No. 21-84

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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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

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.

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).

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 a r (o)16 (u)5u1.05 (o)63

12, 2021)(emphasis omitted). Texas filed an amicus brief in the district court, see D. Ct. Doc.176 (June 1, 2021).

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/abour)

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 an-

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 &

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

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 be-

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

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, d [/Bo13 (t th)9 (e)Tc 0 Tw 1oa<</Attachi-,7/Att,(w)7 (er)12 (e)108n

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

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,