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.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The events that occurred after the Petition was filed only make this case a stronger candidate for review. Just as Petitioners feared when they moved to intervene, the District Court threw out a key provision of the 2020 Title IX Rule without considering Petitioners' constitutional arguments and the Federal Respondents declined to appeal. Texas was subsequently permitted to intervene, but its lawyers have told Petitioners that they will not make Petitioners' constitutional arguments either—a decision that is hardly surprising given the State's interest in defending its public universities against claims under the First Amendment and Due Process Clause. Petitioners thus find themselves in exactly the same position they were in before the District Court ruled: unable to defend the Rule on grounds that the existing governmental parties are unwilling to advance and disagreeing with the Federal Respondents' arguments for rejecting Plaintiffs' suit at the threshold for lack of standing.

Indeed, the only thing that has changed is that the District Court vacated part of the Rule in a decision that the Federal Respondents are using to short circuit the usual process for making significant changes to federal regulations. The District Court invalidated part of the Rule that other courts have refused to enjoin. *See Pennsylvania v. DeVos*, 480 F. Supp. 3d 47 (D.D.C. 2020); *New York v. Dep't of Education*, 477 F. Supp. 3d 279 (S.D.N.Y. 2020). But on the strength of the District Court's decision, the Federal Respondents have announced that they will no longer enforce the invalidated provision

anywhere—transforming the District Court's decision into a de facto nationwide injunction. *See* Letter from Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights (Aug. 24, 2021), https://bit.ly/3kVW9EH.

The Federal Respondents do not deny that the circuits are divided over how to decide whether a governmental litigant adequately represents the interests of a proposed intervenor, and the Court should resolve the conflict in this case.

I. This is an ideal vehicle for assessing the presumption of adequate representation applied by some circuits when a party seeks to intervene as of right alongside a governmental party.

A. The briefs in opposition lean heavily on recent events to argue that the dispute presented by Petitioners is no longer live. After Petitioners litigated the District Court's intervention decision in the First Circuit and petitioned for review by this Court, the District Court held a critical part of the challenged Rule to be arbitrary and capricious. *See Victim Rights Law Center v. Cardona*, 2021 WL 3185743, at *15 (D. Mass. July 28, 2021). Following that decision, and as Petitioners feared when they sought to intervene at the case's inception, the Federal Respondents decided not to appeal and declared that they would stop enforcing the invalidated provision nationwide. The Department of Education has also announced its intention to issue a notice of proposed rulemaking that could amend the Rule. SG BIO 9. Several groups moved to intervene for purposes of appeal. Texas was allowed to intervene, *see* Electronic Order, *Victim Rights Law Center v. Cardona*, 1:20-cv-11104-WGY,

Doc. 195 (D. Mass. Sept. 27, 2021), but individuals and interest groups similar to Petitioners were not, Order at 3, *id.*, Doc. 215 ("FACE Order") (Oct. 14, 2021).

The briefs in opposition argue that these developments have overtaken Petitioners' intervention appeal and that, regardless of whether Petitioners have been adequately represented heretofore, Petitioners are *now* adequately represented because Texas was permitted to intervene for purposes of appeal. But Texas, just like the Department of Education, is a governmental entity with a perspective that is "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." *See Pennsylvania v. President United States of America*, 888 F.3d 52, 60–61 (3d Cir. 2018). In fact, Texas has told Petitioners that it will not be arguing, as Petitioners would, that the standards enshrined in the Rule are not just legally permissible but constitutionally required. Texas's position on these constitutional issues makes sense given its governmental interests: like the Federal Respondents, Texas has an institutional interest in limiting the extent to which the Constitution constrains when and how public universities may punish student misconduct.[1]

Texas's ability to adequately represent Petitioners' interests is also potentially deficient in

[1] Plaintiffs' contention that representation of Petitioners' interests could be handed off from one governmental litigant to another mid-lawsuit underscores the extent to which the presumption is unrealistic about the forces that influence governmental entities' litigating positions in high-profile cases like this one. *See* Pet. 31–34, 36–37.

another respect: Plaintiffs may argue that Texas's appeal should be dismissed because Texas lacks Article III standing. *See* Pls.' Opp'n to Tex. Mot. to Intervene, *Pennsylvania v. Cardona*, No. 20-cv-01468, Doc. 142 at 3 (D.D.C. Feb. 2, 2021) (arguing in opposition to intervention by Texas that even if Plaintiffs prevail, "Texas schools can continue to use sexual harassment policies and procedures that conform to the [current] Rule"); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950–51 (2019) (appellant intervenor must have standing to defend law on appeal).

Plaintiffs argue that Petitioners should have renewed their motion to intervene after the District Court ruled. But the District Court denied the intervention motion of another private group on the ground that it was adequately represented by Texas, *see* FACE Order at 3, and there is no doubt that the District Court, after applying the same legal standard Petitioners are challenging here, would have denied a similar motion by Petitioners. The problem is not that Petitioners failed to move to intervene often enough but that the lower courts applied a strong and unjustifiable presumption that governmental litigants will adequately represent Petitioners' interests.

B. The briefs in opposition also argue that certiorari should be denied because, though currently not moot, the case "might become moot before or shortly after the Court resolved the intervention issue." SG BIO 17; *see* Pls.' BIO 16. But a case only becomes moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emp. Int'l Union, Loc. 1000*, 567

U.S. 298, 307–08 (2012) (quotation marks omitted); *see CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 475 (4th Cir. 2015) (final judgment entered by district court does not automatically moot pending intervention appeal). And here, effective relief is readily available. If this Court holds that the presumption of adequate governmental representation is irreconcilable with *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), and the text of Rule 24(a), it would remove the sole basis for the decision below. And while the District Court has issued a final judgment on all claims, the process of appealing that decision has only just begun.[2]

Although the Federal Respondents have announced that they plan to issue a notice of proposed rulemaking to change the Rule sometime in "spring 2022," SG BIO 17, there is no chance that the administrative process will moot the Petition before the end of this Term. It took the previous Administration a year and a half to finalize the Rule after issuing a notice of proposed rulemaking, during which time the Department of Education considered over 124,000 public comments and drafted a detailed, 2,000-page explanation for its policy judgments. This painstaking process will need to be repeated before the Federal Respondents can finalize changes to the Rule—unless, of course, the federal courts expedite matters by throwing out aspects of the Rule that the current Administration opposes. Rather than

[2] To preserve their ability to appeal the judgment if the District Court's intervention ruling is reversed, Petitioners filed a protective notice of appeal. *See Victim Rights Law Center v. Cardona*, No. 20-11104, Doc. 192 (Sept. 24, 2021).

presenting a vehicle problem, the District Court's merits decision and the pending rulemaking make the need for review by this Court even more urgent.

The Federal Respondents claim that Petitioners themselves have indicated a preference to await completion of the rulemaking process because they "did not object" to holding in abeyance *Pennsylvania v. Cardona*, No. 20-cv-1468 (D.D.C.), a parallel case in which Petitioners were permitted to intervene. SG BIO 17. But Petitioners *did* oppose the original motion to hold *Pennsylvania* in abeyance, *see* Def.-Intervenors' Resp. to Mot. to Hold Case in Abeyance, *id.*, Doc. 145 (Feb. 17, 2021), and the district court in that case suspended further briefing over Petitioners' objections, Minute Order, *id.* (Mar. 11, 2021). In any event, *Pennsylvania* differs from this case in a critical respect: unlike in *Pennsylvania*, where the court held that the Rule was likely valid in full, *see Pennsylvania*, 480 F. Supp. 3d at 59–66, in this case the District Court vacated an important provision of the Rule.

II. The circuit split over the standard for intervention as of right alongside a governmental litigant is real and important.

A. The Federal Respondents do not deny that the circuits are divided over which legal standard to use when a private party seeks to intervene as of right on the same side as a governmental litigant. As the Petition demonstrates, some circuits, including the First Circuit in the opinion below, apply a presumption of adequate representation by governmental litigants that can be overcome only by a "strong affirmative showing" by the would-be

intervenor. Pet. App. 8a. Other circuits do not apply such a presumption but instead "look skeptically on government entities serving as adequate advocates for private parties." *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015). The Third and Ninth Circuits have staked out a middle position that combines elements of both approaches. *See* Pet. 20–22.

Unlike the Federal Respondents, Plaintiffs claim that there is no split. Pls.' BIO 26–28. But the lynchpin for Plaintiffs' argument is a 1979 D.C. Circuit decision that cannot bear the weight that Plaintiffs place upon it. *See Env't Def. Fund, Inc. v. Higginson*, 631 F.2d 738 (D.C. Cir. 1979) (*per curiam*). That case concerned whether Colorado adequately represented some of its own political subdivisions in a dispute over federal water projects; the court had no occasion to address the legal standard that controls when deciding whether governmental litigants serve "as adequate advocates for *private* parties." *Crossroads*, 788 F.3d at 321 (emphasis added). The D.C. Circuit has never extended *Higginson* to cases involving non-governmental intervenors such as Petitioners, and Plaintiffs' expansive reading of that four-decade-old decision cannot be squared with the D.C. Circuit's more recent precedents. *See id.*

Plaintiffs are on no firmer footing when they contest the existence of a split by pointing to cases from the Sixth, Tenth, and Eleventh Circuits that apply a presumption of adequate representation when a proposed intervenor has the same interests as an existing party. Pls.' BIO 27–28. Unlike those courts, which require a stronger showing of inadequacy of representation when a proposed intervenor's interests

are identical to those of one of the existing parties, the courts on the other side of the split apply an *additional* presumption in cases in which a proposed intervenor asks to join the same side as a governmental litigant.[3] Some circuits single out intervention motions in which a private party seeks to litigate on the government's side for special, disfavored treatment. Others do not. The many cases Plaintiffs cite only further demonstrate this clear division of authority.

B. Unable to make a convincing argument that there is no split, both briefs in opposition try to obscure the issue by rewriting the question presented. The Federal Respondents attempt to reframe the Petition in terms of whether the District Court "abused its discretion." SG BIO at I. But whether denials of Rule 24(a)(2) motions for adequacy of representation should be reviewed *de novo* or for abuse of discretion is itself the subject of a longstanding circuit split. *Compare, e.g.*, Pet. App. 3a–4a (reviewing for abuse of discretion), *with Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016) (*de novo* review). Regardless, it is *always* an abuse of discretion to apply the wrong legal standard, as the lower courts did when they presumed that the Federal Respondents would adequately represent Petitioners. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The

[3] The presumptions are related only in the Third and Ninth Circuits, where the strength of the governmental litigant presumption depends on how "closely parallel" the interests of the intervenor and the government are. *Pennsylvania*, 888 F.3d at 60; *Prete v. Bradbury*, 438 F.3d 949, 957 (9th Cir. 2006).

standard of review thus poses no obstacle to this Court reviewing, and reversing, the First Circuit's decision.

Plaintiffs go even further than the Department in revising the question presented, claiming that if the Court grants certiorari it will need to determine in the first instance whether Petitioners' motion to intervene "was properly denied." Pls.' BIO at i. But the motion to intervene was denied *solely* because the lower courts determined that the Federal Respondents adequately represented Petitioners' interests, and the Court would not need to delve into whether Petitioners satisfy the other elements for intervention under Rule 24(a)(2) in order to resolve the entrenched circuit split that the Petition presents.[4]

C. The Federal Respondents argue that this case is a poor vehicle for resolving the split because it is "far from clear" that Petitioners would have been permitted to intervene even under the lenient standard applied by the Sixth, Tenth, Eleventh, and D.C. Circuits to determine adequacy of representation. SG BIO 24; *see also id.* at 21–23. But it is not unusual for this Court to reverse a lower court that applies the wrong legal standard only for the lower court to again reach the same result for different reasons on remand. *See, e.g.*, *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013); *Smith v. Texas*, 550 U.S. 297, 325 (2007) (collecting additional cases). Even accepting the Federal Respondents' premise that it is "unclear" whether Petitioners would be permitted to

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[4] Plaintiffs note that in parallel litigation a district court in New York "denied intervention entirely" to Petitioner FIRE, Pls.' BIO 9, but they neglect to mention that the ruling was later vacated by the Second Circuit, *see* Mot. Order, *New York v. FIRE*, No. 20-2429, Doc. 75 (2d Cir. Mar. 10, 2021).

intervene on remand if this Court reversed the First Circuit, SG BIO 18, that is not a reason to deny the Petition.

In any event, Petitioners can easily make the minimal showing that is required for intervention in circuits that do not apply a presumption of adequate representation by governmental litigants. In the proceedings below, the Federal Respondents never claimed to represent Petitioners' interests, and in some circuits that fact alone would be sufficient to establish that the Federal Respondents are inadequate representatives. *See, e.g.*, *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001) ("The government has taken no position on the motion to intervene in this case. Its silence on any intent to defend [intervenors'] special interests is deafening." (cleaned up)).

To be sure, even circuits that reject special rules for intervention motions involving governmental parties apply a rebuttable presumption of adequate representation "when [parties] share the same ultimate objective." SG BIO 23 (quoting *United States v. Michigan*, 424 F.3d 438, 443–44 (6th Cir. 2005)). But Petitioners and the Federal Respondents do not, in any meaningful sense, have the same interests at stake in this litigation. *See* Pet. 33–34. The briefs in opposition can only dispute this by framing Petitioners' interests at the highest possible level of generality, claiming that because Petitioners want the courts to uphold the Rule, they have the same interests as the Federal Respondents. *See, e.g.*, SG BIO 20. This argument proves too much. Every proposed intervenor must seek to join one side of the "*v.*" or the other. Moreover, the Federal Respondents'

argument cannot be squared with the more granular approach this Court took to assessing an intervenor's interests in *Trbovich*. In that case, even though the Secretary and Trbovich sought the same disposition of the case, the Secretary was not an adequate representative because it was uncertain whether the differing interests of the Secretary and Trbovich would "always dictate precisely the same approach to the conduct of the litigation." 404 U.S. at 636.

D. Finally, the Federal Respondents defend the presumption. Their arguments regarding *Trbovich* and the text of Rule 24(a) are addressed in the Petition. *See* Pet. 26–31. The Federal Respondents also argue that, if nowhere else, a presumption of adequacy should at least obtain where the government seeks to defend a regulation under the Administrative Procedure Act ("APA"), because agency action must rise or fall based upon the reasoning of the agency, *see* SG BIO 12; 24. But intervention in such cases is commonplace, *see, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), and for good reason. While the merits of many APA claims depend on the agency's stated rationale, the question of *remedy* is not so limited. In *Monsanto*, for example, private litigants whose interests in remedy differed from those of the agency were allowed to intervene by the district court. *See* 561 U.S. at 168–68. This case is similar. If Petitioners are correct that cross-examination in post-secondary Title IX proceedings is required by the Due Process Clause, then any defect in the Department's explanation for its decision to require cross-examination was harmless error. *See* 5 U.S.C. § 706 (requiring reviewing court to take "due account . . . of the rule of prejudicial error"). Under Petitioners' constitutional

arguments, Plaintiffs' APA claims could at most justify remanding the matter to the agency for further explanation without vacating the Rule—not the more expansive remedy of vacatur that the District Court awarded.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

November 15, 2021

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