

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

MAXWELL KADEL, *et al.*,

Appellees,

v.

DALE FOLWELL, *in his official capacity
as State Treasurer of North Carolina*; and
EXECUTIVE ADMINISTRATOR OF
THE NORTH CAROLINA STATE
HEALTH PLAN FOR TEACHERS AND
STATE EMPLOYEES,

Appellants.

No. 22-1721

**APPELLEES' RESPONSE TO APPELLANTS' CITATION OF
SUPPLEMENTAL AUTHORITIES PURSUANT TO RULE 28(J)**

Appellees respectfully submit this response to Appellants' Citation of Supplemental Authorities Pursuant to Rule 28(j), referring the Court to *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, — F.4th —, 2022 WL 18003879 (11th Cir. 2022) (No. 18-13592)). ECF No. 82. *Adams* involved a transgender student seeking to access restrooms in accordance with his gender, but reached starkly different conclusions than this Court's decision in *Grimm v. Gloucester County School Board*, 972 F.3d 586, 593 (4th Cir. 2020), as amended (Aug. 28, 2020). *Adams* is not persuasive authority for at least two reasons:

First, Appellants point to *Adams*' decision not to apply heightened scrutiny to the plaintiff student's sex and transgender status discrimination claims under the Fourteenth Amendment. ECF No. 82 at 1 ("the Eleventh Circuit refused to hold that gender identity is 'akin to biological sex' and therefore declined to apply intermediate scrutiny to the policy before it"). *Adams* holds no persuasive value here where *Grimm* reached the opposite conclusion, finding that excluding transgender students from restrooms matching their gender discriminates both on sex and transgender status—with each independently requiring heightened scrutiny. *Grimm*, 972 F.3d at 608, 613.

Second, in direct contrast to the explicitly discriminatory exclusion here for treatment in connection with "*sex changes* or modifications," JA3833-3880 (emphasis added), *Geduldig* reviewed a facially neutral exclusion. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 n.3 (1993) (explaining that *Geduldig* examined a "facially neutral benefit plan"). The health plan terms here, which expressly discriminate based both on sex and transgender status, could not be more different. See, e.g., *Williams v. Kincaid*, 45 F.4th 759, 772 (4th Cir. 2022) (finding as a matter of constitutional avoidance that if a law excluded treatment for gender dysphoria from protection, the Court would have "little trouble concluding that" it "would discriminate against transgender people as a class"). Nothing about *Adams* counsels in favor of a different result.

Dated: January 22, 2023

Respectfully submitted,

/s/ Amy E. Richardson

Amy E. Richardson
Lauren E. Snyder
HWG LLP
1919 M Street, NW, #6220
Washington, DC 20036
(202) 730-1300

Dmitriy G. Tishyevich
McDERMOTT WILL & EMERY
One Vanderbilt Avenue
New York, NY 10017-3852
(212) 547-5534

David P. Brown
Ezra Cukor
TRANSGENDER LEGAL DEFENSE &
EDUCATION FUND, INC.
520 8th Avenue, Ste. 2204
New York, NY 10018
(646) 862-9396

/s/ Tara L. Borelli

Tara L. Borelli
Carl S. Charles
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
1 West Court Square, Ste. 105
Decatur, GA 30030
(404) 897-1880

Omar Gonzalez-Pagan
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585

Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response is in compliance with Federal Rule of Appellate Procedure 28(j) because the body of this response does not exceed 350 words as indicated by Microsoft Word, the program used to prepare this document.

Dated: January 22, 2022

/s/ Tara L. Borelli

Tara L. Borelli

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

1 West Court Square, Ste. 105

Decatur, GA 30030

(404) 897-1880

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: January 22, 2022

/s/ Tara L. Borelli

Tara L. Borelli

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

1 West Court Square, Ste. 105

Decatur, GA 30030

(404) 897-1880