

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON DIVISION**

**B.P.J., by her next friend and mother,  
HEATHER JACKSON,  
Plaintiff,**

v.

**Civil Action No. 2:21-cv-00316  
Honorable Joseph R. Goodwin, Judge**

**WEST VIRGINIA STATE BOARD OF EDUCATION,  
HARRISON COUNTY BOARD OF EDUCATION,  
WEST VIRGINIA SECONDARY SCHOOL  
ACTIVITIES COMMISSION, W. CLAYTON BURCH  
in his official capacity as State Superintendent, and  
DORA STUTLER in her official capacity as  
Harrison County Superintendent,  
Defendants,**

**And**

**LAINY ARMISTEAD,  
Defendant-Intervenor.**

**WVSSAC'S MOTION FOR LEAVE TO FILE SURREPLY**

Now comes West Virginia Secondary School Activities Commission (WVSSAC), by counsel, Roberta F. Green, Kimberly M. Bandy, Shannon M. Rogers and Shuman McCuskey Slicer PLLC, and, pursuant to Local Rule 7.1(a)(7), moves for leave to file the Surreply attached as Exhibit A in order to formally present Plaintiff's admission against interest, on information and belief, made expressly for the first time in Plaintiff's Reply In Support Of Her Motion *In Limine* To Exclude Evidence and/or Testimony of Bernard Dolan Regarding Certain Hearsay Statements and Supporting Memorandum Of Law.<sup>1</sup> Whereas WVSSAC has identified a number of related admissions and/or admissions by omission by the Plaintiff, the capstone admission that **"Mr.**

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<sup>1</sup> ECF No. 470 at 2.

**Dolan is not a legislator and did not have any input on whether or if H.B. 3293 was enacted”<sup>2</sup>** appeared for the first time after the close of motions practice for WVSSAC. These arguments and claims have never appeared previously in Plaintiff’s briefs nor ever in Plaintiff’s briefs with WVSSAC, and thus WVSSAC has not had an opportunity to reply or to place this admission in context with WVSSAC’s pending motions and arguments. The attached Surreply addresses only this admission and does not stray into ancillary or new issues or evidence beyond that scope. *See Cordish Cos. v. Affiliated FM Ins. Co.*, 573 F. Supp. 3d 977 (D. Md. 2021) at 988, stating that “[a] surreply is ordinarily permitted when the party seeking to file the surreply ‘would be unable to contest matters presented to the court for the first time’ in the opposing party's reply. *Clear Channel Outdoor, Inc. v. Mayor & City Council of Baltimore*, 22 F. Supp. 3d 519, 529 (D. Md. 2014) (quotations and citations omitted). Conversely, a surreply is usually not permitted if the content is merely responsive to an issue raised in the opposition. *See Khoury v. Meserve*, 268 F. Supp. 2d 600, 605-06 (D. Md. 2003).”

Where courts have declined to allow for a surreply when one party merely raises a new argument that only gained saliency through the other party’s reply,<sup>3</sup> the instant ‘argument’ against interest was never revealed by the Plaintiff in motions practice with WVSSAC or in discovery. Most interestingly, the admission was made in motions practice between other parties, whose motions were *about* WVSSAC. In motions practice with the State and Intervenor, Plaintiff admitted a fact that supports WVSSAC’s arguments raised *ab initio*.

“The standard for granting a leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's

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<sup>2</sup> ECF No. 470 at 2 (emphasis added).

<sup>3</sup> *The Courtland Co., Inc. v. Union Carbide*, 2022 U.S. Dist. Lexis 78174 (S.D. W. Va.), citing *EEOC v. Freeman*, 961 F. Supp. 2d 783, 801 (D. Md. 2013).

reply.” *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001). WVSSAC satisfies this standard because this precise admission arose for the first time at the close of motions practice in a manner that logically would not suggest its application to WVSSAC directly absent this motions practice.

For the reasons set forth herein, WVSSAC respectfully requests that its Motion for Leave be granted and its Surreply filed as attached.

**WEST VIRGINIA SECONDARY SCHOOL  
ACTIVITIES COMMISSION,  
By Counsel.**

***/S/ Roberta F. Green***

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Roberta F. Green (WVSB #6598)  
Kimberly M. Bandy (WVSB #10081)  
Shannon M. Rogers (WVSB # 13920)  
SHUMAN MCCUSKEY SLICER PLLC  
Post Office Box 3953 (25339)  
1411 Virginia Street East, Suite 200 (25301)  
Charleston, WV 25339  
(304) 345-1400  
(304) 343-1826 FAX  
[rgreen@shumanlaw.com](mailto:rgreen@shumanlaw.com)  
[kbandy@shumanlaw.com](mailto:kbandy@shumanlaw.com)  
[srogers@shumanlaw.com](mailto:srogers@shumanlaw.com)

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in his official capacity as State Superintendent, and  
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Defendant-Intervenor.**

**CERTIFICATE OF SERVICE**

I hereby certify that I, Roberta F. Green, have this, the 19th day of September, 2022, served a true and exact copy of the foregoing “**WVSSAC’s Motion for Leave to File Surreply**” with the Clerk of Court using the CM/ECF System, which will send notification of such filing to the following counsel of record:

Loree Beth Stark  
Nicholas Ward  
ACLU of WV FOUNDATION  
1614 Kanawha Boulevard, East  
Charleston, WV 25311  
[lstark@acluwv.org](mailto:lstark@acluwv.org)  
[nward@acluwv.org](mailto:nward@acluwv.org)

Kathleen R. Hartnett  
Julie Veroff  
COOLEY LLP  
101 California St. – 5<sup>th</sup> Floor  
San Francisco, CA 94111-5800  
[khartnett@cooley.com](mailto:khartnett@cooley.com)  
[jveroff@cooley.com](mailto:jveroff@cooley.com)

Katelyn Kang  
COOLEY LLP  
55 Hudson Yards  
New York, NY 10001-2157  
[kkang@cooley.com](mailto:kkang@cooley.com)

Elizabeth Reinhardt  
COOLEY LLP  
500 Boylston St., 14<sup>th</sup> Floor  
Boston, MA 02116-3736  
[ereinhardt@cooley.com](mailto:ereinhardt@cooley.com)

Andrew Barr  
COOLEY LLP  
1144 15<sup>th</sup> St., Suite 2300  
Denver, CO 80202-5686  
[abarr@cooley.com](mailto:abarr@cooley.com)

Avatara Smith-Carrington  
LAMBDA LEGAL  
3500 Oak Lawn Ave., Suite 500  
Dallas, TX 75219  
[asmithcarrington@lambdalegal.org](mailto:asmithcarrington@lambdalegal.org)

Joshua Block  
Chase Strangio  
ACLU FOUNDATION  
125 Broad Street  
New York, NY 10004  
[jblock@aclu.org](mailto:jblock@aclu.org)

Carl Charles  
LAMBDA LEGAL  
1 West Court Square, Suite 105  
Decatur, GA 30030  
[ccharles@lambdalegal.org](mailto:ccharles@lambdalegal.org)

Sruti Swaminathan  
LAMBDA LEGAL  
120 Wall St., 19<sup>th</sup> Floor  
New York, NY 10005  
[sswaminathan@lambdalegal.org](mailto:sswaminathan@lambdalegal.org)

Susan Llewellyn Deniker  
Jeffrey M. Cropp  
STEPTOE and JOHNSON, LLC  
400 White Oaks Boulevard  
Bridgeport, WV 26330  
[susan.deniker@steptoe-johnson.com](mailto:susan.deniker@steptoe-johnson.com)  
[jeffrey.cropp@steptoe-johnson.com](mailto:jeffrey.cropp@steptoe-johnson.com)

Kelly C. Morgan  
Michael W. Taylor  
Kristen Vickers Hammond  
BAILEY & WYANT, PLLC  
500 Virginia St., East, Suite 600  
Charleston, WV 25301  
[kmorgan@baileywyant.com](mailto:kmorgan@baileywyant.com)  
[mtaylor@baileywyant.com](mailto:mtaylor@baileywyant.com)  
[khammond@baileywyant.com](mailto:khammond@baileywyant.com)

Tara Borelli  
LAMBDA LEGAL  
1 West Court Square, Suite 105  
Decatur, GA 30030  
[tborelli@lambdalegal.org](mailto:tborelli@lambdalegal.org)

Douglas P. Buffington, II  
Curtis R.A. Capehart  
Jessica A. Lee  
State Capitol Complex  
Building 1, Room E-26  
Charleston, WV 25305-0220  
[Curtis.R.A.Capehart@wvago.gov](mailto:Curtis.R.A.Capehart@wvago.gov)

Taylor Brown  
American Civil Liberties Union  
125 Broad St., 18<sup>th</sup> Floor  
New York, NY 10004  
[tbrown@aclu.org](mailto:tbrown@aclu.org)

Jonathan Scruggs  
Roger Greenwood Brooks  
Alliance Defending Freedom  
15100 N. 90<sup>th</sup> Street  
Scottsdale, AZ 85260  
[jscruggs@adflegal.org](mailto:jscruggs@adflegal.org)  
[rbrooks@adflegal.org](mailto:rbrooks@adflegal.org)

Timothy D. Ducar  
Law Offices of Timothy D. Ducar, PLC  
7430 E. Butherus Drive, Suite E  
Scottsdale, AZ 85260  
[tducar@azlawyers.com](mailto:tducar@azlawyers.com)

Aria S. Vaughan  
U.S. Department of Justice  
Civil Rights Division  
Educational Opportunities Section  
950 Pennsylvania Ave., NW  
4CON, 10<sup>th</sup> Floor  
Washington, DC 20530  
[aria.vaughan@usdoj.gov](mailto:aria.vaughan@usdoj.gov)

Brandon S. Steele  
Joshua D. Brown  
Law Offices of Brandon S. Steele  
3049 Robert C. Byrd Drive, Ste 100  
Beckley, WV 25801  
[bstelelawoffice@gmail.com](mailto:bstelelawoffice@gmail.com)  
[joshua\\_brown05@hotmail.com](mailto:joshua_brown05@hotmail.com)

Christiana Holcomb  
Rachel Csutoros  
Alliance Defending Freedom  
440 First Street NW, Suite 600  
Washington, DC 20001  
[cholcomb@adflegal.org](mailto:cholcomb@adflegal.org)  
[rcsutoros@adflegal.org](mailto:rcsutoros@adflegal.org)

Meredith Taylor Brown  
American Civil Liberties Union  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004  
[tbrown@aclu.org](mailto:tbrown@aclu.org)

Fred B. Westfall, Jr.  
Jennifer M. Mankins  
United States Attorney's Office  
300 Virginia Street, East – Rm. 400  
Charleston, WV 25301  
[fred.westfall@usdoj.gov](mailto:fred.westfall@usdoj.gov)  
[jennifer.mankins@usdoj.gov](mailto:jennifer.mankins@usdoj.gov)

***/S/ Roberta F. Green***

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Roberta F. Green, Esquire (WVSB #6598)

SHUMAN MCCUSKEY SLICER PLLC

Post Office Box 3953 (25339)

1411 Virginia Street E., Suite 200 (25301)

Charleston, West Virginia

(304) 345-1400; FAX: (304) 343-1826

*Counsel for Defendant WVSSAC*

[rgreen@shumanlaw.com](mailto:rgreen@shumanlaw.com)



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Defendants,**

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**SURREPLY IN SUPPORT OF PENDING MOTIONS**

Now comes West Virginia Secondary School Activities Commission (WVSSAC), by counsel, Roberta F. Green, Kimberly M. Bandy, Shannon M. Rogers and Shuman McCuskey Slicer PLLC, and highlights for the Court supplemental authority that came before the Court in the form of an admission by the Plaintiff, as follows. As part of the pretrial motions, Plaintiff, State and Intervenor have briefed issues relative to WVSSAC's 30(b) testimony. Specifically, the parties have engaged in motions practice relative to whether WVSSAC had been receiving calls from or related to transgender athletes. In his capacity as 30(b) witness for WVSSAC, Bernie Dolan testified to calls, including a call relative to a male student who purportedly wanted to

play volleyball (a girl’s only sport).<sup>1</sup> The State and Intervenor relied on that testimony in their dispositive motions,<sup>2</sup> arguing that it shows that HB 3293 reflects the current state of sports and inquiries at the time, such that the questions and issues related to transgenderism predate the legislation.

On motions in limine, Plaintiff moved to exclude the testimony on the basis of hearsay.<sup>3</sup> The State opposed that motion, arguing that it did not rely on the statements for their content but rather because the statements reflect a present sense impression.<sup>4</sup> The State argued that it does not matter who called and whether the caller was transgender or not, but rather that WVSSAC believed it was getting calls with transgender issues – that it was on notice of the issue; it demonstrates intent.<sup>5</sup> Plaintiff replied that WVSSAC’s state of mind or the state of mind of the individuals who promulgated the State law<sup>6</sup> would only be meaningful if WVSSAC had any input on HB 3293. However, Plaintiff further wrote, “**Mr. Dolan is not a legislator and did not have any input on whether or if H.B. 3293 was enacted.**”<sup>7</sup>

First, Plaintiff’s admission constitutes supplemental authority in support of WVSSAC’s dispositive motion.<sup>8</sup> In particular, WVSSAC has argued that H.B. 3293 does not mention WVSSAC and does not create any duties for WVSSAC.<sup>9</sup> As WVSSAC has argued previously, WVSSAC’s exclusion from the enrolled legislation is meaningful in that the Legislature is

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<sup>1</sup> ECF No. 276-1 at 120-21.

<sup>2</sup> ECF No. 287 at 4-5; ECF No. 288 at 5.

<sup>3</sup> ECF No. 406.

<sup>4</sup> ECF No. 422.

<sup>5</sup> ECF No. 422.

<sup>6</sup> ECF No. 470 at 2.

<sup>7</sup> ECF No. 470 at 2 (emphasis added).

<sup>8</sup> ECF No. 277 at 7, 10, 13; ECF No. 335 at 2.

<sup>9</sup> See, e.g., ECF No. 277 at 10; First Am. Compl. (ECF No. 64) at ¶¶ 49-50.

presumed to have included or excluded knowingly.<sup>10</sup> Plaintiff has not attempted to refute her admission in her First Amended Complaint that the Legislature specifically removed language from H.B. 3293 that would have required WVSSAC to participate in determinations made in accordance with the law.<sup>11</sup> Plaintiff has produced no evidence that WVSSAC will have a role in implementing H.B. 3293. And now Plaintiff has admitted against interest that **“Mr. Dolan is not a legislator and did not have any input on whether or if H.B. 3293 was enacted.”**<sup>12</sup> The course of discovery and motions practice has demonstrated that WVSSAC is differently situated, has no role under H.B. 3293 and now that WVSSAC did not have any input on whether the legislation was enacted. WVSSAC is not a state actor, has not been adjudicated to be a state actor, and now Plaintiff joins WVSSAC in asserting that WVSSAC had no input on whether or not H.B. 3293 was enacted.

Beyond dispositive motions, however, Plaintiff’s admission is meaningful in the context of the motions in *limine*, for instance, relative to the State Board’s Green Book (Exhibit H to the Blatt Deposition).<sup>13</sup> WVSSAC opposed the use of the Green Book to the extent that it identifies WVSSAC’s Executive Director as the contact person for HB 3293, although the evidence did not explain or support his appearance there.<sup>14</sup> That is, at its 30(b) deposition, the State Board conceded that it had listed Mr. Dolan without an understanding of what he knows of the legislation and/or what involvement he had with the legislation, if any at all.<sup>15</sup> The State Board conceded that Mr. Dolan was not an employee of the State Board and further conceded that Mr.

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<sup>10</sup> West Virginia’s Code Chapter 18 elsewhere cites WVSSAC, but WVSSAC is expressly excluded in W. Va. Code § 18-2-25d(e). “[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983).

<sup>11</sup> *See, e.g.*, First Am. Compl. at ¶ 50.

<sup>12</sup> ECF No. 470 at 2 (emphasis added).

<sup>13</sup> ECF No. 390.

<sup>14</sup> ECF No 391 at 4.

<sup>15</sup> ECF No. 289-19 at 129-31.

Dolan should be consulted directly about what he and/or WVSSAC know of the legislation.<sup>16</sup> In response to WVSSAC's motion, Plaintiff argued that "Plaintiff *does not* intend to offer the Green Book for the 'truth of the matter asserted' that WVSSAC Executive Director Bernie Dolan in fact acted as the West Virginia Department of Education contact for questions regarding H.B. 3293. *See* Fed. R. Evid. 801. Plaintiff also *does not* intend to offer the Green Book as evidence that Mr. Dolan has any specialized knowledge about H.B. 3293 or that WVSSAC is 'align[ed] with the legislation or the State.'"<sup>17</sup> Plaintiff asserts that Exhibit 21 will not be used "as evidence that Mr. Dolan has any specialized knowledge about H.B. 3293 or that WVSSAC is 'align[ed] with the legislation of the state.'"<sup>18</sup> Further mitigating against the use of the Green Book, at least with Mr. Dolan's name extant, Plaintiff has further conceded that Mr. Dolan "**did not have any input on whether or if H.B. 3293 was enacted.**"<sup>19</sup> Plaintiff has never countered WVSSAC's argument that, for all of these reasons, it is more prejudicial than probative to introduce the Green Book or to introduce it with Mr. Dolan's name extant. To the extent that Plaintiff now further distances Mr. Dolan from the legislative process, WVSSAC renews its request that the Court either exclude the Green Book in its entirety or allow for its use at trial only with Mr. Dolan's name redacted.

Further, to the extent that Plaintiff seeks to use any of Mr. Dolan's emails and texts relative to HB 3293,<sup>20</sup> Plaintiff's admission undercuts Plaintiff's position relative to those communications as well. Specifically, Plaintiff has sought to introduce Mr. Dolan's texts with Senator Baldwin purportedly related to Mr. Dolan's appearance at a caucus breakfast. Plaintiff has asserted that the thread is relevant because it "discusses the legislative history and intent in

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<sup>16</sup> ECF No. 289-19 at 129-31.

<sup>17</sup> ECF No. 439 at 2 (emphasis in original).

<sup>18</sup> ECF No. 439 at 2.

<sup>19</sup> ECF No. 470 at 2 (emphasis added).

<sup>20</sup> ECF No. 392.

enacting H.B. 3293.”<sup>21</sup> Plaintiff further specifies that the Baldwin text thread shows “how H.B. 3293 was understood by at least some legislators to be a bill specifically about transgender students.”<sup>22</sup> However, given that Plaintiff also concedes that Mr. Dolan “**did not have any input on whether or if H.B. 3293 was enacted,**”<sup>23</sup> genuine issues of material fact complicate any use of the interactions between Mr. Dolan and Senator Baldwin. For instance, what is the meaning or significance in what Senator Baldwin says or pointedly does not say in communicating with a person who did not have any input on whether the legislation was enacted. That discovery was not conducted in this matter, and any use of the texts without that additional information is unfairly prejudicial to WVSSAC given Plaintiff’s admission.

The same is true of the Melissa White emails and texts, which Plaintiff seeks to introduce to “show how H.B. 3293 was perceived by the West Virginia legislators who passed it and how H.B. 3293 was represented to the public.”<sup>24</sup> However, Plaintiff conducted no discovery relative to Melissa White and her communications that would allow Plaintiff to make this inference, in particular, given Plaintiff’s admission that Mr. Dolan had no input into the enactment of the legislation. Further, the John Raby email exchange, which Plaintiff argues is relevant to “whether H.B. 3293 is substantially related to the government’s alleged interests in enacting H.B. 3293,”<sup>25</sup> is undercut by Plaintiff’s more recent assertion that Mr. Dolan is not a legislator and was not involved in enacting H.B. 3293.

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<sup>21</sup> ECF No. 437 at 3.

<sup>22</sup> ECF No. 437 at 3.

<sup>23</sup> ECF No. 470 at 2 (emphasis added).

<sup>24</sup> ECF No. 437 at 6. *See also Dobbs v. Jackson*, 597 U.S. \_\_\_, [28] (2022), stating that “[t]his Court has long disfavored arguments based on alleged legislative motives. *See, e.g., Erie v. Pap’s A. M.*, 529 U. S. 277, 292 (2000) (plurality opinion); *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 652 (1994); *United States v. O’Brien*, 391 U. S. 367, 383 (1968); *Arizona v. California*, 283 U. S. 423, 455 (1931) (collecting cases). *The Court has recognized that inquiries into legislative motives “are a hazardous matter.” O’Brien*, 391 U. S., at 383.”

<sup>25</sup> ECF No. 437 at 7.

For all of the reasons set forth here, and for the reasons set forth in WVSSAC's motion for summary judgment,<sup>26</sup> motions *in limine* and memoranda in support of all,<sup>27</sup> WVSSAC renews and buttresses its motions for dismissal as a matter of law and its motions limiting the evidence to be produced at trial. WVSSAC seeks the relief this Court deems just.

**WEST VIRGINIA SECONDARY SCHOOL  
ACTIVITIES COMMISSION,  
By Counsel.**

**/s/ Roberta F. Green**

Roberta F. Green (WVSB #6598)  
Kimberly M. Bandy (WVSB #10081)  
Shannon M. Rogers (WVSB # 13920)  
SHUMAN MCCUSKEY SLICER PLLC  
Post Office Box 3953 (25339)  
1411 Virginia Street East, Suite 200 (25301)  
Charleston, WV 25339  
(304) 345-1400  
(304) 343-1826 FAX  
[rgreen@shumanlaw.com](mailto:rgreen@shumanlaw.com)  
[kbandy@shumanlaw.com](mailto:kbandy@shumanlaw.com)  
[srogers@shumanlaw.com](mailto:srogers@shumanlaw.com)

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<sup>26</sup> ECF Nos. 276, 335.

<sup>27</sup> *See, e.g.*, ECF Nos. 277, 289 (439), 290 (439), 392 (456).