

GLBT CIVIL RIGHTS ISSUES

SOGII Section Program

Matt Nosanchuk

United States Department of Justice
Civil Rights Division
Dallas, Texas

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10:30 a.m. – 11:30 a.m.



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Matt Nosanchuk joined the Civil Rights Division in July as a Senior Counselor to the Assistant Attorney General. He brings extensive experience as a civil rights attorney from his time in Congress, as well as work in the non-profit and private sectors. Among his primary duties, Matt helps to oversee the Division's Criminal Section and the Division's pursuit of key policy priorities. He represents the Division in many capacities, including working with LGBT community and with Congress. He returns to the Justice Department after serving in the Office of Policy Development under Attorney General Janet Reno during the Clinton Administration. Matt also has worked on the House Judiciary Committee's Democratic Staff under then Ranking Member John Conyers; at Third Way, where he established and directed the organization's Gay Equality Initiative; and, most recently, in the Senate as Counsel to Senator Bill Nelson of Florida, where he covered judiciary and civil rights matters. During the 2008 presidential election campaign, Matt was a leader of the LGBT policy committee on the Obama campaign and worked on the Obama for America campaign staff as State Research Director in Florida and Regional LGBT Outreach Director in South Florida. Matt received his undergraduate and law degrees from Stanford, where he was a Truman Scholar and Senior Note Editor of the Stanford Law Review. He clerked on the U.S. Court of Appeals for the Seventh Circuit in Chicago for Judge Walter J. Cummings and was a Skadden Fellow at the ACLU of Illinois, where Matt served as staff attorney on the organization's AIDS and Civil Liberties Project.



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

October 28, 2009

TO: ALL UNITED STATES ATTORNEYS

FROM: Thomas E. Perez
Assistant Attorney General for the Civil Rights Division

RE: The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009

Dear United States Attorneys:

The Civil Rights Division and the United States Attorneys' Offices have a long and time-honored history of collaboration and partnership in prosecuting criminal civil rights cases. Using our existing authority, we have brought individuals to justice for committing hate crimes, engaging in law enforcement misconduct, and human trafficking. And our cases have sent the strong message that criminal conduct that violates an individual's civil rights or seeks to victimize entire communities has no place in a democratic society, wherever and whenever it occurs in the United States of America.

Today President Obama signed into law landmark legislation that builds upon an already strong foundation: The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009. The Matthew Shepard and James Byrd Hate Crimes Prevention Act is the first significant expansion of federal criminal civil rights laws in more than a decade, the last being passage of the Church-Arson statute in the mid-1990s. The Act creates a new criminal code provision, 18 U.S.C. § 249, which criminalizes willfully causing bodily injury (or attempting to do so with fire, firearm, or other dangerous weapon) when (1) the crime was committed because of the actual or perceived race, color, religion, national origin of any person or (2) the crime was committed because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person and the crime affected interstate or foreign commerce or occurred within federal special maritime and territorial jurisdiction. The new law also provides funding and technical assistance to state, local and tribal jurisdictions to help them to more effectively investigate, prosecute and prevent hate crimes.

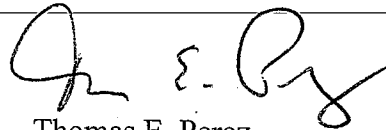
The Matthew Shepard and James Byrd Hate Crimes Prevention Act is essential because, sadly, hate crimes and the intolerance that breeds them remain all too prevalent in our nation. According to the most current FBI statistics, in 2007 there were 7,621 hate crime incidents reported motivated by a single, discernable animus. This means that there was at least one hate crime incident every hour of every day in our country last year, but the number of actual crimes is

likely higher because a number of jurisdictions report incomplete statistics or none at all. Of those incidents that were reported, over half were motivated by racial bias; 18% were motivated by religious bias; 16% were motivated by a sexual-orientation bias; and 13% were motivated by national-origin bias. From 2003-2007, the number of reported hate crimes against Hispanics increased nearly 40%. And, the number of reported hate crimes against individuals because of their sexual orientation increased to the highest level in five years – amounting to 1,265 incidents.

Attorney General Holder has repeatedly emphasized that the Department and the Civil Rights Division are steadfastly committed to vigorously enforcing the Matthew Shepard and James Byrd Hate Crimes Prevention Act. In order to do this, we will need your help and active participation. In addition, we look forward to working with you to develop ways that the Justice Department can educate communities about the new law and prevent hate crimes from occurring in the first place.

The Civil Rights Division's Criminal Section will soon be issuing guidance on enforcing this new legislation, and we look forward to working together with you in its enforcement. If, before we issue more formal guidance, you have any questions or want more information on the Matthew Shepard and James Byrd Hate Crimes Prevention Act, please contact me or my Senior Counselor Matt Nosanchuk at (202) 305-0864, or Acting Criminal Section Chief Robert Moossy at (202) 305-2445 or at Robert.Moossy@USDOJ.Gov.

Respectfully,



Thomas E. Perez
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GARY GLENN, PASTOR LEVON YUILLE,
PASTOR RENE B. OUELLETTER, PASTOR
JAMES COMBS,

Plaintiffs

v.

ERIC HOLDER, Jr., in his official capacity as
Attorney General of the United States,

Defendant

Case No. 2:10-cv-10429-TLL-CEB

THOMAS L. LUDINGTON
United States District Judge

CHARLES E. BINDER
Magistrate Judge

DEFENDANT'S MOTION TO DISMISS AND
BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
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United States District Judge

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Magistrate Judge

DEFENDANT'S MOTION
TO DISMISS

For the reasons set forth in the accompanying Brief, defendant Eric Holder, Jr., Attorney General of the United States, respectfully moves this Court for an order dismissing this action pursuant to Rule 12(b)(1), Federal Rules Civil Procedure, for lack of subject matter jurisdiction, or, in the alternative, pursuant to Rule 12(b)(6), Federal Rules Civil Procedure, for failure to state a claim upon which relief can be granted.

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Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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BRIEF IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

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IN THE UNITED STATES DISTRICT COURT
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Defendant

Case No. 2:10-cv-10429-TLL-CEB

THOMAS L. LUDINGTON
United States District Judge

CHARLES E. BINDER
Magistrate Judge

BRIEF IN SUPPORT
OF DEFENDANT'S MOTION
TO DISMISS

Defendant Eric Holder, Jr., Attorney General of the United States, respectfully moves this Court for an order dismissing this action pursuant to Rule 12(b)(1), Federal Rules Civ. P., for lack of subject matter jurisdiction, or, in the alternative, pursuant to Rule 12(b)(6), Federal Rules Civ. P., for failure to state a claim upon which relief can be granted.

QUESTIONS PRESENTED

1. Whether plaintiffs lack standing to maintain this action.
2. Whether plaintiffs' claims are ripe for judicial review.
3. Whether the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (the Shepard-Byrd Hate Crimes Act or the Hate Crimes Act) violates the Free Speech or Freedom of Association Clauses of the First Amendment.
4. Whether the Shepard-Byrd Hate Crimes Act violates the Free Exercise Clause of the First Amendment.

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5. Whether the Hate Crimes Act violates the Equal Protection requirements of the Fifth Amendment.

6. Whether Congress has the authority to enact Section 249(a)(2) of the Shepard-Byrd Hate Crimes Act pursuant to the Commerce Clause.

7. Whether the Shepard-Byrd Hate Crimes Act violates the Tenth Amendment.

CONTROLLING AUTHORITY

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United States v. Napier, 233 F.3d 394 (6th Cir. 2000)

United States v. Baylor, 517 F.3d 899 (6th Cir.), cert. denied, 128 S. Ct. 2982 (2008)

STATEMENT OF THE CASE

This is a pre-enforcement challenge to one of the criminal provisions of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (the Shepard-Byrd Hate Crimes Act or the Hate Crimes Act). Plaintiffs do not allege that they have been prosecuted under the Act, that they have been threatened with such prosecution, or that they intend to engage in any conduct prohibited by the Act. The Act does not proscribe speech. It prohibits only violent conduct and includes specific provisions ensuring that it may not be applied to infringe any rights guaranteed by the First Amendment. The Act applies evenhandedly to all who commit bias-motivated acts, regardless of ideology or religious belief. As relevant here, the Act requires proof of an interstate commerce connection in every case. Nonetheless, plaintiffs, speculating that the Act may be enforced against them because of their strong public views, contend that the Act is facially invalid in violation of the First Amendment, that it violates the Equal Protection guarantees of the Fifth Amendment, that it exceeds Congress's authority under the Commerce Clause, and that it violates the Tenth Amendment.

As explained below, plaintiffs' claims should be dismissed for lack of jurisdiction because plaintiffs lack standing and because their claims are not ripe for review. In the alternative, plaintiffs claims should be dismissed for failure to state a claim upon which relief can be granted.

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1. The Shepard-Byrd Hate Crimes Act was enacted by Congress and signed into law by the President in October 2009. Pub. L. No. 111-84, Div. E, 123 Stat. 2190 (Oct. 28, 2009). Sections 4704-4706 of the Act authorize financial and other assistance to state and local authorities for the investigation and prosecution of hate crimes, while Section 4707 creates federal criminal offenses, to be codified at 18 U.S.C. 249, for bias-motivated violent conduct.

The criminal provisions of the Act prohibit only willful, violent conduct. At issue in this case is Section 249(a)(2), which provides criminal penalties for:

(A) IN GENERAL. — Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), *willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person*, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.

18 U.S.C. 249(a)(2) (emphasis added).¹ Section 249(a)(2) also requires proof of one of several interstate commerce elements. See 18 U.S.C. 249(a)(2)(B).

No federal prosecution may be undertaken for violations of the Act in the absence of a certification by the Attorney General or a designee that:

(A) the State does not have jurisdiction;

(B) the State has requested that the Federal Government assume jurisdiction;

¹ Section 249(a)(1) provides criminal penalties for such violent conduct committed “because of the actual or perceived race, color, religion, or national origin of any person.” Section 249(a)(3) provides criminal penalties for conduct described in Sections 249(a)(1) or (a)(2) that occurs in the special maritime or territorial jurisdiction of the United States. These provisions are not at issue in this case.

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(C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or

(D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

18 U.S.C. 249(b).

Congress made several statutory findings when it enacted the Act, including the following:

(1) The incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem.

(2) Such violence disrupts the tranquility and safety of communities and is deeply divisive.

(3) State and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes in the United States, including violent crimes motivated by bias. These authorities can carry out their responsibilities more effectively with greater Federal assistance.

(4) Existing Federal law is inadequate to address this problem.

(5) A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.

(6) Such violence substantially affects interstate commerce in many ways, including the following:

(A) The movement of members of targeted groups is impeded, and members of such groups are forced to move across State lines to escape the incidence or risk of such violence.

(B) Members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity.

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(C) Perpetrators cross State lines to commit such violence.

(D) Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence.

(E) Such violence is committed using articles that have traveled in interstate commerce.

* * * * *

(9) Federal jurisdiction over certain violent crimes motivated by bias enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes.

(10) The problem of crimes motivated by bias is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States, local jurisdictions, and Indian tribes.

Pub. L. No. 111-84, Div. E, Sec. 4702 (1)-(6), (9), (10), 123 Stat. 2835 (Oct. 28, 2009).

Before enacting the statute, Congress heard evidence about the prevalence of hate crimes and the need for federal involvement to address the problem. As the House Report on the bill stated, such offenses “are disturbingly prevalent and pose a significant threat to the full participation of all Americans in our democratic society.” H.R. Rep. No. 86, 111th Cong., 1st Sess. Pt. 1 at 5 (2009). In 2007 alone, the FBI had documented more than 7,600 hate crimes, including 1,265 incidents (16.6%) motivated by bias based upon sexual orientation. *Ibid.* The enactment of the Hate Crimes Act, the House Report explained, would provide assistance to state and local law authorities for the investigation and prosecution of such crimes, and would permit federal prosecutions “where the State does not have an appropriate statute, or otherwise declines to investigate or prosecute; where the State requests that the Federal Government assume jurisdiction; or where actions by State and local law enforcement officials leave demonstratively unvindicated the Federal interest in eradicating bias-motivated violence.” *Id.* at 6. The House

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Report emphasized that the State and local authorities would continue to “investigate and prosecute the overwhelming majority of hate crimes.” *Ibid.*

2. Congress also enacted rules of construction to ensure that the Act is enforced in ways that are consistent with the First Amendment and the Federal Rules of Evidence:

(1) IN GENERAL. — Nothing in this division shall be construed to allow a court, in any criminal trial for an offense described under this division or an amendment made by this division, in the absence of a stipulation by the parties, to admit evidence of speech, beliefs, association, group membership, or expressive conduct unless that evidence is relevant and admissible under the Federal Rules of Evidence.

(2) VIOLENT ACTS. — This division applies to violent acts motivated by actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability of a victim.

(3) CONSTRUCTION AND APPLICATION. — Nothing in this division, or an amendment made by this division, shall be construed or applied in a manner that infringes any rights under the first amendment of the Constitution of the United States. Nor shall anything in this division, or an amendment made by this division, be construed or applied in a manner that substantially burdens a person’s exercise of religion (regardless of whether compelled by, or central to, a system of religious belief), speech, expression, or association, unless the Government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest, if such exercise of religion, speech, expression, or association was not intended to –

(A) plan or prepare for an act of physical violence; or

(B) incite an imminent act of physical violence against another.

(4) FREE EXPRESSION. — Nothing in this division shall be construed to allow prosecution based solely upon an individual’s expression of racial, religious, political, or other beliefs or solely upon an individual’s membership in a group advocating or espousing such beliefs.

(5) FIRST AMENDMENT. — Nothing in this division, or an amendment made by this division, shall be construed to diminish any rights under the first amendment to the Constitution of the United States.

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(6) CONSTITUTIONAL PROTECTIONS. — Nothing in this division shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the first amendment to the Constitution of the United States and peaceful picketing or demonstration. The Constitution of the United States does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of violence.

Pub. L. No. 111-84, Div. E, Sec. 4710 (1)-(6), 123 Stat. 2841 (Oct. 28, 2009).

3. This is a pre-enforcement, facial challenge to the constitutionality of the Hate Crimes Act. According to the complaint, plaintiffs “take a strong public stand against homosexual activism, the homosexual lifestyle, and the homosexual agenda.” Complaint ¶¶ 17, 19, 22, 24. Plaintiffs allege that “[c]lear and emphatic opposition to homosexuality, homosexual activism, and the homosexual agenda is a duty of all Christians,” and that they “publicly denounce homosexuality, homosexual activism, and the homosexual agenda as being contrary to God’s law and His divinely inspired Word.” Complaint ¶¶ 37-38. Plaintiffs do not allege that they intend to cause bodily injury or to attempt to cause bodily injury to any person.

Plaintiffs brought this action against Attorney General Eric Holder, Jr., in his official capacity. Complaint ¶ 26. They contend that the Act violates their rights under the First Amendment and the Equal Protection Clause of the Fifth Amendment, that Congress lacked the authority to enact the Act under the Commerce Clause, and that the Act violates the Tenth Amendment. Complaint ¶¶ 102-125. They seek a declaration that the Act violates these provisions of the Constitution and an injunction barring its application to their speech or activities.

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ARGUMENT

I

THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

A. *Plaintiffs Lack Standing To Maintain This Action*

1. To establish standing, as an “irreducible constitutional minimum,” a plaintiff must establish that he or she has “suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent,’ not ‘conjectural’ or ‘hypothetical.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations & internal quotation marks omitted). The “threshold question” in determining standing is “whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant,” that is, “whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The requisite “personal stake” exists “only when the plaintiff himself has suffered ‘some threatened or actual injury resulting from the putatively illegal action.’” *Id.* at 499 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)). Plaintiffs are required to demonstrate standing for each specific claim that they seek to raise. *Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Further, a court should not consider the merits of an action unless and until it is satisfied that plaintiffs have standing and that their claims are ripe. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93-94 (1998).

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Plaintiffs may assert sufficient injury to bring a pre-enforcement challenge to a criminal statute only if they allege “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution thereunder.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (citing *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). In *Virginia v. American Booksellers Ass’n, Inc.*, 484 U.S. 383, 392 (1988), this requirement was met because the law plaintiffs sought to challenge was “aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution.” On the other hand, “persons having no fears of * * * prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs.” *Babbitt*, 442 U.S. at 298 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). Thus, in *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 716 (6th Cir. 1995), the plaintiff did not have standing to challenge an anti-panhandling ordinance where he had not violated the ordinance in the past and did not allege that he intended to violate its terms in the future.

Plaintiffs here cannot meet the threshold requirement for standing because they have not alleged that they intend “to engage in a course of conduct * * * proscribed by [the] statute,” let alone that “there exists a credible threat of prosecution thereunder.” *Babbitt*, 442 U.S. at 298. In particular, they have not alleged that they intend to “willfully cause[] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[] to cause bodily injury to any person, because of the actual or perceived * * * sexual orientation * * * of any person.” 18 U.S.C. 249(a)(2). Thus, they have not alleged that they will suffer an injury in fact as a result of the Shepard-Byrd Hate Crimes Act.

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Plaintiffs nonetheless allege that the Act authorizes “federal investigative and other federal law enforcement actions against” them because of their opposition to “homosexual activism, the homosexual lifestyle, and the homosexual agenda,” Complaint ¶ 48, and that the Act will subject them “to increased government scrutiny, questioning, investigation, [and] surveillance on account of” their opposition, Complaint ¶ 52. There is no basis for these allegations in the language of the Act itself, which prohibits only willful, violent conduct – “willfully caus[ing] bodily injury to any person” or attempting to cause such injury “through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device.” 18 U.S.C. 249(a)(2); see also Section 4710 (“This division applies to *violent acts* motivated by actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability of a victim.”) (emphasis added). To establish a “willful” violation of the Act, the prosecution must prove “that the defendant knew both the pertinent fact(s) and understood the illegality of the pertinent charged conduct.” *United States v. Carney*, 387 F.3d 436, 442 (6th Cir. 2004) (citing *United States v. Bryan*, 524 U.S. 184, 192-93 (1998)). Because plaintiffs do not allege that they intend willfully to engage in any violent conduct that might subject them to prosecution under the Act, there is no likelihood that they will be subjected to any federal action or otherwise injured by enforcement of the Act.

Plaintiffs’ allegation, Complaint ¶¶ 54-69, that the Act will subject them to liability under 18 U.S.C. 2 is also without foundation. Section 2(a) of Title 18 provides that one who “aids, abets, counsels, commands, induces or procures” an offense “is punishable as a principal.” To establish this offense, the prosecution must prove “that the substantive offense has been committed” and “that the defendant committed overt acts or affirmative conduct to further the

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offense, and intended to facilitate the commission of the crime.” *United States v. Dolt*, 27 F.3d 235, 238 (6th Cir. 1994) (citations omitted); see *Carney*, 387 F.3d at 446 (affirming a conviction under 18 U.S.C. 2 where “[t]he record evidence compellingly demonstrated that the defendant[s] * * * knowingly, willfully, actively, and repeatedly collaborated with a convicted felon’s ongoing unlawful conspiratorial scheme”). Thus mere speech – without the intent to facilitate the commission of a violent act and some active assistance or participation in the offense itself – could never be the basis for a prosecution for aiding and abetting a violation of the Hate Crimes Act. Plaintiffs have not alleged that they intend to commit any overt acts to further an offense under the Act or to facilitate the commission of any violent conduct that might violate the Act.

Plaintiffs also contend that the possibility that they will be investigated in connection with a hate crime chills their exercise of their First Amendment rights. See *e.g.*, Complaint ¶¶ 52, 69. But these contentions are insufficient to establish standing. Even in the First Amendment context, plaintiffs “must present more than ‘[a]llegations of a subjective chill.’ There must be a ‘claim of specific present objective harm or a threat of specific future harm.’” *Bigelow v. Virginia*, 421 U.S. 809, 816-817 (1975) (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)) (internal quotation marks omitted); *White v. United States*, No. 09-3158, 2010 WL 1404377, at *7 (6th Cir. April 9, 2010). In *Laird*, “most if not all of the [plaintiffs]” established that they had “been the subject of Army surveillance reports.” *Tatum v. Laird*, 444 F.2d 947, 954 n.17 (D.C. Cir. 1971), rev’d, 408 U.S. 1 (1972). They contended that the surveillance of their activities had “chilled” their exercise of First Amendment rights. *Laird*, 408 U.S. at 13. The Supreme Court nevertheless held that plaintiffs failed to demonstrate “a direct injury as the result of [the Government’s] action” because their decision to curtail their expressive activity reflected

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a “subjective ‘chill’” that did not qualify as a “specific present objective harm or a threat of specific future harm” caused by the Government’s surveillance. *Id.* at 13-14 (citation omitted); see also *ACLU v. National Sec. Agency*, 493 F.3d 644, 661 (6th Cir. 2007) (“[T]o allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government’s actions, instead of by his or her own subjective chill.”), cert. denied, 552 U.S. 1179 (2008); see *id.* at 689 (Gibbons, J., concurring in the judgment).

The Supreme Court addressed a similar claim of a subjective “chill” in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), a First Amendment challenge to a state statute that enhanced an offender’s sentence if his crime was motivated by bias. The Court rejected the defendant’s claim that the statute was “unconstitutionally overbroad because of its ‘chilling effect’ on free speech,” finding the claim too speculative to support an overbreadth challenge:

The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional “overbreadth” cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim’s protected status, thus qualifying him for penalty enhancement. * * * This is simply too speculative a hypothesis to support Mitchell’s overbreadth claim.

Id. at 488-490.

In this case, plaintiffs’ claim is even more attenuated than in *Mitchell* or *Laird*. The Act prohibits violent conduct, not speech. Evidence of speech, expression, or associations (see Sec. 4710(1); Complaint ¶ 51) generally would be relevant and thus admissible in a prosecution against one who has engaged in the prohibited violent actions to prove *that individual’s* motive. See *Mitchell*, 508 U.S. at 489-490; *United States v. Skillman*, 922 F.2d 1370, 1372-1374 (9th

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Cir. 1990). But plaintiffs do not allege that they intend to engage in any such violent conduct. Thus, their claim that they will be subjected to any kind of investigation is pure speculation. To be sure, like all citizens, if plaintiffs have information relevant to the investigation of a violent offense, they may be asked to provide that information to law enforcement officials. But the mere possibility that they might be called upon to do so in relation to an offense that might occur in the future is simply too “‘conjectural’ or ‘hypothetical’” to constitute a claim of actual injury necessary to establish standing. *Lujan*, 504 U.S. at 560 (citation omitted).

Finally, plaintiffs recite alleged statements by third parties, Complaint ¶¶ 57-67, claims about the enforcement of allegedly similar legislation in other jurisdictions, Complaint ¶¶ 70-72, and isolated statements by Congressional supporters of the legislation that ultimately was enacted as the Shepard-Byrd Hate Crimes Act, Complaint ¶¶ 59, 74-75, in support of their contention that they could be investigated or prosecuted for violating the Act based solely on their speech. But these allegations are simply irrelevant. None of the individuals or organizations quoted have any responsibility for the enforcement of the Act. And it is the language of the Act – not the enforcement of allegedly “similar” statutes in other jurisdictions, or isolated statements of supporters – that will govern its enforcement. The Hate Crimes Act prohibits only willful, violent conduct. It does not criminalize speech.²

2. In addition to these minimum constitutional requirements, the courts impose prudential limits on litigants’ standing. Of particular relevance here, “even when the plaintiff has

² Any allegation that plaintiffs might be subjected to false prosecution under the Hate Crimes Act solely because of their public views or associations is too speculative to confer standing. *White v. United States*, 2010 WL 1404377, at *6. Such false prosecution could occur only *if* a hate crime occurred, *if* plaintiffs’ speech was somehow associated with such an offense, and *if* the Act was improperly enforced. *Id.* at *8.

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alleged injury sufficient to meet the ‘case or controversy’ requirement, * * * the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth*, 422 U.S. at 499. This prudential limit is relaxed for plaintiffs who allege that a statute is overbroad in violation of the First Amendment. Such plaintiffs “are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” *American Booksellers Ass’n, Inc.*, 484 U.S. at 392-393 (internal citations & quotation marks omitted). But this principle does not overcome the “irreducible minimum” requirement that a plaintiff allege a personal stake in the litigation. Even plaintiffs seeking to assert an overbreadth challenge must first allege sufficient facts to establish a claim that *they* have suffered or are likely to suffer some injury as a result of the challenged statute. See *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 353-354 (6th Cir. 2007). As explained above, plaintiffs here have failed to allege any such harm because they have not alleged that they intend to engage in conduct that is likely to subject them to prosecution under the statute. Therefore, they lack standing to assert an overbreadth claim.

Plaintiffs seek to assert a classic “generalized grievance” against a federal statute with which they disagree. They complain that the statute is “inherently divisive” and creates “a special, protected class of persons under federal law.” Complaint ¶¶ 1, 3. They allege that the Act “seeks to normalize” behavior that they believe to be “contrary to the moral law and harmful to the common good of society.” Complaint ¶ 4. These and other grievances contained in plaintiffs’ complaint amply illustrate why the Judicial Branch imposes prudential standings

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requirements. If mere disagreement with a federal policy were enough to create a federal case, then the judicial system would be flooded with claims. The generalized grievance standing barrier prevents this from happening by blocking claims that are rooted in ideological disagreements and not designed to redress a specific, concrete injury. “Prudential standing requirements preclude litigation in federal court ‘when the asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens,’ or where instead of litigating ‘his own legal rights and interests,’ the plaintiff instead purports to ‘rest his claim to relief on the legal rights or interests of third parties.’” *Prime Media, Inc.*, 485 F.3d at 349 (citation & internal quotation marks omitted).

Plaintiffs therefore lack standing to bring a pre-enforcement challenge to the Act.

B. Plaintiffs’ Claims Are Not Ripe For Review

This court also lacks subject matter jurisdiction because plaintiffs’ claims are not ripe for review. *Bigelow v. Michigan Dep’t of Nat. Res.*, 970 F.2d 154, 157 (6th Cir. 1992); *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002), cert. denied, 537 U.S. 1172 (2003). As *Norton* explained, the “[r]ipeness doctrine exists ‘to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities.’” *Ibid.* (citation omitted). In determining ripeness, “this court examines (1) the likelihood that the harm alleged will ever come to pass; (2) whether the factual record is sufficiently developed to allow for adjudication; and, (3) hardship to the parties if judicial review is denied.” *Ibid.* (citing *Adult Video Ass’n v. United States*, 71 F.3d 563, 568 (6th Cir. 1995)). In a pre-enforcement challenge such as this one, “a case is ordinarily ripe for review only if the probability of the future event occurring is

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substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Ibid.* (internal citation & quotation marks omitted).

All three of these factors indicate that plaintiffs’ claims are not ripe for review. First, as explained above (pp. 3, 8, *supra*), plaintiffs have not alleged that they intend to engage in any conduct that might violate the Act. Thus, there is *no* “likelihood that the harm alleged will ever come to pass.” *Norton*, 298 F.3d at 554. This case is quite unlike the facial challenges to the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. 248, which prohibits not only violent conduct but also “threat[s] of force” and “physical obstruction.”³ The plaintiffs in *Norton*, for example, alleged that they had engaged in “protesting, praying and counseling on the sidewalks around” a Planned Parenthood clinic; that federal law enforcement officials had told the plaintiffs they might be arrested if they did not move their protests across the street from the clinic; and that they had limited their protest activities at the clinic because of these threats. *Norton v. Reno*, No. 4:00-CV-141, 2000 WL 1769580, at *1-2 (W.D. Mich. Nov. 24, 2000); see also *American Life League, Inc. v. Reno*, 855 F. Supp. 137, 139 (E.D. Va. 1994) (finding plaintiffs’ claims ripe only after they amended their complaint to allege that “their action at times has constituted, and in the future will constitute * * * ‘a physical obstruction’ * * * and that by so doing, they interfere with, and/or intimidate and/or injure abortion seekers and providers”), *aff’d*, 47 F.3d 642 (4th Cir.), cert. denied, 516 U.S. 809 (1995).

³ FACE provides criminal penalties for anyone, who “by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.” 18 U.S.C. 248(a)(1).

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Second, because they have brought a facial challenge to the Act, plaintiffs' claims exist in a factual vacuum. No offense has occurred. No offenders have been charged. There is no factual predicate to determine whether any particular application of the Act is constitutional. "Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review." *National Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997). "Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Id.* at 284.

Finally, because plaintiffs have not established any likelihood of harm resulting from enforcement of the Act, they will suffer no hardship if their claims are not reviewed.

II

THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Even if plaintiffs had standing and their claims were ripe, the complaint must be dismissed for failure to state a claim upon which relief can be granted. In addressing a motion to dismiss a complaint for failure to state a claim, a court "must take all the factual allegations in the complaint as true," but is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In addressing a facial challenge, a court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S.

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442, 450 (2008) (citing *United States v. Raines*, 362 U.S. 17, 22 (1960)); *Sabri v. United States*, 541 U.S. 600, 609-610 (2004) (“Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks. Facial adjudication carries too much promise of ‘premature interpretatio[n] of statutes’ on the basis of factually barebones records.”) (quoting *Raines*, 362 U.S. at 22).

A. *The Shepard-Byrd Hate Crimes Act Does Not Violate The Free Speech Or Expressive Association Protections Of The First Amendment*

The Shepard-Byrd Hate Crimes Act prohibits only willful, violent conduct. Such conduct is entitled to no protection under the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence. ‘Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy.’”) (quoting *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring)); *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (“A physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.”); *American Life League, Inc. v. Reno*, 47 F.3d 642, 648 (4th Cir.) (“The use of force or violence is outside the scope of First Amendment protection.”), cert. denied, 516 U.S. 809 (1995); *United States v. Rahman*, 189 F.3d 88, 114-116 (2d Cir. 1999) (statute prohibiting conspiracy to use force against the United States does not, on its face, violate the First Amendment), cert. denied, 528 U.S. 1094 (2000). Moreover, if there were any doubt, the Rules of Construction set forth in Section 4710(3)-(6) of the Act (see pp. 6-8, *supra*) ensure

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that the Act may not be enforced in such a way as to violate the First Amendment. The Act thus regulates conduct that is wholly outside the protection of the First Amendment.⁴

Plaintiffs' contention (Complaint ¶ 104) that the Act is overbroad is meritless. "The overbreadth doctrine is 'strong medicine'" to be applied "with hesitation, and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Particularly when a statute proscribes conduct and not pure speech, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615; see *Parker v. Levy*, 417 U.S. 733, 760 (1974) ("[E]ven if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.'") (citation omitted). Here, of course, the Act reaches *no* protected conduct. And, as the Court recognized in *Mitchell*, the mere possibility that any speech or association might be chilled is "too speculative a hypothesis to support [an] overbreadth claim." 508 U.S. at 488-489; see *United States v. Bowker*, 372 F.3d 365, 378 (6th Cir. 2004) ("We fail to see how a law that prohibits interstate travel with the intent to kill, injure, harass or intimidate has a substantial sweep of constitutionally protected conduct."), vacated on other grounds, 543 U.S. 1182 (2005).

Mitchell also makes it clear that the Act is not invalid because, just like numerous other anti-discrimination statutes, it prohibits only *bias-motivated* conduct. In *Mitchell*, the Court

⁴ As explained above (p. 17, *supra*), unlike 18 U.S.C. 248, the Hate Crimes Act does not "incidentally affect" *any* "conduct with expressive elements, such as peaceful but obstructive picketing." *Norton v. Ashcroft*, 298 F.3d 547, 552 (6th Cir. 2002). Thus it is not necessary to subject the Act to intermediate scrutiny. *Id.* at 553 (applying intermediate scrutiny to Section 248 as a content-neutral restriction that might incidentally affect protected expression).

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unanimously upheld a Wisconsin statute that increased the penalty for crimes motivated by bias, specifically rejecting a claim that the statute “punishes the defendant’s discriminatory motive, or reason, for acting.” 508 U.S. at 487. As *Mitchell* explained, “motive plays the same role under the Wisconsin statute as it does under federal and state anti-discrimination laws,” which the Court previously had upheld “as content neutral regulation of conduct.” *Ibid.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984); *Hishon v. King Spaulding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *R.A.V. v. St. Paul*, 505 U.S. 377, 389-390 (1992)). Moreover, Wisconsin justified the penalty-enhancement statute on the ground that bias-motivated “conduct is thought to inflict greater individual and societal harm.” *Mitchell*, 508 U.S. at 487-488; see also *id.* at 488 (“As Blackstone said long ago, ‘it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.’”) (quoting William Blackstone, 4 Commentaries *16). The Supreme Court concluded that the State’s determination to redress these harms indicated that the statute was not intended to punish offenders for their beliefs. *Id.* at 488. Similarly, Congress has determined that hate crimes pose special societal harms, finding that violence motivated by bias “disrupts the tranquility and safety of communities and is deeply divisive,” and that such violence not only affects the victim and his or her family and friends, but also “frequently savages the community sharing the traits that caused the victim to be selected.” Hate Crimes Act, Pub. L. No. 111-84, Div. E, Sec. 4702(2) & (5), 123 Stat. 2835 (see p. 5, *supra*). As in *Mitchell*, these findings indicate that Congress intended to remedy the harms caused by bias-motivated crimes, and that the Act was not intended to punish anyone because of their viewpoint.

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Mitchell also disposes of any contention that the Act is facially unconstitutional because its enforcement might involve the admission of evidence of the defendant's speech: "The First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like." 508 U.S. at 489. Of course, as *Mitchell* makes clear and as explained above (pp. 13-14, *supra*), such evidence generally is admissible to prove the *defendant's* motive. The Hate Crimes Act prohibits only violent conduct, not speech, and plaintiffs here do not allege that they intend to engage in any conduct that might subject them to prosecution under the Act. In any event, any disputes over the admission of arguably protected expression are best addressed in particular cases, where the relevance of the evidence may be weighed against any possible First Amendment implications.

As explained above (pp. 11-12, *supra*), there is no basis for plaintiffs' contention that their speech will be chilled because of fears that they might be charged with aiding and abetting a hate crime. Unless plaintiffs specifically intend to facilitate the commission of a violent offense prohibited by the Act, they have no plausible fear of prosecution. Their claim that their speech may be chilled for this reason "is simply too speculative a hypothesis to support" their claim. *Mitchell*, 508 U.S. at 488-489; see *Washington State Grange*, 552 U.S. at 450 (in addressing a facial challenge, a court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases").

Plaintiffs also err in contending that the Hate Crimes Act is "unconstitutionally vague * * * in violation of the First Amendment." Complaint ¶ 104. At the outset, we note that

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vagueness is a Due Process, not a First Amendment, doctrine. See *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008). “A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Ibid.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). The Hate Crimes Act is sufficiently clear to avoid either ground for vagueness. First, there is no “indeterminacy” or “subjectiv[ity]” about the statutory terms describing the other elements of the offense. See *Williams*, 128 S. Ct. at 1846. No one needs to guess at the meaning of a prohibition on causing “bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[ing] to cause bodily injury to any person.” 18 U.S.C. 249(a)(2). Nor is there anything vague about the prohibition of conduct undertaken “because of the actual or perceived * * * sexual orientation * * * of any person.” *Ibid.* Whether a defendant acted with the requisite intent is a “clear question[] of fact. Whether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment such as whether conduct is ‘annoying’ or ‘indecent.’” *Williams*, 128 S. Ct. at 1846. To be sure, prosecutions under any criminal statute may present close factual questions. But, as *Williams* explained, the problem of “close cases * * * is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.” *Ibid.* Further, the statute’s requirement that the offense be “willful” requires proof, beyond a reasonable doubt, that the defendant knew that his conduct was unlawful. *United States v. Carney*, 387 F.3d 436, 442 (6th Cir. 2004) (willfulness element requires proof that the defendant “understood the illegality of the pertinent charged conduct”); see *Village of Hoffman*

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Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) (“[A] scienter requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.”).

Finally, plaintiffs allege that the Shepard-Byrd Hate Crimes Act “has deterred, inhibited, and chilled the exercise of Plaintiffs’ right to expressive association.” Complaint ¶ 107. The Act, however, imposes absolutely no restrictions on association, let alone restrictions that might be constitutionally suspect. Freedom of “expressive association” relates to associations for the purpose of engaging in those activities protected by the First Amendment, such as speech, assembly, petition for the redress of grievances, and the exercise of religion protected under the Freedom of Speech Clause of the First Amendment. *Roberts*, 468 U.S. at 618. This right is not implicated by the proscriptions of the Hate Crimes Act, which, as explained above, merely proscribes willful, violent conduct, and does not limit protected speech, assembly, or association in any way.

B. The Shepard-Byrd Hate Crimes Act Does Not Violate The Free Exercise Clause Of The First Amendment

The Shepard-Byrd Hate Crimes Act prohibits only violent conduct. And violence is not protected by the Free Exercise Clause. *American Life League, Inc. v. Reno*, 47 F.3d 642, 656 (4th Cir.) (“We do not think the Free Exercise Clause shields conduct violating a criminal law that protects people and property from physical harm.”), cert. denied, 516 U.S. 809 (1995). Plaintiffs do not contend that their religious beliefs require them to commit violent acts. But even if they did, the Free Exercise Clause would not bar their prosecution for such acts or invalidate this statute. “[T]he right of free exercise does not relieve an individual of the

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obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (citation omitted); cf. *Rahman*, 189 F.3d at 117 (“The fact that [defendant’s] speech or conduct was ‘religious’ does not immunize him from prosecution under generally-applicable criminal statutes.”); *American Life League*, 47 F.3d at 654; *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995).

The Hate Crimes Act is a generally-applicable criminal law that is not directed at any religious practice or belief. The Act prohibits bias-motivated violence without regard to religious motivation. See *Smith*, 494 U.S. at 878-879. Its purpose is to prohibit violent conduct, not to suppress religious beliefs. Nothing in the Act limits the exercise or expression of religious beliefs. And, contrary to plaintiffs’ allegation, Complaint ¶ 111, the Act does not target anyone because of his or her religious beliefs. Like FACE, it “applies to anyone who violates its terms, regardless of ideology or message.” *Norton*, 298 F.3d at 553. Indeed, the Act prohibits not only violent conduct motivated by bias based on sexual orientation, but also conduct based on race, color, national origin, religion, gender, gender identity, and disability. See 18 U.S.C. 249. It prohibits such violent conduct whether the actor’s motivation is religious or secular. The Act does not “discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct because it is undertaken for religious reasons.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). It therefore does not violate the Free Exercise Clause.

Moreover, if there were any doubt, the Rules of Construction set forth in Section 4710(3)-(6) of the Act ensure that the Act may not be enforced in such a way as to violate the Free Exercise Clause.

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C. *The Shepard-Byrd Hate Crimes Act Does Not Violate Equal Protection*

Plaintiffs' Equal Protection claim simply misconstrues the statute. The Act does not “target[] Plaintiffs for disfavored treatment on account of [their] religious viewpoint.” Complaint ¶ 114. The Act does not exempt lesbians and gay men or those who support gay rights from its prohibitions. Complaint ¶ 115. It does not create “special rights, protections, and recognition” for any class of individuals. Complaint ¶ 116. The Act prohibits willful, violent conduct against individuals because of their actual or perceived sexual orientation, among other characteristics. Thus, it protects those who are physically attacked because of their heterosexuality as well as those who are physically attacked because they are gay or lesbian or bisexual. Cf. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that 42 U.S.C. 1981 prohibits discrimination against whites as well as against African Americans). The Act also prohibits willful, violent conduct against individuals based on their actual or perceived religion. Thus, it protects plaintiffs, along with everyone else, from violent attacks based upon their religious views. The Hate Crimes Act “applies to anyone who violates its terms, regardless of ideology or message.” *Norton*, 298 F.3d at 553. Congress undoubtedly had a rational basis for these prohibitions. See *Mitchell*, 508 U.S. at 488 (“State’s desire to redress these perceived harms [of bias-motivated crime] provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders’ beliefs or biases.”).⁵

⁵ Plaintiffs acknowledge that rational basis analysis is applicable here. Complaint ¶¶ 116-117.

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D. Enactment Of Section 249(a)(2) Of The Hate Crimes Act Was Authorized By The Commerce Clause

Plaintiffs contend (Complaint ¶ 120) that the Hate Crimes Act is unconstitutional because its enactment was not authorized by the Commerce Clause. Because plaintiffs are mounting a facial challenge to the Act, they can succeed on this claim only “by ‘establish[ing] that no set of circumstances exists under which the Act would be valid,’ *i.e.*, that the law is unconstitutional in all of its applications.” *Washington State Grange*, 552 U.S. at 449 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); see *Sabri*, 541 U.S. at 604-605.

The Commerce Clause authorizes Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. Art. I, § 8.

Congress’s Commerce power falls into three overlapping categories:

First, Congress may regulate the use of the channels of interstate commerce. * * * Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. * * * Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, * * * *i.e.*, those activities that substantially affect interstate commerce.

United States v. Lopez, 514 U.S. 549, 558-559 (1995); see *United States v. Page*, 167 F.3d 325 (6th Cir.) (en banc), cert. denied, 528 U.S. 1003 (1999).

Congress made specific findings about the nexus between hate crimes and interstate commerce (see pp. 5-6, *supra*), and it ensured that Section 249(a)(2) would be applied only to cases falling into one of the three *Lopez* categories by requiring proof of an interstate commerce element in every case. See 18 U.S.C. 249(a)(2)(B). The requirement that the prosecution prove at least one of these elements “ensure[s], through case-by-case inquiry,” *Lopez*, 514 U.S. at 561,

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that the prosecution “is in pursuance of Congress’ power to regulate interstate commerce,” *United States v. Morrison*, 529 U.S. 598, 613 (2000).⁶ The existence of the interstate commerce elements is thus fatal to plaintiffs’ claim that the Act is facially unconstitutional.

The interstate commerce elements in the statute are similar to those in other criminal statutes and fit comfortably within Congress’s Commerce power. Thus, it is clear that “circumstances exist under which the Act would be valid.” See *Washington State Grange*, 552 U.S. at 449 (citation omitted). It is well established, for example, that “the transportation of persons across state lines [is] a form of ‘commerce.’” *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997); *Caminetti v. United States*, 242 U.S. 470, 491 (1917). Thus, Congress has the authority to prohibit interstate travel with the intent to commit domestic violence. *Page*, 167 F.3d at 334-335 (Moore, J., concurring); *id.* at 336 (Kennedy, J., dissenting); *id.* at 338 (Ryan, J., dissenting); see *Morrison*, 529 U.S. at 613 n.5 (noting that “[t]he Courts of Appeals have uniformly upheld this criminal sanction as an appropriate exercise of Congress’ Commerce Clause authority”). It follows that Congress has the authority to prohibit bias-motivated violence where the offense occurs “during the course of, or as the result of, the travel of the defendant or the victim” either “across a State line or national border” or “using a

⁶ In *United States v. Corp*, 236 F.3d 325, 330-331 (6th Cir. 2001), abrogation recognized on other grounds in *United States v. Bowers*, 594 F.3d 522, 523 (6th Cir. 2010), the Sixth Circuit suggested that the presence of an interstate commerce element may not ensure the constitutionality of a statute if the element itself is so insubstantial as to provide almost no limitation at all. *Corp* specifically declined, however, to rule that the statute at issue in that case was facially unconstitutional. 236 F.3d at 332. Instead, it concluded that interstate commerce elements must be interpreted “as meaningful restrictions” and thus examined the interstate nexus in the case before it to determine whether the statute was constitutionally applied. *Ibid.*

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channel, facility, or instrumentality of interstate or foreign commerce.” See 18 U.S.C.

249(a)(2)(B)(i).

Congress also has the authority to regulate and protect instrumentalities of commerce, “even though the threat may come only from intrastate activities.” *United States v. McHenry*, 97 F.3d 125, 126-127 (6th Cir. 1996) (quoting *Lopez*, 514 U.S. at 558), cert. denied, 519 U.S. 1131 (1997). Thus, Congress may prohibit the use of the instrumentalities of commerce to facilitate the commission of an offense. See *United States v. Weathers*, 169 F.3d 336, 341-342 (6th Cir.) (upholding the application of the federal murder-for-hire statute, 18 U.S.C. 1958(a), where defendant used a cellular telephone in the commission of the offense), cert. denied, 528 U.S. 838 (1999).⁷ It follows that Congress similarly has the authority to prohibit bias-motivated violence where “the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the” offense. 18 U.S.C. 249(a)(2)(B)(ii).

Congress has the authority to prohibit the possession of firearms that have traveled in interstate commerce. *United States v. Bass*, 404 U.S. 336 (1971); *Scarborough v. United States*, 431 U.S. 563 (1977); *United States v. Napier*, 233 F.3d 394, 400-402 (6th Cir. 2000). Thus, it may prohibit the use of firearms or incendiary devices that have moved in interstate commerce to commit bias-motivated violence. See 18 U.S.C. 249(a)(2)(B)(iii).

In addition, Congress has the authority to regulate activities that substantially affect interstate commerce, *Lopez*, 514 U.S. at 559; *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Thus,

⁷ 18 U.S.C. 1958(a) declares it unlawful, *inter alia*, “to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value.”

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Congress may prohibit violent conduct, such as robbery and extortion, that “in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce.” 18 U.S.C. 1951(a); see *United States v. Green*, 350 U.S. 415, 416, 417, 420-421 (1956) (holding that application of Hobbs Act to attempt to extort payments from employer through threats of violence was consistent with Commerce Clause); *United States v. Baylor*, 517 F.3d 899, 900-903 (6th Cir.) (upholding application of Hobbs Act to robbery of a restaurant upon proof that offense had a *de minimis* effect on interstate commerce), cert. denied, 128 S. Ct. 2982 (2008). It follows that Congress may prohibit bias-motivated violence where the offense “(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or (II) otherwise affects interstate or foreign commerce.” 18 U.S.C. 249(a)(2)(B)(iv). This element would be established, for example, if a defendant caused bodily injury by firebombing a gay bar that participates in the interstate market for goods and services. Cf. *Baylor*, 517 F.3d at 901-903; *United States v. Rayborn*, 312 F.3d 229 (6th Cir. 2002) (holding that church had sufficient nexus to interstate commerce to satisfy the interstate commerce element of the federal arson statute, 18 U.S.C. 844(i), which requires that the building be used in an activity affecting interstate commerce).

Because proof of one of these interstate commerce elements in every case will ensure that the prosecution “is in pursuance of Congress’ power to regulate interstate commerce,” *Morrison*, 529 U.S. at 613, plaintiffs’ facial challenge must be rejected.

E. Enactment Of The Hate Crimes Act Did Not Violate The Tenth Amendment

The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the

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people.” Plaintiffs contend that the Hate Crimes Act violates the Tenth Amendment because the power to enact it “was ‘not delegated’ to Congress by the United States Constitution.”

Complaint ¶ 124. As explained in Part II.D., *supra*, however, the Act is well within Congress’s legislative authority under the Commerce Clause. The Act therefore does not violate the Tenth Amendment. “If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.” *New York v. United States*, 505 U.S. 144, 155 (1992).

Congress addressed federalism concerns in the Act by requiring proof of an interstate commerce element in every prosecution under 18 U.S.C. 249(a)(2), and by requiring the Attorney General or his designee to certify, before a case is brought under the Act, that: “(A) the State does not have jurisdiction; (B) the State has requested that the Federal Government assume jurisdiction; (C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or (D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.” 18 U.S.C. 249(b).

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CONCLUSION

Plaintiffs' complaint should be dismissed for lack of jurisdiction. In the alternative, plaintiffs' complaint should be dismissed for failure to state a claim upon which relief can be granted because the Shepard-Byrd Hate Crimes Act does not violate the First Amendment, the Equal Protection Clause of the Fifth Amendment, the Commerce Clause, or the Tenth Amendment.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on April 15, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

THOMAS MORE LAW CENTER
Robert J. Muise, Esq. (P62849)
Richard Thompson, Esq. (P21410)
Keith Corbett, Esq. (P24602)

I further certify that I have mailed by U.S. mail the paper to the following non-ECF participants:

None

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Department of Justice

STATEMENT OF

**THOMAS E. PEREZ
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS
UNITED STATES SENATE**

ENTITLED

**“EMPLOYMENT NON-DISCRIMINATION ACT:
ENSURING OPPORTUNITY FOR ALL AMERICANS”**

PRESENTED

NOVEMBER 5, 2009

**Statement of
Thomas E. Perez
Assistant Attorney General
Department of Justice
Before the
Committee on Health, Education, Labor and Pensions
United States Senate
At a Hearing Entitled
“Employment Non-Discrimination Act: Ensuring Opportunity for All Americans”
November 5, 2009**

Mr. Chairman, Ranking Member Enzi and members of the HELP Committee, thank you for the opportunity to appear before you today. It is a privilege to represent the Obama Administration and the Department of Justice at this hearing to consider the Employment Non-Discrimination Act (ENDA), and to voice the Administration’s strong support for fully-inclusive legislation that prohibits discrimination on the basis of sexual orientation and gender identity.

The Civil Rights Division, which I have the great honor to lead, serves as the conscience of the federal government. Our mission is clear: to uphold and protect the civil and constitutional rights of all Americans, particularly some of the most vulnerable among us. We seek to advance this Nation’s long struggle to embrace the principle so eloquently captured by Dr. Martin Luther King, Jr., that persons should be judged based on “content of their character,” and not on their race, color, sex, national origin, religion or any other irrelevant factors. Our civil rights laws – laws enforced by the Civil Rights Division – reflect and uphold this noble principle.

Just last month Congress passed and the President made history when he signed the first federal law that provides civil rights protections to lesbian, gay, bisexual and transgender (LGBT) individuals. I applaud you for recognizing the critical need for the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, and I assure you the Department of Justice is prepared to fulfill its new duties under that law. Its enactment filled a critical gap in our enforcement abilities. Today, I come before you because passage of ENDA would provide us with the tool we need to fill another hole in our enforcement authority.

On an issue of basic equality and fundamental fairness for all Americans, we cannot in good conscience stand by and watch unjustifiable discrimination against lesbian, gay, bisexual and transgender individuals occur in the workplace without redress. We have come too far in our struggle for “equal justice under the law” to remain silent or stoic when our LGBT brothers and sisters are still being mistreated and ostracized for reasons that have absolutely nothing to do with their skills or abilities and everything to do with myths, stereotypes, fear of the unknown, and prejudice. No American should be denied a job or the opportunity to earn promotions, pay raises and other benefits of employment because of his or her sexual orientation or gender

identity, which have no bearing on work performance. No one should be fired because he or she is gay, lesbian, bisexual or transgender. Period. ENDA would provide much needed and long overdue federal protections for LGBT individuals, who still face widespread discrimination in workplaces across the Nation. For this reason, the passage of ENDA is a top legislative priority for the Obama Administration.

Broadly stated, ENDA would prohibit intentional employment discrimination on the basis of actual or perceived sexual orientation or gender identity, by employers, employment agencies, and labor organizations. Its coverage of intentional discrimination parallels that available for individuals under Title VII, and the principles that underlie this coverage have been well-established for decades. Under ENDA, we would share responsibility for its enforcement with the Equal Employment Opportunity Commission (EEOC). Our role would be to challenge prohibited discrimination by state and local government employers.

The Civil Rights Division and other federal civil rights agencies regularly receive letters and inquiries from individuals all over the country complaining of sexual orientation and gender identity discrimination in employment. This ongoing discrimination and abuse takes many forms, ranging from cruel instances of harassment and exclusion to explicit denials of employment or career-enhancing assignments because of the individual's sexual orientation or gender identity. It is painfully disappointing to have to tell these working men and women that, in the United States of America in 2009, they may well be without redress because our federal employment anti-discrimination laws either exclude them or fail clearly to protect them.

Many letters sadly describe the same kind of hostility, bigotry and even hatred that other groups faced for much of our history, and which Congress responded to by passing the landmark Civil Rights Act of 1964. That Act prohibited employment discrimination on the basis of race, color, religion, sex, or national origin. At the time the bill was debated, many of the same arguments that we hear today about ENDA – that it would open the floodgates to litigation, it would overburden employers and afford special rights to certain groups – were vociferously offered by the bill's opponents. No one would seriously contend that the parade of horrors predicted at the time ever became reality, and the 1964 Act, which, like ENDA, was introduced over multiple Congresses before it finally passed, has become a rock-solid foundation for our laws ensuring equality of opportunity in the workplace.

Throughout the decades that followed passage of the 1964 Act, we as a nation have recognized a need to attend to unfinished business in the fight for justice in the workplace. Accordingly, Congress has expanded the scope of employment protections on several occasions, passing the Age Discrimination in Employment Act of 1967, the Pregnancy Discrimination Act of 1978, and the Americans With Disabilities Act of 1990. The Obama Administration believes that ENDA must be the next step, and that this Act will be a worthy addition to its venerable predecessors.

It is estimated that there are more than one million LGBT individuals working in state and local governments and just under seven million LGBT individuals employed in the private sector. A large body of evidence demonstrates that employment discrimination against LGBT individuals remains a significant problem. The Williams Institute, a national research center on sexual orientation and gender identity law and public policy at the UCLA School of Law, conducted a year-long study of employment discrimination against LGBT individuals. The study reviewed the numerous ways in which discrimination has been documented – in judicial opinions; in surveys of LGBT employees, state and local government officials; and in extensive evidence presented to Congress over the past fifteen years during which ENDA has been considered. The study concluded that discrimination based on sexual orientation and gender identity is widespread and persistent in terms of quantity, geography and occupations. The study focused primarily on discrimination against LGBT employees of state and local governments, but also reviewed broader surveys that indicate that the problem is equally widespread in the private sector.

To combat the widespread employment discrimination against LGBT individuals, some states have passed laws banning discrimination based on sexual orientation and gender identity. However, 29 states still provide no protections for lesbian, gay and bisexual individuals and 38 states provide no protection for transgender workers. State laws therefore leave large numbers of LGBT individuals without recourse for workplace discrimination on the basis of the sexual orientation or gender identity.

Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act and other bedrock civil rights laws recognize that protecting valued members of our workforce from discrimination should not be left to a patchwork of state and local laws that leaves large gaps in coverage. Discrimination in my home state of Maryland is just as wrong as discrimination in Montana. As with those laws, federal legislation prohibiting discrimination based on sexual orientation and gender identity will help eradicate workplace discrimination that should be neither tolerated nor condoned.

To underscore the need for a federal statute, I would like to review the current scope of the law. 21 states – including Connecticut, Nevada, New Hampshire, and Maryland – prohibit employment discrimination based on sexual orientation. Another 12 states – including Iowa, New Mexico, Oregon, Colorado, Minnesota, Washington, Rhode Island, and Vermont – as well as the District of Columbia, prohibit discrimination based on sexual orientation and gender identity. A number of local jurisdictions contain similar protections in their local laws. For example, in my home state of Maryland, Baltimore City and Montgomery County have expanded the protections available under state law by banning employment discrimination against transgendered individuals.

In states where no remedies exist, LGBT employees have no opportunity to combat egregious workplace discrimination and harassment. The recent report of the Williams Institute documents a distressing number of such allegations. For example:

- A police officer at the Pineville City Police Department in West Virginia reported regular harassment by his coworkers because of his sexual orientation, who deliberately sent him on calls without back-up. After learning of the officer's sexual orientation, one coworker allegedly hit him across the face with a night stick, breaking the officer's glasses and cutting his eye. The officer believes that his eventual discharge was based on his sexual orientation and not his job performance.
- An openly lesbian probation officer in Carroll County, Indiana, was allegedly denied promotion to chief probation officer because of her sexual orientation. A superior court judge allegedly told her that he would not promote her because she was a lesbian, that she was embarrassing the court by dating a woman, and that he had asked other court employees about her sexual orientation and personal life. A man with no prior probation experience was promoted to the position.
- An employee of the Virginia Museum of Natural History, a state agency, was allegedly forced to resign because of his sexual orientation shortly after receiving a positive evaluation that otherwise would have resulted in a raise. The Executive Director of the Museum reportedly expressed concerns that the employee's sexual orientation would jeopardize donations to the museum. A Virginia appellate court dismissed his sexual orientation employment discrimination claim, holding that the governor's executive order prohibiting such discrimination did not create a private right of action.

These examples – which would fall within the Civil Rights Division's enforcement authority under ENDA – are but a sampling of a disturbing number of reports of workplace discrimination against LGBT Americans in recent years. Unfortunately, the above LGBT employees have no opportunity to prove their claims, because they live in states that do not afford them redress.

The Williams Institute estimates that there are more than 200,000 LGBT employees in the federal workforce, yet, as in the case of state and local governments, we also lack strong statutory protection from sexual orientation and gender identity discrimination in this arena. The Civil Service Reform Act, which prohibits discrimination on the basis of conduct not affecting job performance, has been interpreted by the Office of Personnel Management to prohibit discrimination on the basis of sexual orientation. In addition, Executive Order 13087 prohibits employment discrimination on the basis of sexual orientation in much of the Executive Branch. But the administrative remedies available under both of these provisions are far more limited than those available to federal employees who experience other forms of discrimination, such as race, sex, or disability discrimination.

Moreover, although some courts have held that Title VII's prohibition against sex discrimination can protect LGBT persons from certain types of discrimination under certain circumstances, the extent of such protection varies significantly from court to court. Enactment

of legislation prohibiting discrimination against LGBT individuals in employment is needed to meaningfully and unambiguously prohibit employment discrimination on the basis of sexual orientation and gender identity and to give victims of such discrimination adequate remedies.

Preventing employment discrimination on the basis of sexual orientation and gender identity and providing the victims of such discrimination with a means to protect their rights not only is a matter of basic fairness, it is also a matter of enlightened economic self-interest. As the global marketplace becomes increasingly competitive, and as we work to revitalize and strengthen our economy, America cannot afford to waste talent or allow workplace bias and hostility to impede productivity, especially when many businesses operate in multiple cities and states. There is no reason why, for example, LGBT employees working for a company in Wisconsin, which was the first state to prohibit discrimination against LGBT individuals, should have their right to earn a living jeopardized or taken away if they are transferred across the lake to Michigan, which has not yet passed such a law.

Many of America's top businesses already recognize that discrimination of any kind, anywhere, is bad for business and costs money. Indeed, hundreds of companies now bar employment discrimination on the basis of sexual orientation and/or gender identity. According to the Human Rights Campaign's recently published Corporate Equality Index 2010, as of September 2009, 434 (87%) of the Fortune 500 companies had implemented non-discrimination policies that include sexual orientation, and 207 (41%) had policies that include gender identity. This, of course, is just the tip of the iceberg. Although most of the nation's largest businesses have started addressing workplace fairness for LGBT employees, significant numbers of individuals still face discrimination on the basis of sexual orientation or gender identity and desperately need the nationwide protections and remedies that ENDA would provide.

I have explained why legislation like ENDA is sorely needed in the private and public sectors and why it makes good business sense. We look forward to working with you on legislation as it advances in the Congress and are currently reviewing the proposed legislation. We may offer some technical comments on the bill. Now let me take a few moments to briefly dispel some misconceptions about the scope and impact of the legislation.

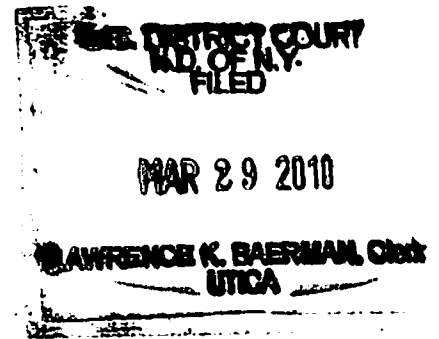
As you know, ENDA covers cases of intentional discrimination and explicitly precludes disparate-impact claims, does not permit the use of quotas or other forms of preferential treatment. Moreover, ENDA does not apply to small businesses with fewer than 15 employees, tax-exempt private membership clubs, or religious organizations. Indeed, ENDA contains a broad exemption for religious organizations and states that it does not apply to any corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of Title VII. In addition, nothing in ENDA infringes on an individual's ability to practice his or her faith, to hold and adhere to religious beliefs, or to exercise First Amendment rights of free speech on these or other issues. In addition, ENDA does not apply to the relationship between the federal government and members of the armed forces, and does not affect federal, state, or local rules providing veterans' preferences in employment decisions.

Lastly, there is nothing to suggest that ENDA will burden employers, unleash a flood of complaints that would threaten to overwhelm the EEOC or the Department of Justice, or clog the federal courts. On the contrary, the experience of states and local governments with sexual orientation and gender identity discrimination statutes for decades demonstrates that complaints under these statutes make up a relatively small portion of total employment discrimination complaints. Moreover, the jurisdictions that prohibit discrimination on the basis of sexual orientation and gender identity have been able to implement and enforce these laws in an entirely workable manner. We fully expect that the same would hold true at the federal level.

I will conclude by noting what a great honor it is for me to testify about a legislative initiative of the late Senator Ted Kennedy, who championed ENDA for more than a decade and who constantly reminded us that civil rights are the great unfinished business of our nation. I can think of no better way to honor his life and work than to pass ENDA and provide sorely-needed protections from arbitrary and unjustified discrimination to LGBT individuals in the workplace throughout our nation.

Thank you once again for the opportunity to testify. I welcome your questions.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK



**J.L., a minor child, by his father and
natural guardian, ROBERT SULLIVAN,**

Plaintiff,

**STIPULATION AND
SETTLEMENT
AGREEMENT**

**Civil Case No.: 09-CV-943
(DNH/DEP)**

**MOHAWK CENTRAL SCHOOL DISTRICT;
JOYCE CAPUTO, Superintendent of Mohawk
Central School District; EDWARD RINALDO,
Principal of Gregory B. Jarvis Junior/Senior High
School; CYNTHIA STOCKER, Equal
Opportunity Compliance Officer,**

Defendants.

**WHEREAS, Plaintiff, a former student of the Mohawk Central School District by his
father and natural guardian, brought this action on or about August 18, 2009, alleging claims
under the Equal Protection Clause of the United States Constitution, Title IX of the Education
Amendment of 1972, 20 U.S.C. § 1681, et seq., and state law;**

WHEREAS, the United States sought to intervene in this action;

WHEREAS, Defendants deny any liability arising from Plaintiff's allegations;

**WHEREAS, the parties and the United States wish to resolve matters relating to
Plaintiff's claims without the need for continued litigation over the claims set forth in the
Amended Complaint or as to any defenses to those claims;**

**IT IS STIPULATED AND AGREED by and between the parties and the United States,
and their respective counsel, that:**

1. Defendant Mohawk Central School District shall issue one check, payable to Robert Sullivan as trustee of the "J.L. [REDACTED] 2010 Trust," in the amount of \$50,000.00, as payment in full for all claims asserted by Plaintiff herein. Defendant Mohawk Central School District also shall issue one check, payable to the New York Civil Liberties Union Foundation (NYCLU) in the amount of \$25,000.00, in full settlement of Plaintiff's claims for attorneys' fees. Said checks shall be delivered to Plaintiff's counsel no later than thirty (30) days following the execution of this agreement.

2. Defendant Mohawk Central School District shall provide reimbursement for counseling services for Plaintiff J.L. These shall consist of counseling sessions with a licensed psychiatrist, psychologist, therapist, or social worker with specific training in lesbian, gay, bisexual, and transgender youth issues. Defendant Mohawk Central School District shall reimburse Plaintiff's documented expenses for counseling sessions, not to exceed one session per week and/or the sum of \$100 per week, within thirty (30) days of receipt of an invoice prepared by the counselor. Defendant Mohawk Central School District shall be obligated to provide such payment for counseling services received through June 30, 2013.

3. Defendant Mohawk Central School District shall retain an expert mutually agreed upon by the District, the NYCLU, and the United States in the area of the prevention of sex- and sexual orientation-based harassment in schools, for purposes of conducting a review of the District's policies and practices concerning the prohibition and prevention of discrimination and harassment in the District. That review shall include, but not be limited to: (1) a review of those policies that relate to the prohibition of discrimination and harassment based on sex, gender identity, gender expression, and sexual orientation; (2) an analysis of the practices and procedures associated with the implementation of those policies; and (3) an analysis of the role of

the District's Title IX officer with respect to the enforcement of the District's harassment and discrimination policies and procedures, including the Title IX officer's role in investigating and resolving complaints of harassment or discrimination based on sex, gender identity, gender expression, and sexual orientation.

4. Defendant Mohawk Central School District shall develop and implement a comprehensive dissemination plan for the policies and procedures referenced in paragraph 3 to ensure annual dissemination to all District staff, parents or guardians, and students affected by the policies.

5. Defendant Mohawk Central School District shall retain the services of an expert in the area of the prevention of sex- and sexual orientation-based harassment in schools to conduct annual training sessions, to be held at the Mohawk Central School District, for purposes of training and instruction of its staff in the prohibition of discrimination generally and with respect to the prohibition of discrimination and harassment based on sex, gender identity, gender expression, and sexual orientation. This instruction shall include an emphasis on the affirmative obligation of staff to identify and report potential incidents of discrimination, bullying, and harassment based on sex, gender identity, gender expression, and sexual orientation. Staff whose responsibilities include supervision of students will be directed to attend such training sessions.

6. Defendant Mohawk Central School District herewith stipulates that it has retained the services of the Anti-Defamation League to provide such training and instruction for staff and, to the extent deemed appropriate by the Anti-Defamation League, for students as well.

7. To document its compliance with the District's policies and procedures related to complaints of harassment or discrimination, Defendant Mohawk Central School District agrees to maintain records of its investigation of and response to each incident of alleged harassment or

discrimination perpetrated against any student, which shall be retained for at least five years from the date of the alleged events at issue. Such records shall include all documentation gathered during the course of the District's investigation and resolution processes, including, but not limited to documentation of complaints or allegations of harassment or discrimination, interview notes, discipline referrals, and documentation of complaint resolution.

8. Defendant Mohawk Central School District shall provide reports to Plaintiff's counsel at the NYCLU, and the United States, through its undersigned counsel, regarding its compliance with this agreement on June 30 of each year. From the entry of this agreement, or the date of the last compliance report, whichever is later, each compliance report shall include, but not be limited to: (1) current copies of the District's policies that prohibit discrimination and harassment in the District, indicating all changes to the policies and procedures; (2) a description of the training provided by the District and/or the agreed upon expert to the District's staff and students as described in paragraph 5, including the content of such training, materials disseminated or used in the training, and identification of those participating in the training; (3) a copy of the expert's recommendations regarding modifications to the District's harassment and discrimination policies, procedures, and practices; and (4) summaries of the reporting, investigation and resolution of complaints of discrimination and harassment based on sex and sexual orientation in the District. Such summaries will include, but shall not be limited to, identification of any complaints of discrimination or harassment based on sex or sexual orientation that the District receives, a description of the allegations in each such complaint, and a description of the actions taken by the District to respond to and resolve each such complaint. The NYCLU and the United States shall retain the right to review any records regarding the reported complaints of discrimination or harassment to the extent permitted by the Family

Education Rights and Privacy Act (FERPA).

9. The training component and reporting requirements outlined in paragraphs 5-8 shall remain in effect through June 30, 2013. Thereafter, no further reports shall be forwarded to the NYCLU or the United States. The District shall then be free to determine for itself the appropriate program for training and instructing of students and staff.

10. In conjunction with any press release regarding this agreement, the parties and the NYCLU shall issue the attached joint statement concerning the fact that the parties have mutually reached a settlement agreement and have worked cooperatively to resolve this matter. While it is recognized that the parties and their counsel may speak publicly concerning the settlement of this litigation, the parties and their counsel further agree that they will not make any statement or cause any statement to be made on their behalf to the press regarding the allegations of the Complaint and Amended Complaint filed in this action that would disparage, demean, or impugn the other parties to this agreement, nor shall either party or their counsel represent this agreement as an admission of wrongdoing on the part of any other party.

11. The United States agrees that it shall not represent this agreement as an admission of liability on the part of the District or any of the individual Defendants. The United States further agrees that in written public statements, the United States shall not identify individual District employees by name (*e.g.*, Jane Doe), but instead will use titles (*e.g.*, principal) or the Mohawk Central School District to refer to the Defendants in this litigation.

12. In consideration of this settlement agreement, Plaintiff shall voluntarily dismiss with prejudice, by Stipulation of Dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), this action against Defendants Mohawk Central School District, Joyce Caputo, Edward Rinaldo, and Cynthia Stocker. Said Stipulation of Dismissal shall be filed with the Court no later than thirty

(30) days from the date of the execution of this agreement. It is understood and agreed that the dismissal of the action as to the individual Defendants shall be complete and unconditional and they shall not have any individual responsibility to carry out any of the requirements of this agreement, except (to the extent applicable) as employees of Defendant Mohawk Central School District.

13. Plaintiff shall release and forever discharge Defendants Mohawk Central School District, Joyce Caputo, Edward Rinaldo, and Cynthia Stocker, the Board of Education of the Mohawk Central School District, its employees and agents, from all actions, causes of action, suits, debts, sums of money, controversies, trespasses, claims and demands whatsoever in law or in equity, including claims for attorneys' fees, which Plaintiff may have had, have now, or at any time in the past held, up to the date of this release, that are or should have been known to Plaintiff. It is also understood and agreed that this settlement agreement shall be executed by Robert Sullivan, as parent and natural guardian of Plaintiff J.L., a minor child, and it is further represented and warranted that Robert Sullivan has the legal capacity and authority to execute said settlement agreement on behalf of the minor child J.L., and to fully settle and resolve all claims against the above-named persons and/or entities.

14. In consideration of this settlement agreement, the United States shall voluntarily withdraw its Motion to Intervene with prejudice. The United States shall notify the Court of this withdrawal no later than thirty (30) days from the date of the execution of this agreement. It is understood and agreed that the withdrawal of the action as to the individual Defendants shall be complete and unconditional and they shall not have any individual responsibility to carry out any of the requirements of this agreement, except (to the extent applicable) as employees of Defendant Mohawk Central School District.

15. This settlement agreement is a compromise of disputed claims. It is not to be construed as an admission of liability on the part of any named person herein, including the Mohawk Central School District, its officers, Board of Education members, employees, or agents, including but not limited to Joyce Caputo, Edward Rinaldo, and Cynthia Stocker. The settlement agreement is not to be construed as an admission of liability on the part of any of the above-named persons nor is it an admission that any individual included herein took any unlawful, wrongful act, or that it or their conduct in any way violated a state, federal, or local law, rule, or regulation.

16. The parties hereto and the United States agree that this stipulation contains the final and complete understandings between the parties and the United States, and that the terms herein are contractual, and that those terms supersede all prior agreements and understandings, whether written or oral.

17. The parties and the United States further agree that this stipulation of settlement shall be construed in accordance with the laws of the State of New York, and that its provisions shall be enforceable in the nature of a contract under state law. If any provision of this agreement shall, for any reason, be held to be invalid or unenforceable, such invalidity or unenforceability shall not affect or impair any other provision of this agreement, but it shall be construed as if the invalid or unenforceable provision had never been contained in the settlement agreement. Further, to the extent there are any future disputes regarding compliance with this agreement, the parties and the United States first shall work in good faith to resolve the issues amicably before seeking resolution in court.

18. Plaintiff J.L., by and through his father, Robert Sullivan, is represented by counsel of his choosing, namely lawyers employed by the NYCLU. Plaintiff acknowledges that he has

read this settlement agreement and that he understands its terms and provisions. Plaintiff further acknowledges that he, through his father Robert Sullivan, has executed this agreement freely and voluntarily, with full understanding of the consequences of the execution of this agreement.

19. This agreement shall be binding upon Plaintiff J.L., by and through his father Robert Sullivan, and upon J.L.'s heirs, successors, assigns, and legal representatives, and the United States, through its undersigned counsel. This agreement also shall be binding upon the Mohawk Central School District and its agents, employees, successors, and assigns.

20. Plaintiff J.L., by and through his father Robert Sullivan, acknowledges and understands that the compensation provided for herein is the sole and exclusive compensation to which he shall be entitled under the terms of this agreement. Plaintiff further agrees and acknowledges that he shall not be entitled to any additional form of compensation or assistance from the Mohawk Central School District in connection with this litigation.

21. All parties herein and the United States understand and agree that each has not relied upon any representation or statement made by any other party or the employees, agents, or attorneys of that other party, except as expressly set forth herein.

22. **IN WITNESS WHEREOF**, the parties hereto and the United States have caused this settlement agreement, consisting of eleven (11) pages, including the signature pages, to be duly executed on the date indicated below.

23. The parties and the United States further acknowledge that this settlement agreement is not valid until it has been approved by the United States District Court for the Northern District of New York.

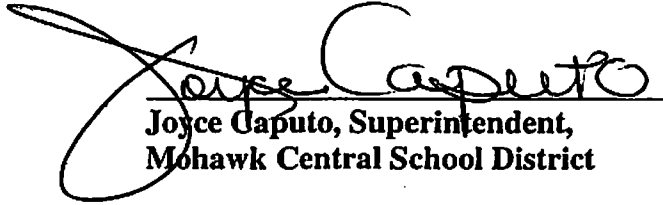
Robert Sullivan
J.L., by his father, **Robert Sullivan**

State of New York)
County of Herkimer) ss.:

On the 24 day of March 2010 before me, the undersigned, personally appeared **Robert Sullivan**, who is personally known to me or proved to me on the basis of satisfactory evidence to be the individual who executed this instrument, and that by his signature on the instrument, the individual, or the person upon whose behalf the individual acted, executed the instrument.

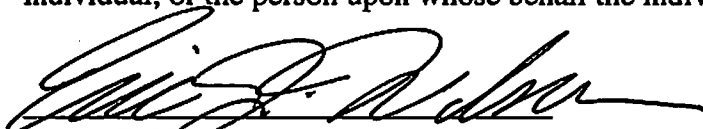
Marie K. Hennings
Notary Public

MARIE K. HENNINGS
Notary Public in the State of New York
No. 4833402
Registered in Herkimer County
My Commission Expires 08/31/2013

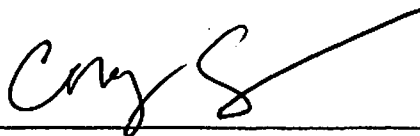

Joyce Caputo, Superintendent,
Mohawk Central School District

State of New York)
County of Herkimer) ss.:

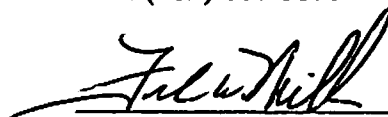
On the 9th day of March ~~February~~ 2010 before me, the undersigned, personally appeared **Joyce Caputo**, who is personally known to me or proved to me on the basis of satisfactory evidence to be the individual who executed this instrument, and that by her signature on the instrument, the individual, or the person upon whose behalf the individual acted, executed the instrument.


Notary Public

Eric J. Wilson
Notary Public, State of New York
Qualified in Onon. Co. No. 02148112251
Commission Expires July 19, 2012



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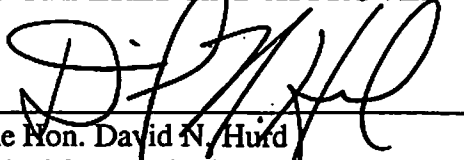


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Civil Rights Division
Educational Opportunities Section
950 Pennsylvania Ave, PHB Suite 4300
Washington, DC 20530
Phone: (202) 616-9939
Fax: (202) 514-8337

SO ORDERED AND APPROVED



The Hon. David N. Hurd
United States District Court, Northern District of New York

March 29, 2010
Utica, N.Y.

JOINT STATEMENT OF THE PARTIES ON SETTLEMENT OF THE *J.L. v. MOHAWK CENTRAL SCHOOL DISTRICT* LITIGATION

The Mohawk Central School District and a former student of the school district today jointly announced the settlement of a federal civil rights lawsuit filed last August.

The 15-year-old student alleged in the lawsuit that the school district was deliberately indifferent to harassment based on sex and sexual orientation and failed to take steps to protect him from it. The Justice Department had sought to intervene in the case on behalf of the student. The school district has denied the allegations and today's settlement does not constitute an admission of liability or wrongdoing by the school district or any of its employees.

As part of the settlement, the school district agreed to undertake several measures designed to prevent and address harassment based on sex, gender identity, gender expression and sexual orientation. The school district also agreed to keep the New York Civil Liberties Union, who represented the student in the lawsuit, and the Justice Department informed of these efforts as well as its ongoing response to complaints of discrimination and harassment. The student has agreed to dismiss the lawsuit against the school district and its employees, and the Justice Department agreed to withdraw its motion to intervene.

With these changes, the school district and the NYCLU look forward to working together, along with the Justice Department, and hope that the Mohawk Central School District can serve as a model for other school districts confronting issues of bullying and intolerance of lesbian, gay, bisexual, transgender, and gender non-conforming students.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

J.L., a minor child, by his father and)
natural guardian, ROBERT SULLIVAN)
)
Plaintiff,)
)
and)
)
UNITED STATES OF AMERICA,)
)
Plaintiff-Intervenor)
)
v.)
)
MOHAWK CENTRAL SCHOOL)
DISTRICT, et. al.)
)
Defendants.)
)
)
)
)

6:09 Cv. 943 (DNH) (ECF CASE)

JURY DEMAND

**JUDGE HURD
MAGISTRATE JUDGE PEEBLES**

**MEMORANDUM OF LAW IN SUPPORT OF
THE UNITED STATES' MOTION TO INTERVENE**

PRELIMINARY STATEMENT

The United States of America (“United States”) respectfully submits this memorandum of law in support of its motion to intervene in the action entitled *J.L. v. Mohawk Central School District, et al.*, 6:09 Cv. 943 (N.D.N.Y.). The United States seeks to intervene in this case pursuant to Federal Rules of Civil Procedure 24(a) and 24(b), and Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2. For the reasons set forth below, the United States satisfies the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(1). In the alternative, the United States satisfies the requirements for intervention as of right under Federal

Rule of Civil Procedure 24(a)(2) and permissive intervention under Rule 24(b). Accordingly, we respectfully request that the Court grant the United States' motion to intervene.

PROCEDURAL HISTORY

On August 18, 2009, J.L., a minor, by his father, Robert Sullivan, filed suit against the District and school district officials, including Superintendent Joyce Caputo, former Principal of Gregory B. Jarvis Jr./Sr. High School ("Jarvis"), Edward Rinaldo, and the District's Title IX Compliance Officer, Cynthia Stocker, alleging that the Defendants discriminated against Plaintiff based on sex due to their failure to take appropriate action in response to known incidents of persistent and derogatory name-calling, threats, physical assaults, and harassment of a sexual nature. Plaintiff pled violations of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title IX of the Education Amendments of 1972 ("Title IX"), one count of negligent supervision, and violations of several provisions of New York Human Rights Laws. On September 10, 2009, Plaintiff filed an amended complaint to perfect his state law claims. The Court's October 9, 2009 Pretrial Scheduling Order provides that discovery closes April 30, 2010 and dispositive motions are not due until June 30, 2010. To date, the parties have engaged in settlement negotiations and very limited discovery.

On November 6, 2009, the United States requested that the District provide information related to the allegations in the complaint. On December 8-9, 2009, the United States conducted interviews of Principal Rinaldo, Principal Speich (current principal), Superintendent Caputo, Ms. Stocker, and several teachers and aides at Jarvis. Since that time, J.L. has withdrawn from the District and now attends high school in a neighboring district. Based on the information it gathered, the United States determined that the District had violated the Equal Protection Clause

and Title IX. On January 7, 2010, the Assistant Attorney General, pursuant to 42 U.S.C. § 2000h-2, authorized intervention by certifying that this is a case of general public importance.

FACTUAL ALLEGATIONS

As stated in the attached complaint-in-intervention, J.L. is a fourteen year old male whose gender expression does not conform to male stereotypes. J.L. dyes his hair, wears make-up and nail polish, and engages in physical expressions that are stereotypically female, *e.g.*, swinging his hips and singing in a high pitched voice. Throughout the 2007-08 school year, when J.L. was in seventh grade, students at Jarvis subjected J.L. to verbal sex-based harassment on a regular basis based on J.L.'s failure to conform to gender stereotypes. Throughout the 2008-09 school year, when J.L. was in the eighth grade, students at Jarvis continued to harass J.L. based on the perception that J.L. did not look or act like other boys. Students at Jarvis persisted in verbally harassing J.L. on a daily basis. J.L. also was threatened, intimidated, and physically assaulted based on his non-masculine expression. From the start of the 2009-10 school year through December 2009, the fall of J.L.'s ninth grade year, students continued to verbally and physically harass J.L., including harassment of a sexual nature.

District officials with the authority to address the harassment, including Principal Rinaldo and Principal Speich, were informed by J.L.'s father of the repeated incidents of harassment. Despite the District's knowledge of harassment based on sex against J.L., it was deliberately indifferent, resulting in increasingly severe and pervasive harassment of J.L. during his time at Jarvis. In almost all of the numerous complaints to the principals, the District failed to investigate, or conducted incomplete investigations of the allegations. The District's deliberate indifference prevented Plaintiff from enjoying the educational benefits and opportunities provided by the District. Over the two and a half year period of harassment, J.L.'s grades

suffered, he experienced significant absences from school, he received detention for failing to participate in gym class, he stayed home from school the last two weeks of eighth grade because he did not feel safe, he attended summer school because he was in danger of failing eighth grade, and he dropped out of his favorite course, choir, to avoid one of his harassers. J.L. is no longer enrolled at Jarvis.

ARGUMENT

Rule 24(a) of the Federal Rules of Civil Procedure sets out the standards by which parties may intervene as of right. *See* Fed. R. Civ. P. 24(a). Rule 24(a) articulates two ways in which a party may intervene as of right:

On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). The United States should be granted leave to intervene under Rule 24(a)(1) as Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, grants the United States authority to intervene to seek relief from denials of equal protection if the matter is certified as of general public importance. In the alternative, the United States also meets the standards for intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b).

I. The United States Satisfies the Requirements for Intervention as of Right Under FRCP 24(a)(1)

A statute of the United States confers an unconditional right for the United States to intervene in this action. Under 42 U.S.C. § 2000h-2:

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; *see also* Fed. R. Civ. P 24(a)(1) (codifying that “the court must permit anyone to intervene who . . . is given an unconditional right to intervene by a federal statute).

This statutory language unambiguously establishes the right of the United States to intervene in this case, in which Plaintiff has alleged a “denial of equal protection of the laws under the fourteenth amendment.” *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 431 (1976); *Smith v. Board of Educ. of Morrilton Sch. Dist.*, 365 F.2d 770 (8th Cir. 1966); *see also* 7C Wright, Miller & Kane, *Federal Practice & Procedure* § 1906 at 244 (2d ed. 1986) (United States has unconditional right to intervene under § 2000h-2). The Assistant Attorney General has certified this case as one of general public importance. *See* Exhibit A. The United States’ motion to intervene also is timely as the parties have engaged in minimal discovery, no depositions have been conducted, and the deadline for dispositive motions is June 30, 2010. For a fuller discussion of timelines, *see infra* at II.A.

Under 42 U.S.C. § 2000h-2, the United States is entitled to seek “the same relief as if it had instituted the action.” 42 U.S.C. § 2000h-2. This statute therefore provides authority for the United States to intervene as of right and prosecute this case under both the Equal Protection

Clause and Title IX because the United States would have sought relief under both statutes if it had instituted the action.

II. The United States Satisfies the Requirements for Intervention as of Right Under FRCP 24(a)(2)

In addition to the United States' right to intervene under the statutory authority of § 2000h-2 pursuant to Rule 24(a)(1), the United States also is entitled to intervene in this lawsuit as of right under Rule 24(a)(2). Rule 24(a)(2) provides that a court must permit a party to intervene if the movant "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Rule 24 has been interpreted broadly to entitle the United States to intervene "in the maintenance of its statutory authority and the performance of its public duties[.]" *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 460 (1940). Here, the United States has a strong interest in ensuring that recipients of federal funds, such as the District, do not discriminate on the basis of sex in violation of the Equal Protection Clause and Title IX. It has a further interest in ensuring that federal funds are not disbursed to entities that fail to comply with federal anti-discrimination laws.

This Circuit has developed a four-pronged test for determining whether a party may intervene as of right under Rule 24(a)(2). The party must (1) file a timely motion; (2) demonstrate an interest related to the subject matter of the litigation; (3) establish that its interest may be impaired by the disposition of the action absent intervention; and (4) show that its interest is not adequately protected by the parties to the action. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir.

1994); *see also Hoblock v. Albany County Bd. of Elections*, 233 F.R.D. 95, 97 (N.D.N.Y. 2005); *Great Atlantic & Pacific Tea Co., Inc. v. Town of East Hampton, et al.*, 178 F.R.D. 39, 42-43 (E.D.N.Y. 1998). As discussed below, the United States satisfies all four requirements for intervention under Rule 24(a)(2).

A. The United States' Motion is Timely

The United States' application to intervene is timely. The determination of timelines of a motion to intervene is within the discretion of the district court and is "evaluated against the totality of the circumstances before the court." *D'Amato*, 236 F.3d. at 84 (quoting *Farmland Dairies v. Comm'r of the N.Y. State Dep't of Agric. and Markets*, 847 F.2d 1038, 1043-44 (2d Cir. 1988)). The circumstances considered include: "(1) how long the applicant had notice of the interest before [making] the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *Id.* (quoting *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994)).

An analysis of these factors underscores the timely nature of the United States' motion to intervene. Plaintiff's amended complaint was filed September 10, 2009, approximately four months ago. Since that filing, the United States requested information from the District, reviewed that information, and conducted interviews. According to the Court's October 9, 2009 Pretrial Scheduling Order, discovery closes April 30, 2010 and dispositive motions are not due until June 30, 2010. The United States is filing its motion at the earliest practicable date. The United States also satisfied the second consideration under timeliness. There is no delay in filing that causes any prejudice to the parties. While the parties have engaged in settlement discussions, no settlement has been reached. The United States does not seek to disrupt any

progress that has been made toward settlement, but rather to ensure that the United States' interest in the enforcement of the Equal Protection Clause and Title IX is adequately represented in the litigation, which it would not be absent intervention as discussed more fully at *infra* II.C. and II.D. As an intervenor the United States would not seek to add parties or claims to this lawsuit, and it does not intend to ask the Court to deviate from the deadlines set forth in the current scheduling orders. Accordingly, the United States' presence in this litigation would not burden or prejudice the current parties in any legally cognizable manner.

The United States would be prejudiced if its motion to intervene is denied. The United States is intervening in this lawsuit to pursue the just application of Title IX to the circumstances underlying Plaintiff's lawsuit and to District students more broadly, and to enforce the Equal Protection Clause's prohibition on sex-based discrimination. The United States' interest is not adequately represented by Plaintiffs, who do not have standing to seek District-wide injunctive relief due to J.L.'s withdrawal from the District.

In sum, the United States has worked diligently and expeditiously to prepare its motion and complaint in this matter and the relevant circumstances support a finding that the application is timely.

B. The United States Has a Legal Interest in the Litigation

The United States has a strong interest in ensuring that Districts do not discriminate on the basis of sex in violation of the Equal Protection Clause and Title IX. It has a further interest in ensuring that federal funds are not disbursed to entities that fail to comply with federal anti-discrimination laws. The United States plays a central role in the enforcement of the Equal Protection Clause and Title IX. Congress delegated to federal departments and agencies the authority to promulgate regulations to implement Title IX, and the responsibility to ensure that

recipients of federal funds comply with the statute and its regulations. *See* 20 U.S.C. § 1682. On numerous occasions the United States has intervened in lawsuits that present Title IX claims to vindicate these interests. *See, e.g., Lopez v. Metro. Gov't of Nashville and Davidson County, et al.*, 3:07-cv-00799, Order Granting Intervention (M.D. Tenn. Nov. 4, 2008) (copy attached); *A.B. v. Rhinebeck Central Sch. Dist.*, 224 F.R.D. 144 (S.D.N.Y. 2004); *Hoffman v. South Dakota High School Activities Ass'n*, CIV 02-4127 (D.S.D. July 22, 2002) (copy attached); *Lovins v. Pleasant Hill Pub. Sch. Dist.*, No. 99-0550-CV (W.D. Mo. July 31, 2000) (copy attached).

C. Potential Impairment of the United States' Interest

The United States has an interest in obtaining broad injunctive relief to protect all students in the District from violations of the Equal Protection Clause and Title IX. However, absent the United States' intervention, there is a great likelihood that this lawsuit could be resolved through a settlement agreement or other monetary disposition that does not compel the District to implement the institutional changes necessary to ensure that District students are protected from sex-based discrimination, including discrimination based on gender non-conformity in the future. The United States' interest would be significantly impaired by such a disposition.

Governmental entities have litigation interests that inherently differ from the interests of a private litigant because the government invariably intervenes to protect the interests of a broad constituency of citizens. *See Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992). Furthermore, the United States has an interest in ensuring that its enforcement of Title IX in subsequent matters is not undermined by adverse precedent generated in this case. *See United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988) (“[A] *stare decisis* effect is an important consideration in determining the extent to which an applicant's interest may be impaired.”). As

the sole governmental enforcer of Title IX in the federal courts, the interests of the United States may be affected by the resolution of this litigation. Moreover, rulings of law made on the factual record in this case may have an impact on subsequent enforcement actions. A favorable disposition for the District could complicate not only the United States' efforts to obtain injunctive relief in the instant matter, but also its ability to prosecute future instances of unlawful discrimination in this judicial district.

D. The United States' Interest is Not Adequately Protected by the Parties

The considerations discussed above compel the conclusion that the existing parties to this lawsuit may not adequately represent the United States' interests – a separate but related precondition to intervention as of right under Rule 24(a)(2). *See Hoblock*, 233 F.R.D. at 97; *D'Amato v. Deutsche Bank*, 236 F.3d at 84. “An applicant for intervention as of right has the burden of showing that representation may be inadequate, although the burden ‘should be treated as minimal.’” *United States Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir.1978) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)).

The United States has a unique interest in enforcing federal law, which is an interest that only it can adequately represent. The United States has a significant interest in enforcing the dictates of the Constitution and in seeing that recipients of federal funds do not unlawfully discriminate. In situations where discrimination has occurred, the United States has an important interest in ensuring that such conduct is declared unlawful and enjoined and that appropriate remedies are implemented to prevent like discrimination in the future for all students, not just Plaintiff. Here, Plaintiff is not in a position to secure the injunctive relief necessary to protect the United States' interest in enforcing the Equal Protection Clause and Title IX in more than the individual circumstances surrounding Plaintiff. Because Plaintiff is no longer enrolled in a

District school, Plaintiff is likely to obtain only monetary relief and some individual remedial relief, and therefore the United States participation in the matter is critical to securing injunctive relief. *See Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 989 F.2d 994, 1170 (8th Cir. 1993) (holding that where interests of existing party and the intervenor are “disparate, even though directed at a common legal goal, . . . intervention is appropriate”).

The United States has an interest in District-wide relief for all District students, and must be a party to the litigation to enforce any future non-compliance with the Equal Protection Clause and Title IX. The United States also seeks to monitor the District’s compliance with the Equal Protection Clause and Title IX, and Plaintiff is not in a position to secure adequately broad reporting requirements that would compel the District to report on its compliance with the Equal Protection Clause and Title IX moving forward.

III. The United States Should Be Granted Permissive Intervention Pursuant to Rule 24(b).

Because this lawsuit is predicated in part on federal statutory claims, the Court may also grant the United States’ motion to intervene pursuant to Rule 24(b). Rule 24(b) states that:

On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact. . . . 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)(2)-(3). Rule 24(b) further provides in part that “[o]n timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party’s claim or defense is based on . . . a statute or executive order administered by the officer or agency.”

Id. Prior to the adoption of this explicit statutory authority, the Supreme Court held that the Government may have “a sufficient interest in the maintenance of its statutory authority and the

performance of its public duties to entitle [it] to intervention.” *United States Realty*, 310 U.S. at 460.

This case raises important issues concerning the legal standards to be applied in actions enforcing federal civil rights laws. As noted above, the United States is not intervening in this lawsuit to add additional claims or join additional parties. Hence, its presence in this case should not prejudice the rights of the current parties to this lawsuit. Moreover, it is appropriate that the United States participate in such an action to ensure consistent development of the applicable legal standards.

CONCLUSION

For the foregoing reasons, we respectfully request that the United States’ Motion to Intervene be granted.

Respectfully submitted,

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Mohawk Central School District is located within the Northern District of New York and the claims alleged in this complaint arose from events that occurred within this judicial district.

PARTIES

4. Plaintiff J.L. was a student at Gregory B. Jarvis Jr./Sr. High School (“Jarvis Jr./Sr. High”) in Mohawk Central School District from August 2007 until December 2009. He was a student in the District at all times relevant to this lawsuit.

5. Defendants District, Joyce Caputo, and Cynthia Stocker are responsible for the administration of educational services for all students enrolled in the District, including students at Jarvis Jr./Sr. High School.

6. The District is a recipient of Federal financial assistance and, therefore, is subject to Title IX.

7. The District is organized under, and exists pursuant to, the laws of the State of New York and, as such, is subject to the prohibitions of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

8. Individual Defendants are sued in their official capacities, and, as such, are likewise subject to the Fourteenth Amendment’s prohibitions.

PROCEDURAL BACKGROUND

9. On August 18, 2009, Plaintiff J.L. and his father filed a complaint in this Court against the District and District administrators alleging that he was subjected to student-on-student harassment and discrimination based on sex. On September 10, 2009, Plaintiff amended his complaint to perfect certain state law claims.

FACTUAL ALLEGATIONS

10. J.L. is a fourteen year old male whose gender expression does not conform to male stereotypes. J.L. dyes his hair, wears make-up and nail polish, and engages in physical expressions that are stereotypically female, *e.g.*, swinging his hips and singing in a high pitched voice.

11. Throughout the 2007-08 school year, when J.L. was in seventh grade, students at Jarvis Jr./Sr. High subjected J.L. to verbal sex-based harassment on a regular basis based on J.L.'s failure to conform to gender stereotypes.

12. Throughout the 2008-09 school year, when J.L. was in the eighth grade, students at Jarvis Jr./Sr. High continued to harass J.L. based on the perception that J.L. did not look or act like other boys. Students at Jarvis Jr./Sr. High persisted in verbally harassing J.L. on a daily basis. J.L. also was threatened, intimidated, and physically assaulted based on his non-masculine expression.

13. From the start of the 2009-10 school year through December 2009, the fall of J.L.'s ninth grade year, students continued to verbally and physically harass J.L., including harassment of a sexual nature.

14. District officials with the authority to address the harassment, including the former Jarvis Jr./Sr. High Principal and the current Jarvis Jr./Sr. High Principal, were informed about the incidents referenced in Paragraphs 11-13 by J.L.'s father.

15. Despite the District's knowledge of harassment based on sex against J.L., it was deliberately indifferent, resulting in increasingly severe and pervasive harassment of J.L. during his time at Jarvis Jr./Sr. High. In almost all of the numerous complaints to the principals, the District failed to investigate, or conducted incomplete investigations of the allegations.

16. The District's deliberate indifference prevented Plaintiff from enjoying the educational benefits and opportunities provided by the District. Over the past two and a half years, J.L.'s grades have suffered, he has experienced significant absences from school, he has received detention for failing to participate in gym class, he stayed home from school the last two weeks of eighth grade because he did not feel safe, he attended summer school because he was in danger of failing eighth grade, and he dropped out of his favorite course, choir, to avoid one of his harassers.

CLAIMS FOR RELIEF

17. The United States realleges and herein incorporates by reference the allegations set forth in paragraphs 10 through 16 above.

18. The District's deliberate indifference to known instances of severe, pervasive, and objectively offensive sex-based harassment to which Plaintiff J.L. was subjected effectively barred Plaintiff's equal access to educational opportunities or benefits.

19. Defendants' actions and inactions in response to the harassment violate the Equal Protection Clause of the Fourteenth Amendment and Title IX.

20. Unless enjoined by this Court, the District will continue to violate the Equal Protection Clause of the Fourteenth Amendment and Title IX.

21. The United States requests intervention in this lawsuit in order to seek relief to ensure that the District will operate a school system that provides an educational environment that is free from sex-based harassment for its students and is in compliance with the United States Constitution and Federal law.

20. The Assistant Attorney General, pursuant to 42 U.S.C. § 2000h-2, has certified in the attached certification that this is a case of general public importance.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests that this Court:

a. Declare that the Defendants have denied Plaintiff the Equal Protection of the laws in violation of the Fourteenth Amendment.

b. Declare that the District has discriminated on the basis of sex by failing to address, prevent, and remedy sex-based harassment, and in doing so, has failed to provide the benefits of its educational activities and services to Plaintiff J.L. in violation of the Equal Protection Clause of the Fourteenth Amendment and Title IX.

c. Permanently enjoin the District, its officers, agents, employees, successors, assigns, and all persons in active concert or participation with the District from all unlawful discrimination against District students on the basis of sex.

d. Order the District to develop, adopt, and expediently implement a comprehensive plan that will ensure a safe and secure environment free from sex-based harassment for all District students.

e. Order the District to file a report annually with the United States detailing the implementation of its plan.

f. Provide such relief as is necessary to compensate Plaintiff J.L. for the discrimination to which he was subjected.

g. Grant such additional relief as the needs of justice may require.

Respectfully submitted,

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Compliance Officer, Cynthia Stocker, alleging that the Defendants discriminated against Plaintiff based on sex due to their failure to take appropriate action in response to known incidents of persistent and derogatory name-calling, threats, physical assaults, and harassment of a sexual nature.

2. Plaintiff pled violations of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title IX, one count of negligent supervision, and violations of several provisions of New York Human Rights Laws. On September 10, 2009, Plaintiff filed an amended complaint to perfect his state law claims. The Court's October 9, 2009 Pretrial Scheduling Order provides that discovery closes April 30, 2010 and dispositive motions are not due until June 30, 2010.

3. Rule 24(a)(1) of the Federal Rules of Civil Procedure provides that the court must permit anyone to intervene who is given an unconditional right to intervene by a federal statute.

4. The United States should be granted leave to intervene under Rule 24(a)(1) as Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, grants the United States authority to intervene to seek relief from denials of equal protection if the matter is certified as a matter of general public importance.

5. Under 42 U.S.C. § 2000h-2, the United States is entitled to seek "the same relief as if it had instituted the action." 42 U.S.C. § 2000h-2. This statute therefore provides authority for the United States to intervene as of right and prosecute this case under both the Equal Protection Clause and Title IX because the United States would have sought relief under both statutes if it had instituted the action.

6. The Assistant Attorney General has certified that this case is of general public importance, and the certificate is attached to the complaint-in-intervention.

7. The United States' motion to intervene also is timely as the parties have engaged in minimal discovery, no depositions have been conducted, and the deadline for dispositive motions is June 30, 2010.

8. In the alternative, the United States also meets the standards for intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b).

9. The Second Circuit has developed a four-pronged test for determining whether a party may intervene as of right under Rule 24(a)(2). The party must (1) file a timely motion; (2) demonstrate an interest in the litigation; (3) establish that its interest may be impaired by the disposition of the action; and (4) show that its interest is not adequately protected by the parties to the action. *See Hoblock v. Albany County Bd. of Elections*, 233 F.R.D. 95, 97 (N.D.N.Y. 2005) (quoting *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001)). As discussed more fully in the attached Memorandum of Law, the United States satisfies all four requirements for intervention under Rule 24(a)(2).

10. The Court may also grant the United States' motion to intervene pursuant to Rule 24(b). Rule 24(b) allows permissive intervention when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

11. Rule 24(b) further provides in part that "[o]n timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on . . . a statute or executive order administered by the officer or agency."

12. This case raises important issues concerning the legal standards to be applied in actions enforcing federal civil rights laws; therefore, it is appropriate that the United States participate in such an action to ensure consistent development of the applicable legal standards.

Wherefore, the United States requests that the Court grant its motion to intervene in this lawsuit, and direct the Clerk to file the attached complaint-in-intervention.

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