UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 20-1748

VICTIM RIGHTS LAW CENTER; EQUAL RIGHTS ADVOCATES; LEGAL VOICE; CHICAGO ALLIANCE AGAINST SEXUAL EXPLOITATION; JANE DOE, an individual by and through her mother and next friend MELISSA WHITE; ANNE DOE; SOBIA DOE; SUSAN DOE; JILL DOE; NANCY DOE; LISA DOE,

Plaintiffs-Appellees,

v.

BETSY DEVOS, in her official capacity as Secretary of Education; KENNETH L. MARCUS, in his official capacity as Assistant Secretary for Civil Rights; U.S. DEPARTMENT OF EDUCATION,

Defendants-Appellees.

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION; INDEPENDENT WOMEN'S LAW CENTER; SPEECH FIRST, INC.,

EMILY MARTIN
NEENA CHAUDHRY
SUNU CHANDY
SHIWALI G. PATEL
ELIZABETH TANG
NATIONAL WOMEN

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel for appellee Victim Rights Law Center certifies as follows: Victim Rights Law Center is a non-profit organization with no parent corporation and no stock.

The undersigned counsel for appellee Legal Voice certifies as follows: Legal Voice is a non-profit organization with no parent corporation and no stock.

The undersigned counsel for appellee Equal Rights Advocates certifies as follows: Equal Rights Advocates is a non-profit organization with no parent corporation and no stock.

The undersigned counsel for appellee Chicago Alliance Against Sexual Exploitation certifies as follows: Chicago Alliance Against Sexual Exploitation is a non-profit organization with no parent corporation and no stock.

Dated: November 3, 2020

/s/ Michael F. Qian
Michael F. Qian

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REASONS WHY ORAL ARGUMENT NEED NOT BE HEARD

The issues in this appeal are governed by a deferential standard of review, and the district court's decision is amply supported by settled precedent. This Court therefore need not hear oral argument to affirm. If, however, the Court is not prepared to affirm on the briefs, Plaintiffs would respectfully request the opportunity to present oral argument.

STATEMENT OF THE ISSUES

1. Did the district court act within its discretion by denying intervention as of right to third parties seeking to defend a federal regulation that the government is defending?

2. Did the district court act within its discretion by denying permissive intervention to third parties that can ad

adequately represents their interests. But Movants have the same goal in this suit as the Department: to save the regulation from the plaintiffs' challenge. The Department is, of course, already advancing arguments in defense of the regulation. And Movants never attempt to explain why they could not supplement the Department's arguments with their own contentions as amici. Under this Court's settled precedent, there is no inadequacy of representation in these circumstances. Were it otherwise, any interested group would, simply by proposing some alternative legal argument, be entitled to participate as a party in any case challenging government action.

Nor can Movants establish that the district court abused its discretion in denying their request for permissive intervention. They focus entirely on the brevity of the district court's order. But succinct orders denying intervention are unremarkable, and this Court has made clear that such brevity is not a sufficient basis for vacatur. Movants do not even attempt to establish any other reason that denying permissive intervention was beyond the district court's broad discretion. Nor could they. Injecting new parties into the litigation would only have created opportunities to frustrate the efficient resolution of this time-sensitive case, which is set for trial on November 12, 2020. Indeed, given that Movants can already present any legal arguments as amici, it is difficult to see what else intervention would accomplish.

The district court's order should be affirmed.

STATEMENT OF THE CASE

A. Regulatory Background

Title IX is a landmark federal civil rights law protecting against sex discrimination in schools. It establishes an antidiscrimination guarantee: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Congress not only empowered private litigants to enforce this guarantee in court, but it also directed federal agencies to implement Title IX administratively. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979); 20 U.S.C. § 1682.

Since 1975, agency regulations have imposed obligations on schools to effectuate Title IX's antidiscrimination mandate. *See Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 40 Fed. Reg. 24,128 (June 4, 1975). In 1997, the Department of Education, following notice and comment, issued guidance addressing schools' Title IX obligations regarding sexual harassment. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997). Among other things, that guidance provided that sexual harassment gives rise to Title IX liability if it is "sufficiently severe, persistent, or pervasive that it adversely affects a student's

education or creates a hostile or abusive educational environment." 62 Fed. Reg. at 12,034. In 2001, the Department maintained this standard for administrative enforcement in the wake of Supreme Court decisions addressing Title IX's liability standards in private damages actions. U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001);[1] *see Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (explaining that standards for administrative enforcement differ from those for private damages actions). Subsequent Department guidance has elaborated on how schools must handle sexual harassment complaints. *See* U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter* (Apr. 4, 2011);[2] U.S. Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014).[3]

But recently, the Department changed course. In 2018, the Department published a Notice of Proposed Rulemaking seeking to depart from the agency's previous Title IX standards regarding sexual harassment. After receiving over

[1] https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

[2] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[3] https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

124,000 comments, the Department published a final Rule in May 2020, with an effective date of August 14, 2020.

Barring victims of sexual harassment from filing formal complaints if they have since graduated, transferred, or dropped out (even if the harassment drove them out of school). 34 C.F.R. § 106.30(a) ("formal complaint").

Lowering the standard for schools responding to sexual harassment to require only that they not be "deliberately indifferent." 34 C.F.R. § 106.44(a).

Precluding schools from offering certain "supportive measures" to victims of sexual harassment on the grounds that they are "disciplinary," "punitive," or "unreasonably burden[some]," and allowing schools to decline supportive measures to students whose complaints must be dismissed under the Rule. 34 C.F.R. §§ 106.30(a) ("supportive measures"), 106.44(a).

Introducing a "presumption that the respondent is not responsible for the alleged conduct," which is not required for any other type of student or staff misconduct proceeding. 34 C.F.R. § 106.45(b)(i)(iv).

Eliminating schools' discretion to tailor proceedings for sexual harassment investigations—instead mandating, for example, live hearings and cross-examination by a party's advisor of choice in all cases at postsecondary institutions, and excluding from consideration in those cases all oral and written statements by any party or witness who declines to submit to live cross-examination, even if their statement is contained in reliable and relevant

In excess of statutory jurisdiction in violation of the APA, including because no statute empowers the Department to stop schools from protecting students against sex discrimination. JA157-59.

In violation of the APA's procedural requirements, including because several provisions of the Rule are not a logical outgrowth of the proposed rule. JA159-60.

set a hearing in September. JA40, JA264. After the hearing, the district court ordered that the "preliminary injunction [be] collapsed with trial on the merits in accordance with Rule 65A and set for hearing on October 14, 2020." JA52. Trial has since been rescheduled for November 12, 2020. Order Governing Proceedings, Oct. 9, 2020, ECF No. 142.[4]

2. Movants sought intervention, which the district court denied

Movants are three non-profit organizations asserting a mission of "promoting free speech and due process on college campuses" that have attempted to insert themselves into these proceedings. Memorandum in Support of Motion to Intervene 4, July 21, 2020, ECF No. 25. Interested in preserving the Rule, Movants seek to become defendants in the case and make constitutional arguments supporting the Rule. *Id.* at 1, 8-9. Specifically, they contend that certain provisions of the Rule coincide with what the Free Speech and Due Process Clau

This case was not the first in which Movants sought to intervene. Separate plaintiffs have filed APA challenges to the same Rule in three other district courts. *See Pennsylvania v. DeVos*, No. 20-cv-1468 (D.D.C.); *New York v. U.S. Dep't of Educ.*, No. 20-cv-4260 (S.D.N.Y.); *Know Your IX v. DeVos*, No. 20-cv-1224 (D. Md.). In all three cases, some or all Movants filed intervention motions—all three Movants in the Maryland and D.C. cases, and the Foundation for Individual Rights in Education ("FIRE") in the New York case. Each motion invoked both Federal Rule of Civil Procedure 24(a)(2), governing intervention as of right, and

proceeding on "a very short timeline." *Id.* In the Maryland case, the district court deemed the intervention motion moot after dismissing the suit without prejudice on standing grounds. *Know Your IX*, 2020 WL 6150935, at *8.

Only the D.C. district court granted permissive intervention, noting that "'[p]ermissive intervention is an inherently discretionary enterprise.'" Minute Order, *Pennsylvania*, No. 20-cv-1468 (July 6, 2020) (quoting *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998)). Upon obtaining party status in the D.C. case, Movants filed a motion seeking to depose six witnesses who had filed sworn declarations for the plaintiffs. *See* Motion to Take Deps., *Pennsylvania*, No. 20-cv-1468 (July 15, 2020), ECF No. 76. As the plaintiffs and the Department explained, these depositions were entirely unnecessary and would unduly delay the expedited proceedings. Pls.' Resp. 2, *Pennsylvania*, No. 20-cv-1468 (July 20, 2020), ECF No. 83; Defs.' Resp. 1-2, *Pennsylvania*, No. 20-cv-1468 (July 20, 2020), ECF No. 84. The district court denied Movants' request. Minute Order, *Pennsylvania*, No. 20-cv-1468 (July 21, 2020).

In this case, Movants filed their intervention motion on July 21. On July 27, after expediting the preliminary-injunction proceedings—and in the wake of the New York court's denial of intervention and Movants' attempt to depose the plaintiffs' declarants in

additional argument is obviously necessary to the defense. To the contrary, the

II. The district court also did not abuse its discretion in denying permissive intervention. As the district court noted in its order, this case does not require Movants' participation as parties because the Department is already defending the Rule and Movants can present their additional arguments as amici. Granting party status would only have threatened complexity and delay in these expedited proceedings.

Movants' sole argument is that the district court's order was too brief. But this Court has made clear that a district court does not abuse its discretion merely by denying intervention in a summary order. *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 38 (1st Cir. 2020). Instead, in reviewing such an order, this Court examines the record as a whole to determine whether the district court's ultimate conclusion was within its broad discretion. Movants identify no basis for disturbing the district court's discretionary determination here.

STANDARD OF REVIEW

A district court's decision to deny intervention as of right is reviewable only for abuse of discretion. *See In re Efron*, 746 F.3d 30, 35 (1st Cir. 2014). "Despite its nomencl dic2.Tw[(9v0l 0 TDtTD7R 0eieLs withs2.9313 0 erven3foy,SewaD.D.001-74.5(Db

court either fails to follow the general recipe provided in Rule 24(a)(2) or reaches a plainly incorrect decision.'" *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 807 F.3d 472, 475 (1st Cir. 2015) (citation and alterations omitted); *see also Maine*, 262 F.3d at 18 n.3 (noting that this Court reviews denials of intervention even more deferentially than some other circuits).

"As to permissive intervention, appellate review is even more restrictive." *Maine*, 262 F.3d at 21. "The discretion afforded to the district court under Rule 24, substantial in any event, is even broader when the issue is one of permissive intervention." *R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 11 (1st Cir. 2009). This Court will set aside a decision on permissive intervention "only upon a showing of a clear abuse of that broad discretion." *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 42 (1st Cir. 2020).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING INTERVENTION AS OF RIGHT

Movants first claim an entitlement to intervene as of right under Rule 24(a)(2). That provision authorizes intervention only by one who "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." Fed. R. Civ. P. 24(a)(2) (emphasis added); *see United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982).

Movants contest only the district court's determination that existing parties adequately represent Movants' interest (JA40), acknowledging that even if they prevail, they would still have to establish on remand that they satisfy the other requirements for intervention as of right. Opening Br. 25, 35. A movant contesting

presumption arises that the government adequately represents the interests of the would-be intervenor." *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 39 (1st Cir. 2020); *see, e.g.*, *Daggett*, 172 F.3d at 111. To rebut that presumption "requires 'a strong affirmative showing' that the [government] is not fairly representing the applicants' interests." *Pub. Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998) (quoting *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984)).

Both presumptions apply here. Movants' interest in this suit is to "defend[] the Rule"—the Department's own action—"against legal challenges." Opening Br. 4; *see id.* at 16. The Department is already doing just that. "Adding heft to" the presumptions, the Department has defended the Rule zealously. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 807 F.3d 472, 475 (1st Cir. 2015). The Department's "full-scale, uncompromising defense of" its regulation, "in itself, weighs heavily in favor of denying mandatory intervention." *Patch*, 136 F.3d at 208; *see T-Mobile*, 969 F.3d at 39; *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999).

Movants give these presumptions short shrift. They never mention the presumption of adequacy for an existing party's pursuit of a common goal. Yet they admit that in this suit, "both Appellants and the Department want to rebuff Plaintiffs'

challenges to the Title IX Rule." Opening Br. 16. That alone is enough for the first of these presumptions to apply. *Daggett*, 172 F.3d at 111.

Movants do resist the separate presumption that the government's representation is adequate. But they cannot deny that they "seek[] to appear alongside a governmental body in defense of the validity of some official action," which suffices to trigger the presumption. *T-Mobile*, 969 F.3d at 39. Movants focus instead on denying that this presumption of adequacy should exist. Opening Br. 23-24. Yet as Movants acknowledge, their quarrel is with binding circuit precedent. Opening Br. 23. This Court has applied the presumption time and again, as recently as a few months ago. *See T-Mobile*, 969 F.3d at 39 (citing *Maine v. Director, U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001); *Daggett*, 172 F.3d at 111; *Patch*, 136 F.3d at 207).[5] This Court's precedent, not Movants' wishful thinking, governs this case.

of showing inadequacy is ordinarily "minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). As this Court has explained, that usual burden is simply "ratcheted upward" when the presumption applies. *Patch*, 136 F.3d at 207.

B. Movants Cannot Overcome The Presumptions Of Adequacy

Movants nevertheless maintain that the district court abused its discretion in finding adequate representation. Their various attempts to rebut the presumptions

"essential" argument requires participation as a party—for example, to develop different evidence. *Daggett*, 172 F.3d at 112. A prospective intervenor fails to establish inadequacy if he has "made no showing" that an "amicus brief would not do the job." *Id.*; *see Mass. Food Ass'n*, 197 F.3d at 567; *Students for Fair Admissions*, 807 F.3d at 477-78; *Maine*, 262 F.3d at 19. Movants here cannot meet these requirements.

It is hardly uncommon for third parties to come up with additional justifications for government action that the government has not itself invoked. In such cases, this Court has repeatedly refused to find inadequacy. Take *Massachusetts Food Association*, where trade associations sought to intervene alongside the State in defending a liquor-store regulation. 197 F.3d at 562-63. The plaintiffs challenged the law on antitrust grounds, and the State answered those objections. *Id.* at 567. But like the Movants here, the trade associations sought to inject a constitutional defense—there, that the Twenty-First Amendment justified the law. This Court held that the trade associations' "interest in offering *other* legal arguments" to sustain the statute did not render the State's representation inadequate, as "these arguments were easily presented in amicus briefs." *Id.* (emphasis in original).

Likewise, in *Maine*, environmental groups sought to defend an agency rule on a different legal ground. 262 F.3d at 18. These groups argued that the agency's

previous failure to adopt the present rule was unlawful. *Id.* But this Court held that argument was merely "a suppl

Rule on those grounds. Movants' additional argument that the Free Speech and Due Process Clauses separately justify some provisions of the Rule is thus not "a necessary one to the defense." *Id.*

Indeed, Movants' argument is even more ancillary to the case than were the arguments asserted in *Massachusetts Food Association* and *Maine*. To begin, a central element of Movants' theory is already foreclosed by binding precedent. This Court has held that in university disciplinary proceedings, due process does not require "cross-examination by the accused or his representative" even when the "proceeding turns on the witnesses' credibility." *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 68-69 (1st Cir. 2019). Yet that is what the Rule requires. 34 C.F.R. § 106.45(b)(6). Movants' recitation of that rejected view will hardly be crucial to the district court's analysis.

More fundamentally, Movants' constitutional defense—unlike the one in *Massachusetts Food Association*—cannot cure fatal defects in the Rule. It is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. 743, 758 (2015) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). But as Movants admit, the Department "declined to take" Movants' proposed constitutional theory when promulgating the Rule. Opening Br. 10. That renders Movants' arguments irrelevant in defending the Rule against claims

Plaintiffs raise. Consider, for example, Plaintiffs' position that provisions of the Rule are arbitrary and capricious because the Department inadequately justified its choices. JA156-57. Those deficiencies in the Department's decisionmaking cannot be erased with a constitutional theory the agency never invoked. *See Chenery*, 318 U.S. at 87. That is especially so because even under Movants' theory, the Department had a range of policy options available (match the minimum standards supposedly required by the Constitution, or provide even greater accommodations). Judicial review must focus on the Department's own justifications for its choice. *See Chenery*, 318 U.S. at 87.

Moreover, even if Movants' theory were relevant to the questions raised in this case, it would provide at most a partial answer. Movants address only two aspects of the Rule: its definition of sexual harassment, 34 C.F.R. § 106.30(a)(2), and its procedures governing sexual harassment investigations, 34 C.F.R. § 106.45. *See* Opening Br. 8-9. Even if a court accepted Movants' theory, the Rule's survival would remain at issue: Plaintiffs have challenged other aspects of the Rule, such as its limits on schools' obligations to respond to sexual harassment, including when offering supportive measures, under 34 C.F.R. §§ 106.30 and 106.44(a). *See* JA95-103, JA105-08.

In any event, Movants are fully able to present their constitutional arguments as amici. Movants need not become parties to participate in factual development, as

their theory is purely legal and review of the Rule is, as in *Maine*, "confined to the record before the agency." *Maine*, 262 F.3d at 20. And while of course "an amicus does not enjoy the same opportunities as a full-fledged litigant"—for example, to present oral argument or to take an appeal—this Court has rejected the contention that these differences alone give an outsider the right to intervene to present supplemental arguments. *Mass. Food Ass'n*, 197 F.3d at 567-68. For this reason as well, Movants cannot demonstrate inadequacy.

b. Movants' contrary arguments lack merit

Movants do not even attempt to show that they must participate as parties, rather than amici, to raise their constitutional theory. They contend only that their theory will somehow "shape all issues in this case." Opening Br. 21-23. But that does not distinguish the constitutional defense in *Massachusetts Food Association* or the alternative regulatory justification in *Maine*. And in any event, Movants' contentions are overblown.

Movants point to only one way in which their theory addresses the merits: to supply a reason under the doctrine of constitutional avoidance for doubting Plaintiffs' interpretation of Title IX and other statutes. Opening Br. 21. But that argument (which Movants can make as amici) addresses only a slice of Plaintiffs' claims. JA154-61; *see supra* at 7-8, 23. And even on Plaintiffs' statutory claims, a constitutional-avoidance argument functions merely "as a supplement to the

in *Massachusetts Food Association*

the Court looks to goals in the litigation, not background motivations, and Movants admit they and the Department have the same goal in this suit. *Supra* at 17-18.

This Court's decision in *United Nuclear Corp.* illustrates that principle. There, an environmental group seeking to intervene in a suit challenging a state statute had "a more specialized interest in environmental affairs" than the State. *United Nuclear Corp.*, 696 F.2d at 144. This Court nevertheless presumed the State adequately represented the group's interests because they had "the same ultimate goal of upholding and defending" the statute. *Id.*

Similarly, in *Students for Fair Admissions*, a group of students sought to aid Harvard's defense of its race-conscious admissions policy. 8a04 Tce768 0 TD( )]TJ-21"s10

Here, Movants say that the Department "must balance a host of interests," while they single-mindedly seek "the greatest possible protection" for free-expression and due-process rights. Opening Br. 17. Those differences in motivation—a more "specialized," "single-minded[]" interest versus striking a "balanc[e] of competing priorities"—are exactly the distinctions this Court has held insufficient to establish inadequacy. *United Nuclear Corp.*, 696 F.2d at 144; *Students for Fair Admissions*, 807 F.3d at 476. Whatever their motivations, all that matters in the adequacy analysis is that in this suit, Movants and the Department are both trying to save the Rule.

That is especially so because Movants' professed disagreement with the Department lies outside this suit. Movants worry that although their "goals sometimes coincide" with the Department's—as they do here in defending the Rule—that might not be true "in the futu

prevents some new action the Department takes. This suit is about the fate of the current Rule alone. On that subject, Movants and the Department agree.

This case is therefore nothing like *Trbovich v. United Mine Workers of America*, where the applicant and the existing party sought different outcomes. *See* Opening Br. 18. There, the Secretary of Labor filed a suit seeking to set aside the election and to order a new election under his supervision. *Trbovich*, 404 U.S. at 529. Moving to intervene, a union member sought relief that the Secretary did not: "certain specific safeguards with respect to any new election." *Id.* at 530. The Court—applying Rule 24(a)(2) in the first instance, with no district court decision to which to defer—held that the Secretary did not adequately represent the union member's interests. *Id.* at 537-39; *see id.* at 530-37 (reversing the district court's separate, statutory grounds for denying intervention). The Secretary was required

Movants rely, treated an existing party's silence only as confirming inadequacy that was already apparent: the government had already accepted a consent decree capitulating to "virtually all the relief sought." 966 F.2d at 44. An existing party's

do not (and could not) question the adequacy with which Plaintiffs defend their own standing.

In any event, for the reasons already explained, Movants' stance on this issue does not undermine the adequacy of the Department's representation of Movants' interest in upholding the Rule. Again, a disagreement over rationales is not enough to establish inadequacy. *Mass. Food Ass'n*, 197 F.3d at 567; *Maine*, 262 F.3d at 19-20; *Daggett*, 172 F.3d at 112; *Students for Fair Admissions*, 807 F.3d at 475-76; *see supra* at 19-27. Movants' view on standing does not change their ultimate goal, shared by the Department, of defending the Rule and denying Plaintiffs' requested relief.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PERMISSIVE INTERVENTION

A district court deciding whether to grant permissive intervention under Rule 24(b) "may 'consider almost any factor rationally relevant' to the intervention determination." *T-Mobile*, 969 F.3d at 40 (quoting *Daggett*, 172 F.3d at 113). In conducting that analysis, "[t]he court 'enjoys very broad discretion.'" *Id.* at 40-41 (quoting *Daggett*, 172 F.3d at 113). For that reason, "[r]eversal of a district court's denial of permissive intervention on grounds of abuse of discretion 'is so unusual as to be almost unique.'" *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 641 (1st Cir. 1989) (citation omitted); *see, e.g., Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 803 (7th Cir. 2019) (similar); *Floyd v. City of New York*, 770

F.3d 1051, 1062 n.38 (2d Cir. 2014) (similar). Where "the district court summarily denies a motion to intervene, the court of

Department will not cross-examine Plaintiffs' declarants. Order Governing Proceedings, Oct. 9, 2020, ECF No. 142. That not only reflects the case's urgency and the issues being confined to the administrative record, but also avoids the harm that depositions and trial testimony would have inflicted on Plaintiffs, who include survivors of sexual assault as young as ten years old. JA67. But in the parallel case in the District Court for the District of Columbia, the same three Movants obtained permissive intervention, then sought to take six depositions—which the existing parties agreed was unnecessary and would only delay the proceedings.[6] The district court here denied intervention in the wake of those events. *See* Memorandum in Support of Motion to Intervene 2, ECF No. 25 (alerting court to D.D.C. proceedings); JA40.

[6] *See* Minute Order, *Pennsylvania*, No. 20-cv-01468 (July 6, 2020) (granting intervention); Motion to Take Deps., *Pennsylvania*, No. 20-cv-1468 (July 15, 2020), ECF No. 76; Pls.' Resp. 2, *Pennsylvania*, No. 20-cv-1468 (July 20, 2020), ECF No. 83; Defs.' Resp. 1-2, *Pennsylvania*, No. 20-cv-1468 (July 20, 2020), ECF No. 84; Minute Order, *Pennsylvania* (July 21, 2020) (denying discovery).

intervention-as-of-right considerations as reasons to deny permissive intervention—as this Court itself has done. *See, e.g.*, *Caterino v. Barry*, 922 F.2d 37, 39 (1st Cir. 1990) ("[O]ur conclusion that the court acted within its discretion in denying intervention as of right effectively disposes of the permissive intervention question as well."); *T-Mobile*, 969 F.3d at 41 (adequate representation is reason to deny permissive intervention); *Mass. Food Ass'n*, 197 F.3d at 568 (same).

Movants cannot identify a single decision of this Court upsetting a denial of permissive intervention because the district court's explanation was too short. They rely instead on *Daggett* and *Negrón-Almeda v. Santiago*, 528 F.3d 15 (1st Cir. 2008)—neither of which finds fault in a permissive intervention opinion. Opening Br. 27, 34. Instead, in both cases the district court misapprehended the law in analyzing intervention as of right. *Daggett*, 172 F.3d at 113 (vacating because "it is unclear whether the district court would have decided the issue differently had it had the benefit of our clarification of *Moosehead*"); *Negrón-Almeda*, 528 F.3d at 25 (vacating because district court misinterpreted previous order, which "influenced its finding as to timeliness" under Rule 24(a)(2)). Neither case supports the result Movants seek: disturbing a district court's denial of permissive intervention that, in light of the record, lies undisputedly within the court's broad discretion.

CONCLUSION

The district court's order denying intervention should be affirmed.

Dated: November 3, 2020

Respectfully submitted,

/s/ Michael F. Qian

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CERTIFICATE OF COMPLIANCE

In compliance with Fed. R. App. P. 32(g)(1), I certify that:

This brief complies with the type-volume limitations of First Circuit Rule 32(a) because it contains 8,782 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word-counting feature of Microsoft Word 2016.

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Dated: November 3, 2020

/s/ Michael F. Qian
Michael F. Qian

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system on November 3, 2020.

Dated: November 3, 2020

/s/ Michael F. Qian
Michael F. Qian