TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

INTRODUCTION

Plaintiff seeks to leverage its complaints about alleged sexual misconduct at a single public high school into a basis for throwing out the entirety of a Department of Education rule that protects free speech and due process rights at both secondary schools and college campuses throughout the United States. Movants include some of America's largest and most prominent advocacy organizations dedicated to promoting free speech and due process at colleges and universities. They seek to intervene in thismandatory and permissive intervention, and they should be allowed to intervene to defend an interest otherwise unrepresented in this litigation.

BACKGROUND

A. The Department of Education's Title IX Rule

On May 6, 2020, the Department of Education announced that it would issue a final rule imposing certain legal obligations under Title IX on federal funding recipients—a category that includes virtually all colleges and universities in the United States. One of the Final Rule's most important provisions is its definition of conduct that qualifies as the kind of "sexual harassment" that Title IX requires funding recipients to investigate and punish. Among other things, the rule defines "sexual harassment" to include "unwelcome conduct on the basis of sex determined by a reasonable person" that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." 85 Fed. Reg. 30,026, at 30,178 (May 19, 2020). This definition is drawn from the Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 650 (1999), a case where a private plaintiff sued a funding recipient under Title IX for its deliberate indifference to peer sexual harassment.

The Final Rule's adoption of "the *Davis* standard" to define sexual harassment marks a departure from the Department's past guidance, which claimed to follow *Davis* but described the

attributes of actionable sexual harassment in the disjunctive ("severe, pervasive, or objectively offensive") and stated that conduct that is "persistent" qualifies as harassment (even if it is not objectively offensive). *See, e.g.*, U.S. Dep't of Educ., Dear Colleague Letter: Harassment and Bullying at 2 (Oct. 26, 2010), https://bit.ly/2Bp3rg4. The Final Rule became effective on August 14, 2020. Plaintiff asks the Court to throw out the rule's definition of "sexual harassment" and to force the Department to reinstate a broader and more subjective definition of that important term. *See* Complaint for Injunctive and Declaratory Relief Administrative Procedure Act Case at p. 22–23, Doc. 1 (March 8, 2021) ("Compl.").

Before the Final Rule was promulgated, the Foundation for Individual Rights in Education ("FIRE") and the Independent Women's Forum—two of the proposed intervenors—submitted comments to the Department urging it to adopt the *Davis* standard because any broader definition of sexual harassment would violate the First Amendment. *See* Comment of the Foundation for Individual Rights in Education in Support of the Department of Education's Proposed Regulations on Title IX Enforcement (Jan. 30, 2019), https://bit.ly/2Nl6qss; IWF, Comments on the Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), https://bit.ly/2Bw54J5. *Davis* itself strongly supports this position. In response to First Amendment concerns raised by Justice Kennedy in dissent, the *Davis* majority took care to define the conduct that funding recipients must punish in a manner that allows public university administrators "to refrain from a form of disciplinary action that would expose [them] to constitutional . . . claims." 562 U.S. at 649. Since *Davis*, courts have looked to that decision for guidance on the scope of "sexual harassment" that public universities may prohibit consistent with the First Amendment. *See, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008).

Despite adopting the *Davis* standard in part because it concluded that doing so would help

to punish speech, including speech on gender, sex, and other controversial topics that have routinely been the basis for discipline under conduct codes that prohibit "sexual harassment." FIRE also spends money preparing printed materials on these issues for distribution on college campuses. The implementation of the rule

If, on the other hand, the Court upholds the Final

litigation, it was "clear" to the Court "that in this case there is sufficient doubt about the adequacy of representation to warrant intervention." *Id*. at 538.

Similarly, in *Californians for Safe and Competitive Dump Truck Transp. v. Mendonca*, the Ninth Circuit permitted a union to intervene as a defendant in an action against state agencies regarding the preemption of California's Prevailing Wage Law. 152 F.3d 1184, 1190 (9th Cir. 1998). The Court noted that the employment interests of the union members in receiving the prevailing wage "were . . . more narrow and parochial" than the state's broader interest in defending the law generally, and therefore the union had made a sufficient showing of inadequacy. *Id*.; *see also Citizens for Balanced Use*, 647 F.3d at 899 ("[T]he government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entitii3

(N.D. Cal. 2016) (intervention timely where motion filed in "early stage of the proceedings before the complaint had been answered . . . or substantive proceedings had occurred."). Lastly, Movants' defenses—which "squarely respond" to Plaintiff's claims—obviously share common questions with the main action. *Kootenai Tribe*, 313 F.3d at 1111.

Moreover, intervention will not cause any undue delay or prejudice. Rule 24(b) only mentions *undue* delay, and normal delay does not require denying intervention—"otherwise every intervention motion would be denied out of hand because it carried with it, almost [by] definition, the prospect of prolonging the litigation." *W. Coast Seafood Processors Assn v. Nat. Res. Def. Council, Inc*., 643 F.3d 701, 710 (9th Cir. 2011) (citing *League of*

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Respectfully submitted,

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*Motion to Appear Pro Hac Vice Forthcoming