No. 21-84

In the

Supreme Court of the United States

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FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, ET AL.,

Petitioners,

v.

VICTIM RIGHTS LAW CENTER, ET AL.,

Respondents.

•

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

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BRIEF OF AMICUS CURIAE MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, ET AL.'S PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMIC US CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

I. The Court's Presumption that the Department of Justice will Adequately Defend the Regulations is in Tension With President Biden Instructing the Departme nt of Education to Consider Suspending Them 5

II. Biden's Nomination of Catherine Lhamon to be Assistant Secretary for Civil Rights Demonstrates Continued Hostility to the Title IX Regulations. 11

III. The District Court Erred in its Opinion Setting Aside One Part of the Title IX Regulations 15

IV. Petitioners Must Be Able to Intervene In Order to Appeal the District Court's Ruling 24

V. Even if the Department of Education Planned to Appeal the District Court Order, Congress May Stop Them. 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES PAGE(S)

Adarand Constructors v. Pena,
515 U.S. 200 (1995) 1

Crossroads Grassroots Pol'y Strategies v. FEC,
788 F.3d 312 (D.C. Cir. 2015) i

Didrickson v. U.S. Dept. of Interior,
982 F.2d 1332 (9th Cir. 1992) 25

Idaho Farm Bureau Federation v. Babbitt,
58 F.3d 1392 (9th Cir. 1995) 26

National Wildlife Federation v. Lujan,
928 F.2d 453 (D.C. Cir. 1991) 25

Stringfellow v. Concerned Neighbors in Action,
480 U.S. 370 (1987) 24

United States v. Yale University,

Victim Rights Law Center v. Rosenfelt

34 C.F.R. § 106.45(b)(6)(i) .... Passim

Notice of Proposed Rulemaking (NPRM)
Dept. of Ed. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 FR 61462 (Nov. 29, 2018) 6

NPRM, 83 FR 61498 19

Dept. of Ed., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assist ance

C-SPAN, Education Secretary DeVos on Title IX (Sept. 7, 2017) 3, 9

Department of Education Office for Civil Rights OPEN Center Technical Assistance Repository, Cross-Examination, at 5, 8-9

U.S. Senate HELP Committee Questions for the Record for Catherine Lhamon, Nominee to be Assistant Secretary for Civil Rights, Department of Education (Jul. 14, 2021) 14, 15

Zhonette Brown, Biden's Activist Recruits Raise Risk of 'Sue and Settle' Collusion, National Review Online (Feb. 7, 2021)... 10

IDENTITY AND INTEREST OF AMICUS CURIAE [1]

MSLF is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. See, e.g., Adarand Constructors v. Pena, 515 U.S. 200 (1995) (MSLF serving as lead counsel). MSLF also frequently represents clients who intervene in federal litigation, often on the side of valid and appropriate federal deregulatory conduct. In order to secure these interests, MSLF files this amicus brief urging the Court to grant the Petition.

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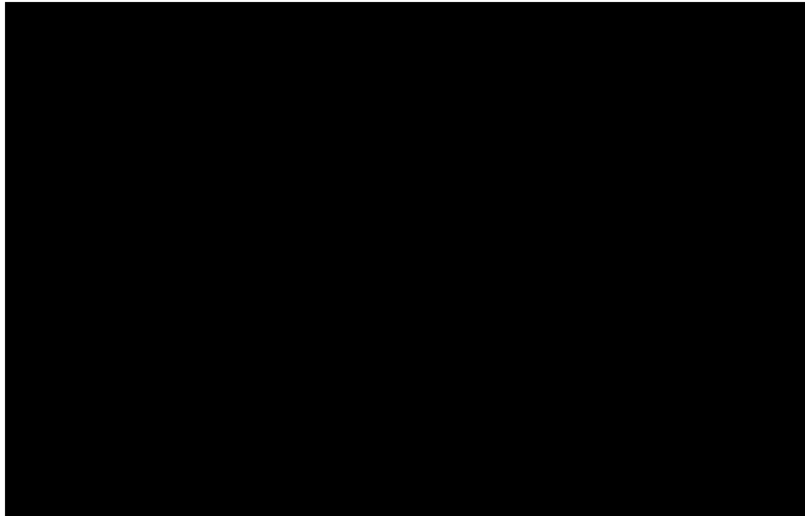
[1] The parties were timely notified and have consented to the filing of this amici curiae brief. See Sup. Ct. R. 37.2(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

rebut (or not rebut) the presumption of adequate defense at diff

Long before May 6, 2020, Biden tweeted opposition to the effort to undo his prior work on Title IX, based on the publication of the unofficial copy of the Notice of Proposed Rulemaking issued by the Department in November 2018.[6]



Joe Biden (@JoeBiden), Twitter (Nov. 16, 2018, 2:18 PM).[7]

[6] Dept. of Ed, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Notice of Proposed Rulemaking (NPRM), 83 Fed. Reg. 61462, Nov. 29, 2018. The unofficial copy of the NPRM, which was submitted to the Federal Register on November 16, 2018, is available at https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf

[7] https://twitter.com/joebiden/status/1063541867910963201.

And after the formal issuance of the Title IX regulations, Biden stated unequivocally that the regulations were harmful to survivors of sexual harassment, and affirmatively based on animus toward survivors and parents generally. See id. ("Biden said … 'Betsy DeVos — is trying to shame and silence survivors, and take away parents' peace of mind.'"). His campaign incorporated criticism of the Title IX regulations into its talking points. Education Writers Association Webinar, Biden Policy Director Talks Education, and Fields Questions (Oct. 22, 2020), at 3:35 (Video remarks of Stef Feldman, policy director, Biden for President campaign) ("Biden will ensure our schools are safe places for all children, instead of ripping away protections for sexual assault survivors in our schools.").[8]

Biden's objections were not just policy-based. They were also legal. He contended that: "This [Title IX] rule fundamentally disregards student's civil rights under Title IX." Statement by Vice President Joe Biden on the Trump Administration Rule to Undermine Title IX and Campus Safety (May 6, 2020).[9] Put simply, the Biden Administration's position publicly was that the regulations conflicted with Title IX.

Biden's objections to the new Title IX regulations also cited the fact that he famously had been a part of

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[8] https://www.ewa.org/webinar/biden-policy-director-talks-education-and-fields-questions

[9] https://medium.com/@JoeBiden/statement-by-vice-president-joe-biden-on-the-trump-administration-rule-to-undermine-title-ix-and-e5dbc545daa

the Obama Administration's efforts to is sue "Dear Colleague Letters" to schools explaining their

Exec. Order 14,021 , § 2(iii) , 86 Fed. Reg. 13803 (Mar.8, 2021). Although the Executive Order did not clarify how

could agree to put the rule on hold, effectively killing it.").

Indeed, the Biden Administration has dismissed other civil rights actions after a district court denied intervention, based on the overlapping interests between the party trying to intervene and the federal government. See United States v. Yale University, 337 F.R.D. 35, *41 (D. Conn., Jan. 19, 2021) ("SFFA fails to rebut the presumption of adequate representation of its interest by the government."); see id. at *41 ("That presumption arises because the governments complaint and SFFA's proposed intervenors complaint share an 'identity of interest' and seek 'the same ultimate objective.'"); see also Minute Order, United States v. Yale, 3:20-cv-01534-CSH (D. Conn., Feb. 3, 2021) (ECF No. 51) (Order dismissing case in light of the Plaintiff United States' Notice of Voluntary Dismissal). In other words, just because parties may be aligned on paper at one point in time, does not mean that they are aligned fully and have the same interests.[13]

II. Biden's Nomination of Catherine Lhamon to be Assistant Secretary for Civil Rights Demonstrates Conti nued Hostility to the Title IX Regulations.

On May 13, 2021, President Biden announced his intent to nominate Catherine Lhamon to the position of Assistant Secretary for Civil Rights in the Department. See The White House, President Biden Announces His Intent to Nominate Catherine

Catherine Lhamon (@CatherineLhamon), Twitter (May 5, 2020, 6:48 PM).[16]

At her July 13, 2021 confirmation hearing before the Senate Health, Education, Labor, and Pensions (HELP) Committee, she was asked whether she continued to believe the content of her tweet . She confirmed that she did:

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[16] https://twitter.com/CatherineLhamon/status/1257834691366772737.

> Senator Cassidy: Do you think … the law as it has been implemented has given the right to rape and sexually harass with impunity?
>
> Ms. Lhamon: I think the regulation; so I think what I said in the tweet. The regulation permits students to rape and sexually harass with impunity.

See Hearing, *Nominations of Catherine Lhamon to be Assistant Secretary for Civil Rights at the Department of Education, Elizabeth Brown to be General Counsel of the Department of Education, and Roberto Rodriguez to be Assistant Secretary for Planning, Evaluation, and Policy Development of the Department of Education*, U.S. Senate HELP Comm., (Jul. 13, 2021), at 1:29:15.[17]

Moreover, she made it clear that her objections were not just policy-based, but also legal in nature:

> Republican Sen. Bill Cassidy asked Lhamon about a May 2020 tweet in which she said that then-Secretary DeVos's rules made it "permissible to rape and sexually harass students with impunity." Cassidy asked her if she would enforce the law …. She told the committee, "The regulation permits

[17] https://www.help.senate.gov/hearings/nominations-of-catherine-lhamon-to-be-assistant-secretary-for-civil-rights-at-the-department-of-education-elizabeth-brown-to-be-general-counsel-of-the-department-of-education-and-roberto-rodriguez-to-be-assistant-secretary-for-planning-evaluation-and-policy-development-of-the-department-of-education.

> students to rape and sexually harass with impunity. I think that the law, that the regulation has weakened the intent of Title IX that Congress wrote.

Samuel Kim, Biden’s civil rights nominee remains unapologetically divisive on Title IX , Yahoo News, (Jul. 14, 2021).[18] Lhamon left no doubt that she thought the Title IX regulations were in tension with the statute.

After her hearing, the Senate HELP Committee issued Questions for the Record, which asked Lhamon to further clarify her answer on this topic. She responded:

> When I used the term “impunity” quoted here, I referred to the expanded focus within the existing Title IX regulations on reducing the scope of liability for recipients of Federal financial assistance, at the expense of the nondiscrimination mandate of the law and in contrast to decades of OCR policy and practice during both Republican and Democratic presidential administrations with respect to the implementation and enforcement of Title IX.

U.S. Senate HELP Committee

Education (Jul. 14, 2021).[19] Once again, Ms. Lhamon suggested that the Title IX regulations were contrary to the "nondiscrimination mandate of the law," and contrary to the practice of prior administrations of both parties.

While Lhamon's confirmation remains in doubt at the time of this filing, the fact that she remains President Biden's nominee to lead the Office for Civil Rights demonstrates the Administration's overall position on the 2020 Title IX regulations. The net is that the fate of Secretary DeVos's historic effort to enshrine protections against sexual harassment into federal regulations is in the hands of an Administration hostile to those very efforts at a policy level, and even skeptical or dismissive of their legality.

III. The District Court Erred in its Opinion Setting Aside One Part of the Title IX Regulations.

On July 28, 2021, the District Court in this case held that 34 C.F.R. § 106.45(b)(6)(i) was set aside under the Administrative Procedure Act as arbitrary and capricious. See Victim Rights Law Center v. Cardona, --- F.Supp.3d ---, 2021 WL 3185743 (D. Mass., Jul. 28, 2021). The opinion of the District Court stated :

> Neither the Government's briefing nor this Court's thorough review of the record indicates that the Department considered or adequately explained why it intended for section 106.45(6)(i) to compound with a respondent's procedural safeguards quickly to render the most vital and ultimate hallmark of the investigation —the hearing —a remarkably hollow gesture.

Id. at *15. Essentially, the district court was concerned that because part of Section 106.45(b)(6)(i) requires that Title IX decision-makers not rely on statements that have not been subjected to cross-examination, there would be some cases where complainants could never "overcome the presumption of nonresponsibility to attain anything beyond the supportive measures that he or she is offered when they first file the formal complaint." Id. at *15.[20]

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[20] To reach this conclusion, the District Court seemed to place a significant amount of weight on the idea that a respondent accused of sexual harassment could try to work with their school to schedule a hearing at an inconvenient time for all non-party witnesses. See id. at *15 ("[A] respondent may work with the school to schedule the live hearing, and nothing in the Final Rule or administrative record prevents him or her from doing so to further a disruptive agenda —e.g., at an inopportune time for third-party witnesses."). There was no evidence in the record, however, that a respondent could actually succeed in tricking a school, without its knowledge, into scheduling a hearing that happens to be an inconvenient time for all non-party witnesses.

The judge then held that it was “this Court’s responsibility under section 706(2)(A) of the APA to ensure that the Department considered this necessary and likely consequence of section 106.45(b)(6)(1) [sic] and require the agency to provide a reasoned explanation why it nevertheless intended this result. ” See id. at *16. Then, stating that it had not seen such an explanation, the District Court ruled that 106.45(b)(6)(i) was arbitrary and capricious. See id.

Indeed, the Title IX regulations re quire schools to have a process to temporarily delay proceedings for good cause, including the absence of a witness :

> A recipient’s grievance process must … [i] nclude reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

34 C.F.R. 106.45(b)(1)(v) (emphasis added). Accord Preamble, Final Ru le, 85 Fed. Reg. at 30346–47 (“If the respondent ‘wrongfully procures ’. 10t47ae o-3.8 (ble)-5 (ar)-3.7 la(al)-12.3 al .42 ( )-12.1 (a6.)-1.1 br.e o, (ble)-

("[I]n the absence of evidence that the Department adequately considered section 106.45(b)(6)(i)'s prohibition on statements not subject to cross-examination, this Court finds and rules said prohibition arbitrary and capricious.").

But, with respect, the District Court got it wrong. Demonstrably. An entire section of the Title IX regulations' preamble is entitled "No Reliance on Statements of a Party Who Does Not Submit to Cross-Examination." Final Rule, 85 Fed. Reg. at 30344 (discussing comments on provision).

The very provision that the District Court took issue with had been amended, after considering public comment, from its prior version, in the Notice of Proposed Rulemaking:

NPRM (Nov. 2018) Proposed 106.45(b)(3)(vii)	Final Rule (May 2020) Section 106.45(b)(6)(i)
If a party or witness does not submit t o cross	

provide more due process and fundamental fairness to both parties in the search for truth." Id.

- "The Department recognizes that not every party or witness will wish to participate, and that recipients have no ability to compel a party or witn ess to participate." Id . at 30322.
- "Further, § 106.45(b)(6)(i) includes language that directs a decision -maker to reach the

> documents and records may not be relied on to the extent that they contain the statemen ts of a party or witness who has not submitted to cross -examination. While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue to the decision -maker about the credibility and implications of such evidence. Probing the credibility and reliab ility of statements asserted by witnesses contained in such evidence requires the parties to have the opportunity to crossexamine the witnesses making the statements.

Id . at 30349. I n short, i t is difficult to understand how the District Court did not conclude that the Department fully and robust feep .9 h(e)-1-1 (t-9 (s)-(r)5 -c5 (o)-4 ((

submit, so that the statements of one party cannot be relied on but statements of the other party may be relied on. "); accord Department of Education Office for Civil Rights OPEN Center Technical Assistance Repository , Cross-Examination , at 5, 8-9 (January 2021) (reiterating that the Title IX regulations' limitations on admission of uncrossed statements apply even when a party de clines to submit to cross - examination to avoid their own text messages or other statements being admitted) .[21]

Moreover, the very provision that the District Court held was insufficiently considered was actually adopted as a considered alternative to a harsher rule,
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> opportunity to meaningfully be heard before an impartial decision-maker reaches a determination regarding responsibility.

See Final Rule, 85 Fed. Reg. at 30345.

What will the Biden Administration do with this evidence that the District Court missed? Any number of occurrences may result next. The parties may allow the District Court's judgment to stand, for instance. Or the plaintiff may appeal, seeking to establish that the District Court's ruling was too narrow. Or the government may file an appeal, but opt to shift course and dismiss an appeal once they are shamed by their supporters into letting Section 106.45(b)(6)(i) be invalidated. What is clear, regardless of what happens next in the underlying litigation, is that the Petitioner ought to be in the case in order to engage in a robust defense of the Title IX regulations.

IV. Petitioners Must Be Able to Intervene in Order to Appeal the District Court's Erroneous Ruling.

"Denied intervention, movants are left with no recourse in settlement discussions and no say in whether to appeal an adverse ruling." Pet., at 35.

Normally, intervening parties have the ability to appeal a final adverse judgment. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987) ("An intervenor, whether by right or by

> To invoke this court's jurisdiction on the basis of an injury related to the judgment, Intervenors must establish that the district court's judgment causes their members a concrete and particularized injury that is actual or imminent and is likely to be redressed by a favorable decision.

Western Watersheds Project, 632 F.3d at 482 (internal citations omitted); see also Idaho Farm Bureau Federation v. Babbitt, 58 F.3d 1392 (9th Cir. 1995) ("Intervenors can allege a threat of injury stemming from the order they seek to reverse, an injury which would be redressed if they win on appeal.").

Given the Biden Administration's interest in

agencies for the fiscal year ending September 30, 2022, and for other purposes." Although it appropriates certain funds to t he Department of Education, it contains a provision stating:

> Sec. 529. None of the funds made available by this Act may be used to implement or enforce section 106.6(h), section 106.45(b), or the definition of " formal complaint " in section 106.30(a), of t itle 34 of the Code of Federal Regulations as amended by the final rule entitled, " Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" published in the Federal Register on May 19, 2020 (85 Fed. Reg. 30026).

The bill was received in the U.S. Senate on August 3, 2021, and remains pending at the time of this brief's filing. Put simply, there is a possibility that Department of Education employees—including attorneys in its Office for Civil Rights and its Office of the General Counsel —will feel bound by a statute that precl udes them from using any funds to "implement or enforce" parts of the Title IX regulations, meaning that they would be limited in reviewing, commenting, or drafting briefs to defend the law. (Additionally, there is nothing stopping Cu78o8i(a)-4 (r)3 (e)- (s)6 (s)2 (f)2 (r)3 (o)-1 (m)-2l (y)-

It is hard to imagine that an executive branch agency—the client in this matter—might be legally precluded from assisting in its own defense, and yet might also be presumed to adequately help defend its regulations.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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