No. 15-2056

In the United States Court of Appeals for the Fourth Circuit

G.G., *ex rel.* GRIMM,
Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,
Defendant-Appellee.

Appeal from the U.S. District Court for the Eastern District of Virginia
Robert G. Doumar, Senior District Judge (No. 4:15-cv-00054-RGD-DEM)

GLOUCESTER COUNTY SCHOOL BOARD'S PARTIAL OPPOSITION TO MOTION FOR EXPEDITED BRIEFING AND ARGUMENT

Defendant-Appellee Gloucester County School Board ("Board") files this partial opposition to the motion by Plaintiff-Appellant ("G.G.") for expedited briefing and argument. The Board does not oppose G.G.'s request that the parties simultaneously submit supplemental briefs and responses, nor does the Board oppose G.G.'s proposed word limits for those briefs. *See* Mot. at 5 ¶ 18 (proposing limits of 13,000 and 6,500 words, respectively). The Board does, however, oppose G.G.'s request to

expedite briefing and to schedule argument during this Court's May 2017 sitting. *Id.* at 1.

G.G.'s proposed schedule would not permit the Court, the parties, and *amici* time to sufficiently address the important Title IX issue now posed on remand. Nor would it allow the United States adequate time to inform the Court of its current position, as it has previously done twice in this case. In light of that, the Board respectfully suggests that the Court establish a supplemental briefing schedule—such as the one set forth below—that allows sufficient time for briefing by the parties, *amici* and the United States, and that the Court schedule argument in this case for the September 2017 sitting.

BACKGROUND

1. This appeal concerns whether the Board's policy designating multiple-user restrooms and locker rooms according to students' "biological gender," while providing single-stall unisex restrooms for any student, is valid under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq*. Compl., ¶¶ 34, 61-65. On June 11, 2015, G.G. sued the Board, claiming Title IX affords the right to access school restrooms according to one's "gender identity," as distinguished from

one's "assigned sex at birth." *Id.* ¶¶ 14, 61-65.[1] The United States filed a brief supporting G.G. ECF No. 28. In September 2015, the district court denied G.G.'s request for a preliminary injunction and granted the Board's motion to dismiss the Title IX claim. *G.G. v. Gloucester Cnty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015) ("*G.G. I*").

2. On April 19, 2016, this Court reversed. *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) ("*G.G. II*") (No. 15-2056). The Court "accorded controlling weight" to a 2015 U.S. Department of Education letter opining that a Title IX regulation—34 C.F.R. § 106.33—requires "transgender students" to be allowed to access sex-separated restrooms, locker rooms, and showers "consistent with their gender identity." *G.G. II*, 822 F.3d at 723, 718 (applying *Auer v. Robbins*, 519 U.S. 452 (1997)). While deferring to the letter, the Court noted that its interpretation of the regulation was "novel" and "perhaps not the intuitive one." *Id.* at 722.[2] On remand the district court entered a preliminary injunction without further briefing or evidence. *G.G. v. Gloucester Cnty. Sch. Bd.*,

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[1] G.G. also brought a claim under the Equal Protection Clause, which the district court has not ruled on and which is consequently not at issue in this appeal.

[2] On appeal, the United States again submitted a brief supporting G.G. ECF No. 25.

No. 4:15-CV-54, 2016 WL 3581852, at *1 (E.D. Va. June 23, 2016) ("*G.G. III*").

3. The Board appealed (No. 16-1733). After this Court denied a stay, the Supreme Court granted the Board's request to recall and stay this Court's mandate in No. 15-2056 and to stay the injunction pending a certiorari petition on August 3, 2016. *Gloucester Cnty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016) (per curiam) ("*G.G. IV*"). The Board petitioned for certiorari in No. 15-2056 and for certiorari before judgment in No. 16-1733, which the Supreme Court granted on October 28, 2016.

4. On February 22, 2017, the U.S. Departments of Education and Justice issued a "Dear Colleague" letter "withdraw[ing] and rescind[ing]" Title IX guidance issued by the prior administration, including the letter this Court relied on in *G.G. II*. Mot. App. A at 1. The letter noted that the prior administration's guidance documents "d[id] not … contain extensive legal analysis or explain how [their] position [was] consistent with the express language of Title IX," that they did not "undergo any formal public process," and that they "g[ave] rise to significant litigation" leading to divergent outcomes. *Id.* As a result, the Departments have stated that they "will not rely on the views expressed within" that prior

guidance and will instead "further and more completely consider the legal issues involved." *Id.* Additionally, the Departments now emphasize that "there must be due regard for the primary role of the States and local school districts in establishing educational policy." *Id.*

5. Rather than hear argument, the Supreme Court issued this summary disposition on March 6, 2017:

> The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.

Gloucester Cnty. Sch. Bd. v. G.G., No. 16-273, 2017 WL 855755, at *1 (U.S. Mar. 6, 2017) ("*G.G. V*").

6. On March 8, 2017, G.G. moved to expedite supplemental briefing and to schedule re-argument for the Court's May 2017 sitting.

ARGUMENT

1. This Court's prior decision in this case turned solely on deference to the previous administration's view that 34 C.F.R. § 106.33 requires "transgender students" to be allowed to access sex-separated facilities "consistent with their gender identity." *G.G. II*, 822 F.3d at 723, 718. The Court thus did not have to reach its own definitive

interpretation of Title IX or the implementing regulations. Because the prior administration's guidance has been withdrawn, the issue now before this Court on remand is whether Title IX and section 106.33 *themselves* permit the Board's policy of allowing access to multiple-user restrooms and locker rooms according to biological sex as opposed to gender identity, while providing single-stall unisex restrooms for any student. This Court's consideration of that new and important issue merits more deliberation than the expedited schedule G.G. proposes.

2. G.G.'s proposal demands that the parties must prepare four full-length supplemental briefs and responses and that numerous *amici* must file their briefs in the less than two months that remain before this Court's May 2017 argument sitting. That is hardly enough time, especially allowing for the Court to digest those voluminous filings before argument.

3. Despite G.G.'s confidence that the prior Supreme Court briefing will allow all parties and *amici* to "quickly" provide supplemental briefing, Mot. at 5, many of the *amici* (and much of the parties' briefing) addressed not Title IX, but *Auer* deference. It is unrealistic to predict that all interested parties, and especially the *amici*, can adequately brief the

issue on remand in the short amount of time allocated by G.G. This Court's process would be better served by briefs prepared with more deliberation, and submitted more than a few weeks before argument.

4. Furthermore, the proposed expedited schedule would likely prevent the United States from providing the Court with its current view. Twice before the United States has filed amicus briefs in this case. This Court relied on the United States' position. *See G.G. II*, 822 F.3d at 719, 720, 722 (citing United States' brief). It would only be fair—and would aid this Court's deliberations—to give the United States adequate opportunity to weigh in again now that the merits question is squarely posed, particularly since the February 22, 2017 letter suggests that the United States is in the process of reconsidering its previous position. Mot. App. A at 1 (noting Departments' intention to "further and more completely consider the legal issues involved"). Many of the federal personnel whose judgment would be required, however, are not yet in place, and the pending nominee for U.S. Solicitor General is recused. *See* Feb. 22, 2017 Ltr. E. Kneedler to S. Harris, Mot. App. B. It is unlikely that the United States would be able to participate on the timeline that G.G. requests.

5. Waiting until September 2017 to hear argument will mitigate these timing issues, and allow the Court to consider the question on remand in light of the fully considered views of all interested parties, including the United States.

6. Nor is G.G.'s proposal appropriate as a matter of judicial economy. The reason G.G. gives for expediting briefing and argument is "to facilitate a ruling before [G.G.] graduates on June 10, 2017." Mot. at 6. That is a presumptuous demand on this Court. The issue on remand is already the subject of numerous conflicting decisions in federal circuit and district courts.[3] Yet G.G. proposes that the parties, *amici* and this Court address a critical Title IX issue on the merits in less than two months' time, and that the Court then render its decision in under a *month*. G.G.'s desire to receive a ruling before graduation, while understandable, is not a reason to decide the important and novel issue in this case on an unrealistically expedited schedule. This Court's decisional process would be better served by additional time.

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[3] G.G.'s motion includes a partial listing of those decisions, Mot. at 5 n.1, but there are others. *See also Texas v. United States*, __ F. Supp. 3d __, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016); *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007); *Ulane v. E. Airlines, Inc.,* 742 F.2d 1081 (7th Cir. 1984).

7. Instead, the Board respectfully suggests that the Court establish a briefing schedule along the following lines, which would allow argument at the September 2017 sitting:

- Supplemental briefs filed by parties .....**Monday, May 1, 2017**
- Briefs filed by *amici* ..... **Thursday, June 1, 2017**
- Response briefs filed by parties ..... **Monday, July 3, 2017**

8. Finally, G.G.'s motion suggests that the Court take "judicial notice" of various "factual developments" that have allegedly occurred since the case was last in this Court. Mot. at 3-4. A motion to expedite oral argument is not the forum to debate whether extra-record facts may properly be taken into account by a circuit court. Both parties will have the opportunity to address those questions in supplemental briefing. It is neither necessary nor appropriate to do so at this stage.

CONCLUSION

For the foregoing reasons, the Board respectfully asks the Court to deny G.G.'s motion for expedited briefing and argument and instead to establish a reasonable supplemental briefing schedule that would allow the case to be argued at the Court's September 2017 sitting.

Respectfully submitted,

/s/ *S. Kyle Duncan*

David P. Corrigan
Jeremy D. Capps
M. Scott Fisher Jr.
HARMAN, CLAYTOR,
CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
(804) 747-5200

S. Kyle Duncan
Gene C. Schaerr
Stephen S. Schwartz
SCHAERR|DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
Kduncan@Schaerr-Duncan.com

Counsel for Defendant-Appellee

March 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys

This the 14th day of March, 2017.

/s/ *S. Kyle Duncan*
S. Kyle Duncan
Counsel for Defendant-Appellee