16, 2024) (holding that transgender student banned from girls' sports team showed irreparable harm "due to the medical, emotional, social, financial, and dignitary harms that flow from a public rejection of [her] gender identity and her inability to access the benefits of athletics through her public school"). All told, then, there is ample evidence that John and other transgender students will suffer irreparable harm absent a preliminary injunction.

C. The Balance of Equities and Public Interest in Enforcement of Civil Rights Protections Favor Enjoining Enforcement of Proviso 1.120's Restroom Provision.

The balance of equities and public interest strongly favor an injunction here. While John and the Class face severe and irreparable harms in the absence of relief, *see supra* Part II, an injunction would not harm Defendants. The Fourth Circuit has long and repeatedly held that the government "is in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Leaders*, 2 F.4th at 346; *see Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (same); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (same). As the court found in *Grimm*, inclusive restroom policies respecting transgender students' gender identities do not harm students; discrimination does. *Grimm*, 972 F.3d at 614-15, 617-18, 620; *see supra* pp. 7-12. And unlike Proviso 1.120, the proposed injunction would not require the Defendants to affirmatively do anything. It would simply allow transgender students to use the correct restrooms, just like they could do before the law passed, and just like transgender students continue to do in schools "across the country . . . without incident." *Grimm*,

972 F.3d at 614. In fact, enjoining enforcement of Proviso 1.120 would free teachers and administrators to spend less time policing which restroom transgender students use so they can focus on teaching students.

Finally, it is always in the public interest to uphold constitutional and Title IX rights. *Leaders*, 2 F.4th at 346 ("[I]t is well-established that the public interest favors protecting constitutional rights."); *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013) ("[U]pholding constitutional rights surely serves the public interest."); *Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011) ("[U]pholding constitutional rights is in the public interest."); *Wood Cnty.*, 888 F. Supp. at 778 ("The public interest is certainly served by promoting compliance with Title IX."); *see also G.G.*, 822 F.3d at 729 (Davis, J., concurring) ("Enforcing [a student's] right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest.").

In short, the equities and public interest weigh heavily in favor of the requested injunction.

II. The Court May Issue Class-Wide Preliminary Relief Before Certifying the Class.

Although this is a classic case for class certification, the Court "may enter class-wide injunctive relief before certification of a class." *J.O.P. v. U.S. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367, 376 (D. Md. 2019); *see* 2 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 4:30 (6th ed. 2022) ("[A] court may issue a classwide preliminary injunction in a putative class action suit prior to a ruling on the class certification motion."); *Gooch v. Life Invs. Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012) ("Simply put, there is nothing improper about a preliminary injunction preceding a ruling on class certification."); *Brandon v. Marshall*, No. 24-CV-00265, 2024 WL 2834014, at *5 n.1 (S.D. W. Va. June 4, 2024) (same); *Sanchez v. McAleenan*, No. GJH-19-1728, 2020 WL 607032, at *5 n.7 (D. Md. Feb. 7, 2020) (same);

Rodriguez v. Providence Cmty. Corr., Inc., 155 F. Supp. 3d 758, 767 (M.D. Tenn. 2015) (explaining that a court may "award appropriate classwide injunctive relief prior to a formal ruling on the class certification issue based upon either a conditional certification of the class or its general equity powers").

Indeed, even in individual cases where the plaintiff has not moved to certify a class, the Fourth Circuit has repeatedly held that statewide—and even "nationwide"—injunctions "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." *HIAS, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021); *Mayor of Baltimore v. Azar*, 973 F.3d 258, 294 (4th Cir. 2020) (affirming statewide injunction against unlawful federal regulation); *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 672 (8th Cir. 2022) (upholding facial injunction against state law banning gender-affirming care even though court did not certify a class). "An injunction warranted by a finding of unlawful discrimination is not prohibited merely because it confers benefits upon individuals who were not plaintiffs or members of a formally certified class." *Evans v. Harnett Cnty. Bd. of Educ.*, 684 F.2d 304, 306 (4th Cir. 1982) (holding that district court should have enjoined unlawful employment practice as a whole even though plaintiff brought only an individual claim). So even if class certification were not appropriate, the Court could still grant the requested relief under its broad equitable powers.

III. The Court Should Not Require John to Post a Bond.

Under Rule 65(c), a court may require the moving party to post a security bond "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). It is within the district court's discretion to set the bond amount or waive the security requirement. *Pashby*, 709 F.3d at

332. The bond amount "depends on the gravity of the potential harm to the enjoined party." *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999). Where the restrained party faces "no likelihood of material harm," courts may set a bond amount of zero. *Md. Dep't. of Hum. Res. v. U.S. Dep't. of Agric.*, 976 F.2d 1462, 1483 n.23 (4th Cir. 1992). And they often do. *See, e.g.*, *ProPac, Inc. v. $5,219,224.20 U.S. Dollars Deposited to Acct. of Med. Biowaste Sols., Inc.*, No. 20-3792, 2020 WL 6707608, at *4 (D.S.C. Nov. 16, 2020) (setting bond in the amount of $0.00 because the defendant bore no risk of sustaining costs or damages); *Planned Parenthood S. Atl. v. Wilson*, 527 F. Supp. 3d 801, 815 (D.S.C. 2021) (issuing a preliminary injunction without bond because "South Carolina is in no way harmed by the issuance of a preliminary injunction which prevents it from enforcing a law that is likely to be found unconstitutional" (cleaned up)), *vacated on other grounds*, No. 21-1369, 2022 WL 2900658 (4th Cir. July 21, 2022); *Disability Rts. S.C. v. McMaster*, 564 F. Supp. 3d 413, 427 (D.S.C. 2021) ("Because the Defendants are in no way harmed by the issuance of injunctive relief, the Court concludes the temporary restraining order and preliminary injunction should issue without bond."), *vacated in part on other grounds*, 24 F.4th 893 (4th Cir. 2022).

Here, for the same reason, requiring John to post a security bond is unwarranted. The preliminary injunction would pose no harm to the Defendants and would cost them nothing. *See supra* Part I.C (discussing absence of harm to Defendants). The Court should similarly waive the bond requirement in this case.

CONCLUSION

For the reasons stated above, Plaintiff John Doe respectfully requests that the Court grant the Motion for Preliminary Injunction.

DATED: November 14, 2024

Respectfully submitted,

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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

Harper T. Segui