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' REPLY BRIEF

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INTRODUCTION & SUMMARY OF ARGUMENT

The district court summarily denied Appellants' motion to intervene, offering minimal reasoning and without hearing from any of the existing parties. Plaintiffs now try to backfill the district court's decisions with reasoning that isn't there and arguments that they didn't make. But Plaintiffs' retrospective defense does not cure the substantive or procedural shortcomings of the decision below. This Court should vacate and remand.

I. Appellants have sufficiently shown that the Department's representation of their interests may be inadequate.

As anticipated, *see* Br. 25-26, Plaintiffs do not argue that Appellants' motion was untimely or that Appellants lack a cognizable interest that may, as a practical matter, be affected by this litigation. They defend only the district court's conclusory holding that the Education Department adequately represents Appellants' interests.

As Appellants have explained, that finding is wrong. Appellants and the Department have significantly divergent interests, which are reflected, in turn, in their different objectives for this specific lawsuit and the different arguments they would make to achieve those objectives. *See* Br. 16-22. These differences of goal and perspective satisfy Appellants' "minimal" burden of showing that the Department's representation of their interests "may be inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (cleaned up); *accord 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").

Plaintiffs' contrary arguments betray a misguided approach to the liberal intervention rules. This Court has long stressed that intervention "requires a holistic, rather than reductionist, approach," *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998), mandating close attention to "the facts of the specific case," *Maine v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 14 (1st Cir. 2001), and "the issues at stake in the particular litigation," *Patch*, 136 F.3d at 208. Critically, "[b]ecause small differences in fact patterns can significantly affect the outcome, the very nature of a[n intervention] inquiry limits the utility of comparisons between and among published opinions." *Id.* at 204. And even when speaking of a "presumption" of adequacy, the Court has emphasized the "danger in a mechanistic application of such language." *Maine*, 262 F.3d at 19.

Plaintiffs' arguments represent that kind of "mechanistic," "reductionist[] approach." Plaintiffs' heavy reliance on the presumption of adequacy misses that, even where the presumption applies, it "means no more … than calling for an adequate explanation as to why what is assumed—here, adequate representation—is not so." *Id.*; *accord Daggett v. Comm'n on Govtl. Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999) ("converg[ence]" of two "trigger[s]" for presuming adequacy simply "established" "the applicants' obligation to offer reasons or evidence" of inadequacy); *see* Pltfs.-Br. 16-19.

Worse, Plaintiffs disassemble Appellants' holistic case for intervention, then argue that each artificially isolated element, standing alone, "does not establish

inadequacy." *See, e.g.*, Pltfs.-Br. 19, 27, 31. Plaintiffs would reduce this Court's precedents (which stress the flexible, context-dependent nature of each decision) to a system of all-or-nothing, woodenly mechanical rules. Rather than holistically weighing the facts as a whole, Plaintiffs habitually assume that a given fact must either "establish" inadequacy, Pltfs.-Br. 19, 27, 31, or else must not "matter," Pltfs.-Br. 25; *see also, e.g.*, Pltfs.-Br. 13 ("immaterial"), 29 ("all that matters"). The Court should reject this hyper-schematized framework.

Plaintiffs' granular reasoning fares no better. Their most fundamental mistake is their failure to recognize that a divergence in underlying interests favors inadequacy. Pltfs.-Br. 27-31. Plaintiffs formalistically divide the world of "interests" into narrowly-understood litigation "goals" (which Plaintiffs say matter) and mere "background motivations" (which Plaintiffs say do not). Pltfs.-Br. 28. But under *Trbovich*, a difference in two parties' underlying interests can render representation inadequate even if the parties have the very same claims or defenses. *See* 404 U.S. at 537-39 (finding inadequacy even after holding that the intervening union member was limited to the claims raised by the Secretary of Labor). Plaintiffs offer a strained reading of *Trbovich* as turning on additional relief sought by the intervenor. *See* Pltfs.-Br. 30. But while *Trbovich* held that the intervenor could propose additional relief if the suit were successful, *see* 404 U.S. at 537 n.8, that holding had no bearing on its adequacy-of-representation analysis, *see id.* at 537-39.

Plaintiffs' rigid goals/motivation dichotomy finds no support in this Court's decisions either. *See* Pltfs.-Br. 28-29. Those cases simply recognize that an intervenor's "more specialized interest" does not mandate intervention when the existing parties would make exactly the same arguments, *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982); *see also Daggett*, 172 F.3d at 112 (rejecting as wholly speculative the fear that the government would neglect movants' proposed arguments), or (worse yet) when the intervenor's argument would actually "work against the goal they profess to share," *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 807 F.3d 472, 476 (1st Cir. 2015). Such decisions do not speak to the situation here, where it is undisputed that the Department will not raise Appellants' constitutional theories, *see generally* Doc. 96 (making no such constitutional arguments); Doc. 144 (same), and there is no argument that Appellants' theories would favor Plaintiffs.

In any event, Appellants do *not* share the Department's specific goals for this litigation. As Plaintiffs acknowledge, *see* Pltfs.-Br. 25, Appellants and the Department seek judgments based on different rationales, with correspondingly different stare decisis effects. *See* Br. 22-23. That is a patent difference in "goals" with respect to this lawsuit. And given this Court's acknowledgment that stare decisis effects alone can provide a sufficient interest for intervention, *Int'l Paper Co. v. Inhabitants of Jay*, 887 F.2d 338, 344 (1st Cir. 1989), it follows that it is also a divergence of interests within the meaning of Rule 24. *See Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016) (finding representation inadequate, despite presumptions of

adequacy, where private party sought a judgment on the merits and the governmental agency "would accept a procedural victory").

Plaintiffs do not meaningfully engage with this argument save to assert that it would "entitle[]" "all interested third parties making alternative arguments" to intervene. Pltfs.-Br. 25. But, in *all* cases, whether a party with an alternative argument may intervene is a context-dependent inquiry that must turn on, among other things, the nature of the case, the nature of the proposed intervenor's interests in the case, and how the argument relates to the issues and to the parties' interests. *See Int'l Paper Co.*, 887 F.2d at 444-45 (quoting *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967), to illustrate such a contextual inquiry); *see also Daggett*, 172 F.3d at 113 (noting that "tests of 'inadequacy' tend to vary depending on the strength of the interest"); *id.* at 116-17 (Lynch, J., concurring) (noting that intervention "ha[s] particular force where the subject … is of great public interest, the intervenor has a real stake in the outcome and the intervention may well assist the court in … the framing of the issues"). In a case where an unwieldy number of third parties sought to intervene with alternative arguments, nothing would prevent a court from determining that only certain parties' interests and arguments merited intervention.

Here, the appropriate contextual inquiry supports a finding of inadequacy. *See* Br. 16-22. Appellants (the only parties to seek intervention) have significant, long-term, and institutional interests in how Title IX is applied to college disciplinary proceedings. As a practical matter, those interests may well be impaired by an adverse decision in this

case. *See Int'l Paper Co.* at 344-45. Further, no existing party shares Appellants' interest in a judgment that vindicates the Title IX Rule on the merits and on constitutional grounds. In fact, the Department primarily seeks dismissal for lack of standing, a position that directly contradicts Appellants' position and interests.[1] *See* Doc. 96 at 8-21; Doc. 144 at 1-9. Appellants' constitutional arguments belong in this case, and they should thus be allowed to present their arguments as parties.

Plaintiffs' efforts to downplay Appellants' constitutional arguments are unpersuasive. *See* Pltfs.-Br. 19-27. Plaintiffs assert that for a difference in intended arguments to even be relevant, "the movant must show" that the new argument is "'clearly helpful' or 'essential'" or that "'pursuit of the shared goal obviously calls for the argument to be made,'" Pltfs.-Br. 19-20, phrases drawn respectively from *Daggett* and *Students for Fair Admissions*. But neither relevant passage purports to formulate a necessary condition for inadequacy, much less to erect as high a bar as Plaintiffs suggest. In *Daggett*, the Court observed in passing that a party's neglect of "obvious arguments" *could* show that representation was inadequate, then—in part because the movant's

[1] Plaintiffs contend that Appellants' disagreement with the Department over standing is irrelevant because Plaintiffs themselves uphold their own standing. *See* Pltfs.-Br. 32-33. But the dispositive question is whether *the Department* represents Appellants' interests, not whether Appellants and *Plaintiffs* share certain legal positions. Plaintiffs offer no examples of cases reasoning that an opposing party adequately represents a proposed intervenor's interests (even in part). Rather, such reasoning is conspicuously absent even in cases where it would have been apposite. *See, e.g.*, *Wal-Mart Stores*, 834 F.3d at 569 (not suggesting that the plaintiffs' presumed interest in resisting a "procedural victory" for the defendant was relevant).

arguments were "clearly helpful" and "perhaps even essential" to the defense—found that nothing but "speculation" supported the fear that the defendant actually *would* neglect those vital arguments. 172 F.3d at 112. In *Students for Fair Admissions*, the Court observed that, to assess whether failure to make an argument constituted "*per se* inadequate" representation, it would "ask" whether the argument was "obviously call[ed] for." 807 F.3d at 476. It then held that the movants' proposed argument did not support intervention because it actually *undermined* the position they shared with the defendant. *Id.* In context, it makes no sense to read either case as establishing a specific floor for just how "helpful" or "obvious" an argument must be before it favors intervention.

In any case, Appellants' constitutional theories are "obviously call[ed] for." *Id.* If some of the Rule's provisions are required by the First and Fourteenth Amendments (as Appellants contend), that surely bears on whether Title IX, the Clery Act, and the Fifth Amendment forbid those same provisions (as Plaintiffs contend). *See* JA154-56 ¶¶273-77, 157-59, 283-89, 160-61, 295-99. Recognizing this fact would not ignore the *Chenery* principle. *Cf.* Pltfs.-Br. 22-23. That principle applies only to "determination[s] or judgment[s] which [the] agency *alone* is authorized to make," *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (emphasis added), so it necessarily does not reach constitutional issues—neither in their own right nor as bearing on questions of statutory construction. Further, the principle merely prevents courts from upholding agency actions on alternative discretionary grounds; it does not limit the grounds on which

courts can reject a challenger's erroneous legal arguments. Appellants' constitutional theories are both relevant and important to this case.

Plaintiffs are wrong to dismiss Appellants' constitutional arguments as "even more ancillary" than the movants' theories in *Maine* and *Massachusetts Food Association v. Massachusetts Alcoholic Beverages Control Commission*, 197 F.3d 560, 567 (1st Cir. 1999). Pltfs.-Br. 22. *Maine* was a case reviewing an agency's decision to list an endangered species, where the movant's only additional "argument" to support the listing was that an earlier and since-reversed agency decision not to list the species had been unlawful. 262 F.3d at 18. That assertion, which had only an exceedingly oblique bearing on the legality of the final listing, did not even rise to the level of "a different legal ground," Pltfs.-Br. 21; rather, the Court aptly described it as more of "a building block in an argument" than an argument in its own right. 262 F.3d at 20. As for *Massachusetts Food Association*, there "the intervention issue [was] largely … academic," with the Court rejecting the movant's constitutional defense only after determining that the plaintiffs' antitrust claims did not "even arguably" have merit. 197 F.3d at 563-64. Here, of course, the merits have yet to be decided.

Plaintiffs' remaining arguments miss the mark. Rule 24 contains no requirement that an intervenor address every issue in a case. *See* Pltfs.-Br. 23 (complaining that Appellants' theories "provide at most a partial answer" to the complaint). Indeed, Appellants' focus on certain elements of the relief Plaintiffs seek only underscores the fact that Appellants and the Department do not share the same interests. Plaintiffs'

confidence that Appellants' constitutional arguments could not affect the relief ordered is premature. *See* Pltfs.-Br. 25. After all, courts are not limited to the relief demanded in the pleadings, *see* Fed. R. Civ. P. 54(c), and have remedial discretion even in APA cases, *e.g.*, *Town of Weymouth v. Mass. Dep't of Envtl. Prot.*, 973 F.3d 143, 145-46 (1st Cir. 2020).

In short, Appellants have met their minimal burden to show that the Department's representation of Appellants' interests may be inadequate, which Plaintiffs have failed to rebut. The district court's adequacy ruling should be reversed.

II. Plaintiffs' defense of the district court's ruling on permissive intervention is unavailing.

The district court's opaque denial of permissive intervention—supported by nothing more than a finding on one intervention-as-of-right element, and with no anti-intervention arguments from the parties to provide clarifying context—is procedurally indefensible. As Appellants have explained, *see* Br. 27-35, there is good reason to worry that the district court conflated permissive and as-of-right intervention or failed to consider significant factors. At minimum, the imperatives of meaningful appellate review require a remand to ensure that the district court applied the right standard, considered all significant factors, and reasonably exercised its discretion. *See id.* at 30-31 & n.4, 34; *see also Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997) (explaining that, in denying permissive intervention, a district court must "provide enough of an explanation to enable … meaningful review," unless the record makes the basis of the decision "obvious"); *Caterino v. Berry*, 922 F.2d 37, 39 (1st Cir. 1990)

(discussing previous remand where, absent additional explanation, this Court was "unable to perform a meaningful review" of order denying intervention).

Plaintiffs ignore these arguments until the last two pages of their brief, and even then attack only strawmen. *See* Pltfs.-Br. 37-38. Contrary to Plaintiffs' assertion, Appellants do not contend that a short district-court decision is "'a per se abuse of discretion,'" *id.* at 38 (quoting *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 38 (1st Cir. 2020)); *see also id.* at 14 (incorrectly stating that "Movants' sole argument is that the district court's order was too brief"), nor do Appellants ask the Court to simply "assume" "the least 'generous possible reading' of a summary order," *id.* at 37. Rather, Appellants point out that the district court's reasons for denying permissive intervention are obscure due to the combination of (1) the district court's minimal explanation, (2) its total failure to show (even cursorily) that it distinguished permissive intervention from intervention as of right, and (3) the total absence of arguments against intervention in the record. *See* Br. 13, 31-32, 35. Appellants also show that every possible interpretation of the court's decision—including the "*most* generous possible reading," Br. 29, 34 (emphasis added)—involves either legal error, a failure to consider relevant factors, or (at minimum) a failure to enable meaningful review. *See* Br. 28-35. Plaintiffs have no answer to *this* argument—the one that Appellants actually make.

Similarly, Appellants never argued that district courts are "forbid[den]" to consider representational adequacy when weighing permissive intervention. *Cf.* Pltfs.-Br. 37. Appellants argued that, while representational adequacy may be a *factor* under

Rule 24(b) (along with every other "'rationally relevant' consideration"), it is not as critical there as it is under Rule 24(a)(2) (for which inadequacy is "an ironclad requirement"). *See* Br. 27-28. Citing this Rule 24(a)(2) factor alone, without providing any other reasoning or even mentioning permissive intervention, is not enough to be sure that the district court truly exercised its discretion. Plaintiffs express "puzzl[ement]" at the notion that the district court might have failed to consider permissive intervention, given that "the district court denied the entire motion to intervene." Pltfs.-Br. 37 n.8. But it does not follow that the district court actually *considered* every part of the motion. *Cf. Johnson v. Williams*, 568 U.S. 289, 303 (2013) (explaining that habeas claims "rejected as a result of sheer inadvertence" by state courts "have been adjudicated and present federal questions [federal courts] may review, but it does not follow that they have been adjudicated 'on the merits'").

Plaintiffs also attempt to supply a missing rationale for the district court's permissive-intervention ruling. They suggest that the district court's reference to an amicus brief was among its *reasons* for denying intervention, an interpretation with no support in the text of the minute order. Pltfs.-Br. 34. They suggest that the district court "conclude[d] that the costs of intervention would outweigh the benefits," even though the district court said nothing about either costs *or* benefits and had no such arguments before it when it ruled. Pltfs.-Br. 34-35. Plaintiffs even suggest that the district court was influenced by an unrelated discovery dispute in the parallel D.D.C. case—a dispute that the district court never mentioned and that nobody in this case brought to its

attention. Pltfs.-Br. 36. Ironically, these scattershot guesses only confirm Appellants' position: that efforts to divine the district court's reasoning are pure speculation. Br. 34.

Plaintiffs also seem to think that the district court's inscrutable reasoning is no obstacle to affirmance as long as "the district court's ultimate conclusion was within its broad discretion." Pltfs.-Br. 14; *see also* Pltfs.-Br. 34, 37, 38. On this view, the key question is not whether the district court applied the right standard and reasonably weighed relevant factors; rather, the key question is whether the appellate court, considering "the record as a whole," can find *any* reasonable ground to retrospectively justify the same "ultimate conclusion." Pltfs.-Br. 14.

But that is not how abuse-of-discretion review works. Quite the contrary: "This scope of review necessarily entails consideration of the reasons" the district court actually relied on. *Am. Home Assurance Co. v. Insular Underwriters Corp.*, 494 F.2d 317, 320 (1st Cir. 1974). Thus, appellate courts routinely remand discretionary rulings when it is unclear whether they involved an abuse of discretion, such as a faulty legal standard or neglect of important factors. *See, e.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1989 (2016) (possible neglect of relevant factors); *Fresh Results, LLC v. ASF Holland, B.V.*, 921 F.3d 1043, 1051 (11th Cir. 2019) (possible neglect of relevant factors); *Matthews v. White*, 807 F.3d 756, 763 (6th Cir. 2015) (unclear what legal standard the district court applied); *Daggett*, 172 F.3d at 113-14 (possible faulty legal standard). And when the trial court's reasoning cannot be discerned at all, it is necessarily unclear

whether that reasoning was an abuse of discretion. *See Mich. State AFL-CIO*, 103 F.3d at 1248; *Caterino*, 922 F.2d at 39.

Daggett vividly illustrates why Plaintiffs' theory of review is mistaken. There, the Court explicitly concluded that the district court's bottom-line result (denying intervention) was within its discretion. 172 F.3d at 113. If Plaintiffs' theory of review were correct, that should have been enough to affirm. But it wasn't. Instead, the Court vacated and remanded given "the possibility" that (1) the district court *might* have misunderstood the law and (2) that "possibl[e]" misunderstanding *might* have affected its exercise of discretion. *Id.* The lesson is plain: When it's "unclear" if a ruling rests on an abuse of discretion, the Court should vacate and remand for reconsideration or clarification, even if the result can be justified on non-abusive grounds. *Id.*

Plaintiffs brush aside *Daggett* as a case where "the district court misapprehended the law in analyzing intervention as of right." Pltfs.-Br. 38. That breezy dismissal misses the point in three distinct ways. First, in *Daggett*, it was only "possibl[e]"—not certain—that the district court had mistaken the legal standard. 172 F.3d at 113. Second, applying an incorrect standard is only one of several ways in which a court can abuse its discretion. *See Negrón-Almeda v. Santiago*, 528 F.3d 15, 21-22 (1st Cir. 2008). And third, the "in case of doubt, remand" principle that *Daggett* exemplifies is hardly unique to intervention-as-of-right cases; rather, appellate courts have applied the principle in all sorts of contexts. *See, e.g.*, *Kirtsaeng*, 136 S. Ct. at 1989 (fee-shifting decision); *Fresh Results*,

921 F.3d at 1051 (forum non conveniens decision); *Matthews*, 807 F.3d at 763-64 (denial of funding to develop mitigation evidence).

Denials of permissive intervention are no exception. *See Mich. State AFL-CIO*, 103 F.3d at 1248; *EEOC v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1048-49 (D.C. Cir. 1998). To be sure, a district court's discretion "is at its zenith" when weighing permissive intervention. *Daggett*, 172 F.3d at 113. So a permissive-intervention ruling will rarely be reversed just because the appellate court weighs the factors differently than the district court. But the breadth of the district court's *substantive* discretion does not undermine—if anything, it underscores—the appellate court's *procedural* responsibility to confirm that the district court actually exercised its discretion, actually applied Rule 24(b), and actually "consider[ed] [the] significant factor[s] in the decisional calculus." *Negrón-Almeda*, 528 F.3d at 21. "The existence of a zone of discretion does not mean that the whim of the district court governs." *Mich. State AFL-CIO*, 103 F.3d at 1248.

Plaintiffs base their theory of review on a superficial reading of *T-Mobile*. *See* Pltfs.-Br. 14, 34. That case rejected the proposition "that brevity in denying a motion for intervention, without more, constitutes a per se abuse of discretion," rightly observing that such a rule was inconsistent with this Court's precedents. 969 F.3d at 38. The precedents *T-Mobile* cited were either cases where the district court's reasons were

sufficiently clear despite limited explanation[2] or cases where the record unequivocally supported only one outcome.[3] That a remand is obviously unnecessary in those scenarios does not support a general rule that district courts *never* need to explicate their obscure decisions, a rule that would conflict with the remands in *Daggett*, 172 F.3d at 113-14, and in *Caterino*, 922 F.2d at 39.

T-Mobile itself likely belonged to both categories. Unlike this case, the district court in *T-Mobile* received opposition arguments before "[r]ul[ing] on the papers," providing context to its summary order that is entirely lacking here. 969 F.3d at 37. The text of the *T-Mobile* district court's order left little doubt that it ruled based on the arguments before it: "Having considered the motion to intervene … *and the opposition to same*, the Court DENIES the motion." Electronic Order (Oct. 3, 2019), *T-Mobile Ne. LLC v. Town of Barnstable*, No. 1:19-cv-10982 (D. Mass.), Doc. 41 (emphasis added)

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[2] *See Unger v. Arafat*, 634 F.3d 46, 51 (1st Cir. 2011) ("[The district court's] findings and reasoning can easily be inferred from the record. Thus, we can gauge whether the court applied the Rule 24(a)(2) factors appropriately."); *R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 12 (1st Cir. 2009) ("Because it is readily apparent why the district court [ruled as it did], we can proceed with appellate review.").

[3] *See Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 65 (1st Cir. 2008) ("[T]he record amply demonstrates that [the movant] satisfied the requirements of Rule 24(a)[.]"); *Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 37 (1st Cir. 2000) (holding that the district court abused its discretion by denying intervention as of right). Similar cases not cited in *T-Mobile* include *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1234 (1st Cir. 1992) (affirming denial of intervention where timeliness factors decisively showed that the movant "fiddled while Rome burned"), and *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 neither was supportable).

(docket citations omitted). Further, *T-Mobile* rejected the movants' arguments for intervention as wholly insubstantial and undeveloped, rendering the district court's precise rationale moot (and any remand futile). *See, e.g.*, 969 F.3d at 40 ("[The movants] offered only conclusory arguments, founded entirely on speculation and surmise."); *id.* at 41 ("[T]he [movants]' motion papers did not articulate what, if anything, they would contribute to the … defense.").

This case is different on both scores. Again, the district court had not heard a *single* argument against Appellants' motion when it summarily denied it. And there can be little doubt that the district court *could have* allowed Appellants to intervene (just like the D.D.C. did) without abusing its discretion. Whether the court abused its discretion by denying permissive intervention is impossible to tell without knowing its reasons for doing so. Neither the minute order itself nor the record makes those reasons clear. Thus, a remand is necessary.

III. If the Court affirms, Appellants respectfully request acknowledgment that they can again seek intervention should the Department change course.

Since Appellants filed their opening brief, the November election has taken place. If the Court affirms the order denying intervention, Appellants respectfully request that it make clear in its opinion that a subsequent motion to intervene could be proper if the Department's representation of Appellants' interests becomes inadequate. The Court has repeatedly included similar acknowledgements in its opinions. *See Maine*, 262 F.3d at 14, 21; *Mass. Food Ass'n*, 197 F.3d at 568; *Daggett*, 172 F.3d at 112. There is

no downside to providing this clarity. And there is especially good reason to do so in this case. Regardless of its positions up to now, it is possible that the Department could shift its position on the Title IX Rule. *See, e.g.*, Bianca Quilantan, *Biden Vows 'Quick End' to Devos' Sexual Misconduct Rule*, Politico (May 7, 2020), politi.co/2KHMNgn. Should that happen, Appellants should be allowed to renew their bid for intervention.

CONCLUSION

The Court should vacate the district court's order denying intervention and remand for further proceedings.

Dated: December 7, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 32(a)(7)(B) because it contains 4,343 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: December 7, 2020 */s/ 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: December 7, 2020 *_/s/ Cameron T. Norris_*