

Appeal No. 16-4117

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

Superintendent William Dodds; Highland Local School District; Principal Shawn Winkelfoos; Board of Education of the Highland Local School District,

*Third-Party-Defendants Appellants,*

v.

United States Department of Education; John B. King, Jr., Secretary of Education; United States Department of Justice; Loretta E. Lynch, United States Attorney General; and Vanita Gupta, Principal Deputy Assistant Attorney General,

*Defendants,*

and

Jane Doe, a minor, by and through her legal guardians Joyce and John Doe,

*Intervenor-Third-Party-Plaintiff Appellee.*

---

On Appeal from the United States District Court  
for the Southern District of Ohio  
Civil Case No. 2:16-cv-524 (Honorable Algenon L. Marbley)

---

**NOTICE OF SUPPLEMENTAL AUTHORITY BY THIRD-PARTY-  
DEFENDANTS APPELLANTS IN SUPPORT OF THEIR MOTION TO  
STAY PRELIMINARY INJUNCTION**

---

David Langdon, OH 0067046  
LANGDON LAW, LLC  
8913 Cincinnati Dayton Road  
West Chester, Ohio 45069  
(513) 577-7380  
dlangdon@langdonlaw.com

Steven O'Ban, WA 17265  
Douglas G. Wardlow, AZ 032028  
Jeana Hallock, AZ 032678  
Gary S. McCaleb, AZ 018848  
ALLIANCE DEFENDING FREEDOM  
15100 North 90th Street  
Scottsdale, Arizona 85260  
(480) 444-0020  
soban@ADFlegal.org  
dwardlow@ADFlegal.org  
jhallock@ADFlegal.org  
gmccaleb@ADFlegal.org

Matthew J. Markling (0068095)  
Sean Koran (0085539)  
Patrick Vrobel (0082832)  
McGown & Markling Co., L.P.A.  
1894 North Cleveland-Massillon Road  
Akron, Ohio 44333  
(330) 670-0005  
mmarkling@mcgownmarkling.com  
skoran@mcgownmarkling.com  
pvrobel@mcgownmarkling.com

*Counsel for Third-Party-Defendants Appellants*

Third-Party-Defendants Appellants, respectfully bring to the Court's attention the United States Supreme Court's grant of certiorari on October 28, 2014 in *Gloucester County School Board v. G.G.*, 16-273 ("Opinion"), a copy of which is attached hereto as Exhibit A.

As the Opinion indicates, the United States Supreme Court granted certiorari to Questions 2 and 3 presented in the petition, questions which are central to the instant appeal:

2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?
3. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

*See* Exhibit B.

The grant of certiorari leaves in place the United States Supreme Court's stay of the preliminary injunction entered by the United States District Court for the Eastern District of Virginia until the United States Supreme Court issues its judgment.

*Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (mem.).

Date: November 7, 2016

Respectfully submitted,

s/ Steven O'Ban

Steven O'Ban, WA 17265

Douglas G. Wardlow, AZ 032028

Jeana Hallock, AZ 032678

Gary S. McCaleb, AZ 018848

ALLIANCE DEFENDING FREEDOM

David Langdon, OH 0067046  
LANGDON LAW, LLC  
8913 Cincinnati Dayton Road  
West Chester, Ohio 45069  
(513) 577-7380

dlangdon@langdonlaw.com

15100 North 90th Street  
Scottsdale, Arizona 85260  
(480) 444-0020  
soban@ADFlegal.org  
dwardlow@ADFlegal.org  
jhallock@ADFlegal.org  
gmccaleb@ADFlegal.org

Matthew J. Markling (0068095)  
Sean Koran (0085539)  
Patrick Vrobel (0082832)  
McGown & Markling Co., L.P.A.  
1894 North Cleveland-Massillon Road  
Akron, Ohio 44333  
(330) 670-0005  
mmarkling@mcgownmarkling.com  
skoran@mcgownmarkling.com  
pvrobel@mcgownmarkling.com

*Counsel for Third-Party-Defendants Appellants*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 7, 2016, I filed the foregoing document, entitled Notice of Supplemental Authority by Third-Party-Defendants Appellants in Support of their Motion to Stay Preliminary Injunction through the Court's ECF system, which will effectuate service on all parties.

s/ Steven O'Ban \_\_\_\_\_  
Steven O'Ban

# **EXHIBIT A**

2016 WL 4565643 (Mem)  
GLOUCESTER COUNTY SCH. BD. V. G. G

No. 16-273.  
|  
Oct 28, 2016.

**Opinion**

The petition for a writ of certiorari is granted limited to Questions 2 and 3 presented by the petition.

**All Citations**

--- S.Ct. ----, 2016 WL 4565643 (Mem)

---

**End of Document**

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

# **EXHIBIT B**

No.

---

**In the Supreme Court of the United States**

---

GLOUCESTER COUNTY SCHOOL BOARD, PETITIONER

*v.*

G.G., BY HIS NEXT FRIEND AND MOTHER,  
DEIRDRE GRIMM

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

---

**PETITION FOR A WRIT OF CERTIORARI**

---

JONATHAN F. MITCHELL  
D. JOHN SAUER  
JAMES OTIS LAW GROUP, LLC  
12977 North Forty Drive  
Suite 214  
St. Louis, MO 63141  
(314) 682-6067

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  
*Counsel of Record*  
GENE C. SCHAERR  
SCHAERR|DUNCAN LLP  
1717 K Street NW, Suite 900  
Washington, DC 20006  
(202) 714-9492  
KDuncan@Schaerr-  
Duncan.com

*Counsel for Petitioner*

---

## QUESTIONS PRESENTED

Title IX prohibits discrimination “on the basis of sex,” 20 U.S.C. § 1681(a), while its implementing regulation permits “separate toilet, locker rooms, and shower facilities on the basis of sex,” if the facilities are “comparable” for students of both sexes, 34 C.F.R. § 106.33. In this case, a Department of Education official opined in an unpublished letter that Title IX’s prohibition of “sex” discrimination “include[s] gender identity,” and that a funding recipient providing sex-separated facilities under the regulation “must generally treat transgender students consistent with their gender identity.” App. 128a, 100a. The Fourth Circuit afforded this letter “controlling” deference under the doctrine of *Auer v. Robbins*, 519 U.S. 452 (1997). On remand the district court entered a preliminary injunction requiring the petitioner school board to allow respondent—who was born a girl but identifies as a boy—to use the boys’ restrooms at school.

The questions presented are:

1. Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?
2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?
3. With or without deference to the agency, should the Department’s specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?