Appeal No. 16-4107

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Board of Education of the Highland Local School District,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

Intervenor Third-Party Plaintiff,

v.

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

Third Party Defendants.

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)

PLAINTIFF-APPELLANT'S MOTION TO STAY PROCEEDINGS PENDING THE DECISION OF THE UNITED STATES SUPREME COURT IN *GLOUCESTER COUNTY SCHOOL BOARD V. G.G.*

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Counsel for Plaintiff-Appellant Board of Education of the Highland Local School District

Pursuant to Federal Rule of Appellate Procedure 27 and Sixth Circuit Rule 27, Plaintiff-Appellant Board of Education of the Highland Local School District ("Highland") hereby respectfully moves this Honorable Court for a stay of this appeal pending the decision of the United States Supreme Court in *Gloucester County School Board v. G.G.*, No. 16-273. Counsel for Highland has consulted with counsel for Defendant-Appellees United States Department of Education, John B. King, Jr., in his official capacity as the Secretary of Education, the United States Department of Justice, Loretta E. Lynch, in her official capacity as United States Attorney General, and Vanita Gupta, in her official capacity as Principal Deputy Assistant Attorney General (collectively, the Federal Defendant-Appellees). Federal Defendant-Appellees do not oppose the relief requested in this motion, but they intend to file a short response.

A stay of proceedings is warranted here because when the Supreme Court decides *G.G.*, it will address relevant issues and likely direct the resolution of this case. A stay is in the interest of judicial economy—saving the Court and all parties from expending substantial resources on briefing issues which are directly implicated in the pending *G.G.* case and limiting the risk of creating inconsistent or simply short-lived legal precedent regarding *Auer* deference and the interpretation of Title IX in the Sixth Circuit. Moreover, a stay will not unduly prejudice any other party.

ARGUMENT

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and

effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Jewell v. Davies*, 192 F.2d 670, 673 (6th Cir. 1951) ("[T]he power to make [a stay] order is incidental to the power of the court to control the disposition of the case on its docket. This power is not affected by the fact that the parties in the two causes are not exactly the same or that the issues in each were not identical."). Staying a case pending the resolution of another is proper when issues relevant to both cases are likely to be addressed, particularly when the other proceeding is likely to decide, or to contribute to the decision of, the factual or legal issues presented. *See Marshel v. AFW Fabric Corp.*, 552 F.2d 471, 472 (2d Cir. 1977) (per curiam) (remanding damages claim to district court with instructions to stay proceedings pending resolution of another case that had recently been heard by the Supreme Court which would likely decide the question of liability for damages); *see also Smith v. United States*, 254 F.2d 865, 869 (6th Cir. 1958) (per curiam).

Here, the Supreme Court's resolution of *Gloucester County School Board v. G.G.* is likely to be dispositive of this appeal. *Gloucester County School Board v. G.G.* centers on the Department of Education's ("DOE") determination that "sex" in Title IX and its implementing regulations turns not on the physiological differences between men and women, but on a person's "gender identity." The Fourth Circuit, citing *Auer v. Robbins*, 519 U.S. 452 (1997), held that DOE's construction was controlling. *G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016). In agreeing to review the Fourth Circuit's decision, the Supreme Court granted certiorari on two questions: (1)

whether the Fourth Circuit properly deferred to the agency's interpretation under *Auer*, and (2) whether, regardless of deference to the agency, DOE's specific interpretation of Title IX and 34 C.F.R. § 106.33 should be given effect. *Gloucester County School Board v. G.G.*, 137 S. Ct. 369 (Mem.) (2016) (No. 16-273); Petition for Writ of Certiorari, *Gloucester County School Board v. G.G.* (Aug. 29, 2016) (No. 16-273), 2016 WL 4610979, at *i.

These two questions are at the heart of the present appeal. In this case, the District Court denied Highland's motion for a preliminary injunction barring enforcement of the DOE's interpretation of Title IX. Highland had argued that (1) DOE's interpretation does not warrant deference under *Auer v. Robbins*, and (2) DOE's interpretation is contrary to the plain meaning of Title IX and its implementing regulations—precisely the issues that the Supreme Court has announced it will consider in *G.G.* Accordingly, the resolution of *G.G.* will undoubtedly affect—if not direct—the resolution of Highland's claims in this case.

This is true even though the District Court denied Highland's motion for a preliminary injunction on the basis that it lacked subject-matter jurisdiction over Highland's claims. If the Supreme Court in *G.G.* determines that "sex" in Title IX means male and female (thus excluding the fluid continuum of gender identity), it will moot the present appeal: the DOE would not be able to prosecute an enforcement action against Highland, and thus Highland would have no need to seek a preliminary injunction against the DOE by pressing the present appeal. If the Supreme Court

determines that Title IX's use of the term "sex" encompasses gender identity, it may dispose of the present appeal by depriving Highland of a basis to argue that it is likely to prevail on the merits of its claims.[1] And if the Supreme Court's decision in *G.G.* rests on the propriety of *Auer* deference, that decision will doubtless direct the court with regard to the disposition of the merits of this appeal and likely guide the court with respect to the question of subject-matter jurisdiction as well.

Accordingly, an immediate stay is in the interests of judicial economy. Granting a stay will prevent the Court from expending substantial time and effort dealing with a case which may be rendered moot or otherwise disposed of by the Supreme Court's decision in *G.G.* Likewise, the parties will not expend significant resources drafting briefs for an appeal that may not need to be pressed at all, based on legal questions that the Supreme Court may decide. The Court's time will be better spent considering well-thought-out arguments based on proper legal analysis guided by the Supreme Court's resolution of *G.G.*

Finally, no party will be unduly prejudiced by a stay pending the Supreme Court's resolution of *G.G.*: were our case to proceed through briefing, argument, and decision, the opinion would likely issue about the same time (late spring to early summer) that the *G.G.* decision would issue. Indeed, oral argument in *G.G.* has been set for March

[11] It may be that the Supreme Court will pay more heed to the bodily privacy violations inherent in granting access to sex-specific intimate facilities on the basis of gender identity—an issue given short shrift by the DOE and the Fourth Circuit in *G.G.*. But even with this result, awaiting a decision on the two questions now before the Supreme Court would serve strong interests in judicial economy.

28. Thus, pausing this appeal while *G.G.* is decided will not harm the Appellees Department of Education or Department of Justice, who do not oppose the relief sought by this motion (though they intend to file a short response). And while Highland properly argued that it is suffering irreparable harm in its motion for a preliminary injunction, it reasonably appears that the key legal issues will be resolved by *G.G.* within about the same time frame as proceeding with the instant appeal. Hence, there would be no undue injury to Highland's interests.

Jane Doe, the appellee in the related appeal, No. 16-4117, will not be harmed by a stay either. Jane Doe's motion for a preliminary injunction was granted by the District Court, and that preliminary injunction will remain in place during the period of the stay. Because Jane Doe's preliminary relief will remain in place, Jane Doe will lose nothing by virtue of the stay. A stay will only preserve the parties' resources pending resolution of the legal questions that will likely drive the outcome of this case.

CONCLUSION

For all of the foregoing reasons, Highland respectfully requests that this Court grant its motion and stay the instant appeal pending the Supreme Court's resolution of *Gloucester County School Board v. G.G.*

Date: February 10, 2017

Respectfully submitted,

s/ Douglas G. Wardlow

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, I filed the foregoing document, entitled Plaintiff-Appellant's Motion to Stay Proceedings Pending the Decision of the United States Supreme Court in *Gloucester County School Board v. G.G.*, through the Court's ECF system.

s/ Douglas G. Wardlow
Douglas G. Wardlow