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18 **UNITED STATES DISTRICT COURT**
19 **EASTERN DISTRICT OF CALIFORNIA**

20 AURORA REGINO,

21 Plaintiff,

22 v.

23 SUPERINTENDENT KELLY STALEY, in
24 her official capacity; CAITLIN DALBY, in
her official capacity; REBECCA KONKIN,
25 in her official capacity; TOM LANDO, in his
official capacity; EILEEN ROBINSON, in
26 her official capacity; and MATT TENNIS, in
his official capacity,

27 Defendants.
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Case No. 2:23-cv-00032-JAM-DMC

**PROPOSED DEFENDANT-
INTERVENOR GSA NETWORK'S
REPLY IN SUPPORT OF MOTION TO
INTERVENE**

Judge: Judge John A. Mendez
Date: March 28, 2023
Time: 1:30 p.m.
Courtroom: 6

1 **INTRODUCTION**

2 GSA Network (“GSAN”) seeks to intervene in this lawsuit to assert its decades-long
3 interest in supporting LGBTQ+ youth in schools through the establishment of student clubs and
4 policies that affirm LGBTQ+ student identity. Two such GSAN-supported clubs presently operate in
5 the District, where current non-discrimination policies respect and affirm a student’s decisions around
6 “coming out” as LGBTQ+. Plaintiff’s lawsuit—which claims that a school violates the constitutional
7 rights of parents when affirming a student’s transgender identity without the parent’s knowledge *and*
8 consent—is a direct and immediate threat to GSAN’s mission and the LGBTQ+ students it supports.

9 In opposing GSAN’s motion, Plaintiff minimizes this interest and GSAN’s connection to
10 the core issues in this case.¹ In fact, GSAN was an official co-sponsor of AB 1266, which requires
11 schools to allow students to use the school facilities that correspond with their gender identity and
12 serves as the foundation for the District’s policy of permitting students to use the name, pronouns,
13 and bathroom that align with their gender identity.

14 GSAN is prepared to defend the District’s policy through direct participation in this case,
15 particularly in the discovery process where it can help ensure the creation of a factual record
16 commensurate with the weighty constitutional issues before this Court. While the District will likely
17 defend this lawsuit with the goal of avoiding a finding of liability, it is no secret that the District faces
18 the difficult task of aligning its use of its limited resources with the desires of its multiple
19 constituencies, none of which include GSAN.

20 **ARGUMENT**

21 **I. GSAN Satisfies the Requirements for Intervention as of Right**

22 A. GSAN Has a Direct Interest Relating to this Action, and an Unfavorable
23 Disposition Will Impair and Impede Its Ability to Protect That Interest.

24 Plaintiff fails to meaningfully address GSAN’s Ninth Circuit authority establishing that an
25 organization has a direct and immediate interest in intervention when its mission or activities—
26 including legislative action—are directly related to the specific issues being litigated. *See* Motion at
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28 ¹ The District has not opposed GSAN’s motion.

1 7-8 (citing *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001), *Washington*
 2 *State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *Idaho v.*
 3 *Freeman*, 625 F.2d 886, 887 (9th Cir. 1980), *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528
 4 (9th Cir. 1983), and *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995)).

5 Instead, Plaintiff dismisses these authorities out of hand, arguing that GSAN's official co-sponsoring
 6 of AB 1266—which allows students to use school facilities, including bathrooms, “consistent with his
 7 or her gender identity,” Cal. Educ. Code § 221.5(f)—is irrelevant because AB 1266 “is not being
 8 challenged” in this case.² Opp'n at 5. Plaintiff's contention is incorrect for at least two reasons.

9 First, this lawsuit calls into question the future of AB 1266, and the protections it has
 10 provided California students for the past nine years. Plaintiff's Complaint alleges that a parent has a
 11 constitutional right to direct whether and how a school will “socially transition” a student. Dkt. No. 1
 12 at ¶ 1. According to Plaintiff, “social transitioning” is the “active affirmation of a transgender
 13 identity,” which includes “allowing [someone] to use public bathrooms associated with their new
 14 gender.” *Id.* at ¶ 1 n.1. Further, under the District's policy, “schools accomplish social transitioning
 15 of students by, among other things, . . . allowing students to use bathrooms associated with their new
 16 gender.” *Id.* at ¶ 21; *see also* Dkt. No. 21-1 at 27 (providing that District policy includes allowing a
 17 student to use bathrooms consistent with their gender identity). Thus, Plaintiff's assertion that the
 18 Constitution requires that the parent, not the child, be afforded the right to direct the “social
 19 transitioning” of a student at school appears fundamentally inconsistent with AB 1266's requirement
 20 that schools allow each student to “use facilities consistent with his or her gender identity.” Cal.
 21 Educ. Code § 221.5(f).

22 Second, even assuming Plaintiff's suit does not imperil AB 1266, that provision is
 23 nonetheless directly at issue in this case. Plaintiff's allegations explicitly identify AB 1266 as the
 24 state law from which the District's policy is derived, a point the District has already confirmed. *See*
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26 ² Curiously, Plaintiff cites *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993) for the proposition
 27 that “even legislators do not have legally protectable interests in challenging or defending legislation sufficient
 28 to support intervention as a matter of right in the absence of some sort of actual persona[l] injury.” Opp'n at 5.
 But *Sierra Club*, which concerned the real property interests of proposed intervenor the City of Phoenix, is
 silent on the protectable interest of legislators or the supposed requirement of “actual personal injury.”

1 Dkt. No. 1 at ¶¶ 44-47; *see also* Dkt. No. 21 at 7. Moreover, the CDE states that the guidance at issue
 2 was published to “assist school districts with *understanding and implementing policy changes related*
 3 *to AB 1266* and transgender student privacy, facility use, and participation in school athletic
 4 competitions.” California Department of Education, *Frequently Asked Questions: School Success*
 5 *and Opportunity Act (AB 1266)*, <https://www.cde.ca.gov/re/di/eo/faqs.asp> (last visited March 9, 2023)
 6 (emphasis added). GSAN’s interest, therefore, is direct and immediate whether the constitutionality
 7 of AB 1266 or a policy derived from AB 1266 is at issue. To hold otherwise would contravene the
 8 Ninth Circuit’s instructions to interpret the requirements “broadly in favor of intervention” and to
 9 conduct an analysis “guided primarily by practical considerations, not technical distinctions.” *W.*
 10 *Watersheds Project v. Haaland*, 22 F.4th 828, 835 (9th Cir. 2022).

11 This is particularly true here, where GSAN’s involvement with AB 1266 translates
 12 directly to its interest in the continued vitality of the two GSA clubs within the District. Thanks to
 13 the District’s non-discrimination policies, including its implementation of AB 1266, these GSA clubs
 14 currently operate in an environment conducive to transgender and other LGBTQ+ students expressing
 15 their identity because school staff are required to respect and affirm those identities. GSAN’s
 16 mission of promoting the well-being and safety of LGBTQ+ students through GSA clubs thus
 17 directly aligns with the District’s challenged policy.

18 In attempting to undermine this connection, Plaintiff ignores the record in this case and
 19 minimizes the case’s ramifications. Specifically, Plaintiff contends that a finding that a student
 20 cannot have their transgender identity affirmed without the consent of their parent “would not impact
 21 GSA’s ability to run local chapters, continue the same level of advocacy it currently engages in, or
 22 prohibit any student within the District from joining a GSA chapter.” Opp’n at 5.³ Not so. As
 23 GSAN’s Co-Executive Director Ginna Brelsford attests, if Plaintiff’s suit were successful, “we would
 24 lose GSAs.” Dkt. No. 22-1 (“Brelsford Decl.”) at ¶ 13. Based on its work in states with anti-trans

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 26 ³ Plaintiff also incorrectly asserts that GSAN’s argument is “without authority.” *See* Motion at 7 (citing cases
 27 for the proposition that direct and immediate interest is found when an organization’s mission or activities are
 28 directly related to the specific issues being litigated). In *Sagebrush Rebellion*, for example, the Ninth Circuit
 held that the Audubon Society had an “interest in the preservation of birds and their habitats” in a suit
 challenging environmental protections it helped support. *Sagebrush Rebellion*, 713 F.2d at 528.

1 laws, GSAN knows that such laws and policies can chill GSA club participation by both students and
2 advisors. Brelsford Decl. at ¶ 11. Citing her experience and knowledge of laws undermining
3 protections for LGBTQ+ youth, Brelsford further testifies that such laws increase the risk of suicide,
4 particularly for transgender and non-binary students. *Id.* at ¶ 13.

5 Yet GSAN would be unable to provide adequate support to these students in a school
6 setting if acknowledgement and affirmation of their identities were contingent on the consent of their
7 parents. *Id.* at ¶¶ 11-13. Instead, “[y]oung people would start to seek safety and support outside of
8 school, and GSA Network would have to expend significant capacity and resources to shift [its]
9 model to meet their needs.” *Id.* at ¶ 13. These statements—which the Court must accept as true for
10 purposes of this motion, *Sw. Ctr.*, 268 F.3d at 819-20—repudiate Plaintiff’s assertion that a negative
11 outcome would not impair GSAN’s interests.

12 B. GSAN Has Shown Inadequacy of Representation

13 Plaintiff barely articulates a contention against inadequacy, relying instead on her
14 arguments regarding a direct and immediate interest and the District’s generic interest in defending
15 the constitutionality of the policy. Opp’n at 7. But, as demonstrated in its Motion, the District is
16 clearly an inadequate representative for GSAN’s interests in this action, given that at least one
17 member of the District’s five-person governing board has publicly declared that they would “[n]ever
18 condone such a policy or practice.” Motion at 9-10. Moreover, during the hearing on Plaintiff’s
19 Motion for Preliminary Injunction, counsel for the District confirmed GSAN’s concern regarding the
20 lack of overlapping interests. Specifically, counsel for the District positioned the District as not on
21 the “other side” of Plaintiff, but rather “in the middle just trying to do the right thing and figure out
22 and follow the law.” Dkt. No. 36 at 14:14-15; *see also id.* at 12:8-10 (“[M]y clients are trying to
23 follow the law and trying to figure out what the law is.”). GSAN’s interest in defending the District’s
24 policy and the laws on which it is based, and thus the privacy and safety interests of its youth
25 constituents, does not occupy “the middle” of Plaintiff’s constitutional challenge to transgender
26 student protections. This more than satisfies GSAN’s “minimal” burden to show that “representation
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1 of its interests ‘may be’ inadequate.” *W. Watersheds*, 22 F.4th at 840.⁴

2 **II. Alternatively, GSAN Should be Permitted to Intervene**

3 Plaintiff’s argument against GSAN’s satisfaction of the standard for permissive
4 intervention hinges on a plain misreading of GSAN’s motion. Contrary to Plaintiff’s suggestion,
5 GSAN has not argued, and does not intend to argue, that the Constitution “requires” a school district
6 to enact the District’s specific policy; rather, GSAN has argued that policies like the District’s are
7 appropriate (and constitutional) because they protect the rights of transgender students. In further
8 attempting to persuade this Court to exercise its discretion against intervention, Plaintiff rehashes
9 several of her prior arguments, all of which fail for the reasons explained above. Importantly,
10 Plaintiff incorrectly disregards GSAN’s decades of work on inclusive school laws and policies, which
11 have left it enormously experienced in assisting transgender and other LGBTQ+ youth in matters of
12 identity, support, safety, and privacy. As the Court knows, developing the factual record on these
13 issues will be central to this case. Particularly during depositions and expert discovery, GSAN will
14 play an important role in ensuring these issues are fully vetted, with an eye towards the interests of
15 transgender students.

16 **CONCLUSION**

17 For the foregoing reasons, GSAN respectfully requests that the Court grant leave for it to
18 participate in the above-captioned matter as Defendant-Intervenor.

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⁴ Notably, Plaintiff cites to, but does not argue for, application of two presumptions the Ninth Circuit sometimes applies when assessing adequacy of representation. Opp’n at 6. Plaintiff’s lack of explication should forfeit consideration of those presumptions. Tellingly, just last summer, the Ninth Circuit declined to apply the “ultimate objective” presumption, recognizing that a recent Supreme Court decision “calls into question” whether the presumption is still good law. *Callahan v. Brookdale Senior Living Communities, Inc.*, 42 F.4th 1013, 1021 n.5 (9th Cir. 2022) (citing *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191 (2022) (reversing en banc ruling applying “ultimate objective” presumption and noting lack of precedent in support of such a presumption)). Additionally, Plaintiff’s citation to the presumption regarding some forms of government representation is inapplicable for the additional reason that GSAN is not a District constituent. See, e.g., *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (noting an assumption of adequacy may apply “when the government is acting on behalf of a constituency that it represents”).

1 Dated: March 10, 2023

Respectfully submitted,

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