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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

The Women's Student Union,

Plaintiff,

v.

U.S. Department of Education,

Defendant,

Foundation for Individual Rights in Education, Independent Women's Law Center, and Speech First, Inc.,

[Proposed] Intervenor-Defendants

Case No. 3:21-cv-01626-EMC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVENOR-DEFENDANTS MOTION TO INTERVENE AS DEFENDANT

Judge: Hon. Edward M. Chen

Date: July 1, 2021
Time: 1:30 p.m.
Crtrm: 5, 17th Floor

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INTRODUCTION

Plaintiff seeks to leverage its complaints about alleged sexual misconduct at a single public high school into a basis for throwing out the entirety of a Department of Education rule that protects free speech and due process rights at both secondary schools and college campuses throughout the United States. Movants include some of America's largest and most prominent advocacy organizations dedicated to promoting free speech and due process at colleges and universities. They seek to intervene in this case to protect their interests and to advance a legal theory in defense of the rule that the Department of Education will not: that many of the rule's protections for students are not just reasonable policy decisions—they are constitutionally required. Movants satisfy the Federal Rules' requirements for both mandatory and permissive intervention, and they should be allowed to intervene to defend an interest otherwise unrepresented in this litigation.

BACKGROUND

A. The Department of Education's Title IX Rule

On May 6, 2020, the Department of Education announced that it would issue a final rule imposing certain legal obligations under Title IX on federal funding recipients—a category that includes virtually all colleges and universities in the United States. One of the Final Rule's most important provisions is its definition of conduct that qualifies as the kind of "sexual harassment" that Title IX requires funding recipients to investigate and punish. Among other things, the rule defines "sexual harassment" to include "unwelcome conduct on the basis of sex determined by a reasonable person" that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." 85 Fed. Reg. 30,026, at 30,178 (May 19, 2020). This definition is drawn from the Supreme Court's decision in Davis v. Monroe County Board of Education, 526 U.S. 629, 650 (1999), a case where a private plaintiff sued a funding recipient under Title IX for its deliberate indifference to peer sexual harassment.

The Final Rule's adoption of "the Davis standard" to define sexual harassment marks a departure from the Department's past guidance, which claimed to follow Davis but described the

attributes of actionable sexual harassment in the disjunctive ("severe, pervasive, or objectively offensive") and stated that conduct that is "persistent" qualifies as harassment (even if it is not objectively offensive). See, e.g., U.S. Dep't of Educ., Dear Colleague Letter: Harassment and Bullying at 2 (Oct. 26, 2010), https://bit.ly/2Bp3rg4. The Final Rule became effective on August 14, 2020. Plaintiff asks the Court to throw out the rule's definition of "sexual harassment" and to force the Department to reinstate a broader and more subjective definition of that important term. See Complaint for Injunctive and Declaratory Relief Administrative Procedure Act Case at p. 22–23, Doc. 1 (March 8, 2021) ("Compl.").

Before the Final Rule was promulgated, the Foundation for Individual Rights in Education ("FIRE") and the Independent Women's Forum—two of the proposed intervenors—submitted comments to the Department urging it to adopt the Davis standard because any broader definition of sexual harassment would violate the First Amendment. See Comment of the Foundation for Individual Rights in Education in Support of the Department of Education's Proposed Regulations on Title IX Enforcement (Jan. 30, 2019), https://bit.ly/2Nl6qss; IWF, Comments on the Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), https://bit.ly/2Bw54J5. Davis itself strongly supports this position. In response to First Amendment concerns raised by Justice Kennedy in dissent, the Davis majority took care to define the conduct that funding recipients must punish in a manner that allows public university administrators "to refrain from a form of disciplinary action that would expose [them] to constitutional . . . claims." 562 U.S. at 649. Since Davis, courts have looked to that decision for guidance on the scope of "sexual harassment" that public universities may prohibit consistent with the First Amendment. See, e.g., DeJohn v. Temple Univ., 537 F.3d 301, 319 (3d Cir. 2008).

Despite adopting the Davis standard in part because it concluded that doing so would help to avoid "a chill on free speech and academic freedom," 85 Fed. Reg. at 30,142, the Department stopped short of saying that the Davis standard is required by the First Amendment. That is an important point of disagreement between the Department and Movants: while the Department purports to have selected one of a range of constitutionally permissible definitions of "sexual

harassment," Movants' position is that the use of any definition of "sexual harassment" broader than the Davis standard would violate the First Amendment. The disagreement between Movants and the Department on this point has direct implications for this case. If Movants are correct, the canon of constitutional avoidance militates strongly against interpreting Title IX and the APA to mandate the broadened definition of "sexual harassment" that Plaintiff advocates.

B. Proposed Intervenors

Movants are nonprofit organizations dedicated to promoting free speech and due process on college campuses.

Proposed Intervenor FIRE is a nonprofit membership organization with approximately 50 employees and a student network with members on college campuses throughout the United States. FIRE staff work directly with students and faculty who are subjected to disciplinary proceedings for engaging in conduct that is protected by the First Amendment. In instances when a disciplinary proceeding threatens to chill unpopular but constitutionally protected speech, FIRE staff educate the accused of his or her rights and communicate with school administrators about their obligations under the First Amendment. Considerable staff time and funds are devoted to these activities, and in recent years a significant share of these resources have been used to counter sexual misconduct proceedings at universities with conduct codes that use broad, amorphous definitions of prohibited "sexual harassment." The use of the Davis standard in the Department's rule has reduced the frequency with which universities attempt to punish free speech on sensitive issues of gender and sex and thus has enabled FIRE to shift its resources to addressing other threats to protected speech on campus. FIRE does not have enough staff time or money to assist every student who approaches it for help. The rule's definition of sexual harassment now frees up resources for use in cases that do not involve allegations of sexual harassment.

In addition to its involvement in individual disciplinary proceedings, FIRE also devotes considerable staff time and money to working with its Student Network members to educate college students about their free-speech and due process rights. Members of FIRE's Student Network work to promote their own constitutional rights as well as the constitutional rights of other students through messaging about the constitutional limits on the authority of public schools and universities

to punish speech, including speech on gender, sex, and other controversial topics that have routinely been the basis for discipline under conduct codes that prohibit "sexual harassment." FIRE also spends money preparing printed materials on these issues for distribution on college campuses. The implementation of the rule has permitted FIRE and its student members to shift resources and efforts to promoting free speech on other topics. Some members of the FIRE Student Network have also been subjects of university disciplinary proceedings relating to alleged sexual harassment in the past.

The Independent Women's Law Center ("Center") is a project of the Independent Women's Forum ("Forum"), a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. The Center supports this mission by devoting time and resources to advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and access to the marketplace of ideas. The Center participates in free-speech litigation challenging universities "bias" and "harassment" policies, and the Forum has long studied and advocated for greater free-speech and due-process protections for college students. See, e.g., Heather Madden, Title IX and Freedom of Speech on College Campuses, POLICY FOCUS, Jan. 2016, https://bit.ly/2XgoQPS. Unsurprisingly then, the Center and Forum were leading proponents of the rule. In addition to the comment in support, the Center (along with Speech First) helped defeat proposals to delay the rule's effective date. See Independent Women's Law Center & Speech First, Letter to Secretary DeVos and Assistant Secretary Marcus (Apr. 9, 2020), https://bit.ly/3e4vEH0.

Speech First is a membership association of college students, parents, faculty, alumni, and concerned citizens. Speech First is committed to restoring the freedom of speech on college campuses through advocacy, education, and litigation. And its student members are subject to speech codes and disciplinary procedures that violate the First Amendment but that, according to universities, comply with the Title IX guidance that the Final Rule has replaced. For example, Speech First has challenged speech-chilling "harassment" policies at the University of Michigan, Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019); the University of Texas, Speech First, Inc. v. Fenves, 979 F.3d 319 (5th Cir. 2020); the University of Illinois, Speech First, Inc. v. Killeen,

968 F.3d 628 (7th Cir. 2020); and Iowa State University, Speech First, Inc. v. Wintersteen, No. 4:20-cv-2 (S.D. Iowa). If the Final Rule stands, schools will bring their policies in line with it, freeing Speech First to spend its resources on other pressing constitutional concerns. And like FIRE, Speech First has student members who have been subject in the past, and could be subject in the future, to Title IX disciplinary proceedings.

Proposed intervenors' missions are related and complementary, and their views on the issues in this case are aligned. But still, they are three separate organizations with different counsel, independent resources, and unique missions. To conserve the Court's and the parties' resources, and to minimize their footprint in this case, proposed intervenors are jointly moving to intervene and, if their intervention is granted, will make their arguments in one consolidated brief. Proposed intervenors will also follow whatever deadlines govern the existing defendants.

ARGUMENT

The Federal Rules allow "intervention of right" under Rule 24(a) and "permissive intervention" under Rule 24(b). Under either standard, "[a] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173, 1179 (9th Cir. 2011) (citing United States v. City of Los Angeles, 288 F.3d 391, 397–98 (9th Cir. 2002)). Movants satisfy the standards for both intervention as of right and permissive intervention.

I. Movants are entitled to intervene as of right.

Under Rule 24(a), a court "must permit anyone to intervene who" (1) makes a timely motion to intervene, (2) has an "interest relating to the property or transaction that is the subject of the action," (3) is "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and (4) shows that he is not "adequately represent[ed]" by "existing parties." FED. R. CIV. P. 24(a). Movants meet each of those four requirements.

A. This motion is timely.

Movants have timely filed this motion. Plaintiff filed the complaint on March 8, Defendants have yet answer the Complaint, and nothing of substance has happened in the case. For the

timeliness requirement of Rule 24(a), courts consider "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997) (citing County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir.1986)). "[T]imeliness is not an issue" where, as here, proposed intervenors move "relatively early in the proceedings," represent that they "will not . . . disturb the schedule set by [the] court," and "when few substantive issues have been addressed." See E&B Nat. Res. Mgmt, Corp. v. Cnty. of Alameda, 2019 WL 5697912, at *7 (N.D. Cal. Nov. 4, 2019). Movants arrived quickly to protect their interests at stake in this suit, filing well before any substantive issues have been addressed, and their intervention would not in any way impede the progress of this litigation.

B. Movants have a protected interest in this action.

Movants have at least three " 'significantly protectable' interest[s]" in the subject of the action. Wilderness Soc., 630 F.3d at 1177–78 (quoting Donaldson v. United States, 400 U.S. 517, 531 (1971)). First, Movants are public interest groups that advocate for the free speech and due process rights the rule protects, and under the Ninth Circuit's precedents "[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); see also Washington State Building & Construction Trades v. Spellman, 684 F.2d 627 (9th Cir.1982); Idaho v. Freeman, 625 F.2d 886 (9th Cir.1980).

Second, as the description of Movants' activities provided above makes clear, the rule affects Movants' allocation of resources in a way that gives them an interest that is the "mirror-image" of Plaintiff's. Builders Ass'n of Greater Chicago v. City of Chicago, 170 F.R.D. 435, 440–41 (N.D. Ill. 1996). While Plaintiff alleges that the rule forces it to divert resources to activities that would be unnecessary without the rule, Compl. ¶ 80, exactly the opposite is true for Movants; the rule has allowed Movants to reallocate resources to other activities that would otherwise be used to resist unconstitutional disciplinary proceedings. If Plaintiff has Article III standing to challenge the rule on a diversion-of-resources theory, see Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), then it necessarily follows that Movants have a significantly protectable interest in defending it, see

California ex rel. Lockyer v. United States, 450 F.3d 436, 442 (9th Cir. 2006) ("[T]he same evidence that bolsters the [Plaintiff's] standing to sue also bolsters the case for intervention.").

Third, Movants have a significantly protectable interest in safeguarding the free-speech and due process rights of themselves and their members. Expansive definitions of "sexual harassment" in school conduct codes have a chilling effect on speech concerning gender, sex, and related topics, and even speech on those subjects that many find offensive is valuable and protected by the First Amendment. See Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.' "). The First Amendment and due process rights of Movants and their members are at stake in this case, and those rights plainly qualify as an "interest" under Rule 24(a)(2). Brody ex rel. Sugzdinis v. Spang, 957 F.2d 1108, 1125 (3d Cir. 1992); see also Piekkola v. Klimek, 2016 WL 6072354, at *2 (D. S.D. Oct. 17, 2016) (finding where proposed intervenor's "First Amendment rights are implicated, her interest is substantial and protectable.").

C. This action threatens to impair Movants' interests.

Movants' significant interests and their ability to protect those interests may be impaired "as a practical matter" by this action. FED. R. CIV. P. 24(a)(2). It is a premise of Plaintiff's lawsuit that the rule's definition of "sexual harassment" will significantly narrow the types of speech and expressive conduct that schools prohibit and punish. If that premise is correct—as it must be for Plaintiff's injuries to be fairly traceable to the rule—then Movants unquestionably stand to gain or lose by the direct legal operation of the outcome of this case. See Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 822 (9th Cir. 2001). For the same reasons that Plaintiff stands to gain from a decision in its favor, Movants stand to lose.

Moreover, Movants' interests will be affected not only by whether this Court upholds the rule's use of the Davis standard but also on what grounds. As Plaintiff's complaint documents, the Department's guidance on the definition of "sexual harassment" has changed over time. Compl. ¶¶ 25–36. If the Court considers and accepts Movants' First Amendment argument, it will establish that the Department cannot constitutionally revert to the broader definitions it has used in the past.

If, on the other hand, the Court upholds the Final Rule's definition of "sexual harassment" as one of a range of approaches that are permissible under Title IX, the Department could in the future abandon its current position. Without intervention, Movants' interests may be impaired as a practical matter because they have "no alternative forum where they can mount a robust defense" of the rule's inclusion of the Davis standard. California ex rel. Lockyer, 450 F.3d at 442. The potential stare decisis effects of the judicial opinions that will be generated in this case thus provide a basis for intervention as of right. Day v. Apoliona, 505 F.3d 963, 965 (9th Cir. 2007) (intervention granted where disposition "may impede [movant's] ability to protect [its] interest, not the least because the Opinion may have a precedential impact").

Furthermore, participating in this case as an amicus would not enable Movants to adequately protect their interests. This Court would not be required to consider Movants' constitutional arguments if they were presented only in an amicus brief, and if Movants were only accorded the status of amici they could not file motions or appeal from an adverse judgment. In short, intervention is necessary for Movants to safeguard their significant interests in this case and any subsequent appeal. See Freedom from Religion Found., Inc. v. Geithner, 262 F.R.D. 527, 530 (2009) ("The filing of an amicus brief to the court seems a meager substitute in comparison, and would deny the potential intervenors a voice in key junctures of this litigation."); City of Los Angeles, 288 F.3d at 400 ("[A]micus status is insufficient to protect the [intervenor's] rights because such status . . . gives it no right of appeal.").

D. The existing parties do not adequately represent Movants' interests.

To assess adequate representation, courts in the Ninth Circuit assess "whether a present party will undoubtedly make all of the intervenor's arguments, whether a present party is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected." Prete v. Bradbury, 438 F.3d 949, 956 (9th Cir. 2006) (cleaned up) (citing Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983)). "The burden of showing inadequate representation is minimal, and doubts about adequacy of representation should be resolved in favor of the intervenor." Winston v. United States, No. 14-CV-05417-MEJ, 2015 WL 9474284, at *4 (N.D. Cal. Dec. 29, 2015) (citing Forest Conservation

Council v. United States Forest Serv., 66 F.3d 1489, 1498 (9th Cir. 1995)); see also Citizens for Balanced Use v. Montana Wilderness Ass'n, 647 F.3d 893, 900–01 (9th Cir. 2011) ("intervention of right does not require an absolute certainty that . . . existing parties will not adequately represent its interests."). Movants satisfy this requirement.

Although the Ninth Circuit recognizes that "a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee," Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1499 (9th Cir. 1995), abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011), a movant can overcome that presumption by showing "distinctly different, and likely conflicting, interests" than those currently represented by the parties in suit. California ex rel. Lockyer, 450 F.3d at 443–44. Moreover, the Ninth Circuit has held that "[i]nadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public," Forest Conservation Council, 66 F.3d at 1499 (citing 3B Moore's Federal Practice, ¶ 24.07[4] at 24–78 (2d ed. 1995)).

Movants have distinct and different interests from those of the Department. In issuing the rule, the Department explicitly sought to "balance protection from sexual harassment with protection of freedom of speech and expression." 85 Fed. Reg. at 30,165. Movants, in contrast, represent interests on one side of those scales: the free-speech and due process rights of students. The conclusion that Movants are not adequately represented follows from the Supreme Court's decision in Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972). In that case, the Secretary of Labor brought an action to set aside an election of officers of the United Mine Workers of America. Id. at 529. The union member whose complaint led the Secretary to sue sought to intervene in the action. Id. The district court denied his motion to intervene and the court of appeals affirmed, but the Supreme Court reversed. Id. at 530. The Court reasoned that, while the Secretary of Labor was charged with representing the union member's interest in the litigation, it also was charged with protecting the "vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." Id. at 539. Because of the presence of this additional interest and its potential to affect the Secretary's approach to the

litigation, it was "clear" to the Court "that in this case there is sufficient doubt about the adequacy of representation to warrant intervention." Id. at 538.

Similarly, in Californians for Safe and Competitive Dump Truck Transp. v. Mendonca, the Ninth Circuit permitted a union to intervene as a defendant in an action against state agencies regarding the preemption of California's Prevailing Wage Law. 152 F.3d 1184, 1190 (9th Cir. 1998). The Court noted that the employment interests of the union members in receiving the prevailing wage "were . . . more narrow and parochial" than the state's broader interest in defending the law generally, and therefore the union had made a sufficient showing of inadequacy. Id.; see also Citizens for Balanced Use, 647 F.3d at 899 ("[T]he government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'"); Nw. Env't Advocs. v. United States Dep't of Com., 769 F. App'x 511, 512 (9th Cir. 2019); Christian Legal Soc'y Chapter of Univ. of California v. Kane, 2005 WL 8162602, at *3 (N.D. Cal. Aug. 1, 2005). As in Mendonca, Movants and their members have narrower interests than the Department in defending the rule from Plaintiff's challenge. See also United States v. Oregon, 839 F.2d 635, 638 (9th Cir. 1988) (government did not adequately represent intervention applicants' interests because it was "apparent that the government's arguments will not include the constitutional deficiencies raised by the applicants").

The Third Circuit's decision in Pennsylvania v. President of the United States, 888 F.3d 52 (3d Cir. 2018), is also instructive. In that case, a group of Catholic nuns sought to intervene to defend provisions of a Department of Health and Human Services rule that created a religious exemption to the Affordable Care Act's contraceptive mandate. The district court denied the motion to intervene as of right on the ground that the nuns were adequately represented by the agency, but the Third Circuit reversed. In so ruling, the Third Circuit explained that the agency was tasked with "serving two related interests that are not identical: accommodating the free exercise rights of religious objectors while protecting the broader public interest in access to contraceptive methods and services." Id. at 61. Because the agency was charged with balancing the intervenors' interest

against other competing interests, the agency could not adequately represent the intervenors. The same is true here.

Movants have distinct and different interests from those of the Department, which will have direct consequences on the kinds of arguments each will make. In addition to its immediate interest in defending the rule, the Department has a long-term interest in preserving the scope of its discretion to issue rules under Title IX. Consistent with that interest, which Movants do not share, the Department has been careful not to say that the First Amendment required it to use the Davis standard in its definition of "sexual harassment" or that the Due Process Clause mandates the procedural protections the rule guarantees to accused students. Where, as here, proposed intervenors seek to make arguments that none of the existing parties are prepared or willing to advance, there is a compelling reason to conclude that their interests are not adequately represented. See Citizens for Balanced Use, 647 F.3d at 900–01 (intervention particularly appropriate where the original party may be "unable or unwilling to pursue vigorously all available arguments in support of the [intervenor's] interest.").

To be sure, in another lawsuit challenging the Department's Title IX rule, the First Circuit affirmed a district court's ruling that the Department adequately represented the interests of Movants. See Victim Rights Law Center v. Rosenfelt, 988 F.3d 556 (1st Cir. 2021). But in contrast to the more modest presumption deployed by the Ninth Circuit, the First Circuit imposes an unusually robust presumption of adequate representation by the government that can only be overcome by " 'a strong affirmative showing' that the [government] is not fairly representing the applicants' interests." Id. at 561 (citing Cotter v. Mass. Ass'n of Minority L. Enf't Officer, 219 F.3d 31, 35 (1st Cir. 2000), and Public Serv. Co. of N.H. v. Patch, 136 F.3d 197, 207 (1st Cir. 1998)). Consistent with the Supreme Court's decision in Trbovich, the focus of the inquiry under the Ninth Circuit's precedents is whether a government's representation of a proposed intervenor's interests may be inadequate—there is no requirement to show that the government "is not fairly representing the applicants' interests." Compare Victim Rights Law Center, 988 F.3d at 561, with Citizens for Balanced Use, 647 F.3d at 899. And while the First Circuit concluded that intervenors' "interest in making an additional constitutional argument in defense of government action does not render the

government's representation inadequate," Victim Rights Law Center, 988 F.3d at 562, this reasoning has been rejected by the Ninth Circuit because it "stands the relevant provisions of Rule 24 on its head by defining adequacy in terms of what existing parties are going to argue rather than in terms of the interests of the applicants in the subject matter of the litigation," Oregon, 839 F.2d at 638.

II. The Court should grant Movants permissive intervention.

Movants were granted permissive intervention in a parallel lawsuit challenging the rule in the District of Columbia. See Minute Order, Pennsylvania v. DeVos, No. 20-1468 (D.D.C. July 6, 2020). Consistent with the district court's exercise of its discretion in that case, Movants should be granted permissive intervention here. The prerequisites for permissive intervention are whether the movant shows "(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." Nw. Forest Res. Council v. Glickman, 82 F.3d 825, 839 (9th Cir. 1996) (citing Greene v. United States, 996 F.2d 973, 978 (9th Cir.1993), aff'd, 64 F.3d 1266 (9th Cir.1995)). Unlike Rule 24(a)(2), Rule 24(b) does not require the intervening party to demonstrate an interest at stake in the litigation or inadequacy of representation. See Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1108 (9th Cir. 2002), abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011). Instead, "[i]n 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)(3).

The requirements of Rule 24(b) are satisfied here. To start, in federal question cases, "the district court's jurisdiction is grounded in the federal question(s) raised by the plaintiff." Levin Richmond Terminal Corp. v. City of Richmond, 482 F. Supp. 3d 944, 968 (N.D. Cal. 2020) (Freedom from Religion Found., Inc. v. Geithner, 644 F.3d 836, 844 (9th Cir. 2011)). "Where . . . proposed intervenors do not raise new claims, 'the jurisdiction concern drops away.' " Id. Since Plaintiff is asserting federal claims under the APA, and Movants do not seek to add additional claims to the case, the first requirement is satisfied. Second, as explained above, it is beyond cavil that this motion is timely. See United States v. Blue Lake Power, LLC, 215 F. Supp. 3d 838, 842

(N.D. Cal. 2016) (intervention timely where motion filed in "early stage of the proceedings before the complaint had been answered . . . or substantive proceedings had occurred."). Lastly, Movants' defenses—which "squarely respond" to Plaintiff's claims—obviously share common questions with the main action. Kootenai Tribe, 313 F.3d at 1111.

Moreover, intervention will not cause any undue delay or prejudice. Rule 24(b) only mentions undue delay, and normal delay does not require denying intervention—"otherwise every intervention motion would be denied out of hand because it carried with it, almost [by] definition, the prospect of prolonging the litigation." W. Coast Seafood Processors Assn v. Nat. Res. Def. Council, Inc., 643 F.3d 701, 710 (9th Cir. 2011) (citing League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1304 (9th Cir.1997)). Granting Movants permissive intervention would not slow this case down at all, as nothing of substance has happened apart from the filing of the complaint, and Movants will follow whatever briefing schedule governs Defendant. Nor could Movants' participation possibly prejudice Plaintiff (which must prove its case anyway) or Defendant (which should have to grapple with the constitutional implications of its arguments). See League of Women Voters of Michigan v. Johnson, 902 F.3d 572, 577–79 (6th Cir. 2018). Movants have further reduced any possible burden by joining forces, intervening together, and agreeing to submit consolidated briefs.

Allowing Movants to permissively intervene will have other benefits as well. For one, there is a substantial possibility that "allowing intervention will promote judicial economy and spare the parties from needing to litigate [in other courts.]" California v. Health & Hum. Servs., 330 F.R.D. 248, 255 (N.D. Cal. 2019) (citing Venegas v. Skaggs, 867 F.2d 527, 531 (9th Cir. 1989)). Before the rule went into effect, FIRE and Speech First regularly challenged universities' harassment policies in court. But if the rule is upheld—particularly on the constitutional grounds that Movants plan to raise—then many of these lawsuits can be avoided. Most universities accept federal funds, and most universities will follow the definition of actionable harassment adopted by the rule. Because that definition complies with the First Amendment, Movants can reduce the number of lawsuits they file—conserving substantial resources for the judicial system as a whole. See Students & Parents for Privacy v. U.S. Dep't of Educ., 2016 WL 3269001, at *3 (N.D. Ill. June 15, 2016).

Moreover, "the magnitude of this case is such that [Movants'] intervention will contribute to the equitable resolution of this case." Kootenai Tribe, 313 F.3d at 1111. This case "impact[s] large and varied interests" but, without Movants' intervention, important perspectives will be missing. Id. For example, only Movants represent the students who "directly" benefit from the rule's protections for free speech and due process. League of Women Voters of Mich., 902 F.3d at 579. And as supporters of the rule, Movants "represent the 'mirror-image' interests of the plaintiff[]" and are thus "uniquely qualified" to permissively intervene. Democratic Nat'l Comm. v. Bostelmann, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020) (quoting Builders Ass'n, 170 F.R.D. at 441).

Movants also have a wealth of experience and expertise that bear on the historical, factual, and legal questions in this case—questions that Movants have been actively studying, discussing, promoting, and litigating for years. As thought leaders and repeat players in this field, Movants' participation as parties will meaningfully assist the Court. See, e.g., Berg, 268 F.3d at 823 ("Applicants would likely offer important elements to the proceedings that the existing parties would likely neglect."); Am. C.L. Union of N. California v. Burwell, No. 16-CV-03539-LB, 2017 WL 492833, at *3 (N.D. Cal. Feb. 7, 2017) (granting intervention because "[proposed intervenor's] participation will contribute to the development of the factual and legal landscape.").

Movants have unique expertise, unique interests, unique constitutional arguments, and unique perspectives. This Court should exercise its broad discretion over determinations of permissive intervention and allow Movants to join this case as defendants. See Spangler v. Pasadena City Bd. of Ed., 552 F.2d 1326, 1329 (9th Cir. 1977).

CONCLUSION

For the foregoing reasons, the Court should grant Movants' motion to intervene.

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Respectfully submitted,

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