# No. 20-2429

## United States Court of Appeals

*for the*

## Second Circuit

STATE OF NEW YORK AND THE BOARD OF EDUCATION FOR THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,
*Plaintiffs-Appellees*,

– v. –

UNITED STATES DEPARTMENT OF EDUCATION AND ELIZABETH DEVOS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF EDUCATION
*Defendants-Appellees*,

&

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION,
*Proposed Intervenors–Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, No. 1:20-CV-04260-JGK

**APPELLANT'S OPENING BRIEF**

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## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant, Foundation for Individual Rights in Education ("FIRE"), has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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## INTRODUCTION

In this case, the State of New York and the New York City school board challenge a rule in which the Department of Education struck a balance between, on the one hand, the need to combat sexual misconduct at colleges and universities, and, on the other hand, the need to protect the free speech and due process rights of accused students. The plaintiff governmental entities maintain that the Rule goes too far in protecting the interests of accused students, and the Department counters that it acted within the broad range of its policy discretion to promulgate rules in pursuit of competing objectives under Title IX.

Missing from the list of existing parties is anyone who speaks for the accused students whose rights are directly at stake in this case. The absence of any such party has direct consequences for how the case is being litigated: there are strong constitutional arguments that could be advanced in defense of the Rule that the Department refuses to make because it (understandably) does not wish to have its own policy options limited in the future by a ruling that the First Amendment and the Due Process Clause place significant constraints on when and how a public university may punish speech. Appellant, the Foundation for Individual Rights in Education ("FIRE"), attempted to fill this gap by moving to intervene in the district court, and it was an abuse of discretion for the district court to deny FIRE's motion.

FIRE's Student Network includes at least one member who is currently subject to disciplinary proceedings for alleged sexual misconduct, and the outcome of this case will have very real consequences for that student, as well as many other FIRE Student Network members and FIRE itself. The district court went seriously astray in nevertheless concluding that FIRE has no interest at stake in this case that could merit intervention under Federal Rule of Civil Procedure 24. And although one who seeks to intervene as of right must show that its interests are not adequately represented by the existing parties, that requirement is "minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). The requirement is easily satisfied here given the adversity of interests between FIRE and the Department and the fact that FIRE seeks to intervene so that it can advance arguments in support of the Rule that the Department has declined to make. Accordingly, the Court should reverse the district court's ruling denying FIRE's motion to intervene.

## JURISDICTIONAL STATEMENT

This appeal arises from a district court's denial of a motion to intervene under Federal Rule of Civil Procedure 24. Plaintiffs-Appellees assert that the court below has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 2201(a), as well as the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. This Court has appellate jurisdiction under 28 U.S.C. § 1291. Section 1291 provides that "courts of appeals . . . shall have jurisdiction of appeals from all final

decisions of the district courts of the United States." 28 U.S.C. § 1291. It is settled law in this Court that a district court order denying intervention "is final for purposes of appeal." *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 991 n.19 (2d Cir. 1984) (citing *Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 188–89 (2d Cir. 1970)). The district court entered an order denying FIRE's motion to intervene on July 10, 2020. Mem. Op. and Order, Doc. 47 (S.D.N.Y. July 10, 2020). FIRE filed a timely notice of appeal on July 27, 2020. Not. of Interlocutory Appeal, Doc. 76 (S.D.N.Y. July 27, 2020).

## ISSUE PRESENTED

Whether the district court abused its discretion when it determined that, for purposes of a motion to intervene under Federal Rule of Civil Procedure 24(a): (1) FIRE has no interest that could be adversely affected by the outcome of a case that will directly affect the free speech and due process rights of FIRE Student Network members; and (2) FIRE is adequately represented by the Department of Education in this case, even though the Department refuses to make substantial constitutional arguments in defense of the Rule because doing so would not be in the Department's long-term institutional interest.

## STATEMENT OF THE CASE

This is an appeal from a denial of a motion to intervene. Judge Koeltl's opinion denying the motion is reported at 2020 WL 3962110 and appears in the appendix at A-120–133.

### 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 (the "Department") promulgated a final rule (the "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 Next Friend LaShonda D. 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, 650–51 (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—definitions that FIRE contends are inconsistent with the First Amendment. 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. FIRE has a direct interest in the Rule.**

The Rule directly affects FIRE's work and members of its student network. 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 university administrators about their due process obligations. These activities require substantial expenditures of staff time and funds.

In recent years, FIRE has used a significant share of these resources to counter sexual misconduct proceedings at institutions that have adopted sweeping, amorphous definitions of prohibited "sexual harassment" without providing sufficient procedural protections for the accused. By using the *Davis* standard, the Rule will reduce the frequency with which universities attempt to punish free speech on sensitive issues of gender and sex and thus has allow FIRE to shift its resources to address other threats to protected speech on campus. Further, the Rule's procedural protections free up FIRE to use its limited staff, time, and money to help additional students who approach FIRE for help concerning other matters.

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 vacated, FIRE and its student members will be forced to divert resources away from 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, and the accused student wants the benefit of the additional procedural protections that the Rule provides. If the Rule is vacated, fewer procedural safeguards will apply to this case if it is adjudicated under prior university policy rather than in the manner required under the Rule.

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 many features of the proposed Rule and suggesting improvements to others. *See Comment of the*

*Foundation for Individual Rights in Education in Support of the Department of Education's Proposed Regulations on Title IX Enforcement*, FIRE (Jan. 30, 2019) ("FIRE Comment"), https://bit.ly/2Nl6qss.

### C. The district court denies FIRE's motion to intervene.

This case is one of four legal challenges brought against the Rule. Plaintiff the State of New York filed its complaint in the Southern District of New York on June 4, 2020, and filed an amended complaint (the operative pleading) joining Plaintiff the Board of Education for the City School District of the City of New York (collectively "Plaintiffs") on June 18, 2020. Similar litigation is proceeding in the District of Massachusetts, the District of Maryland, and the District of Columbia. *See Victim Rights Law Center v. Devos*, No. 1:20-cv-11104-WGY (D. Mass.), *Know Your IX v. DeVos*, No. 1:20-cv-1224 (D. Md.); *Commonwealth of Pennsylvania v. DeVos*, No. 1:20-cv-1468 (D.D.C.).

Plaintiffs challenge the Rule's use of the *Davis* standard to define "sexual harassment" and its procedural protections for the accused. Among other things, Plaintiffs allege that these features of the Rule:

- exceed the Department's authority under Title IX, *see* A-113;
- conflict with Title IX, the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), and Executive Order No. 12866, *see* A-114;

- are arbitrary and capricious under the Administrative Procedure Act (APA), *see* A-116–117; and
- were promulgated without observance of procedure required by law in violation of the APA, *see* A-117–118.

Plaintiffs seek a judgment declaring the Rule invalid and enjoining its implementation. Among other specific goals, they aim to replace the *Davis* standard with a far more subjective and expansive definition of sexual harassment—any "unwelcome conduct of a sexual nature." A-60.

FIRE disagrees both with the Plaintiffs' aims and with their legal theories. Indeed, FIRE maintains that the policies Plaintiffs hope to revive through this litigation are not simply unjust but also *constitutionally prohibited*. Specifically, FIRE's position is that any definition of "sexual harassment" that encompasses more speech than the *Davis* standard would violate the First Amendment.[1] FIRE also maintains that in many instances the Due Process Clause independently requires public colleges and universities to observe many of the same procedural protections

[1] This position finds strong support in *Davis* itself. In response to First Amendment concerns raised by the dissent, the Court's 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." 526 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).

mandated by the Rule, including clear notice of allegations and the opportunity to cross-examine witnesses. *See, e.g.*, FIRE Comment at 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 FIRE and other commentators that 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 views of the Department and FIRE.

To ensure that its constitutional views are represented in litigation over the Rule, FIRE filed a motion to intervene in this case on June 29, 2020, together with a proposed answer to the amended complaint. *See generally* FIRE Mot. to Intervene, Doc. 24 (June 29, 2020); Mem. of Law in Support of FIRE Mot. to Intervene, Doc. 25 (June 29, 2020). FIRE argued for intervention as of right, *see* FED. R. CIV. P. 24(a)(2), and permissive intervention, *see* FED. R. CIV. P. 24(b)(1)(B)—explaining its interests in the case and the additional, unique perspective it would contribute to the development of the factual and legal record of the case. *See* Order, Doc. 26 (June 30, 2020). While Plaintiffs filed a brief in opposition to the motion to intervene, *see* Mem. Of Law in Opp'n to FIRE Mot. to Intervene, Doc. 31 (July 2, 2020), Defendants did not oppose FIRE's motion. On July 7, 2020, after the close of briefing, FIRE filed a notice of supplemental authority observing that it was granted permissive intervention in the parallel case in D.D.C. *See* Not. of Suppl. Authority, Doc. 42 (July 7, 2020); Minute Order, *Commonwealth of Pennsylvania v. DeVos*, No. 1:20-cv-1468, (July 6, 2020).

On July 7, 2020, the district court denied FIRE's motion to intervene, holding that FIRE failed to meet the standard for both intervention as of right and by permission of the court. *See* A-120–133. FIRE timely filed a notice of appeal. A-134. Since then, the district court denied Plaintiffs motion for preliminary injunction, finding Plaintiffs' "have failed to show that they will likely prevail on their argument

that the DOE acted 'arbitrarily and capriciously' or otherwise in violation of law when it promulgated the Rule." *See* Op. and Order, Doc. 81 at 2 (Aug. 9, 2020).

## SUMMARY OF THE ARGUMENT

This case concerns, among other things, the procedures public universities must use when adjudicating claims of sexual misconduct, and at least one member of FIRE's Student Network is currently the subject of disciplinary proceedings for alleged sexual misconduct at a public university. With all respect due to the district court, its conclusion that FIRE does not have an interest in this case within the meaning of Federal Rule of Civil Procedure 24 cannot possibly be correct; accused students have a vital interest in the procedures that universities use when deciding whether to impose the life-altering sanctions that come with being found guilty of serious sexual misconduct. That interest, as well as FIRE's organizational and economic interests in defending a Rule that allows it to reallocate resources to pursuing other aspects of its mission, would be thwarted if Plaintiffs prevail in this case and persuade the courts to set aside the Rule.

The district court also erred in concluding that FIRE's interests are adequately represented in this litigation by the Department of Education. A party seeking to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) bears a minimal burden of showing that existing parties may not adequately represent its interests. FIRE has amply carried that burden here. FIRE 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 Rule on constitutional grounds—FIRE is. The presence of FIRE's 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 that many of the Rule's challenged provisions require universities to follow procedures that are also mandated by the Constitution, leaving the Department no room to change course later on (as FIRE wants). For these reasons, this Court should reverse the district court's ruling that FIRE is adequately represented.

## STANDARD OF REVIEW

The standard of review for denial of a motion to intervene is "abuse of discretion." *See Lopez Torres v. N.Y. State Bd. of Elections*, 300 F. App'x 106 (2d Cir. 2008). "[A]buse of discretion occurs if the district court 'has (1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located within the range of permissible decisions.'" *Harris-Clemons v. Charly Trademarks Ltd.*, 751 F. App'x

83, 84 (2d Cir. 2018) (citing *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010)).

## ARGUMENT

Federal Rule of Civil Procedure 24(a)(2) dictates that a district court *must* grant a motion to intervene as of right made by any party that: (1) files a "timely motion;" (2) "claims an interest relating to the property or transaction [that] is the subject of the action;" (3) "is so situated that the dispos[ing] of the action may as a practical matter impair or impede the [movant's] ability to protect its interest;" and (4) shows that existing parties do not "adequately represent[] [that interest]." *See Washington Elec. Co-op., Inc. v. Mass. Mun. Wholesale Elec. Co*., 922 F.2d 92, 96 (2d Cir. 1990). While "[a]ll four parts of the test must be satisfied to qualify for intervention as of right," *id.* at 96, this Court has employed a flexible approach when applying the standard, noting that a strong showing as to one or some of the requirements may make intervention as of right appropriate even if the proposed intervenor's showing is weaker as to others. *United States v. Hooker Chems. & Plastics Corp*., 749 F.2d 968, 983 (2d Cir. 1984).

The district court erred in finding that FIRE lacked an interest in the action, that FIRE's ability to protect that interest would not be impaired or impeded by a denial of intervention, and that the Department adequately represents FIRE's interests. FIRE has laid out clear evidence—consistent with Second Circuit

precedent—that establishes its interest in this litigation. FIRE has met the minimal burden of showing that disposing of the action *may* impair or impede its ability to protect its interests. And FIRE has met the burden of showing that the Department cannot adequately represent its interests. The district court's ruling to the contrary was an abuse of discretion because it misapplied applicable legal principles and misapprehended the nature and scope of FIRE's interest in the litigation.

## I. The district court erred in concluding that FIRE failed to establish an interest in the action.

Before the district court, none of the existing parties disputed that FIRE has an interest relating to the subject of this action, and for good reason. Plaintiffs challenge a Department of Education rule that affords procedural safeguards to students accused of sexual misconduct, and FIRE represents the interests of students accused of sexual misconduct—including at least one member of the FIRE Student Network who is currently the subject of a public university's disciplinary proceedings. That is plainly sufficient for FIRE to "claim[] an interest relating to the property or transaction that is subject to the action," for accused students have a "direct, substantial, and legally protect[ed]" interest in the procedures that are used to determine whether they will be subjected to the life-changing sanctions that come with being found guilty of serious sexual offenses. *See Washington Elec.*, 922 F.2d at 97; *Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 874 (2d Cir.1984). The free speech rights of FIRE Student Network members also

give FIRE a cognizable interest in this litigation; throwing out the Rule would enable Plaintiffs and public universities throughout the country to adopt expansive definitions of "sexual harassment" in their conduct codes—definitions that have a chilling effect on student speech concerning gender, sex, and related topics. These important due process and free speech rights clearly qualify as "interest[s]" under Rule 24(a)(2). *See Brody ex rel. Sugzdinis v. Spang*, 957 F.2d 1108, 1125 (3d Cir. 1992).

Second, and wholly apart from the due process and free speech rights of FIRE Student Network members, FIRE also has an economic interest in this litigation because a decision invalidating the Rule would prompt FIRE to divert resources that would otherwise be used for other purposes to assisting students accused of sexual misconduct. "[W]here a proposed intervenor's interests are otherwise unrepresented in an action, the standard for intervention is no more burdensome than the standing requirement," *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 131 (2d Cir. 2001), and standing in a case like this one can be established by an organization's diversion of resources to identify and counteract allegedly unlawful action, *see, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110–11 (2d Cir. 2017) ("[W]here an organization diverts its resources away from its current activities, it has suffered an injury that has been repeatedly held to be independently

sufficient to confer organizational standing."). The pocketbook injury FIRE would sustain if the Rule is invalidated plainly is an "interest" within the meaning of Rule 24(a).

The foregoing analysis is confirmed by this Court's decision in *New York Public Interest Research Group, Inc., v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975). In that case, the Pharmaceutical Society of the State of New York, Inc. (the "Society") and three pharmacists moved to intervene in litigation where consumers sought to enjoin the implementation of a new statewide regulation prohibiting the advertisement of prescription drug prices. *Id.* at 351. This Court found the pharmacists had economic interests in the regulation and the Society "ha[d] a sufficient interest to permit it to intervene since the validity of a regulation from which its members benefit is challenged." *Id.* at 352. To support the latter point, the Court relied on *General Motors Corporation v. Burns*, 50 F.R.D. 401 (D. Haw. 1970), in which a member organization "strongly lobbied" on behalf of its members for the enactment of a new law. When that law was challenged and the organization sought to intervene to defend the law, the Court concluded that the organization had a "sufficient interest" to intervene "[s]ince defending in the courts the constitutionality of the Act for which [it had] fought in the legislature is within" the organization's purpose. *Id.* at 403. Like the organization in *General Motors Corporation*, FIRE took an active role to support the interests of its members and

the students it defends nationwide during the drafting of the new regulations, submitting a detailed comment setting forth constitutional and other arguments in favor of policies that were ultimately adopted in the Rule. This fact further buttresses the conclusion that FIRE has an "interest" in this litigation for purposes of Rule 24(a).

Without engaging with the points outlined above, the district court ruled in a footnote that FIRE does not have an interest in the litigation sufficient to justify intervention under Rule 24(a). A-124–125. In so holding, the district court proceeded from the mistaken premise that the *unique arguments* FIRE seeks to advance as a party to the litigation also define the metes and bounds of FIRE's *interests* in the litigation. This was error. FIRE's interest is in seeing the Rule upheld so that the due process and free speech rights of its Student Network members will not be violated and so that it can avoid the need to divert its limited resources to defending students accused of sexual misconduct under the expansive speech codes that Plaintiffs promote. FIRE thus has a broad interest in defending the Rule—not just an interest in defending it on specific constitutional grounds. To be sure, FIRE seeks party status so that it can advance constitutional arguments that, for institutional reasons, the Department of Education is unwilling to make. But FIRE's interests in the case are not circumscribed by the particular arguments it proposes to advance as a supplement to the Department of Education's defense of the Rule.

Once the scope and nature of FIRE's interests in the litigation is understood, it becomes clear that the district court was wrong to label those interests as too speculative to provide a basis for intervention. The district court was no doubt correct that it would be unnecessary to reach the merits of FIRE's constitutional arguments in support of the Rule if the courts "find[ ] that the Final Rule is valid under the APA" for other reasons. A-124–125. But the same basic point could be made any time a proposed intervenor seeks to advance alternative grounds for awarding relief that one of the existing parties is already requesting. *See, e.g.*, *Israel Bio-Eng'g Project v. Amgen Inc.*, 401 F.3d 1299, 1306 (Fed. Cir. 2005). It is almost always the case at the outset of litigation that a proposed intervenor's participation might not make a difference to the outcome, yet this possibility has never been thought to prevent a proposed intervenor from establishing that it has an "interest" within the meaning of Rule 24(a).

Nor are FIRE's interests in this litigation too speculative merely because FIRE supports the Rule rather than opposing it. The district court seemed to say otherwise, *see* A-127, but FIRE is unaware of any authority that would support applying a different and more demanding standard for intervention as of right when the proposed intervenor seeks to join the case on the defendant's side of the dispute. To the contrary, the fact that a proposed intervenor has interests that are the "mirror image" of an existing party who the proposed intervenor opposes is a factor that

supports intervention. *See Brennan*, 260 F.3d at 130. If Plaintiffs can sue over the costs of implementing the Rule, then surely FIRE can intervene based upon the costs it would incur if the Rule is invalidated.

## II. The district court erred in concluding that FIRE failed to establish that its ability to protect its interests would be impaired or impeded.

The district court's failure to appreciate the nature and scope of FIRE's interests in the litigation also prompted it to err in concluding that FIRE is not "so situated that disposing of the action may as a practical matter impair or impede [its] ability to protect its interest[s]." FED. R. CIV. P. 24(a)(2). The Rule protects the due process and free speech rights of students, including members of FIRE's Student Network. Plaintiffs are suing to have the rule invalidated—a step that would undermine the rights of FIRE Student Network members while also prompting FIRE to divert resources from other activities to working to defend students accused of sexual misconduct. Plainly, if Plaintiffs receive the relief they seek, the interests of FIRE and its student members will be "impede[d]." *Id.* Indeed, FIRE and its Student Network members—not least of all the member who is currently the subject of a public university's disciplinary proceedings for alleged sexual misconduct—"stand to gain or lose by the direct legal operation" of the outcome of this case. *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991).

The district court suggested that FIRE's interests cannot be harmed by any outcome in the underlying litigation because it "is at liberty to initiate litigation

alleging that the Final Rule is required by the Constitution." A-126. But Rule 24 calls for a "practical" assessment of whether FIRE's interests "may" be "impair[ed] or impede[d]," FED. R. CIV. P. 24(a)(2), and the possibility that FIRE could file its own lawsuits in the future is not an adequate substitute for participating in this case for several reasons. First, if the Rule is held to be invalid, the universities represented by Plaintiffs and many others will immediately return to their former speech codes, which failed to provide robust procedural protections to students accused of sexual misconduct. Even if FIRE could sue individual public universities for violating the Constitution in this scenario, filing such suits would be a resource-intensive and time-consuming endeavor that would force FIRE to divert considerable resources from other activities. In the time that it took to conduct the required investigations and litigate such cases to final judgment, many accused students would have their cases adjudicated using procedures that do not satisfy due process and much student speech would be chilled by definitions of "sexual harassment" that violate the First Amendment. *See Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015) (proposed intervenor had interest that could be impaired or impeded under Rule 24(a) "because a judicial pronouncement that the FEC's dismissal was contrary to law would make the task of reestablishing the status quo more difficult and burdensome (cleaned up)). In contrast to *In re Holocaust Victim Assets Litigation*, 225 F.3d 191, 199 (2d Cir. 2000), in which denial of a motion to

intervene merely threatened to *delay* the proposed intervenors' recovery, FIRE and its Student Network members could not be made whole through the filing of subsequent lawsuits if public universities are temporarily permitted to return to the regime that prevailed on most campuses prior to implementation of the Rule.

Second, the possibility of future suits is not an adequate substitute for intervention in this case because such suits would not revive the Rule but only compel public universities to comply with the Constitution. From the standpoint of FIRE's effort to safeguard its interests and the interests of its Student Network members, the need to rely on lawsuits alleging constitutional violations rather than any Department of Education rule would be particularly problematic as it relates to the procedures that public universities must follow when adjudicating cases involving allegations of sexual misconduct. The Rule sets forth clear, across-the-board requirements that Title IX funding recipients must follow when adjudicating such matters. *See* 85 Fed. Reg. at 30,575–77. In contrast, courts tasked with deciding which procedures a public university must follow as a matter of due process apply the balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). *See Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017). Under that test, the particular procedures required depend in part on the nature of the allegations and the extent of the possible sanctions. FIRE should not be denied an opportunity to defend the Department of

Education's clear, prophylactic rule on the theory that it can file additional lawsuits in the future invoking a case-by-case constitutional standard after an alleged violation has already occurred.

Third, the district court's analysis of this issue did not properly account for the possible *stare decisis* effects of a decision invalidating the Rule. In *New York Public Interest Research Group*, this Court found the argument that a non-party "may protect their interests after an adverse decision in the instan[ce] case by attacking any new regulation on constitutional . . . grounds" unpersuasive because it "ignored the possible stare decisis effect of an adverse decision." 516 F.2d at 352. The district court said that no *stare decisis* consequences relevant to FIRE's interests will follow from a decision invalidating the Rule to the extent that the courts refuse to consider FIRE's constitutional arguments. But as discussed above, FIRE's interests are not limited to advancing constitutional arguments in defense of the Rule, and there is no doubt that a decision setting aside the Rule would, as a matter of *stare decisis*, foreclose many legal arguments that could otherwise be made in support of robust due process and free speech protections for students accused of sexual misconduct.

Lastly, participating in this case as an amicus would not enable FIRE to adequately protect its interests and the interests of its Student Network members. The district court would not be required to consider FIRE's constitutional arguments

as an amicus—indeed, the district court's order denying FIRE's motion to intervene strongly suggests that it *will not* consider FIRE's constitutional arguments if offered in an amicus brief. Moreover, as amicus FIRE could not file motions or appeal from an adverse judgment. In short, intervention is necessary for FIRE to safeguard its significant interests in this case. *See Feller v. Brock*, 802 F.2d 722, 730 (4th Cir. 1986) ("Participation by the intervenors as amicus curiae is not sufficient to protect against these practical impairments. Amicus participants are not able to make motions or to appeal the final judgment in the case."); *Brooks v. Flagg Bros., Inc.*, 63 F.R.D. 409, 414–15 (S.D.N.Y. 1974). More practically, given the possibility of a change in Administration following the upcoming election, FIRE's interests may be impaired or impeded in the event that the Department declines to continue to defend the Rule or to appeal from an adverse judgment. *See Floyd v. City of New York*, 770 F.3d 1051, 1059 (2d Cir. 2014); *see also Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973–74 (3d Cir. 1998) ("Although it is unlikely that the intervenors' economic interest will change, it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts.").

* * *

The burden to show impairment under Rule 24(a) is "minimal." *See Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001); *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999). That only a minimal showing is

required is supported by 1966 Amendment to Rule 24, which eliminated a requirement "that the applicant might be 'bound' by the judgment in the pending action." *See Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967) (explaining 1966 amendment to Rule 24 "repudiated" narrow approach of prior version of the Rule to "liberalize the right to intervene in federal actions."). Given the weighty interests that FIRE seeks to defend in this litigation and the immediate effect that a ruling in Plaintiffs' favor would have on those interests, FIRE has easily satisfied its minimal burden.

## III. The district court erred in concluding that FIRE's interests are adequately represented by the existing parties.

The district court was also wrong to conclude that FIRE's interests are adequately represented in this litigation by the Department of Education. As an initial matter, it bears emphasis that the Department has never claimed to adequately represent FIRE and took no position on FIRE's motion to intervene as of right. The district court's conclusion that FIRE is nevertheless adequately represented by the Department is an outlier; when governmental defendants "take[] no position on the motion to intervene," courts typically grant intervention because the government's "silence on any intent to defend the intervenors' special interests is deafening." *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d at 1256 (cleaned up); *accord Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (same). Indeed, FIRE knows of no case denying intervention where the movant wanted to

litigate alongside the government and the government did not object. The Department's failure to object is no surprise in light of the facts of this case and the applicable legal standard, for the Department cannot represent FIRE's interests when FIRE is seeking to advance constitutional arguments that the Department has refused to make and that would limit the Department's policy discretion in the future.

### A. FIRE satisfies its minimal burden to demonstrate inadequacy of representation because it proposes to make arguments in defense of the Rule that would narrow the scope of the Department's administrative discretion.

The burden to demonstrate inadequacy of representation "should be treated as minimal," *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978), and the Supreme Court has said that this requirement for intervention as of right is satisfied so long as the existing parties' representation of a proposed intervenor's interests "*may be* inadequate," *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). FIRE clears this low hurdle. True, both FIRE and the Department want to rebuff Plaintiffs' challenges to the Rule. But the agreement ends there. FIRE has 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.

FIRE's and the Department's interests are not coextensive. FIRE is a nonprofit that consistently advocates for greater free-expression and due-process

rights on college and university campuses; its 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. Indeed, when it issued 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. These divergent objectives ensure that the Department cannot adequately represent FIRE's interests. *See 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.").

One interest of the Department that FIRE emphatically does not share—and that directly impacts this litigation—is its 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 requiring public universities to provide due process and free speech protections already mandated by the federal constitution or to defend the Rule on such grounds in this and related litigation. Thus, unless FIRE is allowed to intervene and make its constitutional arguments, no party will represent its unique perspective.

That FIRE's and the Department's interests are not coextensive means that the Department is not an adequate representative for FIRE. 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 Cnty. v. United States*, 928 F.3d 877, 895 (10th Cir. 2019); *Conservation Law Found. of New England, Inc., v. Mosbacher*, 966 F.2d 39, 44–45 (1st Cir. 1992).

The Third Circuit's decision in *Commonwealth of Pennsylvania v. President of the United States*, 888 F.3d 52 (3d Cir. 2018), is also instructive. In that case, the Little Sisters of the Poor, 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 Little Sisters' motion to intervene as of right on the grounds that they 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 Little Sisters' interest against other, competing interests that were also at stake in the litigation, the agency could not adequately represent the Little Sisters. The same is true here.

In short, a movant seeking "to make a more vigorous presentation" on one side of the argument is not adequately represented by a public entity that must balance competing interests. *See Trbovich*, 404 U.S. at 539; *see also N.Y. Pub. Interest Resch. Grp., Inc.*, 516 F.2d at 352 (". . . the interests of the pharmacists and the association are not adequately represented by existing parties. Specifically, we are satisfied that there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would the Regents."); *Brennan*, 260 F.3d at 133 (existing party with varying interest "may, in short, behave like a stakeholder rather than an advocate" for movant). Because FIRE seeks to

present a vigorous, constitutional defense of the Rule that the Department will not make, the Department cannot adequately represent FIRE's interests.

### B. The district court erred in applying a presumption of adequate representation because the differing arguments FIRE and the Department would make in defense of the Rule reflect differing objectives.

In concluding that FIRE's interests are adequately represented by the Department, the district court gave significant weight to a presumption of adequate representation that arises under this Court's precedents if a proposed intervenor and one of the existing parties "have the same ultimate objective." A-128 (quoting *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001)). But FIRE and the Department do not share the same objective in this litigation, for a potentially momentous issue this case presents is not just *whether* the Rule is valid but *why*. Because *stare decisis* attaches to the grounds for a judgment, it necessarily follows that a proposed intervenor may have an interest not just in the outcome, but also the *basis*, of a court's future ruling. Here, FIRE seeks to advance arguments for a judgment establishing that many of the Rule's challenged provisions require conduct that is also mandated by the Constitution, and the Department has proven that it will not present those arguments. *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"); *cf. U.S. Postal Service*, 579 F.2d at 191 (finding adequate representation where "Appellants did not contend that the United States Attorney's Office would not advance all of the appropriate legal arguments in favor" of shared position on constitutionality of challenged statute). The presumption relied upon by the district court, moreover, can be overcome by a showing of "adversity of interest," *Butler, Fitzgerald & Potter*, 250 F.3d at 180, and FIRE's and the Department's interests are adverse for the reasons already explained above.

To be sure, "the use of different arguments . . . is not inadequate representation *per se*." *Daggett v. Comm'n on Governmental Ethics and Election Pracs.*, 172 F.3d 104, 112 (1st Cir. 1999). The test for inadequacy turns on the degree of divergence in the arguments and—ultimately—the degree to which they reflect different interests and big-picture objectives. *See Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 209 (1st Cir. 1998); *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982). Here, FIRE disagrees with the Department's decision to forgo constitutional merits defenses. And as already explained, that disagreement is directly related to FIRE's and the Department's divergent interests. Thus, the district court was wrong to cast this as a case where a proposed intervenor and one of the existing parties merely differ over litigation strategy. On the contrary, the differences

between FIRE 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 one considers how pervasively FIRE's distinct arguments would shape the issues in this case. FIRE's constitutional arguments would 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 FIRE is 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 Plaintiffs' interpretation. FIRE's arguments would also affect the relief available to Plaintiffs should their challenges succeed, for it is axiomatic that a court may not "order[] relief that violates the Constitution." *United States v. Paradise*, 480 U.S. 149, 182 n.32 (1987).

In the end, all signs point in one direction: FIRE has met its minimal burden of showing that the Department may not adequately represent its interests. This Court should reverse the district court's contrary ruling.

## CONCLUSION

FIRE has important perspectives to share and interests at stake in this litigation. The Court should reverse the district court's denial of the motion to intervene.

Dated: October 13, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Local Rule 32.1(a)(4)(A) because it contains 8,101 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief also complies with Federal Rule of Appellate Procedure 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Times New Roman font.

Dated: October 13, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of October 2020, I filed the foregoing Appellants' Opening Brief via the Court's CM/ECF appellate system, which will electronically notify all counsel requiring notice.

Dated: October 13, 2020

/s/Charles J. Cooper
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