No. 16-1733

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

G.G., by his next friend and mother, **DEIRDRE GRIMM**

Plaintiff-Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia
Newport News Division

PLAINTIFF'S RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR STAY PENDING APPEAL

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.
Gail M. Deady (VSB No. 82035)
Rebecca K. Glenberg (of counsel)
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
gdeady@acluva.org
rglenberg@aclu-il.org

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Joshua A. Block
Leslie Cooper
125 Broad Street, 18th Floor
New York, New York 10004
Phone: (212) 549-2500
Fax: (212) 549-2650
jblock@aclu.org
lcooper@aclu.org

Counsel for Plaintiff-Appellant

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-1733 Caption: G.G. v. Gloucester County School Board

Pursuant to FRAP 26.1 and Local Rule 26.1,

G.G., by his next friend and mother, Deirdre Grimm
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Gail M. Deady Date: July 7, 2016

Counsel for: Appellee

CERTIFICATE OF SERVICE

****

I certify that on July 7, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Gail M. Deady (signature) July 7, 2016 (date)

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Cases

Plaintiff-Appellee, G.G., by and through his mother, Deirdre Grimm, submits this response in opposition to the emergency motion filed by Defendant-Appellant, the Gloucester County School Board (the "Board"), for a stay of the district court's preliminary injunction pending appeal or pending disposition of the Board's future request for the Supreme Court to recall and stay the mandate in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016).

INTRODUCTION

The district court faithfully applied this Court's decision in *G.G.* and issued a preliminary injunction allowing G. to begin his senior year of high school without being forced to use separate restrooms that no other student at the school is required to use. Although the first day of classes is on September 6, 2016,[1] the Board now seeks an "emergency" stay based on its own self-imposed deadline to file a stay application with the Supreme Court by July 12, 2016.

This Court has already rejected the Board's arguments and should reject them again. The Board's latest motion for a stay reiterates the same arguments the Board made in its briefing of the *G.G.* appeal, in its petition for rehearing en banc, and in its motion to stay the mandate of *G.G.* Indeed, in its discussion of each of the factors for issuing a stay, the Board's arguments are premised on the

[1] *See* 2016-2017 School Calendar, http://gets.gc.k12.va.us/Portals/Gloucester/District/docs/Calendar/calendarnext.pdf.

assumption that its own interpretation of Title IX is right, and this Court's interpretation of Title IX is wrong. The Supreme Court will have the opportunity to consider the Board's arguments in due course, but in the meantime, this Court is bound by its decision in *G.G.* In accordance with binding circuit precedent, the motion to stay the preliminary injunction should be denied.

BACKGROUND

The underlying facts of this case are recounted in this Court's earlier decision in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016). G. is a transgender boy at Gloucester High School who, with the permission of school administrators, used the boys' restroom for almost two months during his sophomore year until the Board overruled the administrators and passed a new school policy restricting transgender students' access to school restrooms. *Id.* at *1. The policy states that restrooms will be restricted to students based on their "biological gender" and that students with "gender identity issues" will be provided an "alternative appropriate private facility." *Id.* at *2.

The day after his sophomore year ended, G. filed a complaint alleging that the Board's new policy violates Title IX, as well as a motion for a preliminary injunction allowing him to resume using the boys' restroom while the case proceeds. *Id.* at *3. The district court dismissed G.'s Title IX claim and denied his

motion for a preliminary injunction. *Id.* On appeal, this Court reversed the dismissal of the Title IX claim and vacated the denial of the preliminary injunction for reconsideration under the proper evidentiary standard. *Id.* at *1. With respect to Title IX, this Court deferred to the U.S. Department of Education's interpretation of its own regulations and concluded that when a school district provides separate restroom for boys and girls, it must allow transgender students to use restrooms consistent with their gender identity. *Id.* at *8. In a concurring opinion, Judge Davis urged the district court to "turn its attention to this matter with the urgency the case poses" and noted that "[b]y the time the district court issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year." *Id.* at *14 (Davis, J., concurring).

The Board filed a petition for rehearing en banc, which this Court denied. *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 3080263 (4th Cir. May 31, 2016). The Board then filed a motion to stay the mandate, which this Court also denied. *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 94 (4th Cir. June 9, 2016). The mandate issued on June 17, 2016, without the Board filing a stay application with the Supreme Court. *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 95 (4th Cir. June 9, 2016). On remand, the district court faithfully applied this Court's decision and granted G.'s motion for preliminary injunction,

which allows him to begin his senior year of high school without being stigmatized and ostracized by the Board's discriminatory policy. Stay Motion App. F.

Although the first day of classes is September 6, 2016, the Board now seeks an "emergency" stay in order to meet its own self-imposed deadline of filing a stay application with the Supreme Court on July 12, 2016. Stay Motion at 3. The Board notes that it "must seek a stay of the injunction pending appeal before seeking that relief" from the Supreme Court. *Id.* at 4.

ARGUMENT

A stay pending appeal "is an intrusion into the ordinary processes of administration and judicial review," and "[t]he parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citations omitted). Accordingly, a stay pending appeal "is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right." *Id.* at 437 (Kennedy, J., concurring). The four "stay equities" considered by courts when determining whether to grant a stay are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (majority). "There is substantial overlap between these and the factors governing preliminary injunctions, not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Id.* (citation omitted).

I. The Board has not established a "strong showing" of likelihood of success.

This Court held in *G.G.* that the Department of Education's interpretations of its own regulations are entitled to deference and that schools must allow transgender students to use restrooms consistent with their gender identity. In light of that conclusion, "G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim." *G.G.*, 2016 WL 1567467, at *12 (Davis, J., concurring).

The Board now asks this Court to reverse course and conclude that the Board—not G.—is the party likely to succeed. The Board candidly admits that its "likelihood of success in this appeal is intertwined with its likelihood of obtaining Supreme Court review of, and reversal of *G.G.*" Stay Motion at 12. In this Court, however, *G.G.* is binding precedent, and the Board's likelihood of success must be assessed in accordance with this Court's previous decision, not based on a prediction that the decision will be overturned. *Cf. United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.1 (5th Cir. 2008) ("Absent an intervening Supreme

Court case overruling prior precedent, we remain bound to follow our precedent even when the Supreme Court grants certiorari on an issue."); *Lawrence v. Florida*, 421 F.3d 1221, 1224 n.1 (11th Cir. 2005) ("T]he district court abused its discretion in entering a stay order pending a certiorari ruling by the United States Supreme Court.").

Similarly, this Court does not have authority to grant a stay based on the Board's prediction that the Supreme Court will ultimately overrule its decision in *Auer v. Robbins*, 519 U.S. 452 (1997). *See Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Lee-Thomas v. Prince George's Cty. Pub. Sch.*, 666 F.3d 244, 250 (4th Cir. 2012) ("It is . . . solely the prerogative of the Supreme Court to decide when to overrule one of its decisions."). Although three sitting Justices have indicated their willingness to reconsider *Auer*, a majority of the Supreme Court has never embraced those views. Indeed, the Supreme Court recently denied *certiorari* in a case that directly posed the question whether *Auer* should be overruled. *See United Student Aid Funds v. Bible*, 136 S. Ct. 1607 (2016).

II. The Board will not be irreparably injured if the preliminary injunction is not stayed.

The narrow, limited preliminary injunction granted by the district court will not inflict any of the purported injuries the Board claims it will suffer. The preliminary injunction applies only to G.; it applies only to the boy's restrooms; and it applies only at Gloucester High School. The preliminary injunction does not force the Board to "develop new policies to safeguard the privacy and safety rights of its students, kindergarten through twelfth grade." Stay Motion at 6. *See Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 834 (10th Cir. 1993) ("Because this is not a class action, the broad sweep of the remedy exists only in defendant's imagination."). Any broader implications this case has for other students or other facilities, such as locker rooms, would follow from the precedential effect of *G.G.*—not from the preliminary injunction issued by the district court.

Moreover, this Court in *G.G.* already rejected the Board's argument that allowing G. to use the restroom would infringe on the constitutional rights of other students. As the majority explained, "G.G.'s use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present" in the cases regarding the constitutional right to bodily privacy. *G.G.*, 2016 WL 1567467, at *8 n.10; *accord id.* *13 (Davis, J., concurring) ("As the majority opinion points out, G.G.'s use of the restroom does not implicate the unconstitutional actions involved in the cases cited by the dissent."). To be sure, in

future cases, precedent from *G.G.* may have implications for transgender students' use of locker rooms and showers, but the district court's preliminary injunction (whether or not it is stayed) will have no legal effect on those facilities.

III. Staying the preliminary injunction would irreparably injure G.

"The uncontroverted facts before the district court . . . demonstrated that [G.] will suffer irreparable harm in the absence of an injunction." *G.G.*, 2016 WL 1567467, at *13 (Davis, J., concurring). Staying the preliminary injunction pending appeal would nullify the injunction by forcing G. to experience the same irreparable injuries that justified granting the injunction in the first place.

G.'s senior year is his last chance to attend school in accordance with the legal protections of Title IX, and without being stigmatized and ostracized by the Board's discriminatory policy. G.'s sophomore and junior years have been irrevocably lost and cannot be restored through an award of money damages. Without a preliminary injunction, he will irrevocably lose his senior year as well. *Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d. 771, 778 (S.D.W.V. 2012) (granting a preliminary injunction because plaintiffs "will experience their middle school years only once during their life"); *Chipman v. Grant Cty. Sch. Dist.*, 30 F. Supp. 2d 975, 980 (E.D. Ky. 1998) ("It is undisputed that this is the only time in these girls' lives that they will be seniors in high school with the opportunity to participate in [National Honors Society] activities. Therefore, if an injunction does

not issue, these girls will lose this opportunity forever."); *cf. Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993) (affirming preliminary injunction allowing plaintiff to attend The Citadel because "[d]enying Faulkner's access . . . might likely become permanent for her, due to the extended time necessary to complete the litigation.") Time is of the essence, and "the appropriateness and necessity of . . . prompt action is plain." *G.G.*, 2016 WL 1567467, at *14 (Davis, J., concurring).

IV. Staying the preliminary injunction would be contrary to the public interest.

"Enforcing G.G.'s right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest." *G.G.*, 2016 WL 1567467, at *14 (Davis, J., concurring); *accord Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993) ("[T]he overriding public interest l[ies] in the firm enforcement of Title IX."). The public interest is served by enjoining conduct that violates Title IX, not by allowing that conduct to continue.

CONCLUSION

For the foregoing reasons, the Board's motion to stay the preliminary injunction should be denied.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.

/s/ Gail M. Deady

Gail Deady (VSB No. 82035)
Rebecca K. Glenberg (of counsel)
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
gdeady@acluva.org
rglenberg@aclu-il.org

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Joshua A. Block
Leslie Cooper
125 Broad Street, 18th Floor
New York, New York 10004
Phone: (212) 549-2500
Fax: (212) 549-2650
jblock@aclu.org
lcooper@aclu.org

Counsel for Plaintiff

Dated: July 7, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 2016, I filed the foregoing brief with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

/s/

Gail M. Deady (VSB No. 82035)
American Civil Liberties Union
Foundation of Virginia, Inc.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
gdeady@acluva.org
Counsel for Plaintiff-Appellee