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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion by denying petitioners' motion to intervene as defendants under Federal Rule of Civil Procedure 24(a) in a suit challenging regulatory amendments promulgated by the Department of Education.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 988 F.3d 556. The order of the district court (Pet. App. 20a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2021. The petition for a writ of certiorari was filed on July 19, 2021 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Private respondents sued the United States Department of Education and agency officials, challenging the substantive and procedural validity of amendments to agency regulations implementing Title IX of the Edu-

cation Amendments of 1972, 20 U.S.C. 1681 *et seq.* Petitioners are private advocacy organizations that had submitted comments during the rulemaking. They sought to intervene as defendants in the case under Federal Rule of Civil Procedure 24. The district court denied the motion to intervene, Pet. App. 20a-21a, and the court of appeals affirmed, *id.* at 1a-15a.

1. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs or activities that receive federal financial assistance. See 20 U.S.C. 1681-1688. In 2020, the Department of Education promulgated amendments to agency regulations implementing Title IX. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 29,839, 30,026 (May 19, 2020) (34 C.F.R. 106) (2020 Amendments). The 2020 Amendments established standards for how recipients of federal financial assistance covered by Title IX, including elementary schools, secondary schools, colleges, and universities, must respond to allegations of sexual harassment. 34 C.F.R. 106; see Pet. App. 4a.

As relevant here, the 2020 Amendments defined sexual harassment actionable under Title IX to include (1) a recipient's employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct; (2) unwelcome sexual conduct that a reasonable person would find to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; and (3) sexual assault, dating violence, domestic violence, or stalking (as defined in the Jeanne Clery Disclosure of Campus Security Policy and Cam-

pus Crime Statistics Act, 20 U.S.C. 1092(f), and the Violence Against Women Act of 1994, 34 U.S.C. 12291(a)). 34 C.F.R. 106.30(a); 85 Fed. Reg. at 30,033. The 2020 Amendments also afforded additional procedural protections to students accused of sexual harassment. See 34 C.F.R. 106.45; 85 Fed. Reg. at 30,046-30,055. One such provision stated that a decision-maker at a post-secondary institution, in determining responsibility for sexual harassment under Title IX, may not rely on party or witness statements that were not subject to cross-examination during a live hearing. See 34 C.F.R. 106.45(b)(6)(i).

2. Rule 24 of the Federal Rules of Civil Procedure governs the terms under which a non-party may intervene in an action pending in federal district court. The first part of the Rule sets forth the standards for intervention as of right. Fed. R. Civ. P. 24(a). It provides that a court must grant intervention when the movant "(1) is given an unconditional right to intervene by a federal statute"; or "(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." *Ibid.*

The second part of the Rule sets forth the standards for permissive intervention. It provides in relevant part that, "[o]n timely motion, the court may permit" intervention by any person who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

3. Private respondents are a group of advocacy organizations—Victim Rights Law Center, Equal Rights Advocates, Legal Voice, and Chicago Alliance

Against Sexual Exploitation—as well as several individuals, who collectively filed the present suit in June 2020. See Pet. App. 1a-4a. They alleged that the 2020 Amendments were procedurally and substantively invalid under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and the Equal Protection Clause of the Fifth Amendment. Pet. App. 4a-5a.

Petitioners Foundation for Individual Rights in Education (FIRE), Speech First, Inc., and the Independent Women's Law Center are advocacy groups that "promot[e] free speech and due process on college campuses." Pet. 4. Contending that the government would not adequately represent their interests in defending the challenged provisions of the 2020 Amendments, they filed a motion in July 2020 seeking to intervene as defendants in the suit as of right under Rule 24(a)(2), or, in the alternative, seeking permissive intervention under Rule 24(b). Pet. App. 6a.

The district court denied the motion without calling for a response from private respondents or the government. Pet. App. 21a; see *id.* at 6a. The court found that "there is no adequate showing that the government will not adequately protect the proposed intervenors[']rights." *Id.* at 21a (emphasis omitted). The court stated that it "will, of course, welcome a brief amicus curiae from the proposed intervenors." *Ibid.*

The case proceeded on the merits in district court. The government defended the 2020 Amendments in their entirety, arguing that private respondents lacked standing and that the challenged provisions did not violate either the APA or private respondents' equal protection rights. See Pet. App. 5a. Petitioners did not file an amicus brief.

4. Petitioners filed an interlocutory appeal of the district court's denial of intervention. See *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987) ("[W]hen an order prevents a putative intervenor from becoming a party in any respect, the order is subject to immediate review.") (emphasis omitted). The court of appeals affirmed. Pet. App. 1a-15a.[1]

The court of appeals held that the district court had not abused its discretion in determining that petitioners had failed to show that the government would not adequately represent any interests they have in the present action. Pet. App. 8a. Petitioners argued that, because they had "'interests and goals' purportedly not shared by the government," the government would not adequately represent their interests. *Id.* at 9a. The court recognized that petitioners hoped to raise an additional constitutional argument not advanced by the government in defense of the 2020 Amendments. *Ibid.* The court held, however, that the government was presumptively an adequate representative of the interests of other potential litigants who wished to see the 2020 Amendments upheld, and that the difference in "motivations" and "legal strategies" asserted here was insufficient to show otherwise. *Ibid.* The court explained that "perfect identity of motivational interests between the movant-intervenor and the government" is unnecessary to find adequate representation. *Id.* at 10a.

The court of appeals further held that "the government's putative interests in 'regulatory flexibility' and minimizing future legal challenges do not create a sufficient case-specific conflict to render the district court's

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[1] The government did not take a position as to the proper resolution of petitioners' appeal, and it did not file a brief or participate in oral argument in the First Circuit. See Pet. App. 3a.

denial of intervention an abuse of discretion." Pet. App. 10a. The court distinguished prior circuit precedent in which potential intervenors had demonstrated a conflict between their interests and the litigation goals of the government, finding that here, "the government has raised several defenses to the suit that would uphold the Rule, while [petitioners] would only raise extra constitutional theories not in conflict with government's defenses nor requiring additional evidentiary development." *Id.* at 11a; see *id.* at 10a-11a. The court further determined that "it would be inconsistent with the principle of constitutional avoidance to conclude that the district court abused its discretion in denying an intervention sought to expedite a judgment on constitutional questions that could have been avoided by limiting the case to the issues as framed by the plaintiffs and government." *Id.* at 12a.

Because the court of appeals held that the district court had not abused its discretion in concluding that petitioners had failed to establish inadequacy of representation here, the court found it unnecessary to decide whether petitioners actually had an interest in the litigation sufficient to warrant intervention. See Pet. App. 8a n.5.[2]

5. a. Following the court of appeals' decision, the State of Texas moved in the district court to intervene as of right or for permissive intervention. D. Ct. Doc. 164 (Apr. 30, 2021). The district court denied the motion "as untimely and without merit," but again noted that it would welcome an amicus brief. D. Ct. Doc. 170 (May

[2] The court of appeals also rejected petitioners' challenge to the district court's denial of permissive intervention. See Pet. App. 13a-15a. Petitioners do not seek review of that aspect of the court's decision. See Pet. i.

12, 2021) (emphasis omitted). Texas filed an amicus brief in the district court, see D. Ct. Doc. 176 (June 1, 2021), and pursued an interlocutory appeal of the denial of intervention, see D. Ct. Doc. 177 (June 2, 2021); see also *Victim Rights Law Center* v. *Texas*, No. 21-1445 (1st Cir.).

b. On July 28, 2021, the district court entered final judgment in private respondents' suit, largely upholding the 2020 Amendments. See D. Ct. Doc. 183. The court upheld, as reasonable, the agency's conclusions as to the scope of Title IX and what constitutes sex discrimination. *Id.* at 35-39. The court further held that the 2020 Amendments were a logical outgrowth of the proposed rule and that they did not violate private respondents' rights under the Equal Protection Clause. *Id.* at 50-61.

With respect to nearly all of the challenged regulatory provisions, the district court rejected private respondents' contention that the 2020 Amendments were arbitrary and capricious. See D. Ct. Doc. 183 at 39-45. The single exception was a portion of 34 C.F.R. 106.45(b)(6)(i) that prohibits a decision-maker at a post-secondary institution from relying on party and witness statements not subject to cross-examination during a live hearing in determining responsibility for sexual harassment under Title IX. D. Ct. Doc. 183 at 45-50. In the court's view, "the Department failed, even implicitly, to consider the consequences from the prohibition and definition of statements" not subject to cross-examination. *Id.* at 49. Finding that provision to be arbitrary and capricious, the court vacated the provision and remanded it to the agency for "further consideration and explanation." *Id.* at 61; see D. Ct. Doc. 186, at

2 (Aug. 10, 2021) (clarifying that earlier order included vacatur of Section 106.45(b)(6)(i)).

c. Private respondents appealed the district court's judgment to the First Circuit. D. Ct. Doc. 198 (Sept. 27, 2021). Several other entities or individuals who had supported the 2020 Amendments also submitted post-judgment filings.

On September 24, 2021, after the Department of Education indicated that it did not intend to appeal the district court's order vacating Section 106.45(b)(6)(i) and remanding to the agency for further consideration, Texas filed a new motion to intervene as defendant for purposes of appeal. D. Ct. Doc. 187; see D. Ct. Doc. 188, at 1-2 (Sept. 24, 2021). Texas also filed a notice of appeal of the district court's final judgment, conditioned on the district court's grant of its motion to intervene. D. Ct. Doc. 191 (Sept. 24, 2021). On September 27, 2021, the district court granted Texas's motion to intervene solely for purposes of appeal. D. Ct. Doc. 195.

Petitioners also filed a conditional notice of appeal of the district court's judgment. D. Ct. Doc. 192 (Sept. 24, 2021). Unlike Texas, however, petitioners did not file a new motion to intervene for purposes of appeal.

Finally, advocacy group Families Advocating for Campus Equality (FACE) and three individual college students who are subject to Title IX disciplinary proceedings filed conditional notices of appeal and motions to intervene for purposes of appeal. See D. Ct. Doc. 199 (Sept. 27, 2021); D. Ct. Doc. 200 (Sept. 27, 2021); D. Ct. Doc. 201 (Sept. 27, 2021); D. Ct. Doc. 202 (Sept. 27, 2021). The district court denied their motions to intervene, finding that the motions were not timely and that the movants had "fail[ed] to explain how the State of Texas, which [the district court] allowed to intervene for

purposes of appeal, will not adequately protect their interests." D. Ct. Doc. 215, at 3 (Oct. 14, 2021) (citation omitted). On October 18, 2021, FACE and the three individual students appealed that ruling to the First Circuit. D. Ct. Doc. 218.

6. After the district court entered judgment on the merits, the Department of Education announced that it would no longer enforce the vacated portion of the 2020 Amendments. See Letter from Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep't of Education, to Students, Educators, and Other Stakeholders, *Re: Victim Rights Law Center et al. v. Cardona* 2 (Aug. 24, 2021) (Aug. 24, 2021 Letter), https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf. The Department also indicated, consistent with earlier statements, that it is currently "undertaking a comprehensive review of [its] actions" under Title IX as instructed by a March 2021 Executive Order. *Ibid.*; see Executive Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 11, 2021). As part of that ongoing review, the Department plans to issue a notice of proposed rulemaking that would amend the 2020 Amendments that are at issue in the present suit. Aug. 24, 2021 Letter 2.

Because of the ongoing review and upcoming rulemaking, the Department and plaintiffs in a parallel district court case filed a joint motion to hold that case in abeyance. See Joint Motion To Hold Case In Abeyance, *Pennsylvania* v. *Cardona*, 20-cv-1468 (D.D.C.) (Feb. 3, 2021). The court granted the motion. See Minute Order, *Pennsylvania v. Cardona*, 20-cv-1468 (D.D.C.) (Feb. 4, 2021). The parties subsequently filed joint status reports requesting that the court continue the stay

because the upcoming rulemaking could "alter significantly the course of th[e] litigation," and thus "the interests of the parties and of judicial economy would be well served by continuing the present abeyance to permit the Department to evaluate potential regulatory changes." Joint Status Report 3, *Pennsylvania* v. *Cardona*, 20-cv-1468 (D.D.C.) (July 6, 2021) (July 6, 2021 Joint Status Report); Joint Status Report 3-4, *Pennsylvania* v. *Cardona*, 20-cv-1468 (D.D.C.) (Sept. 7, 2021) (Sept. 7, 2021 Joint Status Report). Petitioners and Texas, who were granted permissive intervention in that case, did not object to the requested continuation of the stay. *Ibid.*[3] The district court granted the parties' requests. Minute Order, *Pennsylvania* v. *Cardona*, 20-cv-1468 (D.D.C.) (July 8, 2021); Minute Order, *Pennsylvania* v. *Cardona*, 20-cv-1468 (D.D.C.) (Sept. 13, 2021) (Sept. 13, 2021 Minute Order).

ARGUMENT

Petitioners contend (Pet. 31-34) that the district court abused its discretion in denying their motion to intervene in this case in July 2020. They assert (Pet. 15-26) that the court of appeals' decision affirming that denial implicates a division of authority among the circuits about the showing a potential intervenor must make when seeking to intervene alongside the federal govern-

[3] The government consented to permissive intervention in that case and took no position on petitioners' motion to intervene as of right. See Gov't Response to Mot. to Intervene, *Pennsylvania* v. *Cardona*, 20-cv-1468 (D.D.C.) (July 1, 2020). Noting that the motion presented a "close question," the district court stated that it was relying on its "inherent discretion" to grant permissive intervention under Rule 24(b). Minute Order, *Pennsylvania* v. *Cardona*, 20-cv-1468 (D.D.C.) (July 6, 2020).

ment to defend a federal rule. The court of appeals correctly affirmed the denial of intervention here, and petitioners have not shown that any other circuit would have viewed the district court's order as an abuse of discretion. Moreover, developments that post-date the court of appeals' decision demonstrate that this case would not be a suitable vehicle to resolve any conflict among the circuits. Further review is not warranted.

1. a. The district court acted well within its discretion in denying petitioners' motion to intervene in July 2020. In contending that the federal government would not "adequately represent" petitioners' putative interests in this suit, Fed. R. Civ. P. 24(a)(2), petitioners asserted that they would advance legal arguments different from the government's because they hoped for "a definitive ruling that accepts their constitutional arguments" rather than a decision upholding the 2020 Amendments on narrower grounds. D. Ct. Doc. 25, at 12 (July 21, 2020). But at the time of the district court's decision, there was no "conflict" between the defenses the government was likely to (and ultimately did) assert and the "extra constitutional theories" that petitioners sought to inject into the case. Pet. App. 10a-11a. "[T]he government's success in defending the Rule would not foreclose [petitioners] from presenting their constitutional arguments in a later and appropriate case." *Id.* at 11a. Accordingly, petitioners' July 2020 motion "demonstrated merely that they disagree[d] with the Attorney General's reasonable litigation tactics" for the defense of the 2020 Amendments. *Stuart* v. *Huff*, 706 F.3d 345, 352 (4th Cir. 2013) (Wilkinson, J.).

Even assuming that tactical disagreements might in some circumstances be a sufficient basis for finding a lack of "adequate[] represent[ation]," Fed. R. Civ. P.

24(a)(2), the district court did not abuse its discretion in concluding that the particular disagreement asserted here—about whether to argue that certain aspects of the 2020 Amendments were constitutionally required—was insufficient to compel such a finding. "[T]he government made a strategic and policy choice to defend the Rule's promulgation on non-constitutional grounds." Pet. App. 12a. That decision was consistent with the principle of constitutional avoidance, which "counsel[s] 'not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Pearson* v. *Callahan*, 555 U.S. 223, 241 (2009) (citations omitted). Conversely, it would be "*inconsistent* with the principle of constitutional avoidance to conclude that the district court abused its discretion in denying an intervention sought to expedite a judgment on constitutional questions that could have been avoided by limiting the case to the issues as framed by the plaintiffs and government." Pet. App. 12a (emphasis added).

A governmental party is especially likely to serve as an adequate representative of a putative intervenor's interests in a case, like this one, that involves judicial review of formal agency action. Under the principles set forth in *Securities & Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80 (1943), a reviewing court ordinarily may uphold such actions only on rationales articulated by the agency itself. See *id.* at 95 ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."). In adopting the 2020 Amendments at issue here, the Department of Education did not rely on or endorse the constitutional arguments that petitioners sought to assert in the ensuing litigation. The existence

of an independent administrative-law obstacle to the reviewing court's consideration of those arguments made it particularly likely that the government would serve as an adequate representative of other parties that sought to have the 2020 Amendments sustained.[4]

b. Petitioners' reliance (Pet. 26-28) on this Court's decision in *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528 (1972), is misplaced.

The statute at issue in *Trbovich* gave "individual union members certain rights against their union" and was structured such that, "for purposes of enforcing those rights," "the Secretary of Labor in effect becomes the union member's lawyer." 404 U.S. at 538-539 (citation omitted). In that statutory context, the Court held that "the member who initiated the entire enforcement proceeding" by bringing his claim to the Secretary could intervene to vindicate his own rights if he had "a valid complaint about the performance of 'his lawyer'" (*i.e.*, the Secretary). *Id.* at 539.

The suit in which petitioners sought to intervene, by contrast, does not involve an enforcement proceeding

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[4] On October 29, 2021, this Court granted a writ of certiorari on the first question presented in *State of Arizona* v. *City and County of San Francisco, California*, No. 20-1775. That question concerns an effort by the petitioning States to intervene in pending litigation to appeal a preliminary injunction against enforcement of a federal regulation after the federal government ceased its efforts to defend the rule. In the present case, by contrast, petitioners did not submit any renewed request to intervene after the government announced that it would not appeal the adverse aspect of the district court's merits ruling. See p. 8, *supra*. Rather, the only question before this Court is whether the district court abused its discretion by denying petitioners' motion to intervene at a time when the federal government was defending all aspects of the 2020 Amendments.

initiated by or brought on behalf of petitioners. Instead, petitioners sought to intervene in order to assert a "defense," Fed. R. Civ. P. 24(c), of the Department of Education's 2020 regulatory amendments. Because neither the Department of Education nor its Department of Justice attorneys act as petitioners' lawyers or otherwise assert legal claims on petitioners' behalf, the special relationship that existed in *Trbovich* is absent here. Rather, the relevant interest in the litigation is the "share[d] objective" of upholding the challenged law. *Stuart*, 706 F.3d at 353. In such a case *Trbovich* is "inapposite," and instead "the relevant and settled rule is that disagreement over how to approach the conduct of the litigation is not enough to rebut the presumption of adequacy." *Ibid.*; see *ibid.* (collecting authorities).

c. Petitioners argue (Pet. 29-31) that the First Circuit's decision is inconsistent with the text of Rule 24(a)(2). Specifically, petitioners contend that, because the Rule's adequacy-of-representation requirement is preceded by the word "unless," "the 'adequate representation' element of the test only comes into play after a party has demonstrated that it otherwise has an interest at stake and should presumptively be allowed to intervene." Pet. 29-30 (emphasis omitted).

Contrary to petitioners' suggestion, nothing in the text of the Rule establishes a presumption against finding adequate representation. Rather, Rule 24(a)(2) is silent as to the manner in which adequacy of representation can be proved or disproved, and courts (including this Court in *Trbovich*, 404 U.S. at 538 n.10) have consistently placed the burden on potential intervenors to make an affirmative showing of inadequacy. See *Daggett* v. *Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999) ("case law is

settled that the applicant for intervention must identify any inadequacy of representation").

d. Petitioners contend (Pet. 33) that, because the government is "obliged to act on behalf of the entire public and with concern for its own institutional prerogatives and flexibility for future rulemakings," it will often be an inadequate representative for potential intervenors who seek to assert narrower interests. See Pet. 31-34. That policy concern is at its lowest ebb, however, where the government and potential intervenor share the goal of upholding the validity of a federal law and simply disagree about the best arguments in support of that result. See pp. 11-13, *supra*. Adopting petitioners' skeptical approach to the adequacy of governmental representation in such cases could enable a virtually limitless number of private parties to intervene as of right. Petitioners identify nothing in Rule 24's text or history suggesting that the Rule was intended to produce that result. Cf. Fed. R. Civ. P. 24(b)(3) (providing that, in deciding whether to allow permissive intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights"). Indeed, "to permit private persons and entities to intervene in the government's defense of a statute [or regulation] upon only a nominal showing would greatly complicate the government's job," since "[f]aced with the prospect of a deluge of potential intervenors, the government could be compelled to modify its litigation strategy to suit the self-interested motivations of those who seek party status, or else suffer the consequences of a geometrically protracted, costly, and complicated litigation." *Stuart*, 706 F.3d at 351.

2. Petitioners contend that this Court's review is warranted to resolve a circuit conflict on the question whether adequacy of representation should be presumed when a litigant seeks to intervene on the same side as the government. For multiple reasons, however, this is not a suitable case in which to resolve any differences among the courts of appeals' approaches to determining adequacy of representation under Rule 24(a)(2).

a. As a result of intervening developments, this Court's determination whether the district court abused its discretion by denying petitioners leave to intervene, based on the facts that were before the district court when it denied petitioners' motion, would no longer serve any practical purpose. Petitioners' motion to intervene has been overtaken by subsequent events: the parties and amici submitted extensive summary-judgment briefing in the district court; the district court issued a final judgment on the merits, upholding 12 of the 13 challenged regulatory provisions; the government determined not to appeal the portion of the judgment that invalidated the one remaining provision; upon learning of the government's decision, Texas filed a renewed motion to intervene for purposes of appeal; the district court granted that motion; and Texas filed a timely notice of appeal. See pp. 7-9, *supra*.

Even if petitioners could show that the federal government did not adequately represent their interests at an earlier stage of this case, it is unclear why any such inadequacy would exist now. In particular, it is unclear why petitioners' putative interests in the case are not fully served by Texas's participation as a party in the appeal—as the district court recently observed in deny-

ing a new motion to intervene filed by an advocacy organization with asserted interests similar to petitioners'. See D. Ct. Doc. 215, at 3.

b. Even if this Court granted the petition for a writ of certiorari, the underlying suit might become moot before or shortly after the Court resolved the intervention issue. The Department of Education's comprehensive review of its Title IX regulations is ongoing, and the Department plans to issue a notice of proposed rulemaking in spring 2022, followed by new regulatory amendments supported by a new administrative record. See p. 9, *supra*. Respondents' claims regarding the 2020 Amendments may become moot upon issuance of a new rule.

Petitioners appear to recognize this possibility. As discussed, see pp. 9-10 & n.3, *supra*, petitioners were granted permissive intervention in a parallel challenge to the 2020 Amendments. See *Pennsylvania* v. *Cardona*, No. 20-cv-1468 (D.D.C.). Petitioners did not object, however, to a joint request to continue to hold that suit in abeyance pending completion of the Department of Education's more recent rulemaking process. See Sept. 7, 2021 Joint Status Report 3-4 ("Because the Department is exploring administrative options that are likely to alter significantly the course of this litigation—including the publication of a notice of proposed rulemaking—the interests of the parties and of judicial economy would be well served by continuing the present abeyance to permit the Department to evaluate potential regulatory changes."); Sept. 13, 2021 Minute Order. Similarly here, any decision by the First Circuit on the merits of private respondents' claims—and thus the defenses petitioners wish to assert—could become unnecessary in light of further rulemaking at the Department of Education. If petitioners are dissatisfied with

the result of that rulemaking process, they can bring a separate lawsuit challenging any new rule and, if appropriate, raise in that suit the constitutional arguments that they sought to raise as intervenors here.

c. Even if this Court granted review and ruled in petitioners' favor on the sole issue raised by the petition for a writ of certiorari and addressed by the courts below—*i.e.*, adequacy of representation—that would not entitle petitioners to intervene as of right. Rather, petitioners still would need to show on remand that they have a sufficient "interest relating to the property or transaction that is the subject of the action," and that they are "so situated that disposing of the action may as a practical matter impair or impede [their] ability to protect [their] interest." Fed. R. Civ. P. 24(a)(2). At this juncture, it is unclear whether petitioners could meet those requirements.

d. Although petitioners contend that the courts of appeals are divided over what standard applies when a litigant seeks to intervene on the same side as the government, that contention is overstated, and petitioners have not established that any other circuit would have viewed the district court's order here as an abuse of discretion.

Petitioners acknowledge (Pet. 16-19) that most of the courts of appeals apply a presumption of adequate representation that is not materially different from the presumption discussed in the decision below. Like the First Circuit, the Second, Fourth, Fifth, Seventh, Eighth, and Federal Circuits all require a strong showing of inadequacy in order to overcome the presumption of adequate representation by the government. See *United States* v. *City of New York*, 198 F.3d 360, 367 (2d Cir. 1999); *North Carolina State Conference of NAACP*

v. *Berger*, 999 F.3d 915, 932–933 (4th Cir. 2021) (en banc); *Entergy Gulf States La., LLC* v. *EPA*, 817 F.3d 198, 203 n.2 (5th Cir. 2016); *Planned Parenthood* v. *Kaul*, 942 F.3d 793, 799 (7th Cir. 2019); *North Dakota ex rel. Stenehjem* v. *United States*, 787 F.3d 918, 922 (8th Cir. 2015); *Wolfsen Land & Cattle Co.* v. *Pacific Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012); see also Pet. App. 8a.

Although petitioners describe the approaches of the Third and Ninth Circuits as applying a weaker presumption of adequacy and thereby "stak[ing] out a middle ground" (Pet. 15), the decisions on which petitioners rely do not conflict with the decision below. In *Pennsylvania* v. *President United States of America*, 888 F.3d 52 (2018), for example, the Third Circuit stated that it applies a rebuttable presumption of adequacy of representation when a movant attempts to intervene in support of a government entity. *Id.* at 60. Although the court observed that "even when the government is a party, '[t]he burden of establishing inadequacy of representation . . . varies with each case,'" it made clear that where "the governmental and private interests 'closely parallel' one another," the presumption of adequacy is "particularly strong." *Ibid.* (citation omitted; brackets in original).

Petitioners argue (Pet. 20-21) that here, as in *Pennsylvania*, see 888 F.3d at 61-62, petitioners' interests diverged from the government's interests in regulatory flexibility and protecting the public welfare. But while petitioners wished to "advance a legal theory" that the government had indicated it would not raise, Pet. 11, petitioners and the government shared the core legal objective of upholding the 2020 Amendments, so that their interests in the litigation were closely aligned in the relevant sense,

see Pet. App. 8a-12a. Petitioners' attempt to establish inadequacy therefore would likely fail under the Third Circuit's test. *Pennsylvania*, 888 F.3d at 60; Pet. App. 9a-12a.

Petitioners' intervention motion would not likely have prevailed in the Ninth Circuit either. That court has stated that, under its precedent, "it is 'unclear'" whether the fact that the government represents a given side in litigation gives rise to an independent presumption of adequacy, or merely "strengthens" the presumption of adequacy that arises when *any* two parties share the same "ultimate objective." *Prete* v. *Bradbury*, 438 F.3d 949, 957 (9th Cir. 2006) (citation omitted); see Pet. 21. Either way, because petitioners and the government had the same "ultimate objective" of upholding the 2020 Amendments, the presumption of adequacy would apply if this case had arisen in the Ninth Circuit. See *Perry* v. *Proposition 8 Official Proponents*, 587 F.3d 947, 950–951 (9th Cir. 2009) ("Where the party and the proposed intervenor share the same 'ultimate objective,' a presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a 'compelling showing' to the contrary.") (quoting *Arakaki* v. *Cayetano,* 324 F.3d 1078, 1086 (9th Cir.), cert. denied, 540 U.S. 1017 (2003)).

Petitioners also have not established that they would have been permitted to intervene as of right in the four circuits that they describe (Pet. 22-24) as imposing only a minimal burden on potential intervenors to show inadequacy. Each of the decisions petitioners cite is distinguishable on its facts, particularly because none of those cases involved an APA challenge to the validity of a federal regulation. See *Crossroads Grassroots Policy Strategies* v. *FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015);

Grutter v. *Bollinger*, 188 F.3d 394 (6th Cir. 1999); *Utah Ass'n of Counties* v. *Clinton*, 255 F.3d 1246, 1255–1256 (10th Cir. 2001); *Clark* v. *Putnam Cnty.*, 168 F.3d 458 (11th Cir. 1999).

In *Crossroads Grassroots*, the Federal Election Commission (FEC or Commission) dismissed a private party's administrative complaint against a nonprofit corporation (Crossroads) by an equally divided vote, after the FEC's General Counsel had recommended that the Commission "find reason to believe" Crossroads had violated the law. See 788 F.3d at 315. When the private complainant filed suit to challenge the dismissal, the district court denied Crossroads' motion to intervene, finding that the Commission could adequately represent its interests. *Id.* at 315-316. The D.C. Circuit reversed, concluding that "Crossroads easily met its minimal burden of showing inadequacy of representation and should be allowed to intervene as of right." *Id.* at 321. The court found it "apparent the Commission and Crossroads hold different interests, for they disagree about the extent of the Commission's regulatory power, the scope of the administrative record, and post-judgment strategy." *Ibid.* Here, by contrast, the government and petitioners unambiguously shared the objective of upholding the challenged regulation, and there was no showing of conflicting interests. See Pet. App. 9a-12a.

Other D.C. Circuit cases show that this context matters, since that court has found intervention as of right to be unwarranted where the interests of a party and a potential intervenor were "closely aligned." *Massachusetts Sch. of Law at Andover, Inc.* v. *United States*, 118 F.3d 776, 781 (1997); see *Jones* v. *Prince George's County*, 348 F.3d 1014, 1019 (2003) (affirming district court's holding that potential intervenors had "failed to

show that any interests they may have are inadequately represented in this case") (citation omitted). In arguing that the D.C. Circuit would have found no such alignment here, petitioners point out (Pet. 25, 38) that they were permitted to intervene in a parallel suit in the District of Columbia. But the district court's electronic minute order in that case, which granted permissive intervention under Rule 24(b) with government consent, provides no meaningful evidence regarding the D.C. Circuit's likely disposition of petitioner's current appeal, which involved a motion to intervene as of right. See Minute Order, *Pennsylvania* v. *Cardona*, 20-cv-1468 (D.D.C.) (July 6, 2020) (noting that motion presented "close question," and relying on "inherent discretion" under Rule 24(b)).

The Sixth Circuit's decision in *Grutter*, *supra*, is likewise distinguishable. That case involved challenges to a state law school's admissions policy that was directly applicable to some of the potential intervenors (future applicants to the school), rather than (as here) a challenge to a federal regulation that affects the potential intervenors only indirectly. See *Grutter*, 188 F.3d at 396. In a subsequent case, moreover, the Sixth Circuit held that while the standard for establishing inadequate representation "has been described as minimal," applicants for intervention "[n]evertheless * * * must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit." *United States* v. *Michigan*, 424 F.3d 438, 443-444 (2005) (citing, *inter alia*, *Grutter*, 188 F.3d at 400). Because petitioners "share[d] the same ultimate objective as" the government, *ibid.*, the presumption of adequacy would apply in the Sixth Circuit.

Citing *Utah Association of Counties*, 255 F.3d at 1255–1256, petitioners argue (Pet. 23) that the Tenth Circuit applies a "minimal burden" standard without any presumption of adequacy. Later Tenth Circuit decisions, however, show that the court's standard is not clear-cut. In *Kane County* v. *United States*, 597 F.3d 1129 (2010), where the parties disputed the existence and scope of certain rights of way over federal land, the Tenth Circuit affirmed a district court's denial of intervention as of right on adequacy-of-representation grounds. Employing a case-specific analysis that did not rely on either a minimal-burden standard or a presumption of adequacy, the court held that the potential intervenor "ha[d] failed to establish that its interest in the instant case will not be adequately represented by the federal government," and noted that past disagreements with the government's land-management decisions were insufficient to demonstrate inadequacy of representation. *Id.* at 1134; see *id.* at 1134-1135.

Several years later, following the Tenth Circuit's partial reversal and remand of the final judgment eventually entered in that case, the district court denied a new intervention motion filed by the same potential intervenor. See *Kane County* v. *United States*, 928 F.3d 877, 883-886 (10th Cir. 2019), cert. denied, 141 S. Ct. 1283, 1284 (2021). On appeal, a divided Tenth Circuit panel reversed the denial of intervention. See *id.* at 892-897. Although the majority relied on circuit precedent holding that the burden to demonstrate inadequacy is "minimal," it also emphasized that "representation is not inadequate simply because the applicant and the representative disagree regarding the facts or law of the case." *Id.* at 892. The court stated that a presumption of adequacy would apply where the government

and the putative intervenor had "identical interests," but explained that the disposition of the case sought by the putative intervenor there (an order defining the scope of the existing rights of way as narrowly as possible) was potentially different from the one the United States would seek. *Id.* at 893; see *id.* at 893-895. In this case, by contrast, petitioners and the government sought the same disposition—an order upholding the 2020 Amendments in their entirety—and disagreed only about the legal arguments to advance in pursuit of that shared goal. It is accordingly unclear whether the result of this case would have been different in the Tenth Circuit.

For similar reasons, petitioners' reliance on the Eleventh Circuit's decision in *Clark*, *supra*, is misplaced. In *Clark*, the court explained that "[w]e presume adequate representation when an existing party seeks the same objectives as the would-be interveners." 168 F.3d at 461. The court later explained that, even when a potential intervenor's general interests in the underlying subject matter of an APA challenge are different from the federal government's, what matters for purposes of determining adequacy of representation under Rule 24(a)(2) is whether the two share an interest in upholding the legality of the challenged action. *Sierra Club, Inc.* v. *Leavitt*, 488 F.3d 904, 910-911 (11th Cir. 2007) ("This reasoning applies with equal force here: the [putative intervenor's] and the EPA's mutual interest in this case is to defend the EPA's approval of Florida's 2002 List."). Under that standard, it is far from clear that the Eleventh Circuit would have overturned the district court's denial of intervention in this case.

* * * * *

Petitioners have not demonstrated that any other circuit would have held that the district court abused its discretion in denying petitioners' motion to intervene under the circumstances of this case. And even if this Court granted the petition for a writ of certiorari and ruled in petitioners' favor on that issue, its decision likely would have no practical impact on petitioners' interests in light of developments that post-date the court of appeals' ruling. This Court's review therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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