No. 24-6200

In the United States Court of Appeals
for the Fourth Circuit

SOFIA CANO,

Plaintiff-Appellee,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS;

BRYAN STIRLING, DR. CHRIS KUNKLE, ESTHER LABRADOR, AND DR. ANDREW HEDGEPATH, in their official and individual capacities;

DR. JOHN TAYLOR, WILLIAM LANGDON, MCKENDLEY NEWTON, TERRIE WALLACE, SALLEY ELLIOTT, KENNETH JAMES, NETRA ADAMS, PAMELA DERRICK, DR. ROBERT ELLIS, DR. JENNIFER BLOCK, TIMOTHY GREEN, CHELSEA JOHNSON, YVONNE WILKINS-SMITH, AND SHAWANDA WASHINGTON, in their individual capacities;

Defendants-Appellants.

On Appeal from the United States District Court for the
District of South Carolina
No. 9:22-cv-04247-JDA-MHC
Hon. Jacquelin D. Austin

RESPONSE BRIEF OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Local Appellate Rule 26.1, Plaintiff-Appellee states that she is not a publicly held corporation, other publicly held entity, or trade association; does not issue shares to the public and has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad; that no publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation; and that the case does not arise out of a bankruptcy proceeding.

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INTRODUCTION

The South Carolina Department of Corrections (SCDC) categorically excludes prisoners with gender dysphoria from receiving hormone replacement therapy unless they were already receiving that care upon their commitment to SCDC. Because this blanket denial of medical care for nonmedical reasons constitutes deliberate indifference under the Eighth Amendment and discriminates against individuals with gender dysphoria in violation of Title II of the Americans with Disabilities Act (ADA), the district court was correct to grant preliminary injunctive relief.[1]

On appeal, Defendants do not discuss their obligations under Eighth Amendment or the ADA. Instead, they press a narrow issue: whether South Carolina Budget Proviso 65.28 prohibits SCDC from providing hormone therapy to prisoners who were not yet receiving treatment upon their commitment. But Defendants fail to explain why that matters. If the district court properly construed the Proviso, and state law allows SCDC to provide hormone therapy to Ms. Cano, then it was correct to issue preliminary injunctive relief under the Eighth Amendment and the ADA. And if the Proviso does prohibit SCDC from funding hormone therapy for Ms. Cano, the court was *still* correct to issue preliminary injunctive relief, because state law cannot override Ms. Cano's right to individualized, nondiscriminatory medical care under federal law.

[1] Ms. Cano's Complaint also alleges that Defendants' denial of care violates the Equal Protection Clause, the Rehabilitation Act, and the Affordable Care Act, but those claims were not the basis for preliminary injunctive relief.

The Court can resolve this appeal by affirming the district court on grounds that the Proviso does not, by its terms, prohibit SCDC from providing the care sought by Ms. Cano, or by affirming on grounds that the Proviso—insofar as it prohibits care that is required under federal law—is unconstitutional and invalid. Either way, the district court decision to enjoin SCDC's administrative prohibition on hormone therapy should be affirmed.

STATEMENT OF THE CASE

I. Procedural History

After many failed attempts to obtain gender-affirming care to treat her gender dysphoria through SCDC's internal processes, Ms. Cano filed suit against current and former SCDC officials and SCDC itself, alleging violations of the Eighth Amendment, Equal Protection Clause, Americans with Disabilities Act, Rehabilitation Act, and Affordable Care Act. JA18–66 (First Amended Complaint). Along with her Complaint, Ms. Cano moved for a preliminary injunction, requesting medically necessary gender-affirming care, including hormone therapy, under the Eighth Amendment and ADA. JA96–125; *see also* JA150.

Defendants moved to dismiss Ms. Cano's Eighth Amendment and Equal Protection claims, arguing in part that the Budget Proviso's alleged prohibition on the use of state funds for hormone therapy shielded Defendants from liability. JA178–88. The district court rejected that argument, agreeing with the magistrate

judge's recommendation that "the Budget Proviso does not prohibit the use of state funds to start a prisoner on hormone therapy." JA291.

On Ms. Cano's motion for a preliminary injunction, the magistrate judge agreed that Ms. Cano was likely to prevail under the Eighth Amendment and ADA and recommended that SCDC be required to "to provide Plaintiff with medically necessary gender-affirming care for her gender dysphoria. To that end, Defendants should be directed to have Plaintiff evaluated by SCDC medical professionals within thirty days of the issuance of the injunction to determine whether hormone therapy is medically necessary to treat Plaintiff's gender dysphoria." JA285. The district court adopted the magistrate judge's reasoning and granted the recommended relief. JA310–11.

II. Preliminary Injunction Findings by the District Court

Whether to grant a preliminary injunction presents a mixed question of law and fact. The following facts were determined by the district court and are reviewable for clear error.[2]

Plaintiff Sofia Cano is a transgender woman incarcerated at SCDC. In July 2020, when Ms. Cano was 18 years old, a Qualified Mental Healthcare Professional (QMHP) employed by SCDC wrote that she "believe[s] that I/M Cano has Gender Dysphoria." JA250. Gender dysphoria is a psychiatric medical

[2] The initial factfinding was done by the magistrate judge, whose findings were incorporated by reference by the district court. *See* JA288 ("As an initial matter, the Magistrate Judge provides a thorough recitation of the relevant facts and the applicable law, which the Court incorporates by reference."); *see also* JA244–86 (R&R).

condition marked by serious prolonged distress because of an individual's experience of deep incongruence with their birth-assigned sex and gender identity. JA245.[3] Over the next several months, Ms. Cano continuously requested treatment for gender dysphoria. During that time, Ms. Cano repeatedly alleged that she was experiencing serious distress, including suicidal ideation. According to SCDC records, Ms. Cano was formally diagnosed with gender dysphoria by SCDC personnel on December 3, 2020. *See* JA258–59, 303.

Following Ms. Cano's diagnosis, she repeatedly sought to begin hormone replacement therapy—medically necessary care that is recommended by the prevailing standards of care for gender dysphoria. JA246–48, 256–64. Defendants refused, but always for nonmedical reasons. Each time, Defendants explained that Ms. Cano was categorically ineligible for hormone therapy because she was not receiving that care upon her commitment to SCDC.[4]

In 2021, Ms. Cano was transferred from Kirkland Correctional Institution to Allendale Correctional Institution (Allendale). JA259. At Allendale, Ms. Cano, who was first diagnosed with gender dysphoria while incarcerated at SCDC,

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[3] This Court is, of course, well acquainted with gender dysphoria. *See, e.g.*, *Kadel v. Folwell*, 100 F.4th 122, 164 (4th Cir. 2024) (en banc) (holding that exclusion of gender affirming care in North Carolina and West Virginia's state healthcare plans violated the Equal Protection Clause, Title VII, Medicaid Act, and the Affordable Care Act); *B.P.J. by Jackson v. West Va. State Bd. of Educ.*, 98 F.4th 542, 566 (4th Cir. 2024) (holding that state law preventing transgender girls from playing on girls athletic teams violates the Equal Protection Clause and Title IX).

[4] Ms. Cano was incarcerated at age thirteen and entered SCDC at age seventeen. JA18–19.

sought preliminary injunctive relief against that policy on grounds that it violates her right to nondiscriminatory healthcare under the Eighth Amendment of the U.S. Constitution and Title II of the Americans with Disabilities Act (ADA). JA96–125.

Defendants did not dispute that Ms. Cano has gender dysphoria, that her condition is "objectively serious," or that she was denied care solely because of SCDC's blanket policy regarding access to hormone therapy. JA245. Rather, Defendants argued that because their refusal to provide care was required under a South Carolina Budget Proviso, Ms. Cano could not show that they acted with deliberate indifference or with discriminatory animus. JA272–73, 301. Applying settled law, the district court concluded that Ms. Cano's claims regarding hormone therapy are likely to succeed, preliminarily enjoined Defendants' policy, and ordered that SCDC evaluate Ms. Cano for hormone replacement therapy. JA301, 303, 310–11. This appeal followed.

STANDARD OF REVIEW

The Fourth Circuit reviews the grant or denial of a preliminary injunction "for an abuse of discretion[,] reviewing the district court's factual findings for clear error . . . and its legal conclusions *de novo*." *League of Women Voters of N. C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014) (internal quotation marks and citations omitted). Abuse of discretion occurs when a district court "misapprehends or misapplies the applicable law." *Id.* (citations omitted). "[T]his Court may affirm the district court's judgment on any basis supported by the record." *Sloas v. CSX Transp., Inc.*, 616 F.3d 380, 388 n.5 (4th Cir. 2010) (citations omitted).

SUMMARY OF ARGUMENT

Budget Proviso 65.28 does not prohibit the use of state funds to pay for hormone therapy. The text of the Proviso—the most reliable evidence of the legislature's intent—*forbids* the use of state funds for gender-affirming surgery and *mandates* the use of state funds for hormone therapy for individuals receiving the treatment before entering SCDC. The text is silent, however, about the use of state funds for hormone therapy for those not already receiving it. This Court should not presume from that silence an intent to categorically ban a form of medical treatment, particularly when the legislature clearly knows how to include explicit prohibitions and chose not to do so here.

But even if the Proviso forbids the use of state funds for hormone therapy, it does not excuse Defendants from complying with the Eighth Amendment and the ADA. Lack of funds, or even contrary state law, is no defense under the Eighth Amendment. Likewise, the ADA by its own terms envisions reasonable modifications, even to state laws, to accommodate an individual's disabilities. This Court may also elect to invalidate the Budget Proviso in its entirety as unconstitutional. If the Proviso outlaws individualized medical treatment for gender dysphoria, it is unconstitutional under the Eighth Amendment. If it excludes individuals with a specific disability from medical care, it violates the ADA. And if it intentionally discriminates against transgender individuals—as Defendants and Amicus argue that it does—without an "exceedingly persuasive justification," then it facially violates the Equal Protection Clause.

Finally, Defendants' so-called "procedural" arguments do not warrant relief. The district court's interpretation of the Proviso—issued in the first instance in response to Defendants' motion to dismiss—was both substantively and procedurally correct. Contrary to Defendants' arguments, there is no analytical difference between statutory analysis as part of a motion to dismiss or a motion for preliminary injunction. But even if the district court was wrong to rely on its motion to dismiss analysis in granting Plaintiff's motion for preliminary relief, the "error" is meaningless. This Court interprets Budget Proviso 65.28 *de novo*, and its interpretation will supersede that of the district court.

ARGUMENT

I. The district court did not abuse its discretion by issuing a preliminary injunction.

The district court found that Defendants knew that Ms. Cano suffered from an objectively serious medical condition (gender dysphoria) and categorically excluded her from receiving necessary medical care (hormone replacement therapy) for a nonmedical reason (an administrative "freeze frame" policy). Given these well-supported and uncontested findings, the district court was right to rule that Ms. Cano is likely to prevail on the merits of her deliberate indifference claim under the Eighth Amendment. *See, e.g.*, *De'Lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003) ("that VDOC's policy is not to provide hormone therapy to prisoners, supports the inference that Appellees' refusal to provide hormone treatment to De'lonta was based solely on the Policy rather than on a medical judgment concerning De'lonta's specific circumstances[]"); *Keohane v. Fla. Dep't*

of Corr. Sec'y, 952 F.3d 1257, 1266–67 (11th Cir. 2020) (failure to provide hormone therapy under administrative freeze-frame policy "is the very definition of 'deliberate indifference'"); *Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir. 2014) ("[T]he blanket, categorical denial of medically indicated surgery solely on the basis of an administrative policy . . . is the paradigm of deliberate indifference."); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (holding that denial of hormone therapy and gender reassignment surgery under Wisconsin state statute constituted deliberate indifference); *Roe v. Elyea*, 631 F.3d 843, 859-60 (7th Cir. 2011) ("[I]nmate medical care decisions must be fact-based with respect to the particular inmate, the severity and stage of his condition, the likelihood and imminence of further harm and the efficacy of available treatments.") (citation omitted).

The district court also rightly concluded that Ms. Cano's gender dysphoria is a "disability" within the meaning of the ADA and that SCDC's "freeze frame" policy "create[s] an additional requirement to receive necessary medical care which discriminates against Plaintiff on the basis of her diagnosis." JA303–04.

As to the remaining three *Winter* factors, the district court ruled that each favor granting a preliminary injunction. JA309 ("[T]he Court is of the strong opinion that access to constitutionally adequate medical care is in the public interest.").

On appeal, Defendants do not contest any of the district court's factual findings or its conclusions on any of the other three *Winter* factors. As a result, those issues need not be examined on appeal. *See* Fed. R. App. P. 28(a)(9)(A);

Edwards v. City of Goldsboro, 178 F.3d 231, 241 n.6 (4th Cir. 1999); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, Cir. J.) ("[A]ppellate courts do not sit as self-directed boards of legal inquiry and research, but [rather] as arbiters of legal questions presented and argued by the parties before them."); *see also Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) ("It is well settled that if an appellant fails to comply with these requirements [of Rule 28] on a particular issue, the appellant normally has abandoned and waived that issue on appeal and it need not be addressed by the court of appeals.") (citations omitted); *North Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1221 (11th Cir. 2008) ("Because Axiom has not challenged the district court's implied findings with respect to the subsidiary factors, any such challenge is deemed abandoned.").

The lone issue raised on appeal is whether the district court misinterpreted Budget Proviso 65.28. But because Defendants fail to show why that issue, even if resolved in their favor, requires a different outcome, Defendants' appeal provides no grounds for relief.

A. As the district court properly ruled, Budget Proviso 68.25 does not prohibit SCDC from providing hormone replacement therapy.

Defendants and Amicus chide the district court for ignoring legislative intent and devote major portions of their briefs to eulogizing the discriminatory intent of the South Carolina legislature in passing Budget Proviso 65.28. In their briefs, Defendants and the Governor both jump straight into extratextual evidence of legislative intent. *See* ECF No. 18, Opposition Brief ("Op. Br.") at 9, 15–20; ECF No. 17, Amicus Brief ("Am. Br.") at 2. But in South Carolina, "[i]t is axiomatic

that statutory interpretation begins (*and often ends*) with the text of the statute in question." *Smith v. Tiffany*, 799 S.E.2d 479, 483 (S.C. 2017) (emphasis added) (citations omitted). And though Defendants are correct that legislative intent is the "cardinal rule of statutory construction[,]" *Hodges v. Rainey*, 533 S.E.2d 578, 581 (S.C. 2000), the South Carolina Supreme Court's rule is that "[t]he text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will," *Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 699 S.E.2d 687, 690 (S.C. 2010). It is "[o]nly '[w]here the language of an act gives rise to doubt or uncertainty as to legislative intent,' may the construing court 'search for that intent beyond the borders of the act itself.'" *Smith*, 799 S.E.2d at 483 (quoting *Kennedy v. S.C. Ret. Sys.*, 549 S.E.2d 243, 247 (S.C. 2001) (citing *The Lite House, Inc. v. J.C. Roy Co., Inc.*, 419 S.E.2d 817, 819 (S.C. Ct. App. 1992)); *see also Timmons v. S.C. Tricentennial Comm'n*, 175 S.E.2d 805, 817 (S.C. 1970) (holding that where the text is unambiguous, "there is no need to resort to statutory interpretation *or legislative intent* to determine its meaning") (emphasis added).

Here, Budget Proviso 65.28 is unambiguous. As the district court pointed out, the text of the Proviso narrowly cabins SCDC's budgetary discretion and imposes special constraints on funding for two types of medical care: "sexual reassignment surgery" and "hormonal therapy." As to the first, the Proviso categorically *prohibits* SCDC from spending state funds or state resources "to provide a prisoner in the state prison system sexual reassignment surgery." As to the second, the proviso *mandates* that SCDC continue to provide hormone therapy to prisoners "taking hormonal therapy" at the time of their commitment to SCDC.

Conspicuously, the text of the Proviso applies no constraints on hormone therapy for prisoners not already taking those medications upon commitment. As a result, the funding decision is left to the discretion of the agency being funded—here, SCDC. *See Cain v. S.C. Pub. Servs. Auth.*, 72 S.E.2d 177, 183 (S.C. 1952) ("The natural and appropriate office of a proviso is to modify the operation of that part of the statute immediately preceding the proviso, or to restrain or qualify the generality of the language that follows.") (quoting 50 Am. Jur., Statutes, § 438).

Defendants and the Governor ask the Court to infer from the Proviso's silence that the General Assembly intended to prohibit all hormonal therapy *except* for when a person was already taking such medications upon commitment. That makes no sense. To start, the legislature knows how to prohibit the use of state funds if they wish to do so. *See, e.g.*, H.R. 4624, 125th Gen. Assemb., 2d Reg. Sess. (S.C. 2024) (signed by the Governor on May 21, 2024) (amending Title 44 of the S.C. Code to add: "Public funds may not be used directly or indirectly for gender transition procedures," which include the provision of "cross-sex hormones"). In fact, as the Governor's brief recites, the legislature began by doing exactly that: "As originally proposed, th[e] bill prohibited state funds from being used for any 'sexual reassignment surgery *or hormone therapy*.'" ECF No. 17 at 9 (quoting a previous version of the bill) (emphasis added). That language was then amended to *remove* the prohibition on use of funds for hormone therapy. *Id.* If that process is, as the Governor argues, "instructive," *id.* at 12, the resulting lesson is that the legislature *intended* to *remove* any prohibition on the use of public funds for hormone therapy.

Defendants' argument that the district court's construction leads to bizarre results is also wrong. By requiring that SCDC continue to provide hormone therapy if an individual was taking them upon commitment, the General Assembly guarded against foreseeable harm: rather than permitting SCDC to reassess a person's medical qualifications for hormone therapy upon their commitment and potentially override a prior medical opinion, the Proviso requires that the therapy be continued. To the contrary, a more bizarre result would be to mandate violation of federal law, including the Eighth Amendment and the ADA. *See infra*, Part I.B.

In short: courts do not apply the laws that legislators *wanted* to pass, but the laws that they *did* pass. Here, the unambiguous text of Budget Proviso 65.28 does not prohibit SCDC from funding hormone replacement therapy. To quote the now-famous words of Justice Gorsuch, "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 653 (2020).

B. Even if the Court agrees with Defendants' statutory analysis, the district court was right to grant a preliminary injunction.[5]

Even if Budget Proviso 65.28 does what Defendants and Amicus claim, it cannot change the outcome here because Defendants are still bound to follow federal law.

[5] The impact of a state law that prohibits the use of public funds on specific

1. The Budget Proviso cannot absolve Defendants of responsibility under the Eighth Amendment.

If Budget Proviso 65.28 prohibits SCDC from using state funds to provide hormone therapy, the district court must still be affirmed. For three reasons, the Proviso provides no refuge for Defendants.

First, Budget Proviso 65.28 does not—indeed, *cannot*—prohibit specific conduct. It is not a law of general application, but a limited constraint on SCDC's use of funds that were appropriated by the General Assembly in the 2022-23 Appropriations Act. That matters here because lack of funding cannot excuse Eighth Amendment violations. *See Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 201 (8th Cir. 1974) ("When a state confines a person by reason of a conviction of a crime, the state must assume an obligation for the safekeeping of that prisoner. . . . Lack of funds is not an acceptable excuse for unconstitutional conditions of confinement."); *Battle v. Anderson*, 564 F.2d 388, 395–96 (10th Cir. 1977) ("Nor is the lack of financing a defense to a failure to provide minimum constitutional standards.") (citing *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968)); *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) ("We do not agree that 'financial considerations must be considered in determining the reasonableness' of inmates' medical care . . .") (citation omitted); *Peralta v. Dillard*, 744 F.3d 1076, 1083–84

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types of medical care for inmates is an issue that is likely to come before this Court again. On May 21, 2024, Governor McMaster signed House Bill 4624, which, *inter alia*, explicitly forbids the use of public funds for "gender transition procedures," including hormone therapy. H.R. 4624 at §§ 44-42-310(6), 44-42-340 (available at: https://www.scstatehouse.gov/sess125_2023-2024/bills/4624.htm). The application and constitutionality of H.R. 4624 has not yet been addressed by the district court.

(9th Cir. 2014) (en banc); *cf. LaMarca v. Turner*, 995 F.2d 1526, 1536–39, 1542 (11th Cir. 1993) (holding that prison official who did everything he could would not be personally liable but that a prisoner *could* get an injunction against that person in his official capacity).

Second, because the Proviso conflicts with federal law, it cannot govern. Under the Supremacy Clause, "the 'relative importance to the State of its own law is not material when there is a conflict with a valid federal law[.]'" *King v. McMillan*, 594 F.3d 301, 309 (4th Cir. 2010) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)). Here, as the district court found (and Defendants do not contest), the Eighth Amendment required an individualized assessment of Ms. Cano's need for hormone replacement therapy. *See Roe*, 631 F.3d at 859. If (as Defendants argue) Budget Proviso 65.28 prohibits actions that are required by federal law, it is invalid. *See, e.g.*, *Perez v. Campbell*, 402 U.S. 637, 652 (1971) ("[S]tate legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.").

Third, well-reasoned precedent instructs that prison officials who withhold medical care, even pursuant to state law, act with deliberate indifference and are liable under 42 U.S.C. § 1983.[6] Here, Defendants do not contest that they knew Ms. Cano suffered from gender dysphoria, that gender dysphoria is a serious

[6] Refusing to pay for medical care is tantamount to denying medical care. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("An inmate must rely on prison authorities to treat [her] medical needs; if the authorities fail to do so, those needs will not be met."); *see also Monmouth Cnty. Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 347, 351 (3d Cir. 1987); *cf. City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 245 (1983).

medical condition, or that that they refused to provide necessary medical care (here, hormone replacement therapy) for nonmedical reasons. Whether their decision was motivated by base transphobia or sincere fidelity to state law, it was deliberately indifferent all the same.

The Seventh Circuit addressed this very question in *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011). There, a class of incarcerated individuals diagnosed with Gender Identity Disorder (GID)[7] sued prison officials at the Wisconsin Department of Corrections (WDOC) alleging that the prison's refusal to provide hormone replacement therapy or gender reassignment surgery violated the Eighth and Fourteenth Amendments. *Id.* at 552–53. As with Defendants here, WDOC officials argued that they were required to deny care under a Wisconsin statute that prohibited WDOC from "authoriz[ing] the payment of any funds . . . to facilitate the provision of hormonal therapy or sexual reassignment surgery[.]" *Id*. (quoting the state law). The Seventh Circuit squarely rejected that proposition:

> It is well established that the Constitution's ban on cruel and unusual punishment does not permit a state to deny effective treatment for the serious medical needs of prisoners. . . . Surely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious

[7] "With the publication of DSM–5 in 2013, 'gender identity disorder' was eliminated and replaced with 'gender dysphoria.'" *Gender Dysphoria Diagnosis*, Am. Psych. Ass'n, available at https://tinyurl.com/zvjmvbbu (last visited on May 16, 2024); *see also* JA142–43.

> medical condition serves no valid penological purpose and amounts to torture.

Fields, 653 F.3d at 556 (citations omitted).

So too here. Even if Budget Proviso 65.28 forbids the use of state funds to pay for hormone therapy, it is overrun by Defendants' obligations under federal law to provide adequate and individualized medical care to Ms. Cano.

2. Likewise, South Carolina cannot shirk the anti-discrimination mandate of the ADA by refusing to fund certain types of care.

If an individual has a disability and is otherwise eligible to receive the benefits of a public service or program, the government must make reasonable accommodations to permit the individual meaningful access to that service or program. *National Fed'n of the Blind v. Lamone*, 813 F.3d 494, 502–05 (4th Cir. 2016) (citing 42 U.S.C. § 12132 and 28 C.F.R. § 35.130).

As an initial matter, the State cannot render a person ineligible to receive benefits solely on the basis of their disability. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 n.10 (1999); *see also Salcido ex rel. Gilliland v. Woodbury Cnty., Iowa*, 119 F. Supp. 2d 900, 937 (N.D. Iowa 2000) (noting that the "exclusion of *all* persons with a specified disability" does not "excuse discrimination by reason of that particular disability" and emphasizing that "the Supreme Court recently, and emphatically, rejected such a contention in *Olmstead*"). Ms. Cano is otherwise eligible to receive medically necessary healthcare under SCDC's own policy. *See* JA 119 (describing SCDC's policy that all inmates be provided with "medically necessary care" when "an existing pathological process threatens the well-being of

the inmate over a period of time"); *see also* JA277, JA303–04. The fact that Budget Proviso 65.28 excludes Ms. Cano from receiving treatment because she has a specific diagnosis (gender dysphoria) cannot render her ineligible for care under SCDC's policy.

Nor can the State refuse to provide a reasonable accommodation on the ground that it is prohibited by state law. Rather, "the ADA's reasonable modification requirement contemplates modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate Title II's reasonable modification provision." *Mary Jo C. v. N.Y. State & Loc. Ret. Sys.*, 707 F.3d 144, 163 (2d Cir. 2013). In other words, it "cannot be correct" that "the mere fact of a state statutory requirement insulates public entities from making otherwise reasonable modifications to prevent disability discrimination" *Lamone*, 813 F.3d at 508; *see also Quinones v. City of Evanston, Ill.*, 58 F.3d 275, 277 (7th Cir. 1995) (Although the defendant "believes that it is compelled to follow the directive from the state, [] the Supremacy Clause of the Constitution requires a different order of priority. A discriminatory state law is not a *defense* to liability under federal law; it is a *source* of liability under federal law.") (citing *Williams v. General Foods Corp.*, 492 F.2d 399, 404 (7th Cir. 1974)); *Barber ex rel. Barber v. Colo., Dep't of Revenue*, 562 F.3d 1222, 1233 (10th Cir. 2009) ("Reliance on state statutes to excuse non-compliance with federal laws is simply unacceptable under the Supremacy Clause."); *Campbell v. Universal City Dev. Partners, Ltd.*, 72 F.4th 1245, 1248, 1257–58 (11th Cir. 2023) ("'[C]ompliance with state law' does not relieve" an entity "of its obligation to follow the ADA.") ("To paraphrase then-

Judge Gorsuch, 'the demands of the federal [statute] do not yield to state laws that discriminate against the disabled; it works the other way around.'") (quoting then-Judge Gorsuch's concurrence in *Barber*, 562 F.3d at 1234); *Seaman v. Virginia*, 593 F. Supp. 3d 293, 322-24 (W.D. Va. 2022) (invalidating Virginia's mask-optional statute insofar as it prohibited schools from considering universal mandatory masking as a reasonable accommodation); *Salcido*, 119 F. Supp. 2d at 937–38; *cf. Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 601–02 (4th Cir. 2010) (holding that the Fair Housing Act and Americans with Disabilities Act preempt state law claims for indemnity from FHA and ADA violations).

If a State cannot operate a program in compliance with federal law, it cannot operate that program. *See, e.g.*, *Quinones*, 58 F.3d at 278 ("[I]f as Evanston believes it is forbidden by state law to operate its fire department in compliance with the ADEA . . . then it had better disestablish its fire department."). Here, "the mere fact" that Budget Proviso 65.28 may prohibit the use of state funds for hormone therapy cannot "insulate[]" SCDC "from making otherwise reasonable modifications"—paying for hormone therapy—"to prevent disability discrimination[.]" *Lamone*, 813 F.3d at 508.

II. Budget Proviso 65.28 should be struck down as facially unconstitutional.

"An appellee may defend, and this Court may affirm, the district court's judgment on any basis supported by the record." *Sloas*, 616 F.3d at 388 n.5 (citing *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982)). Here, the record supports the

conclusion that Budget Proviso 65.28 is facially unconstitutional under the Eighth Amendment and Equal Protection Clause.

A. If the Budget Proviso mandates the denial of necessary medical care to prisoners for non-medical reasons, then it is unconstitutional under the Eighth Amendment.

More than two decades ago, the Fourth Circuit established that prison officials' refusal to provide medical treatment—in that case, hormone therapy as well—"based solely on" non-medical reasons, such as policy, "rather than on medical judgment concerning [the patient's] specific circumstances" would amount to the kind of "extreme deprivation" that constitutes an Eighth Amendment violation. *De'lonta*, 330 F.3d at 634–35; *see also Gordon v. Schilling*, 937 F.3d 348, 360–62 (4th Cir. 2019); *Hunt v. Sandhir, M.D.*, 295 F. App'x 584, 586 (4th Cir. 2008). Other circuits agree. *See, e.g.*, *Durham v. Kelley*, 82 F.4th 217, 230 (3d Cir. 2023); *Bernier v. Allen*, 38 F.4th 1145, 1151–52 (D.C. Cir. 2022); *Keohane*, 952 F.3d at 1266–67; *Delaughter v. Woodall*, 909 F.3d 130, 138, 140 (5th Cir. 2018); *Mitchell v. Kallas*, 895 F.3d 492, 496–98, 501 (7th Cir. 2018); *Colwell*, 763 F.3d at 1063; *Bingham v. Thomas*, 654 F.3d 1171, 1176 (11th Cir. 2011); *Fields*, 653 F.3d 550; *Roe*, 631 F.3d at 860; *Hartsfield v. Colburn*, 371 F.3d 454, 457–58 (8th Cir. 2004); *Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 899 (6th Cir. 2004); *Harrison v. Barkley*, 219 F.3d 132, 138 (2d Cir. 2000).

Again, the Seventh Circuit's decision in *Fields* is instructive. In *Fields*, the Seventh Circuit struck down the Wisconsin statute that disallowed the use of state funds for hormone therapy or gender-affirming surgery. In addressing the scope of

the ruling, the court clarified that although "[a] facial challenge to the constitutionality of a law can succeed only where plaintiffs can establish that no set of circumstances exists under which the Act would be valid . . . the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." 653 F.3d at 557 (cleaned up) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022)). In that case, the Wisconsin statute was "irrelevant to inmates who are not diagnosed with severe GID and in medical need of hormones," and for those who were, the statute's application was invalid. *Fields*, 653 F.3d at 557.

Here—just like the statute in *Fields*—the Budget Proviso bars the type of individualized medical care for gender dysphoria that the Eighth Amendment requires. Because the Budget Proviso "frustrates the full effectiveness of federal law," it "is rendered invalid by the Supremacy Clause." *Perez*, 402 U.S. at 652.

B. Given Defendants' and the Governor's insistence that Budget Proviso 65.28 was designed to discriminate against transgender prisoners, the Court should rule that the Proviso is facially discriminatory and violates the Equal Protection Clause.

This Court has been resolute in its scrutiny of anti-transgender legislation. Noting the "long history of discrimination against transgender people," the Court has repeatedly held that "intermediate scrutiny applies to laws that discriminate against them." *Williams v. Kincaid*, 45 F.4th 759, 772 (4th Cir. 2022) (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020) ("[T]ransgender people constitute at least a quasi-suspect class.")); *see also Kadel*,

100 F.4th at 141 ("In this case, discriminating on the basis of diagnosis *is* discriminating on the basis of gender identity and sex."); *see generally B.P.J.*, 98 F.4th 542.

Under intermediate scrutiny, such laws will "fail unless they are substantially related to a sufficiently important governmental interest." *Grimm*, 972 F.3d at 608 (cleaned up). To pass muster, "the state must provide an 'exceedingly persuasive justification'" for the law, *id.* (quoting *United States v. Virginia*, 518 U.S. 515, 534 (1996)), that is "based on 'reasoned analysis rather than [on] the mechanical application of traditional, often inaccurate, assumptions[]'" and is "genuine, not hypothesized or invented *post hoc* in response to litigation," *Kadel*, 100 F.4th at 156 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) and *Virginia*, 518 U.S. at 533).

Here, Defendants and the Governor insist that the budget proviso was *intended to be* discriminatory. Op. Br. at 16–17; Am. Br. at 9–11. And as grounds for the discrimination, Defendants and the Governor offer no justification beyond their apparent distaste for transgender people. *See* Am. Br. at 9 (juxtaposing Ms. Cano's "relatively novel theory that a man can become a woman" with "basic biology"). In doing so, Defendants trigger—and, in the same breath, fail—intermediate scrutiny.

No legitimate justification exists. If, as Defendants have argued below, the Budget Proviso was "a policy decision on the expenditure of limited financial resources," JA163, 186, 236, the Proviso cannot survive, *Kadel*, 100 F.4th at 156 ("[A] state may not protect the public fisc by drawing an invidious distinction

between classes of its citizens.") (quoting *Memorial Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974)). And though Defendants have not (yet) raised this argument, bans on funding gender-affirming healthcare also do not "[p]rotect[] public health from ineffective medicine." *Kadel*, 100 F.4th at 156–57. The overt—and, according to Defendants and Amicus, intentional—discrimination in Budget Proviso 65.28 is exactly the type of danger the Equal Protection Clause guards against.

III. Defendants' so-called "procedural" arguments are nonsensical and provide no grounds for relief.

Beyond the substance of Defendants' statutory interpretation arguments, Defendants also argue that the district court erred "by conclusively deciding the Budget Proviso's meaning at the preliminary injunction stage, while conflating the competing standards applicable to motions to dismiss and motions for preliminary injunction." Op. Br. at 7. But for three reasons, Defendants' arguments about this purported "procedural" error are both incorrect and inconsequential.

First, the district court was right to "conclusively" resolve a question of statutory interpretation at the motion to dismiss phase. A district court can, and often *must*, decide threshold legal questions—like the proper interpretation of a statute—to resolve a motion to dismiss. *See Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) ("[A] court can *fully resolve* any purely legal question on a motion to dismiss[.]") (emphasis added); *Atlantic Specialty Ins. Co. v. Bindea*, 656 F. Supp. 3d 624, 640 n.8 (W.D. Va. 2023) ("[T]his Court may answer the threshold legal question of how Virginia law

characterizes [the] claims on a Rule 12(b)(6) motion to dismiss."); *cf. Ray v. Roane*, 948 F.3d 222, 228–29 (4th Cir. 2020) ("[T]he purely legal question of whether the constitutional right at issue was clearly established is always capable of decision . . . on a motion to dismiss[.]"). And once a court resolves a standalone legal question, it should not be relitigated at subsequent stages of litigation. *See United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986) ("[R]econsideration of legal questions previously decided should be avoided.") (citing 18 Charles Alan Wright & Arthur R. Miller, Fed. Practice & Proc. § 4478, at 788 (1981)) , *abrogated on other grounds by Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816–817 & n.5 (1988); *see also* Op. Br. at 13 (agreeing that "the district court's ruling significantly limits the arguments available to Appellants at the summary judgment and trial phases"), 14 (arguing that preliminary injunction orders that resolve a "pure issue of law" establish the law of the case on that issue). And though Defendants are correct that *factual* allegations are treated differently under Fed. R. Civ. P. 12(b)(6) than under Fed. R. Civ. P. 65, that has no bearing here. Strict legal questions, like the meaning of Budget Proviso 65.28, do not rely on factual determinations. As a result, they are analyzed using the same standards under Rule 12(b)(6) and Rule 65.

Second, this appeal cures whatever "procedural" errors that Defendants think occurred below. Interpretation of Budget Proviso 65.28 is a legal question that this Court reviews *de novo*. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991) ("[A] court of appeals should review *de novo* a district court's determination of state law."); *see also* Op. Br. at 9 ("A district court's interpretation of a statute is

reviewed de novo."), 14 ("[T]he district court decided an issue of law . . ."). Given that, it does not matter whether the district court first decided the question at the motion to dismiss or preliminary injunction stage. Whether or not the district court was right to bootstrap its statutory analysis from Defendants' motion to dismiss, this Court's task remains the same—*de novo* review of a purely legal question.

Third, this appeal also cures Defendants' concerns about the "broader implications" of the district court's ruling. Unless the Court dismisses this appeal, it will announce an authoritative interpretation of Proviso 65.28. That interpretation will necessarily resolve the "difficult position" that Defendants claim to be in, Op. Br. at 13, and will establish the "law of the case" as to the meaning of Proviso 65.28, *id.* at 14–15.

CONCLUSION

Defendants' categorical refusal to treat Ms. Cano's serious medical condition violates the Eighth Amendment and the ADA regardless of how the Court interprets the South Carolina Appropriations Act. The district court's decision should be affirmed.

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Respectfully submitted,

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