**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

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| S.W., by his parents and next friends, SETH WOLFE and AMANDA WOLFE<br><br>and<br><br>J.S., by his parents and next friends, JEFFERY SMITH and RENAE SMITH,<br><br>Plaintiffs<br><br>United States of America,<br><br>Intervenor-Plaintiffs<br><br>v.<br><br>LOUDOUN COUNTY SCHOOL BOARD<br><br>Defendant. | ) | No. l:25cv1536 (LMB/WEF) |

**UNITED STATES' MEMORANDUM IN SUPPORT OF RENEWED MOTION TO INTERVENE**

## INTRODUCTION

Defendant Loudoun County School Board ("School Board") intentionally discriminated on the basis of religion in violation of the Equal Protection Clause of the Fourteenth Amendment. Section 902 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000h-2, empowers the United States to intervene in such cases. Because discrimination on the basis of religion is abhorrent to a free society, the United States moves to intervene and protect its citizens.

As detailed in the United States' Second Proposed Complaint in Intervention ("Second Proposed Complaint") (attached as Exhibit A), the School Board unconstitutionally implemented and applied Policy 8040, "Rights of Transgender and Gender-Expansive Students," and its enacting Regulation 8040 (collectively, "Policy 8040" or "the Policy") in a discriminatory manner. Policy 8040 establishes and promotes the School Board's view of matters related to "sex, sexual orientation, transgender status, or gender identity/expression," including that students may "use their chosen name and gender pronouns that reflect their consistently asserted gender identity without any substantiating evidence"; "participate in [interscholastic, co-curricular, and extra-curricular] activities in a manner consistent with the student's gender identity"; and "use the [bathroom or locker room] facility that corresponds with their consistently asserted gender identity."

Policy 8040 requires staff and students to adopt its understanding of "gender identity" and conform their speech and behavior to fit that understanding. The School Board disfavors any view of "sex, sexual orientation, transgender status, or gender identity/expression" that does not align with its own and casts disagreement with Policy 8040—*i.e.*, using names and pronouns that align with a person's sex—as a "refus[al] to respect a student's gender identity." The School Board's decision to disregard the concerns of Christians who opposed Policy 8040 based on their sincerely held religious beliefs and elevate the discriminatory views of those who were openly hostile to those Christians evidences its improper motives in implementing and applying the Policy, which was intended to, and ultimately did, punish Christians who expressed their religious beliefs about sex and gender, including the effects of a policy that forces students to use intimate spaces with members of the opposite sex.

S.W. and J.S. (collectively, "Plaintiffs"), who are Christian, male students at Stone Bridge High School, oppose girls accessing their intimate spaces (bathrooms and locker rooms). Plaintiffs' religious beliefs inevitably collided with Policy 8040 when one of their fellow Stone Bridge High School students, a female student who purportedly identifies as a boy ("Female Student"), entered the boys' locker room. After Plaintiffs expressed their views on this matter, which flow from their religious beliefs, the School Board punished Plaintiffs. Sanctions include: (1) "no-contact" orders regarding Female Student; (2) for each, development of a "Comprehensive Student Support Plan" that is intended to change Plaintiffs' "behavior" in a way that conforms to Policy 8040; and (3) 10-day suspensions, equaling two weeks of class time.

"Unquestionably, the free exercise of religion is a fundamental right." *Johnson v. Robison*, 415 U.S. 361, 375 n. 14 (1974)). And religion is an inherently suspect classification. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (acknowledging protected suspect classes as race, religion or alienage). The First Amendment prohibits the government from requiring an individual to adhere to state-favored orthodoxies. *303 Creative LLC v. Elenis*, 600 U.S. 570, 602 (2023); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The Equal Protection Clause protects against government action that is motivated, at least in part, by an invidiously discriminatory intent. *Sylvia Dev. Corp. v. Calvert Cnty., Maryland*, 48 F.3d 810, 818-19 (4th Cir. 1995). State law classifications that interfere with a fundamental right trigger strict scrutiny under the Equal Protection Clause, which requires the government action to be narrowly tailored to achieve a compelling governmental interest. *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore Cnty., Maryland*, 915 F.3d 256, 265 (4th Cir. 2019), *as amended* (Feb. 25, 2019) ("[W]e apply strict scrutiny under the Equal Protection Clause where (as here) the challenged action interferes with a fundamental right.").

The School Board operated with an invidiously discriminatory intent when it implemented Policy 8040, reflecting the hostility of the community toward Christians who hold traditional beliefs about gender and live according to those beliefs. From using preferred pronouns to sharing intimate spaces with students of the opposite sex, the School Board's policy unconstitutionally directs Plaintiffs to go against their sincere religious beliefs and practice, which require using sex-aligned pronouns and using sex-segregated intimate spaces.

LCPS applied School Board Policy 8040 to Plaintiffs in an unconstitutional manner when it attempted to limit Plaintiffs' religious expression and later punished them when they expressed their religious beliefs. LCPS's application of School Board Policy 8040 to Plaintiffs reveals its discriminatory intent and burdens Plaintiffs' First Amendment rights to free exercise and free speech.

Plaintiffs face irreparable harm from the School Board's conduct. Plaintiffs will endure significant educational and social harms if they miss ten days of school simply for exercising their constitutionally protected rights. Significantly, the School Board's decision will remain on Plaintiffs' respective school and disciplinary records, which they will have to disclose when applying to colleges, enlisting in the military, or searching for gainful full-time employment. *See Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, 28 F.4th 529, 535 (4th Cir. 2022) (quoting *Goss v. Lopez*, 419 U.S. 565, 575 (1975) (acknowledging that disciplinary measures that remain in a student's permanent record "could . . . interfere with later opportunities for higher education and employment")). In addition, imposition of a "no-contact order" insinuates that Plaintiffs pose a danger to others—and it is undisputed they do not—which damages their character and reputations. *See id.* (quoting *Goss*, 419 U.S. at 575 (also acknowledging that misconduct charges "could seriously damage [a] student[]'s standing with [his] fellow pupils and [his] teachers")).

Because (1) Plaintiffs assert an Equal Protection Claim and (2) the Attorney General has certified this is a case of general public importance, the United States has an unconditional right to intervene in this case under Federal Rule of Civil Procedure 24(a)(1) and Section 902 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000h-2. Section 902 grants the United States an unconditional right to intervene in cases "seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of . . . religion . . . upon timely application if the Attorney General certifies that the case is of general public importance." 42 U.S.C. § 2000h-2.

## PROCEDURAL HISTORY

On September 15, 2025, Plaintiffs commenced this action. *See* Pls.' Compl., ECF 1. On October 10, 2025, the Court held a hearing and granted Plaintiffs' Motion for Preliminary Injunction. *See* Order, ECF 45. On October 29, 2025, Plaintiffs filed their Amended Complaint. *See* Pls.' Am. Compl., ECF 53. On November 26, 2025, Defendant filed its Motion to Dismiss Plaintiffs' Amended Complaint, with accompanying Memorandum in Support. ECF 69-70. On December 10, Plaintiffs filed their Opposition to the Motion to Dismiss. ECF 86. On December 16, 2025, Defendant filed its Reply in Support of its Motion to Dismiss. ECF 92. On December 16, 2025, the United States filed its Statement of Interest concerning Defendant's Motion to Dismiss. ECF 92. On January 5, 2025, Defendant filed its Response to the United States' Statement of Interest. ECF 113.

On December 8, 2025—before the Motion to Dismiss was fully briefed—the United States filed its initial Motion to Intervene ("First Motion to Intervene"), with accompanying Memorandum in Support, which included its initial Proposed Complaint in Intervention ("First Proposed Complaint"). ECF 79-80. On December 22, Defendant filed its Opposition to the United

States' First Motion to Intervene. ECF 100. On January 5, 2026, the United States filed its Reply in Support of its First Motion to Intervene. ECF 112.

On January 16, 2026, the Court held a hearing on the pending motions and (1) denied *without prejudice* the United States' First Motion to Intervene and (2) granted-in-part and denied-in-part Defendant's Motion to Dismiss (*i.e.*, dismissed only Counts X-XII of Plaintiffs' Amended Complaint). Jan. 16, 2026 Short Order, ECF 121. Also on that date, the Court ordered the Parties to mediation, and the Settlement Conference is scheduled for February 13, 2026. Jan. 16, 2026 Short Order, ECF 121; Jan. 20, 2026 Short Order, ECF 128. As a result of the Parties' willingness to pursue mediation, the Court vacated the Court's October 24, 2025 Scheduling Order [ECF 52]. Jan. 16, 2026 Short Order, ECF 121.

## ARGUMENT

### A. The Merits of the United States' Second Proposed Complaint Are Irrelevant at the Motion-to-Intervene Stage.

When the Court denied the United States' First Motion to Intervene, it did so despite its "understanding . . . that the United States has standing" and a "right" to intervene under Section 902 "in cases where this kind of equal protection claims exist." Hr'g Tr. 4:5-8. To support its decision, the Court stated that "the prayer for relief doesn't exist" because "[t]he Fourth Circuit has clearly" provided precedent "that does, in fact, support the position of the [S]chool [B]oard vis-à-vis trans students and their right to access the bathroom of their identity, not their necessary biological background." Hr'g Tr. 4:10-18; *see Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021). Without addressing the statements in the United States' briefing that the merits of the United States' First Proposed Complaint are irrelevant at the motion-to-intervene (as opposed to motion-to-dismiss) stage, *see* Reply in Supp. of Mot. to Intervene, ECF 112, 1-2, 7, 17, the Court stated that it did not "see any basis upon which [the

United States] should be intervening in this litigation," Hr'g Tr. 5:9-11. The same day, the Court denied Defendant's Motion to Dismiss with regard to Plaintiffs' Equal Protection claim. Hr'g Tr. 12:25-13:2; Short Order, ECF 121.

The ordinary rule that a would-be intervenor's "proposed pleading must state a good claim for relief," 7C Mary Kay Kane & Allen Stein, *Federal Practice & Procedure* § 1914 (3d ed.) (footnote omitted), does not apply when, as here, the movant has an unconditional statutory right to intervene. In two cases involving aggrieved employees' statutory right to intervene in lawsuits by the EEOC pursuant to 42 U.S.C. § 2000e-5(f)(1), appellate courts have held that district courts erred in denying intervention even if the plaintiffs' claims had other fatal defects. *EEOC v. STME, LLC*, 938 F.3d 1305, 1313 (11th Cir. 2019) (holding the employee "had an unconditional statutory right to intervene," and the district court "should have considered the merits of [her] motion"); *EEOC v. PJ Utah, LLC*, 822 F.3d 536, 540 n.4 (10th Cir. 2016) (holding "the district court should have granted [the] motion to intervene and then granted [the defendant's] motion to compel arbitration").

Although the United States has amended its prayer for relief in its Renewed Motion to Intervene, the requirements for intervention as of right are satisfied even if the Court finds deficiencies in the Second Proposed Complaint. The United States also meets the factors for permissive intervention under Federal Rule of Civil Procedure 24(b).

**B. Rule 24(a)(1) Grants the United States a Right to Intervene.**

This Court should grant the United States' Renewed Motion to Intervene under Rule 24(a)(1) because the United States satisfies the requirements for intervention as of right. Under Rule 24(a)(1), "[o]n timely motion, the court must permit anyone to intervene who . . . is given an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1); *see also Brandt v. Gooding*, 636 F.3d 124, 136 (4th Cir. 2011) (stating that Rule 24(a)(1) allows "intervention as of

right when a statute of the United States confers an unconditional right to intervene") (citation omitted).

Here, Section 902 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000h-2, gives the United States an unconditional statutory right to intervene. Section 902 provides as follows:

> Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, *religion*, sex or national origin, the Attorney General for or in the name of the United States may intervene in such action upon timely application if the Attorney General certifies that the case is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.

42 U.S.C. § 2000h-2 (emphasis added).

Many courts, including the Supreme Court, have recognized that this statute entitles the United States to intervene in Equal Protection cases. *See, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (acknowledging Section 902 allows the Attorney General to intervene in private Equal Protection suits); *Air Lines Steward & Stewardesses Ass'n, Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 103 n.2 (7th Cir. 1972) (finding Attorney General can intervene as of right in Equal Protection suits). The United States Court of Appeals for the Fourth Circuit has recognized that Section 902 "empower[s] the Attorney General to intervene in private suits." *U.S. v. Hunter*, 459 F.2d 205, 217-18 (4th Cir. 1972).

Here, Plaintiffs assert an Equal Protection claim (which has survived the motion-to-dismiss stage). *See* Am. Compl. ¶¶ 367–81. On December 5, 2025, the Attorney General certified that the case is of general public importance. *See* Certificate of the Attorney General, attached as Exhibit B. The United States has met the requirements for statutory intervention under Rule 24(a)(1), and its Renewed Motion to Intervene should be granted on that basis alone.

**C. The United States Meets the Permissive Intervention Standard under Rule 24(b).**

Alternatively, this Court should permit the United States to intervene because the United States meets the requirements for permissive intervention under Rule 24(b). For permissive intervention, Rule 24(b) provides as follows:

> **(1)** ***In General.*** On timely motion, the court may permit anyone to intervene who:
> . . .
>
> **(B)** has a claim or defense that shares with the main action a common question of law or fact.
> . . .
>
> **(3)** ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b).

As noted above, Plaintiffs assert an Equal Protection claim regarding religious discrimination. The United States also alleges an Equal Protection claim, namely that Defendant engaged in intentional discrimination on the basis of religion, in violation of the Equal Protection Clause. The United States' claim shares common questions of law and fact with Plaintiffs' claims. Indeed, the United States' Second Proposed Complaint in Intervention largely tracks the substance of Plaintiffs' Amended Complaint.

The United States' motion is timely. In determining the timeliness of intervention, trial courts in the Fourth Circuit are "obliged to assess three factors: first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt v. U.S. E.P.A.*, 758 F.3d 588, 591 (4th Cir. 2014) (denying motion to intervene where proceedings had reached an advanced stage (*i.e.*, seven other parties had long ago requested and received permission to intervene; motions to dismiss were fully briefed, argued, and denied; the case had been stayed once; the court's scheduling order had

been extended twice; and summary judgment briefing had commenced)) (citation omitted). "The purpose of the timeliness exception is to "prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *Id.*

As noted above, the United States' Second Proposed Complaint largely tracks Plaintiffs' Amended Complaint. The United States also files its motion after Plaintiffs' Equal Protection claim has survived Defendant's Motion to Dismiss but before any meaningful discovery has taken place. Indeed, in order to allow the Parties to focus on mediation, the Court took the "[discovery] pressure off of" the Parties and vacated the Scheduling Order that provided a March 13, 2026 discovery deadline, and no new discovery deadline has been set. Hr'g Tr. 16:8-11. Under these circumstances, the United States' participation would neither unduly delay the proceedings nor prejudice the existing parties' rights. Given that the litigation is in its very early stages, this lawsuit is not "within sight of the terminal." *Alt*, 758 F.3d at 591. Thus, the United States meets the requirements for permissive intervention under Rule 24(b).

**D. The United States Seeks Relief This Court Can Grant.**

The Court denied the United States' First Motion to Intervene on the ground that the government sought relief that could not be granted by the Court in light of the *Grimm* decision. *See* Short Order, ECF 121; Hr'g Tr. 4:8-5:11; 6:24-7:4. The United States maintains that intervention should have been granted regardless of the type of relief sought. Nevertheless, the United States' attached Second Proposed Complaint seeks relief that this Court can grant without disturbing the holding in *Grimm*. Specifically, the Prayer for Relief now requests, *inter alia*:

"(a) A declaratory judgment that Defendant's enforcement of Policy 8040 violates the rights of Plaintiffs under the U.S. Constitution";

(b) A declaratory judgment that Policy 8040's lack of provisions for (i) parental notice and (ii) opt-out with an appropriate alternative violates the rights of Plaintiffs, the Wolfes, and the Smiths under the U.S. Constitution";

"(c) [a] preliminary and a permanent injunction: . . . (2) prohibiting Defendant, and their officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with Defendant, from: i. enforcing Policy 8040 against S.W., J.S., or any similarly situated student in a way that violates students' First Amendment rights"; and

"[(c)](3) requiring Defendant to provide parents of LCPS students with: i. advance notification that their children will be sharing the bathroom or locker room with a student of the opposite sex; and ii. an opportunity to opt their children out of using the bathroom or locker room with a student of the opposite sex, which comes with an appropriate alternative that allows children to comfortably and fully engage in school programs and activities." (Exhibit A at 51-52).

The central holding of *Grimm* is that schools may not apply their policies in a discriminatory manner. 972 F.3d at 618-19. The United States asks for a similar outcome with its prayer for relief. *Grimm* is silent on how school systems should protect the First Amendment rights of third parties who must continue to use bathrooms and locker rooms in a post-*Grimm* world, but "the Board may [not] rely on its own discriminatory notions" in applying Policy 8040 to Plaintiffs. *See id.* at 619. As such, granting the relief sought by the U.S. (*i.e.*, advanced parental notice, opt-out provisions, and prohibiting enforcement in a manner that violates constitutional rights) would not contravene the holding in *Grimm*. This Court can grant such relief and should allow the United States to intervene.

## CONCLUSION

For the reasons set forth above, the Court should grant the United States' Renewed Motion to Intervene.

DATED: January 30, 2026

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 30, 2026, I filed the foregoing through the Court's CM/ECF electronic filing system, which will transmit a Notice of Electric Filing (NEF) to all counsel of record in the case.

/s/ *Brian L. Repper*
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