UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOEL DOE, a minor, by and through his Guardians JOHN DOE and JANE DOE, et al., Plaintiffs, v. BOYERTOWN AREA SCHOOL DISTRICT, et al., Defendants, and PENNSYLVANIA YOUTH CONGRESS FOUNDATION, Intervenor-Defendant.	Civil Action No. 17-1249-EGS

BRIEF OF INTERVENOR-DEFENDANT PENNSYLVANIA YOUTH CONGRESS FOUNDATION IN OPPOSITION TO PLAINTIFFS' MOTION TO STAY PROCEEDINGS

This Court has already concluded after an extensive evidentiary hearing that Plaintiffs are unlikely to succeed on the merits of their claims, a decision that was affirmed by the Third Circuit and left undisturbed by the Supreme Court. This litigation was stayed for nearly two years while Plaintiffs exhausted their appeals. Having done so, and having failed to persuade any court to overturn this Court's decision, Plaintiffs now press this Court to halt this litigation for an additional year while different cases involving different parties make their way through the Supreme Court. *See Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (2019) (order granting certiorari); *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019) (same); *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* ("*Harris Funeral Homes*"), 139 S. Ct. 1599 (2019) (same).

The cases pending before the Supreme Court present the question whether Title VII of the Civil Rights Act of 1964 prohibits firing someone for being lesbian, gay, bisexual, or transgender. This case, by contrast, involves a different question under different provisions of law—whether the Constitution, Title IX, or Pennsylvania law forbids local school districts from choosing as a matter of school policy to allow boys and girls who are transgender to use the same common restrooms and locker rooms as other boys and girls.

This Court has already expended significant resources in resolving that question, and the decision in the pending Supreme Court cases will not alter the answer. Additionally, a decision in those cases is not expected until June 2020, and it would be unfair to require transgender students at Boyertown Area Senior High to wait another twelve months before this case moves forward and the cloud of uncertainty is lifted.

Notably, the district court overseeing the case of Gavin Grimm, the former Virginia high school student who was excluded from using the boys' restrooms because he is transgender, recently denied a motion to stay Mr. Grimm's case pending resolution of the same Supreme

Court cases. *Grimm v. Gloucester Cty. Sch. Bd.*, Civil No. 4:15cv54 (E.D. Va. June 21, 2019) (order denying motion to stay), http://tinyurl.com/y392c5qw.

Plaintiffs' motion to continue the stay should be denied.

BACKGROUND

After a three-day hearing on Plaintiffs' request for a preliminary injunction, this Court denied Plaintiffs' request to halt the Boyertown Area School District's practice of allowing boys and girls who are transgender to use the same common restrooms and locker rooms as other boys and girls in August 2017. *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324 (E.D. Pa. 2017). Shortly after rendering its decision, this Court placed this matter into civil suspense while Plaintiffs appealed the denial of their motion for a preliminary injunction. ECF No. 78.

The Third Circuit affirmed this Court's opinion denying Plaintiffs' motion for a preliminary injunction in a short order of judgment after oral argument. *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 890 F.3d 1124 (3d Cir. 2018). The panel subsequently issued a formal opinion recognizing that the question whether Title IX of the Education Amendments of 1972 *requires* school districts to allow transgender students to use facilities consistent with their gender is "very different" from the question presented in this case, namely, whether Title IX *forbids* school districts from choosing to allow transgender students to use facilities consistent with their gender as a matter of school policy. *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 515, 536 (3d Cir. 2018), *reh'g en banc denied*, 897 F.3d 515 (3d Cir. 2018). Plaintiffs sought review by the United States Supreme Court.

The Supreme Court denied Plaintiffs' petition for certiorari on May 28, 2019, nearly two years after active proceedings in this case. *See Doe v. Boyertown Area Sch. Dist.*, No. 18-658,

2019 WL 2257330 (U.S. May 28, 2019). Meanwhile, in April 2019, the Supreme Court announced that it would hear three cases involving workers who were fired for being gay or transgender. *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (2019) (worker fired for being gay); *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019) (same); *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) (worker fired for being transgender).

Plaintiffs now claim that proceedings in this case should be further delayed pending the Supreme Court's resolution of those cases, which are not expected to be resolved until June 2020.

LEGAL STANDARD

"When deciding a motion to stay proceedings pending the resolution of another action in federal court, courts have considered three factors: (1) the promotion of judicial economy; (2) the balance of harm to the parties; and (3) the duration of the requested stay." *Richardson v. Verde Energy USA, Inc.*, Civil Action No. 15-6325, 2016 WL 4478839, at *2 (E.D. Pa. Aug. 25, 2016) (internal quotation marks omitted); *see generally Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936).

ARGUMENT

I. Judicial economy would not be served by waiting for the Supreme Court's resolution of *Harris Funeral Homes* because that decision will not alter the outcome of this case.

Judicial economy is not served by waiting for a pending decision that will not be of value to this Court and will not affect the determination of the pending claims. *See Richardson*, 2016 WL 4478839, at *2; *see also Dennis v. Trans Union, LLC*, Civil Action No. 14-2865, 2016 WL 127453, at *3 (E.D. Pa. Jan. 12, 2016) (denying stay where "the possible impact of the as-yet undecided Supreme Court cases . . . cannot yet be determined").

The question in *Harris Funeral Homes* is whether Title VII's prohibition against discrimination because of sex bars an employer from firing a worker because she is transgender.[1] This case presents a very different question: whether the Constitution or Title IX forbids local school districts from choosing as a matter of school policy to allow boys and girls who are transgender to use the same common restrooms and locker rooms as other boys and girls when there are alternative, completely private facilities available to all.

A. The Third Circuit already concluded that the question whether federal law prohibits discrimination against transgender people is "very different" than the questions in this case.

The Third Circuit noted last year that the question whether Title IX, which is often interpreted in tandem with Title VII, prohibits discrimination against people because they are transgender is a "very different issue" than the question in this case. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 515, 536 (3d Cir. 2018). Accordingly, the Third Circuit concluded that it "need not decide" the question whether Title IX's prohibition against discrimination because of sex bars schools from discriminating against students because they are transgender in order to resolve Plaintiffs' claims. *Id.*

Likewise, this Court need not—and should not—wait for the Supreme Court to decide whether Title VII's prohibition against discrimination because of sex bars employers from firing people because they are lesbian, gay, bisexual, or transgender before proceeding with this litigation. Indeed, the Supreme Court itself signaled as much when it denied Plaintiffs' petition for certiorari on May 28, 2019, *after* granting the petition in *Harris Funeral Homes* on April 22, 2019. Had the Supreme Court thought its decision in *Harris Funeral Homes* would alter the

[1] The question in the two companion cases is whether discrimination based on an individual's sexual orientation is a form of sex discrimination that violates Title VII. *See, e.g.*, Opening Br. for Resp'ts at i, *Altitude Express, Inv. v. Zarda*, No. 17-1623 (U.S. June 26, 2019), http://tinyurl.com/y3f8dya7.

outcome here, it would have held Plaintiffs' petition pending disposition of *Harris Funeral Homes*.

B. The Supreme Court did not agree to decide the meaning of "sex" or the lawfulness of sex-specific polices such as restrooms in *Harris Funeral Homes*.

Plaintiffs insist that "the Supreme Court is poised to answer the question of what 'sex' means under federal nondiscrimination law." Pl. Br. 2. Not so. Petitioner R.G. & G.R. Harris Funeral Homes, Inc. ("Harris Homes") *requested* that the Supreme Court decide "[w]hether the word 'sex' . . . meant 'gender identity' and included 'transgender status' when Congress enacted Title VII in 1964." Pet. for Cert. at i, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (U.S. July 20, 2018). Importantly, however, the Supreme Court did not grant certiorari on the question as Harris Homes had drafted it. Instead, the Court crafted a different question: "Whether Title VII prohibits discrimination against transgender people based on . . . their status as transgender . . . ." *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019).

Comparison of the question as proposed by Harris Homes, on the one hand, and as accepted for review by the Supreme Court, on the other, makes plain that the Court has *not* agreed to decide "the question of what 'sex' means." And resolution of the question actually presented does not require addressing the definition of "sex." Even if Title VII's reference to "sex" encompasses only one's sex assigned at birth, as Plaintiffs assert, Harris Homes' decision to fire Respondent Aimee Stephens was "because of sex." Had Ms. Stephens been assigned a female rather than a male sex at birth, Harris Homes would not have fired her for living openly as a woman. *See* Br. for Resp't Aimee Stephens (Part I.B), *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (June 26, 2019), http://tinyurl.com/y6evvnsk. As a result, it is not necessary to the outcome of *Harris Funeral Homes* to decide whether the definition of "sex" is limited to sex assigned at birth.

What is more, in disposing of *Harris Funeral Homes*, the Supreme Court is unlikely to resolve the lawfulness of sex-specific policies, such as dress codes and restrooms, or how such rules apply to people who are transgender. Again, Plaintiffs ignore the mismatch between the questions Harris Homes presented for review and those the Supreme Court accepted. Harris Homes sought review of the following question: "Whether *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), prohibits employers from applying sex-specific policies according to their employees' sex rather than their gender identity." Pet. for Cert. at i. But, as above, the Supreme Court did not accept the question as drafted by the petitioner, instead limiting its review of *Price Waterhouse* to "[w]hether Title VII prohibits discrimination against transgender people based on . . . sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)." 139 S. Ct. 1599. Notably absent is any mention of sex-specific policies, such as dress codes or restrooms. That is unsurprising given that questions regarding dress codes or restrooms are not presented in *Harris Funeral Homes*. *See* Br. for Resp't Aimee Stephens (Part IV.B), http://tinyurl.com/y6evvnsk.

C. This Court's conclusion that Plaintiffs are unlikely to succeed on the merits of their claims did not turn on the meaning of "sex."

In any event, as in *Harris Funeral Homes*, resolution of Plaintiffs' claims does not turn on the meaning of "sex."

This Court correctly decided that Plaintiffs are unlikely to succeed on their constitutional right to bodily privacy claim because no student is required to change clothes in front of other students, let alone to expose intimate body parts while doing so. *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 388-89 (E.D. Pa. 2017). The lack of involuntary exposure dooms Plaintiffs constitutional claim regardless of the definition of "sex."

Similarly, this Court also concluded that Plaintiffs could not establish a sexually harassing hostile environment in violation of Title IX because "none of these plaintiffs were

subjected to pervasive sexual harassment in regard to their actual interaction with transgender students." *Id.* at 397. This conclusion, too, does not turn on the definition of "sex."

Finally, this Court found that Plaintiffs' tort claim failed because they have no reasonable expectation of being secluded from others when they are in communal areas of restrooms and locker rooms. *Id.* at 406-07. Seclusion does not turn on the sex of other people, but rather on the expectation of being alone.

It would not serve judicial economy to further delay resolution of legal claims that this Court has already expended significant resources to resolve, especially where the decision in the pending Supreme Court cases will not alter the conclusion. *Cf. Grimm*, slip op. at 2, http://tinyurl.com/y392c5qw.

II. The remaining stay factors weigh against further delay.

The expected duration of the proposed stay in this case—as long as one year—weighs against further delay. The Supreme Court has not yet scheduled oral argument in *Harris Funeral Homes* and, in any event, decisions in high-profile cases such as this typically are not announced until June, the final month of the Supreme Court's Term. Courts routinely deny motions to stay where the expected duration is as long as the expected duration in this case. *See, e.g.*, *Grimm*, slip op. at 4, http://tinyurl.com/y392c5qw (denying stay pending decision in *Harris Funeral Homes*, which "could delay resolution for a year or more"); *Richardson*, 2016 WL 4478839, at *2 (denying stay where duration "is indeterminate and could even last for well over a year"). Transgender students at the high school should not have to wait an additional year before this litigation proceeds—a year in which a cloud of uncertainty hangs over their ability to live openly and fully at school.

CONCLUSION

Plaintiffs' motion to stay proceedings pending the Supreme Court's resolution of *Bostock v. Clayton County, Georgia*, 139 S. Ct. 1599 (2019), *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019), and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019), should be denied.

Dated: July 1, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2019, the foregoing Brief of Intervenor-Defendant Pennsylvania Youth Congress Foundation in Opposition to Plaintiffs' Motion to Stay Proceedings, together with an accompanying proposed order, was filed electronically with the Court and a true and correct copy was served on all counsel of record via the Court's ECF system.

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