No. _____

In the Supreme Court of the United States

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, ET AL.,

Petitioners,

v.

VICTIM RIGHTS LAW CENTER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 19, 2021

QUESTION PRESENTED

Under Federal Rule of Civil Procedure 24(a)(2), an entity that seeks to intervene as of right must establish that none of the existing parties "adequately represent" its interests. In cases in which someone seeks to intervene on the side of a governmental entity, the First Circuit and several other courts of appeals apply a presumption that the government will adequately represent the proposed intervenor. The presumption can only be overcome by "a strong affirmative showing" that the government "is not fairly representing the applicants' interests." Pet. App. 8a. In contrast, four Circuits do not apply a presumption in such cases. *See, e.g.*, *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015). Relying heavily on the presumption in the proceedings below, the First Circuit ruled that Petitioners could not intervene as of right to advance constitutional arguments in support of an important Department of Education rule on Title IX that none of the existing parties are willing to make.

The question presented is whether a movant who seeks to intervene as of right on the same side as a governmental litigant must overcome a presumption of adequate representation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are three nonprofit organizations—the Foundation for Individual Rights in Education (FIRE), the Independent Women's Law Center, and Speech First, Inc.—which moved to intervene as intervenor defendants in the District Court and were movants-appellants in the Court of Appeals. Petitioners have no parent corporation, and no publicly held company owns 10 percent or more of their stock.

Respondents the 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, and Lisa Doe were the plaintiffs in the District Court and plaintiffs-appellees in the Court of Appeals.

Respondents Miguel Angel Cardona, in his official capacity as Secretary of Education, Suzanne Goldberg, in her official capacity as Acting Assistant Secretary for Civil Rights, and the U.S. Department of Education are the defendants in the District Court and were defendants-appellees in the Court of Appeals.[1]

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[1] Former Secretary of Education Betsy DeVos was a defendant in the District Court and an appellee in the Court of Appeals. Former Acting Secretary of Education Phil Rosenfelt and, later, Secretary of Education Miguel Cardona, replaced her in the Court of Appeals. Former Assistant Secretary for Civil Rights Kenneth L. Marcus was a defendant in the District Court and an

STATEMENT OF RELATED PROCEEDINGS

- *Victim Rights Law Ctr., et al., v. Rosenfelt, et al.*, No. 20-1748 (1st Cir.) (opinion issued and judgment entered February 18, 2021).

- *Victim Rights Law Ctr., et al., v. DeVos, et al.*, No. 1:20-cv-11104 (D. Mass.) (motion to intervene denied July 27, 2020).

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appellee in the Court of Appeals. Acting Assistant Secretary for Civil Rights Suzanne Goldberg replaced him in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 988 F.3d 556 and is reproduced at Pet. App. 1a. The District Court's electronic order has not been published in the Federal Supplement and is reproduced at Pet. App. 20a.

JURISDICTION

The Court of Appeals issued its judgment on February 18, 2021. On March 19, 2020, this Court issued a standing order that extends the time for filing a petition for a writ of certiorari to and including July 19, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Rule 24 of the Federal Rules of Civil Procedure provides:

(a) INTERVENTION OF RIGHT. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so

situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) PERMISSIVE INTERVENTION.

(1) *In General.* On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) *By a Government Officer or Agency.* On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) NOTICE AND PLEADING REQUIRED. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

INTRODUCTION

This case presents a particularly stark example of a well-developed circuit split over a question of significant importance. The First Circuit, along with several others, has developed a two-tiered system for reviewing motions to intervene as of right. Under this system, motions to intervene on the side of a private party generally require only a minimal showing that the existing parties will inadequately represent the intervenor's position. But if the movant seeks to intervene on the side of a governmental entity, it must overcome a strong presumption that the government will adequately represent its interests. The Third and Ninth Circuits apply a similar, but weaker presumption. The Sixth, Tenth, Eleventh and D.C. Circuits have correctly rejected the presumption altogether.

The presumption conflicts with *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972), which held that a movant who sought to intervene on the same side as a governmental litigant had only a "minimal burden" to establish inadequacy of representation. The presumption likewise lacks support in the text of Rule 24(a)(2), which employs conditional language suggesting that, where a movant is otherwise qualified to intervene, the question whether another party's representation is "adequate" should rarely tip the scales against intervention. Finally, the presumption obscures the frequent disconnect between the broad public interests represented by a government agency in litigation defending a law or legislative rule and the narrower interests represented by private litigants who would be

adversely affected by invalidating that law or rule. As a result of the presumption, parties who otherwise qualify to intervene are left out of cases that threaten to impair or impede their interests—even when they can show that the existing parties' interests are different than their own.

This case illustrates the particular importance of the circuit split over the application of Rule 24(a)(2). Petitioners are advocacy groups devoted to promoting free speech and due process on college campuses. They sought to intervene on the side of the Department to defend the culmination of a years-long rulemaking process—a key regulation mandating the most significant changes to administrative proceedings under Title IX in the history of that important statute. Even though Petitioners represent comparatively narrow interests that are inconsistent with the broader interests of the Department, the First Circuit presumed the Department would adequately represent Petitioners and affirmed the denial of their motion to intervene. As a result, Petitioners were denied the ability to raise their proposed constitutional defenses of the Department's Title IX Rule despite the fact that the Department refuses to raise those defenses, which conflict with the Department's own interests in the litigation.

In contrast, in essentially identical litigation relying on essentially identical arguments in the United States District Court for the District of Columbia—where the presumption does not apply—Petitioners were allowed to permissively intervene alongside the Department. And Petitioners have a pending motion to intervene in another case

challenging the Rule in the Northern District of California, which means that when all is said and done they will have been subjected to *all three* approaches that the courts of appeals take to adequacy of representation.

Petitioners are hardly alone. In the courts that apply the presumption, it often prevents similarly interested parties from participating in litigation over important issues and undercuts the general principle that intervention is favored. The Court should grant the writ in this case to provide much-needed guidance to the lower courts on a question that affects a wide variety of important cases.

STATEMENT

I. The Department of Education promulgates its first ever Rule governing funding recipients' obligations under Title IX to address sexual harassment.

Title IX prohibits education programs that receive federal financial assistance from discriminating on the basis of sex. *See* 20 U.S.C. § 1681. Since nearly all colleges and universities in the United States receive federal funds, the interpretation and application of Title IX by the Department has sweeping importance for higher education.

On May 19, 2020, the Department published its Rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (the "Rule") to take effect on August 14, 2020. *See* 85 Fed. Reg. 30,026 (May 19, 2020) (codified in various sections of 34 C.F.R. pt. 106).

The Rule was the culmination of a comprehensive regulatory process during which the Department considered over 124,000 comments, hearing from those who had been victims of sexual assault and sexual harassment, those who had been accused, and thousands of others—schools, universities, educators, social workers, nonprofit groups, and concerned citizens. Petitioners were active participants in this administrative process.

The final Rule uses a definition of discriminatory "sexual harassment" that closely tracks this Court's definition of that term in *Davis v. County Board of Education*, 526 U.S. 629 (1999). The final Rule defines "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). In *Davis*, this Court similarly 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. at 651; *see also* 85 Fed. Reg. at 30,036–38.

The Department's adoption of the *Davis* standard was an important change of course for the agency. In its prior informal guidance, the Department had embraced a more expansive definition of discriminatory sexual harassment, defining it as conduct "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a

hostile or abusive educational environment." *Id.* at 30,034 (quoting prior guidance). The former definition departed from the *Davis* standard by disjunctively listing the attributes of discriminatory harassment, ignoring the "objectively offensive" criterion, introducing the term "persistent," and eschewing terms like "denial" or "deprivation" in favor of more amorphous terms like "limit."

In another departure from the Department's prior informal guidance, the Rule sets out a number of procedural protections for those accused of sexual misconduct. *See* 34 C.F.R. § 106.45; 85 Fed. Reg. at 30,046–55. For instance, the Rule mandates that schools: (1) provide timely notice to respondents in sexual misconduct proceedings; (2) employ neutral, unbiased adjudicators; (3) objectively consider inculpatory and exculpatory evidence; and (4) afford complainants and respondents equal opportunities to gather and present evidence, to select advisors, and to appeal. *See* 85 Fed. Reg. at 30,053–54. In addition, postsecondary institutions must guarantee the accused a live hearing with the opportunity for cross-examination. 34 C.F.R. § 106.45(b)(6); 85 Fed. Reg. at 30,054.

The Rule has been met with controversy in some quarters. The number of comments during the rulemaking attests to the public's intense and varying views on sexual misconduct proceedings in schools. Those seeking elective office also took note. For instance, then-candidate Joseph R. Biden quickly proclaimed his opposition to the Rule after it was announced. *See* Bianca Quilantan, *Biden vows 'quick end' to DeVos' sexual misconduct rule*, POLITICO (May

6, 2020), *available at* https://politi.co/3r6SBkQ. In fact, Mr. Biden campaigned on bringing the Rule to a "quick end." *Id*.

Yet "the Department's Title IX regulations, as amended in 2020, remain in effect."[2] While the Department has thus far not announced that it will rescind the Rule, the new Administration has taken a number of steps signaling that it may initiate a new rulemaking that could ultimately do so. The President issued an Executive Order calling for a review of existing Title IX regulations.[3] The Department also recently represented that its "comprehensive review of the rule" is "continuing."[4] And although the Department "anticipate[s] issuing a notice of proposed rulemaking to amend the regulations,"[5] any such effort to repeal a rule that took years to adopt would itself be an arduous multi-year process.[6] Of course, if

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[2] Letter to Students, Educators, and other Stakeholders re Executive Order 14021, at 3, DEP'T OF EDUC. (April 6, 2021), *available at* https://bit.ly/3wCwq6Y.

[3] *See* Exec. Order No. 14,021 at § 2(i), 86 Fed. Reg. 13803 (Mar. 8, 2021) (requesting review of "the rule entitled 'Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,' and any other agency actions taken pursuant to that rule, for consistency with governing law") (citation omitted).

[4] Joint Status Report, Doc. 150 at 2, *Pennsylvania v. Cardona*, No. 1:20-cv-01468-CJN (D.D.C. July 6, 2021).

[5] Letter to Educators on Title IX's 49th Anniversary, at 2, DEP'T OF EDUC. (June 23, 2021), *available at* https://bit.ly/3hBap4g.

[6] *See* Regulation Identifier Number 1870-AA16, Spring 2021 Unified Agenda, OIRA, (announcing that Department plans to issue Notice of Proposed Rulemaking in May 2022 as part of a "Long-Term Action[]"), *available at* https://bit.ly/36FVi33.

the plaintiffs' suit is successful, no such new rulemaking would be necessary to set aside the rule.

II. Petitioners move to intervene as defendants.

A. Petitioners are nonprofits with direct interests in defending the final Rule.

Petitioners are three nonprofit organizations dedicated to promoting free expression and due process on college and university campuses across the United States. These organizations work on issues directly affected by the Rule. Accordingly, all three organizations took part in or carefully followed the regulatory process that led to the Rule, and all three have substantial interests in defending the Rule against legal challenges such as the one in this case.

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 nationwide, some of whom have been subject to Title IX disciplinary proceedings and others of whom may be subject to such proceedings in the future. FIRE staff work directly with college students and faculty subjected to disciplinary proceedings for engaging in protected First Amendment activity, and FIRE seeks to educate both the accused of their rights in these proceedings and public-university administrators of their due process obligations. These efforts also have increasingly extended in recent years to confronting sexual misconduct proceedings at institutions that have adopted amorphous definitions of "sexual

harassment" and provided few procedural protections for the accused. Given its interest and prominent public voice on these issues, FIRE closely followed and took part in the Rule's regulatory process, submitting a detailed comment in support of the proposed rule that made various suggestions on how it could be improved.

The Independent Women's Law Center ("Center") is a project of the Independent Women's Forum ("Forum"), a nonpartisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. Both the Center and the Forum were leading proponents of the Rule. The Forum submitted commentary in support of the Department's proposed rule, and the Center specifically opposed proposals to delay the effective date of the Rule in light of the COVID-19 pandemic.

Speech First, Inc., is a membership association of college students, parents, faculty, alumni, and concerned citizens that is committed to restoring freedom of speech on college and university campuses. 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. Accordingly, Speech First has often challenged speech-chilling "harassment" policies in court, which universities often defend by pointing to the Department's former (pre-Rule) Title IX guidance. Like FIRE, Speech First has student members who have been subject in the past (and may be subject in the future) to Title IX disciplinary proceedings.

B. Petitioners seek to intervene to advance a legal defense that the Department refuses to put forward.

The Rule faced court challenges almost as soon as it was announced. In this case, plaintiffs sued in the U.S. District Court for Massachusetts, which had jurisdiction under 28 U.S.C. § 1331. Plaintiffs allege that the Rule's use of the *Davis* standard to define "sexual harassment" and its additional procedural protections for the accused are unlawful under Title IX, the Administrative Procedure Act, and the Fifth Amendment's equal protection guarantee. Among other relief, plaintiffs seek a court order that would compel the Department to replace the *Davis* standard with a more elastic definition of discriminatory sexual harassment—any "unwelcome conduct of a sexual nature." Am. Complaint, *Victim Rights Law Center v. Devos*, No. 1:20-cv-11104, Doc. 13 at 5 (D. Mass. July 6, 2020). Shortly after plaintiffs filed their amended complaint, Petitioners filed a motion to intervene as defendants. *See* Pet. App. 5a, 21a.

Petitioners moved to intervene to protect their interests and to advance a legal theory that the Department of Education will not: that many of the Rule's protections for college students are not just reasonable policy decisions—they are constitutionally required. Petitioners maintain and sought to argue as parties below that any definition of "sexual harassment" more expansive than the *Davis* standard would unconstitutionally infringe on First Amendment-protected speech—both directly and through its inevitable chilling effect. Further, Petitioners sought to argue that the Due Process

Clause independently requires public colleges and universities to provide many of the same procedural protections now mandated by the Rule.

The Department has declined to take these legal positions. In the Rule's Preamble, the Department maintained that applying the *Davis* standard was "consistent with the First Amendment," not required by it. 85 Fed. Reg. at 30,033. And the Department maintains that the Rule's procedural protections "likely will meet constitutional due process obligations" and are "inspired by principles of due process," but nevertheless are not required by constitutional due process. *Id.* at 30,100–01. Consistent with those statements, throughout the litigation over the Rule, the Department has refused to defend the Rule on constitutional grounds.

Moreover, Petitioners' interests are not coextensive with those of the Department. Petitioners are nonprofits that consistently advocate for narrowly defining "sexual harassment" under *Davis* to safeguard free expression and due process rights on college and university campuses. Thus, their interests lie in securing the greatest possible protection for those rights. By contrast, the Department is a federal agency subject to all manner of legal and political forces. The Department thus must balance a host of interests with every action it takes. For instance, the Department noted one such balancing act in the Rule's preamble by saying it explicitly sought to "balance protection from sexual harassment with protection of freedom of speech and expression." 85 Fed. Reg. at 30,165.

Accordingly, to ensure that their constitutional defenses and interests are represented in litigation over the Rule, Petitioners filed a motion to intervene on July 21, 2020—a little over two weeks after plaintiffs filed an amended complaint. *See* Pet. App. 5a, 21a. Petitioners sought to intervene as of right, *see* FED. R. CIV. P. 24(a)(2), and, in the alternative, sought permissive intervention, *see* FED R. CIV. P. 24(b)(1)(B); Pet. App. 6a. In their motion, Petitioners also informed the court that the U.S. District Court for the District of Columbia had already permitted Petitioners to intervene permissively in a parallel suit challenging the Rule. *See* Minute Order, *Pennsylvania*, No. 1:20-cv-01468-CJN (July 6, 2020). In substance, many of the D.D.C. plaintiffs' claims are the same as those in this case, and Petitioners made materially identical arguments for intervention in both cases.[7]

The District Court denied Petitioners' motion to intervene. In doing so, the District Court did not wait to receive arguments or even learn the positions of any of the existing parties regarding Petitioners' motion. Moreover, the District Court denied the motion on grounds that the D.D.C. plaintiffs did not even dispute: adequacy of representation. The District Court's electronic minute order offered a single sentence of explanation for the denial: "The motion to intervene is denied as there is no adequate showing that the government will not adequately protect the proposed intervenors['] rights." Pet. App. 21a.

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[7] The D.D.C. case is being held in abeyance because of the Department's aforementioned regulatory review. *See* Minute Order, *Pennsylvania*, No. 1:20-cv-01468-CJN (July 8, 2021).

Petitioners timely appealed. Pet. App. 6a. While plaintiffs contested intervention, the Department took no position and did not participate in the interlocutory appeal. Pet App. 3a.

The U.S. Court of Appeals for the First Circuit affirmed the District Court's decision. Pet. App. 17a. "Generally," the First Circuit explained, "an applicant for intervention need only make a minimal showing that the representation afforded by existing parties likely will prove inadequate." Pet. App. 8a. (internal quotation marks omitted). But the First Circuit "and a number of others" apply a higher standard when the applicants seek to intervene "alongside a government entity." Pet. App. 8a. In those instances, the applicants' "burden of persuasion is ratcheted upward" because of "a rebuttable presumption that the government will defend adequately its action." *Id.* A "successful rebuttal requires a strong affirmative showing that the agency (or its members) is not fairly representing the applicants' interests." *Id.* (internal quotation marks omitted).

Applying this presumption, the First Circuit concluded that the District Court was correct to deny Petitioners' motion to intervene. Pet. App. 17a. Since the District Court's denial of Petitioner's motion, the court has held a bench trial in which Petitioners could not participate. The court, however, has not issued a ruling on the merits of the plaintiffs' suit.

REASONS FOR GRANTING THE WRIT

I. The courts of appeals are split over what showing of inadequacy a proposed intervenor must make to intervene on the same side as a governmental litigant.

An entity seeking to intervene alongside the government in the First Circuit faces a serious challenge. That court presumes the government will adequately represent any would-be intervenor, who must make a "strong affirmative showing" that the government "is not fairly representing" its interests. Pet. App. 8a (quotations omitted).

In the D.C. Circuit, the situation is entirely different. The court "look[s] skeptically on government entities serving as adequate advocates for private parties," and the task of showing inadequate representation is "not onerous." *Crossroads Grassroots Pol'y Strategies v. FEC.*, 788 F.3d 312, 321 (D.C. Cir. 2015) (quotations omitted).

With the exception of the Third and Ninth Circuits—which stake out a middle ground, purporting to apply a presumption that, in practice, does not carry much weight—the other circuits all follow either the First Circuit or the D.C. Circuit's approach. The result is that where a lawsuit is brought is often a dispositive factor in determining whether an interested party can intervene as of right—indeed, that was the case here.

A. A Strong Presumption: The First Circuit and several others require proposed intervenors to overcome a "presumption of adequacy" to intervene alongside a governmental entity.

This Court last provided guidance on the standards that should govern intervention as of right under Rule 24(a)(2) in *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972). In that case, a union member, Trbovich, filed a complaint with the Secretary of Labor in which he alleged that a union election had been tainted by violations of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA). *Id.* at 529. When the Secretary of Labor sued the union based on these allegations, Trbovich sought to intervene on the same side as the Secretary. *Id.* at 529–30. In the portion of its opinion that addressed Rule 24(a)(2), the Court held that the inadequate representation requirement of Rule 24(a)(2) "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Id.* at 538 n.10. Under the LMRDA, the Court considered that the Secretary of Labor was, in essence, acting as a lawyer for the members of the union including Trbovich, and yet Trbovich succeeded in intervening because, the Court explained, the Secretary of Labor had an additional "obligation to protect the 'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.'" *Id.* at 539 (quoting *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 475 (1968)). "Even if the

Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer.' Such a complaint . . . should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2)." *Id.*

In the years since *Trbovich* was decided, several courts of appeals have added an exception to *Trbovich*'s statement that the burden of showing inadequate representation "should be minimal." Surprisingly, the exception applies in cases *exactly* like *Trbovich*—where a party seeks to intervene alongside a governmental entity.

In the First Circuit, the presumption is well-established. Long before it applied the presumption dispositively against Petitioners, the First Circuit determined that the burden of persuasion should be "ratcheted upward" when a movant wants to intervene alongside a governmental entity. *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998). Unless a movant makes "a showing to the contrary," the First Circuit is "quite ready to presume that a government defendant will 'adequately represent' the interests of all private defenders of the statute or regulation." *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999). In practice, that means where, as here, movants want to make legal arguments the government does not, they are typically relegated to *amici* status. *Id.*

Several other courts of appeals have adopted the same strong presumption that the First Circuit applied in the proceedings below. The Second Circuit requires "[t]he proponent of intervention [to] make a

particularly strong showing of inadequacy in a case where the government is acting as *parens patriae*." *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999). To overcome the presumption, intervenors must make "a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant." *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984).

In the Fourth Circuit, "[a] government defendant, given its basic duty to represent the public interest, is a presumptively adequate defender of duly enacted statutes," and "when a government official is legally required to represent the state's interest," courts "start from a presumption of adequate representation and put the intervenor to a heightened burden to overcome it." *N.C. State Conf. of NAACP v. Berger*, 999 F.3d 915, 932–33 (4th Cir. 2021) (en banc) (cleaned up). Carrying this heightened burden is difficult: "[A] very strong showing of inadequacy is needed to warrant intervention" on the side of a governmental entity. *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (citation omitted).

The Fifth Circuit follows the same rule, although it restricts application of the presumption to cases "involving matters of sovereign interest." *Entergy Gulf States La., LLC v. EPA*, 817 F.3d 198, 203 n.2 (5th Cir. 2016). The same is true in the Federal Circuit. *Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012).

In the Seventh Circuit, a presumption of adequacy that arises when parties have the same goal "becomes even stronger when the representative party

'is a governmental body charged by law with protecting the interests of the proposed intervenors'; in such a situation the representative party is presumed to be an adequate representative 'unless there is a showing of gross negligence or bad faith.'" *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019) (citation omitted).

The presumption is also very strong in the Eighth Circuit. Overcoming it requires "a strong showing of inadequate representation," which could be accomplished by "showing that the *parens patriae* has committed misfeasance or nonfeasance in protecting the public." *N.D. ex rel. Stenehjem v. United States*, 787 F.3d 918, 922 (8th Cir. 2015) (citations omitted). But "[a]bsent [a] clear dereliction of duty . . . the proposed intervenor cannot rebut the presumption of representation by merely disagreeing with the litigation strategy or objectives of the party representing him." *Id.* (citations omitted).

The First Circuit's decision in this case applied this law and demonstrated a robust application of the presumption. Because Petitioners sought "to intervene as a defendant alongside a government entity," they were required to make "a strong affirmative showing that the agency (or its members) is not fairly representing [Petitioners'] interests." Pet. App. 8a (quotations omitted). That Petitioners represented narrower interests than the Department, that they proposed to offer constitutional arguments in defense of the Rule that the Department refuses to advance, and that the Department had an interest (not shared by Petitioners) in maintaining regulatory flexibility and minimizing future legal challenges—

none of these sufficed to overcome the presumption. Pet. App. 9a–11a.

B. A Weak Presumption: The strength of the presumption in the Third and Ninth Circuits is dependent on a finding that the parties have the same interests.

Although the Third Circuit purports to apply a presumption of adequacy, in practice its analysis more closely reflects the views of the circuits that reject the presumption. Unlike in the First Circuit and those that share its approach, in the Third Circuit the strength of this presumption "varies with each case." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998). "[T]he presumption is particularly strong when the governmental and private interests 'closely parallel' one another, or are 'nearly identical' " and requires a "compelling showing" to overcome. *Pennsylvania v. President United States of Am.*, 888 F.3d 52, 60 (3d Cir. 2018) (citations omitted). But if "an agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden is comparatively light." *Id.* at 60–61.

The important difference offered by this approach can be readily seen in *Pennsylvania v. President United States of America*, in which the Little Sisters of the Poor sought to intervene to defend regulations promulgated under the Affordable Care Act. 888 F.3d at 54. In the context of determining whether it should require a "compelling showing" of inadequacy or apply a "comparatively light" burden, the Third Circuit first

determined "the degree of divergence between the interests of the Little Sisters on the one hand and those of the federal government on the other." *Id.* at 60–61. Assessing this question *without first applying any presumption*, the Third Circuit explained that, like in *Trbovich*, the government was 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," and there was "no guarantee that the government will sufficiently attend to the Little Sisters' specific interests as it attempts to uphold both [regulations] in their entirety." *Id.* Thus, the Third Circuit confirmed that "the Little Sisters carry a 'comparatively light' burden here and have overcome the presumption." *Id.*

The Ninth Circuit has taken a similar approach to the Third Circuit, noting that it is "unclear" whether the government representing a given side in litigation gives rise to an independent presumption of adequacy or merely "strengthens" the presumption that arises when two parties share the same "ultimate objective." *Prete v. Bradbury*, 438 F.3d 949, 957 (9th Cir. 2006). Whether the parties share the same "ultimate objective" is, in practice, dispositive of whether a presumption of adequate governmental representation applies. *See Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899–900 (9th Cir. 2011) ("Even if we applied a presumption of adequate representation, that presumption was persuasively rebutted by Applicants' presentation."). And applicants have different "ultimate objectives" if they offer "fundamentally differing points of view . . . on the litigation as a whole," *id.* at 899, not, as the

First Circuit considers the question, only if they seek different legal relief, *Mass. Food Ass'n*, 197 F.3d at 567; *see also Citizens for Balanced Use*, 647 F.3d at 899 ("[T]he government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'") (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009)).[8]

C. No Presumption: The D.C. Circuit and three others allow proposed intervenors who are otherwise interested to intervene unless it is "clear" another party will adequately represent their interests.

In even stronger contrast to the First Circuit's approach, four circuit courts have rejected the presumption of adequacy entirely. The D.C. Circuit demonstrated its permissive approach in *Crossroads Grassroots Pol'y Strategies*, in which the appeals court reversed a district court's denial of intervention under Rule 24(a)(2), faulting the district court for failing to "acknowledge[] that we have described this last

[8] Petitioners have a pending motion to intervene in a lawsuit challenging the Rule in the Northern District of California. *See* Motion to Intervene, Doc. 35, *Women's Student Union v. U.S. Dep't of Education*, No. 3:21-cv-01626-EMC (N.D. Cal. May 24, 2021). In seeking to intervene in defense of the Rule in parallel litigation across several circuits, Petitioners have thus been subjected to *all three* of the different approaches the courts of appeals take to adequacy of representation when someone seeks to intervene on the same side as a governmental litigant.

requirement [for inadequacy of representation] as 'not onerous,' or 'low,' and that a movant 'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation.'" 788 F.3d at 321 (citations omitted). Unlike the First Circuit, the D.C. Circuit "look[s] skeptically on government entities serving as adequate advocates for private parties." *Id.* (citing *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003), and *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912–13 (D.C. Cir. 1977)).

The Sixth Circuit has also eschewed the presumption, faulting a district court for applying it in *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999), and explaining that "this circuit has declined to endorse a higher standard for inadequacy when a governmental entity is involved." *Id.* at 400.

In the Tenth Circuit, "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001). The Tenth Circuit reached that conclusion noting, as this Court did in *Trbovich*, that "[i]n litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." *Id.* at 1256. Lest there be any doubt, the Tenth Circuit underscored: "This potential conflict exists even when the government is called upon to defend against a claim which the would-be intervenor also wishes to contest." *Id.*

The Eleventh Circuit also makes no distinction between governmental and private entities in applying Rule 24(a)(2). In *Clark v. Putnam County*, 168 F.3d 458 (11th Cir. 1999), the court rejected the county's argument that it adequately represented the proposed intervenors because public officials "represent the interests of all Putnam County citizens." The Eleventh Circuit pointed out that the "intent to represent everyone in itself indicates that the [county] represent[s] interests adverse to the proposed interveners; after all, both the plaintiffs and the proposed defendant-interveners are Putnam County citizens." *Id.* at 461.

There is no doubt that if Petitioners' motion had been litigated under the circuit precedent of any of these four courts of appeals, the Department would not have been found to adequately represent Petitioners. Indeed, the Department's failure to affirmatively claim that it adequately represents Petitioners in the proceedings below would have been dispositive in the Tenth and D.C. Circuits. Where, as here, *see* Pet. App. 3a, the government takes no position on a would-be intervenor's motion, the Tenth Circuit has found "its silence on any intent to defend the intervenors' special interests is deafening." *Id.* (cleaned up). A similar rule applies in the D.C. Circuit, where "equivocation about whether the Department will continue to appeal the adverse ruling of the district court or will otherwise protect the intervenors' interests constitutes at least the requisite minimal showing" of inadequacy. *U.S. House of Reps. v. Price*, No. 16-5202, 2017 WL 3271445, at *2 (D.C. Cir. Aug. 1, 2017) (cleaned up).

* * *

The divide between the courts of appeals is clear. It was also the decisive factor in the denial of Petitioners' intervention motion. The district court's summary order offered one sentence of reasoning to support its decision: "The motion to intervene is denied as there is no adequate showing that the government will not adequately protect the proposed intervenors['] rights." Pet. App. 21a. The First Circuit, in reviewing that order, considered only whether Petitioners would be adequately represented and concluded, based on the presumption, they would be. Pet. App. 8a.

In contrast, Petitioners also sought to intervene on essentially identical grounds in an essentially identical case challenging the same regulations in the District Court for the District of Columbia—where there is no presumption of adequacy—and intervention was granted. Minute Order, *Pennsylvania v. Devos*, No. 1:20-cv-1468 (D.D.C. July 6, 2020). Although the D.C. district court granted Petitioners' motion under Rule 24(b) and not Rule 24(a), that distinction is immaterial for present purposes since the First Circuit also considers adequacy of representation as a factor informing permissive intervention, *see T-Mobile Ne. LLC v. Barnstable*, 969 F.3d 33, 41 (1st Cir. 2020), and it affirmed denial of Petitioners' permissive intervention under Rule 24(b) on the same grounds as it affirmed denial of intervention as of right under Rule 24(a). Pet. App. 14a. That the First Circuit applies a strong presumption of adequacy when someone seeks to intervene on the same side as a governmental litigant

and the D.C. Circuit does not is *the* difference between these two cases.

II. Review is needed because the First Circuit's decision is inconsistent with *Trbovich*, the plain text of Rule 24, and the realities of government litigation.

Although it purported to follow *Trbovich* and paid lip service to the rule that "an applicant for intervention need only make a minimal showing that the representation afforded by existing parties likely will prove inadequate," the First Circuit quickly discarded that standard and "ratcheted upward" Petitioners' burden to "require 'a strong affirmative showing' that the agency (or its members) is not fairly representing the applicants' interests." Pet. App. 8a (citations omitted). This was error.

A. The First Circuit's approach cannot be squared with *Trbovich*, which applied the "minimal" standard for would-be intervenors like Petitioners, *even though* the intervenor in that case was a member of the specific union constituency on whose behalf the Secretary of Labor had filed suit. *Trbovich*, 404 U.S. at 538 & n.10. In fact, this Court went so far as to say that "the Secretary of Labor in effect becomes the union member's lawyer" in actions under the LMRDA. *Id.* (quoting 104 Cong. Rec. 10947 (remarks of Sen. Kennedy)). But far from requiring "a strong affirmative showing that the agency (or its members) *is not* fairly representing the applicant's interests," Pet. App. 8a (quotations omitted and emphasis added), in *Trbovich*, the Court noted that Rule 24 "is satisfied if the applicant shows that representation of his

interest 'may be' inadequate." 404 U.S. at 538 n.10. And rather than *assuming* that a private citizen would be adequately represented despite the government's additional interests in "regulatory flexibility" and a desire to "minimiz[e] future legal challenges," Pet. App. 10a, this Court emphasized how secondary governmental objectives that extend beyond an intervenor's interests may lead to "a valid complaint about the performance" of the government as the citizen's representative, "[e]ven if [it] is performing [its] duties, broadly conceived, as well as can be expected." 404 U.S. at 539.

The only way to square the First Circuit's presumption of adequacy with *Trbovich* would be to suggest it does not mean what it says, which at least one judge in a circuit applying the presumption has tried to do. In *Wolfsen Land & Cattle Co.*, Judge Reyna concurred in the denial of intervention but faulted the majority for "rel[ying] on a belief that the burden imposed by [the presumption of adequacy] is quite high," because "a high burden would be contrary to Supreme Court precedent, as well as the general principle that intervention is favored." 695 F.3d at 1319. Judge Reyna argued that, despite the language courts use, rebutting the presumption ought to be easier than it sounds—even as he acknowledged that the "standard adopted by the majority makes it more difficult for parties to intervene and presents an effective bar to intervention in many cases." *Id.* at 1320.

But contrary to Judge Reyna's effort to harmonize the presumption with this Court's decision in *Trbovich*, the courts that apply the presumption

saddle movants with a heavy burden to make an "affirmative showing" that the governmental litigant is not adequately representing their interests. Pet. App. 8a. In fact, some circuits have gone even further. In the Seventh Circuit, for example, to overcome the presumption a party must demonstrate gross negligence or bad faith on the part of the government. As Judge Sykes recognized, "[t]o borrow a phrase from another context, the gross-negligence/bad-faith standard is strict in theory and fatal in fact. No Attorney General or other government lawyer will be so derelict in his duty as to flunk the test." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 805 (Sykes, J. concurring); *see also N.C. State Conf. of NAACP*, 999 F.3d at 918 ("It follows that [movants] have a right to intervene under Rule 24(a)(2) . . . only if a federal court first finds that the Attorney General is inadequately representing that same interest, in dereliction of his statutory duties—a finding that would be 'extraordinary.'") (quoting *Planned Parenthood of Wis.*, 942 F.3d at 801).

Although Judge Reyna and Judge Sykes favored application of the presumption in some form or other, both were broadly correct: The presumption as it is applied, including by the First Circuit in this case, is inconsistent with this Court's decisions. Were Trbovich attempting to intervene in the First Circuit today (to say nothing of the Seventh or Fourth), without any evidence to support "a strong affirmative showing" that the government was already failing to fairly represent him, there is little doubt that he too would be denied the right to intervene.

B. The presumption is also inconsistent with the text of Rule 24. In relevant part, the Rule requires:

> On timely motion, the court *must* permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FED. R. CIV. P. 24(a)(2) (emphasis added). By its terms, the Rule "calls for a contextual, case-specific analysis and *does not imply the existence of categorical exclusions*." *Planned Parenthood of Wis.*, 942 F.3d at 805 (Sykes, J. concurring) (emphasis added). And yet in practice the First Circuit's presumption of adequacy functions as a major obstacle for parties seeking to intervene alongside the government.

Nothing in the Rule's text suggests that the "adequacy" of an existing party's representation should form a significant barrier to intervention. By mandating that an interested party "must [be] permit[ted]" to intervene "*unless*" its interests are adequately represented, the Rule suggests that the other elements required for intervention as of right under Rule 24(a)(2) should be the primary focus of the inquiry and that courts should only exclude proposed intervenors on adequacy of representation grounds when it is clear that intervention is unnecessary to protect the proposed intervenor's interests. In other words, under the plain text of the Rule, the "adequate representation" element of the test only comes into play after a party has demonstrated that it otherwise

has an interest at stake and should presumptively be allowed to intervene.

The First Circuit and the other courts that apply a presumption of adequacy do damage to this text by requiring movant-intervenors with an interest that warrants intervention to make a *further* substantial showing of why they should not *still* be kept out of the case or why an "amicus brief would not do the job." *Daggett v. Comm'n on Governmental Ethics and Elections Pracs.*, 172 F.3d 104, 112 (1st Cir. 1999). In fact, the First Circuit has candidly acknowledged that its approach is out of step with the Rule's text: "Although the quoted language is prefaced with the word 'unless,' the case law is settled that the applicant for intervention must identify any inadequacy of representation." *Id.* at 111 (citing *Trbovich*, 404 U.S. at 538 & n.10).

In contrast, the D.C. Circuit's approach is more faithful to the language of the Rule. As that court has repeatedly said, "a movant ordinarily should be allowed to intervene *unless it is clear that the party will provide adequate representation*." *Crossroads Grassroots Pol'y Strategies*, 788 F.3d at 321 (emphasis added and quotations omitted). And an expression of skepticism that *any* party, whether it is a government agency or not, will adequately represent the interests of another is the necessary implication of a rule that permits intervention "unless" an existing party adequately represents the movant. *See Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969) ("As the conditional wording of Rule 24(a)(2) suggests in permitting intervention 'unless the applicant's interest is adequately represented by existing parties,'

'the burden (is) on those opposing intervention to show the adequacy of the existing representation.'") (citations omitted).

C. In addition to lacking a basis in this Court's precedent or the text of Rule 24(a)(2), the presumption of adequacy applied by the First Circuit is fundamentally unrealistic about the nature of governmental representation of private or "parochial" interests in litigation regarding matters of public importance.

In any given challenge to its laws and regulations, a governmental entity "must consider internal interests, such as the efficient administration of its own litigation resources." *Kane Cnty., Utah v. United States*, 928 F.3d 877, 895 (10th Cir. 2019). And a governmental defendant—typically an executive official tasked with administering the challenged law or regulation—will rarely care about securing a victory on the merits the way that interested citizens sometimes do. *See, e.g.*, *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016) ("The [intervenor] intends to seek a declaratory judgment that the regulatory scheme is constitutionally valid; the Commission merely seeks to defend the present suit and would accept a procedural victory."). In fact, where the validity of a regulation is at issue, a governmental defendant will often prefer *not* to reach the merits, or at least to limit the scope of an eventual ruling on the merits, in order to preserve its own flexibility going forward. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency

construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). And at least one circuit has noted that a "change in [presidential a]dministration raises 'the possibility of divergence of interest' or a 'shift' during litigation" that can especially justify concerns about the adequacy of the government's representation of an intervenor's interests. *See W. Energy All. v. Zinke*, 877 F.3d 1157, 1169 (10th Cir. 2017) (noting that shortly after taking office, President Trump had signed several Executive Orders that "created the opportunity for the [agency] to conduct a review that could result in its abandonment of the [policy at issue]").

To be sure, it is a feature, not a bug, of our democracy that a governmental litigant can be expected to respond to a change of administration and to consider broader public interests when deciding how to defend or prosecute a lawsuit. A governmental entity "is charged by law with representing the public interest of its citizens" as well as the administrative interests of the entity itself, while individual citizens usually possess distinct interests that are "more narrow and parochial." *Dimond v. District of Columbia*, 792 F.2d 179, 192–93 (D.C. Cir. 1986); *see also Fund For Animals*, 322 F.3d at 737. In fact, a governmental entity would "shirk[] its duty were it to advance this narrower interest at the expense of its representation of the general public interest." *Id.* at 193.

Even though the capacity of governmental litigants to take a broad view of litigation is a valuable feature of our system of government, the failure of the courts to accurately assess the government's interests in defending its laws and regulations is undoubtedly a bug. The presumption applied by the First Circuit and the others that follow its lead in this area only serves to disguise reality and leads courts to overlook compelling reasons to worry that the government will not adequately represent proposed intervenors.

Every one of the problems with government representation outlined above appears in this case. Petitioners have an interest in securing "broad First Amendment and due process rights on college and university campuses" and seek a judgment on the merits in favor of the regulations at issue, while the Department "failed to make constitutional arguments [Petitioners] would make" and instead argued that the plaintiffs lack standing. Pet. App. 9a. This position is eminently understandable from the Department's point of view—it is obliged to act on behalf of the entire public and with concern for its own institutional prerogatives and flexibility for future rulemakings. But given its own interests, the Department cannot adequately represent Petitioners' interests at the same time.

Given this backdrop, there is good reason to anticipate that the Department's responsibilities will lead it to pursue a legal strategy aimed at preserving its flexibility for future rulemakings. The Department cannot simultaneously represent Petitioners, who not only seek to preserve the current regulations against invalidation, but also to secure a declaration that

many of the Rule's mandates are in any event constitutionally required. It casts no aspersions on the Department to note that its interest in the litigation diverges from the interests of Petitioners. That divergence ought to have been enough to support intervention as of right without any requirement that Petitioners surmount a strong presumption that the Department adequately represents the interests of anyone who seeks to intervene on the Department's side of the case.

III. The circuit split over the standards governing intervention is important and should be resolved in this case.

In the fifty years since this Court decided *Trbovich*, the courts of appeals have wrestled with how to determine when a private litigant's position will be adequately represented by a governmental entity that is an original party to the litigation. Several circuits that were once more or less suspicious of a governmental entity's "representative" abilities, *see Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) ("[A] governmental entity charged by law with representing the public interest of its citizens might shirk its duty were it to advance the narrower interest of a private entity."); *In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991), have changed course and developed a "presumption of adequacy" that imposes an often-insurmountable hurdle to intervention. Multiple opinions have been written on both sides of the split and more than one circuit judge has suggested that, if the presumption means what it says, it is at odds with

this Court's decision in *Trbovich* and the plain text of the Rule. And yet, the circuit courts remain in confusion. As four Tenth Circuit judges recently opined: "It may be time for the Supreme Court to provide guidance to the lower courts on the meaning of 'unless existing parties adequately represent that interest' in FED. R. CIV. P. 24(a)(2)." *Barnes v. Sec. Life of Denver Ins. Co.*, 953 F.3d 704, 705 (10th Cir. 2020) (Hartz, J., dissenting from denial of en banc rehearing).

This issue arises frequently in cases of significant national importance like this one, and the presumption is often the death knell for otherwise-meritorious motions to intervene. Denied intervention, movants are left with no recourse in settlement discussions and no say in whether to appeal an adverse ruling. And as the First Circuit pointed out in ruling against Petitioners here, should the rejected intervenor desire to press its arguments as an *amicus*, the court cannot consider them if they go beyond the issues raised by the parties. App. 14a n.8. This can have a serious downstream effect on caselaw as the government elects, for any number of reasons, not to make arguments or pursue appeals of adverse rulings that intervenors might press. Most recently and notably, the Third Circuit's decision reversing the district court and approving intervention in *Pennsylvania*, 888 F.3d 52, made it possible for the Little Sisters to participate as petitioners in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 (2020).

The circuit split here is particularly troublesome because it is open to exploitation by litigants who might be interested in avoiding potential intervenors. Because the D.C. Circuit rejects the presumption and "[a] party filing a petition for review of an agency decision usually may choose between the D.C. Circuit and at least one other circuit," there is a risk that savvy litigants will select circuits that apply the presumption to bring their challenges. *See* Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. L. J. & PUB. POL'Y 1, 4 (2012); *see generally* 28 U.S.C. § 1391(e). "[O]ther things being equal, [a party] is likely to choose the forum it believes offers a greater probability of reversing the agency." Ginsburg, *supra*, at 4. The split at issue in this case thus presents a danger of forum shopping and a "threat to the goal of uniformity of federal procedure." *Hana v. Plumer*, 380 U.S. 460, 463 (1965).

Finally, the presumption of adequacy may take on an outsized role in a small number of very significant cases. As Judge Wilkinson recently noted:

> Every attorney general who looks in the mirror sees a governor. Or so it is said. Therein lies a temptation. When a challenge is brought to an unpopular or controversial state law, an attorney general's defense of the law may be less than wholehearted. If the plaintiffs in the case are politically influential, the temptation to pull punches becomes even stronger.

N.C. State Conf. of NAACP, 999 F.3d at 939 (Wilkinson, J., dissenting). Requiring proposed

intervenors to make a heightened showing of inadequacy in such cases not only blinks reality but also puts courts in the regrettable position of having to weigh the extent to which the tug of political considerations is affecting a governmental entity's litigation strategy. To avoid that problem, courts should simply ask whether a governmental defendant's representation "may be" inadequate, *Trbovich*, 404 U.S. at 538 n.10, rather than demanding "a strong affirmative showing" that the governmental defendant "is not fairly representing the applicants' interests," Pet. App. 8a.

Although Petitioners agree with Judge Wilkinson that "an [Attorney General's] professional and ethical obligations—and certainly those of the Department of Justice which he leads—will most often prevail over the political itch," *id.*, the reality is that the presumption of adequacy forces litigants who fear their interests may be inadequately represented to attempt to prove collusive behavior in order to intervene, *see City and Cnty. of San Francisco v. United States Citizenship and Immigr. Servs.*, 992 F.3d 742 (Mem.) (9th Cir. 2021) (VanDyke, J., dissenting from the denial of intervention). The standard should be much lower, as *Trbovich* makes clear. *See Smuck*, 408 F.2d at 181 ("It is not necessary to accuse the board of bad faith in deciding not to appeal or of a lack of vigor in defending the suit below in order to recognize that a restrictive court order may be a not wholly unwelcome haven.").

* * *

This case offers an ideal vehicle for this Court's review. Although the split among the circuits is stark

and well-developed, few cases can offer such a clear example of the importance of the presumption: Litigation over the Rule has proceeded in parallel through two different courts, one that applies the presumption and one that does not. In the jurisdiction that applies the presumption, Petitioners were denied the opportunity to intervene, while Petitioners were allowed to permissively intervene in the court that does not apply the presumption. And although litigation over these issues is often highly factual and involves consideration of multiple factors, the decision below considered just one factor and left no doubt that the presumption of adequacy was dispositive.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

July 19, 2021

Respectfully submitted,

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APPENDIX

APPENDIX A

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.

PHIL ROSENFELT, in his official capacity as Acting Secretary of Education,[*] SUZANNE GOLDBERG, in her official capacity as Acting Assistant Secretary for Civil Rights,[**] UNITED STATES DEPARTMENT OF EDUCATION,

Defendants, *Appellees*.

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[*] Pursuant to Fed. R. App. P. 43(c)(2), Acting Secretary of Education Phil Rosenfelt has been substituted for former Secretary of Education Elisabeth DeVos.

[**] Pursuant to Fed. R. App. P. 43(c)(2), Acting Assistant Secretary for Civil Rights Suzanne Goldberg has been substituted for former Assistant Secretary for Civil Rights Kenneth Marcus.

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

Putative Intervenors, *Appellants*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. William G. Young, U.S. District Judge]

February 18, 2021

Before Lynch and Selya, *Circuit Judges*, and Laplante,[***] *District Judge*.

Laplante, *District Judge*.

The question in this interlocutory appeal is whether the district court abused its discretion in denying both intervention as of right and permissive intervention to the Foundation for Individual Rights in Education, Independent Women's Law Center, and Speech First, Inc. collectively, the "movants" or "movant-intervenors") under Federal Rule of Civil Procedure 24(a)(2) and (b)(1)(B).

The suit underlying the appeal involves a challenge to the U.S. Department of Education's recent promulgation of a regulation that sets the standard for

[***] Of the District of New Hampshire, sitting by designation.

actionable sexual harassment for administrative enforcement of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), and provides additional procedural protections to students accused of sexual harassment. The plaintiffs are appellees here defending the district court's decision. Acting Secretary Rosenfelt, Acting Assistant Secretary Goldberg, and the Department of Education (collectively, "the government") are the named defendants in the suit. The government has taken no position on the issue of intervention and did not participate in either the briefing or the oral argument in this appeal.

The Foundation for Individual Rights in Education, Independent Women's Law Center, and Speech First, Inc. moved to intervene for the purpose of arguing that the First Amendment requires a standard for actionable "sexual harassment" that is at least as narrow as the definition provided in the new regulation and that the Fifth Amendment's Due Process Clause mandates the additional procedural protections. The district court denied the motion in a summary order, finding that the movant-intervenors had failed to show that the government would not adequately protect their rights. On appeal, the movant-intervenors contend that the district court abused its discretion by denying the motion to intervene. We affirm.

I. Applicable Standard of Review

A district court's denial of a motion to intervene as of right under Rule 24(a) is reviewed "through an abuse-of-discretion lens." *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 38 (1st Cir. 2020). The same

"lens" is used for reviewing the denial of a motion for permissive intervention under Rule 24(b). *Id.* But "the abuse-of-discretion standard is not a monolith: within it, abstract legal rulings are scrutinized de novo, factual findings are assayed for clear error, and the degree of deference afforded to issues of law application waxes or wanes depending on the particular circumstances." *Id*.

II. Background

The regulation challenged by the plaintiffs is entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 85 Fed. Reg. 30,026 (May 19, 2020) (codified at 34 C.F.R. § 106) (the "Rule"). It sets standards for how educational institutions that receive federal financial assistance must handle student allegations of sexual harassment. As relevant here, the Rule defines the standard for "sexual harassment" to be used in administrative enforcement of Title IX to be generally the same as the standard set by *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), for private Title IX suits. *See* 34 C.F.R. § 106.30(a)(2); 85 Fed. Reg. at 30,033 (explaining the reasoning for adopting the *Davis* standard). The Rule also requires that schools provide additional procedural protections to students accused of sexual harassment. 85 Fed. Reg. at 30,046-55.

In June 2020, the plaintiffs filed this suit challenging various portions of the Rule and its promulgation under the Administrative Procedure Act ("APA") and the Fifth Amendment's Equal Protection

guarantees.[1] They seek an injunction declaring the Rule invalid and enjoining its implementation.[2] The government has opposed the relief sought by the plaintiffs and has challenged the plaintiffs' standing, asserted various APA defenses as to each claim, and argued that there was no Equal Protection violation.

The movant-intervenors disagree with the government's strategic and policy choice not to argue that the First Amendment requires the use of a standard for actionable sexual harassment that is at least as narrow as the standard set by *Davis* and that the additional procedural protections for students accused of sexual harassment provided by the Rule are required by the Fifth Amendment's Due Process Clause. The movant-intervenors thus requested intervention for the purpose of presenting those

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[1] The plaintiffs' Equal Protection claim is premised on allegations that former Secretary of Education DeVos and other members of the Department of Education held discriminatory and stereotypical beliefs about women and accordingly singled out women for excessively onerous procedures and standards in establishing sexual harassment.

[2] Similar suits about the Rule have proceeded in the Southern District of New York, the District of Maryland, and the District of Columbia. *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.). The movants asked to intervene in all three cases. The Southern District of New York denied intervention. In the District of Maryland, the motion to intervene was denied as moot after the case was dismissed without prejudice for lack of standing. The District Court for the District of Columbia granted permissive intervention.

constitutional arguments in addition to the government's non-constitutional defenses. In their motion, the movants argued that they were entitled to intervene as of right under Rule 24(a) and by the court's permission under Rule 24(b).

Before either the plaintiffs or the government filed any responses or objections, the district court denied the motion to intervene in a summary electronic order. The order stated, in full:

> 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.

This interlocutory appeal followed.[3] We held oral argument on January 5, 2021.[4]

III. Discussion

> On timely motion, the court must permit anyone to intervene who . . . claims an interest

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[3] An order denying a motion to intervene is immediately appealable. *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998).

[4] Between the filing of this appeal and the issuance of this opinion, the district court tried the case. The movant-intervenors did not file any motion in the district court for leave to file an amicus brief raising their legal theory. The district court granted every motion for leave to file an amicus brief that was presented to it, accepting nine briefs from various amici.

> relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Failure to satisfy any single requirement for intervention as of right under Rule 24(a) – such as showing inadequate representation by existing parties – is sufficient grounds to deny a request for "intervention as of right." *See id*.

If the requirements of Rule 24(a)(2) are not met, "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Intervention under Rule 24(b) is known as "permissive intervention." *Id*.

The movant-intervenors contend that the district court abused its discretion by denying their motion to intervene as of right on the ground that the government will adequately represent their interests. They also argue that the district court abused its discretion by failing to adequately explain its denial of permissive intervention, preventing this court from conducting a meaningful appellate review. The plaintiffs respond that the district court correctly reasoned that the government will adequately represent the movant-intervenors' interests and that this serves as sufficient reason to deny both intervention as of right and permissive intervention.

A. Intervention as of Right

In denying the motion to intervene, the district court found that the movant-intervenors failed to show that the existing defendants, namely, the government, would not adequately represent their claimed interests.[5] Generally, "an applicant for intervention need only make a minimal showing that the representation afforded by existing parties likely will prove inadequate." *Patch*, 136 F.3d at 207. But, in any case, "[a] party that seeks to intervene as of right must produce some tangible basis to support a claim of purported inadequacy." *Id*.

Furthermore, "the burden of persuasion is ratcheted upward" when the movant seeks to intervene as a defendant alongside a government entity. *See id*. In those circumstances, "this court and a number of others start with a rebuttable presumption that the government will defend adequately its action[.]" *Cotter v. Mass. Ass'n of Minority L. Enf't Officers*, 219 F.3d 31, 35 (1st Cir. 2000). A successful rebuttal "requires 'a strong affirmative showing' that the agency (or its members) is not fairly representing the applicants' interests." *Patch*, 136 F.3d at 207 (quoting *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984)).

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[5] Because we may affirm solely on the ground that the government adequately represents whatever interests the movants may have in the subject matter of this case, we do not express any opinion as to whether the movants have shown that they have an interest sufficient to warrant intervention under Rule 24(a).

The movant-intervenors attempt to make that showing by identifying their "interests and goals" purportedly not shared by the government. They contend that while they want to secure broad First Amendment and due process rights on college and university campuses, the government wants to minimize legal challenges and maintain regulatory flexibility. The movant-intervenors assert that these divergent motivations have led them to pursue different legal strategies than those pursued by the government. Specifically, the movant-intervenors say that the government has failed to make constitutional arguments that they would make, and they suggest that the government has made an argument (that the plaintiffs lack standing) that they would not. Consequently, the movant-intervenors contend, the government's representation is inadequate.

We reject the movant-intervenors' claim. As explained in *Massachusetts Food Association v. Massachusetts Alcoholic Beverages Control Commission*, a movant-intervenors' interest in making an additional constitutional argument in defense of government action does not render the government's representation inadequate. 197 F.3d 560, 567 (1st Cir. 1999) (rejecting movant-intervenors' argument that the state's representation was inadequate because of their intent to make an argument under the Twenty-First Amendment that was not pursued by the state); *see also T-Mobile Ne.*, 969 F.3d at 39 ("[T]he presumption that a governmental entity defending official acts adequately represents the interests of its citizens applies full-bore, given the Town's vigorous,

no-holds-barred defense of its refusal to grant a variance or other regulatory relief to T-Mobile."); *Maine v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 19-20 (1st Cir. 2001) (rejecting argument that movants were entitled to intervention where government could make "several obvious, more direct arguments . . . in which the [movant and government had] a common interest"); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 112-13 (1st Cir. 1999). Nor is perfect identity of motivational interests between the movant-intervenor and the government necessary to a finding of adequate representation. *See Mass. Food Ass'n*, 197 F.3d at 567. And the government's putative interests in "regulatory flexibility" and minimizing future legal challenges do not create a sufficient case-specific conflict to render the district court's denial of intervention an abuse of discretion.

For example, in *Cotter* the court held that the City of Boston's defense of its use of racial criteria in promotions for law enforcement officers was sufficiently inadequate as to the movant minority police officers because the City's interests and likely defenses were in conflict with the minority officers' interests and proposed defense that racial criteria were appropriate given "alleged deficiencies in its current" promotional exams. 219 F.3d at 32-33, 35-36 (emphasis omitted). Similarly, in *Conservation Law Foundation of New England, Inc. v. Mosbacher*, the court held that a state agency's representation of movant fishing groups was inadequate when the agency raised no defense to the suit and agreed to a settlement that subjected the movants to more stringent rules than had previously

been in effect. 966 F.2d 39, 44 (1st Cir. 1992). In contrast, here, the government has raised several defenses to the suit that would uphold the Rule, while the movant-intervenors would only raise extra constitutional theories not in conflict with government's defenses nor requiring additional evidentiary development.

The movants point to *International Paper Co. v. Inhabitants of the Town of Jay* for the supposition that "the adverse impact of stare decisis standing alone may be sufficient to satisfy the [practical impairment] requirement." 887 F.2d 338, 344 (1st Cir. 1989) (alteration in original) (quoting 3B J. Moore, *Moore's Federal Practice* ¶ 24.07[3], at 24-65 (2d ed. 1987)). From this, the movants infer that the district court abused its discretion in denying intervention because the judgment they seek would set precedent on their preferred constitutional theories while the judgment sought by the government would not. *International Paper Co.* does not render the district court's decision an abuse of discretion, as the government's success in defending the Rule would not foreclose the movants from presenting their constitutional arguments in a later and appropriate case. *See id*. ("[I]t was not unreasonable for the district court to conclude that a refusal to let Maine intervene would not impair or impede Maine's ability to protect its interest in the interpretation of its environmental laws.").

Moreover, the movants' proposition that the government's avoidance of constitutional issues renders inadequate its representation of their interest in having those issues addressed is inconsistent with the principle

of constitutional avoidance. Courts are obliged to avoid rulings on constitutional questions when non-constitutional grounds will suffice to resolve an issue. *Sony BMG Music Ent. v. Tenenbaum*, 660 F.3d 487, 511 (1st Cir. 2011) (discussing the myriad problems that are likely to arise if a court fails to observe the principle of constitutional avoidance and vacating district court's avoidable ruling on constitutional issue). Consistent with that principle, the government made a strategic and policy choice to defend the Rule's promulgation on non-constitutional grounds. The movants' putative interest in having certain constitutional issues addressed now rather than later does not obviate the principle of constitutional avoidance. Indeed, it would be inconsistent with the principle of constitutional avoidance to conclude that the district court abused its discretion in denying an intervention sought to expedite a judgment on constitutional questions that could have been avoided by limiting the case to the issues as framed by the plaintiffs and government. Accordingly, the district court did not abuse its discretion in denying intervention as of right. See Fed. R. Civ. P. 24(a)(2).[6]

B. Permissive Intervention

The movant-intervenors assert that, even if they are not entitled to intervene as of right, the district court should have permitted them to intervene under Rule

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[6] To the extent the movants contend that the district court abused its discretion by summarily disposing of the motion for intervention as of right, that argument is foreclosed by *T-Mobile Northeast*. 969 F.3d at 38.

24(b). They argue that the district court failed to adequately explain its reasoning for denying the motion to intervene, such that this court cannot meaningfully review the order.[7]

This court's precedents foreclose the movants' position. The court may affirm a district court's ruling for any reason supported by the record. *Miles v. Great N. Ins. Co.*, 634 F.3d 61, 65 n.5 (1st Cir. 2011). That holds true even in the context of review for abuse of discretion, as this court offers deference to the district court's decisionmaking to the extent its "findings or reasons can be reasonably inferred." *Cotter*, 219 F.3d at 34; *see also Ungar v. Arafat*, 634 F.3d 46, 51 (1st Cir. 2011) ("The district court denied the motion to intervene in a bench decision. It did not subdivide its analysis into discrete silos. Nevertheless, its findings and reasoning can easily be inferred from the record."). And, to the extent the district court's reasons are not stated or cannot be reasonably inferred, "abuse-of-discretion review simply becomes less deferential because there is nothing to which to give deference." *See T-Mobile Ne.*, 969 F.3d at 38 (internal quotation marks omitted). But even if "the district court summarily denies a motion to intervene, the court of appeals must review the record as a whole to ascertain whether, on the facts at hand, the denial was

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[7] The movants also reiterate their belief that the district court erred in finding that the government will adequately represent their interests, and they contend that the district court therefore abused its discretion if it relied on that ground to deny permissive intervention.

within the compass of the district court's discretion." *Id*. (affirming summary order denying motion to intervene).

T-Mobile Northeast forecloses the movants' suggestion that the district court abused its discretion by not adequately considering their arguments for permissive intervention or by summarily denying the motion. *Id*. Moreover, to conclude that the district court did not abuse its discretion in denying the motion, we need not go beyond the express reasons the district court gave for denying intervention. Though its order was terse, the district court's reasoning need not be divined: the movant-intervenors did not show that the government would not adequately protect their interests and the amicus procedure provides sufficient opportunity for them to present their view.[8] That reasoning, which as discussed above supports denial of intervention as of right, is also sufficient on this record to sustain the district court's discretion as to permissive intervention. *See id*. at 41 ("To begin, a district court considering requests for permissive intervention should ordinarily give weight to whether the original parties to the action adequately represent the interests of the putative intervenors."); *Mass. Food Ass'n*, 197 F.3d at 568 (affirming denial of motion for permissive

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[8] Of course, a district court should not consider arguments raised by amici that go beyond the issues properly raised by the parties. *E.g., Sindi v. El-Moslimany*, 896 F.3d 1, 31 n.12 (1st Cir. 2018). And, as we noted, the principle of constitutional avoidance requires courts to avoid ruling on constitutional questions if the issues can be resolved on non-constitutional grounds. *Sony BMG Music Ent*., 660 F.3d at 511.

intervention when "[t]he district court reasonably concluded that the Commonwealth was adequately representing the interests of everyone concerned to defend the statute and that any variations of legal argument could adequately be presented in amicus briefs").

IV. Conclusion

The district court's order denying the Foundation for Individual Rights in Education, Independent Women's Law Center, and Speech First, Inc.'s motion to intervene is AFFIRMED.

APPENDIX B

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.

PHIL ROSENFELT, in his official capacity as Acting Secretary of Education, SUZANNE GOLDBERG, in her official capacity as Acting Assistant Secretary for Civil Rights, UNITED STATES DEPARTMENT OF EDUCATION,

Defendants, *Appellees*.

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

Putative Intervenors, *Appellants*.

JUDGMENT

Entered: February 18, 2021

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's order denying the Foundation for Individual Rights in Education, Independent Women's Law Center, and Speech First, Inc.'s motion to intervene is affirmed.

By the Court:

Maria R. Hamilton, Clerk

APPENDIX C

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.

MIGUEL ANGEL CARDONA, in his official capacity as Acting Secretary of Education, SUZANNE GOLDBERG, in her official capacity as Acting Assistant Secretary for Civil Rights, UNITED STATES DEPARTMENT OF EDUCATION,

Defendants, *Appellees*.

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

Putative Intervenors, *Appellants*.

MANDATE

Entered: April 12, 2021

In accordance with the judgment of February 18, 2021, and pursuant to Federal Rule of Appellate Procedure 41(a), this constitutes the formal mandate of this Court.

By the Court:

Maria R. Hamilton, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 1:20-cv-11104-WGY

VICTIM RIGHTS LAW CENTER, *et al*.,

Plaintiffs,

v.

ELIZABETH D. DEVOS, in her official capacity as Secretary of the United States Department of Education, *et al*.,

Defendants.

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

[Proposed] Intervenors-Defendants.

07/27/20	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.** (Guadet, Jennifer) (Entered 07/27/2020)