UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARY SMITH, *et al.*, Plaintiffs, v. BOARD OF EDUCATION OF FREDERICK COUNTY, MARYLAND, *et al.*, Defendants.	Civil Action No. 1:17-cv-02302-ELH

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS INTERVENORS-DEFENDANTS OF FREDERICK COUNTY TEACHERS ASSOCIATION, MARYLAND STATE EDUCATION ASSOCIATION, AND NATIONAL EDUCATION ASSOCIATION

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INTRODUCTION

The Frederick County Teachers Association ("FCTA") is the exclusive representative of the teachers, guidance counselors, reading specialists, school support teachers, teacher specialists, and other educators in the Frederick County Public Schools. It is an organization by, of, and for these employees. FCTA is affiliated with the statewide organization of educators, the Maryland State Education Association ("MSEA"), as well as the national organization of educators, the National Education Association ("NEA"). FCTA, MSEA, and NEA (collectively "FCTA") move to intervene in this suit to protect the unique interests educators have in the Frederick County Board of Education ("School Board") policies being challenged in this case.

Alarmed by the harm that discrimination and harassment does to transgender and gender nonconforming students, FCTA has been actively organizing as advocates for these students for years—first in their classrooms, then in their communities, and finally before their School Board. FCTA was an active participant in the campaign to urge the School Board to adopt the challenged policies, believing that those policies will make Frederick schools safer and more welcoming for all their students. Plaintiffs challenge those policies, and in so doing, accuse educators of unlawful and unconstitutional actions, and seek relief that would compel FCTA members to engage in harmful and unconstitutional actions against their students. FCTA members have interests of the highest order in the outcome of this case. FCTA urges this Court to grant its motion to intervene to protect these interests. Students' learning conditions, after all, are educators' working conditions.

BACKGROUND

I. FCTA had a longstanding role in supporting Frederick County transgender and gender nonconforming students, and in gaining passage of the School Board's trans-inclusive policies.

Beginning as early as the late 2000s, early 2010s, transgender and gender nonconforming students began to come out and transition in schools throughout the Frederick County Public Schools. Dirks Decl. ¶ 4 (attached as **Exhibit A**). For many educators in Frederick, this presented challenges and questions they had not yet confronted in their professional lives. *Id.* Questions arose: Should transgender students who request to use bathrooms consistent with their gender identity be allowed to do so? *Id.* Should educators call a student by their birth-assigned name and pronoun or should they use the student's preferred name and pronoun? *Id.* How should educators handle bullying and harassment directed at transgender and nonconforming students? *Id.* How should educators discuss gender identity issues with students and parents? *Id.* What should they disclose about a transgender or gender nonconforming student and what can they not disclose? *Id.*

For several years, each school's specific administration would address these questions in an ad hoc manner. *Id.* ¶ 6. Transgender students were treated differently depending on what class or school they were in, and educators across the county received conflicting direction about how to address issues that arose concerning transgender students. *Id.* ¶ 6. Sometimes transgender students were allowed to use facilities consistent with their gender identity; sometimes not. *Id.* ¶ 6. Some transgender students were required to use bathrooms that were reserved for staff; some not. *Id.* ¶ 6. Sometimes students were called by preferred names and pronouns; sometimes not. *Id.* ¶ 5.

Some transgender students were not out even to their peers—meaning they were known only by their gender identity—and some educators would avoid outing transgender and

nonconforming students by using preferred names and pronouns instead of birth-assigned named and pronouns. *Id.* But because the School Board had no mechanism to memorialize such naming conventions in county-used attendance software, substitute teachers would inadvertently out transgender and gender nonconforming students by using birth-assigned names and pronouns when calling attendance. *Id.* Educators were given little to no training about how to deal with these issues or how to address bullying and harassment of transgender and nonconforming students. *Id.* ¶¶ 4, 7.

This ad hoc approach left teachers in the lurch and placed transgender and gender nonconforming students in untenable positions. Students who were denied access to restroom facilities consistent with their gender identity responded by being absent from school altogether, missing class time when they were in school because the bathroom they were assigned was far from their classes, or abstaining from food and drink to limit the number of bathroom trips. *Id.* ¶ 6. The abstaining caused health and concentration problems for these growing and developing students. *Id.* Teachers witnessed how this negative school climate harmed their transgender and gender nonconforming students academically and emotionally, and how it harmed the overall school climate. *Id.* They knew well from their professional experience that when one group of students is stigmatized and ostracized it becomes more difficult to make their classrooms safe learning spaces for other students as well. *Id.* ¶ 17.

On May 13, 2016, the United States Department of Education's Office for Civil Rights along with the Department of Justice, issued a "Dear Colleague" letter, stating that, in the Departments' view, the prohibition on sex discrimination in education found in Title IX of the Education Amendments of 1972 includes discrimination based on gender identity, and as such, schools "must allow transgender students access to [restroom and locker room] facilities

consistent with their gender identity," and schools should use names and pronouns consistent with each student's gender identity. Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice at 3 (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf. This view was consistent with the vast weight of legal authority addressing these questions. *See generally* Nat'l Educ. Ass'n, Legal Guidance on Transgender Students' Rights 11–18 (June 2016), https://www.nea.org/assets/docs/20184_Transgender%20Guide_v4.pdf. This Dear Colleague Letter was a welcome relief for educators who had advocated for their transgender students and provided much needed clarity about what schools should do in these circumstances. But the lived experiences of educators in Frederick changed little; the ad hoc approach to transgender issues endured. Dirks Decl. ¶ 9.

Even before the Dear Colleague Letter, FCTA decided to take action to address this problem. FCTA and its members began by hosting a series of trainings for its members designed to help them better serve their transgender and gender-nonconforming students. *Id.* ¶ 8. In November 2015, a transgender member of FCTA and a transgender student co-taught a training for FCTA members on transgender issues. *Id.* Part of that training included training members on "Schools in Transition," a guide that was developed by NEA (and others) to train educators about how best to support transgender students. *Id.*

Even after the 2016 Dear Colleague Letter was issued, few or no substantive trainings on the letter were forthcoming from the School Board. Indeed, many Frederick County educators did not even learn about the existence of the Letter from the Board. FCTA filled the void, hosting its own trainings for Frederick educators on the Dear Colleague Letter. *Id.* ¶ 9. In early

Spring 2016, FCTA co-sponsored and promoted members' attendance at the "Welcoming Frederick" event hosted by the Frederick Center, a local LGBT group. *Id.* ¶ 10. The event consisted of a day-long community training program for building inclusive schools for LGBTQ children. *Id.* FCTA also sponsored and participated in Frederick County Pride events to support issues confronting transgender and gender-nonconforming youth in school. *Id.* Knowing that just one faculty ally in a school can make all the difference to LGBTQ students, FCTA formed the LGBTQ+ Subcommittee in May 2016 in order to train at least two allies in every school building on how to support transgender students. *Id.* ¶ 11. FCTA distributed buttons that members could wear at school that are adorned with rainbow flags and say "I am FCTA." *Id.* ¶ 16. These are but some of the ongoing activities the FCTA has engaged in to support its transgender and gender nonconforming students in the past few years.

As these trainings were occurring, FCTA, its local leadership, and its members recognized that FCTA-led trainings were not going to be enough. School Board policy change was needed. Students were likewise coming to the realization that a trans-inclusive School Board policy was the only way they could ensure that their rights were respected and their well-being protected. Student activists in various Frederick schools' Gay-Straight and Gender-Sexuality Alliances ("GSAs")—which are organizations formed by LGBTQ students and their allies, and are sponsored by FCTA faculty members—began to organize a community campaign to urge the School Board to adopt a trans-inclusive policy. *Id.* ¶ 13. FCTA supported these efforts from its earliest stages. *Id.* ¶ 15.

Two events supercharged FCTA's commitment to the campaign to push the School Board to adopt a trans-inclusive policy. The first was the release of the United States Centers for Disease Control and Prevention's 2014 Maryland Youth Risk Behavior Survey, which occurred

in June 2016. *Id.* ¶ 12. The Survey revealed that LGBTQ students in Maryland generally were suffering, but they were particularly suffering in Frederick County. *Id.* The Survey showed that 16 percent of LGBTQ students in Frederick County missed school because of safety concerns versus 5 percent of the general student population; and 20 percent of LGBTQ students in Frederick County had been involved in fights whereas only 8 percent of all students had been. *Id.*

But what emotionally shook FCTA members and local leaders was the Survey's suicide numbers. *Id.* Fifty-two percent of Frederick County's LGBTQ students had serious thoughts about killing themselves, and 42 percent had even made a plan to do so. *Id.* These numbers were nearly four times the rate of students in the general population, and 12 and 14 points higher, respectively, than the statewide LGBTQ numbers. *Id.*

These numbers were even more shocking to FCTA leaders and members because they understood that national numbers show that transgender students' suicide numbers are even higher than the LGBTQ student population as a whole. *Id.* They inferred that even more than 52 percent of Frederick County's transgender students had contemplated suicide, and even more than 42 percent had made a plan to do so. *Id.* FCTA, its leaders, and members recognized that the lives of their transgender students were literally on the line and resolved to remedy this crisis. *Id.*

Second, on February 22, 2017, the Departments of Education and Justice withdrew the Dear Colleague Letter that affirmed that transgender students have the federal right under Title IX to equal educational opportunities. U.S. Dep't of Just. & U.S. Dep't of Educ., Dear Colleague Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. & T.E. Wheeler, II, Acting Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice, (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf. The withdrawal made clear that when it comes to bathrooms and names, the federal government was going to be

at best silent. Still, the withdrawal letter emphasized that "the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy," and that "withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment." *Id.* at 1, 2. "All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment." *Id.* at 2.

FCTA engaged in the campaign to get the Frederick County School Board to adopt a trans-inclusive policy with gusto. In January 2017, FCTA conducted an "Educators as Allies" training on how educators could support LGBTQ+ students in their classroom, including how to combat bullying and bias. Dirks Decl. ¶ 14. On March 2, 2017, FCTA's Representative Assembly (its member-run governing body) unanimously voted in favor of supporting a trans-inclusive policy, and elected its local president, Melissa Dirks, to speak on behalf of FCTA in support of the trans-inclusive Policies at the March 8, 2017, meeting of the School Board that was considering adoption of the Policies. *Id.* ¶ 15. FCTA and its members attended pro-transgender rallies before School Board meetings; its local president and other leaders spoke passionately at the rallies; and they promoted the rallies through social media. *Id.*

The School Board responded to the community campaign and passed Policy 443 in June 2017, and later amended it slightly. Beginning in September 2017, FCTA participated in the student-led "I am Frederick campaign" supporting Frederick County's transgender students. *Id.* ¶ 16. Many FCTA members took pictures of themselves with an "I am Frederick" sign and posted the photos on their social media pages. *Id.* At FCTA's annual picnic, NEA Secretary-Treasurer Princess Moss also took an "I am Frederick" photo and posted it to her Twitter account. *Id.*

FCTA continued training educators on trans-inclusive issues and distributed NEA-branded anti-bullying posters to its members to post in their classrooms that say "Bullyfree It Starts with Me," which many members displayed in their classrooms. *Id.* MSEA also provided a grant to FCTA, enabling FCTA to produce and distribute t-shirts with the "I am FCTA" logo and rainbow-flag background similar to the buttons they distributed to members in 2016. *Id.* And the FCTA board of directors passed a resolution seeking legal support from MSEA and NEA to help fight this lawsuit, which, as FCTA recognized, could tear down all the work they and others have done to make Frederick County schools safer for all their students, and especially their transgender and nonconforming students. *Id.* ¶ 18. As recently as October 24, 2017, FCTA partnered with GLSEN Maryland to host a training, "Building Safe Spaces for LGBT Youth," which included information on Policy 443 for FCTA members. *Id.* ¶ 16.

As for MSEA and NEA, they too have been engaged in the larger fight to ensure that transgender and gender nonconforming students have safe and supportive schools and equal access to educational opportunities, even beyond all the support they have provided FCTA. For its part, NEA has been a national leader in the promotion of the rights of transgender students. Inclán Decl. ¶ 3 (attached as **Exhibit B**). Its core mission is to ensure that every student, regardless of zip code, has access to a great public school. *Id.* ¶ 2. Beginning in 2005, NEA has "develop[ed] a comprehensive strategy to deal with new and more sophisticated attacks on curricula, policies and practices that support gay, lesbian, and bi-sexual and transgender students, families and staff members in public schools." *Id.* ¶ 5. Pursuant to that, NEA has "provide[d] all state and local affiliates with existing model language . . . focused on district policy on transgender and gender nonconforming students that our school boards can adopt"; its model policies are very similar to policies adopted by Frederick County. *Id.* ¶ 7. NEA has a standing

commitment to "encourage all state and local affiliates to use valid and existing resources to provide transgender and gender nonconforming awareness training for faculty, staff, and administrators . . . ." *Id.* ¶ 5. In 2015, it partnered in the development of *Schools in Transition: A Guide to Support Transgender Students in K-12*, a practical resource on transgender issues for administrators and educators, and, in 2016, released a seminal "Legal Guidance on Transgender Students' Rights" for educators and legal advocates in 2016. *Id.* ¶ 6. NEA has hosted webinars and trainings and presentations at national and regional conferences for its vast membership, and has filed amici briefs in support of transgender students in several federal cases. *Id.* ¶¶ 9, 10, 11. NEA has provided advice to its members and affiliates on transgender issues, and has provided support and training for members to advocate for transgender students. *Id.* ¶ 12.

II. Policies 437 and 443 affirm rights and respect for transgender and gender nonconforming students, direct education staff to take particular actions, and provide specific training and professional support for educators.

In June 2017, the Frederick County Board of Education adopted Policy 443, "Creating Welcoming and Affirming Schools for Transgender and Gender Nonconforming Students," and modified it slightly on August 23, 2017. ECF No. 15-3 (Defs.' Motion to Dismiss, Ex. 1). The policy's purpose is to "prevent discrimination, stigmatization, harassment, and bullying of students who are transgender or who are gender nonconforming and to create school cultures that are safe, welcoming, and affirming for all students." *Id.* at 2 (Defs.' Mot. to Dismiss, Ex.1, at 1).

There are five main elements to Policy 443. First, it protects the privacy of all students by providing that transgender students control information about their gender identity and by guaranteeing every student, regardless of gender identity, the right to use a private bathroom or locker room facilities or be provided other privacy protections, such as privacy curtains, if they request them. *See id.* Second, it provides that "[a]ll students must have access to facilities,

including rest rooms, locker rooms, or changing facilities, that correspond to their gender identity." *Id.* at 4 (Defs.' Mot. to Dismiss, Ex. 1, at 3). Third, it ensures that students will be called by preferred names and pronouns, directs all staff to call students by preferred names and pronouns, and establishes that "[a]ll staff who work with students will have access to a current and complete list of preferred names and pronouns." *Id.* at 3–4 (Defs.' Mot. to Dismiss, Ex. 1, at 2–3). Fourth, it ensures that students are allowed to participate in educational programs, including athletics, overnight field trips, dances, graduation, and the like, in a manner consistent with their gender identity. *Id.* at 4–5 (Defs.' Mot. to Dismiss, Ex. 1, at 3–4). And fifth, it provides much needed training and professional development for staff. *Id.* at 5 (Defs.' Mot. to Dismiss, Ex. 1, at 4).

Specifically, it promises that all FCPS staff will have access to trainings on:

- The importance of privacy for all students, as well as an overview of the legal and other implications of disclosing gender identity to parents.
- Terms, concepts, and current developmental understandings of gender identity, gender expression, and gender diversity in children and adolescents.
- Developmentally appropriate strategies for communication with students and parents about issues related to gender identity and gender expression that protect student privacy.
- Developmentally appropriate strategies for preventing and intervening in bullying incidents, including cyberbullying.
- Classroom management practices, curriculum, and resources that educators can integrate into their classrooms to foster a more gender-inclusive environment for all students; and

- The 443 policy itself.

Id.

The School Board also adopted an implementing regulation, Regulation 400-36, which, among other things, directs staff to:

- "[Make] [e]very effort . . . to encourage and support communication between transgender and gender nonconforming students and the student's parent/guardian."
- "[O]ffer to meet jointly with the parent/guardian and the student at school"; and
- "[W]ork to both support student needs [to privacy about their gender identity] as well as respect the rights of the parent/guardian to have access to student records in compliance with federal and state law."

ECF No. 15-4, at 4 (Defs.' Mot. to Dismiss, Ex. 2, at 3).

Finally, the School Board modified Policy 437, the Board's anti-bullying and anti-harassment policy, adding "gender expression" harassment to the list of prohibited harassment that already included harassment based on sex, sexual orientation, and gender identity. ECF No. 15-5, at 2 (Defs.' Mot. to Dismiss, Ex. 3, at 1). Policy 437 not only protects students from bullying and harassment, but it also applies to school staff, protecting them too from bullying and harassment. *See id.*

III. The lawsuit alleges educator misconduct and asks this Court to order educators to engage in activities that they know harm their students.

On August 11, 2017, two pseudonymous Plaintiffs, Mary Smith and Jane Doe, who appear to be a Frederick County student and her parent, filed suit challenging the Policies as unconstitutional or illegal under several federal and state constitutional and statutory provisions.

The Complaint makes several scandalous allegations specifically about FCTA educators:

- It compares Frederick County educators to personnel in the Soviet Union who ran "child cults [like the] Soviet Komsomol or Young Pioneers." Pls.' Compl. ¶ 24.
- It accuses educators of insufficient supervision of students, causing a "sexualized climate in bath facilities at FCPS schools which continues to this day such that many girls no longer use the lockers rooms or showers out of fear of being raped, videoed, or otherwise having their privacy invaded." *Id.* ¶ 45.
- It accuses educators of refusing "to intervene and stop the bullying" of the Plaintiff, and even accused one teacher of "making jokes about a student." *Id.* ¶ 54.
- It asserts that "[g]overnment actors" are treating students in ways that "evoke imagery from the horrors of Nazi death camps." *Id.* ¶ 90.
- It asserts that "Mary Smith has been bullied and marginalized . . . by teachers on account of her mother's and her objection to the policy." *Id.* ¶ 113.
- And it accuses educators of doing these and other actions "under color and pretense of state law," meaning that educators could, in Plaintiffs' view, be subject to constitutional liability. *Id.* ¶ 147.

For relief, Plaintiffs request that this Court strike down Policies 437 and 443 and order essentially anti-Policies 437 and 443. Specifically, Plaintiffs request an order:

- Permanently enjoining Policies 437 and 443 in their entirety;
- Requiring school staff and administration to inform parents of "all matters" involving their students' "sexuality or gender related information or behavior";

- Requiring staff to only allow students to use bathrooms and lockers rooms that align with students' birth-assigned sex regardless of the student's gender identity or expression; and
- Refusing to allow girls to participate in male-designated athletic programs, and vice versa.

Pls.' Compl. ¶ I (Petition for Relief).

ARGUMENT

Federal Rule of Civil Procedure 24 provides two avenues for intervention that are relevant here—intervention as of right and permissive intervention. "[L]iberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." *Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 303 F.R.D. 266, 271 (D. Md. 2014) (quoting *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986)). FCTA, MSEA, and NEA qualify for intervention under both standards.

I. FCTA, MSEA, NEA Are Entitled to Intervention as of Right.

"Rule 24(a)(2) requires a district court to allow an applicant to intervene if its application is timely and if it 'claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.'" *Safety-Kleen, Inc. (Pinewood) v. Wyche,* 274 F.3d 846, 867 (4th Cir. 2001) (quoting Fed. R. Civ. P. 24(a)(2)). When the movant shows timeliness, a district court must permit intervention as a matter of right if the movant can demonstrate "(1) an interest in the subject matter of the action; (2) that the protection of this

interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation." *Teague v. Bakker*, 931 F.2d 259, 260–61 (4th Cir.1991).

A. FCTA's motion to intervene is timely.

"[A]n application made before the existing parties have joined issue in the pleadings has been regarded as clearly timely." 7C Charles A. Wright et al., *Federal Practice and Procedure* § 1916 (3d ed.). Timeliness is determined by three factors: "first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion."

This suit has just begun—the School Board filed its motion to dismiss the complaint less than two weeks before this motion, Plaintiffs have not yet even responded to the motion to dismiss, the Court is still considering the one other pending motion to intervene, and discovery has not yet even commenced. As a consequence, no prejudice could possibly result to the parties from FCTA's intervention, nor could FCTA's intervention be deemed in any way tardy. *See, e.g.*, *Allco Fin. Ltd. v. Etsy*, 300 F.R.D. 83, 86 (D. Conn. 2014) (holding timely intervention motion filed "just over three months after [the suit] was commenced and before Defendant had filed an answer or motion to dismiss"). Indeed, courts routinely find timeliness satisfied where intervention is sought much later in a case's progression. *See Students for Fair Admissions Inc. v. Univ. of North Carolina*, 319 F.R.D. 490, 494 (M.D.N.C. 2017) (finding timeliness seven months after complaint and three months after defendant filed answer); *Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Security*, No. 2017 WL 2778820, at *9 (D. Md. June 26, 2017) (finding timeliness "ten months after suit was initiated" because case was "still in its early stages").

B. FCTA has several significant protectable interests related to this case and the disposition of this case may impair or impede FCTA's interests.

FCTA has "significant protectable interest[s]" that it "stand[s] to gain or lose" by this case. *Teague*, 931 F.2d at 261 (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)).

First, as a vocal public supporter of the trans-inclusive policies eventually adopted by the School Board, FCTA has a significant protectable interest in those policies that could be impaired or impeded by this suit. Indeed, the Ninth Circuit has specifically held on several occasions that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995); *accord Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982); *cf. Prete v. Bradbury*, 438 F.3d 949, 952 (9th Cir. 2006) (holding that Oregon AFL-CIO had an interest in defending constitutionality of ballot measure that prohibited certain types of payments to petition-signature gatherers because union was a "major supporter").

The Sixth and Tenth Circuits have agreed. In *Michigan State AFL-CIO v. Miller*, the Sixth Circuit held that the AFL-CIO, as "a vital participant in the political process that resulted in legislative adoption," had a significant protectable interest in defending the legislation. 103 F.3d 1240, 1246–47 (6th Cir. 1997). And in *Coal. of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior*, the Tenth Circuit held that even a single person, who was an amateur biologist and naturalist, had a significant protectable interest in defending a federal regulation protecting the Spotted Owl in light of his "persistent record of advocacy for [the Owl's] protection." 100 F.3d 837, 841 (10th Cir. 1996); *see also Marie v. Moser*, No. 14-CV-02518-DDC/TJJ, 2014 WL 5800151, at *3 (D. Kan. Nov. 7, 2014) (applying Ninth Circuit

rule). The Fourth Circuit has not yet had occasion to consider this per se rule, but this Court should apply it here.

Second, FCTA members are specifically governed by the policies. Students' learning conditions, after all, are educators' working conditions. "[I]n cases challenging various statutory schemes as unconstitutional . . . courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention." 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1908.1 (3d ed. 2017); *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 528 (1986) (noting that firefighter union had right to intervene in case challenging the city's employment practices); *United States v. City of Detroit*, 712 F.3d 925, 931 (6th Cir. 2013) (concluding that a union's interests are substantial when agreed-upon working conditions are impaired by a district court's decision); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322–23 (7th Cir. 1995) (holding that exotic dancers had right to intervene in a Department of Labor enforcement action against their employer because their employment conditions could be affected by the outcome of the case); *New York Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N. Y.*, 516 F.2d 350, 351–52 (2d Cir. 1975) (holding that pharmacists had right to intervene in challenge to regulation prohibiting price advertising of prescription drugs because the regulations could have an eventual impact on pharmacists' jobs); *Oliver v. Sch. Dist. of City of Kalamazoo, Kalamazoo Cty.*, 448 F.2d 635, 636 (6th Cir. 1971) (per curiam) (granting motion to intervene by "Kalamazoo City Education Association, The Michigan Education Association, The National Education Association" in desegregation case that was under an order to adopt a new school attendance plan).

The challenged Policies govern multiple aspects of educators' workplaces and their interactions with students and parents. Policies 437 and 443 provide specific instructions to educators: what they must call students, which bathrooms students can use, which programs students have access to, and more. The Policies offer specific benefits to educators: much needed training about transgender students' issues. And the Policies provide specific workplace protections for educators: Plaintiffs seek to enjoin not only the policy that prohibits harassment against students, but also the policy that prohibits workplace harassment against educators. *See* ECF No. 15-5, at 2 (Defs.' Mot. to Dismiss, Ex. 3, at 1) (prohibiting "bullying, harassment, or intimidation *of any person on school property or at school-sponsored functions*").

FCTA and its members specifically advocated for the Policies because of the harm that the lack of policies did to their students and to themselves. Were transgender students required to use bathrooms inconsistent with their gender identity, individual educators, administrators, and school employees would be compelled to police transgender students' movements in bathroom and locker room facilities, knowing that such practices are degrading and harmful. When policies prevent teachers from addressing student needs, teachers no longer have access to the moral rewards of being an educator, leading to demoralization and frustration. Movants have an interest in maintaining the Policies for which they advocated, and from which they have since benefitted.

Third, Plaintiffs ask this Court to enjoin FCTA members from engaging in actions they believe are good for students and order FCTA members to take specific actions that they believe harm their students. When a party seeks an injunction, the injunction, as a general matter, can only bind parties, employees and agents of parties, and those in "active concert or participation" with the same. Fed. R. Civ. P. 65(d)(2). Courts have recognized that unions, as the legal representatives of specific employees, have a right to intervene in cases where a sought

injunction would operate against the union's members. *See, e.g.*, *United States v. City of Los Angeles*, 288 F.3d 391, 399 (9th Cir. 2002) (holding that union had "a protectable interest because the complaint seeks injunctive relief against its member[s]"); *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996) (holding that police union had right to intervene even at very late stage in part because its members "in essence will be bound by the Consent Decree"); *Int'l Bhd. of Teamsters, Chauffeurs, Stablemen & Helpers of Am., Local Union No. 523, of Tulsa, Okl. v. Keystone Freight Lines*, 123 F.2d 326, 328–29 (10th Cir. 1941) (holding that because "Plaintiff sought an injunction not only against the defendants, but also against [a union's] members who were employed by defendants," the union's "right of intervention was not permissive, but absolute").

FCTA's interest in protecting its members from injunctions is even more pronounced here, where Plaintiffs seek an order that would require teachers to engage in unconstitutional, illegal, and harmful acts directed at their students. *See* FCTA Proposed Mot. to Dismiss (attached as **Exhibit C**). FCTA members are champions for their students. They deeply believe that the Policies are good not just for transgender and gender nonconforming students, but for all students. The Policies, they believe, will make equal educational opportunities available to their transgender and gender nonconforming students and reduce the stigma and stress that they see their students struggle with. But Plaintiffs seek to transform FCTA members from their students' champions to their oppressors. Plaintiffs seek to conscript educators in a deeply harmful scheme of discrimination directed at the very students they care so deeply for.

Fourth, FCTA has a similar interest in protecting its members from Plaintiffs' scandalous accusations. Plaintiffs have accused FCTA members of outrageous conduct, and many of those scurrilous accusations are entirely irrelevant to Plaintiffs' challenge to the trans-inclusive

Policies. *See, e.g.*, Pls.' Compl. ¶ 45 (alleging that teachers neglected their supervisory duties around school facilities, creating a "sexualized climate"); *id.* ¶ 54 (alleging that "school staff does nothing to intervene and stop the bullying" of minor Plaintiff); *id.* ¶ 90 (alleging that students are being treated in a way that "evoke[s] imagery from the horrors of Nazi death camps"). These accusations, if true, could subject individual teachers to community scorn, employment discipline, and even constitutional liability. If those accusations are going to be part of this litigation, FCTA has a significant interest in rebutting them.

This is particularly true when Plaintiffs allege, as they do here, that FCTA's members themselves have engaged in illegal and unconstitutional conduct. *See, e.g.*, *id.* ¶¶ 89, 113 (accusing "[g]overnment actors" of "exposing children to becoming victims of child pornography" in violation of the Fourteenth Amendment, and "teachers" of harassing and retaliating against minor Plaintiff for "object[ing] to the policy" in violation of Title IX). A union has "a protectable interest in the merits phase of the litigation" when the "complaint [alleges] that its member[s] committed unconstitutional acts[.]" *See City of Los Angeles*, 288 F.3d at 399 (holding that the police union has an interest in the merits of litigation that alleges constitutional violations by police officers).

Fifth, how this Court decides the core questions of whether cisgender students who are offended by transgender students have standing to challenge trans-inclusive policies, whether such policies are legal, and whether such policies are legally required "will have a persuasive stare decisis effect in any parallel or subsequent litigation." *United States v. State of Or.*, 839 F.2d 635, 638 (9th Cir. 1988). MSEA and NEA in particular have a significant interest in this Court's decisions. If the Plaintiffs prevail before this Court, such a decision could imperil trans-inclusive school district policies throughout the state and the nation. Such stare decisis interests,

as courts have recognized, warrant intervention. *Id.*; *see also WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010) ("[F]or purposes of Rule 24(a)(2), sufficient impairment may result even from the 'stare decisis effect' of a district court's judgment."); *Stone v. First Union Corp.*, 371 F.3d 1305, 1310 (11th Cir. 2004) (noting that "potential for a negative stare decisis effect may supply that practical disadvantage which warrants intervention of right" (quoting *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)).

C. The Schools Board does not adequately represent FCTA's interests.

"[T]he application satisfies Rule 24(a)'s third requirement if it is shown that representation of its interest 'may be' inadequate." *In re Sierra Club*, 945 F.2d 776, 779–80 (4th Cir. 1991) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). The burden of making this showing should be treated as "minimal." *Id.* To be sure, a presumption arises that intervenors' interests are adequately represented when the proposed intervenor shares the same objective as the governmental agency and the "existing defendants are represented by a government agency," but this presumption is rebutted with a showing of "adversity of interest, collusion, or nonfeasance." *Stuart v. Huff*, 706 F.3d 345, 349, 351 (4th Cir. 2013).

First, FCTA and the School Board have an inherent adversity of interest. And state law recognizes this adversity. *See, e.g.*, Md. Code Ann. Educ. § 6-408 (describing negotiations between school employer and employee organization, including when negotiations have reached an impasse). Courts have specifically declined to extend the *Stuart* presumption when a public-sector union is asserting the interests of its members. *See City of Los Angeles*, 288 F.3d at 402 ("The presumption has not been applied to parties who are antagonists in the collective bargaining process. The [union] is the designated representative of its members in that endeavor; the City is not."). It is well recognized that public employers can "hardly be expected to litigate

with the interests of their employees uppermost in their minds," especially when the employees are represented by a public-sector union. *See Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 738 F.2d 82, 84 (8th Cir. 1984) (allowing intervention of NEA affiliate in desegregation case). As the Second Circuit put it, there is an "inherent conflict" between a local government and the public-sector local union because "the interests of employers and their employees frequently diverge, especially in the context of municipal employment, where an employer's interests are often not congruent with the employee's." *See Floyd v. City of New York*, 770 F.3d 1051, 1059 (2d Cir. 2014) (concluding that it was obvious that the city *might not* adequately represent the public employee's interests but affirming denial to intervene on timeliness grounds); *see also Trbovich*, 404 U.S. at 538–39 (concluding that "sufficient doubt about the adequacy of representation [existed] to warrant intervention" by a union member where the Secretary of Labor had two distinct, "related, but not identical" duties—to serve union members and to protect the public interest). Given this, there should be no doubt that the School Board "may" not adequately represent FCTA's members' interests.

Second, the *Stuart* presumption is inapplicable when the government is defending a law or policy that was passed only after recent political pressure. In such circumstances, it is fair to conclude that there may be some hesitancy on the part of the government when the pending lawsuit alters the local entity's political calculation. A case very similar to this one, *Students & Parents for Privacy v. United States Department of Education*, is instructive. In that case, the plaintiffs, much like Plaintiffs here, challenged a school district's trans-inclusive facilities policies (and also challenged the Obama-era Department of Education transgender guidance). No. 16-4945, 2016 WL 3269001, at *1 (N.D. Ill. June 15, 2016). The school district had adopted those policies under federal and local pressure. In that circumstance, the court recognized that the

presumption did not apply to the school district, noting "there does not appear to be any dispute that the [school] District inadequately represents the movants' interests, but the federal defendants," who were also defending the Obama-era trans-inclusive guidance, "are another matter," because the federal government "was presumed to adequately represent their interests." *Id.* at **2–3.

Indeed, school districts in several cases initially respected transgender students' rights but changed course after public pressure. *See G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 714 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (describing school board's initial approval of a transgender boy's use of the boys' restroom, and then subsequent policy change); *Students & Parents for Privacy*, 2016 WL 6134121, at *2 n.1 (noting that a transgender girl was allowed to use girls' restrooms, but noting school district's later objection); *cf. Johnston v. Univ. of Pittsburgh of Com. System of Higher Educ.*, 97 F. Supp. 3d 657, 663 (W.D. Pa 2015) (discussing transgender male plaintiff's use of men's restrooms, athletic programs, and locker rooms consistently without incident until administration told him to use women's facilities).

Given this, the School Board's representation "may be" inadequate to protect FCTA's interests.

II. Alternatively, FCTA's motion for permissive intervention should be granted.

Under Rule 24(b)(1)(B), courts may allow permissive intervention when an applicant "has a claim or defense that shares with the main action a common question of law or fact." A permissive intervenor must show that "(1) the motion is timely; (2) the defenses or counterclaims have a question of law or fact in common with the main action; and (3) intervention will not result in undue delay or prejudice to the existing parties." *Carcaño v. McCrory*, 315 F.R.D. 176, 178 (M.D.N.C. 2016).

As discussed, this motion is timely, coming within two weeks of the Defendants' first response to the Complaint. The defenses to be raised by FCTA have both questions of law and fact in common with the main action. FCTA will not litigate peripheral issues but will instead litigate the central question before this Court: whether the Policies are legal. The intervention will not result in undue delay or prejudice.

If anything, FCTA's involvement could help facilitate the speedy resolution of the case. FCTA's members have intimate knowledge of and involvement with the challenged Policies and the classroom dynamics that warrant them, and FCTA does not intend to "play an exceptional role in the ligation." *See Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1534–35 (9th Cir. 1985) (noting that the Mead Education Association (an NEA local affiliate) was permitted to intervene to defend the constitutionality of certain reading assignments). Indeed, NEA and its affiliates have been permitted to intervene in numerous lawsuits that involve legal challenges to school district policies and practices and have no history of being an impediment to the speedy and fair resolution of those cases. *See, e.g.*, *Ross v. Houston Indep. Sch. Dist.*, 559 F.2d 937 (5th Cir. 1977); *Lee v. Macon Cty. Bd. of Educ.*, 482 F.2d 1253 (5th Cir. 1973); *Tims v. Bd. of Educ. of McNeil, Ark.*, 452 F.2d 551 (8th Cir. 1971); *Oliver v. Sch. Dist. of City of Kalamazoo, Kalamazoo Cty.*, 448 F.2d 635 (6th Cir. 1971); *Bd. of Educ. of Shelby Cty., Tenn. v. Memphis City Bd. of Educ.*, No. 11–2101, 2011 WL 1743693 (W.D. Tenn. May 5, 2011).

CONCLUSION

FCTA, MSEA, and NEA members have specific interests of the highest order in this case. The specific Policies being challenged in this case were advocated by these organizations and their members, and these members gained specific benefits from the Policies—increased training and clear rules that improve the school climate for all students—and the outcome of this

case could imperil similar policies throughout Maryland and the nation. Plaintiffs accuse FCTA members of scurrilous acts and seek to use this Court to conscript them into a scheme that would harm their students and violate their students' legal and constitutional rights. FCTA, MSEA, and NEA respectfully request that this Court grant their motion to intervene.

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Respectfully submitted,

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