



THE CASE FOR INCLUSION

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Supreme Court To Decide First Case On Transgender Rights

BY TIMOTHY H. POWELL • NOVEMBER 8, 2016

On October 28, the Supreme Court agreed to take up its first case on the issue of transgender rights, involving students' ability to access school bathrooms that correspond with their gender identity. The justices accepted a petition by the School Board of Gloucester County, Virginia to review an order issued last April by the Fourth Circuit Court of Appeals ruling that 17-year-old Gavin Grimm, a transgender student who identifies as male, be permitted to use the male bathrooms at his high school.

The underlying complaint, captioned [GG v. Gloucester County School Board](#), was filed in the U.S. District Court for the Eastern District of Virginia in June 2015, alleging that the School Board's policy requiring students to use bathrooms that correspond with their "biological sex" violated Grimm's civil rights under the Fourteenth Amendment's Equal Protection Clause and constituted unlawful discrimination under Title IX of the Education Amendments of 1972. While the District Court initially [dismissed](#) Grimm's Title IX claim and denied his motion for a preliminary injunction, these decisions were [reversed](#) by the Fourth Circuit on Grimm's appeal. In its decision, the Fourth Circuit deferred to the position taken by the Department of Education's Office for Civil Rights in a January 2015 opinion letter stating that under the Department's Title IX regulations, when a school elects to separate or treat students differently on the basis of sex in providing restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes, "a school must treat transgender students consistent with their gender identity." The Fourth Circuit's opinion relied upon the Supreme Court's 1997 decision in [Auer v. Robbins](#), which held that courts should generally defer to an agency's interpretation of its own regulation.

In August, the Supreme Court voted 5-3 to stay this ruling pending the School Board's petition for review, effectively preventing Grimm from using the male bathroom of his choosing during his senior year until the Court issues its decision. The case will likely be argued during the court's February sitting, which begins on February 21, 2017, with a decision expected by June. This means that Grimm will likely never get to enjoy the benefit of a ruling in his favor before graduating high school, although a victory for Grimm would have wide-ranging impact on the rights of transgender individuals in education and may influence law in other realms such as employment and public accommodations.

The possible outcomes of this case are uncertain and more variable than usual, however, due to the current state of the Supreme Court. After the death of Justice Antonin Scalia in February, the Court now sits at an even eight justices, with several contentious cases having split 4-4 along ideological lines during the last term. To date, Senate Republicans have refused to consider President Obama's nomination of Merrick Garland to fill Scalia's seat, and the future of this confirmation process [remains up in the air](#) regardless of the outcome of today's contentious presidential election. If the ninth seat remains vacant through the spring of 2017, another 4-4 split in this case along ideological lines is likely. While a vote of at least 5 justices is required to either affirm or overturn a lower court decision, and thus create a nationwide precedent, a 4-4 tie would merely leave the Fourth Circuit ruling in place – binding all schools in the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia), but not elsewhere. Another possibility is that a ninth justice is not appointed by the time of oral argument, but is in place on the Court at the time of its decision on the case. Customarily, justices abstain from participation in the formulation of an opinion when they were not seated at the time of oral argument, but there is no written rule barring absentee justices from casting a vote. Of course, the Court may delay scheduling of oral argument on this case until a justice is confirmed or schedule a rehearing following a confirmation to avoid this situation, given that the composition of the Court is likely to affect the outcome of this case.

Stay tuned to the blog for updates on this important case as we head into the Supreme Court's next term.