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.

BETSY DEVOS, in her official capacity as Secretary of Education; KENNETH L. MARCUS, in his official capacity as Assistant Secretary for Civil Rights; U.S. DEPARTMENT OF EDUCATION,

Defendants-Appellees.

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

Movants-Appellants.

On Appeal from the United States District Court for the District of Massachusetts, No. 1:20-cv-11104-WGY, Hon. William G. Young

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel for appellee Victim Rights Law Center certifies as follows: Victim Rights Law Center is a non-profit organization with no parent corporation and no stock.

The undersigned counsel for appellee Legal Voice certifies as follows: Legal Voice is a non-profit organization with no parent corporation and no stock.

The undersigned counsel for appellee Equal Rights Advocates certifies as follows: Equal Rights Advocates is a non-profit organization with no parent corporation and no stock.

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Dated: November 3, 2020

/s/ Michael F. Qian
Michael F. Qian

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REASONS WHY ORAL ARGUMENT NEED NOT BE HEARD

The issues in this appeal are governed by a deferential standard of review, and the district court's decision is amply supported by settled precedent. This Court therefore need not hear oral argument to affirm. If, however, the Court is not prepared to affirm on the briefs, Plaintiffs would respectfully request the opportunity to present oral argument.

STATEMENT OF THE ISSUES

1. Did the district court act within its discretion by denying intervention as of right to third parties seeking to defend a federal regulation that the government is defending?

2. Did the district court act within its discretion by denying permissive intervention to third parties that can adequately present their views as amici?

INTRODUCTION

Plaintiffs in this case challenge a regulation promulgated by the Department of Education. The appellants here (collectively, "Movants") are three outside groups seeking to make arguments in defense of that regulation. That is not unusual—in this case alone, a number of interested third parties wish to add arguments in support of one side or the other. Ten sets of groups have already done so as amici curiae. The district court afforded Movants that same opportunity. Yet Movants seek more than these other groups: they requested to become *parties* to the case.

The district court did not abuse its discretion in denying that request. A district court is not required to grant intervention to groups in Movants' position. To the contrary, this Court has repeatedly affirmed denials of intervention where, as here, a third party simply seeks to add arguments in support of an existing party.

None of Movants' contentions allow them to evade this settled law. Asserting a mandatory entitlement to intervention, Movants insist that no existing party

adequately represents their interests. But Movants have the same goal in this suit as the Department: to save the regulation from the plaintiffs' challenge. The Department is, of course, already advancing arguments in defense of the regulation. And Movants never attempt to explain why they could not supplement the Department's arguments with their own contentions as amici. Under this Court's settled precedent, there is no inadequacy of representation in these circumstances. Were it otherwise, any interested group would, simply by proposing some alternative legal argument, be entitled to participate as a party in any case challenging government action.

Nor can Movants establish that the district court abused its discretion in denying their request for permissive intervention. They focus entirely on the brevity of the district court's order. But succinct orders denying intervention are unremarkable, and this Court has made clear that such brevity is not a sufficient basis for vacatur. Movants do not even attempt to establish any other reason that denying permissive intervention was beyond the district court's broad discretion. Nor could they. Injecting new parties into the litigation would only have created opportunities to frustrate the efficient resolution of this time-sensitive case, which is set for trial on November 12, 2020. Indeed, given that Movants can already present any legal arguments as amici, it is difficult to see what else intervention would accomplish.

The district court's order should be affirmed.

STATEMENT OF THE CASE

A. Regulatory Background

Title IX is a landmark federal civil rights law protecting against sex discrimination in schools. It establishes an antidiscrimination guarantee: "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). Congress not only empowered private litigants to enforce this guarantee in court, but it also directed federal agencies to implement Title IX administratively. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979); 20 U.S.C. § 1682.

Since 1975, agency regulations have imposed obligations on schools to effectuate Title IX's antidiscrimination mandate. *See Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 40 Fed. Reg. 24,128 (June 4, 1975). In 1997, the Department of Education, following notice and comment, issued guidance addressing schools' Title IX obligations regarding sexual harassment. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997). Among other things, that guidance provided that sexual harassment gives rise to Title IX liability if it is "sufficiently severe, persistent, or pervasive that it adversely affects a student's

education or creates a hostile or abusive educational environment." 62 Fed. Reg. at 12,034. In 2001, the Department maintained this standard for administrative enforcement in the wake of Supreme Court decisions addressing Title IX's liability standards in private damages actions. U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001);[1] *see Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (explaining that standards for administrative enforcement differ from those for private damages actions). Subsequent Department guidance has elaborated on how schools must handle sexual harassment complaints. *See* U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter* (Apr. 4, 2011);[2] U.S. Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014).[3]

But recently, the Department changed course. In 2018, the Department published a Notice of Proposed Rulemaking seeking to depart from the agency's previous Title IX standards regarding sexual harassment. After receiving over

[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.

124,000 comments, the Department published a final Rule in May 2020, with an effective date of August 14, 2020. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,044 (May 19, 2020) (the "Rule").

The Rule makes sweeping changes that weaken protections for victims of sex-based harassment. The changes include:

- Narrowing what qualifies as "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 requiring schools to dismiss Title IX complaints alleging conduct that does not meet this new definition. 34 C.F.R. §§ 106.30(a)(2) (emphases added), 106.44(a), 106.45(b)(3)(i).
- Reducing a school's obligation to address sexual harassment only to cases where a school employee has "actual knowledge" of the harassment—and at post-secondary institutions, "actual knowledge" by only a small set of employees. 34 C.F.R. §§ 106.30(a) ("actual knowledge"), 106.44(a).
- Forcing schools to dismiss formal complaints alleging conduct that occurs outside of an "education program or activity" but nevertheless creates a hostile educational environment (such as many off-campus and online incidents). 34 C.F.R. §§ 106.44(a), 106.45(b)(3)(i).

- Barring victims of sexual harassment from filing formal complaints if they have since graduated, transferred, or dropped out (even if the harassment drove them out of school). 34 C.F.R. § 106.30(a) ("formal complaint").
- Lowering the standard for schools responding to sexual harassment to require only that they not be "deliberately indifferent." 34 C.F.R. § 106.44(a).
- Precluding 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 supportive measures to students whose complaints must be dismissed under the Rule. 34 C.F.R. §§ 106.30(a) ("supportive measures"), 106.44(a).
- Introducing a "presumption that the respondent is not responsible for the alleged conduct," which is not required for any other type of student or staff misconduct proceeding. 34 C.F.R. § 106.45(b)(i)(iv).
- Eliminating schools' discretion to tailor proceedings for sexual harassment investigations—instead mandating, for example, live hearings and cross-examination by a party's advisor of choice in all cases at postsecondary institutions, and excluding from consideration in those cases all oral and written statements by any party or witness who declines to submit to live cross-examination, even if their statement is contained in reliable and relevant

evidence like text messages, emails, medical records, police reports, or sworn testimony from other proceedings. 34 C.F.R. § 106.45(b)(1), (5)-(6).

B. Procedural History

1. Plaintiffs challenged the Rule, and the Department is defending it

Plaintiffs are four survivor advocacy organizations and seven individual victims of sexual harassment, ranging from elementary-school-age to college-age. JA66-68. This suit was filed in June 2020, less than a month after the final Rule was published and over two months before its effective date. JA37; 85 Fed. Reg. 30,026.

Plaintiffs challenge the Rule as unlawful under the Administrative Procedure Act ("APA") and the Fifth Amendment's equal protection guarantee. They sued the Department and its officials, seeking to declare the Rule unlawful, vacate it, and enjoin its implementation. JA161-62. Specifically, Plaintiffs claim that provisions of the Rule, including the ones above and more, are:

- Not in accordance with law in violation of the APA, including because the Rule departs from Title IX and its requirement that the Department's rules "be consistent with achievement of the objectives of the statute," 20 U.S.C. § 1682. JA154-56.
- Arbitrary and capricious in violation of the APA, including because the Department disregarded material considerations and failed to adequately explain its departure from decades of policy. JA156-57.

- In excess of statutory jurisdiction in violation of the APA, including because no statute empowers the Department to stop schools from protecting students against sex discrimination. JA157-59.
- In violation of the APA's procedural requirements, including because several provisions of the Rule are not a logical outgrowth of the proposed rule. JA159-60.
- Discriminatory on the basis of sex in violation of the Fifth Amendment's equal protection guarantee, including because it imposes unique burdens on victims of sexual harassment not faced by victims of other forms of harassment by relying, at least in part, on the discriminatory and baseless gender stereotype that women and girls lack credibility when they report sexual harassment. JA160-61.

On July 24, Plaintiffs moved to preliminarily enjoin or stay the Rule before it took effect. JA211-63. The Department opposed Plaintiffs' motion, disputing each of the APA and Fifth Amendment grounds Plaintiffs invoked as well as challenging Plaintiffs' standing. JA284-315. Additionally, ten sets of amici filed briefs on the preliminary-injunction motion, eight supporting Plaintiffs and two supporting the Department. JA48-51.

The litigation has proceeded rapidly. In light of the August effective date, the district court ordered expedited briefing on the preliminary-injunction motion and

set a hearing in September. JA40, JA264. After the hearing, the district court ordered that the "preliminary injunction [be] collapsed with trial on the merits in accordance with Rule 65A and set for hearing on October 14, 2020." JA52. Trial has since been rescheduled for November 12, 2020. Order Governing Proceedings, Oct. 9, 2020, ECF No. 142.[4]

2. Movants sought intervention, which the district court denied

Movants are three non-profit organizations asserting a mission of "promoting free speech and due process on college campuses" that have attempted to insert themselves into these proceedings. Memorandum in Support of Motion to Intervene 4, July 21, 2020, ECF No. 25. Interested in preserving the Rule, Movants seek to become defendants in the case and make constitutional arguments supporting the Rule. *Id.* at 1, 8-9. Specifically, they contend that certain provisions of the Rule coincide with what the Free Speech and Due Process Clauses independently require (namely, the Rule's definition of sexual harassment, 34 C.F.R. § 106.30(a)(2), and "many of" its procedures governing sexual harassment investigations, 34 C.F.R. § 106.45). Opening Br. 9-10.

[4] Following the preliminary-injunction hearing, the district court dismissed without prejudice some of the individual plaintiffs. Electronic Clerk's Notes, Sept. 2, 2020, ECF No. 130. Other individual plaintiffs remain in the case, and Plaintiffs have also moved to file an amended complaint adding another individual plaintiff. Consent Motion for Leave to File Second Am. Compl., Oct. 2, 2020, ECF No. 138. These substitutions do not affect the issues on appeal.

This case was not the first in which Movants sought to intervene. Separate plaintiffs have filed APA challenges to the same Rule in three other district courts. *See Pennsylvania v. DeVos*, No. 20-cv-1468 (D.D.C.); *New York v. U.S. Dep't of Educ.*, No. 20-cv-4260 (S.D.N.Y.); *Know Your IX v. DeVos*, No. 20-cv-1224 (D. Md.). In all three cases, some or all Movants filed intervention motions—all three Movants in the Maryland and D.C. cases, and the Foundation for Individual Rights in Education ("FIRE") in the New York case. Each motion invoked both Federal Rule of Civil Procedure 24(a)(2), governing intervention as of right, and Rule 24(b), governing permissive intervention.

None of those district courts granted intervention as of right. *See New York v. U.S. Dep't of Educ.*, No. 20-cv-4260, 2020 WL 3962110 (S.D.N.Y. July 10, 2020) (unpublished); *Know Your IX v. DeVos*, No. 20-cv-1224, 2020 WL 6150935, at *8 (D. Md. Oct. 20, 2020) (unpublished); Minute Order, *Pennsylvania v. DeVos*, No. 20-cv-1468 (D.D.C. July 6, 2020). The court in the New York case denied intervention entirely. *New York*, 2020 WL 3962110, at *4. As to intervention as of right, the court determined that FIRE had failed to establish either that its interests would be impaired without intervention or that the Department's representation of its interests was inadequate. *Id.* As to permissive intervention, the court observed that FIRE's participation would add complexity, "unduly delay the adjudication of the case[,] and would prejudice the plaintiffs' interests"—especially as the case was

proceeding on "a very short timeline." *Id.* In the Maryland case, the district court deemed the intervention motion moot after dismissing the suit without prejudice on standing grounds. *Know Your IX*, 2020 WL 6150935, at *8.

Only the D.C. district court granted permissive intervention, noting that "'[p]ermissive intervention is an inherently discretionary enterprise.'" Minute Order, *Pennsylvania*, No. 20-cv-1468 (July 6, 2020) (quoting *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998)). Upon obtaining party status in the D.C. case, Movants filed a motion seeking to depose six witnesses who had filed sworn declarations for the plaintiffs. *See* Motion to Take Deps., *Pennsylvania*, No. 20-cv-1468 (July 15, 2020), ECF No. 76. As the plaintiffs and the Department explained, these depositions were entirely unnecessary and would unduly delay the expedited proceedings. Pls.' Resp. 2, *Pennsylvania*, No. 20-cv-1468 (July 20, 2020), ECF No. 83; Defs.' Resp. 1-2, *Pennsylvania*, No. 20-cv-1468 (July 20, 2020), ECF No. 84. The district court denied Movants' request. Minute Order, *Pennsylvania*, No. 20-cv-1468 (July 21, 2020).

In this case, Movants filed their intervention motion on July 21. On July 27, after expediting the preliminary-injunction proceedings—and in the wake of the New York court's denial of intervention and Movants' attempt to depose the plaintiffs' declarants in the D.C. case—the district court here denied Movants' motion to intervene. JA40. The court determined that "there is no adequate showing

that the government will not adequately protect the proposed intervenors[’] rights." JA40. The court additionally explained that it would "welcome a brief amicus curiae from the proposed intervenors." JA40.

Movants took this interlocutory appeal. JA43. They sought no stay of the district-court proceedings. JA43.

SUMMARY OF ARGUMENT

I. The district court did not abuse its discretion in determining that existing parties adequately represent Movants' interests in this case, therefore barring intervention as of right. In this suit, Movants seek to defend the Rule. But the Department is already doing just that. In these circumstances, this Court presumes adequacy twice over: both because Movants share the Department's goal in the suit, and because the Department is defending its own official action. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999).

Movants cannot overcome these presumptions of adequacy. Movants offer a legal argument that the Department has not made, but this Court has repeatedly rejected claims of inadequacy in similar circumstances. In fact, this Court has done so in the very situation presented here: proposed intervenors raising a constitutional defense of a law the government is already defending on other grounds. *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999). Movants fail to show, as they must to establish inadequacy, that their

additional argument is obviously necessary to the defense. To the contrary, the Department is already pursuing more direct responses to Plaintiffs' claims. Movants' new theory, moreover, was not invoked by the agency and thus is no basis for upholding agency action—and, at any rate, is no more than a partial answer to the claims in this case. Nor have Movants shown that to raise their new argument, they must participate as parties, rather than amici.

Movants' other attempts to establish inadequacy similarly collapse under settled precedent. Movants assert that they and the Department are motivated by different interests in defending the Rule. But those interests lead Movants and the Department to the same ultimate goal in this suit: to preserve the Rule. Any divergence in motivation therefore does not render the Department's representation of Movants' interests inadequate. *See, e.g.*, *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982).

Nor can a movant establish inadequacy by pointing to an existing party's view on intervention. *Pub. Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 208 (1st Cir. 1998). That the Department has taken no position on intervention is immaterial to the adequacy analysis.

Finally, Movants contend that the Department does not share their view that Plaintiffs have standing. But Plaintiffs of course hold that view, and they are undisputedly adequate representatives to defend their own standing.

II. The district court also did not abuse its discretion in denying permissive intervention. As the district court noted in its order, this case does not require Movants' participation as parties because the Department is already defending the Rule and Movants can present their additional arguments as amici. Granting party status would only have threatened complexity and delay in these expedited proceedings.

Movants' sole argument is that the district court's order was too brief. But this Court has made clear that a district court does not abuse its discretion merely by denying intervention in a summary order. *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 38 (1st Cir. 2020). Instead, in reviewing such an order, this Court examines the record as a whole to determine whether the district court's ultimate conclusion was within its broad discretion. Movants identify no basis for disturbing the district court's discretionary determination here.

STANDARD OF REVIEW

A district court's decision to deny intervention as of right is reviewable only for abuse of discretion. *See In re Efron*, 746 F.3d 30, 35 (1st Cir. 2014). "Despite its nomenclature, intervention 'as of right' usually turns on judgment calls and fact assessments that a reviewing court is unlikely to disturb except for clear mistakes." *Maine v. Director, U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 17-18 (1st Cir. 2001) (citation and quotation marks omitted). This Court "will only reverse 'if the district

court either fails to follow the general recipe provided in Rule 24(a)(2) or reaches a plainly incorrect decision.'" *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 807 F.3d 472, 475 (1st Cir. 2015) (citation and alterations omitted); *see also Maine*, 262 F.3d at 18 n.3 (noting that this Court reviews denials of intervention even more deferentially than some other circuits).

"As to permissive intervention, appellate review is even more restrictive." *Maine*, 262 F.3d at 21. "The discretion afforded to the district court under Rule 24, substantial in any event, is even broader when the issue is one of permissive intervention." *R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 11 (1st Cir. 2009). This Court will set aside a decision on permissive intervention "only upon a showing of a clear abuse of that broad discretion." *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 42 (1st Cir. 2020).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING INTERVENTION AS OF RIGHT

Movants first claim an entitlement to intervene as of right under Rule 24(a)(2). That provision authorizes intervention only by one 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); *see United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982).

Movants contest only the district court's determination that existing parties adequately represent Movants' interest (JA40), acknowledging that even if they prevail, they would still have to establish on remand that they satisfy the other requirements for intervention as of right. Opening Br. 25, 35. A movant contesting an adequacy determination bears a "heavy" burden, as "adequacy is primarily a fact-sensitive judgment call and the standard of review is deferential." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 111-12 (1st Cir. 1999).

Movants cannot carry that heavy burden. Under settled precedent, the district court acted well within its discretion in concluding that Movants' desire to supplement the Department's arguments did not establish inadequate representation.

A. Under Two Converging Presumptions, The Department Adequately Represents Movants' Interests

This case lies at the heart of "two converging presumptions" of adequacy. *Daggett*, 172 F.3d at 111. First, "adequate representation is presumed where the goals of the applicants are the same as those of the plaintiff or defendant." *Id.*; *see, e.g.*, *Moosehead Sanitary Dist. v. S. G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). Second, "when a would-be intervenor seeks to appear alongside a governmental body in defense of the validity of some official action, a rebuttable

presumption arises that the government adequately represents the interests of the would-be intervenor." *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 39 (1st Cir. 2020); *see, e.g.*, *Daggett*, 172 F.3d at 111. To rebut that presumption "requires 'a strong affirmative showing' that the [government] is not fairly representing the applicants' interests." *Pub. Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998) (quoting *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984)).

Both presumptions apply here. Movants' interest in this suit is to "defend[] the Rule"—the Department's own action—"against legal challenges." Opening Br. 4; *see id.* at 16. The Department is already doing just that. "Adding heft to" the presumptions, the Department has defended the Rule zealously. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 807 F.3d 472, 475 (1st Cir. 2015). The Department's "full-scale, uncompromising defense of" its regulation, "in itself, weighs heavily in favor of denying mandatory intervention." *Patch*, 136 F.3d at 208; *see T-Mobile*, 969 F.3d at 39; *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999).

Movants give these presumptions short shrift. They never mention the presumption of adequacy for an existing party's pursuit of a common goal. Yet they admit that in this suit, "both Appellants and the Department want to rebuff Plaintiffs'

challenges to the Title IX Rule." Opening Br. 16. That alone is enough for the first of these presumptions to apply. *Daggett*, 172 F.3d at 111.

Movants do resist the separate presumption that the government's representation is adequate. But they cannot deny that they "seek[] to appear alongside a governmental body in defense of the validity of some official action," which suffices to trigger the presumption. *T-Mobile*, 969 F.3d at 39. Movants focus instead on denying that this presumption of adequacy should exist. Opening Br. 23-24. Yet as Movants acknowledge, their quarrel is with binding circuit precedent. Opening Br. 23. This Court has applied the presumption time and again, as recently as a few months ago. *See T-Mobile*, 969 F.3d at 39 (citing *Maine v. Director, U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001); *Daggett*, 172 F.3d at 111; *Patch*, 136 F.3d at 207).[5] This Court's precedent, not Movants' wishful thinking, governs this case.

Nor do Movants' criticisms hold water in any event. The presumption does not foreclose "case-specific, contextual inquiry" (Opening Br. 23); it can be rebutted. And the presumption squares with the general proposition that the burden

[5] *See also, e.g.*, *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020); *Stuart v. Huff*, 706 F.3d 345, 350-51 (4th Cir. 2013); *Curry v. Regents of Univ. of Minn.*, 167 F.3d 420, 423 (8th Cir. 1999); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 984-85 (2d Cir. 1984); 7 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure – Civil* § 1909 (West 3d ed. 2020).

of showing inadequacy is ordinarily "minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). As this Court has explained, that usual burden is simply "ratcheted upward" when the presumption applies. *Patch*, 136 F.3d at 207.

B. Movants Cannot Overcome The Presumptions Of Adequacy

Movants nevertheless maintain that the district court abused its discretion in finding adequate representation. Their various attempts to rebut the presumptions of adequacy fail.

i. That Movants would add different legal arguments does not establish inadequacy

a. Movants' constitutional defense of the Rule does not entitle them to intervention

Seeking to establish inadequacy, Movants point to their desire to make a constitutional argument that the Department will not. But a "difference in tactics as to presenting a legal argument does not necessarily an inadequacy make." *Maine*, 262 F.3d at 19. Rather, the movant must show that "a refusal to present obvious arguments" is "so extreme as to justify a finding that representation by the existing party was inadequate." *Daggett*, 172 F.3d at 112. Accordingly, this Court "ask[s] whether pursuit of the shared goal obviously calls for the argument to be made." *Students for Fair Admissions*, 807 F.3d at 476. And even when that requirement is satisfied, this Court also considers whether making that "clearly helpful" or

"essential" argument requires participation as a party—for example, to develop different evidence. *Daggett*, 172 F.3d at 112. A prospective intervenor fails to establish inadequacy if he has "made no showing" that an "amicus brief would not do the job." *Id.*; *see Mass. Food Ass'n*, 197 F.3d at 567; *Students for Fair Admissions*, 807 F.3d at 477-78; *Maine*, 262 F.3d at 19. Movants here cannot meet these requirements.

It is hardly uncommon for third parties to come up with additional justifications for government action that the government has not itself invoked. In such cases, this Court has repeatedly refused to find inadequacy. Take *Massachusetts Food Association*, where trade associations sought to intervene alongside the State in defending a liquor-store regulation. 197 F.3d at 562-63. The plaintiffs challenged the law on antitrust grounds, and the State answered those objections. *Id.* at 567. But like the Movants here, the trade associations sought to inject a constitutional defense—there, that the Twenty-First Amendment justified the law. This Court held that the trade associations' "interest in offering *other* legal arguments" to sustain the statute did not render the State's representation inadequate, as "these arguments were easily presented in amicus briefs." *Id.* (emphasis in original).

Likewise, in *Maine*, environmental groups sought to defend an agency rule on a different legal ground. 262 F.3d at 18. These groups argued that the agency's

previous failure to adopt the present rule was unlawful. *Id.* But this Court held that argument was merely "a supplement to the defendants' main argument in the case" that the present rule satisfied the APA's arbitrary-and-capricious standard. *Id.* at 19-20. There were "several obvious, more direct arguments for the government to make" and the groups' argument was "hardly a necessary one to the defense." *Id.* at 20. And because "review of federal agency administrative actions is usually confined to the record before the agency," the groups did not need to be parties to make the argument; they could do so as amici. *Id.*; *see also Daggett*, 172 F.3d at 112 (no inadequacy where movants offered additional arguments in defense of state statute); *Students for Fair Admissions*, 807 F.3d at 475-76 (no inadequacy where movants offered additional arguments in defense of Harvard's admissions policy).

This case is no different. To begin, Movants' supplemental defense of the Rule is far from "obviously call[ed] for." *Students for Fair Admissions*, 807 F.3d at 476. Movants raise exactly the same kind of argument the Court faced in *Massachusetts Food Association*: a constitutional defense of a law being challenged (and defended by the government) on other grounds. Plaintiffs challenge only the Rule's conformity with the APA, the Title IX statutory framework, and the equal protection guarantee of the Fifth Amendment. The Department is already arguing that the Rule complies with those laws—the "obvious, more direct arguments for the government to make." *Maine*, 262 F.3d at 20. A court, moreover, could uphold the

Rule on those grounds. Movants' additional argument that the Free Speech and Due Process Clauses separately justify some provisions of the Rule is thus not "a necessary one to the defense." *Id.*

Indeed, Movants' argument is even more ancillary to the case than were the arguments asserted in *Massachusetts Food Association* and *Maine*. To begin, a central element of Movants' theory is already foreclosed by binding precedent. This Court has held that in university disciplinary proceedings, due process does not require "cross-examination by the accused or his representative" even when the "proceeding turns on the witnesses' credibility." *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 68-69 (1st Cir. 2019). Yet that is what the Rule requires. 34 C.F.R. § 106.45(b)(6). Movants' recitation of that rejected view will hardly be crucial to the district court's analysis.

More fundamentally, Movants' constitutional defense—unlike the one in *Massachusetts Food Association*—cannot cure 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) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). But as Movants admit, the Department "declined to take" Movants' proposed constitutional theory when promulgating the Rule. Opening Br. 10. That renders Movants' arguments irrelevant in defending the Rule against claims

Plaintiffs raise. Consider, for example, Plaintiffs' position that provisions of the Rule are arbitrary and capricious because the Department inadequately justified its choices. JA156-57. Those deficiencies in the Department's decisionmaking cannot be erased with a constitutional theory the agency never invoked. *See Chenery*, 318 U.S. at 87. That is especially so because even under Movants' theory, the Department had a range of policy options available (match the minimum standards supposedly required by the Constitution, or provide even greater accommodations). Judicial review must focus on the Department's own justifications for its choice. *See Chenery*, 318 U.S. at 87.

Moreover, even if Movants' theory were relevant to the questions raised in this case, it would provide at most a partial answer. Movants address only two aspects of the Rule: its definition of sexual harassment, 34 C.F.R. § 106.30(a)(2), and its procedures governing sexual harassment investigations, 34 C.F.R. § 106.45. *See* Opening Br. 8-9. Even if a court accepted Movants' theory, the Rule's survival would remain at issue: Plaintiffs have challenged other aspects of the Rule, such as its limits on schools' obligations to respond to sexual harassment, including when offering supportive measures, under 34 C.F.R. §§ 106.30 and 106.44(a). *See* JA95-103, JA105-08.

In any event, Movants are fully able to present their constitutional arguments as amici. Movants need not become parties to participate in factual development, as

their theory is purely legal and review of the Rule is, as in *Maine*, "confined to the record before the agency." *Maine*, 262 F.3d at 20. And while of course "an amicus does not enjoy the same opportunities as a full-fledged litigant"—for example, to present oral argument or to take an appeal—this Court has rejected the contention that these differences alone give an outsider the right to intervene to present supplemental arguments. *Mass. Food Ass'n*, 197 F.3d at 567-68. For this reason as well, Movants cannot demonstrate inadequacy.

b. Movants' contrary arguments lack merit

Movants do not even attempt to show that they must participate as parties, rather than amici, to raise their constitutional theory. They contend only that their theory will somehow "shape all issues in this case." Opening Br. 21-23. But that does not distinguish the constitutional defense in *Massachusetts Food Association* or the alternative regulatory justification in *Maine*. And in any event, Movants' contentions are overblown.

Movants point to only one way in which their theory addresses the merits: to supply a reason under the doctrine of constitutional avoidance for doubting Plaintiffs' interpretation of Title IX and other statutes. Opening Br. 21. But that argument (which Movants can make as amici) addresses only a slice of Plaintiffs' claims. JA154-61; *see supra* at 7-8, 23. And even on Plaintiffs' statutory claims, a constitutional-avoidance argument functions merely "as a supplement to the

defendants' main argument"—that the Rule comports with the statute as written. *Maine*, 262 F.3d at 19.

Nor will Movants' constitutional theory affect the relief ultimately granted. *Cf.* Opening Br. 21-23. With or without Movants' arguments, the possible judgments on the merits are the same. If the Department prevails—on either Movants' view of the merits or the Department's—the court would issue a judgment denying the relief Plaintiffs seek, leaving the Rule intact. And if Plaintiffs prevail, the Rule will be vacated. JA161-62. That relief would not, as Movants suggest, "'violate[] the Constitution.'" Opening Br. 22 (citation omitted). Accepting Movants' constitutional theory, if the Rule were vacated, the very same standards would simply continue to apply as a constitutional matter. Nothing in the Constitution would prevent a court from vacating an invalidly promulgated Rule.

To be sure, Movants say they care about the judgment's "stare decisis effects"—that is, they want a decision in the Department's favor *on a particular rationale*. Opening Br. 22-23. But that does not rebut the presumption of adequacy. *See Mass. Food Ass'n*, 197 F.3d at 567; *Maine*, 262 F.3d at 19-20; *Daggett*, 172 F.3d at 112; *Students for Fair Admissions*, 807 F.3d at 475-76. Otherwise, all interested third parties making alternative arguments would be entitled to intervention as of right. Nor does it matter that Movants' constitutional argument reflects their interests outside this case. The same was true, for example, of the trade associations

in *Massachusetts Food Association* (which invoked an economic interest in their view of the Twenty-First Amendment) and the environmental groups in *Maine* (which had an interest in expansive federal environmental regulation). Reply Brief for Intervenor-Appellants at 9, *Mass. Food Ass'n*, No. 99-1280, 1999 WL 34826059 (1st Cir. Sept. 10, 1999); *Maine*, 262 F.3d at 16-17, 18. Moreover, this case's stare decisis implications are a particularly weak basis for Movants' intervention, because the case would produce no adverse precedent for Movants if they do not participate. Regardless which party wins on APA and Equal Protection grounds, Movants would remain free to assert their Free Speech and Due Process theories in future litigation.

Movants muster only one case in which this Court allowed intervention to make a new legal argument—and that decision rested on more than just a difference in arguments alone. Opening Br. 19 n.2. In *Cotter v. Massachusetts Ass'n of Minority Law Enforcement Officers*, Black police officers moved to intervene in a suit by white officers who claimed they were improperly denied promotions based on race. 219 F.3d 31, 32-33 (1st Cir. 2000). While the department sought to defend its current promotion policies, the movants argued that those policies were "in violation of law." *Id.* at 35-36. The movants' view was thus adverse to the department's, rendering the department's representation of their interest inadequate. *Id.*; *see Students for Fair Admissions*, 807 F.3d at 477 ("*Cotter* was, by its own terms,

virtually *sui generis* . . . .”). There is such no adversity here: Both Movants and the Department believe the Department’s actions are lawful.

Movants principally rely instead on cases finding that representation is *adequate* when the applicant and the existing party have the *same* arguments. Opening Br. 19-20. But none of those cases holds the converse proposition that representation is *inadequate* when the arguments are *different*. *T-Mobile*, 969 F.3d at 40; *United Nuclear Corp.*, 696 F.2d at 144, *Patch*, 136 F.3d at 209; *Int’l Paper Co. v. Town of Jay*, 887 F.2d 338, 345 (1st Cir. 1989). Movants describe these propositions as “two sides of the same legal coin,” Opening Br. 19, but they are logically distinct—as this Court’s precedent reflects. *See Mass. Food Ass’n*, 197 F.3d at 567 (rejecting intervention where movants had different arguments from those raised by existing parties); *Maine*, 262 F.3d at 19-20; *Daggett*, 172 F.3d at 112; *Students for Fair Admissions*, 807 F.3d at 475-76 (same). Movants’ sleight of hand cannot succeed.

ii. That Movants have different motivations for defending the Rule does not establish inadequacy

Movants maintain that the Department does not share their desire to maximize protection for free-speech and due-process rights. Opening Br. 17-18. But this purported divergence in *motivations* does not establish inadequacy. In assessing whether an existing party can adequately “represent” the interest of another, this Court does not require that interests be identical. Fed. R. Civ. P. 24(a)(2). Rather,

the Court looks to goals in the litigation, not background motivations, and Movants admit they and the Department have the same goal in this suit. *Supra* at 17-18.

This Court's decision in *United Nuclear Corp.* illustrates that principle. There, an environmental group seeking to intervene in a suit challenging a state statute had "a more specialized interest in environmental affairs" than the State. *United Nuclear Corp.*, 696 F.2d at 144. This Court nevertheless presumed the State adequately represented the group's interests because they had "the same ultimate goal of upholding and defending" the statute. *Id.*

Similarly, in *Students for Fair Admissions*, a group of students sought to aid Harvard's defense of its race-conscious admissions policy. 807 F.3d at 475-76. Although the would-be intervenors were more "single-minded[]" in their support of race-conscious admissions and did not share "Harvard's balancing of competing priorities," they still shared Harvard's goals in the suit: "defending Harvard's right to consider race and defeating [the plaintiff's] request for declaratory judgment." *Id.* (quotation marks and alterations omitted). This Court accordingly applied a presumption of adequacy and held that the students failed to rebut it. *Id.* at 475-76; *see also Daggett*, 172 F.3d at 112 (argument that government "represents 'broader' interests at some abstract level is not enough" to defeat adequacy where government defends its action "in full" (citation omitted)).

Here, Movants say that the Department "must balance a host of interests," while they single-mindedly seek "the greatest possible protection" for free-expression and due-process rights. Opening Br. 17. Those differences in motivation—a more "specialized," "single-minded[]" interest versus striking a "balanc[e] of competing priorities"—are exactly the distinctions this Court has held insufficient to establish inadequacy. *United Nuclear Corp.*, 696 F.2d at 144; *Students for Fair Admissions*, 807 F.3d at 476. Whatever their motivations, all that matters in the adequacy analysis is that in this suit, Movants and the Department are both trying to save the Rule.

That is especially so because Movants' professed disagreement with the Department lies outside this suit. Movants worry that although their "goals sometimes coincide" with the Department's—as they do here in defending the Rule—that might not be true "in the future." Opening Br. 17. Movants hope the Department will not have the regulatory flexibility to "change its mind in the future" or "change course later on" in a way Movants disagree with. Opening Br. 12. But any hypothetical future disagreement between Movants and the Department has no bearing on Movants' right to intervene in this case. Supporters of a government policy of course hope the government will not change its mind later, but that does not entitle them all to intervention. And nothing the Department has argued in this case would preclude Movants from claiming in the future that the Constitution

prevents some new action the Department takes. This suit is about the fate of the current Rule alone. On that subject, Movants and the Department agree.

This case is therefore nothing like *Trbovich v. United Mine Workers of America*, where the applicant and the existing party sought different outcomes. *See* Opening Br. 18. There, the Secretary of Labor filed a suit seeking to set aside the election and to order a new election under his supervision. *Trbovich*, 404 U.S. at 529. Moving to intervene, a union member sought relief that the Secretary did not: "certain specific safeguards with respect to any new election." *Id.* at 530. The Court—applying Rule 24(a)(2) in the first instance, with no district court decision to which to defer—held that the Secretary did not adequately represent the union member's interests. *Id.* at 537-39; *see id.* at 530-37 (reversing the district court's separate, statutory grounds for denying intervention). The Secretary was required by statute to serve "two distinct interests," the Court explained: enforcing individual union members' rights and "'assuring free and democratic union elections.'" *Trbovich*, 404 U.S. at 538-39 (citation omitted). The Court found that the union member had filed "a valid complaint" that the Secretary's pursuit of the latter interest had prevented him from adequately asserting the rights of individual union members. *Id.* at 539.

Unlike in *Trbovich*, where a conflict in interest manifested in a difference in relief requested, here Movants' and the Department's interests are closely aligned,

leading them to the shared goal of upholding the Rule. This Court drew that distinction in *Maine*, where environmental groups sought to intervene in defense of a federal agency rule. 262 F.3d at 19. *Trbovich*, this Court explained, concerned a "statutorily imposed conflict" between the government's interests and the movant's. *Id.* In *Maine*, by contrast, there was a "general alignment of interest" between the agencies and the environmental groups "in upholding" the rule, albeit on different legal rationales. *Id.* at 18. Because their interests in the suit were "closely aligned," the situation was "meaningfully different from *Trbovich*." *Id.* at 19. So too here.

Conservation Law Found. of New England, Inc. v. Mosbacher, 966 F.2d 39 (1st Cir. 1992), on which Movants also rely (at 19), only underscores the point. The proposed intervenors there were commercial fishers who disagreed with a consent decree struck between environmental groups and the government. *Mosbacher*, 966 F.2d at 40. The government did not adequately represent the fishers' interests because the consent decree—the government's desired outcome—would have harmed the fishers, subjecting them to "more stringent rules." *Id.* at 44. Here, far from being harmed by the government's desired outcome of upholding the Rule, Movants actively support it.

iii. That the Department lacks a position on intervention does not establish inadequacy

Movants also try to find significance in the fact that the Department has taken no position on this intervention motion. Opening Br. 24. But *Mosbacher*, on which

Movants rely, treated an existing party's silence only as confirming inadequacy that was already apparent: the government had already accepted a consent decree capitulating to "virtually all the relief sought." 966 F.2d at 44. An existing party's view on intervention is not itself a basis for finding inadequacy. Even when the government *supports* an applicant's view that the government's representation is inadequate, that does not "strip a federal court of the right and power—indeed, the duty—to make an independent determination as to whether Rule 24(a)(2)'s prerequisites are met." *Patch*, 136 F.3d at 208 (affirming denial of intervention); *see also Cotter*, 219 F.3d at 35 (presumption of adequate representation by government applies "even if the governmental defendant itself consents to intervention"). Still less does the government's *lack* of a position change the analysis.

C. Plaintiffs Adequately Represent Movants' Interest In Defending Plaintiffs' Standing

Movants attempt one other showing of inadequacy: They believe Plaintiffs have standing in this suit, a view the Department does not share. Opening Br. 17-18. Plaintiffs welcome Movants' support in an amicus brief. But Plaintiffs of course agree that they have standing, so one of the "existing parties adequately represent[s] that interest." Fed. R. Civ. P. 24(a)(2); *see* Opening Br. 21 (on standing, Movants "are similarly situated to Plaintiffs with respect to their interests"). Indeed, Movants

do not (and could not) question the adequacy with which Plaintiffs defend their own standing.

In any event, for the reasons already explained, Movants' stance on this issue does not undermine the adequacy of the Department's representation of Movants' interest in upholding the Rule. Again, a disagreement over rationales is not enough to establish inadequacy. *Mass. Food Ass'n*, 197 F.3d at 567; *Maine*, 262 F.3d at 19-20; *Daggett*, 172 F.3d at 112; *Students for Fair Admissions*, 807 F.3d at 475-76; *see supra* at 19-27. Movants' view on standing does not change their ultimate goal, shared by the Department, of defending the Rule and denying Plaintiffs' requested relief.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PERMISSIVE INTERVENTION

A district court deciding whether to grant permissive intervention under Rule 24(b) "may 'consider almost any factor rationally relevant' to the intervention determination." *T-Mobile*, 969 F.3d at 40 (quoting *Daggett*, 172 F.3d at 113). In conducting that analysis, "[t]he court 'enjoys very broad discretion.'" *Id.* at 40-41 (quoting *Daggett*, 172 F.3d at 113). For that reason, "[r]eversal of a district court's denial of permissive intervention on grounds of abuse of discretion 'is so unusual as to be almost unique.'" *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 641 (1st Cir. 1989) (citation omitted); *see, e.g.*, *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 803 (7th Cir. 2019) (similar); *Floyd v. City of New York*, 770

F.3d 1051, 1062 n.38 (2d Cir. 2014) (similar). Where "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 within the compass of the district court's discretion." *T-Mobile*, 969 F.3d at 38.

This record reflects multiple sound reasons for denying permissive intervention, two of which the district court expressly cited in its order. First, the Department would "adequately protect the proposed intervenors[']rights." JA40. Second, Movants can express their views in "a brief amicus curiae." JA40. Both conclusions are well-founded, as already explained: Movants need not intervene because the Department is already defending the Rule and Movants can already raise their arguments as amici. *Supra* at 16-31. And both considerations justify denying permissive intervention, as this Court has held. *See, e.g.*, *T-Mobile*, 969 F.3d at 41 (adequacy); *Daggett*, 172 F.3d at 113 (amicus participation). This Court affirmed the denial of permissive intervention in *Massachusetts Food Association* for precisely these reasons. 197 F.3d at 568 ("The 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.").

Because Movants would add little as intervenors rather than amici, the district court was well within its discretion to conclude that the costs of intervention would

outweigh the benefits. *See* Fed. R. Civ. P. 24(b)(3) (directing courts to consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights"). As this Court has recognized, "the addition of still more parties would complicate a case that badly needed to be expedited." *Daggett*, 172 F.3d at 113. This is just such a case. The district court expedited this case, filed before the Rule took effect, to reach a prompt decision on the Rule's fate. JA39-40. When the district court denied the intervention motions, the court had already granted an emergency motion for expedited briefing on Plaintiffs' request for a preliminary injunction. JA264. Since then, the case has continued apace, with the court proceeding directly to trial on November 12—just five months after the initial complaint was filed. JA52; Order Governing Proceedings, Oct. 9, 2020, ECF No. 142. Adding three new parties would only have injected complexity and threatened delay. *See New York v. U.S. Dep't of Educ.*, No. 20-cv-4260, 2020 WL 3962110, at *4 (S.D.N.Y. July 10, 2020) (unpublished) (rejecting FIRE's request to intervene in a parallel challenge for these reasons). "[T]his is the kind of judgment on which the district court's expertise and authority is at its zenith." *Daggett*, 172 F.3d at 113.

These concerns of complexity and delay are not merely hypothetical. Here, the district court has moved the case to trial without formal discovery and ordered, based on the parties' consent, that no witnesses will testify at trial and the

Department will not cross-examine Plaintiffs' declarants. Order Governing Proceedings, Oct. 9, 2020, ECF No. 142. That not only reflects the case's urgency and the issues being confined to the administrative record, but also avoids the harm that depositions and trial testimony would have inflicted on Plaintiffs, who include survivors of sexual assault as young as ten years old. JA67. But in the parallel case in the District Court for the District of Columbia, the same three Movants obtained permissive intervention, then sought to take six depositions—which the existing parties agreed was unnecessary and would only delay the proceedings.[6] The district court here denied intervention in the wake of those events. *See* Memorandum in Support of Motion to Intervene 2, ECF No. 25 (alerting court to D.D.C. proceedings); JA40.

[6] *See* Minute Order, *Pennsylvania*, No. 20-cv-01468 (July 6, 2020) (granting intervention); Motion to Take Deps., *Pennsylvania*, No. 20-cv-1468 (July 15, 2020), ECF No. 76; Pls.' Resp. 2, *Pennsylvania*, No. 20-cv-1468 (July 20, 2020), ECF No. 83; Defs.' Resp. 1-2, *Pennsylvania*, No. 20-cv-1468 (July 20, 2020), ECF No. 84; Minute Order, *Pennsylvania* (July 21, 2020) (denying discovery).

Given all the above, Movants do not even dispute that it was within the district court's discretion to deny permissive intervention on this record.[7] Instead, Movants fault the district court for the brevity of its order, seeking a remand for further elaboration. Opening Br. 27, 35. Each of Movants' criticisms is unfounded. This Court has squarely rejected the notion that in denying intervention, a "court's failure to explicate its reasoning amounts to a per se abuse of discretion." *T-Mobile*, 969 F.3d at 38. Nor does this Court take the least "generous possible reading" of a summary order and assume the district court failed to exercise its discretion. *Contra* Opening Br. 29; *id.* 28-29, 31.[8] Rather, this Court determines whether the decision "was within the compass of the district court's discretion" based on "the record as a whole." *T-Mobile*, 969 F.3d at 38. And nothing forbids a district court from using

[7] Movants list reasons they cited to the district court in favor of permissive intervention but do not claim that the district court was required to grant intervention for those reasons. Opening Br. 32-33. Such a claim would lack merit. For one thing, the other considerations just discussed support the denial of intervention. *Supra* at 34-36. For another, everything Movants say—for example, that they offer "'experience and expertise' on the questions presented," Opening Br. 33—could also be said by innumerable others. It was within the district court's discretion to allow such groups to participate as amici rather than as intervenors.

[8] One of Movants' readings of the district court's order is especially puzzling. Had the district court failed to rule on Movants' request for permissive intervention, as Movants appear to claim, *see* Opening Br. 28, 31, Movants would lack an order from which to appeal on that issue. In reality, the district court denied the entire motion to intervene, thus rejecting Movants' arguments for both as-of-right and permissive intervention. JA40.

intervention-as-of-right considerations as reasons to deny permissive intervention—as this Court itself has done. *See, e.g.*, *Caterino v. Barry*, 922 F.2d 37, 39 (1st Cir. 1990) ("[O]ur conclusion that the court acted within its discretion in denying intervention as of right effectively disposes of the permissive intervention question as well."); *T-Mobile*, 969 F.3d at 41 (adequate representation is reason to deny permissive intervention); *Mass. Food Ass'n*, 197 F.3d at 568 (same).

Movants cannot identify a single decision of this Court upsetting a denial of permissive intervention because the district court's explanation was too short. They rely instead on *Daggett* and *Negrón-Almeda v. Santiago*, 528 F.3d 15 (1st Cir. 2008)—neither of which finds fault in a permissive intervention opinion. Opening Br. 27, 34. Instead, in both cases the district court misapprehended the law in analyzing intervention as of right. *Daggett*, 172 F.3d at 113 (vacating because "it is unclear whether the district court would have decided the issue differently had it had the benefit of our clarification of *Moosehead*"); *Negrón-Almeda*, 528 F.3d at 25 (vacating because district court misinterpreted previous order, which "influenced its finding as to timeliness" under Rule 24(a)(2)). Neither case supports the result Movants seek: disturbing a district court's denial of permissive intervention that, in light of the record, lies undisputedly within the court's broad discretion.

CONCLUSION

The district court's order denying intervention should be affirmed.

Dated: November 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Fed. R. App. P. 32(g)(1), I certify that:

This brief complies with the type-volume limitations of First Circuit Rule 32(a) because it contains 8,782 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word-counting feature of Microsoft Word 2016.

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Dated: November 3, 2020

/s/ Michael F. Qian
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system on November 3, 2020.

Dated: November 3, 2020

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