

No. 19-1952

In the United States Court of Appeals for the Fourth Circuit

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GAVIN GRIMM

*Plaintiff – Appellee*

v.

GLOUCESTER COUNTY SCHOOL BOARD,

*Defendant – Appellant*

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On Appeal from the U.S. District Court, Eastern District of Virginia Civil No. 4:15-00054, Judge Arenda Wright Allen

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**APPELLANT GLOUCESTER COUNTY SCHOOL BOARD’S MOTION TO  
HOLD APPEAL IN ABEYANCE  
AND SUSPEND THE BRIEFING ORDER**

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Pursuant to Federal Rule of Appellate Procedure 27 and Fourth Circuit Rule 12(d), Appellant Gloucester County School Board (“School Board”), by counsel, moves to hold this appeal in abeyance and suspend the Briefing Order pending the United States Supreme Court’s resolution of *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, No. 18-107, *cert. granted* (U.S. April 22, 2019).

Fourth Circuit Rule 27(a) Statement: The School Board has notified Appellee Gavin Grimm (“Grimm”) of its intent to file this motion. Grimm opposes this motion and intends to file a response in opposition.

## BACKGROUND

This is an appeal pursuant to 28 U.S.C. § 1291. Grimm, a transgender male who formerly attended public high school in Gloucester County, Virginia, challenges a School Board policy allowing the use of the boys' and girls' restrooms to students of the corresponding biological genders or one of three single stall restrooms that are available for any student. Grimm brought claims under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.

On August 9, 2019, the District Court denied summary judgment to the School Board and entered summary judgment in Grimm's favor for both the Title IX and Equal Protection claims. With respect to the Title IX claim, the District Court found claims of discrimination on the basis of transgender status are *per se* actionable under a gender stereotyping theory and held Grimm was excluded from participation in an education program on the basis of sex. [ECF Doc. 229 at 15-19]. With respect to the Equal Protection Clause claim, the District Court held that intermediate scrutiny must be applied in analyzing claims of discrimination against transgender individuals. [ECF Doc. 229 at 21].

In granting summary judgment to Grimm, the District Court granted Grimm the following relief: (1) a declaration that the School Board's policy violated Grimm's rights under the Fourteenth Amendment and Title IX on the day the policy was first issued and throughout the remainder of Grimm's time as a student at Gloucester High School; (2) a declaration that the School Board's refusal to update Grimm's official school transcript to match the "male" designation of his updated birth certificate violated, and continues to violate, Grimm's rights under the Fourteenth Amendment and Title IX; (3) nominal damages; (4) a permanent injunction requiring the School Board to update Grimm's official transcript to match the male designation of his updated birth certificate; and (5) Grimm's reasonable costs and attorney's fees pursuant to 42 U.S.C. § 1988.

On April 22, 2019, the United States Supreme Court granted *certiorari* in *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, No. 18-107, *cert. granted* (U.S. April 22, 2019). In *Harris Funeral Homes*, the Supreme Court will decide whether Title VII's proscription of sex discrimination includes discrimination based either on an individual's status as transgender or on sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

## ARGUMENT

This Court should hold the School Board’s appeal in abeyance and suspend the briefing order pending the Supreme Court’s decision in *Harris Funeral Homes*. It is well-settled that “[a] court has control over its own docket. In the exercise of a sound discretion, it may hold one lawsuit in abeyance to abide the outcome of another . . . .” *American Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) (citing *Landis v. North American Co.*, 299 U.S. 248 (1936)). Courts of Appeals frequently hold cases in abeyance after the Supreme Court grants *certiorari* in a case whose outcome may affect the cases before the Courts of Appeals. See, e.g., *United States v. Walker*, 934 F.3d 375 (4th Cir. 2019) (placing an appeal in abeyance pending the Supreme Court’s resolution of *United States v. Davis*, — U.S. —, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019)); *GSS Grp. Ltd. v. National Port Auth. of Liberia*, 822 F.3d 598, 604 n.8 (D.C. Cir. 2016) (noting the case had been held in abeyance pending the Supreme Court’s resolution of *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015)); *Stoffel v. Shinseki*, 527 F. App’x 940, 941 (Fed. Cir. 2013) (per curiam) (noting that the case had been held in abeyance pending the Supreme Court’s resolution of *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011)).

In *Harris Funeral Homes*, the writ of *certiorari* is “limited to the following question: Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).”<sup>1</sup> The resolution of *Harris Funeral Homes* will impact the outcome of this case directly.

Title VII and Title IX contain similar language, and “Title VII forbids actions taken on the basis of sex that ‘discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.’” *Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001), quoting 42 U.S.C. § 2000e-2(a)(1). It has been widely recognized that Title VII and Title IX should be construed *in pari materia* and that Title VII precedents are relevant to construction of Title IX. See, e.g., *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, 718 (4th Cir. 2016) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”), *vacated and remanded on other grounds*, 137 S.Ct. 1239 (2017); *Jennings v. University of North Carolina*, 482 F.3d 686, 695 (4th Cir. 2007), and cases cited.

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<sup>1</sup> See Order List, April 22, 2019, at page 2 ([https://www.supremecourt.gov/orders/courtorders/042219zor\\_9o1b.pdf](https://www.supremecourt.gov/orders/courtorders/042219zor_9o1b.pdf)).

Here, the District Court held with respect to the Title IX claim that claims of discrimination on the basis of transgender status are *per se* actionable under a gender stereotyping theory and further held Grimm was excluded from participation in an education program on the basis of sex. [ECF Doc. 229 at 15-19]. To reach that conclusion, the District Court relied on *Price Waterhouse*, which held that Title VII of the Civil Rights Act of 1964 bars discrimination not only based on a person's gender, but also based on whether the person conforms to stereotypes associated with the person's gender. [ECF Doc. 229 at 8-9]. The District Court further noted, "Courts may, and frequently do, look to case law interpreting Title VII for guidance in evaluating a claim brought under Title IX." [ECF Doc. 229 at FN 3]. In fact, the District Court specifically cited the Sixth Circuit's underlying decision in *Harris Funeral Homes* to support its conclusion that "under Title IX discrimination on the basis of transgender status constitutes gender stereotyping because by definition, transgender persons do not conform to gender stereotypes." [ECF Doc. 229 at 8, FN 4, citing *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560,574-75 (6th Cir. 2018) cert, granted 139 S. Ct. 1599 (2019) (Title VII)].

Given the similarity of the issues in this case under Title IX to the issues which the Supreme Court will decide in *Harris Funeral Homes* under

Title VII, the Supreme Court's decision will likely answer whether Title IX's prohibition of discrimination "on the basis of sex" includes "discrimination" based on transgender status or gender identity. Therefore, this appeal should be held in abeyance in the interest of judicial economy and to assure that it will be decided in accordance with controlling law. *Cf., e.g., Hickey v. Baxter*, No. 87-2028, 1987 WL 39020, at \*1 (4th Cir. Nov. 19, 1987) (finding a district court acted within its discretion in staying proceedings while awaiting guidance from the Supreme Court in a case that could decide relevant issues).

Grimm's claim under the Equal Protection Clause will similarly be influenced by the Supreme Court's decision in *Harris Funeral Homes*. In granting Grimm summary judgment, the District Court reaffirmed a prior holding that discrimination against transgender individuals is subject to heightened scrutiny under the Equal Protection Clause "for at least two reasons." [ECF Doc. 229 at 8]. "First, transgender individuals constitute at least a quasi-suspect class." *Id.* "Second, discrimination based on sex stereotypes constitutes sex-based classification of a type subject to intermediate scrutiny." *Id.* Thus, the Supreme Court's decision in *Harris Funeral Homes* concerning discrimination on the basis of transgender

status and/or sex stereotyping will likely inform the Equal Protection analysis, which further requires this matter to be held in abeyance.

Neither party will be prejudiced by holding this appeal in abeyance and suspending the Briefing Order.<sup>2</sup> First, Grimm no longer attends school in Gloucester County. Second, the School Board has updated Grimm's official transcript to match the male designation of his updated birth certificate pending resolution of this appeal. The interests of all parties and the Court in assuring this case will be correctly decided outweigh any possible prejudice to any party resulting from a stay.<sup>3</sup>

### **CONCLUSION**

Wherefore, for the foregoing reasons, Appellant Gloucester County School Board respectfully requests the Court to hold this appeal in abeyance and suspend the Briefing Order pending the United State Supreme Court's resolution of *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, No. 18-107, *cert. granted* (U.S. April 22, 2019). Appellant will file regular status updates as required by Local Rule 12(d).

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<sup>2</sup> Briefing should be suspended while the appeal is held in abeyance so each party has an opportunity to fully brief the effects of the forthcoming decision in *Harris Funeral Homes* on the facts of this case.

<sup>3</sup> *Harris Funeral Homes* is currently set for argument on October 8, 2019.

Respectfully Submitted,

/s/ David P. Corrigan  
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### **CERTIFICATE OF SERVICE**

I certify that on this 16<sup>th</sup> day of September, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notice of electronic filing to all registered parties.

Dated: September 16, 2019

/s/ David P. Corrigan  
David P. Corrigan  
*Counsel for Appellant*