

No. 18-252

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

GAVIN GRIMM,

Plaintiff-Respondent,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Petitioner,

RESPONSE TO PETITION FOR PERMISSION TO APPEAL

Plaintiff-Respondent agrees that the petition for permission to appeal should be granted. This appeal “involves a controlling question of law as to which there is substantial ground for difference of opinion” and “an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b).

Specifically, this case raises two controlling legal questions:

(a) Whether a public school policy that categorically prohibits boys and girls who are transgender from using the restrooms that align with their gender identity violates Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*

(b) Whether a public school policy that categorically prohibits boys and girls who are transgender from using the restrooms that align with their gender identity violates the Equal Protection Clause of the Fourteenth Amendment.

Plaintiff-Respondent also agrees that, there is substantial ground for difference of opinion in light of the sharply divided opinions of the panel that heard a previous appeal in this case. *Compare G.G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 731 (4th Cir. 2017) (mem.), *as amended* (Apr. 18, 2017) (Davis, J., concurring, joined by Floyd, J.), *with G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 730 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part).

Finally, Plaintiff-Respondent agrees that an immediate appeal from the order may materially advance the ultimate termination of the litigation by providing a definitive answer to these controlling legal questions.¹ Indeed, if the Court grants

¹ Over the past four years, district courts throughout the Circuit have repeatedly been called upon to resolve whether and to what extent transgender people are protected under statutory protections from sex discrimination and under the Fourteenth Amendment. *See M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018) (excluding transgender student from restrooms and locker rooms violates Title IX and equal protection); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017) (President Trump's attempt to ban transgender people from the military is subject to heightened scrutiny and violates equal protection), *stay pending appeal denied*, No. 17-2398, 2018 WL 2717050 (4th Cir. Dec. 21, 2017); *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016) (challenge to North Carolina's "bathroom bill" under Title IX and the Fourteenth Amendment), *appeal dismissed*, No. 16-1989 (4th Cir. Apr. 24, 2017); *Lewis v. High Point Reg'l Health Sys.*, 79 F. Supp. 3d 588 (E.D.N.C. 2015) (plaintiff stated claim under Title VII for discrimination based on transgender status status); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780 (D. Md. 2014) (same).

permission to appeal pursuant to 28 U.S.C. § 1292(b), Plaintiff-Respondent intends to file a petition for initial hearing en banc to enable the Court to address these exceptionally important questions and to secure and maintain uniformity of this Court's decisions. *See* Fed. R. App. P. 35; *cf. G.G. v. Gloucester Cty. Sch. Bd.*, 824 F.3d 450, 453 (4th Cir. 2016) (Niemeyer, J., dissenting from denial of panel rehearing) (explaining that an earlier appeal presented important questions of law warranting en banc consideration but declining to call for an en banc poll so the questions could be resolved quickly by the Supreme Court). Counsel for Defendant has advised that Defendant would not oppose such a petition.

For all these reasons, Plaintiff-Respondent agrees that the petition for permission to appeal should be granted.

Respectfully submitted,

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Dated: June 15, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2018, I filed the foregoing Response to Petition for Permission to Appeal with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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