No. 20-1748

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

VICTIM RIGHTS LAW CENTER, EQUAL RIGHTS ADVOCATES; LEGAL VOICE; CHICAGO ALLIANCE AGAINST SEXUAL EXPLOITATION, JANE DOE, an individual by and through her mother and next friend Melissa White; ANNE DOE; SOBIA DOE; SUSAN DOE; NANCY DOE; LISA DOE

Plaintiffs-Appellees

v.

BETSY DEVOS, in her official capacity as Secretary of Education; KENNETH MARCUS, in his official capacity as Assistant Secretary for Civil Rights; U.S. DEPARTMENT OF EDUCATION

Defendants-Appellees

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION; INDEPENDENT WOMEN'S LAW CENTER; SPEECH FIRST, INC.

Movants–Appellants.

On Appeal from the United States District Court
for the District of Massachusetts, No. 1:20-cv-11104-WGY

APPELLANTS' OPENING BRIEF

Charles J. Cooper
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 220-9600

Counsel for Foundation for Individual Rights in Education

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South, PMB #706
Boston, MA 02109

Cameron T. Norris
Alexa R. Baltes
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
cam@consovoymccarthy.com

Counsel for Speech First, Inc. and Independent Women's Law Center

RULE 26.1 DISCLOSURE STATEMENT

Appellants have no parent corporation, and no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

Table of Authorities iii

Reasons Why Oral Argument Should Be Heard viii

Jurisdiction 1

Issues 1

Statement of the Case 1

A. The Department of Education promulgates a new Title IX Rule that protects free expression and due process. 1

B. Appellants are nonprofits with direct interests in the rule. 4

C. This litigation begins, Appellants move to intervene, and the district court summarily denies the motion without hearing from the parties. 8

Summary of Argument 12

Standard of Review 13

Argument 14

I. The district court erred in denying intervention as of right because the Department does not adequately represent Appellants' interests. 16

II. Even if the district court's adequacy ruling were correct, it would not support the denial of permissive intervention. 27

Conclusion 35

Certificate of Compliance 37

Certificate of Service 38

Addendum

TABLE OF AUTHORITIES

Cases

Am. Home Assurance Co. v. Insular Underwriters Corp.,
494 F.2d 317 (1st Cir. 1974) 29

Blake v. Pallan,
554 F.2d 947 (9th Cir. 1977) 20, 22

Brumfield v. Dodd,
749 F.3d 339 (5th Cir. 2014) 20

Builders Ass'n of Greater Chi. v. City of Chicago,
170 F.R.D. 435 (N.D. Ill. 1996) 18, 32

Caterino v. Berry,
922 F.2d 37 (1st Cir. 1990) 33

City of Arlington v. FCC,
569 U.S. 290 (2013) 21

Conservation Law Found. of New England, Inc. v. Mosbacher,
966 F.2d (1st Cir. 1992) .... passim

Cotter v. Mass. Ass'n of Minority Law Enforcement Officers,
219 F.3d 31 (1st Cir. 2000) .... passim

Crossroads Grassroots Pol'y Strategies v. FEC,
788 F.3d 312 (D.C. Cir. 2015) 23

Daggett v. Comm'n on Govtl. Ethics & Election Practices,
172 F.3d 104 (1st Cir. 1999) .... passim

Davis v. Monroe County Board of Education,
526 U.S 629 (1999) 2

Fiandaca v. Cunningham,
827 F.2d 825 (1st Cir. 1987) 33

Fresh Results, LLC v. ASF Holland, B.V.,
921 F.3d 1043 (11th Cir. 2019) 34

Gall v. United States,
552 U.S. 38 (2007) 30

Geiger v. Foley Hoag LLP Ret. Plan,
521 F.3d 60 (1st Cir. 2008) 25

Grutter v. Bollinger,
188 F.3d 394 (6th Cir. 1999) 23

Hochendoner v. Genzyme Corp.,
823 F.3d 724 (1st Cir. 2016) 26

In re R & R Assocs. of Hampton,
402 F.3d 257 (1st Cir. 2005) 30

In re Thompson,
965 F.2d 1136 (1st Cir. 1992) 14

Int'l Paper Co. v. Inhabitants of Jay,
887 F.2d 338 (1st Cir. 1989) .... passim

Johnson v. Williams,
568 U.S. 289 (2013) 28

Kane County v. United States,
928 F.3d 877 (10th Cir. 2019) 19

Know Your IX v. DeVos,
No. 1:20-cv-1224 (D. Md.) 8, 24, 25

Kootenai Tribe of Idaho v. Veneman,
313 F.3d 1094 (9th Cir. 2002) 32

Mass. Food Ass'n v. Mass. Alcoholic Beverage Ctrl. Comm'n,
197 F.3d 560 (1st Cir. 1999) 20

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 17

Negrón-Almeda v. Santiago,
528 F.3d 15 (1st Cir. 2008) 14, 27, 32, 34

New York v. U.S. Dep't of Educ.,
No. 1:20-cv-4260 (S.D.N.Y.) 8

Peaje Invs. LLC v. García-Padilla,
845 F.3d 505 (1st Cir. 2017) 34

Pennsylvania v. DeVos,
No. 1:20-cv-1468 (D.D.C.) .... passim

Pennsylvania v. President of the United States,
888 F.3d 52 (3d Cir. 2018) 19

Pub. Serv. Co. of N.H. v. Patch,
136 F.3d 197 (1st Cir. 1998) 19, 20

R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.,
584 F.3d 1 (1st Cir. 2009) 1, 30

Rita v. United States,
551 U.S. 338 (2007) 31

Smith v. Casey,
741 F.3d 1236 (11th Cir. 2014) 26

Speech First, Inc. v. Fenves,
No. 19-50529 (5th Cir.) 7

Speech First, Inc. v. Killeen,
No. 19-2807 (7th Cir.) 8

Speech First, Inc. v. Schlissel,
939 F.3d 756 (6th Cir. 2019) 7

Speech First, Inc. v. Wintersteen,
No. 4:20-cv-2 (S.D. Iowa) 8

State v. Dir., U.S. Fish & Wildlife Servs.,
262 F.3d 13 (1st Cir. 2001) 23, 24

Supermercados Econo, Inc. v. Integrand Assurance Co.,
375 F.3d 1 (1st Cir. 2004) 30

T-Mobile Ne. LLC v. Town of Barnstable,
969 F.3d 33 (1st Cir. 2020) 19, 20, 23

Top Entm't, Inc. v. Torrejon,
351 F.3d 531 (1st Cir. 2003) 28

Trbovich v. United Mine Workers of Am.,
404 U.S. 528 (1972) 16, 18

Unger v. Arafat,
634 F.3d 46 (1st Cir. 2011) 30

United Guar. Residential Ins. Co. of Iowa v. Phila. Sav. Fund Soc.,
819 F.2d 473 (4th Cir. 1987) 19

United Nuclear Corp. v. Cannon,
696 F.2d 141 (1st Cir. 1982) 19, 20

United States v. Doe,
513 F.2d 709 (1st Cir. 1975) 30

United States v. McKinney,
419 F.2d 1019 (5th Cir. 1970) 30

United States v. Paradise,
480 U.S. 149 (1987) 22

Utah Ass'n of Cntys. v. Clinton,
255 F.3d 1246 (10th Cir. 2001) 25

Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n,
834 F.3d 562 (5th Cir. 2016) 22

Wennik v. Polygram Grp. Distrib'n, Inc.,
304 F.3d 123 (1st Cir. 2002) 30

Statutes

20 U.S.C. §1681(a) 2

28 U.S.C. §1291 1

Rules

Fed. R. Civ. P. 24 .... 11, 15, 32

Regulations

34 C.F.R. §106.30 2

34 C.F.R. §106.45 .... 3, 4

85 Fed. Reg. 30026 .... 2, 3, 4, 10

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Appellants believe the merits of this appeal are clear, as the district court's conclusory denial of Appellants' motion to intervene—entered before the other parties had even responded to the motion—cannot be affirmed. Appellants also seek a speedy decision that allows them to return promptly to the district court and begin participating in this litigation as parties. But this case is critically important, and this appeal does present a unique application of Rule 24's adequacy requirement (the contours of which has split the circuits). If the Court finds the issues close or believes oral argument would be beneficial, Appellants would appreciate the opportunity to be heard.

JURISDICTION

This Court has appellate jurisdiction under 28 U.S.C. §1291 "because an order denying a motion to intervene is immediately appealable." *R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009). The district court entered a minute order denying Appellants' motion to intervene on July 27, 2020. JA40. Appellants filed a timely notice of interlocutory appeal on July 28, 2020. JA265.

ISSUES

I. Did the district court err in denying intervention on the ground that the Department of Education adequately represents Applicants' interests, in light of their significantly divergent interests, legal theories, and objectives for this litigation?

II. Did the district court abuse its discretion by denying permissive intervention in a one-sentence minute order that did not disaggregate permissive intervention from as-of-right intervention, was entered before hearing from the existing parties, did not consider significant factors, and provided no analysis other than its denial of intervention as of right?

STATEMENT OF THE CASE

A. The Department of Education promulgates a new Title IX Rule that protects free expression and due process.

A bedrock of federal education law, Title IX of the Education Amendments of 1972 dictates that "[n]o person … shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity" that receives federal funding. 20 U.S.C. §1681(a). Since

nearly all American colleges and universities receive federal funds, the interpretation and application of Title IX's directives have sweeping importance for higher education.

Recently, the Department of Education promulgated a final rule to regulate the application of Title IX in the context of inter-student sexual misconduct and related school disciplinary proceedings. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (codified in various sections of 34 C.F.R. pt. 106). As relevant here, the Rule chiefly does two things.

First, with regard to inter-student sexual misconduct, the Rule defines discriminatory "sexual harassment" to include "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." 34 C.F.R. §106.30(a)(2). This definition tracks the Supreme Court's decision in *Davis v. Monroe County Board of Education*, which held that "actionable" sexual harassment under Title IX must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." 526 U.S. 629, 651 (1999); *see* 85 Fed. Reg. at 30,036–38.

While it may seem unremarkable for an agency to adopt the Supreme Court's definition of a legal term, guidance documents prior to the Rule had embraced looser definitions of sexual harassment for purposes of Title IX. For example, in a 2010 letter to funding recipients, the Department opined that discriminatory harassment consisted

of "conduct [that] is sufficiently severe, pervasive, *or persistent* so as to *interfere with or limit* a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school." U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* 2 (Oct. 26, 2010), bit.ly/2Bp3rg4 (emphases added). This definition departed from *Davis* by listing the attributes of discriminatory harassment disjunctively, wholly ignored the "objectively offensive" criterion while introducing the new term "persistent," and eschewed terms like "denial" or "deprivation" in favor of the more amorphous terms "interfere with" and "limit." With the Rule's express adoption of "the *Davis* standard," the Department has now repudiated such expansive definitions and their potential for abuse. 85 Fed. Reg. at 30,143–44

Second, addressing concerns about arbitrary investigation and punishment of allegations of inter-student sexual misconduct, the Rule requires schools to provide certain procedural protections to students accused of Title IX sexual harassment. *See* 34 C.F.R. §106.45; 85 Fed. Reg. at 30,046–55. Among other things, the Rule mandates that schools employ neutral, unbiased adjudicators; provide clear and timely notice to respondents of the allegations against them; objectively consider all relevant inculpatory and exculpatory evidence; and afford complainants and respondents equal opportunities to gather and present evidence and to select advisors. *See* 85 Fed. Reg. at 30,053–54. In the case of postsecondary institutions, the Rule also requires a live hearing

with the opportunity for cross-examination by the parties' advisors. 34 C.F.R. §106.45(b)(6); 85 Fed. Reg. at 30,053–54.

B. Appellants are nonprofits with direct interests in the rule.

Appellants are three nonprofit organizations dedicated to promoting free expression and due process on college and university campuses. All three organizations work directly on issues affected by the Rule, took part in the regulatory process that resulted in the Rule, and have substantial interests in defending the Rule against legal challenges (such as this lawsuit).

The Foundation for Individual Rights in Education (FIRE) is a nonprofit membership organization with approximately 50 employees and a student network with members on campuses throughout the country. FIRE staff work directly with college students and faculty subjected to disciplinary proceedings for engaging in protected First Amendment activity. In cases where disciplinary proceedings threaten to chill unpopular but constitutionally protected speech, FIRE staff educate the accused of their rights and communicate with public-university administrators about their due-process obligations. These activities require substantial expenditures of staff time and funds.

In recent years, a significant share of these resources has been used to counter sexual-misconduct proceedings at institutions that have adopted sweeping, amorphous definitions of prohibited "sexual harassment" while providing few procedural protections for the accused. Unless the Rule is vacated, its use of the *Davis* standard will

reduce the frequency with which universities attempt to punish free speech on sensitive issues of gender and sex and thus allow FIRE to shift its resources to addressing other threats to protected speech on campus. Further, as FIRE does not have enough staff, time, or money to assist every student who approaches it for help, the Rule's procedural protections will free up resources for use in other cases.

In addition to individual disciplinary proceedings, FIRE also devotes considerable staff time and money to educating students about their free-speech and due-process rights through its Student Network. Members of FIRE's Student Network work to promote their own rights as well as the rights of other college students through messaging about the constitutional limits on public universities' authority to punish speech, including speech on gender, sex, and other controversial topics that are sometimes the basis for discipline under university conduct codes that prohibit "sexual harassment," broadly defined. FIRE also spends money preparing printed materials on these issues for distribution on college campuses. If the Rule's procedural protections and its definition of sexual harassment are upheld, FIRE and its student members will be able to shift these resources and efforts to promoting free speech and due process in other contexts.

Moreover, at least one member of the FIRE Student Network is a student at a public university who is currently the subject of an enforcement proceeding for alleged sexual misconduct. This student's case involves a factual dispute, no hearing on the matter has yet been scheduled, and the accused student wants the benefit of the

additional procedural protections that the Rule would provide. Fewer procedural safeguards will apply to this case if it is not adjudicated under prior university policy rather than the manner required under the Rule. This member of FIRE's Student Network thus stands to lose important procedural protections if a court enjoins enforcement of the Rule, even temporarily.

Given its interest in these issues, FIRE closely followed and took part in the regulatory process that resulted in promulgation of the Rule. During the comment period following the Department's Notice of Proposed Rulemaking on November 29, 2018, FIRE submitted a comment expressing support for the proposed Rule and suggesting improvements. *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) (FIRE Comment), https://bit.ly/2Nl6qss.

The Independent Women's Law Center (IWLC or Center) is a project of the Independent Women's Forum, a nonprofit, nonpartisan 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, bit.ly/2XgoQPS.

Unsurprisingly, the Center and Forum were leading proponents of the Rule. Like FIRE, the Forum submitted commentary in support of the Department's Proposed Rule. *See* 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 (IWF Comment). In addition, the Center (along with Speech First) opposed proposals to delay the Rule in light of the COVID-19 pandemic. *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, Inc., 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. Many of its student members are subject to speech codes and disciplinary procedures that violate the First Amendment and Due Process Clause of the Fourteenth Amendment but that, according to universities, comply with the Department's former Title IX guidance. Consistent with its mission, 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*, No. 19-50529 (5th Cir.); the University of Illinois, *Speech First, Inc. v. Killeen*, No. 19-2807 (7th Cir.); and Iowa State University, *Speech First, Inc. v. Wintersteen*, No. 4:20-cv-2 (S.D. Iowa).

If the Rule withstands legal challenge, 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.

C. This litigation begins, Appellants move to intervene, and the district court summarily denies the motion without hearing from the parties.

This case is one of four legal challenges brought against the Rule. Plaintiffs here filed their complaint in the District of Massachusetts on June 10, 2020, and filed an amended complaint (the operative pleading) on July 6, 2020. *See* JA37-38. Similar litigation is proceeding in the Southern District of New York, the District of Maryland, and the District of Columbia. *See New York v. U.S. Dep't of Educ.*, No. 1:20-cv-4260 (S.D.N.Y.); *Know Your IX v. DeVos*, No. 1:20-cv-1224 (D. Md.); *Pennsylvania v. DeVos*, No. 1:20-cv-1468 (D.D.C.).

Plaintiffs in this case are various organizations and students who favor more aggressive disciplinary regimes on campus. Their legal challenges allege that the Rule's use of the *Davis* standard to define "sexual harassment" and its procedural protections for respondents

- are contrary to law and arbitrary and capricious under the Administrative Procedure Act (APA), *see* JA154-57 ¶¶273–82;
- exceed the Department's authority under Title IX and violate the Campus Sexual Violence Elimination Act, an amendment to the Clery Act codified at 20 U.S.C. §1092(f), *see* JA80, 92, 157-59 ¶¶71, 92, 283–89;

- were promulgated without the process required by the APA, *see* JA159-60 ¶¶290–94; and
- violate the Fifth Amendment's equal-protection guarantee, *see* JA160-61 ¶¶295–99.

Plaintiffs seek a judgment declaring the Rule invalid and enjoining its implementation. Among other specific goals, they hope to replace the *Davis* standard with a far more subjective and elastic definition of discriminatory harassment—any "unwelcome conduct of a sexual nature." JA93 ¶95.

Appellants disagree both with Plaintiffs' aims and with their legal theories. Indeed, Appellants believe that Plaintiffs' desired results are *constitutionally prohibited*. Specifically, Appellants believe that any definition of "sexual harassment" narrower than the *Davis* standard would infringe on First Amendment–protected speech—both directly and through its inevitable chilling effect.[1] Appellants further believe that the Due Process Clause independently requires public colleges and universities to observe many of the same procedural protections mandated by the Rule, including clear notice

[1] This position—which both FIRE and IWF advanced in their comments on the Proposed Rule, *see* FIRE Comment 1–2, 8–10; IWF Comment 1—finds strong support in *Davis* itself. In response to First Amendment concerns raised by the dissent, the *Davis* majority took care to emphasize that its decision did not require public universities to pursue "form[s] 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 forms of expressive sex-related conduct that public universities can prohibit consistent with the First Amendment. *See, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008).

of allegations and the opportunity to cross-examine witnesses. *See, e.g.*, FIRE Comment 33, 35.

The Department has notably declined to take these positions. In promulgating the Rule, the Department explained its view that adopting the *Davis* standard "avoid[s] First Amendment concerns," 85 Fed. Reg. at 30,142, because conduct covered by *Davis* does not merit First Amendment protection, *id.* at 30,151 & n.667. But the Department stopped short of expressing agreement with Appellants and other commentators who maintained the inverse proposition, *i.e.*, that expressive conduct *not* covered by *Davis is* protected. *See id.* at 30,140–41 (summarizing relevant comments). So too with the Rule's procedural protections for respondents. While the Department described those protections as "inspired by principles of due process," it made clear that it considers them "independent of constitutional due process" and "distinct from constitutional due process owed by public institutions." *Id.* at 30,100–01.

In short, the Department has maintained only that applying the *Davis* standard is "*consistent* with the First Amendment," *id.* at 30,033 (emphasis added), not that it is *required* by the First Amendment; and has maintained only that the Rule's procedural protections "likely will *meet* constitutional due process obligations," *id.* at 30,100 (emphasis added), not that they are *required* by constitutional due process. Thus, there is significant daylight between the Department's views and Appellants'.

To ensure that their constitutional views are represented in litigation over the Rule, Appellants filed a motion to intervene in this case on July 21, 2020, together with

a proposed answer to the amended complaint. *See* Docs. 24–26. Appellants argued for intervention as of right, *see* Fed. R. Civ. P. 24(a)(2), and by permission of the court, *see* Fed. R. Civ. P. 24(b)(1)(B)—explaining their interests in the case and the additional, unique perspective they would contribute. *See* Doc. 25. Appellants also noted that they had already been granted intervention in the parallel case in D.D.C. *See id.* at 2; *Pennsylvania*, No. 1:20-cv-1468, Minute Order (July 6, 2020).

On July 23, Plaintiffs announced that they would soon seek a preliminary injunction and moved for an expedited briefing schedule. JA205. The day after that, Appellants filed their own motion for expedited briefing on the motion to intervene. Doc. 30. That same day, the district court granted Plaintiffs' motion for an expedited schedule. JA264.

The district court never ruled on Appellants' motion for expedited briefing. Instead, on July 27—without waiting to receive arguments or even *positions* from *any* party regarding Appellants' proposed intervention—the district court denied intervention in a minute order. The minute order contained exactly one sentence of explanation: "The motion to intervene is denied as there is no adequate showing that the government will not adequately protect the proposed intervenors['] rights." Addendum (Add.) 1. The district court did not explain why it reached this conclusion, did not separately discuss as-of-right and permissive intervention, and did not discuss any other relevant factors.

Appellants quickly filed this interlocutory appeal. JA265. Since then, the Department filed an opposition to Plaintiffs' motion for a preliminary injunction, which leads off with a lengthy challenge to Plaintiffs' Article III standing. JA284-97.

SUMMARY OF ARGUMENT

Movants seeking to intervene as of right under Rule 24(a)(2) must show that the existing parties may not adequately represent their interests. Appellants have amply carried that burden here, and the district court's conclusion that they did not is wrong. Appellants and the Department of Education have significantly divergent interests, with significant implications for the arguments they would present and for the development of this lawsuit. The Department is not interested in defending the Title IX Rule on constitutional grounds—Appellants are. The Department hopes to show that Plaintiffs lack standing—Appellants disagree. The presence of Appellants' arguments would pervasively shape the issues in this important litigation and could ultimately affect the basis of the eventual judgment. That, in turn, could mean the difference between a judgment that protects the Rule for now while leaving the Department free to change its mind in the future (as the Department wants) and a judgment that acknowledges the Rule's challenged provisions are constitutionally mandated, leaving the Department *no* room to change course later on (as Appellants want). For these reasons, this Court should reverse the district court's finding that Appellants are adequately represented.

While erroneously rejecting Appellants' motion to intervene as of right, the district court did not clearly explain its denial of Appellants' *separate* request for *permissive*

intervention under Rule 24(b). The district court's brevity, conclusoriness, failure to disaggregate permissive and as-of-right intervention, and haste in ruling on Appellants' motion—before even hearing from the existing parties—all combine to make its reasons for denying permissive intervention indiscernible. That said, the most natural inference from the court's order is that it simply collapsed the distinction between the two forms of intervention, thus failing to apply the correct Rule 24(b) standard. But even in the best-case scenario where the district court undertook the correct inquiry *sub silentio*, meaningful appellate review requires (at a minimum) vacatur and remand for a more thorough analysis. Appellants have a compelling case for permissive intervention, as the D.D.C. found, and Appellants should not lose their opportunity to intervene in this important lawsuit based on mere guesswork at the reasons that lie behind so opaque an order.

STANDARD OF REVIEW

"The standard of review" for denials of intervention "is 'abuse of discretion' circumscribed by the specific standards set forth in the applicable rule." *Daggett v. Comm'n on Govtl. Ethics & Election Practices*, 172 F.3d 104, 109 (1st Cir. 1999). This Court has recognized that "'abuse of discretion' … may be a misleading phrase," for two reasons. *Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 34 (1st Cir. 2000). First, "as always, abstract issues of law (such as the proper standards for evaluating intervention motions) are reviewed *de novo*." *Daggett*, 172 F.3d at 109. And second, "the extent of deference on 'law application' issues tends to vary with the

circumstances." *Cotter*, 219 F.3d at 34. Thus, the standard is not "a rubber stamp, counseling affirmance of every discretionary decision made by a trial court." *Negrón-Almeda v. Santiago*, 528 F.3d 15, 21 (1st Cir. 2008). "To the contrary," a district court abuses its discretion "if it fails to consider a significant factor in the decisional calculus, if it relies on an improper factor in working that calculus, or if it considers all the appropriate factors but makes a serious error in judgment as to their relative weight." *Id.* at 21–22 (citation omitted). And the district court's discretion is still "more circumscribed" when dealing with intervention as of right. *Id.* at 22.

ARGUMENT

The Federal Rules of Civil Procedure adopt a "policy favoring liberal intervention under Rule 24," *In re Thompson*, 965 F.2d 1136, 1143 n.11 (1st Cir. 1992), a policy that has "particular force where the subject matter of the lawsuit is of great public interest, the intervenor has a real stake in the outcome and the intervention may well assist the court in its decision through … the framing of issues," *Daggett*, 172 F.3d at 116–17 (Lynch, J., concurring). Those precise reasons motivate Appellants' proposed intervention here. The Title IX Rule is undoubtedly of great public interest, as are the free-speech and due-process rights of college students. Appellants have a real stake in defending students' rights and the Rule. And, most importantly, Appellants will help frame the issues by defending the Rule on constitutional grounds that no other party will advance.

All this makes an easy case for intervention, which Appellants sought under two distinct provisions of Rule 24. First, Rule 24(a)(2) dictates that district courts "must" allow intervention as of right to "anyone" who (1) files a "timely motion," (2) "claims an interest in or 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 [intervenor's] ability to protect its interest," and (4) shows that existing parties do not "adequately represent that interest." *See also Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992). Second, Rule 24(b) provides that district courts "may" grant permissive intervention to "anyone" who (1) files a "timely motion" and (2) "has a claim or defense that shares with the main action a common question of law or fact." If these "threshold requirement[s]" are met, a district court's prudential weighing of permissive intervention encompasses "almost any factor" that is "rationally relevant," *Daggett*, 172 F.3d at 113, and must consider whether intervention will cause undue delay or prejudice to the existing parties, Fed. R. Civ. P. 24(b)(3).

Rule 24(a)(2) and Rule 24(b) provide "separate grounds" for intervention—as is plain from their distinct tests and the very face of Rule 24. *Int'l Paper Co. v. Inhabitants of Jay*, 887 F.2d 338, 340 (1st Cir. 1989). Yet the district court denied *both* forms of intervention with nothing more than a conclusory finding on the fourth element of Rule 24(a)(2). *See* Add. 1 ("The motion to intervene is denied as there is no adequate showing that the government will not adequately protect the proposed intervenors['] rights."). The court identified no other factors as affecting its decision, and it provided no

reasoning for even the one finding that it expressed. In fact, the court did not even wait to hear what the existing parties thought of Appellants' proposed intervention before rejecting it.

The district court doubly erred. Appellants have met their "minimal" burden of showing that the Department's representation of their interest "may be inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (cleaned up). And whether or not they met that requirement for intervention *as of right*, the district court abused its discretion by denying *permissive* intervention with no further discernible reasoning.

I. The district court erred in denying intervention as of right because the Department does not adequately represent Appellants' interests.

The district court's sole, conclusory rationale for denying intervention is wrong. To satisfy Rule 24(a)(2), Appellants "need only show that representation *may* be inadequate, not that it *is* inadequate." *Mosbacher*, 966 F.2d at 44; *see also Trbovich*, 404 U.S. at 538 (finding "sufficient doubt about the adequacy of representation to warrant intervention"). And "the burden of making that showing should be treated as minimal." *Trbovich*, 404 U.S. at 538 n.10.

Appellants clear this low hurdle. True, both Appellants and the Department want to rebuff Plaintiffs' challenges to the Title IX Rule. But the agreement ends there. Appellants have interests and goals the Department does not share, and vice versa. Those different goals are reflected in different defense theories, which require litigation

of different issues and which (if respectively accepted) would result in different judgments with different stare decisis implications.

Appellants' and the Department's interests are not coextensive. Appellants are nonprofits that consistently advocate for greater free-expression and due-process rights on college and university campuses; their interests lie in securing the greatest possible protection for those rights. By contrast, as a federal agency subject to all manner of legal and political forces, the Department must balance a host of interests with every action it takes. While Appellants' and the Department's goals sometimes coincide, they have not always done so, nor is there any guarantee that they will do so in the future.

One interest that Appellants emphatically do not share—and that directly impacts this litigation—is the Department's interest in maintaining regulatory flexibility. After all, an agency's right to change its mind is one of its most valuable assets. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). It is no surprise, then, that the Department declined either to originally justify the challenged parts of the Title IX Rule as constitutionally mandated, *see supra* 10, or to defend them on such grounds in this case or the other related cases, *see* JA267-316 (opposition to preliminary injunction making no such argument); *Pennsylvania*, Doc. 63 (filed July 8, 2020) (same). Thus, unless Appellants are allowed to intervene and make their constitutional arguments, no party will represent their unique perspective.

That is not all. The Department has also taken the position that Plaintiffs lack standing—a position that aligns with an agency's long-term interest in minimizing the

legal challenges it must face. *See* JA284-90. But that position cuts sharply *against* Appellants' interests. As mission-driven nonprofits dedicated to student rights, Appellants both desire a judgment vindicating the Title IX Rule on the (constitutional) merits, not a procedural ruling, and have an interest in maintaining broad access to judicial review of agency action. That interest is particularly significant here because Plaintiffs' and Appellants' interests in the Rule are the "mirror image" of one another. *Builders Ass'n of Greater Chi. v. City of Chicago*, 170 F.R.D. 435, 440–41 (N.D. Ill. 1996); *compare supra* 4–8, *with* JA66-68, 133-54 ¶¶30–40, 200–72.

That Appellants' and the Department's interests are not coextensive makes the Department not an adequate representative for Appellants. This conclusion follows from *Trbovich*, which held that a union member could intervene in an action brought by the Secretary of Labor to set aside a union election. The Supreme Court reasoned that, while the Secretary was charged with representing the union member's interest in the litigation, he also was charged with protecting the "vital public interest in assuring free and democratic union elections," an interest "that transcend[ed] the narrower interest of the complaining union member." *Trbovich*, 404 U.S. at 539. Because of this additional interest and its potential to affect the Secretary's approach to litigation, it was "clear" to the Court that "there [was] sufficient doubt about the adequacy of representation to warrant intervention." *Id.* at 538. As the Fourth Circuit has explained, "*Trbovich* recognized that when a party to an existing suit is obligated to serve two distinct interests, which, although related, are not identical, another with one of those interests

should be entitled to intervene." *United Guar. Residential Ins. Co. of Iowa v. Phila. Sav. Fund Soc.*, 819 F.2d 473, 475 (4th Cir. 1987); *see also Kane County v. United States*, 928 F.3d 877, 895 (10th Cir. 2019); *Mosbacher*, 966 F.2d at 44–45; *Pennsylvania v. President of the United States*, 888 F.3d 52, 61 (3d Cir. 2018). That is the case here.

Significantly divergent litigating positions and strategies weigh against the adequacy of representation, just as an *identity* of arguments and positions weigh *in favor of* adequacy.[2] Indeed, these two truths are simply the two sides of the same legal coin. *See United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982) (framing the relevant questions as whether the existing party's and proposed intervenor's interests are "sufficiently similar … that the legal arguments of the latter will undoubtedly be made by the former" and whether the existing party is "capable and willing to make such arguments" (quoting *Blake v. Pallan*, 554 F.2d 947, 954–55 (9th Cir. 1977)). And that

[2] *Compare Cotter*, 219 F.3d at 35–37 (identifying distinct arguments likely to be made by the parties and concluding that "the potential conflict between MAMLEO and the Boston Police Department on how best to defend the consideration of race in promotion is enough to show that the interest of MAMLEO members is not adequately represented" (cleaned up)), *with T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 40 (1st Cir. 2020) (affirming denial of intervention where proposed intervenors "neither identified any arguments that the Town was unlikely to advance nor [showed] that they would inject some missing ingredient into the Town's defense"); *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 209 (1st Cir. 1998) (same where proposed intervenor "point[ed] neither to any legal argument favorable to it that the commissioners [were] unwilling or unable to make … nor to any legal position taken by the commissioners that compromise[d] [the proposed intervenor's] interests"); *and Int'l Paper Co.*, 887 F.2d at 342, 345 (same where the existing party "seem[ed] likely to adopt much the same legal position" as the proposed intervenor).

coin comes up on the pro-intervention side here: The Department has already made jurisdictional arguments contrary to Appellants' interests, and it will not make the constitutional arguments Appellants wish to present as the "missing ingredient" in the Department's defense. *T-Mobile Ne.*, 969 F.3d at 40.

Of course, "the use of different arguments … is not inadequate representation *per se*." *Daggett*, 172 F.3d at 112; *accord Mass. Food Ass'n v. Mass. Alcoholic Beverage Ctrl. Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999). The test naturally turns on the degree of divergence in the arguments and—ultimately—the degree to which they reflect different interests and big-picture objectives. *See Patch*, 136 F.3d at 209; *Cannon*, 696 F.2d at 144; *accord, e.g., Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014) ("The lack of unity in all objectives, combined with real and legitimate additional or contrary arguments, is sufficient to demonstrate that the representation *may* be inadequate"). Here, Appellants disagree *both* with the Department's decision to seek dismissal on jurisdictional grounds *and* with its decision to forgo constitutional merits defenses. And as already explained, those disagreements are directly related to Appellants' and the Department's divergent interests. In short, this is not a case where the parties merely differ in "litigation judgment," as in *Daggett*, 172 F.3d at 112, nor is it a case where the parties "have few if any material differences over reasoning," as in *International Paper Co.*,

887 F.2d at 342.[3] On the contrary, the differences between Appellants and the Department go to the very heart of how to frame and defend this lawsuit and flow from significantly different sets of interests.

This becomes even clearer when considering how Appellants' distinct arguments will shape all issues in this case. *See Daggett*, 172 F.3d at 116–17 (Lynch, J., concurring) (noting the special appropriateness of intervention when it "may well assist the court in its decision through … the framing of issues"). At the outset, Appellants (because they are similarly situated to Plaintiffs with respect to their interests, and because they believe the district court should rule on the merits) will not join the Department's challenge to Plaintiffs' standing. Next, Appellants' constitutional arguments will affect how the district court analyzes Plaintiffs' statutory challenges to the Rule. In assessing those challenges, the district court must deploy "the ordinary tools of statutory construction," *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013), including the canon of constitutional avoidance. If Appellants are correct that Plaintiffs' interpretation of the relevant statutes would run afoul of the First Amendment and the Due Process Clause, that is a powerful reason to reject it. Finally, Appellants' arguments will affect the relief available to Plaintiffs should their challenges succeed, for it is axiomatic that a court may not

[3] Much less is it a case where the proposed intervenors' arguments would actually *undermine* the side they wish to join, as in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 807 F.3d 472, 476 (2015).

"order[] relief that violates the Constitution." *United States v. Paradise*, 480 U.S. 149, 182 n.32 (1987).

The clincher for representational inadequacy is the fact that adopting Appellants' or the Department's arguments, respectively, would lead to different final judgments with differing stare decisis effects. As this Court has acknowledged, "the adverse impact of stare decisis standing alone may be sufficient" to show that a proposed intervenor's interests are at stake. *Int'l Paper Co.*, 887 F.2d at 344. "This is especially true where," as here, "a court is deciding questions of first impression," and even more so when those questions pertain to "federal law." *Id.* at 344–45. Because stare decisis attaches to the grounds for a judgment, it necessarily follows that a proposed intervenor can have an interest not just in the outcome, but also the *basis*, of a court's future ruling. *See id.* at 346 (recognizing that "the stare decisis problem is greatly lessened" when existing parties have "the same" "position on the issues" (quoting *Blake*, 554 F.2d at 954)).

Here, Appellants' interest is in a judgment establishing that the Rule's challenged provisions are required by the Constitution, and the Department has proven that it will not represent that distinct interest. On the contrary, it will happily take a procedural victory or a judgment vindicating the Rule merely as one of many reasonable regulations. *See Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016) (finding representation inadequate because, whereas the proposed intervenor "intend[ed] to seek a declaratory judgment that the regulatory scheme [was]

constitutionally valid," the existing governmental party "merely [sought] to defend the present suit and would accept a procedural victory").

To be sure, in some cases in this Circuit where someone seeks to intervene on the government's side, "a rebuttable presumption arises that the government adequately represents the interests of the would-be intervenor." *T-Mobile*, 969 F.3d at 39. But that presumption applies only "where [the government's] interests appear to be aligned with those of the proposed intervenor," *State v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001), and there is no such alignment here, as just explained. Moreover, extending the presumption to the present case would be particularly inappropriate because the presumption has no basis in the text of Rule 24(a), which instead calls for a case-specific, contextual inquiry into adequacy of representation. The presumption also is at odds with the Supreme Court's decision in *Trbovich*—where the Court said a proposed intervenor who sought to enter the case on the same side as a federal agency had a "minimal" burden to show that the government's representation "may be" inadequate. 404 U.S. at 538 n.10. Notably, this Court's use of a presumption of adequate representation by the government conflicts with decisions of the Sixth and D.C. Circuits. *See Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) ("[W]e look skeptically on government entities serving as adequate advocates for private parties."); *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999) ("[T]his circuit has declined to endorse a higher standard for inadequacy when a governmental entity is involved."). The divergence of interests between Appellants and the Department

mean that the presumption does not apply under this Court's precedents, and the shaky doctrinal foundation for the presumption provides a compelling additional reason not to extend it to the present situation.

Even if the presumption applied, moreover, Appellants can overcome it. "'Presumption' means no more in this context than calling for an adequate explanation as to why what is assumed—here, adequate representation—is not so." *U.S. Fish & Wildlife*, 262 F.3d at 19. Appellants have amply explained how their interests and the Department's interests diverge, how those distinct interests inform their distinct theories and litigation strategies, how those distinct theories will shape the issues presented in this lawsuit, and how this all may impact the court's ultimate rationale (with corresponding stare decisis implications). Rule 24(a)(2) requires no more. Indeed, it requires less. *See Mosbacher*, 966 F.2d at 44 ("An intervenor need only show that representation may be inadequate, not that it is inadequate.").

Finally, that the Department did not oppose Appellant's motion to intervene is telling. Although the district court entered its order before receiving a response, the Department has declined to take a position on Appellants' intervention as of right and has consented to Appellants' permissive intervention in the parallel cases. *Know Your IX*, Doc. 25 (filed July 6, 2020); *Pennsylvania*, Doc. 48 (filed July 1, 2020). Where the government consents to or does not oppose intervention, its "candor" is evidence that it does not adequately represent the intervenors' "special interests." *Mosbacher*, 966 F.2d at 44; *accord Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001). The

district court erred by not allowing the Department—the government entity that is supposed to be Appellants' adequate representative—to file its nonopposition to intervention as of right, a "silence on any intent to defend [Appellants'] special interests" that would have been "deafening." *Mosbacher*, 966 F.2d at 44.

In the end, all signs point in one direction: Appellants have met their burden of showing that the Department may not adequately represent their interests. This Court should reverse the district court's contrary ruling and remand for further proceedings on intervention as of right.

* * *

Thanks to the district court's haste, the existing parties have not yet indicated whether they think Appellants satisfy the other requirements in Rule 24(a)(2). That said, Appellants do not anticipate that any party will ask this Court to affirm based on another factor. The Department has not opposed Appellants' intervention in any cases concerning the Rule and has affirmatively consented to Appellants' intervention in two of those cases. (Specifically, the Department consented to permissive intervention and took no position on intervention as of right.) *Know Your IX*, Doc. 25 (filed July 6, 2020); *Pennsylvania*, Doc. 48 (filed July 1, 2020).

Appellants likewise do not anticipate that Plaintiffs will ask this Court to affirm the denial of Rule 24(a)(2) intervention on alternative grounds. There is no substantial argument that Appellants' motion was untimely, as it was filed fifteen days after the amended complaint and before any other substantive filings by any party. *See, e.g.*, *Geiger*

v. Foley Hoag LLP Ret. Plan, 521 F.3d 60, 64 (1st Cir. 2008). Appellants claim concrete interests in the Rule's validity that are the mirror image of Plaintiffs' interests in its alleged invalidity. *Compare supra* 4–8, *with* JA66-68, 133-54 ¶¶30–40, 200–72. And disposing of this action obviously may affect Appellants' interests because, if Plaintiffs prevail, universities will apply more expansive harassment definitions and weaker procedural protections than permitted by the Rule, injuring Appellants' organizational and student-member interests. *See Cotter*, 219 F.3d at 37 (holding this element satisfied based on the consequences "if plaintiffs prevail[ed]").

In any event, appellate courts are generally "reluctant" to consider issues not ruled on—or in this instance, even briefed—in the trial court. *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 735 (1st Cir. 2016). That is especially true where those issues properly belong to the district court's sound discretion and "feel of the case." *Int'l Paper Co.*, 887 F.2d at 344 (cleaned up); *see, e.g.*, *Smith v. Casey*, 741 F.3d 1236, 1243 n.7 (11th Cir. 2014) ("With respect to a decision we would review only for an abuse of discretion, we generally decline to substitute our judgment about the matter when the district court has not yet decided it and leave the decision for the district court to make in the first instance."). Accordingly, Appellants do not focus on the other requirements for intervention as of right in this appeal.

II. Even if the district court's adequacy ruling were correct, it would not support the denial of permissive intervention.

Even if this Court were to affirm the district court's adequacy ruling (and consequently its denial of intervention as of right), the Court should still remand for further proceedings on permissive intervention. The district court's minute order offers no meaningful insight into why it denied permissive intervention, and, to the extent the Court can divine the district court's reasoning, the district court either misapprehended the relevant legal standard or "fail[ed] to consider … significant factor[s] in the decisional calculus." *Negrón-Almeda*, 528 F.3d at 21. Any of these possibilities calls for a remand. *See id.*; *Daggett*, 172 F.3d at 113–14 (vacating and remanding because it was "unclear" whether the district court applied an incorrect standard).

Again, Rule 24(a)(2) and Rule 24(b) provide different avenues for intervention, with different standards. Whereas intervention as of right depends on four discrete, circumscribed elements, permissive intervention encompasses any "rationally relevant" consideration provided that the "threshold requirement[s]" of timeliness and a common question are met. *Daggett*, 172 F.3d at 113.

Despite these markedly different standards, the district court did not separately address permissive intervention and relied on its adequacy determination alone in denying Appellants' entire motion. But of course, adequate representation does not have anything close to the same importance for permissive intervention as for intervention as of right—for the latter, it is an ironclad requirement, whereas for the

former it is at most one factor among indefinitely many. So how should this Court interpret the minute order's denial of permissive intervention? There are four basic possibilities, none of which counsels affirmance.

First, it is possible that the district court simply overlooked Appellants' arguments for permissive intervention. While Appellants would not necessarily jump to this conclusion, it cannot be confidently ruled out. After all, courts do occasionally overlook arguments by inadvertence. *See, e.g.*, *Johnson v. Williams*, 568 U.S. 289, 302 (2013) (rejecting as factually inaccurate "an irrebuttable presumption that state courts never overlook federal claims"). And it is impossible to imagine how the minute order would look any different if the district court had done so here.

Second, the district court may have denied Appellants' request for permissive intervention for the very same reason it denied intervention as of right, in the mistaken belief that adequate representation was fatal to *both* forms of intervention. This is the most plausible hypothesis based on a simple literal reading of the minute order: "The motion to intervene is denied *as there is no adequate showing that* the government will not adequately protect the proposed intervenors['] rights." Add. 1 (emphasis added). Tellingly, the district court did not discuss *any* of the "threshold requirement[s]" for permissive intervention. *Daggett*, 172 F.3d at 113. And nothing in the minute order suggests that the district court distinguished intervention as of right and permissive intervention in any way. On the contrary, the order provides *one* reason for denying Appellants' motion *as a whole*. The natural inference is that the district court thought it

had a single question to answer, and that a single consideration answered that question in its entirety.

If that is what the district court thought, then it plainly misunderstood the legal standard and thus abused its discretion. *See Top Entm't, Inc. v. Torrejon*, 351 F.3d 531, 533 (1st Cir. 2003) ("[A] legal error … is by definition an abuse of discretion."). Indeed, in this scenario, the district court would have failed to exercise its Rule 24(b) discretion at all. The whole point of permissive intervention is that intervention is sometimes appropriate even when one or more requirements for intervention as of right are lacking. *See Daggett*, 172 F.3d at 113 ("The fact that the district court was not required to allow intervention does not mean that it was forbidden from doing so."). Otherwise, Rule 24(b) would be meaningless. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 101 F.3d 503, 509 (7th Cir. 1996) (remanding because the district court "failed to exercise his discretion" by "[m]isconceiving the applicable standard" for permissive intervention by relying solely on a requirement for intervention of right).

The third possibility is that the district court both understood the all-things-considered analysis it was required to conduct and concluded that the same unspecified considerations that made the Department's representation adequate also decisively weighed against permissive intervention. This is the most generous possible reading of the minute order, as it manages to connect the order's sole stated reason to the appropriate legal standard.

Unfortunately, the problems with this theory are manifold. As an initial matter, even if such reasoning does not *formally* collapse the distinction between as-of-right and permissive intervention, it comes perilously close to doing so in practice. But more importantly, there is simply no reason to think that it reflects the district court's actual rationale. Abuse-of-discretion review "necessarily entails consideration of the reasons underlying" the district court's decision. *Am. Home Assurance Co. v. Insular Underwriters Corp.*, 494 F.2d 317, 320 (1st Cir. 1974). If an appellate court were to invent reasons post hoc to justify a trial court's exercise of discretion, it would "substitute [its] own judgment for that of the trial court," which it cannot do. *Id.* Accordingly, for meaningful appellate review of a discretionary decision to be possible, "the district court's findings or reasons" must either be stated or, at minimum, be "reasonably infer[able]" from the record. *Cotter*, 219 F.3d at 34; *see also Unger v. Arafat*, 634 F.3d 46, 51 (1st Cir. 2011) (reasoning that although the district court "did not subdivide its analysis into discrete silos," "its findings and reasoning c[ould] easily be inferred from the record," and thus this Court "c[ould] gauge whether the court applied the Rule 24(a)(2) factors appropriately"); *R & G Mortg. Corp.*, 584 F.3d at 12 ("Because it is readily apparent why the district court treated the two branches of [the] motion to intervene as a unit, we can proceed with appellate review."). Conversely, if it is "unclear" whether the district court applied the right standard, properly exercised its discretion, and ultimately reached an adequately supported decision, this Court should (if nothing else) vacate and remand

for a more complete explanation that will enable meaningful review. *Daggett*, 172 F.3d at 113.[4]

Here, it is certainly "unclear" that the district court conducted an appropriate discretionary analysis of permissive intervention. As already explained, the most natural reading of the minute order is that the district court did not distinguish between the two forms of intervention, instead treating adequate representation as the be-all-and-end-all of a single inquiry. The district court's order would look no different if it had not considered permissive intervention at all. And because the district court did not even wait to receive arguments from the existing parties, this Court cannot infer that the district court accepted whatever arguments against permissive intervention that

[4] Cases that illustrate this general principle are legion, arising in countless areas of law. *See, e.g.*, *Gall v. United States*, 552 U.S. 38, 50 (2007) (when exercising sentencing discretion, a district court "must adequately explain the chosen sentence to allow for meaningful appellate review"); *Wennik v. Polygram Grp. Distrib'n, Inc.*, 304 F.3d 123, 134 (1st Cir. 2002) (when exercising discretion in calculating an attorney's fee award, a district court "must provide a clear explanation of its reasons for the fee award" "[t]o allow for meaningful appellate review" (cleaned up)); *United States v. Doe*, 513 F.2d 709, 712 (1st Cir. 1975) (when exercising discretion in denying a motion for a new criminal trial, the district judge "must spell out his findings with adequate specificity for meaningful appellate review" (quoting *United States v. McKinney*, 419 F.2d 1019, 1026 (5th Cir. 1970)); *see also In re R & R Assocs. of Hampton*, 402 F.3d 257, 264 (1st Cir. 2005) (remand is appropriate where "bankruptcy court findings are too vague or incomplete to enable meaningful appellate review"); *Supermercados Econo, Inc. v. Integrand Assurance Co.*, 375 F.3d 1, 3 (1st Cir. 2004) (explaining that "when," after a bench trial, "the absence of any subsidiary findings of fact or conclusions of law renders it virtually impossible … to do anything but speculate as to the basis of the district court's ruling," appellate courts "are unable to engage in meaningful appellate review and must remand to the district court" (cleaned up)).

Plaintiffs might present on appeal. *See Rita v. United States*, 551 U.S. 338, 356 (2007) (explaining, in the context of discussing meaningful appellate review of sentencing discretion, that a district court may sometimes "rely[] upon context and the parties' prior arguments to make [its] reasons clear" to the reviewing court). There were no such arguments before the district court.

Further, even if this Court could infer that the district court applied the right general standard and exercised its discretion in some fashion, the contours of the district court's thinking are still too opaque for meaningful appellate review. Specifically, it is impossible to tell whether the district court "fail[ed] to consider … significant factor[s] in the decisional calculus" or made "serious error[s] in judgment as to their relative weight." *Negrón-Almeda*, 528 F.3d at 21–22. In arguing for permissive intervention, Appellants identified the following "significant factors" for the district court's consideration:

- That Appellants' proposed defenses squarely respond to Plaintiffs' claims and share common questions with the main action. Doc. 25 at 13–14; *see* Fed. R. Civ. P. 24(b)(1)(B).

- That Appellants' intervention would cause no undue delay or prejudice, as Appellants would submit consolidated briefs on the same schedule as the Department. Doc. 25 at 14; *see* Fed. R. Civ. P. 25(b)(3).

- That bringing Appellants' constitutional arguments into this case would reduce the likelihood of Appellants' filing other actions challenging universities' speech and harassment policies as unconstitutional, "conserving substantial resources for the judicial system as a whole." Doc. 25 at 14–15.

- That this case has significant "magnitude" and "large and varied interests" involved. *Id.* at 15 (quoting *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002)); *see also Daggett*, 172 F.3d at 117 (Lynch, J., concurring) (noting that the reasons for intervention have "particular force where the subject matter of the lawsuit is of great public interest" and the "lawsuit is a far cry from a private fight").

- That Appellants' interests are the "mirror image" of Plaintiffs', making Appellants' intervention particularly appropriate. Doc. 25 at 15; *see Builders Ass'n*, 170 F.R.D. at 441.

- That Appellants are "thought leaders and repeat players" in the field of free-speech and due-process issues in higher education and thus have significant "experience and expertise" on the questions presented. Doc. 25 at 15.

Did the district court consider these factors (as it was required to)? If so, what did it think of them? Did it think them insignificant (contrary to considerable caselaw)? Did it think some of them weighed in favor of intervention, but just not strongly enough? In the presence of these factors, why did the district court think the Department's supposed adequacy of representation interests was enough to deny permissive intervention (assuming that is what it thought)?[5]

[5] That the district court's adequacy finding is wrong or at least strongly contestable, *see supra* I, further reinforces the suspicion that the district court did not actually reason this way. If, counterfactually, Appellants and the Department had *identical* interests, theories, and objectives, then the order's reference to representational adequacy would make considerably more sense as an explanation for denying permissive intervention in addition to intervention as of right. But as things are, it is hard to see how the district court—applying the correct standard—could have believed that an at-best-debatable conclusion on representational adequacy so completely overshadowed all other "rationally relevant" considerations that not one of the above-listed factors was even worth mentioning. *Daggett*, 172 F.3d at 113.

The answers to these questions are completely unknowable, and any attempt to answer them would be sheer guesswork. This is not a case where, "[d]espite limited analysis by the district court," this Court can use common sense and the record to triangulate "the view of the district court" or pinpoint the considerations that "apparently weighed heavily in the district court's mind." *Caterino v. Berry*, 922 F.2d 37, 40–42 (1st Cir. 1990); *see also Fiandaca v. Cunningham*, 827 F.2d 825, 833 (1st Cir. 1987) (reversing denial of intervention where "there [were] only two possible grounds" for the denial and the record showed that neither was supportable). However one may twist or turn the district court's minute order, the plain fact is that it says nothing squarely about, and provides no meaningful insight into why, the district court declined to grant permissive intervention—particularly in the complete absence of any parties' arguments against intervention. Thus, even on this most generous possible reading of the order, meaningful appellate review demands vacatur and remand to ensure that the district court considered *all* significant factors and made no serious errors of judgment in weighing them. *See Negrón-Almeda*, 528 F.3d at 21–22; *Daggett*, 172 F.3d at 113; *see also, e.g.*, *Fresh Results, LLC v. ASF Holland, B.V.*, 921 F.3d 1043, 1051 (11th Cir. 2019) (vacating and remanding a forum non conveniens dismissal because the court could not "conclude[,] based [only] on [a] conclusory statement" of the district court's analysis of the factors favoring dismissal, "that the district court considered all the relevant public factors").

There is also a fourth and last possibility: that the district court denied permissive intervention for reasons unrelated to representational adequacy, and entirely failed to record those reasons. The previous arguments about ensuring meaningful appellate review apply most strongly to this possibility.

In sum, the district court's failure to specifically address permissive intervention or any factors other than adequate representation, combined with its haste in ruling on Appellants' motion without the existing parties' input, makes it altogether impossible to determine the court's grounds for denying permissive intervention. The only thing that is clear is that—in one way or another—the denial of permissive intervention "constituted an insufficiently supported exercise of discretion." *Peaje Invs. LLC v. García-Padilla*, 845 F.3d 505, 516 (1st Cir. 2017). To ensure that the district court discharges its obligations under Rule 24(b), this Court should vacate and remand for further proceedings on permissive intervention.

CONCLUSION

Appellants have important perspectives to share and interests at stake in this litigation. This Court should vacate the district court's order denying intervention and remand for further proceedings.

Dated: October 4, 2020

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com
bbarnes@cooperkirk.com

Counsel for Foundation for Individual Rights in Education

/s/ Cameron T. Norris
Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South, PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

Cameron T. Norris
Alexa R. Baltes
Tiffany H. Bates
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
cam@consovoymccarthy.com
lexi@consovoymccarthy.com

Counsel for Speech First, Inc. and Independent Women's Law Center

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 32(a)(7)(B) because it contains 9,070 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: September 28, 2020 *Isl Cameron T. Norris*

CERTIFICATE OF SERVICE

I filed this brief via the Court's ECF system, which will electronically notify all counsel requiring notice.

Dated: October 4, 2020 *_/s/ Cameron T. Norris_*

ADDENDUM

Order Appealed From .... Add. 1

07/27/2020	35	Judge William G. Young: ELECTRONIC ORDER entered denying 24 Motion to Intervene. **The motion to intervene is denied as there is no adequate showing that the government will not adequately protect the proposed intervenors rights. The Court will, of course, welcome a brief amicus curiae from the proposed intervenors.** (Gaudet, Jennifer) (Entered: 07/27/2020)

United States Court of Appeals
For the First Circuit

No. 20-1748

VICTIM RIGHTS LAW CENTER; EQUAL RIGHTS ADVOCATES; LEGAL VOICE; CHICAGO ALLIANCE AGAINST SEXUAL EXPLOITATION; JANE DOE, an individual by and through her mother and next friend Melissa White; ANNE DOE; SOBIA DOE; SUSAN DOE; JILL DOE; NANCY DOE; LISA DOE,

Plaintiffs - Appellees,

v.

BETSY DEVOS, in her official capacity as Secretary of Education; KENNETH L. MARCUS, in his official capacity as Assistant Secretary for Civil Right; US DEPARTMENT OF EDUCATION,

Defendants - Appellees,

-

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION; INDEPENDENT WOMEN'S LAW CENTER; SPEECH FIRST, INC.,

Movants - Appellants.

APPELLEE'S BRIEFING NOTICE

Issued: October 5, 2020

Appellee's brief must be filed by **November 3, 2020**.

The deadline for filing appellant's reply brief will run from service of appellee's brief in accordance with Fed. R. App. P. 31 and 1st Cir. R. 31.0. Parties are advised that extensions of time are not normally allowed without timely motion for good cause shown.

Presently, it appears that this case may be ready for argument or submission at the coming **February, 2021** session.

The First Circuit Rulebook, which contains the Federal Rules of Appellate Procedure, First Circuit Local Rules and First Circuit Internal Operating Procedures, is available on the court's

website at www.ca1.uscourts.gov. Please note that the court's website also contains tips on filing briefs, including a checklist of what your brief must contain.

Failure to file a brief in compliance with the federal and local rules will result in the issuance of an order directing the party to file a conforming brief and could result in the appellee not being heard at oral argument. See 1st Cir. R. 3 and 45.

Maria R. Hamilton, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
John Joseph Moakley
United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210
Case Manager: Gloria - (617) 748-4214

cc:
Alexa R. Baltes
Brian W. Barnes
Charles J. Cooper
Linda M. Correia
David Hinojosa
Lauren A. Khouri
Donald Campbell Lockhart
Emily Martin
Nicole J. Moss
Gregory Francis Noonan
Cameron Thomas Norris
Oren McCleary Sellstrom
Matthew S. Shapanka
James Reid Sigel
Patrick N. Strawbridge
Elizabeth Tang