No. 16A52

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

G.G., by his next friend and mother, Deirdre Grimm,
Respondent.

REPLY IN SUPPORT OF PETITIONER'S APPLICATION FOR RECALL AND STAY OF THE FOURTH CIRCUIT'S MANDATE PENDING PETITION FOR CERTIORARI

Directed to the Honorable John G. Roberts, Jr.
Chief Justice of the Supreme Court of the United States and
Circuit Justice for the United States Court of Appeals for the Fourth Circuit

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INTRODUCTION

Respondent G.G. ("G.G.") opposes the stay application of the Gloucester County School Board ("Board") based largely on the argument that the Fourth Circuit's April 19 decision, and the resulting preliminary injunction, threaten no irreparable harm to the Board or to Gloucester High School's students and parents. Opp. at 1. But to anyone familiar with public schools in the real world, the irreparable harms flowing from the Fourth Circuit's decision are obvious.

First, as G.G. tacitly concedes (Opp. 21 n. 10), the Fourth Circuit's decision deprives the people of Gloucester County of their ability, acting through elected school board representatives, to establish a policy on one of the most sensitive matters imaginable—who may access single-sex student bathrooms. Indeed, the whole point of the decision below is to overturn the "commonplace and universally accepted" principle that such facilities may be separated by biological sex, App. B-57, and to replace it with principle that access should turn instead on a student's subjective "gender identity," App. B-6, a notion that even the panel majority found "novel" and "perhaps not … intuitive." App. B-24, B-23.

Second, if the recent past is any guide, the Fourth Circuit's decision is highly "likely to cause disruption both in the school and among the parents." App. G-5. Overturning long-settled expectations about who may access boys' and girls' restrooms understandably alarms parents and students alike. When this issue first arose at Gloucester High School, it provoked an immediate and vocal reaction. App. L. This should not be surprising since, as Judge Niemeyer put it, "parents … universally find it offensive to think of having their children's bodies exposed to

persons of the opposite biological sex." App. C-3. If the decision below is not stayed, there is every reason to expect a similar reaction as the new school year approaches.

Third, as Judge Niemeyer warned, the panel's "holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes." App. B-47. And the resulting injunction ensures that "male students at Gloucester High School will be denied the separate facilities provided by the School Board on the basis of sex, as authorized by Congress, and thus will be denied bodily privacy when using the facilities, to the dismay of the students and their parents." App. G-5.

These consequences—both to the Board and to the students and parents the Board represents—flow directly from the Fourth Circuit's decision and the resulting injunction, and they belie any notion that the Board "has not identified any form of irreparable harm." Opp. 19. Furthermore, as explained below and in the Board's application, the remaining stay factors also counsel strongly in favor of staying the lower court decisions pending disposition of the Board's certiorari petition.

ARGUMENT

I. Respondent's arguments do not undermine the likelihood that four Justices will vote to grant review now.

First, G.G. has not undermined the Application's showing of a substantial likelihood that this Court will grant review. G.G. does not dispute that three sitting Justices have already indicated a desire to revisit and resolve a central question presented in this case, that is, whether the doctrine of judicial deference to agency interpretations of their own regulations—as expressed in *Auer* v. *Robbins*, 519 U.S.

452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)—should be overruled or modified. See App. 4. Instead, G.G. asserts "there is no reasonable probability that this Court will grant certiorari" because, according to G.G., (1) this case remains in an interlocutory posture; (2) the Court recently passed up an opportunity to revisit *Auer*; and (3) there are no circuit splits on the proper application of *Auer*. Opp. 24-27. On each point, G.G. is wrong.

1. Although 28 U.S.C. § 1254(1) expressly permits certiorari review of cases in the courts of appeals "before *or* after rendition of judgment," G.G. is of course correct that the Court often exercises its discretion to deny review when the case is "in an interlocutory posture." *Mount Soledad Mem'l Ass'n* v. *Trunk,* 132 S.Ct. 2535, 2536 (2012) (Alito, J., concurring in denial of petition for certiorari). But for at least two reasons, that general practice likely will not prevent review here.

First, unlike the situation in *Mount Soledad* and other cases in which a lack of finality prevented review, here there is no doubt about the implications of the Fourth Circuit's April 19 decision for these proceedings. Indeed, it was based on that decision that the district court *immediately* granted an injunction in G.G.'s favor. See App. F-2. The posture of this case thus stands in sharp contrast to cases like *Mount Soledad,* in which at the time certiorari was sought "it remain[ed] unclear precisely what action the … Government will be required to take" as a result of the court of appeals' decision. 132 S.Ct. at 2536 (Alito, J., concurring). Here there is no doubt about the ultimate outcome in the district court—the injunction has already been entered—or in the subsequent Fourth Circuit appeal.

Second, in any event, the Board also intends to seek certiorari before judgment in the *pending* Fourth Circuit case (which challenges the district court's injunction) at the same time it seeks review of the Fourth Circuit's April 19 decision. Thus, if the Court feels a need to have the preliminary injunction before it when it addresses the Fourth Circuit's April 19 decision, the Court will have that option. And there is no question that the district court's preliminary injunction is a final order subject to appellate review.[1]

2. G.G. also makes much of the Court's recent denial of certiorari in *United Student Aid Funds, Inc.* v. *Bible,* 136 S.Ct. 1607 (2016), which involved regulations governing collection practices for student loans. However, as the brief in opposition there pointed out, that case did not squarely present the issue of the validity of *Auer* deference. Two of the three judges on the Seventh Circuit panel believed the pertinent agency regulation was unambiguous, and therefore did not find it necessary to determine whether *Auer* even applied. See *Bible* v. *United Student Aid Funds, Inc.*, 799 F.3d 633, 645 (7th Cir. 2015) (reaching *Auer* only as an alternative ground); *id.* at 674 (Manion, J., concurring in part and dissenting in part) (arguing *Auer* does not apply). Here, by contrast, both judges in the majority below concluded that the Department of Education regulation at issue here *is* ambiguous, and therefore

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[1] See 28 U.S.C. § 1292(a) (noting that "courts of appeals shall have jurisdiction of appeals from [i]nterlocutory orders of the district courts of the United States ... granting, continuing, modifying, refusing or dissolving injunctions."). Indeed, for reasons discussed in the Application and this reply brief, this case satisfies Rule 11's standard for certiorari before judgment as well as the usual standards for certiorari outlined in Rule 10. Given that the Fourth Circuit's April 19 decision immediately spawned a nationwide "transgender non-discrimination" policy imposed by the U.S. Departments of Justice and Education, this is undoubtedly a case of "imperative public importance." See App. 27-29.

unambiguously held that *Auer* deference applies. App. B-16-21. Accordingly, in this case this Court can easily reach and decide whether *Auer* remains good law and, if so, how it applies in cases such as this.

3. G.G. has also failed to undermine the Board's elucidation of existing circuit conflicts as to the *circumstances* in which *Auer* deference can apply. For example, on the first conflict—whether an agency's interpretation must appear in a format that carries the force of law—G.G. simply misrepresents the First Circuit's decision in *Sun Capital Partners III, LP* v. *New England Teamsters,* 724 F.3d 129 (1st Cir. 2013). That decision clearly held that an agency opinion was not entitled to *Auer* deference because it "was not the result of public notice and comment, and merely involved an *informal* adjudication resolving a dispute between a pension fund and the equity fund." *Id.* at 140 (emphasis added). G.G. says this part of the opinion was addressing *Chevron* and not *Auer* deference, but that is flatly wrong: *Chevron* deference wasn't even asserted, *Auer* deference was.[2]

On the second conflict—whether *Auer* applies when an interpretation is advanced for the first time in the specific litigation in which it is applied—G.G. does not even address the key Ninth and Federal Circuit decisions discussed in the

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[2] See *id.* at 140 ("The [agency] does not assert that its 2007 letter is entitled to deference under [*Chevron*]. It does, however, claim entitlement to deference under [*Auer*]. We disagree. … The letter was not the result of public notice and comment."). G.G. also admits in a footnote (Opp. 26 n. 12) that the Sixth and Seventh Circuits will not defer to agency interpretations where the agencies themselves disclaim the interpretation is binding. But that is exactly why those decisions conflict with the Fourth Circuit's decision in this case: The agency interpretation here—to which the Fourth Circuit deferred—expressly disclaims any intent to bind anyone. See App J-2 (noting that "OCR refrains from offering opinions about specific facts, circumstances, or compliance with federal civil rights laws without first conducting an investigation.").

Application. See App. 24-25. Nor does G.G. dispute that those decisions squarely conflict with the decision of the Fourth Circuit here, and with similar decisions in the Sixth, Seventh, Tenth and Eleventh Circuits. *Id.* Instead, G.G. attempts to sidestep this conflict by focusing instead on a *different* limitation, one the Application did not invoke—that is, that the agency interpretation not be a mere "convenient litigation position" or "*post hoc* rationalizatio[n] … seeking to defend past agency action against attack." Opp. 26 (quoting *Auer,* 519 U.S. at 462). G.G.'s evasiveness merely confirms the Application's analysis of these circuit conflicts.

II. Respondent has failed to undermine the Board's showing of a fair prospect of reversal.

G.G. has likewise failed to undermine the Board's showing that it has a fair prospect of prevailing on the merits. Indeed, most of G.G.'s argument on this point is based on a false premise: G.G. assumes that, if the Court grants review, it will necessarily interpret Title IX and/or 34 C.F.R. § 106.33 *de novo*, and will do so *before* determining whether *Auer* should be overruled and, if not, whether the Fourth Circuit correctly invoked *Auer* given the circumstances. See Opp. 28-35. But that is not how this Court typically operates. If it grants review and decides that the Fourth Circuit incorrectly invoked *Auer* deference, the Court will likely vacate and remand to the Fourth Circuit to address in the first instance the remaining issues concerning the proper application of Title IX and §106.33. And that means the Board could win in this Court in any of three ways: (1) an outright overruling of *Auer*; *or* (2) a determination that *Auer* remains valid but that the Fourth Circuit transgressed a settled limitation on its application; *or* (3) a determination that the Fourth Circuit

and the Department simply misinterpreted Title IX and/or § 106.33. For reasons explained in the Application, the Board has a fair prospect of success in each of these scenarios individually, and it certainly has a fair prospect of success when those scenarios are viewed collectively.

1. G.G. does not dispute the numerous conceptual problems with *Auer* deference, that *Auer*'s own author and other Justices have advocated overturning the doctrine, or that it "is on its last gasp," *United Student Aid Funds, Inc.* v. *Bible*, 136 S.Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari); see App. 29. In short, G.G. does not dispute that there is a fair prospect of this Court's deciding to overrule *Auer* entirely. And that alone establishes a fair prospect that the Fourth Circuit's decision to apply *Auer* will be reversed and the judgment vacated.

2. G.G. also does not dispute that, even if *Auer* survives (or if the Court fails to reach that question), there is a fair prospect this Court will hold that the Fourth Circuit transgressed an appropriate limitation on that doctrine. For example, as explained in the Application (at 21-25) and in the discussion above, several courts of appeals have held that *Auer* deference cannot be invoked when the agency interpretation was developed for the very litigation in which deference is sought or issued in circumstances in which the interpretation does not carry the force of law. Here again, although G.G. disputes that there is a circuit conflict on these issues, G.G. does *not* dispute that the Fourth Circuit's decision to invoke *Auer* deference can and should be reversed on either of these bases. And once again, that alone establishes a fair prospect that the Fourth Circuit's decision to apply *Auer* will be reversed and the judgment vacated.

3. As noted, G.G. devotes nearly all of the "merits" portion of the Opposition to defending the Fourth Circuit's and Department's interpretation of Title IX and § 106.33. See Opp. 28-37. Because most of G.G.'s arguments have already been rebutted in detail in Judge Niemeyer's dissent and in the Application, that analysis will not be repeated here. But three points are worth emphasizing.

First, G.G.'s statutory interpretation argument—like that of the Fourth Circuit—fails on its own terms. Like the Fourth Circuit, G.G. argues (purportedly on the basis of contemporaneous dictionary definitions) that the term "sex" is not limited to "chromosomes or genitals" (Opp. 30), but embraces "*all* the 'morphological, physiological and behavioral' components of an individual's sex." (Opp. 28). That understanding of "sex" is implausible for all the reasons explained in the Application and in Judge Niemeyer's dissent. See App. at 29-32; App. B-57-B-68. But even if "sex" could be construed so broadly, such an interpretation would still not justify the Department's inclusion of "gender *identity*" within that term.

By definition, gender identity is a subjective perception – as G.G. and the Fourth Circuit put it, "one's *sense of oneself* as belonging to a particular gender." Opp. 5 (emphasis added); see also App. B-6-B-7 (describing "incongruence between a person's gender identity and the person's birth-assigned sex.") By contrast, all of the "components" of an individual's sex identified in the definition cited by G.G. and the Fourth Circuit are *objective* characteristics, be they "morphological, physiological [or] behavioral." To be sure, a person's decision to "transition" from, say, a woman to a transgender man might result (with the help of hormone therapy and/or surgery) in the person's developing objective characteristics more commonly found in men. But

even then, the subjective *perception* of "identifying" with one sex or the other does not qualify as a "morphological, physiological or behavioral" characteristic—and therefore could not possibly be considered included in the term "sex."

In short, unlike arguments that fail because they prove too much, G.G.'s (and the Fourth Circuit's) central argument on the meaning of "sex" in Title IX and § 106.33 fails because it proves too little. On that basis alone, the Board has at least a fair prospect of establishing that both the Department and the Fourth Circuit have misconstrued Title IX and its implementing regulation, and on that basis obtaining a reversal of the decision below.

Second, for similar reasons, this Court's decisions in *Price Waterhouse* and *Oncale* do not help G.G. Again, like the Fourth Circuit, G.G. must defend a Department decision to include a person's *subjective* "gender identity" within the meaning of the statutory term "sex." But whatever else they may have done, *Price Waterhouse* and *Oncale* did not allow plaintiffs to assert claims under Title VII based on subjective, gender-related perceptions or "senses." *Price Waterhouse* allowed a claim based upon *observable* sex-related behavior—i.e., acting or dressing in ways that departed from the perceived "norm" for women. See *Price Waterhouse* v. *Hopkins,* 490 U.S. 228, 232-37 (1989). Similarly, *Oncale* allowed a claim for *observable* sex-related conduct—harassment—towards another person. See *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77-78 (1998). Neither decision allowed a claim for discrimination based upon the victim's internal, subjective "sense of oneself." And neither decision suggested that such a subject characteristic was included in the statutory term "sex."

Third, for similar reasons, statutory law has always distinguished "sex" and "gender" from "gender identity."[3] And in briefing on the merits, Petitioner will demonstrate that scores of proposed bills at the federal and state levels have made this express distinction. Thus, legislators have always used a definition of "sex" that by its terms does *not* include "gender identity." It therefore makes no sense to now treat the word "sex" in Title IX as though it included that subjective concept.

For all these reasons, and those explained by Judge Niemeyer and in the Application, the Board has at least a fair prospect of reversal.

III. Respondent has failed to rebut the showing of irreparable injury to the School Board, its parents and students.

While blithely asserting that "the Board has not identified any form of irreparable harm," Opp. at 19, the Opposition leaves virtually unrebutted the Board's substantial showing on that very point. See App. 33-36.

1. For example, G.G. does not dispute that the Board and its constituents have suffered the very type of irreparable injury described in decisions such as *Maryland* v. *King*, 133 S.Ct. 1 (2012) (Roberts, C.J., in chambers). App. 33-34. *King* observed that "'[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Id.* at 3 (quoting *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Here, by requiring the Board to allow G.G. to

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[3] *E.g.,* 42 U.S.C. § 13925(b)(13)(A) (prohibiting discrimination in programs funded through Violence Against Women Act "on the basis of actual or perceived race, … sex, gender identity …, sexual orientation); 18 U.S.C. § 249(a)(2) (providing criminal penalties for "[o]ffenses involving actual or perceived religion, … gender, sexual orientation, gender identity, or disability").

use the boys' bathrooms, the decision below has clearly "enjoined" the Board "from effectuating" a policy "enacted by representatives of [the] people."

That is no doubt why G.G., besides ignoring *King* and burying the entire point in a footnote, offers only a factual distinction—namely, that the Board "is not a State and its restroom policy is not a statute." Opp. at 21 n. 10. But the Opposition identifies no *reason* why the principle articulated in *King* and *New Motor Vehicle* would not also apply to an elected school board writing school policies on sensitive issues. And there is none: Although the invalidation of a state statute may be a *broader* intrusion into the people's right to govern themselves, the nature of the intrusion is the same. It is a difference of degree, not of kind. And in either case, the injury is irreparable because, for however long the injunction lasts, the people will have been deprived of their ability to govern themselves.

2. G.G. also attempts to minimize the disruption caused by the decision below by erroneously suggesting that G.G. previously used the boys' restroom for seven weeks "without incident." Opp. at 9, 22. To the contrary, students and parents began protesting *the day after* the school let G.G. use the boys' restroom. See App. L-1-2. And the "disruption" caused was not solely to "the learning environment" (Opp. 22), but also to the relationship between the school and the parents and students who found this situation alarming.

This should surprise no one. The idea that public bathrooms are separated by biological sex has been a "commonplace and universally accepted" part of our customs and laws since time-out-of-mind, App. B-57, and, moreover, has been explicitly allowed by Title IX regulations for over four decades. Now that those basic

expectations have been overridden by a federal court, G.G. cannot credibly claim there is no irreparable harm to anyone—not to students, or to parents, or to the school system. See, *e.g.*, App. G-5 (Niemeyer, J., dissenting from denial of stay pending appeal) (explaining that enforcement of the injunction will "den[y] [students] bodily privacy when using the facilities, to the dismay of students and their parents").

3. G.G. also baldly asserts that the decision below "will not infringe upon other students' right to bodily privacy." Opp. 21. But G.G. makes no real effort to dispute Judge Niemeyer's showing that the decision creates irreparable harm by intruding upon students' "legitimate and important interest in bodily privacy." App. B-57. Indeed, instead of addressing Judge Niemeyer's analysis, G.G. attempts to put in Judge Niemeyer's mouth the concession that "the risks of privacy and safety are far reduced" in restrooms. But that was *G.G.*'s argument, not Judge Niemeyer's. See Opp. 17; App. B-60. To the contrary, in multiple dissenting opinions, Judge Niemeyer forcefully underscored the harms to student privacy caused by the Fourth Circuit's decision and the resulting injunction. For instance, Judge Niemeyer demonstrated:

- that sex-separated facilities, such as restrooms, respond to "the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes" (App. B-59);
- that "bodily privacy is historically one of the most basic elements of human dignity and individual freedom" and, consequently, "forcing a person of one biological sex to be exposed to persons of the opposite biological sex profoundly offends this dignity and freedom" (App. C-3);
- and that, because of the injunction resulting from the decision below, "male students at Gloucester High School will be denied the separate facilities provided by the School Board on the basis of sex, as authorized by Congress, and thus will be denied bodily privacy when using the facilities, to the dismay of the students and their parents" (App. G-5).

G.G.'s proposed solution to the privacy problem created by the Fourth Circuit's decision is also not credible. G.G. suggests that any male student "uncomfortable using the same restroom" as G.G. may simply use a unisex bathroom. Opp. 21-22. Putting aside the capacity problems that solution creates (with only three unisex bathrooms), forcing boys who value their privacy to use *another* bathroom in order to avoid potentially exposing themselves to an anatomically female student constitutes irreparable harm in its own right. *See*, *e.g.*, *Doe* v. *Luzerne Cnty.*, 660 F.3d 169, 176-77 (3d Cir. 2011) (recognizing individual's "constitutionally protected privacy interest in his or her partially clothed body," "particularly while in the presence of members of the opposite sex").

4. Finally, G.G. essentially admits that the decision below may lead at least some parents to "remove their children from the [public] school system." App. 35. In a footnote, G.G. states that parents "have a fundamental right to decide *whether* to send their child to a public school …." Opp. 22 n. 11 (emphasis added). But that is exactly the point: Some (and perhaps many) parents, exercising their fundamental right to direct the upbringing and education of their children, may choose to *remove* their children from public schools in the face of the privacy and safety problems now caused by the Fourth Circuit's decision.

Their exit would likewise impose irreparable injury on the Board and its schools. The loss of those children—and the state and federal funding they bring with them—will irreparably injure the Board, its schools and the students left behind.

For all these reasons, the Board has clearly established that the decision below imposes the requisite risk of irreparable injury. And contrary to G.G.'s

mischaracterization, the Board's showing of irreparable injury is not at all based on the "expense and annoyance of litigation." Opp. 2 (citing *FTC* v. *Standard Oil*, 449 U.S. 232, 244 (1980)). That showing is based instead on real and irrefutable harms.

IV. Respondent does not dispute that the balance of equities and public interest support a stay.

Finally, G.G. does not even address the Board's showing that the balance of equities and the public interest strongly support a stay. See App. 36-40. That omission is hardly surprising, given the clarity of the public interest in preserving the traditional, well-established rule that biological males use the boys' room and biological females use the girls' room. A stay would serve the public interest not only by preserving the Board's ability to maintain that rule in its own schools, but also by facilitating the efforts of school boards throughout the Nation to preserve that rule in the face of the radical "access" agenda now being pushed on virtually every school in the Nation by the Departments of Justice and Education, in direct reliance on the decision below. See App. 3, 38-40.

The closest G.G. comes to analyzing the pertinent equities is the assertion (at 22) that "a stay would have irreparable consequences" for G.G. because G.G. "experiences painful urinary tract infections and daily psychological harm as a result of the Board's policy." While the Board does not minimize G.G.'s psychological pain, that pain is assuredly not the "result of the Board's policy." Any anatomical female wishing or attempting to live as a teenage boy is bound to face a variety of psychological challenges, whatever policy the Board adopts.

Moreover, the claim that G.G. suffers "urinary tract infections" *because* of G.G.'s exclusion from the boys' bathrooms is not plausible in light of the Board's installation of multiple single-user restrooms for any student's use, and the continued availability of the nurse's restroom, which G.G. has agreed to use in the past. There is simply no reason, attributable to the school, for G.G. to endure any pain resulting from the unavailability of single-sex boys' restrooms.

In short, whatever psychological harm G.G. may or may not suffer, it is not the result of the Board's policy. And any harm to G.G. is more than outweighed by society's compelling interest, as Judge Niemeyer put it, in preserving the bodily "privacy … inherent in the nature and dignity of humankind." App. B-58.

CONCLUSION

The Fourth Circuit's *G.G.* mandate should be recalled and stayed, and the subsequently issued preliminary injunction should also be stayed.

Respectfully submitted,

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July 29, 2016

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