

No. 19-1952

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

GAVIN GRIMM

Plaintiff-Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellant.

**PLAINTIFF-APPELLEE’S OPPOSITION TO
MOTION TO HOLD THE APPEAL IN ABEYANCE
AND SUSPEND THE BRIEFING ORDER**

Plaintiff-Appellee Gavin Grimm (“Gavin”) respectfully submits this Opposition to Defendant-Appellant Gloucester County School Board’s Motion to Hold the Appeal in Abeyance and Suspend the Briefing Order, ECF No. 15.

The Gloucester County School Board (the “Board”) asks the Court to hold the appeal in abeyance and stay briefing pending the Supreme Court’s decision in *R.G. & G.R. Harris Funeral Homes v. EEOC (Harris Funeral)*, No. 18-107, *cert. granted* (U.S. April 22, 2019). Although it may eventually be appropriate to hold the appeal in abeyance for a limited time *after*

briefing and oral argument, the Board's motion to preemptively stay briefing and freeze the entire case should be denied.

ARGUMENT

The federal courts have inherent power to stay proceedings, but “proper use of this authority ‘calls for the exercise of judgment which must weigh competing interests and maintain an even balance.’” *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)).

In this case, the Board's request to preemptively stay the briefing order would delay proceedings for an inordinately long period of time without providing any significant benefit to the parties or this Court. It would be far more efficient for this Court to account for the eventual decision in *Harris Funeral* by allowing this case to be briefed and calendared in the usual course, and then requesting short, supplemental briefing after the *Harris Funeral* decision is issued.

The Board would not suffer any hardship if the Court adheres to the current briefing schedule and then orders supplemental briefing after *Harris Funeral* is decided. Although the Supreme Court's eventual ruling in *Harris Funeral* may have an impact on Gavin's Title IX claims, it will not affect Gavin's equal protection claims, which will have to be briefed and resolved

regardless of how the Supreme Court rules.¹ Whatever interest the Board has in avoiding the inconvenience of supplemental briefing, that interest cannot justify its request to freeze the entire case until *Harris Funeral* is decided.

Without providing any meaningful benefit to the Board, suspending the briefing order would severely impair Gavin's interest in bringing this long-running litigation to conclusion. As the Court is aware, this case has already had a long and tortuous procedural history with numerous stays, remands, and delays. *See Grimm v. Gloucester Cty. Sch. Bd.*, 869 F.3d 286, 289 (4th Cir. 2017). Gavin filed his case over four years ago, when he was a 16-year-old high school student. Gavin is now a 20-year-old man, and if the

¹ The Board speculates that the Supreme Court's ruling in *Harris Funeral* regarding sex stereotyping "will likely inform the Equal Protection analysis" for Gavin's claims. Def.'s Mot. at 7-8, ECF No. 15. But *Harris Funeral* is a statutory interpretation case about the meaning of discrimination because of "sex," as the term was used by Congress in Title VII of the Civil Rights Act of 1964. The Supreme Court's precedents applying heightened scrutiny to gender classifications under the Fourteenth Amendment are not constrained by the narrower scope of Title IX or congressional intent. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982) (explaining that Congress's decision to exempt single-sex vocational schools from Title IX does not insulate those schools from liability for gender discrimination under the Equal Protection Clause); *cf. Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) ("[I]n interpreting the equal protection guarantee, we have recognized that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged.") (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)) (alterations incorporated). The decision in *Harris Funeral* will also not resolve whether discrimination based on transgender status independently qualifies as a suspect or quasi-suspect classification, or whether the Board's policy lacks a rational basis.

Board continues to exhaust every avenue of appeal, Gavin will be lucky if the case is resolved before he graduates from college.

The Court should not unnecessarily prolong the process by preemptively freezing the entire case. If the briefing order is suspended, then the case may be delayed for over a year before the Court hears oral argument. Even if the Supreme Court issues a quick ruling on *Harris Funeral* in early 2020, it is unlikely that the parties would be able to complete briefing in time for this Court to hear oral argument before its 2020 summer recess. The most likely outcome is that this Court would not hear oral argument until its September 9-11, 2020 session. By contrast, if this appeal is briefed and calendared in due course, then the parties can file supplemental briefs shortly after the Supreme Court issues its decision without further delay.

CONCLUSION

For all these reasons, the Board's motion to preemptively suspend the briefing order should be denied.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA FOUNDATION, INC.
Eden B. Heilman (VSB No. 93554)
Jennifer Safstrom (VSB No. 93746)
Nicole Tortoriello (VSB No. 91129)
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
eheilman@acluva.org
jsafstrom@acluva.org
ntortoriello@acluva.org

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
_____/s/_____
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

Dated: September 23, 2019

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of September, 2019, I filed the foregoing Opposition to Defendant-Appellant Gloucester County School Board's Motion to Hold the Appeal in Abeyance and Suspend the Briefing Order with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

 /s/

Joshua A. Block
125 Broad Street, 18th Floor
New York, New York 10004
Phone: (212) 549-2500
Fax: (212) 549-2650
jblock@aclu.org