No. 21-84

In The
Supreme Court of the United States

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, ET AL.,

Petitioners,

v.

VICTIM RIGHTS LAW CENTER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is the national law

but for its intervention. Sometimes this is because IJ made successful substantive arguments different from those the government advanced. Sometimes this is because IJ made tactical decisions that led to quicker resolution of the case. But in each case, the only way for IJ's clients to guarantee the protection of their substantive rights was to intervene directly in the litigation.

But the split of authority at the heart of the Question Presented threatens the ability of IJ to protect the rights of our clients, as more and more lower courts impose inappropriately higher standards for when an applicant may intervene alongside the government. These heightened standards threaten the ability of IJ's clients and other ordinary citizens nationwide to protect their own distinctive individual rights. For these reasons, and to ensure a uniform rule governing this type of intervention, the petition for certiorari should be granted.

SUMMARY OF ARGUMENT

Fifty years ago, this Court laid out a straightforward rule for when an applicant can intervene alongside the government: The Applicant need only show that the government "may be" providing "inadequate" representation. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). This "minimal" standard reflects the reality that "[e]ven if the [government] is performing [its] duties . . . the [intervenor]

may have a valid complaint about the performance of 'his lawyer.' " *Id*. at 539.

Despite this Court's permissive standard, however, the First Circuit and five other circuits[2] impose higher burdens on would-be intervenors when the government is already a party. These higher burdens not only clash with *Trbovich*, but they also make it harder for private citizens to vindicate their rights in court. In contrast, the Circuit Court for the District of Columbia and three other circuits[3] make it easy for applicants whose rights are threatened to intervene. The Third and Ninth circuits are in between with a weak presumption in favor of the government.[4]

This split of authority matters because citizens' ability to intervene alongside the government makes a practical difference to their power to vindicate their rights. This is true in three independent ways. First, an intervenor may advance substantive arguments

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[2] *See*, *e.g.*, *Pub. Serv*.

that the government is either unwilling, or unable, to make. For instance, in at least three state and federal supreme court cases, IJ made arguments with which the courts ultimately agreed—but which the government refused to make. Second, an intervenor may make different tactical decisions than the government that affect an intervenor's rights. Here, too, intervenors' tactical differences with the government have led to the courts' securing intervenors' rights when they would have otherwise gone unprotected (or gone unprotected for some time). Third, intervenors have consistent, private interests, while a government defendant inevitably faces broader political pressures that affect its willingness to make certain arguments and that may change with the passage of time.

This case gives the Court a chance to establish a uniform rule for when an applicant can intervene alongside the government. Since *Trbovich*, too many courts have ratcheted up the standards for intervention and have thereby deprived citizens of a forum where they can argue for their rights. Because the ability of citizens to vindicate their rights should not depend on the court in which third parties have □led suit, this Court should reaf□rm its permissive rule for when an applicant may intervene and reject the heightened standards invented by too many lower courts.

ARGUMENT

This Court's permissive standard for intervention allows applicants to easily move to defend their interests, even when the government is a party. Part I, below, explains how lower courts abandoned this Court's standard in favor of new, stingier rules that hinder intervention. Part II explains why this matters and how permissive intervention rules allow private parties to defend their rights in ways that make a difference to both their legal rights and their lives.

I. Lower courts have departed from *Trbovich*'s permissive standard.

In *Trbovich*, this Court considered whether an applicant could intervene alongside the government. The applicant, a union member, filed a complaint with the Secretary of Labor that his union had held an illegal

government's representation was inadequate. "We disagree . . . that petitioner's interest must be adequately represented unless the court is prepared to find that the [government] has failed to perform [its] statutory duty." *Id.* at 538.

Court's holding in *Trbovich*. First, these courts say the applicant's "burden of persuasion is ratcheted upward" when the government is a party. *Victim Rights L. Ctr. v. Rosenfelt*, 988 F.3d 556, 561 (1st Cir. 2021) (cleaned up). Second, they hold that the government is entitled to a rebuttable presumption that it "will defend adequately its action[.]" *Id.* Third, they require an applicant to make "a strong affirmative showing" that the government is not representing its interests. *Id.*

This standard turns *Trbovich* on its head. Both *Trbovich* and the federal rules for intervention[7] expressly reject the idea that government has a strong rebuttable presumption that it represents an intervenor's interests. This standard also ignores the reality that the government does *not* always have the same interests as an intervenor and that it can make decisions—for reasons strategic, tactical, and political, *see infra*, Part II—that harm intervenors.

Because applicants should not have to first prove that the government will inadequately represent their interests to vindicate their rights, this Court should

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[7] Intervention is warranted "*unless* the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24 (emphasis added). The word "unless" was inserted to "shift the burden of persuasion" from one requiring the applicant to persuade the court that representation is inadequate to one assuming intervention "unless the court is persuaded that the representation is in fact adequate." 7C Charles A. Wright et al., *Federal Practice & Procedure* § 1909 (3d ed. 2007). The effect, in short, is to "mak[e] intervention more freely available." *Id*.

reaf□rm *Trbovich* and allow permissive intervention for would-be intervenors.

II. The question presented is important because the standard for intervention has a practical effect on applicants' ability to vindicate their rights.

A. Permissive intervention allows intervenors to make substantive arguments that courts have accepted but their putative government allies rejected.

There is no escaping the fact that there is an inherent conflict whenever an intervenor and the government litigate on the same side. *See*, *e.g.*, *Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999) (explaining that the "intent to represent everyone in itself indicates that the [government] represent[s] interests adverse to the proposed intervenors."). Simply put, while intervenors seek to advance their personal interests, the government is beholden to "a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001).

There are few areas where the consequences of these differing interests are more apparent than in the history of educational choice litigation. Since 1998, IJ has litigated 33 educational choice cases, of which 21 were as intervenors[9] (including two cases[10] at this Court). In each case, the intervenors made arguments that started with the premise that the rights of individual parents to educational choice differed from the

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[9] *Id.*

[10] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011). IJ also litigated a third case as intervenors at this Court, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

interests of the government in defending educational choice programs. And those different interests led the intervenors to make arguments that the government would not—and in doing so, win cases that the government would have lost had the intervenors been unable to argue on their own behalf. These cases show that even when an intervenor and the government agree about the correct outcome of a case, they can still disagree about which arguments best lead to that outcome:

- In *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), a group of taxpayers challenged Arizona's tax-credit scholarship program. In response, Arizona unsuccessfully argued that the plaintiffs were jurisdictionally barred by the Tax Injunction Act. On remand, applicants intervened to defend the program, and made an argument that Arizona did not—that the taxpayers lacked standing. *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1009 (9th Cir. 2009). The Ninth Circuit rejected the intervenors' argument, which this Court took up on appeal. This Court then reversed the Ninth Circuit, agreeing with intervenors that the taxpayers did not have standing to challenge the program.

- In *Duncan v. State*, 166 N.H. 630 (2014), plaintiffs seeking to throw out an educational choice program relied on a statute conferring standing on taxpayers. Intervenors and the government disagreed about the constitutionality of the statute:

While intervenors argued in trial court that the law was unconstitutional, the government advanced other arguments. On appeal, the New Hampshire Supreme Court sided with intervenors, holding that plaintiffs did not have standing because the statute was unconstitutional.

- In *Kotterman v. Killian*, 193 Ariz. 273 (1999), plaintiffs challenging an educational choice program relied, in part, on Arizona's Blaine Amendment. In its briefing, intervenors—not the state—urged the Arizona Supreme Court to confront the bigoted origins of the Blaine Amendment. In its decision, the court sided with intervenors, declaiming the Amendment's "religious bigotry," and noting that the court "would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it." *Id.* at 291.

In each of these cases, intervenors faced a minimal presumption that the government provided adequate representation.[11] But if intervenors had to overcome a

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[11] For instance, in the Ninth Circuit (*Winn*) "[t]he burden of showing inadequacy of representation is 'minimal' and satis□ed if the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*

strong presumption that the government provided inadequate representation, as required by the First Circuit, it is a near certainty that (1) they would not have been able to intervene and (2) the government would not have advanced the arguments that prevailed in court.

In sum, the history of educational choice litigation shows that an intervenor's "narrow" view and the government's "broad" perspective will inevitably lead to different arguments that can change the outcome of a case. With the permissive intervention rules articulated by this Court, IJ's clients have been allowed to intervene and advance arguments the government, for whatever reason, declined to embrace. But had the heightened standard applied below governed, no party would have made (and no court considered) the arguments that ultimately won the day.

B. Permissive intervention recognizes the reality that tactical differences between the government and intervenors can have—and have had—outsized effects on how a case turns out.

Even if there are no substantive differences between an intervenor's position and the government's, the two parties can still disagree about tactical questions that affect how—and when—a case is resolved.

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their rights." *Bechtel v. Rose ex rel. Maricopa County*, 150 Ariz. 68, 72 (1986) (quoting *Mitchell v. City of Nogales*, 83 Ariz. 328, 333 (1958)).

Government entities simply face different incentives than intervenors when determining how aggressively to proceed in a case. Again, take educational choice programs. An executive agency tasked with defending an educational choice program might make all the proper arguments for the program's legality, but that agency will never have the same incentive to bring a lawsuit to a rapid conclusion as an intervenor might. The government agency (even assuming perfect good faith) wants to defend the program to best educate all children, present and future. But parents want to exercise their fundamental right to educate *their own* children. *Cf. Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (explaining that parents possess a unique liberty interest in "direct[ing] the upbringing and education of children under their control."). No matter its intentions, a government agency will never feel the same urgency for all children as a parent does for her child.

And this difference in incentives plays out in real cases. In *Hart v. State*, 774 S.E.2d 281 (N.C. 2015), exactly this sort of tactical disagreement led to intervenors obtaining interlocutory relief that the government never even requested. In that case, after the plaintiffs persuaded the trial court to declare an educational choice program unconstitutional, nearly 2,000 students found themselves without the scholarships they needed to attend their schools. Both the government and a group of parent-intervenors appealed. But it was only the intervenors (represented by IJ) who sought—and then secured—a writ of supersedeas of

the trial court's judgment. *Hart v. State*, 367 N.C. 775 (N.C. 2014).

On paper, both the intervenors and government were on the "same" side. But because the families had different interests than the state, they made different tactical judgments that decided the educational futures of thousands of children. So, even though the families were in "general alignment" with the government, absent intervention they would have never secured their children's rights for that school year. *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015).

Similar tactical differences arise outside the educational-choice context, too. Take *Minneapolis Taxi Owners Coal., Inc. v. City of Minneapolis*, 572 F.3d 502, 506 (8th Cir. 2009), where a consortium of taxicab companies sued the City of Minneapolis for enacting an ordinance disrupting its monopoly of taxi medallions. Entrepreneurs who bene□ted from the medallion reform (again represented by IJ) intervened and immediately moved to dismiss.[12] In ruling for the intervenors, the court held that the taxicab companies did not have "an unalterable monopoly over the Minneapolis taxicab market," and that the intervenors could participate in the marketplace. *Id.* at 508. As in *Hart*, even though the government and intervenors were on the same side, the intervenors sought (and obtained) immediate certainty about their rights by making tactical

[12] By contrast, the only move that the government made at that point was to remove the case to federal court. *Id.*

choices that the government defendants would have never pursued. [13]

These sorts of differences are particularly important because they generally cannot be known when an applicant moves to intervene. Even if the parties begin with "a shared general agreement" about the litigation, neither the parties nor the court can "predict now the speci□c instances" in which the parties will disagree. *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977). As shown by *Hart* and *Minneapolis*, differences between the parties are often revealed over time and "[t]he tactical similarity of the present" cannot ensure future "adequacy of representation." *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967). Because an intervenor is almost guaranteed to make different tactical decisions than the government, and because it is nearly impossible to know what those decisions will be, this Court's existing approach of imposing a very low bar to intervention is correct—and

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[13] These tactical differences can manifest in other contexts, too. For instance, in *Smuck v. Hobson*, a local board of education sued a school superintendent over the quality of the locality's schools. 408 F.2d 175, 181 (D.C. Cir. 1969). But after the board refused to appeal an adverse ruling, a group of parent-applicants sought to intervene to appeal. In granting the intervention, the court explained that the tactical differences between the parties were enough to support intervention. While the board never acted in bad faith, its "considerations of publicity, cost, and delay" to the board were different from the parents' desire for "policies bene□cial to their own children." *Id*. These considerations meant that even though the parties were on the "same" side that they would still make tactical decisions that led to substantively different outcomes.

lower courts' departure from that rule poses a real problem for would-be intervenors whose rights may be left unprotected.

C. Without permissive intervention, third parties are at the mercy of the political pressures that government is subject to

R. Dreeben, *Stare Decisis in the Of ce of the Solicitor General*, 130 Yale L.J. Forum 541 (2021) (arguing that the Of□ce of the Solicitor General should more freely abandon positions it now considers wrong).

This basic political reality means government will always be an unsteady friend, even when defending its own policies. For example, in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), the Ohio Attorney General made an "unadulterated defense" of a statute. Yet because he also concluded that the statute was unconstitutional, his office contracted with an attorney to submit an amicus brief to inform the Court of his concerns. Note, T. Patrick Cordova, *The Duty to Defend and Federal Court Standing: Resolving a Collision Course*, 73 N.Y.U. Ann. Surv. Am. L. 109, 121–22 (2017). Similarly, in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the federal government "abandoned" its defense of a statute that, it believed, would require it to make "[un]reasonable arguments" against the equality of gay Americans. Cordova, 73 N.Y.U. at 124. And in this case, after campaigning on the removal of a regulation[14] that petitioners seek to defend (and which the government will ostensibly defend), President Biden issued an executive order calling for the review of existing Title IX regulations, including the one at issue.[15]

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[14] *See* Bianca Quilantan, *Biden vows 'quick end' to DeVos' sexual misconduct rule*, POLITICO (May 6, 2020), *available at* https://politi.co/3r6SBkQ.

[15] *See* Exec. Order No. 14,021 § 2(i), 86 Fed. Reg. 13803 (Mar. 8, 2021) (requesting review of "the rule entitled 'Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,' and any other agency

Given these facts, it is no wonder that petitioners would be uneasy with the government adequately representing its interests.

Lower courts have, of course, tried to account for these political vagaries. *See*, *e.g.*, *Zinke*, 877 F.3d at 1169 (explaining that a new administration's executive order was enough to conclude that the government could not adequately represent an intervenor's interest); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528–29 (D.C. Cir. 1983) (holding that government's representation was inadequate because of a new secretary's history as a private citizen opposing the intervenor's interests). And at other times, courts have recognized that politics leads government to prioritize its own power at the expense of intervenors. *See Meek v. Metro. Dade County*, 985 F.2d 1471, 1478 (11th Cir. 1993) (explaining that an intervenor was inadequately represented because its interests con□icted with the government's "desire[] to remain politically popular and effective"). But the better rule is to simply continue this Court's existing permissive policy when it comes to intervention, without requiring lower courts to read tea leaves about the government's future positions or political incentives.

In sum, government faces political pressures in ways that intervenors never will. Due to these pressures, government will inevitably approach litigation with different goals and interests than an intervenor.

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actions taken pursuant to that rule, for consistency with governing law") (citation omitted).

Because these pressures threaten the integrity of adequate representation, intervenors will always have good reasons to not trust government officials to defend their own policies in court.

CONCLUSION

In keeping with this Court's decision in *Trbovich*, this Court should grant the Petition to clear away conflicting intervention standards and establish a uniform