No. 21-84

In The Supreme Court of the United States

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, ET AL., PETITIONERS

v.

VICTIM RIGHTS LAW CENTER, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONSE BRIEF FOR 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, LISA DOE, AND NANCY DOE

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QUESTION PRESENTED

Whether petitioners' motion to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) was properly denied.

CORPORATE DISCLOSURE STATEMENT

Victim Rights Law Center is a non-profit organization with no parent corporation and no stock.

Legal Voice is a non-profit organization with no parent corporation and no stock.

Equal Rights Advocates is a non-profit organization with no parent corporation and no stock.

Chicago Alliance Against Sexual Exploitation is a non-profit organization with no parent corporation and no stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES, RULES, AND REGULATIONS

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The petition presents a stale, factbound intervention dispute unworthy of this Court's review. Petitioners the Foundation for Individual Rights in Education ("FIRE"), the Independent Women's Law Center, and Speech First, Inc. (collectively "Petitioners") ask this Court to review a pre-trial denial of their motion to intervene as of right to help defend a federal rule that the federal government was already defending. That denial has long since been overtaken by subsequent events. Almost a year ago, the district court held the trial, and several months ago it issued its ruling. Meanwhile, the Biden administration decided to reconsider the challenged rule in its entirety. And another party—Texas—has since been granted leave to intervene in order to appeal the district court's vacatur of a portion of the rule. If Petitioners wished to keep their intervention dispute live, they should have moved to intervene to appeal, as Texas did. Whether the government's defense of the rule adequately represented Petitioners' interests at the time Petitioners sought intervention is, at this point, a purely academic issue. There is no reason for this Court to address it.

The petition also would not warrant this Court's review even if it addressed a current controversy. The alleged circuit conflict is illusory. The courts of appeals agree on the standards for intervention as of right, including in cases where an applicant seeks to intervene in support of a government defendant. The First Circuit here correctly applied those

uncontroversial standards to affirm the district court's denial of Petitioners' motion. Given the consensus of authority, Petitioners' motion would have fared no better in any other circuit. In fact, it has not: although Petitioners have filed motions to intervene in several parallel suits, not one court has granted them leave to intervene as of right.

STATEMENT

A. Factual Background

Title IX is a watershed federal civil rights law that protects against sex discrimination in schools. 20 U.S.C. § 1681. Congress sought to prevent federal resources from supporting discriminatory practices and to protect individual citizens from discrimination. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979). The statute's prohibition on discriminatory action is sweeping: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The Department of Education ("Department") is the primary federal agency tasked with fulfilling the purposes of Title IX. The Department is "directed to effectuate" the statute's antidiscrimination mandate "by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute." 20 U.S.C. § 1682. Since 1975, the Department's regulations have imposed obligations on schools to further the purposes

of the statute. *See Nondiscrimination on the Basis of Sex in Educ. Programs and Activities Receiving or Benefiting from Fed. Fin. Assistance*, 40 Fed. Reg. 24,128 (June 4, 1975).

In 1997, the Department issued guidance to address the obligations of schools to protect against sexual harassment. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997). This guidance provided that sexual harassment gives rise to a complaint under Title IX so long as it is "sufficiently severe, persistent, or pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment." *Ibid.* The guidance stated that a school would be liable under Title IX for student-on-student sexual harassment if the school knew or reasonably should have known of the harassment but failed to take immediate and appropriate corrective action. *Id.* at 12,039, 12,042.

In the 1990s, this Court addressed the standards for Title IX liability in private damages actions, while explaining that such standards differed from those in administrative enforcement actions. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 632-33 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998). After those decisions, the Department maintained its preexisting standards for administrative enforcement of Title IX. The Department concluded that "the administrative enforcement standards reflected in the 1997 guidance remain valid in [the Department's Office for Civil

Rights] enforcement actions." U.S. Dep't of Educ., *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* iv (Jan. 19, 2001).[1] The Department adhered to that view in subsequent guidance on schools' obligations to prevent and address sexual harassment. *See* U.S. Dep't of Educ., *Dear Colleague Letter* 4 (April 4, 2011);[2] U.S. Dep't of Educ., *Questions and Answers on Title IX and Sexual Violence* i-ii (Apr. 29, 2014).[3]

But in 2018, the Department changed course, publishing a notice of proposed rulemaking that would depart from the agency's prior standards. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462 (Nov. 29, 2018). After a notice-and-comment period, the Department published its final regulations, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" ("Final Rule" or "Rule"). 85 Fed. Reg. 30,026, 30,044 (May 19, 2020) (codified at 34 C.F.R. § 106). The Final Rule became effective on August 14, 2020. 85 Fed. Reg. at 30,534.

The Final Rule's about-face from the Department's prior standards left victims of sex-based harassment

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[1] https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

[2] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[3] https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

with far weaker protections. The Rule narrowed the definition of "sexual harassment" to conduct that is "so severe, pervasive, *and* objectively offensive that it *effectively denies* a person equal access to the recipient's education program or activity," and it required schools to dismiss Title IX complaints alleging conduct that does not satisfy this narrowed definition. 34 C.F.R. §§ 106.30(a)(2), 106.44(a), 106.45(b)(3)(i) (emphases added). Additionally, the Rule removed schools' discretion to tailor their proceedings for Title IX investigations by both requiring live hearings and cross-examination in all cases at postsecondary institutions and then excluding from consideration all oral and written statements from parties or witnesses who do not submit to live cross-examination. 34 C.F.R. § 106.45(b)(1), (5)-(6). It also allowed schools to apply a higher standard of evidence for sexual harassment complaints. 34 C.F.R. § 106.45(b)(1)(vii).

Other changes further reduced protections for victims of sexual harassment. The Rule: limited a school's obligation to address sexual harassment to cases where a school employee has "actual knowledge" of the harassment, 34 C.F.R. §§ 106.30(a), 106.44(a); forced schools to dismiss formal complaints alleging conduct that occurs outside of an "education program or activity" but nevertheless creates a hostile educational environment, 34 C.F.R. §§ 106.44(a), 106.45(b)(3)(i); barred victims of sexual harassment from filing formal complaints if they have graduated, transferred, or dropped out of school (even if the reason for departure was the harassment itself), 34 C.F.R. § 106.30(a); lowered the standard for schools

responding to sexual harassment to require only that they not be "deliberately indifferent," 34 C.F.R. § 106.44(a); precluded schools from offering certain "supportive measures" to victims of sexual harassment on the grounds that they are "disciplinary," "punitive," or "unreasonably burden[some]," and allowing schools to decline offering supportive measures to students whose complaints must be dismissed under the Rule, 34 C.F.R. §§ 106.30(a), 106.44(a); and introduced a "presumption that the respondent is not responsible for the alleged conduct," 34 C.F.R. § 106.45(b)(1)(iv). The Rule also included a provision preempting conflicting state and local laws that provide stronger protections for victims of sex-based harassment. 34 C.F.R. § 106.6(h).

B. Procedural History

The Final Rule faced immediate challenges from litigants concerned about its consequences for victims of sexual harassment and violence. Plaintiffs Victim Rights Law Center, Equal Rights Advocates, Legal Voice, and Chicago Alliance Against Sexual Exploitation—groups that advocate on behalf of victims of sexual harassment and violence—sued Elisabeth D. Devos, in her official capacity as Secretary of Education, Kenneth L. Marcus, in his official capacity as Assistant Secretary for Civil Rights, and the Department of Education (collectively "the Department") in the U.S. District Court for the District of Massachusetts. Compl., *Victim Rights L. Ctr. v. Devos*,

No. 1:20-cv-11104 (D. Mass. June 10, 2020), ECF 1.[4] Several individual plaintiffs subsequently joined the suit. Am. Compl., ECF 13; Second Am. Compl., ECF 168 (the organizational and individual plaintiffs together, "Plaintiffs"). The individual plaintiffs each experienced sexual harassment at their respective educational institutions. Am. Compl. at 14-15.

In their operative complaint, Plaintiffs challenged multiple provisions of the Final Rule for violating the Administrative Procedure Act (APA), Title IX, and the Fifth Amendment's equal protection guarantee. 5 U.S.C. § 706(2); Second Am. Compl. at 102-08. Plaintiffs sought a preliminary injunction against enforcement of the Final Rule, which was ultimately considered by the court, on an expedited basis, in tandem with a trial on the merits. *Victim Rights L. Ctr. v. Cardona*, No. 20-11104, 2021 U.S. Dist. LEXIS 140982, at *9 (D. Mass. July 28, 2021).

In its opposition to Plaintiffs' motion for a preliminary injunction, the Department argued that the individual and organizational plaintiffs lacked standing to sue; that Plaintiffs' APA claims were likely to fail because the Final Rule's provisions are reasonable, justified, and the product of compliant rulemaking procedures; and that the Rule is consistent with the Fifth Amendment. *See* Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. 8-39, ECF 96.

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[4] Further citations to documents filed on the district court's docket that are not part of the petition appendix use the document name and docket number.

1. Petitioners move to intervene as defendants

In July 2020, Petitioners moved to intervene as defendants, seeking to help the Department defend the new regulations. *See* Pet. App. 5a-6a, 21a. Petitioners argued that the district court should allow them to intervene as of right or permissively under Rule 24 so that they might advance alternative sources of support for the Department's Rule. Mem. ISO Mot. to Intervene at 7-16, ECF 25 (citing Fed. R. Civ. P. 24(a)(2), 24(b)(1)(B)). In particular, Petitioners hoped to argue that the First Amendment affirmatively required the Rule's narrower definition of sexual harassment, and that the Due Process Clause mandated the Final Rule's amendments to Title IX's hearing and reporting procedures. Mem. ISO Mot. to Intervene at 1, 3-4, ECF 25.

The district court denied Petitioners' motion to intervene. It concluded that Petitioners had failed to sufficiently demonstrate that the governmental defendants would inadequately protect Petitioners' interests. Pet. App. 21a. The court invited Petitioners to participate as amici. Pet. App. 21a.

While nine amicus briefs were ultimately submitted in the district court, Petitioners declined to file one. *See Victim Rights L. Ctr. v. Rosenfelt*, 988 F.3d 556, 560 n.4 (1st Cir. 2021) ("The district court granted every motion for leave to file an amicus brief that was presented to it * * * ."). The State of Texas submitted an amicus brief arguing that the Final Rule

was necessary to protect students' First Amendment rights. Texas Amicus Br. at 3-4, ECF 176.

2. Petitioners' other intervention motions

This was not the only case in which Petitioners sought to intervene. Separate plaintiffs filed APA challenges to the Final Rule in New York, Maryland, the District of Columbia, and California. *See New York v. U.S. Dep't of Educ.*, No. 1:20-cv-04260 (S.D.N.Y. June 4, 2020); *Know Your IX et al. v. Devos*, No. 1:20-cv-01224 (D. Md. May 14, 2020); *Commonwealth of Pennsylvania v. Devos*, No. 1:20-cv-01468 (D.D.C. June 4, 2020); *The Women's Student Union v. Dep't of Educ.*, No. 3:21-cv-01626 (N.D. Cal. Mar. 8, 2021). Some or all of the Petitioners also sought to intervene in those suits.

No court granted Petitioners leave to intervene as of right. In New York, the district court denied intervention entirely. *See New York v. U.S. Dep't of Educ.*, No. 20-cv-4260, 2020 WL 3962110, at *5 (S.D.N.Y. July 10, 2020) (unpublished). In the Maryland and California cases, the district courts deemed the motions to intervene moot when the cases were dismissed without prejudice for lack of standing. Order, *Know Your IX v. Devos*, No. 1:20-cv-01224 (D. Md. Oct. 20, 2020), ECF 44; Order, *The Women's Student Union v. Dep't of Ed.*, No. 3:21-cv-01626 (N.D. Cal. Sept. 2, 2021), ECF 75. And the D.C. district court granted only permissive intervention under Federal Rule of Civil Procedure 24(b), stating that permissive intervention is "an inherently discretionary enterprise." Minute Order, *Commonwealth of*

Pennsylvania v. Devos, No. 1:20-cv-01468 (D.D.C. July 6, 2020) (citation omitted).

3. The First Circuit affirms the district court's denial of intervention

Petitioners filed an interlocutory appeal from the district court's denial of intervention. The Department took no position on the intervention issue and did not participate in the appeal. Pet. App. 3a.

The U.S. Court of Appeals for the First Circuit affirmed, holding that the district court did not abuse its discretion in denying intervention (both as of right and permissive) to Petitioners. Pet. App. 16a-17a; Pet. App. 2a-3a.

Affirming the denial of intervention as of right, the court of appeals concluded that Petitioners' "interest in making an additional constitutional argument in defense of government action does not render the government's representation inadequate." Pet. App. 9a (citations omitted). The court first noted that when a movant seeks to intervene as a defendant alongside a government entity, courts apply a rebuttable presumption that the government will adequately defend its action. Pet. App. 8a. And Petitioners, the court continued, had cited no basis for thinking the government's defense would be inadequate. The court explained that no genuine conflict of interest existed between the government and Petitioners, and that the government had in fact defended its own policies. Pet. App. 10a-11a. As the court emphasized, "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." Pet. App. 11a.

As to permissive intervention, the court of appeals found that while the order denying intervention was brief, it contained sufficient reasoning to sustain the district court's exercise of discretion. The court of appeals affirmed the district court's determination that "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." Pet. App. 14a.

4. The district court's judgment on the merits

After Petitioners filed their petition for a writ of certiorari, the district court issued a ruling on the merits in the underlying case. *Victim Rights L. Ctr. v. Cardona*, No. 20-11104-WGY, 2021 U.S. Dist. LEXIS 140982, at *63-*64 (D. Mass. July 28, 2021), *clarified by* 2021 U.S. Dist. LEXIS 150076 (D. Mass. Aug. 10, 2021). The court concluded that many of the Final Rule's provisions do not violate the APA, Title IX, or the Fifth Amendment's equal protection guarantee. *Id.* at *63-*64. Responding to the Department's Article III standing arguments, the court determined that one of the three individual plaintiffs and one of the organizational plaintiffs had standing. *Id.* at *28-*34.

The district court held in favor of Plaintiffs with respect to one of the Final Rule's challenged provisions—specifically, Section 106.45(b)(6)(i), which prohibits statements that would not be subject to cross-examination from being considered by Title IX hearing officers. *Victim Rights L. Ctr.*, 2021 U.S. Dist. LEXIS 140982, at *52-*53. The court reasoned that the Department had not given any consideration to the fact that this section, in combination with several others, would allow respondents to prevent relevant evidence from being considered at a hearing if they elected not to testify themselves and convinced other witnesses not to attend the hearing. *Id.* at *49-*50. Since nothing in the administrative record demonstrated that the Department had considered the combined effect of Section 106.45(b)(6)(i) and other procedural provisions, the court deemed Section 106.45(b)(6)(i) arbitrary and capricious. *Id.* at *52-*53. The district court vacated that provision and remanded to the Department for further explanation. *Id.* at *64; 2021 U.S. Dist. LEXIS 150076, at *7 (clarifying order).

5. The judgment is appealed

The State of Texas sought to intervene for the purpose of appealing the district court's judgment. Mot. to Intervene, ECF 187; Conditional Notice of Appeal, ECF 191. While Texas had unsuccessfully moved to intervene as a defendant earlier in the litigation, it explained that the circumstances had changed now that the district court had entered its judgment and the Department had indicated its intent

not to appeal. Mem. ISO Mot. to Intervene at 4, ECF 188. The district court granted Texas's intervention motion. Electronic Order, ECF 195.

Other third parties also moved to intervene for purposes of appealing the judgment. Having granted Texas's intervention motion, the district court denied these additional motions on both timeliness grounds and because the putative intervenors failed to show that Texas would not adequately represent their interests. Order, ECF 215 (Oct. 14, 2021).

Petitioners filed a "protective" notice of appeal from the final judgment. Protective Notice of Appeal, ECF 192 (capitalization altered). They did not, however, file a motion to intervene for the purpose of appealing the merits decision.

Plaintiffs have also filed a notice of appeal from the district court's judgment. Notice of Appeal, ECF 198. The Department has not appealed.

6. Further administrative developments

Although the Final Rule remains largely in effect, the Biden administration has signaled its intent to reexamine the Final Rule and issue new regulations. Soon after his election, President Biden issued an order requesting that the Secretary of Education review the Final Rule. Exec. Order No. 14,021 (Mar. 8, 2021), 86 Fed. Reg. 13,803, 13,803 (Mar. 8, 2021). In April 2021, the Department acknowledged the order and planned its review process. U.S. Dep't of Educ., *Letter to*

Students, Educators, and other Stakeholders re Executive Order 1402 (Apr. 6, 2021).[5]

While the Department has issued a document clarifying the Final Rule's consequences, it continues to remind stakeholders of the ongoing "comprehensive review" of the Rule. *Questions and Answers on the Title IX Regulations on Sexual Harassment* 1 (July 20, 2021).[6] After the district court vacated and remanded Section 106.45(b)(6)(i), the Department sent a letter to stakeholders announcing it would immediately cease enforcement of the vacated portion of the Rule. U.S. Dep't of Educ., *Letter to Students, Educators, and Other Stakeholders re Victim Rights L. Ctr. et al. v. Cardona* (Aug. 24, 2021).[7] The notice of proposed rulemaking is expected to issue in May 2022.[8]

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied for three reasons.

First, the question presented is moot. Petitioners ask this Court to review an intervention dispute that

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[5] https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

[6] https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf

[7] https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf.

[8] Office of Information and Regulatory Affairs Regulation Identifier Number 1870-AA16, Spring 2021 Unified Agenda, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1870-AA16.

has been superseded by subsequent events. Whether the court of appeals improperly presumed that the Department would adequately represent Petitioners' interests as of the time Petitioners filed their pre-trial intervention motion is academic: the trial has concluded, the district court issued a decision on the merits, and the Department's defenses either succeeded or failed in a manner that Petitioners' proposed constitutional arguments could not possibly salvage. If Petitioners wanted to intervene for purposes of appeal, they should have moved to intervene a second time.

Second, the question presented is factbound. Petitioners' alleged circuit conflict is illusory. On "the question of whether a more exacting showing of inadequacy should be required where the proposed intervenor shares the same objective as a government party"—that is, the question presented here—"every circuit to rule on the matter has held in the affirmative." *Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013). Any differences in outcomes are the result not of a circuit conflict, but of the inherently contextual nature of the adequate representation inquiry. Presumably for these reasons, this Court has denied similar petitions in the past.

Third, the decision below is correct: The trial court committed no abuse of discretion in denying Petitioners' motion to intervene as of right. Petitioners sought to intervene merely to help the Department defend the validity of its own rule. They offered no tangible evidence for believing that the Department's

defense would be inadequate. Instead, they simply disagreed with aspects of the Department's chosen approach to the litigation. Mere tactical disagreements do not suffice to show that an existing party's representation may be inadequate.

ARGUMENT

I. THE QUESTION PRESENTED IS EFFECTIVELY MOOT

Circumstances have changed so significantly since the district court denied Petitioners' motion to intervene that their request is now effectively moot. Petitioners moved to intervene in the district court proceedings just over a month after Plaintiffs' complaint was filed. Since then, the district court held a trial on the merits of Plaintiffs' claims. It issued a 61-page ruling upholding all but one part of the Final Rule. The Department declined to appeal, and Texas successfully intervened to do so in its stead. And meanwhile, the Biden administration has decided to reconsider the Final Rule in its entirety.

The request Petitioners made in their motion to intervene—to participate in the district court proceedings—is moot. Those proceedings have concluded. The Rule Petitioners sought to help defend was in large part upheld. And as discussed below (*infra* p. 32), Petitioners' preferred constitutional arguments could not have saved the provision the district court vacated. If anything, this outcome confirms the district court's conclusion that the Department adequately represented any interests

Petitioners might have had. *See Stuart*, 706 F.3d at 354 ("The reasonableness of the Attorney General's [litigation] choice is particularly manifest given that it was largely successful."). While appeals of the district court's order are currently pending, they too may disappear if the administration rescinds the Final Rule.

Those appeals also highlight the staleness of Petitioners' dispute over whether their pre-trial motion to intervene was properly denied: the facts at the time of the denial from which Petitioners appealed are no longer the relevant facts. "An intervenor must continue to meet the Rule 24 requirements throughout the litigation * * * ." 6 *Moore's Federal Practice—Civil* § 24.03 (2021). For example, "[i]f the intervenor and an original party come to share the same ultimate objective, the intervenor is adequately represented and the intervention is no longer proper under Rule 24." *Ibid.* (internal citation omitted).

Thus, whether or not Petitioners should have been granted leave to intervene earlier in this case, the inquiry has now changed. When the district court denied Petitioners' motion, the Department was defending the Rule. But now that the Department has declined to appeal, the circumstances are significantly different. Courts in the First Circuit would undoubtedly consider the Department's decision in resolving a motion to intervene. *See Daggett v. Comm'n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 112 (1st Cir. 1999) ("If and when there is such a compromise or refusal to appeal, the question of

intervention on this ground can be revisited."). Moreover, now that Texas has intervened, Petitioners' interests may be adequately protected by an entirely different party—another question that was not addressed in Petitioners' appeal below.

Had Petitioners wished to keep their intervention dispute current, they should have moved to intervene for purposes of appeal. *See Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 568 (1st Cir. 1999) ("And if the Commonwealth refused to appeal from a defeat, a would-be intervenor could then seek to intervene."). That is what Texas and several other proposed intervenors did. By filing those motions to intervene post-judgment, these applicants allowed the district court to account for new facts, as well as the standing concerns that arise when the existing defendants elect not to appeal. *See*, *e.g.*, *Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III."). If the district court considered the current factual circumstances and again denied Petitioners' motion—perhaps, as it did with respect to other putative intervenors, because Texas now adequately represents their interests on appeal, *see* Order, ECF 215—Petitioners could have then appealed that decision. Yet Petitioners simply failed to take these straightforward steps.

At a minimum, these changed circumstances make this petition a poor vehicle to address the question presented. *See Taggart v. Weinacker's, Inc.*, 397 U.S. 223, 224-25 (1970) ("[w]hile the changed circumstances do not necessarily make the controversy moot," the "small embers of controversy that may remain do not present the threat of grave state-federal conflict that we need sit to resolve"). Petitioners ask this Court to decide whether the courts below wrongly concluded that their interests were adequately represented at a time when the Department was vigorously defending the Final Rule and no other parties had intervened. Those are not the facts anymore. It makes little sense to adjudicate an intervention dispute based on circumstances that no longer exist.[9]

Future cases are unlikely to present this problem. Petitioners' intervention request was rendered obsolete by the expedited nature of the district court proceedings. *Supra* p. 7. In a non-expedited setting, intervention disputes can (and frequently do) reach

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[9] For similar reasons, any decision in *Arizona v. City and County of San Francisco*, No. 20-1775—in which this Court granted certiorari to address "[w]hether States with interests should be permitted to intervene to defend a rule when the United States ceases to defend"—will have no effect on the dispute here. The Department was defending the Rule when Petitioners (who are not states) sought to intervene. And when the Department subsequently indicated that it would not appeal the district court's decision, the district court granted Texas's motion for intervention—effectively answering the question presented in the *Arizona* case in the affirmative.

this Court without becoming moot. *See*, *e.g.*, *Badillo v. R.I. Dep't of Corr.*, No. 20-1682, 2021 WL 4507770 (Oct. 4, 2021), *cert. denied*; *Kane Cnty. v. United States*, No. 20-82, 141 S. Ct. 1283 (Jan. 25, 2021), *cert. denied*. If, for some reason, this Court believes that the question presented requires resolution, it should await a case in which the relevant intervention dispute remains a live issue.

II. THE QUESTION PRESENTED DOES NOT MERIT REVIEW

Even if this dispute were still live, this Court's review would not be warranted. Petitioners contend that the courts of appeals are divided over the showing of inadequacy a proposed intervenor must make to intervene on the side of a government litigant. But in reality, the courts of appeals agree on the legal standards for intervention in such cases. Any differences in outcomes reflect the factbound nature of Rule 24(a)(2)'s adequacy inquiry.

A. All Courts Of Appeals Apply The Same Legal Standards In Assessing Adequate Representation

This Court established the relevant standard applied by all courts of appeals in *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972). There, the Secretary of Labor filed suit under the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA") to set aside an election of officers of the United Mine Workers of American and to require a new election conducted under his supervision. *Id.* at

529. The petitioner, the union member who had filed the initial complaint that instigated the Secretary's suit, sought to intervene to request additional relief, namely "specific safeguards with respect to any new election." *Id.* at 529-30. This Court held the petitioner was entitled to intervene as of right. On the issue of adequacy, the Court explained that "[t]he requirement of the Rule 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. And on the facts of the case, the Court found "sufficient doubt" that the Secretary would provide adequate representation because "[t]he statute plainly impose[d] on the Secretary the duty to serve two distinct interests": namely, "enforcing" the rights of "individual union members" "against their union," and protecting the "vital public interest in assuring free and democratic union elections." *Id.* at 538-39.

Since *Trbovich*, "there has been little, if any confusion on the part of the lower courts in interpreting the [adequate representation] requirement." *Barnes v. Security Life of Denver Ins. Co.*, 953 F.3d 704, 705 (10th Cir. 2020) (Briscoe, J., concurring in the denial of en banc review). To the contrary, courts of appeals agree that intervention as of right requires a finding that the existing parties' representation of the proposed intervenor's interest

may be inadequate.[10] They also recognize that the likelihood that representation will be inadequate varies depending on how closely the proposed intervenor's interests align with those of the existing parties. Charles Alan Wright & Arthur R. Miller, 7C *Federal Practice & Procedure, Civil* § 1909 (3d ed. 1998) ("The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present parties.").

In accordance with these overarching principles, every circuit has resolved the question presented here in the same way. They have all held that a rebuttable presumption of adequate representation arises when the proposed intervenor shares the same interest as an existing governmental party. *Stuart*, 706 F.3d at 351 (collecting cases); *see T-Mobile Ne. LLC v. Town of*

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[10] *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard College*, 807 F.3d 472, 475 (1st Cir. 2015); *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 98 (2d Cir. 1990); *Commonwealth of Pennsylvania v. President of the United States of America*, 888 F.3d 52, 60 (3d Cir. 2018); *In re Sierra Club*, 945 F.2d 776, 779-80 (4th Cir. 1991); *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014); *United States v. Mich.*, 424 F.3d 438, 443-44 (6th Cir. 2005); *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007); *Little Rock Sch. Dist. v. N. Little Rock Sch. Dist.*, 378 F.3d 774, 779-81 (8th Cir. 2004); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009); *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003); *Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1315-16 (Fed. Cir. 2012).

Barnstable, 969 F.3d 33, 39 (1st Cir. 2020); *United States v. Hooker Chems. & Plastics Corp*., 749 F.2d 968, 985 (2d Cir. 1984); *United States v. Virgin Islands*, 748 F.3d 514, 519-24 (3d Cir. 2014); *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013); *Entergy Gulf States La., LLC v. EPA*, 817 F.3d 198, 203 n.2 (5th Cir. 2016); *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005); *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020); *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 952 (9th Cir. 2009); *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 215 (11th Cir. 1993); *Env't Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979); *Wolfsen Land & Cattle Co.. v. Pac. Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012).

1. The First, Second, Fourth, Fifth, Seventh, Eighth, and Federal Circuits

In attempting to manufacture a split, Petitioners overstate the presumption's impact in the First Circuit. *See* Pet. 16-20. As the First Circuit has explained, "'[p]resumption' means no more in this context than calling for an adequate explanation as to why what is assumed—here, adequate representation—is not so." *Maine v. Director, U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001). That court has "stressed the case-specific nature of this inquiry" and has "discouraged districts courts from identifying only a limited number of 'cubbyholes' for inadequate representation claims." *B. Fernandez & Hnos, Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 546 (1st Cir. 2006). An applicant may thus overcome that presumption when

seeking to intervene in support of a government party in any number of ways, including by "showing adversity of interest, collusion, or nonfeasance," or that the proposed intervenor's "interests are sufficiently different in kind or degree from those of the named party." *Ibid.* Many applicants have successfully done so—including Texas in this very case. *Supra* pp. 12-13; *see also Conservation L. Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (concluding that fishing groups were not adequately represented by Secretary of Commerce).

The same is true of the other courts of appeals on this side of Petitioners' claimed "split"—the Second, Fourth, Fifth, Seventh, Eighth, and Federal Circuits. Each of these circuits recognizes that Rule 24(a)(2) "calls for a contextual, case-specific analysis, and resolving questions about the adequacy of existing representation requires a discerning comparison of interests." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020).[11] And in

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[11] *See Brennan v. NYC Bd. of Educ.*, 260 F.3d 123, 132-33 (2d Cir. 2001) (considering "whether the Board's interests were so similar to those of appellants that adequacy of representation was assured"); *N.C. State Conf. of NAACP v. Berger*, 999 F.3d 915, 931 (4th Cir. 2021) (describing "context-specific approach" to adequacy of representation analysis); *Entergy Gulf States La., L.L.C.*, 817 F.3d at 204 ("Based on these facts, we find that Sierra Club's interests diverge from EPA's interests regarding stay of the case, bifurcation of the case, protection of third-party CBI, and cooperation with Entergy to identify third-party CBI."); *Little Rock Sch. Dist.*, 378 F.3d at 780 ("We determine if representation is adequate 'by comparing the interests of the proposed intervenor with the interests of the current parties to the action.' "); *Wolfsen Land & Cattle Co.*, 695 F.3d at 1315 (adopting same framework as its sister circuits).

each, the presumption can be overcome in myriad ways, including a showing that the intervenor and government's interests diverge, or that the government may not otherwise adequately represent the proposed intervenor's interest. *See Driftless Area Land Conservancy*, 969 F.3d at 749 ("Because the transmission companies' interests and objectives are materially different than the Commission's, the presumption of adequate representation does not apply.").[12] None of these circuits require certainty that the government's representation will be inadequate. As elsewhere, the question is simply whether such representation may be inadequate. *See Brumfield*, 749 F.3d at 346 ("We cannot say for sure that the state's more extensive interests will *in fact* result in inadequate representation, but surely they might, which is all that the rule requires.").

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[12] *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 180 (2d Cir. 2001) *("*Although perhaps not an exhaustive list, we generally agree with the holdings of other courts that evidence of collusion, adversity of interest, nonfeasance, or incompetence may suffice to overcome the presumption of adequacy."); *JLS, Inc. v. Pub. Serv. Comm'n of W. Va.*, 321 F. App'x 286, 292 (4th Cir. 2009) (presumption rebutted where "convincingly show[ed] that their litigation of this suit has been, and would be, significantly more vigorous and effective than PSC's."); *Wal–Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016) (presumption overcome by trade group representing holders of liquor permits by showing its "interest is in fact different from that of the governmental entity" (brackets omitted)); *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 976-77 (8th Cir. 2014) (concluding that EPA may not adequately represent power plant's interest in defending suit brought by environmental groups); *Wolfsen Land & Cattle Co.*, 695 F.3d at 1315-16 (adopting same framework as its sister circuits).

2. The Third and Ninth Circuits

Nor is the presumption in the Third and Ninth Circuits as feeble as Petitioners make it out to be. *Contra* Pet. 20-22. Both courts have repeatedly denied intervention in cases, like this one, where the applicants failed to make a compelling showing that a government party might not adequately represent their interests. *See*, *e.g.*, *Perry*, 587 F.3d at 952 (in suit to challenge constitutionality of ballot initiative, proposed intervenor that sought to uphold initiative failed to make "compelling showing" that existing governmental party would not mount adequate defense of initiative); *Virgin Islands*, 748 F.3d at 519-24 (inmate failed to show that Attorney General may not adequately represent his interest in suit challenging unconstitutional conditions at his correctional facility).

3. The D.C., Sixth, Tenth, and Eleventh Circuits

Petitioners are also wrong that the D.C., Sixth, Tenth, and Eleventh Circuits apply no presumption at all. *See* Pet. 22-24. Quite to the contrary, the D.C. Circuit *pioneered* the presumption. In *Higginson*, the D.C. Circuit explained that "a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens," and "thus, to intervene in a suit in district court in which a state is already a party, a citizen or subdivision of that state must overcome this presumption of adequate representation." 631 F.2d at 740. The

Second, Third, Fifth, Seventh, and Federal Circuits subsequently joined the D.C. Circuit in applying that same presumption.[13] The cases Petitioners incorrectly cite for the proposition that the D.C. Circuit recognizes no presumption (Pet. 22, 32) are merely ones where the court found the presumption successfully displaced by a showing that the applicant's and existing parties' interests materially diverged.[14]

The story is the same in the Sixth, Tenth, and Eleventh Circuits. As elsewhere, a presumption of adequate representation applies when a proposed intervenor has the same objectives as an existing

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[13] *See Hooker Chems. & Plastics*, 749 F.2d at 985 (2d Cir. 1984) ("[W]e agree with the Third, Fifth, and District of Columbia Circuits that, in litigation of this sort, a greater showing that representation is inadequate should be required."); *Wade v. Goldschmidt*, 673 F.2d 182, 186 n.7 (7th Cir. 1982) (citing *Higginson* for proposition that there is a presumption of adequate representation "when the proposed intervenor and a party to the suit (especially if it is the state) have the same ultimate objective"); *Del. Valley Citizens' Council for Clean Air v. Commonwealth of Pa.*, 674 F.2d 970, 973 (3d Cir. 1982) (similar); *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996) (similar); *Wolfsen Land & Cattle Co.*, 695 F.3d at 1316 (Fed. Cir. 2012) (citing D.C. Circuit as among the "regional circuits [that] have embraced" "a presumption of adequacy of representation" and "join[ing] those courts in adopting such a framework for this case").

[14] *See*, *e.g.*, *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 321 (D.C. Cir. 2015) ("It is apparent the Commission and Crossroads hold different interests."); *Dimond v. Dist. of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986) ("Since State Farm's interest cannot be subsumed within the shared interest of the citizens of the District of Columbia, no presumption exists that the District will adequately represent its interests." (citing *Higginson*)).

governmental party. Thus, the Tenth Circuit has explained that "even though a party seeking intervention may have different 'ultimate motivation[s]' from the governmental agency, where its objectives are the same, we presume representation is adequate." *Tri-State Generation & Transmission Ass'n, Inc. v. New Mexico Pub. Regul. Comm'n*, 787 F.3d 1068, 1072-73 (10th Cir. 2015). In the Sixth Circuit, "applicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit." *Michigan*, 424 F.3d at 443-44 (rejecting applicants' argument that governmental "defendants will not adequately represent their interests because the state's 'duty is to the broader public' and it 'has no duty to defend their interests' as private property owners"). Likewise, the Eleventh Circuit "presumes that a proposed intervenor's interest is adequately represented when an existing party pursues the same ultimate objective as the party seeking intervention," and "[w]hen * * * that existing party is a government entity, [it] presume[s] that the government entity adequately represents the public, and * * * require[s] the party seeking to intervene to make a strong showing of inadequate representation." *Burke v. Ocwen Fin. Corp.*, 833 F. App'x 288, 293 (11th Cir. 2020); *see also United States v. City of Miami*, 278 F.3d 1174, 1178-79 (11th Cir. 2002) (applying presumption).

B. Petitioners' Intervention Dispute Is Factbound

Petitioners attempt to paint their intervention dispute as a fight over legal standards. But given the

consensus of authority described above, Petitioners' motion to intervene as of right would have fared no better in any other circuit. In fact, it did not. As noted, Petitioners also moved to intervene in other courts in parallel suits challenging the Final Rule. Not one of those courts granted Petitioners leave to intervene as of right. The New York district court denied the intervention motion entirely. *Supra* p. 9. The Maryland and California district courts both deemed the intervention motions moot after dismissing the plaintiffs' complaints without prejudice on standing grounds. *Supra* p. 9. And the D.C. district court opted to allow only *permissive* intervention, which does not require the applicant to prove that its interests may not be adequately represented. *Supra* pp. 9-10.

In truth, the intervention question Petitioners ask this Court to review is highly factbound—as this Court and others have recognized. Federal Rule of Civil Procedure 24(a)(2) is a general provision meant to apply across a wide variety of civil litigation. As a result, "[t]he inquiry under Rule 24(a)(2)" is necessarily "a flexible one." *Entergy Gulf States La.*, 817 F.3d at 203. "While the decision on any particular motion to intervene may be a difficult one, it is always to some extent bound up in the facts of the particular case." *Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33-34 (1993) (per curiam); *Mo.-Kan. Pipe Line Co. v. United States*, 312 U.S. 502, 506 (1941) ("[T]he circumstances under which interested outsiders should be allowed to become participants in a litigation [are], barring very special circumstances, a matter for

the [trial] court"). "[A]dequacy," in particular, "is primarily a fact-sensitive judgment call." *Daggett*, 172 F.3d at 111.

Such "a relatively factbound issue" "does not meet the standards that guide the exercise of [this Court's] exercise of its certiorari jurisdiction." *Seimitsu Kogyo Kabushiki Kaisha*, 510 U.S. at 34. The reason for that is clear: "Because small differences in fact patterns can significantly affect the outcome, the very nature of a Rule 24(a)(2) inquiry limits the utility of comparisons between and among published opinions." *Public Service Company of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998); *Lung Ass'n v. Reilly*, 962 F.2d 258, 262 (2d Cir. 1992) ("The circumstances that serve as a basis for decision [on motions to intervene] are so varied and random that the court would virtually need to create a new rule to describe each case." (alteration in original)).

This Court's repetition of the factbound inquiry performed twice below is unlikely to produce principles of law broadly applicable beyond this case. It is thus unsurprising that this Court has often, and recently, denied petitions raising similar intervention questions. *See*, *e.g.*, *Badillo*, 2021 WL 4507770 (Oct. 4, 2021), *cert. denied*; *Kane Cnty.*, 141 S. Ct. at 1283 (Jan. 25, 2021), *cert. denied*; *Mich. C.R. Initiative Comm. v. Coal. to Defend Affirmative Action*, 555 U.S. 937, 937 (2008), *cert. denied*; *Thurgood Marshall Legal Soc'y v. Hopwood*, 518 U.S. 1033, 1033 (1996), *cert. denied*. This petition likewise does not warrant this Court's review.

III. THE DECISION BELOW IS CORRECT

The decision below is also entirely correct. The court of appeals correctly affirmed the district court's decision to deny Petitioners' motion to intervene as of right because Petitioners failed to make a sufficient showing that the Department might not adequately represent their interests. As the First Circuit recognized, while the burden to establish inadequacy is minimal, "[a] party that seeks to intervene as of right must produce some tangible basis to support a claim of purported inadequacy." Pet. App. 8a (alteration in original). Here, Petitioners conceded that they sought to "rebuff Plaintiffs' challenges to the Title IX rule"—just as the Department did. Br. for Appellants at 16, No. 20-1748 (Oct. 5, 2020). So the courts below properly required Petitioners to provide "an adequate explanation as to why what is assumed—here, adequate representation—is not so." *Maine*, 262 F.3d at 19.

Petitioners failed to do so. They identified no conduct by the Department reflecting a lack of zealous advocacy in this case, nor any basis to conclude that the Department would not adequately defend its rule. Mem. ISO Mot. to Intervene at 10-13, ECF 25. Instead, Petitioners insisted that they would be inadequately represented because the Department had not said that the Final Rule was constitutionally compelled. *Id.* at 12. But as the circuits agree, a mere disagreement in

litigation tactics generally does not support a claim of inadequate representation.[15]

That principle applied with full force here. The Department asserted direct defenses to Plaintiffs' challenges to the Final Rule. Petitioners' proposed constitutional defense, by contrast, could not have cured fatal defects in the Rule. It is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. 743, 758 (2015). Because the Department never invoked the Constitution in promulgating the Final Rule in the first place, Petitioners' proposed arguments were irrelevant to Plaintiffs' central contention that the Rule is arbitrary and capricious. Petitioners' quibbles with the Department's litigation strategy failed to show that its representation fell below the standard for adequacy.

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[15] *Students for Fair Admissions, Inc.*, 807 F.3d at 475-76; *United States v. Yonkers Bd. of Educ.*, 902 F.2d 213, 218 (2d Cir. 1990); *United States v. Virgin Islands*, 748 F.3d at 522; *Stuart*, 706 F.3d at 355; *Saldano v. Roach*, 363 F.3d 545, 554-55 (5th Cir. 2004); *Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000); *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013); *FTC v. Johnson*, 800 F.3d 448, 452 (8th Cir. 2015); *Proposition 8 Official Proponents*, 587 F.3d at 954; *Bumgarner v. Ute Indian Tribe of Uintah & Ouray Reservation*, 417 F.2d 1305, 1308-09 (10th Cir. 1969); *Gumm v. Jacobs*, 812 F. App'x 944, 947 (11th Cir. 2020); *Jones v. Prince George's Cnty.*, 348 F.3d 1014, 1019-20 (D.C. Cir. 2003).

Contrary to Petitioners' argument (Pet. 26-28), the circumstances here are nothing like those confronting this Court in *Trbovich*. There, the applicant and the existing party sought different outcomes. *See Stuart*, 706 F.3d at 352 ("[I]n *Trbovich* * * * the proposed intervenor[] did not even share the same ultimate objective as an existing party."). While the Secretary of Labor sought to set aside the election and order a new one under his supervision, the union member sought relief the Secretary did not: "certain specific safeguards with respect to any new election." *Trbovich*, 404 U.S. at 530. What is more, the statute at issue expressly directed the Secretary to pursue two distinct interests at once. *Id.* at 538-39. "*Trbovich* * * * stand[s] for the conventional proposition that where the existing party and proposed intervenor seek divergent objectives, there is less reason to presume that the party (government agency or otherwise) will adequately represent the intervenor." *Stuart*, 706 F.3d at 352. Here, by contrast, Petitioners and the Department both sought to uphold the validity of the Final Rule. For that reason, the adequacy of the Department's representation was properly presumed. Petitioners cited nothing that would overcome that presumption.

Of course, that is all the more true now that the trial is over, the district court's judgment has been entered, and Texas has intervened to appeal. Petitioners' constitutional arguments are no defense to the district court's ruling that Section 106.45(b)(6)(i) of

the Final Rule is arbitrary and capricious. *Supra* pp. 11-12. If Plaintiffs opt not to go forward with their pending First Circuit appeal, Petitioners' intervention motion will thus be entirely pointless. Even if Plaintiffs do pursue their appeal, Petitioners' constitutional arguments may have no bearing on any challenge Plaintiffs pursue (assuming Petitioners' constitutional arguments have any relevance in the first place). And regardless, even if Petitioners' interest in making their constitutional arguments could have been a basis to find inadequate representation in the past, it is not now: Texas has also argued that the Final Rule is necessary to avoid constitutional concerns, and it is now a party to the appeal. *Supra* pp. 8-9, 12-13. Texas therefore adequately represents any interests Petitioners might have.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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