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

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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August 20, 2021

QUESTION PRESENTED

Under Federal Rule of Civil Procedure 24(a)(2), an entity that seeks to intervene as of right must establish that none of the existing parties "adequately represent" its interests. In cases in which someone seeks to intervene on the side of a governmental entity, the First Circuit and several other courts of appeals apply a presumption that the government will adequately represent the proposed intervenor. The presumption can only be overcome by "a strong affirmative showing" that the government "is not fairly representing the applicants' interests." Pet. App. 8a. In contrast, four Circuits do not apply a presumption in such cases. *See, e.g.*, *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015). Relying heavily on the presumption in the proceedings below, the First Circuit ruled that Petitioners could not intervene as of right to advance constitutional arguments in support of an important Department of Education rule on Title IX that none of the existing parties are willing to make.

The question presented is whether a movant who seeks to intervene as of right on the same side as a governmental litigant must overcome a presumption of adequate representation.

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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.

[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.

SUMMARY OF THE ARGUMENT

The lawyers working in the Department of Justice's Federal Programs division are some of the best in the country. They are capable of defending a wide array of federal statutes and regulations promulgated by executive branch agencies, like the Department of Education. Nevertheless, it is inaccurate to suggest that the political appointees who direct and control the decisions made at executive branch agencies—not just at the Department of Justice, but also at higher levels of the Executive Branch—will presumptively support the vigorous defense of the policy enactments of prior administrations. That is particularly true where, like here, a presidential administration changes in the middle of litigation. This Court should grant certiorari to ensure that applicants for intervention are not denied an opportunity to intervene based on such a presumption.

ARGUMENT

As the Petitioner notes, on May 6, 2020, the Department of Education announced that it was promulgating final regulations under 20 U.S.C. § 1682, more commonly known as Title IX of the Education Amendments of 1972 (Title IX). ("Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to

such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.").

The regulations were the first of their kind. Never before had the Department enshrined protections against sexual harassment for students, staff, and others into federal regulations. Instead, the Department had pursued a course of issuing guidance documents, which are not subject to the normal notice and comment process under the Administrative Procedures Act. *See* 5 U.S.C. § 553. Without a doubt, it was one of the signature accomplishments of Secretary DeVos's Department of Education during the Trump Administration.

This process, moreover, was set against the backdrop of a September 2017 speech given by then Secretary DeVos, in which she announced that the Department was undertaking significant reforms on Title IX. [2] Part of these reforms involved rescinding old Dear Colleague Letters issued during the Obama-Biden Administration. Unsurprisingly, then-candidate Biden reacted negatively to the Title IX regulations that were promulgated as a culmination of these reforms.

"'It's wrong,' Biden said. 'And, it will be put to a quick end in January 2021.'" Jonathan Easley, *Biden*

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[2] *See* C-SPAN, *Education Secretary DeVos on Title IX* (Sept. 7, 2017), https://www.c-span.org/video/?433696-1/education-secretary-lady-justice-blind-campuses-today

says he'll reverse DeVos rule bolstering protections for those accused of campus sexual assault, The Hill (May 6, 2020).[3] Biden's criticisms were put in dire tones. *See id.* ("Biden said the DeVos rule 'gives colleges a green light to ignore sexual violence' on campuses and would 'strip survivors of their rights.'"). In short, there was no question that Biden viewed the regulations as contrary to his policy preferences.

Biden's intent was unmistakable: if he were elected President, the new regulations would not survive his term. Indeed, by suggesting that they would face a "quick end in January 2021," Biden indicated that the Title IX regulations might not even survive the first 11 days of his presidency—between January 20 and January 31, 2021.

Nevertheless, in a lawsuit filed by the Victim Rights Center, which sought to have many of the new regulations invalidated, the First Circuit held on February 18, 2021, that Petitioners were not entitled to intervention as of right, on the basis that "this court and a number of others start with a rebuttable presumption that the government will defend adequately its action." *Victim Rights Law Center v. Rosenfelt*, 988 F.3d 556, 561 (1st Cir. 2021).

Not only should the government not be entitled to such a presumption, but affording such a presumption is subject to doctrinal and timing difficulties, given that an intervenor may be able to

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[3] https://thehill.com/homenews/campaign/496518-biden-says-hell-reverse-devos-rule-to-bolster-protections-for-those-accused.

rebut (or not rebut) the presumption of adequate defense at different points during the litigation.[4]

This Court should thus grant certiorari to clarify the appropriate legal standard for intervention.

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

President Biden has been outspoken on the topic of sexual harassment. *See* Bianca Quilantan, *Biden vows 'quick end' to DeVos' sexual misconduct rule: Biden disavowed Education Secretary Betsy DeVos' Title IX rule*, Politico (May 7, 2020) (""Before Tara Reade's assault accusations, Biden was unwavering in a presumption of guilt for the accused including Brett Kavanaugh," said Erin Perrine, the Trump Campaign's principal deputy communications director, in response to Biden's statement.").[5]

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[4] *See, e.g.*, State of Texas Memorandum in Support of Intervention, *Victim Rights Law Center v. Cardona*, 2021 WL 2649157 (Apr. 20, 2021), which argued that Texas ought to be able to intervene now that President Biden has taken office. ("[W]hereas FIRE was concerned that the Department would employ different arguments in defense of the Final Rule, Texas has shown that the Department under the Biden Administration has reason to cease defending the Final Rule altogether.") (internal citation omitted).

[5] https://www.politico.com/news/2020/05/06/biden-vows-a-quick-end-to-devos-sexual-misconduct-rule-241715

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]

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[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 issue "Dear Colleague Letters" to schools explaining their obligations under Title IX. *See id.* ("During the Obama-Biden Administration, I traveled to the University of New Hampshire … to announce that colleges would have new guidance and support from our Administration on how best to prevent and respond to campus sexual assault"); *see also* Robin Wilson, *How a 20-Page Letter Changed the Way Higher Education Handles Sexual Assault, The Chronicle of Higher Education* (Feb. 7, 2017) ("The centerpiece of Mr. Biden's announcement, a 20-page letter released by the U.S. Education Department's Office for Civil Rights, has since become legendary.")[10]

It was no surprise, then, that President Biden issued Executive Order 14,021 on March 8, 2021, which stated:

> (iii) The Secretary of Education shall consider suspending, revising, or rescinding—or publishing for notice and comment proposed rules suspending, revising, or rescinding—those agency actions that are inconsistent with the policy set forth in section 1 of this order as soon as practicable and as appropriate and consistent with applicable law, and may issue such requests for information as would facilitate doing so.

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[10] https://www.chronicle.com/article/how-a-20-page-letter-changed-the-way-higher-education-handles-sexual-assault/

Exec. Order 14,021, § 2(iii), 86 Fed. Reg. 13803 (Mar.8, 2021). Although the Executive Order did not clarify how the Department might go about suspending federal regulations, the intent was clear: the President wanted the Title IX regulations to be swiftly rescinded or changed.

Of course, attending to the normal regulatory process under the Administrative Procedures Act is long and painstaking. Indeed, it took the Trump Administration over two years between then-Secretary DeVos's September 2017 speech announcing the project to enshrine protections against sexual harassment into law, and May 2020, when the regulations were finally issued.[11]

Even then, a new set of Title IX regulations would be subject to a new set of legal challenges, which could of course themselves extend beyond President Biden's term. As NBC News observed, "[t]he lawsuits [against the Title IX regulations] offer one potential shortcut to get rid of the regulations." Tyler Kingkade, *Biden wants to scrap Betsy DeVos' rules on sexual assault in schools. It won't be easy.*, NBC News (Nov. 12, 2020)[12]; *see id.* ("Because litigation over the Title IX regulations will likely continue into the spring, the Biden administration

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[11] Compare C-SPAN, *Education Secretary DeVos on Title IX* (Sept. 7, 2017) https://www.c-span.org/video/?433696-1/education-secretary-lady-justice-blind-campuses-today *with* Dept. of Ed., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) ("Final Rule").

[12] https://www.nbcnews.com/politics/2020-election/biden-wants-scrap-betsy-devos-rules-sexual-assault-schools-it-n1247472

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]

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[13] Some agencies have even been known to engage in "sue and settle" practices, whereby plaintiffs sue Executive Branch agencies staffed with sympathetic political appointees, and reach swift settlement agreements. *See* Zhonette Brown, *Biden's Activist Recruits Raise Risk of 'Sue and Settle' Collusion*, National Review Online (Feb. 7, 2021), https://www.nationalreview.com/2021/02/bidens-activist-recruits-raise-risk-of-sue-and-settle-collusion/ ("In 2015, the U.S. Senate Committee on Environment and Public Works published a report finding that sue and settle provided activists 'significant leverage' to drive and influence rulemaking.").

II. Biden's Nomination of Catherine Lhamon to be Assistant Secretary for Civil Rights Demonstrates Continued 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 Lhamon for Assistant Secretary for Civil Rights at the Department of Education (May 13, 2021).[14] Lhamon previously presided over the office from 2013 to 2017, before Secretary DeVos announced her intention to reform the Title IX process. *See* Tyler Kingkade, *Biden will nominate Catherine Lhamon to lead Education Department's civil rights office*, NBC News (May 13, 2021) ("Lhamon's nomination is the latest example of the White House steering civil rights policy back toward the Obama administration's approach and is likely to please advocacy groups for victims of sexual assault and civil rights organizations.").[15]

Unsurprisingly, Lhamon was a fierce critic of the prior administration, and harshly criticized the Title IX regulations even before they were publicly available in May 2020.

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[14] https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/13/president-biden-announces-his-intent-to-nominate-catherine-lhamon-for-assistant-secretary-for-civil-rights-at-the-department-of-education/.

[15] https://www.nbcnews.com/politics/politics-news/biden-will-nominate-catherine-lhamon-lead-education-department-s-civil-n1267166

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 Questions for the Record for Catherine Lhamon, Nominee to be Assistant Secretary for Civil Rights, Department of

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[18] https://www.yahoo.com/now/biden-civil-rights-nominee-remains-144000457.html

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:

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[19] Republican-HELP-Committee-QFRs-for-OCR-Nominee-Catherine-Lhamon-7.19.21.pdf (mslegal.org)

> 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 require 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 Rule, 85 Fed. Reg. at 30346–47 ("If the respondent 'wrongfully procures' a complainant's absence, for example, through intimidation or threats of violence, and the recipient has notice of that misconduct by the respondent (which likely constitutes prohibited retaliation), the recipient must remedy the retaliation, perhaps by rescheduling the hearing to occur at a later time when the complainant may appear with safety measures in place.").

("[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 to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.	If a party or witness does not submit to cross-examination at the **live** hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; **provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.**

NPRM, 83 Fed. Reg. at 61498; 34 C.F.R. § 106.45(b)(6)(i) (emphasis supplied).

Moreover, the Department had indeed considered numerous comments from the public regarding the possibility that in some cases, a decision-maker would not be able to conclude that sexual harassment had occurred due to the cross-examination requirement; it nevertheless felt that the strong interest in preserving cross-examination outweighed that possibility.

For instance, the preamble to the Title IX regulations included the following statements:

- "Commenters argued it is unfair to punish a survivor by denying relief for a meritorious claim just because key witnesses refuse to testify or refuse to submit to cross-examination." Final Rule, 85 Fed. Reg. at 30344.

- "Commenters argued that the statements of witnesses should not be excluded due to nonappearance or refusal to submit to cross-examination, because witnesses may be unavailable for legitimate reasons such as studying abroad, illness, graduation, out-of-state residency, class activities, and so forth." *Id.* at 30345.

- "Commenters argued that the final regulations should allow for evidence not subject to cross-examination ('uncrossed') to be taken into account 'for what it's worth' by the decisionmaker who may assign appropriate weight to uncrossed statements rather than disregarding them altogether, so as to

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 witness to participate." *Id.* at 30322.

- "Further, § 106.45(b)(6)(i) includes language that directs a decision-maker to reach the determination regarding responsibility based on the evidence remaining even if a party or witness refuses to undergo cross-examination, so that even though the refusing party's statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so long as no inference is drawn based on the party or witness's absence from the hearing or refusal to answer cross-examination (or other) questions." *Id.*

In the same vein, the preamble to the Title IX regulations repeatedly emphasizes the value of cross-examination so heavily that it specifically contemplates that some forms of evidence will be disallowed without cross-examination, despite the fact that the evidence could be highly probative:

> The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to crossexamination. … Thus, police reports, SANE reports, medical reports, and other

> documents and records may not be relied on to the extent that they contain the statements 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 reliability 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. In short, it is difficult to understand how the District Court did not conclude that the Department fully and robustly considered and intended the consequences of its actions.

Indeed, the Department even considered that some respondents would engage in gamesmanship to reduce the chance that relevant evidence would be admitted and relied upon; it nevertheless proceeded as it did. *Id*. ("This provision does apply to the situation where evidence involves intertwined statements of both parties (e.g., a text message exchange or e-mail thread) and one party refuses to submit to cross-examination and the other does

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 declines 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, which would have provided for outright dismissal in cases where cross-examination could not occur:

> The Department declines to change this provision so the consequence of refusal to submit to cross-examination is dismissal of the case rather than non-reliance on the refusing party or witness's statement. Such a change would operate only against complainants' interests because a respondent could choose to refuse cross-examination knowing the result would be dismissal (which, presumably, is a positive result in a respondent's view). This would essentially give respondents the ability to control the outcome of the hearing, running contrary to the purpose of the final regulations in giving both parties equal

[21] https://www2.ed.gov/about/offices/list/ocr/open/cross-examination.pdf (last visited, August 18, 2021).

> 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

permission, normally has the right to appeal an adverse final judgment by a trial court.").

That is true even when the subject at issue is the validity of federal regulations, and the federal government has declined to appeal an adverse ruling. *See Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 482 (9th Cir. 2011) ("The end result is that Intervenors seek to defend the 2006 Regulations—regulations that the BLM itself no longer seeks to defend."); *see id.* at 482 ("While this situation presents an unusual circumstance, it is not one without precedent, and it is well established that the government is not the only party who has standing to defend the validity of federal regulations."); *see also Didrickson v. U.S. Dept. of Interior*, 982 F.2d 1332, 1339 (9th Cir. 1992) ("[T]he FSO do not claim to be seeking judicial review of the Government's decision not to appeal. Rather, the FSO are seeking to protect what they believe is the correct interpretation of the MMPA."); *National Wildlife Federation v. Lujan*, 928 F.2d 453, 456 (D.C. Cir. 1991) ("Although the Secretary is not appealing this decision, Industry is.").

Even with respect to intervenor standing on appeal, courts are willing to consider whether the district court judgment itself creates a concrete injury:

> In these circumstances, Intervenors' standing need not be based on whether they would have had standing to independently bring this suit, but rather may be contingent on whether they have standing now based on a concrete injury related to the judgment.

> 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 pursuing changes to the Title IX regulations, and the onerous nature of the process under the APA, it is highly likely that it will not appeal the District Court's decision setting aside part of 34 C.F.R. 106.45(b)(6)(i). For that reason alone, the Biden Administration is unlikely to adequately defend the Title IX regulations.

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

On July 29, 2021, the House of Representatives passed H.R. 4502.[22] That bill is entitled: "Making appropriations for the Departments of Labor, Health and Human Services, and Education, and related

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[22] *Available at* https://www.congress.gov/117/bills/hr4502/BILLS-117hr4502eh.pdf

agencies for the fiscal year ending September 30, 2022, and for other purposes." Although it appropriates certain funds to the 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 title 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 precludes 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 Congress from limiting its appropriate to the Department of Justice in a similar manner).

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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