

1 **OFFICE OF THE ATTORNEY GENERAL OF TEXAS**  
 PATRICK K. SWEETEN, (*pro hac vice motion forthcoming*)  
 2 E-Mail: Patrick.Sweeten@oag.texas.gov  
 KATHLEEN T. HUNKER, (*pro hac vice motion forthcoming*)  
 3 E-Mail: Kathleen.Hunker@oag.texas.gov  
 P.O. Box 12548 (MC-009)  
 4 Austin, TX 78711-2548  
 Telephone: 512.936.1414  
 5 Facsimile: 512.936.0545

6 **LEWIS BRISBOIS BISGAARD & SMITH LLP**  
 MICHAEL K. JOHNSON, CA Bar No. 130193  
 7 E-Mail: Michael.Johnson@lewisbrisbois.com  
 2185 North California Boulevard, Suite 300  
 8 Walnut Creek, California 94596  
 Telephone: 925.357.3456  
 9 Facsimile: 925.478.3260  
 Attorneys for Intervenor-Defendant  
 10 **KEN PAXTON IN HIS OFFICIAL CAPACITY AS**  
**ATTORNEY GENERAL OF TEXAS**

11  
 12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

14  
 15 THE WOMEN’S STUDENT UNION,  
 16 Plaintiff,  
 17 vs.  
 18 U.S. DEPARTMENT OF EDUCATION,  
 19 Defendant.  
 20 and  
 21 STATE OF TEXAS,  
 22 [Proposed] Intervenor-  
 23 Defendant.

Case No. 3:21-cv-01626-EMC

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 INTERVENOR-DEFENDANT STATE OF  
 TEXAS’S MOTION TO INTERVENE AS  
 DEFENDANT**

Judge: Hon. Edward M. Chen

**Date: May 20, 2021**  
**Time: 1:30 p.m.**  
**Crtrm: 5, 17<sup>th</sup> Floor**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

**Page**

INTRODUCTION.....1

STATEMENT OF ISSUES.....1

FACTUAL BACKGROUND .....1

LEGAL STANDARD .....4

ARGUMENT .....5

I. The Court Should Grant Intervention As Of Right. ....5

    A. Texas’ Motion Is Timely.....5

    B. As A Provider Of Public Education, Texas Has Significant Protectable  
    Interests Directly Affected By This Litigation.....6

    C. Disposition Of This Action Would Impair Or Impede Texas’ Ability To  
    Protect Its Interests. ....9

    D. None Of The Parties Adequately Represent Texas’ Interests. ....10

II. In The Alternative, The Court Should Permit Permissive Intervention. ....12

CONCLUSION .....13

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Page**

**FEDERAL COURT CASES**

*Arakaki v. Cayetano*,  
324 F.3d 1078 (9th Cir. 2003)..... 6, 10

*Bates v. Jones*,  
904 F. Supp. 1080 (N.D. Cal. 1995) ..... 10

*Bresgal v. Brock*,  
637 F. Supp. 271 (D. Or. 1985), *aff'd as modified*, 833 F.2d 763 (9th Cir. 1987), 843  
F.2d 1163 (9th Cir. 1987)..... 4

*Builders Ass’n of Greater Chi. v. City of Chicago*,  
170 F.R.D. 435 (N.D. Ill. 1996) ..... 7

*California ex rel. Lockyer v. United States*,  
450 F.3d 436 (9th Cir. 2006)..... 9

*California v. Health & Human Services*,  
330 F.R.D. 248 (N.D. Cal. 2019) ..... 4, 8, 9, 12

*Citizens for Balanced Use v. Montana Wilderness Ass’n*,  
647 F.3d 893 (9th Cir. 2011)..... 9

*Daggett v. Comm’n on Gov’t Ethics*,  
172 F.3d 104 (1st Cir. 1999) ..... 4

*Doe v. Univ. of Scis.*,  
961 F.3d 203 (3d Cir. 2020)..... 8

*E.E.O.C. v. Nat’l Children’s Ctr., Inc.*,  
146 F.3d 1042 (D.C. Cir. 1998) ..... 12

*Edwards v. City of Houston*,  
78 F.3d 983 (5th Cir. 1996)..... 4

*Feller v. Brock*,  
802 F.2d 722 (4th Cir. 1986)..... 10

*Forest Conservation Council v. U.S. Forest Serv.*,  
66 F.3d 1489 (9th Cir. 1995)..... 10

*Hecox v. Little*,  
479 F. Supp. 3d 930 (D. Idaho 2020)..... 6

*Humane Soc. of U.S. v. Clark*,  
109 F.R.D. 518 (D.D.C. 1985)..... 13

*Int’l Paper Co. v. Inhabitants of Town of Jay, Me.*,  
887 F.2d 338 (1st Cir. 1989) ..... 12

1 *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Local*  
 2 *283 v. Scofield,*  
 382 U.S. 205 (1965) ..... 10

3 *Jack Marine Int’l Services Ltd. v. Tilman Enterprises Inc., 18-CV-00693-BLF,*  
 4 2018 WL 1258211 (N.D. Cal. Mar. 12, 2018) ..... 6

5 *Kamakahi v. Am. Soc’y for Reprod. Med., 11-CV-01781-JCS,*  
 2015 WL 1926312 (N.D. Cal. Apr. 27, 2015) ..... 5

6 *Kukui Gardens Corp. v. Holco Capital Group, Inc.,*  
 7 261 F.R.D. 523 (D. Haw. 2009) ..... 4

8 *League of United Latin Am. Citizens v. Wilson,*  
 131 F.3d 1297 (9th Cir. 1997) ..... 4

9 *Mot. to Stay Briefing Schedule, Commonwealth of Pennsylvania v. Devos,*  
 10 1:20-cv-01468-CJN (D.D.C. Feb. 3, 2021) ..... 11

11 *Ninth Circuit. Smith v. Los Angeles Unified Sch. Dist.,*  
 830 F.3d 843 (9th Cir. 2016) ..... 5

12 *Nuesse v. Camp,*  
 13 385 F.2d 694 (D.C. Cir. 1967) ..... 10

14 *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland,*  
 960 F.3d 603 (9th Cir. 2020) ..... 12

15 *Oregon Env’tl. Council v. Oregon Dep’t of Env’tl. Quality,*  
 16 775 F. Supp. 353 (D. Or. 1991) ..... 13

17 *Prete v. Bradbury,*  
 438 F.3d 949 (9th Cir. 2006) ..... 4

18 *Raytek, Inc. v. Omega Eng’g, Inc., C-93-20188 RMW PVT,*  
 19 1993 WL 404088 (N.D. Cal. Sept. 22, 1993) ..... 5

20 *Retiree Support Group of Contra Costa Cnty. v. Contra Costa Cnty.,*  
 315 F.R.D. 318 (N.D. Cal. 2016) ..... 5

21 *Scholl v. Mnuchin,*  
 22 483 F. Supp. 3d 822 (N.D. Cal. 2020) ..... 12

23 *Sw. Ctr. for Biological Diversity v. Berg,*  
 268 F.3d 810 (9th Cir. 2001) ..... 8, 9

24 *Swan v. Peterson,*  
 25 6 F.3d 1373 (9th Cir.1993) ..... 10

26 *Syngenta Seeds, Inc. v. County of Kauai,*  
 CIV. 14-00014BMK, 2014 WL 1631830 (D. Haw. Apr. 23, 2014) ..... 9

27 *Texas. See S.E.C. v. Navin,*  
 28 166 F.R.D. 435 (N.D. Cal. 1995) ..... 9

1 *Title IX. See Daniel v. Univ. of Tex. Sw. Med. Ctr.*,  
 2 960 F.3d 253 (5th Cir. 2020)..... 7

3 *Trbovich v. United Mine Workers of Am.*,  
 4 404 U.S. 528 (1972) ..... 10, 11

5 *United States v. Alisal Water Corp.*,  
 6 370 F.3d 915 (9th Cir. 2004)..... 4

7 *United States v. Blue Lake Power, LLC*,  
 8 215 F. Supp. 3d 838 (N.D. Cal. 2016) ..... 5

9 *Venegas v. Mitchell*,  
 10 495 U.S. 82 (1990) ..... 12

11 *Venegas v. Skaggs*,  
 12 867 F.2d 527 (9th Cir. 1989)..... 12, 13

13 *W. Energy All. v. Zinke*,  
 14 877 F.3d 1157 (10th Cir. 2017)..... 10

15 *WildEarth Guardians v. U.S. Forest Serv.*,  
 16 573 F.3d 992 (10th Cir. 2009)..... 11

17 *Wilderness Soc. v. U.S. Forest Serv.*,  
 18 630 F.3d 1173 (9th Cir. 2011)..... 10

**FEDERAL RULES AND REGULATIONS**

19 Fed. R. Civ. P. 24(a)..... 1

20 Fed. R. Civ. P. 24(b)..... 1

21 Fed. R. Civ. P. 24(c)..... 5

22 Fed. R. Civ. P. 24(b)(1)(B)..... 12

**CONSTITUTIONAL PROVISIONS**

23 Tex. Const.art. VII, § 1..... 6

**ADDITIONAL AUTHORITIES**

24 [https://tea.texas.gov/sites/default/files/comp\\_annual\\_biennial\\_2020.pdf](https://tea.texas.gov/sites/default/files/comp_annual_biennial_2020.pdf). ..... 6

25 Agency, *Enrollment in Texas Public Schools 2019-20 at 1* ,  
 26 [https://tea.texas.gov/sites/default/files/enroll\\_2019-20.pdf](https://tea.texas.gov/sites/default/files/enroll_2019-20.pdf). (Aug. 12, 2020)..... 6

27 *Candice Jackson, OCR, U.S. Dept. of Educ., Dear Colleague Letter* (Sept. 9, 2017),  
 28 [https:// www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf](https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf) ..... 2

2011 *Dear Colleague Letter.” Id; The Biden Plan To End Violence Against Women*,  
 JOEBIDEN.COM, <https://joebiden.com/vawa/> (last visited Mar. 24, 2021)..... 11

Greta Anderson, *More Title IX Lawsuits by Accusers and Accused, Insider Higher Ed* ,  
[https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-  
 challenge-title-ix-proceedings](https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings) (Oct. 3, 2019) ..... 8

1 Janet Napolitano, “Only Yes Means Yes”: *An Essay on University Policies Regarding*  
*Sexual Violence and Sexual Assault*, 33 YALE L. & POL’Y REV. 387, 394–395 (2015) ..... 7, 8

2

3 Joe Biden, *Statement on the Trump Administration Rule to Undermine Title IX and*  
*Campus Safety* (May 6, 2020), [https://medium.com/@JoeBiden/statement-by-vice-](https://medium.com/@JoeBiden/statement-by-vice-president-joe-biden-on-the-trump-administration-rule-to-undermine-title-ix-and-e5dbc545daa)  
[president-joe-biden-on-the-trump-administration-rule-to-undermine-title-ix-and-](https://medium.com/@JoeBiden/statement-by-vice-president-joe-biden-on-the-trump-administration-rule-to-undermine-title-ix-and-e5dbc545daa)  
[e5dbc545daa](https://medium.com/@JoeBiden/statement-by-vice-president-joe-biden-on-the-trump-administration-rule-to-undermine-title-ix-and-e5dbc545daa) ..... 3

4

5 Jonathan Taylor, *Milestone: 600+ Title IX/Due Process Lawsuits in Behalf of Accused*  
*Students, Title IX for All* (Apr. 1, 2020), [https://www.titleixforall.com/milestone-600-](https://www.titleixforall.com/milestone-600-title-ix-due-process-lawsuits-in-behalf-of-accused-students)  
[title-ix-due-process-lawsuits-in-behalf-of-accused-students](https://www.titleixforall.com/milestone-600-title-ix-due-process-lawsuits-in-behalf-of-accused-students)..... 7, 8

6

7 *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving*  
*Federal Financial Assistance*, (May 19, 2020)..... 1

8

9 Press Release, U.S. Dept. of Educ., *Vice Present Biden Announces New Administration*  
*Efford to Help Nation's Schools Address Sexual Violence* (Apr. 4, 2011),  
[https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-](https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-adminstration-effort-help-nations-schools-ad)  
[adminstration-effort-help-nations-schools-ad](https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-adminstration-effort-help-nations-schools-ad). ..... 2

10

11 *Russlynn Ali, OCR, U.S. Dept. of Educ., Dear Colleague Letter: Sexual Violence* ,  
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. (Apr. 4, 2011)..... 1

12

13 Taylor Mooney, *How Betsy DeVos plans to change the rules for handling sexual*  
*misconduct on campus*, CBS NEWS (Nov. 24, 2019) ..... 1

14

15 Tex. Educ. Agency, *2020 Comprehensive Biennial Report on Texas Public Schools* at 297  
(Dec. 4, 2020) (reporting that Texas received \$5.3 billion dollars for K-12 education),  
[https://tea.texas.gov/sites/default/files/comp\\_annual\\_biennial\\_2020.pdf](https://tea.texas.gov/sites/default/files/comp_annual_biennial_2020.pdf). ..... 6

16

17 Tex. Educ. Agency, *Enrollment in Texas Public Schools 2019-20* at 1 (Aug. 12, 2020),  
[https://tea.texas.gov/sites/default/files/enroll\\_2019-20.pdf](https://tea.texas.gov/sites/default/files/enroll_2019-20.pdf). ..... 6

18

19 *Tex. Higher Educ. Coordinating Bd., 2020 Texas Public Higher Education Almanac* at  
28, 47, [https://reportcenter.highered.texas.gov/agency-publication/almanac/2020-texas-](https://reportcenter.highered.texas.gov/agency-publication/almanac/2020-texas-public-higher-education-almanac/)  
[public-higher-education-almanac/](https://reportcenter.highered.texas.gov/agency-publication/almanac/2020-texas-public-higher-education-almanac/). (Sept. 28, 2020) ..... 6

20

21 *The Biden Agenda for Women*, JOEBIDEN.COM, <https://joebiden.com/womens-agenda/>  
(last visited Mar. 24, 2021) ..... 2, 3, 11

22

23 *The Biden Plan To End Violence Against Women* , <https://joebiden.com/vawa/> (last  
visited Mar. 24, 2021) ..... 2

24

25 *Recalibrating Regulation of Colleges and Universities* at 14 (Feb. 12, 2015), available at  
[https://www.acenet.edu/Documents/Higher-Education-Regulations-Task-Force-](https://www.acenet.edu/Documents/Higher-Education-Regulations-Task-Force-Report.pdf)  
[Report.pdf](https://www.acenet.edu/Documents/Higher-Education-Regulations-Task-Force-Report.pdf)..... 7, 9

26

27 *Title IX/Due Process Lawsuits in Behalf of Accused Students, Title IX for All* ,  
[https://www.titleixforall.com/milestone-600-title-ix-due-process-lawsuits-in-behalf-of-](https://www.titleixforall.com/milestone-600-title-ix-due-process-lawsuits-in-behalf-of-accused-students)  
[accused-students](https://www.titleixforall.com/milestone-600-title-ix-due-process-lawsuits-in-behalf-of-accused-students). (Apr. 1, 2020) ..... 8

28

29 *U.S. Dept. of Educ., Questions and Answers on Title IX and Sexual Violence* ,  
<https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. (Apr. 24, 2014) ..... 1

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Press Release, U.S. Dept. of Educ., Vice President Biden Announces New Administration Effort to Help Nation’s Schools Address Sexual Violence,*  
<https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad> ..... 2

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28**INTRODUCTION**

The State of Texas (“Texas”) respectfully moves to intervene in defense of the Department of Education’s (“the Department”) Final Rule addressing Title IX obligations, which took effect on August 14, 2020.<sup>1</sup> Texas submits this motion because, as common provider of education, Texas has a compelling interest in the Department issuing clear, practical regulatory guidance, which enables the State to combat sexual harassment without sacrificing its commitment to either free speech or due process, nor its receipt of federal funds. The Biden Administration, however, has expressed open hostility to the provisions in the Final Rule that do just that and has taken early steps towards the Final Rule’s repeal. In light of these actions, Texas cannot trust that the Department will provide a robust defense of the Final Rule or adequately represent its significant protectable interests.

**STATEMENT OF ISSUES**

(1) Whether the State of Texas has a right to intervene under Rule 24(a) of the Federal Rules of Civil Procedure; and,

(2) Whether, in the alternative, the State of Texas should be permitted to intervene under the Federal Rules of Civil Procedure 24(b).

**FACTUAL BACKGROUND**

During the Obama Administration, the Department issued its deeply misguided and controversial 2011 Dear Colleague Letter<sup>2</sup> and 2014 Questions and Answers on Title IX Sexual Violence (“2014 Question and Answers”).<sup>3</sup> Although neither underwent notice and comment rulemaking, the two guidance documents put recipients in a no-win situation where either conforming or failing to conform to the guidance documents would expose them to significant risk of litigation.<sup>4</sup> Then-Vice-President Joe Biden played a key role in the development and

---

<sup>1</sup>*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020).

<sup>2</sup> *Russlynn Ali, OCR, U.S. Dept. of Educ., Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>3</sup> U.S. Dept. of Educ., *Questions and Answers on Title IX and Sexual Violence* (Apr. 24, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>4</sup> *See, e.g., Taylor Mooney, How Betsy DeVos plans to change the rules for handling sexual misconduct on campus*, CBS NEWS (Nov. 24, 2019) (“Prior to 2011, the number of lawsuits filed against universities for failing to provide due process in Title IX cases averaged one per year. It is (footnote continued)



1 implementation of the Obama Administration’s policies on sexual harassment,<sup>5</sup> including the  
 2 changes the administration advanced regarding Title IX. The former vice president, in fact, stood as  
 3 the Obama Administration’s spokesperson for the Dear Colleague Letter, announcing its publication  
 4 to students at the University of New Hampshire in Durham. *See* Press Release, U.S. Dept. of Educ.,  
 5 *Vice President Biden Announces New Administration Effort to Help Nation’s Schools Address*  
 6 *Sexual Violence* (Apr. 4, 2011), [https://www.ed.gov/news/press-releases/vice-president-biden-](https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad)  
 7 [announces-new-administration-effort-help-nations-schools-ad](https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad).

8 The Dear Colleague Letter and 2014 Questions and Answers had a detrimental impact on  
 9 publicly funded education across the country, including in Texas. Not only did the two guidance  
 10 documents introduce significant confusion as to academic institutions’ obligations under Title IX,  
 11 but they also incentivized academic institutions to violate students’ constitutional rights in order to  
 12 avoid incurring liability. Thus, in response to growing criticism, the Department, under the Trump  
 13 Administration, rescinded both the Dear Colleague Letter and the 2014 Questions and Answers in  
 14 2017.<sup>6</sup> It soon became apparent, however, that the withdrawal could not repair the damage caused  
 15 by the two guidance documents on its own. The Department therefore issued on May 19, 2020 the  
 16 Final Rule that is the subject of this action. The Final Rule, for the first time, clearly demarcated the  
 17 outer boundaries of federal fund recipients’ obligations under Title IX with respect to sexual  
 18 harassment. It thereby reduced their risk of liability and resolved the dilemma of how to enforce  
 19 Title IX without sacrificing the rights of either the victims of sexual harassment or the accused.

20 From the moment it was announced, the former vice president opposed the Department’s  
 21 new guidance. He repeatedly (and erroneously) characterized the Final Rule as “a green light to  
 22 ignore sexual violence.” *The Biden Agenda for Women*, JOEBIDEN.COM, <https://joebiden.com/>  
 23

24 \_\_\_\_\_  
 25 expected there will be over 100 such lawsuits filed in 2019 alone.”), <https://www.cbsnews.com/news/title-ix-sexual-misconduct-on-campus-trump-administration-changing-obama-rules-cbsn-documentary/>.

26 <sup>5</sup> Unless otherwise stated, the term “sexual harassment” encompasses all forms of sexual  
 27 harassment, including sexual violence and sexual assault. Likewise, unless otherwise stated, the  
 28 term, “academic institutions” encompasses all entities covered by the new Final Rule issued by the  
 Department, including schools, colleges, and universities, both primary and secondary.

<sup>6</sup> *See Candice Jackson, OCR, U.S. Dept. of Educ., Dear Colleague Letter* (Sept. 9, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.  
 4828-9071-6900.1

1 womens-agenda/ (last visited Mar. 24, 2021), And he assured his supporters on the campaign trail  
2 that he intended to advance the same objectives for Title IX as he did during the Obama  
3 Administration should he be elected to the presidency. According to his website, a Biden  
4 Administration would restore the 2011 Dear Colleague Letter and curtail, if not repeal outright,  
5 reforms contained in the Final Rule. *See The Biden Plan To End Violence Against Women*,  
6 JOEBIDEN.COM, <https://joebiden.com/vawa/> (last visited Mar. 24, 2021). Indeed, a common refrain  
7 of his campaign was that the Department under a Biden Administration would put a “quick end” to  
8 the Final Rule. *E.g.* Joe Biden, *Statement on the Trump Administration Rule to Undermine Title IX*  
9 *and Campus Safety* (May 6, 2020), [https://medium.com/@JoeBiden/statement-by-vice-president-](https://medium.com/@JoeBiden/statement-by-vice-president-joe-biden-on-the-trump-administration-rule-to-undermine-title-ix-and-e5dbc545daa)  
10 [joe-biden-on-the-trump-administration-rule-to-undermine-title-ix-and-e5dbc545daa](https://medium.com/@JoeBiden/statement-by-vice-president-joe-biden-on-the-trump-administration-rule-to-undermine-title-ix-and-e5dbc545daa).

11 The former vice president was successful in his run for the White House. He entered office  
12 on January 20, 2021, where he and his administration took immediate steps to cabin its defense of  
13 the Final Rule. In particular, his administration instructed the Department to seek an abeyance in  
14 *Commonwealth of Pennsylvania v. Devos*, a parallel case, which challenges the Final Rule under  
15 the Administrative Procedure Act. *See* Mot. to Stay Briefing Schedule, 1:20-cv-01468-CJN (D.D.C.  
16 Feb. 3, 2021). The motion was filed with the support of the plaintiffs in that action and stated that  
17 the Department’s new leadership intended “to review the underlying rule at issue in this case.” *Id.*  
18 The implication, of course, is that the federal government is likely to change its position regarding  
19 the Final Rule. As further evidence of this about-face, President Biden issued an Executive Order  
20 specifically charging the new Secretary of Education to review the Final Rule for “consistency”  
21 with Biden Administration’s stated Title IX policy. The Secretary has instruction “to consider  
22 suspending, revising or rescinding” any portion of the Final Rule it deems inconsistent.

23 The Biden Administration, in sum, is openly hostile to the Final Rule and therefore Texas’  
24 significant protectable interests. Yet, at the same time, it controls the Department’s approach to Title  
25 IX, up to and including the Department’s defense of the Final Rule and the resolution of lawsuits  
26 challenging the Final Rule’s validity. Recognizing this fact, Texas moved to intervene in  
27 *Commonwealth of Pennsylvania* on January 19, 2021, which the D.C. District Court granted. Texas  
28 has now learned that the Women’s Student Union (“Plaintiff”) initiated a separate legal action on

1 March 8, 2021, claiming that the Final Rule is both arbitrary and capricious. Texas files this motion  
2 to intervene in response.

### 3 LEGAL STANDARD

4 The Federal Rules provide two mechanisms for third-party intervention in a lawsuit:  
5 intervention of right under Rule 24(a) and permissive intervention under Rule 24(b). For  
6 intervention of right to apply, the movant must demonstrate that: (1) the motion is timely; (2) the  
7 movant has a legally protected interest in the action; (3) the action must threaten to impair that  
8 interest; and (4) the movant's interest is not adequately represented by the existing parties. *See Prete*  
9 *v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006). "In determining whether intervention is appropriate,  
10 courts are guided primarily by practical and equitable considerations, and the requirements for  
11 intervention are broadly interpreted in favor of intervention." *United States v. Alisal Water Corp.*,  
12 370 F.3d 915, 919 (9th Cir. 2004). "[T]he inquiry" into Rule 24(a) is therefore "flexible one, which  
13 focuses on the particular facts and circumstances surrounding each application" *Edwards v. City of*  
14 *Houston*, 78 F.3d 983, 999 (5th Cir. 1996). "[I]ntervention must be "measured by a practical rather  
15 than technical yardstick." *Id.*; *see also California v. Health & Human Services*, 330 F.R.D. 248, 252  
16 (N.D. Cal. 2019) (stating that intervention should not turn on "technical distinctions").

17 To qualify for permissive intervention, the movant must show: (1) an independent ground  
18 for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of  
19 law or fact in common with the main action. *League of United Latin Am. Citizens v. Wilson*, 131  
20 F.3d 1297, 1308 (9th Cir. 1997). As its name would suggest, permissive intervention is an inherently  
21 discretionary enterprise provided the movant meets the abovementioned requirements. *Kukui*  
22 *Gardens Corp. v. Holco Capital Group, Inc.*, 261 F.R.D. 523, 534 (D. Haw. 2009). The Ninth  
23 Circuit has generally endorsed "liberal construction in favor of applications for intervention."  
24 *Bresgal v. Brock*, 637 F. Supp. 271, 272 (D. Or. 1985), *aff'd as modified*, 833 F.2d 763 (9th Cir.  
25 1987), opinion amended and superseded, 843 F.2d 1163 (9th Cir. 1987). A liberal approach to  
26 intervention is especially appropriate "where the subject matter of the lawsuit is of great public  
27 interest, the intervenor has a real stake in the outcome and the intervention may well assist the court  
28 in its determination through . . . the framing of issues." *Daggett v. Comm'n on Gov't Ethics*, 172

1 F.3d 104, 116–17 (1st Cir. 1999) (Lynch, J., concurring).

2 Texas meets the requirements for both intervention as of right and permissive intervention.

3 Pursuant to Rule 24(c), Texas’ proposed answer is submitted herewith as Exhibit A.

4 **ARGUMENT**

5 **I. The Court Should Grant Intervention As Of Right.**

6 **A. Texas’ Motion Is Timely.**

7 Plaintiff commenced this action on March 8, 2021. Texas filed its motion to intervene on  
8 April 7, 2021, less than a month after Plaintiff submitted its complaint with this Court. Based on  
9 this timeline, there can be no doubt that the motion is timely. *See Raytek, Inc. v. Omega Eng'g, Inc.*,  
10 C-93-20188 RMW PVT, 1993 WL 404088, at \*2 (N.D. Cal. Sept. 22, 1993) (“Generally, the earlier  
11 a party seeks intervention, the more likely it will be granted.”). When evaluating timeliness, courts  
12 in this jurisdiction look to three factors: (1) the stage of the proceeding at which an applicant seeks  
13 to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. *Retiree*  
14 *Support Group of Contra Costa Cnty. v. Contra Costa Cnty.*, 315 F.R.D. 318, 321 (N.D. Cal. 2016).  
15 Here, Texas has sought intervention at the earliest stage of litigation. The Defendant has yet to  
16 appear before this Court, and no substantive briefings and proceedings have occurred. *See United*  
17 *States v. Blue Lake Power, LLC*, 215 F. Supp. 3d 838, 842 (N.D. Cal. 2016). Texas, in short, did  
18 not delay filing its motion but instead acted promptly once it became aware that its significant  
19 protectable interests in the Final Rule were at risk.

20 Texas’ promptness also means that there is no reasonable risk that its intervention would  
21 prejudice the existing parties or subject them to undue delay—the “most important consideration”  
22 in a court’s timeliness analysis, according to the Ninth Circuit. *Smith v. Los Angeles Unified Sch.*  
23 *Dist.*, 830 F.3d 843, 857 (9th Cir. 2016). As this Court has previously held, “[i]n the context of a  
24 timeliness analysis, prejudice is evaluated based on the difference between timely and untimely  
25 intervention—not based on the work Defendants would need to do regardless of when [Texas]  
26 sought to intervene.” *Kamakahi v. Am. Soc’y for Reprod. Med.*, 11-CV-01781-JCS, 2015 WL  
27 1926312, at \*4 (N.D. Cal. Apr. 27, 2015). Texas filed its motion at the earliest point possible, well  
28 before the parties litigated any of the issues raised by the Complaint or entered into agreements that

1 could be affected by Texas' entry into the case. If any difficulty arises from Texas' intervention, it  
 2 stems from including an additional party, not from the date Texas submitted its motion.<sup>7</sup>

3 For this reason, courts have routinely designated as timely motions that are filed by  
 4 prospective intervenors within the first few months of the litigation's commencement. *E.g. Arakaki*  
 5 *v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003), as amended (May 13, 2003); *Hecox v. Little*, 479  
 6 F. Supp. 3d 930, 956 (D. Idaho 2020); *Jack Marine Int'l Services Ltd. v. Tilman Enterprises Inc.*,  
 7 18-CV-00693-BLF, 2018 WL 1258211, at \*1 (N.D. Cal. Mar. 12, 2018); *Eashoo v. Iovate Health*  
 8 *Scis. U.S.A., Inc.*, CV 15-01726-BRO (JWX), 2015 WL 12696036, at \*4 (C.D. Cal. May 26, 2015).  
 9 This Court should do the same here.

10 **B. As A Provider Of Public Education, Texas Has Significant Protectable**  
 11 **Interests Directly Affected By This Litigation.**

12 Texas administers a system of primary and secondary public education that is funded by  
 13 both state and federal money. Tex. Educ. Agency, 2020 *Comprehensive Biennial Report on Texas*  
 14 *Public Schools* at 297 (Dec. 4, 2020) (reporting that Texas received \$5.3 billion dollars for K-12  
 15 education), [https://tea.texas.gov/sites/default/files/comp\\_annual\\_biennial\\_2020.pdf](https://tea.texas.gov/sites/default/files/comp_annual_biennial_2020.pdf). The Texas  
 16 Constitution charges the Texas Legislature "to establish and make suitable provision for the support  
 17 and maintenance of an efficient system of public free schools." Tex. Const. art. VII, § 1. Pursuant  
 18 to this charge, Texas funds, regulates, and oversees the second largest system of K-12 public  
 19 education in the nation, serving over 5.4 million students across 1,200 school districts. Tex. Educ.  
 20 Agency, *Enrollment in Texas Public Schools 2019-20* at 1 (Aug. 12, 2020),  
 21 [https://tea.texas.gov/sites/default/files/enroll\\_2019-20.pdf](https://tea.texas.gov/sites/default/files/enroll_2019-20.pdf).

22 Texas also funds, supports, and administers a robust network of higher education. Texas is  
 23 home to 119 public postsecondary institutions, including 37 universities and 82 two-year colleges  
 24 and technical schools. *See* Tex. Higher Educ. Coordinating Bd., 2020 *Texas Public Higher*  
 25 *Education Almanac* at 28, 47 (Sept. 28, 2020), <https://reportcenter.highered.texas.gov/agency->  
 26

27 \_\_\_\_\_  
 28 <sup>7</sup> Texas' intervention, if anything, will avert a potential disruption to this case should the federal  
 government withdraw its support of the Final Rule and refuse to defend it, which the Biden  
 Administration's recent actions suggest is likely. *See infra* Part I.D.  
 4828-9071-6900.1 6 Case No. 3:21-cv-01626-EMC

1 publication/almanac/2020-texas-public-higher-education-almanac/. While most states have just one  
 2 or two public university systems, Texas has six. The largest of these systems—the University of  
 3 Texas—has 14 separate locations that educate approximately 240,000 students each year. *See About*  
 4 *The University of Texas System*, THE UNIVERSITY OF TEXAS SYSTEM, [https://www.utsystem](https://www.utsystem.edu/about)  
 5 [.edu/about](https://www.utsystem.edu/about) (last visited Jan. 15, 2021). All told, the State’s entire network of higher education  
 6 enrolled just shy of 1.7 million students in 2019. *See Tex. Higher. Educ. Coordinating Bd.*, at 13.

7 Because Texas receives federal funding from the Department for primary and secondary  
 8 education, Texas and its public primary and secondary education systems are subject to Title IX and  
 9 the regulations effectuating Title IX, such as the Final Rule. Likewise, each of the institutions in  
 10 Texas’ systems of higher education receives federal funding and, as a result, is subject to the Final  
 11 Rule as well. This means that Texas and its academic institutions have an obligation to investigate  
 12 and enforce alleged violations of Title IX. *See Daniel v. Univ. of Tex. Sw. Med. Ctr.*, 960 F.3d 253,  
 13 257 (5th Cir. 2020) (recognizing public institutions of higher education as “arms” and  
 14 “instrumentalities” of the State). Texas is intensely interested in the Final Rule as a result. Indeed,  
 15 its interests are the “mirror-image” of Plaintiff’s interests. While Plaintiff alleges that it “[is] being  
 16 injured by the [Final Rule],” Texas “w[ould] be injured by [the Final Rule’s] invalidation.” *Builders*  
 17 *Ass’n of Greater Chi. v. City of Chicago*, 170 F.R.D. 435, 440 (N.D. Ill. 1996).

18 First, the Final Rule clarified the definition of sexual harassment as well as the conditions  
 19 that must be met before a recipient’s obligations under Title IX are activated. Invalidating the Final  
 20 Rule would create uncertainty, harming the Texas institutions regulated under Title IX. *See infra*  
 21 Part I.C. Earlier guidance had caused a great deal of confusion regarding recipients’ legal  
 22 responsibilities under Title IX.<sup>8</sup> Recipients did not know how to comply with the new mandates or  
 23 whether failure to do so would incur legal consequences. *See Janet Napolitano, “Only Yes Means*  
 24 *Yes”: An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L.

25  
 26  
 27 <sup>8</sup> The Task Force on Federal Regulation of Higher Education specifically identified the Dear  
 28 Colleague Letter and 2014 Question and Answers as guidance documents that were meant to  
 eliminate uncertainty but only led to more confusion. *See Recalibrating Regulation of Colleges and*  
*Universities* at 14 (Feb. 12, 2015), available at [https://www.acenet.edu/Documents/Higher-](https://www.acenet.edu/Documents/Higher-Education-Regulations-Task-Force-Report.pdf)  
[Education-Regulations-Task-Force-Report.pdf](https://www.acenet.edu/Documents/Higher-Education-Regulations-Task-Force-Report.pdf).  
 4828-9071-6900.1

1 & POL’Y REV. 387, 394–395 (2015).

2 In an abundance of caution, many academic institutions, including those funded by Texas,  
 3 elected to revise their policies to cover a greater range of conduct and make it easier for  
 4 administrators to arrive at a determination of guilt. *See Doe v. Univ. of Scis.*, 961 F.3d 203, 213 (3d  
 5 Cir. 2020) (describing the pressure universities faced as a result of the Dear Colleague Letter). But  
 6 that led to litigation. Hundreds of lawsuits have been filed since the Dear Colleague Letter was  
 7 issued—a sizeable number of which academic institutions lost or settled. *See* Second, the Final Rule  
 8 reduced Texas’ risk of liability. While previous guidance had supported an improperly broad view  
 9 of Title IX liability, the Final Rule fixed those issues. By confining Title IX liability to proper limits  
 10 set by statute, the Final Rule benefits Texas. If it were invalidated, Texas institutions would be  
 11 subject to litigation expenses, which, in turn, would lead to higher compliance costs and diversion  
 12 of resources.

13 In short, earlier guidance put Texas academic institutions between a rock and a hard place.  
 14 Not following the guidance would risk federal enforcement actions, but following the guidance  
 15 would lead to lawsuits, litigation expenses, and ultimately monetary settlements. *Id.*; *see also* Greta  
 16 Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDER HIGHER ED (Oct. 3, 2019),  
 17 [https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-](https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings)  
 18 [proceedings](https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings) (describing the “high cost of addressing sexual misconduct. . . a lose-lose situation for  
 19 universities”). The Final Rule, by contrast, resolves the dilemma. It provides clear guidance limiting  
 20 Texas’ liability and reducing expected litigation expenses.

21 These interests support intervention. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d  
 22 810, 818 (9th Cir. 2001) (“It is generally enough that the interest asserted is protectable under some  
 23 law, and that there is a relationship between the legally protected interest and the claims at issue.”).  
 24 In *California v. Health & Human Services*, the State of Oregon sought to intervene in a lawsuit  
 25 challenging federal regulations related to the contraception mandate. 330 F.R.D. at 253. This Court  
 26 concluded that the regulations’ impact on Oregon’s finances, public health, and sovereignty

27  
 28

1 constituted significant protectable interests as defined by Rule 24(a).<sup>9</sup> *Id.* Setting aside the Final  
 2 Rule would have similar implications for Texas. Thus, if Oregon satisfied Rule 24(a)'s second  
 3 prong, then so too does Texas. *See S.E.C. v. Navin*, 166 F.R.D. 435, 440 (N.D. Cal. 1995) (describing  
 4 the purpose of the interest test as “involving as many apparently concerned persons as is compatible  
 5 with efficiency and due process”).

6 **C. Disposition Of This Action Would Impair Or Impede Texas' Ability To**  
 7 **Protect Its Interests.**

8 Texas “would be substantially affected in a practical sense by the determination made” in  
 9 this action; it therefore “should, as a general rule, be entitled to intervene” *Sw. Ctr. for Biological*  
 10 *Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001). As explained above, the Final Rule provides  
 11 important benefits to Texas, its schools, and its citizens. It both limits the scope of potential Title IX  
 12 liability and also provides clarity that helps schools follow the law. But Plaintiff asks this Court to  
 13 deprive Texas of those benefits by “setting aside” the Final Rule. *See* ECF 1 at 23. Those “practical  
 14 consequences” are more than sufficient to show impairment of Texas' interests. *Nat. Res. Def.*  
 15 *Council v. Norton*, 1:05CV01207 OWW TAG, 2006 WL 39094, at \*10 (E.D. Cal. Jan. 5, 2006); *see*  
 16 *also California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006) (“Having found  
 17 that appellants have a significant protectable interest, we have little difficulty concluding that the  
 18 disposition of this case may, as a practical matter, affect it.”). When a movant benefits from a  
 19 regulation, invalidation of that regulation would necessarily impair the movant's interests. *See, e.g.,*  
 20 *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011); *Sw. Ctr.*  
 21 *for Biological Diversity* 268 F.3d at 822; *see also Syngenta Seeds, Inc. v. County of Kauai*, CIV. 14-  
 22 00014BMK, 2014 WL 1631830, at \*5 (D. Haw. Apr. 23, 2014) (stating that if intervenors have a  
 23

24 \_\_\_\_\_  
 25 <sup>9</sup> Although this Court determined that Oregon had sufficient interest in the challenged regulations,  
 26 it found that Oregon, who wished to join as a Plaintiff, would not be impeded from protecting its  
 27 interest by the disposition of the lawsuit since the state could file a separate action, seeking  
 28 injunctive relief. *Health & Human Services*, 330 F.R.D. at 253. Texas, who seeks join the above-  
 caption action as defendant, does not have that option. Should Plaintiff's claims succeed, Texas  
 cannot revitalize the Final Rule or recover the benefits it enjoyed under the Final Rule by filing its  
 own petition with the courts. In any event, this Court granted Oregon's motion under Rule 24(b),  
 finding permissive intervention appropriate even when state could not establish intervention as of  
 right. *Id.* at 254–55.



1 protectable interest in the protections offered by a regulation, “it naturally follows that the  
2 invalidation of the [regulation] would impair those interests”).

3 Relegation to the status of amicus curiae would not enable Texas to protect their interests in  
4 this case and “is not an adequate substitute for participation as a party.” *Nuesse v. Camp*, 385 F.2d  
5 694, 702 (D.C. Cir. 1967); *see also Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489,  
6 1498 (9th Cir. 1995), abrogated on other grounds by *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d  
7 1173 (9th Cir. 2011). In such a scenario, no party would provide a comprehensive defense of the  
8 Final Rule to this Court. Texas would not be able to file motions or appeal if necessary. *See Int'l*  
9 *Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield*,  
10 382 U.S. 205, 215–216 (1965) (discussing the difference between party and amicus status). Texas  
11 also would lack the ability to introduce an issue or defense not raised by the parties. *Swan v.*  
12 *Peterson*, 6 F.3d 1373, 1383 & n. 10 (9th Cir.1993). For the reasons stated below, Texas and the  
13 federal government do not share the same interests. *See infra* Part I.D. There is in fact evidence that  
14 the Department does not intend to defend the Final Rule whatsoever. Texas will likely be the sole  
15 party then defending the Final Rule in its entirety, making it essential that its arguments be part of  
16 the Court’s deliberations. “Participation by [Texas] as amicus curiae is not sufficient to protect  
17 against these practical impairments.” *Feller v. Brock*, 802 F.2d 722, 730 (4th Cir. 1986). Texas  
18 should be granted intervenor status.

19 **D. None Of The Parties Adequately Represent Texas’ Interests.**

20 The federal government will neither adequately represent Texas’s interests nor provide an  
21 adequate defense of the Final Rule. Rule 24(a)’s inadequate representation requirement is not  
22 onerous. *See Bates v. Jones*, 904 F. Supp. 1080, 1087 (N.D. Cal. 1995). On its own, “the change in  
23 the Administration raises ‘the possibility of divergence of interest’ or a ‘shift’ during litigation,”  
24 sufficient to satisfy Rule 24(a). *W. Energy All. v. Zinke*, 877 F.3d 1157, 1169 (10th Cir. 2017). As  
25 the Biden Administration’s recent actions illustrate, a change in Administration often precedes  
26 substantial shifts in federal positions, and these shifts mean the Department’s interests are unlikely  
27 to overlap with intervenor Texas’ interest. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir.  
28 2003), as amended (May 13, 2003) (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528,

1 538 n.10 (1972)) (stating that the movant’s “minimal” burden is “satisfied if [movants] could  
2 demonstrate that representation of their interests ‘*may be*’ inadequate”) (emphasis added).

3 The Biden Administration has expressed open hostility to the Final Rule. During the  
4 campaign, President Biden repeatedly (and erroneously) characterized the Final Rule as “a green  
5 light to ignore sexual violence.” *The Biden Agenda for Women*, JOEBIDEN.COM, <https://joebiden.com/womens-agenda/> (last visited Mar. 24, 2021). He promised to put a “quick end” to the Final  
6 Rule and stated that he would “restore [earlier] Title IX guidance for colleges, including the 2011  
7 *Dear Colleague Letter*.” *Id*; *The Biden Plan To End Violence Against Women*, JOEBIDEN.COM,  
8 <https://joebiden.com/vawa/> (last visited Mar. 24, 2021). Nor has the President limited his opposition  
9 to the Final Rule to mere words. Almost immediately after taking office, the Department, acting in  
10 close coordination with the plaintiff-states, sought an abeyance in another case challenging the Final  
11 Rule “so that Department leadership to review the underlying rule at issue in this case.” *See* Mot. to  
12 Stay Briefing Schedule, *Commonwealth of Pennsylvania v. Devos*, 1:20-cv-01468-CJN (D.D.C.  
13 Feb. 3, 2021). The White House also issued an Executive Order specifically charging the new  
14 Secretary of Education to review the Final Rule for “consistency” with Biden Administration’s  
15 stated Title IX policy. The Executive Order further instructs the Secretary “to consider suspending,  
16 revising or rescinding” any portion of the Final Rule it deems inconsistent.

17  
18 Not only are these statements and actions evidence of an unavoidable, fundamental divide  
19 between Texas and the federal government, but the Biden Administration’s unabashed opposition  
20 raises a strong possibility that the federal government will either fail to defend the Final Rule or  
21 omit from its defense key arguments. *See WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992,  
22 997 (10th Cir. 2009) (recognizing that government policy is not static and may shift). Even had the  
23 federal government not committed an about-face, it would have been hard-pressed to accurately  
24 capture Texas’ interest as a common provider of education, subject to Title IX and the Final Rule’s  
25 revisions. *Cf. Trbovich*, 404 U.S. at 539 (concluding that government cannot adequately represent  
26 private parties because it is entrusted with protecting vital public interests). However, at least under  
27 the Trump Administration, the Department had a stake in providing a robust defense of the Final  
28 Rule. Here, the Biden Administration has voiced its opposition to it. Texas is therefore entitled to

1 intervene as of right, and this Court should permit intervention here.

2 **II. In The Alternative, The Court Should Permit Permissive Intervention.**

3 As set forth in Section I, *supra.*, Texas easily meets the requirements for intervention as of  
 4 right. But even if it did not, this Court should exercise its “wide latitude” and permit Texas to  
 5 intervene in this action under Rule 24(b) instead. *Oakland Bulk & Oversized Terminal, LLC v. City*  
 6 *of Oakland*, 960 F.3d 603, 619 (9th Cir. 2020). Texas satisfies all three threshold requisites for  
 7 permissive intervention. *Health & Human Services*, 330 F.R.D. at 252, 254 (N.D. Cal. 2019)  
 8 (permitting the State of Oregon to intervene in action challenging a federal agency’s final rules).  
 9 First, Texas has an independent ground for subject matter jurisdiction, as this action raises a federal  
 10 question, and Texas would establish federal-question jurisdiction independent of Plaintiff’s ability  
 11 to do so. *Id.*; *see also Int’l Paper Co. v. Inhabitants of Town of Jay, Me.*, 887 F.2d 338, 347 (1st Cir.  
 12 1989) (holding that independent jurisdiction exists when the state seeks to defend the statute against  
 13 a challenge based on federal law). Second, Texas’ motion is timely. As explained above, Texas filed  
 14 its motion within a month of Plaintiffs initiating this legal action. *See supra* Part I.A. Accordingly,  
 15 Texas has not delayed, much less prejudiced any of the existing parties. Third, Texas’ position in  
 16 support of the Final Rule involves common questions of law and fact. *E.E.O.C. v. Nat’l Children’s*  
 17 *Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998) (noting courts typically “afforded this requirement  
 18 considerable breadth”). Both “the main action” and Texas’ defense center on whether the Final Rule  
 19 is consistent with Title IX and the Administrative Procedures Act. Fed. R. Civ. P. 24(b)(1)(B). Those  
 20 common questions of law and fact are sufficient for permissive intervention. *See Health & Human*  
 21 *Services*, 330 F.R.D. at 254 (N.D. Cal. 2019).

22 Finally, the Court should exercise its discretion to permit intervention because Texas seeks  
 23 to defend interests that will otherwise go unprotected in the proceeding. As the Ninth Circuit has  
 24 recognized, permissive intervention is concerned with “the fairest and most efficient method of  
 25 handling a case.” *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989), *aff’d sub nom. Venegas v.*  
 26 *Mitchell*, 495 U.S. 82 (1990). In making this determination, the courts look to additional factors,  
 27 which include whether the movant’s interests are adequately represented. *Id.*; *see also Scholl v.*  
 28 *Mnuchin*, 483 F. Supp. 3d 822, 825 (N.D. Cal. 2020) (listing relevant factors). Texas is a common

1 provider of education, whose schools, universities, and other academic programing are subject to  
 2 Title IX. But unlike the Biden Administration, Texas believes that the Final Rule will not only  
 3 facilitate enforcement of Title IX but also discourage unconstitutional practices that have violated  
 4 the rights of individuals accused of misconduct. Texas therefore can provide a broad-based defense  
 5 of the Final Rule from this perspective, enabling the Court to fully assess its validity through  
 6 adversarial proceedings, despite the new Administration’s change of position on the merits. *See*  
 7 *Oregon Env’tl. Council v. Oregon Dep’t of Env’tl. Quality*, 775 F. Supp. 353, 359 (D. Or. 1991)  
 8 (basing its decision on “whether the intervenor would contribute to a full development of the  
 9 underlying issues in the suit”); *see also Humane Soc. of U.S. v. Clark*, 109 F.R.D. 518, 521 (D.D.C.  
 10 1985) (judging it appropriate “[i]n light of the ‘scope and complexity of plaintiffs’ challenge,” to  
 11 have absent interests “directly represented”). Absent Texas’ intervention, multiple defenses to  
 12 Plaintiff’s charge that the Department violated the Administrative Procedure Act will be left  
 13 undeveloped—and that is assuming that the Biden Administration defends the Final Rule at all.

14 The remaining factors—i.e. the possibility of undue delay, judicial economy, and the nature  
 15 of movant’s interest—are addressed earlier in Texas’ arguments, *see supra* Part I.A–B, and likewise  
 16 are “clearly weighed in favor of permissive intervention.” *Skaggs*, 867 F.2d at 530.

17 **CONCLUSION**

18 For the foregoing reasons, the State of Texas respectfully requests that the Court grant its  
 19 motion to intervene as a matter of right under Rule 24(a) or, in the alterative, for permissive  
 20 intervention under Rule 24(b).

21 DATED: April 7, 2021

Respectfully submitted.

22 LEWIS BRISBOIS BISGAARD & SMITH LLP

23 /s/ Michael K. Johnson

24 Michael K. Johnson

Attorneys for Defendant

25 KEN PAXTON IN HIS OFFICIAL  
 26 CAPACITY AS ATTORNEY GENERAL  
 OF TEXAS

27 Patrick K. Sweeten

28 Deputy Attorney General

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

for Special Litigation  
Ken Paxton  
Attorney General of Texas  
Brent Webster  
First Assistant Attorney General  
Grant Dorfman  
Deputy First Assistant Attorney General  
William T. Thompson  
Deputy Chief, Special Litigation Unit  
Kathleen T. Hunker  
Special Counsel  
Attorneys for Defendant  
KEN PAXTON IN HIS OFFICIAL  
CAPACITY AS ATTORNEY GENERAL  
OF TEXAS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**  
*The Women’s Student Union v. U.S. Department of Education, et al.*  
USDC-ND, San Francisco Division, Case No. 3:21-cv-01626-EMC

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to the action. My business address is 2020 West El Camino Avenue, Suite 700, Sacramento, CA 95833. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On April 7, 2021, I served the following document:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVENOR-DEFENDANT STATE OF TEXAS’S MOTION TO INTERVENE**

The document was served by the following means:

**(BY COURT’S CM/ECF SYSTEM)** Pursuant to Local Rule, I electronically filed the document with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to all persons registered by the Court to receive Notifications of Electronic Filing.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: April 7, 2021

/s/ Sandra Hayes  
Sandra Hayes

*The Women's Student Union v. U.S. Department of Education, et al.*  
USDC-ND, San Francisco Division, Case No. 3:21-cv-01626-EMC

**EXHIBIT A**  
( [proposed] Answer )

1 **OFFICE OF THE ATTORNEY GENERAL OF TEXAS**  
 PATRICK K. SWEETEN, (*pro hac vice motion forthcoming*)  
 2 E-Mail: Patrick.Sweeten@oag.texas.gov  
 KATHLEEN T. HUNKER, (*pro hac vice motion forthcoming*)  
 3 E-Mail: Kathleen.Hunker@oag.texas.gov  
 P.O. Box 12548 (MC-009)  
 4 Austin, TX 78711-2548  
 Telephone: 512.936.1414  
 5 Facsimile: 512.936.0545

6 **LEWIS BRISBOIS BISGAARD & SMITH LLP**  
 MICHAEL K. JOHNSON, CA Bar No. 130193  
 7 E-Mail: Michael.Johnson@lewisbrisbois.com  
 2185 North California Boulevard, Suite 300  
 8 Walnut Creek, California 94596  
 Telephone: 925.357.3456  
 9 Facsimile: 925.478.3260  
 Attorneys for Intervenor-Defendant  
 10 **KEN PAXTON IN HIS OFFICIAL CAPACITY AS**  
**ATTORNEY GENERAL OF TEXAS**

11

12

13

UNITED STATES DISTRICT COURT

14

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

15

16

THE WOMEN’S STUDENT UNION,

Case No. 3:21-cv-01626-EMC

17

Plaintiff,

**ANSWER OF [PROPOSED]  
INTERVENOR-DEFENDANT STATE OF  
TEXAS**

18

vs.

Judge: Hon. Edward M. Chen

19

U.S. DEPARTMENT OF EDUCATION,

20

Defendant.

21

and

22

STATE OF TEXAS,

23

[Proposed] Intervenor-  
Defendant.

24

25

26

Putative Intervenor-Defendant, the State of Texas, respectfully files this Answer to  
27 Plaintiff’s Complaint for Injunctive and Declaratory Relief Administrative Procedure Act Case,  
28 ECF 1 (“Complaint”).



1 Pursuant to Federal Rules of Civil Procedure, Texas denies each and every allegation  
2 contained in the Complaint except for those expressly admitted herein. The headings and paragraphs  
3 below directly correlate to the sections and numbered paragraphs of the Complaint. Those titles are  
4 reproduced in this Answer for organizational purposes only, and Texas does not admit any matter  
5 contained therein.

6 Texas responds to the specifically numbered allegations of the First Amended Complaint as  
7 follows:

8 **INTRODUCTION**

9 1. Texas admits that some percentage of students experience sexual harassment,  
10 including sexual violence, at public schools. Texas, however, lacks sufficient knowledge or  
11 information to form a belief about the truth of the remaining allegations contained in Paragraph 1;  
12 on that basis, it denies the allegations in their entirety.

13 2. Texas admits that sexual harassment can have adverse consequences. Texas,  
14 however, lacks sufficient knowledge or information to form a belief about the truth of the remaining  
15 allegations contained in Paragraph 2; on that basis, it denies the allegations in their entirety.

16 3. Texas denies the allegations in Paragraph 3 of the Complaint.

17 4. Texas lacks sufficient knowledge or information about California's Berkeley Unified  
18 School District to form a belief about the truth of the allegations in Paragraph 4; on that basis, it  
19 denies the allegations in their entirety.

20 5. Texas lacks sufficient knowledge or information about Berkeley High School to form  
21 a belief about the truth of the allegations in Paragraph 5; on that basis, it denies the allegations in  
22 their entirety.

23 6. Texas admits that Title IX of the Education Amendments of 1972 applies to schools  
24 that receive federal funds but denies the remaining allegations in Paragraph 6 of the Complaint.

25 7. Texas admits that the U.S. Department of Education enforces Title IX. The  
26 remaining allegations in Paragraph 7 purport to characterize the Department of Education's prior  
27 guidance, which speaks for itself. To the extent that the remainder of this Paragraph contains any  
28 allegations requiring a response, Texas denies them in their entirety.

1           8.       Texas admits that the Department of Education, under then-Secretary Betsy Devos,  
2 issued regulations in 2020 that purport to effectuate Title XI. Texas denies the remaining allegations  
3 in Paragraph 8, including Plaintiff’s characterization of the Final Rule, which speaks for itself.

4           9.       Paragraph 9 contains assertions of law, conclusory statements, and/or argument to  
5 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.  
6 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
7 in their entirety.

8           10.      Paragraph 10 contains assertions of law, conclusory statements, and/or argument to  
9 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.  
10 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
11 in their entirety.

12          11.      Paragraph 11 contains assertions of law, conclusory statements, and/or argument to  
13 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.  
14 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
15 in their entirety.

16          12.      Paragraph 12 contains assertions of law, conclusory statements, and/or argument to  
17 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.  
18 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
19 in their entirety.

20          13.      Paragraph 13 contains assertions of law, conclusory statements, and/or argument to  
21 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.  
22 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
23 in their entirety.

24          14.      Paragraph 14 purports to characterize the Final Rule, which speaks for itself. To the  
25 extent that this Paragraph contains any allegations requiring a response, Texas denies them in their  
26 entirety.

27          15.      Paragraph 15 contains assertions of law, conclusory statements, and/or argument to  
28 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.

1 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
2 in their entirety. Additionally, Texas lacks sufficient knowledge or information about the Women’s  
3 Student Union (“WSU”) and Berkeley High School to form a belief about the truth of the allegations  
4 in the second half of Paragraph 15; on that basis, it denies the allegations in their entirety.

5 **PARTIES**

6 16. Texas lacks sufficient knowledge or information about WSU to form a belief about  
7 the truth of the allegations in Paragraph 16; on that basis, it denies the allegations in their entirety.

8 17. Texas admits the allegations in Paragraph 17 of the Complaint.

9 18. Paragraph 18 contains assertions of law, conclusory statements, and/or argument to  
10 which no response is required. To the extent that this Paragraph contains any allegations requiring  
11 a response, Texas admits that the Defendant is a department of the United States. Texas also admits  
12 that Plaintiff purports to bring claims that arise under Title IX of the Education Amendments of  
13 1972 and the Administrative Procedure Act (APA) but denies that any violation of law has occurred.  
14 Texas denies all other allegations in Paragraph 18, except where previously admitted.

15 **VENUE**

16 19. Paragraph 19 contains assertions of law, conclusory statements, and/or argument to  
17 which no response is required. To the extent that this Paragraph contains any allegations requiring  
18 a response, Texas lacks sufficient knowledge or information about where WSU resides to form a  
19 belief about the truth of the allegations contained in Paragraph 19; on that basis, it denies the  
20 allegations in their entirety.

21 **INTRADISTRICT ASSIGNMENT**

22 20. Texas lacks sufficient knowledge or information to form a belief about the truth of  
23 the allegations in Paragraph 20; on that basis, it denies the allegations in their entirety.

24 **ALLEGATIONS**

25 21. Paragraph 21 contains assertions of law, conclusory statements, and/or argument to  
26 which no response is required. It also purports to characterize legal authority, which speaks for itself.  
27 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
28 in their entirety.

1           22. Paragraph 22 contains assertions of law, conclusory statements, and/or argument to  
2 which no response is required. It also purports to characterize legal authority, which speaks for itself.  
3 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
4 in their entirety.

5           23. Paragraph 23 contains assertions of law, conclusory statements, and/or argument to  
6 which no response is required. It also purports to characterize legal authority, which speaks for itself.  
7 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
8 in their entirety.

9           24. Texas admits that Title IX is administratively enforced by federal agencies. The  
10 remaining allegations in Paragraph 24 either contain assertions of law, conclusory statements, and/or  
11 argument to which no response is required, or purport to characterize legal authority, which speaks  
12 for itself. To the extent that this Paragraph contains any allegations requiring a response, Texas  
13 denies them in their entirety, except where previously admitted. Texas also lacks sufficient  
14 knowledge or information to form a belief about the truth of the allegations in the last sentence of  
15 Paragraph 24; on that basis, it denies the allegations in their entirety.

16           25. Texas admits that the U.S. Department of Education, through its Office for Civil  
17 Rights, enforces Title IX. The remaining allegations in Paragraph 25 either contain assertions of  
18 law, conclusory statements, and/or argument to which no response is required, or purport to  
19 characterize the Department's prior guidance, which speaks for itself. To the extent that this  
20 Paragraph contains any allegations requiring a response, Texas denies them in their entirety, except  
21 where previously admitted.

22           26. Texas admits that the Sexual Harassment Guidance, 62 Fed. Reg. 12,034 (Mar. 13,  
23 1997) and the Revised Sexual Harassment Guidance, 66 Fed. Reg. 5,512 (Jan. 19, 2001) underwent  
24 notice and comment rulemaking. Texas also admits that the listed guidance documents were issued  
25 by both Democratic and Republican administrations. The remaining allegations in Paragraph 26  
26 purport to characterize the Department's prior guidance, which speaks for itself. To the extent that  
27 this Paragraph contains any allegations requiring a response, Texas denies them in their entirety,  
28 except where previously admitted.

1           27. Paragraph 27 purports to characterize the Department’s prior guidance, which speaks  
2 for itself. To the extent that this Paragraph contains any allegations requiring a response, Texas  
3 denies them in their entirety.

4           28. Paragraph 28 purports to characterize the Department’s prior guidance, which speaks  
5 for itself. To the extent that this Paragraph contains any allegations requiring a response, Texas  
6 denies them in their entirety.

7           29. Paragraph 29 purports to characterize Title IX and other legal authority, which speak  
8 for themselves. To the extent that this Paragraph contains any allegations requiring a response,  
9 Texas denies them in their entirety.

10          30. Paragraph 30 purports to characterize legal authority, which speaks for itself. To the  
11 extent that this Paragraph contains any allegations requiring a response, Texas denies them in their  
12 entirety.

13          31. Paragraph 31 purports to characterize the Department’s guidance concerning race  
14 and disability, which speaks for itself. To the extent that this Paragraph contains any allegations  
15 requiring a response, Texas denies them in their entirety.

16          32. Texas denies the allegations in first sentence of Paragraph 32. The remaining  
17 allegations either purport to characterize the Final Rule, which speaks for itself, or contains  
18 assertions of law, conclusory statements, and/or argument to which no response is required. To the  
19 extent that this Paragraph contains any allegations requiring a response, Texas denies them in their  
20 entirety.

21          33. Texas admits that the Final Rule was promulgated under then-Secretary Betsy DeVos  
22 but denies the allegation that the Department failed to provide adequate justification or explanation.  
23 The remaining allegations in Paragraph 33 purport to characterize the Final Rule, which speaks for  
24 itself. To the extent that this Paragraph contains any allegations requiring a response, Texas denies  
25 them in their entirety, except where previously admitted.

26          34. Paragraph 34 contains assertions of law, conclusory statements, and/or argument to  
27 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.

28

1 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
2 in their entirety.

3 35. Texas denies the allegations in Paragraph 35 of the Complaint.

4 36. Texas denies the allegations in Paragraph 36 of the Complaint.

5 ***Limiting what constitutes sexual harassment under Title IX.***

6 37. Paragraph 37 contains assertions of law, conclusory statements, and/or argument to  
7 which no response is required. It also purports to characterize the Final Rule and Title IX, which  
8 speak for themselves. To the extent that this Paragraph contains any allegations requiring a response,  
9 Texas denies them in their entirety.

10 38. Paragraph 38 purports to characterize the Final Rule, which speaks for itself. To the  
11 extent that this Paragraph contains any allegations requiring a response, Texas denies them in their  
12 entirety.

13 39. Texas denies the allegation that the Department failed to provide adequate  
14 justification or explanation. The remaining allegations in Paragraph 39 either purport to characterize  
15 the Final Rule and the Department's prior guidance, which speak for themselves, or contains  
16 assertions of law, conclusory statements, and/or argument to which no response is required. To the  
17 extent that this Paragraph contains any allegations requiring a response, Texas denies them in their  
18 entirety.

19 40. Paragraph 40 contains assertions of law, conclusory statements, and/or argument to  
20 which no response is required. It also purports to characterize the Department's prior guidance and  
21 other legal authority, which speak for themselves. To the extent that this Paragraph contains any  
22 allegations requiring a response, Texas denies them in their entirety.

23 41. Paragraph 41 contains assertions of law, conclusory statements, and/or argument to  
24 which no response is required. It also purports to characterize the Department's prior guidance and  
25 other legal authority, which speak for themselves. To the extent that this Paragraph contains any  
26 allegations requiring a response, Texas denies them in their entirety.

27 42. Paragraph 42 contains assertions of law, conclusory statements, and/or argument to  
28 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.

1 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
2 in their entirety.

3 43. The first sentence of Paragraph 43 contains assertions of law, conclusory statements,  
4 and/or argument to which no response is required. It also purports to characterize the Final Rule and  
5 Title IX, which speak for themselves. To the extent that this sentence contains any allegations  
6 requiring a response, Texas denies them in their entirety. Texas further denies the allegation in the  
7 second sentence of Paragraph 43.

8 44. Paragraph 44 contains assertions of law, conclusory statements, and/or argument to  
9 which no response is required. It also purports to characterize the Final Rule and Title IX, which  
10 speak for themselves. To the extent that this Paragraph contains any allegations requiring a response,  
11 Texas denies them in their entirety.

12 45. Texas denies the allegations in Paragraph 45 of the Complaint.

13 *Limiting where Title IX's protections apply*

14 46. Paragraph 46 contains assertions of law, conclusory statements, and/or argument to  
15 which no response is required. It also purports to characterize the Final Rule and Title IX, which  
16 speak for themselves. To the extent that this Paragraph contains any allegations requiring a response,  
17 Texas denies them in their entirety.

18 47. Paragraph 47 contains assertions of law, conclusory statements, and/or argument to  
19 which no response is required. It also purports to characterize the Final Rule and other legal  
20 authority, which speak for themselves. To the extent that this Paragraph contains any allegations  
21 requiring a response, Texas denies them in their entirety.

22 48. Paragraph 48 contains assertions of law, conclusory statements, and/or argument to  
23 which no response is required. It also purports to characterize the Final, which speaks for itself. To  
24 the extent that this Paragraph contains any allegations requiring a response, Texas denies them in  
25 their entirety.

26 49. Texas denies the allegation that the Department failed to provide adequate  
27 justification or explanation. The remaining allegations in Paragraph 49 either purport to characterize  
28 the Final Rule and the Department's prior guidance, which speak for themselves, or contains

1 assertions of law, conclusory statements, and/or argument to which no response is required. To the  
2 extent that this Paragraph contains any allegations requiring a response, Texas denies them in their  
3 entirety.

4 50. Paragraph 50 contains assertions of law, conclusory statements, and/or argument to  
5 which no response is required. It also purports to characterize the Final Rule and Title IX, which  
6 speak for themselves. To the extent that this Paragraph contains any allegations requiring a response,  
7 Texas denies them in their entirety.

8 51. Texas denies the allegations in the first two sentences of Paragraph 51. The  
9 remaining allegations either purport to characterize the Final Rule, which speaks for itself, or  
10 contains assertions of law, conclusory statements, and/or argument to which no response is required.  
11 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
12 in their entirety.

13 52. Paragraph 52 contains assertions of law, conclusory statements, and/or argument to  
14 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.  
15 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
16 in their entirety.

17 53. Texas denies the allegations in Paragraph 53 of the Complaint.

18 ***Limiting when a school district is responsible for sexual harassment***  
19 ***effecting students in its programs***

20 54. Paragraph 54 contains assertions of law, conclusory statements, and/or argument to  
21 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.  
22 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
23 in their entirety.

24 55. Paragraph 55 contains assertions of law, conclusory statements, and/or argument to  
25 which no response is required. It also purports to characterize the Final Rule and other legal  
26 authority, which speak for themselves. To the extent that this Paragraph contains any allegations  
27 requiring a response, Texas denies them in their entirety.

28



1           56. Paragraph 56 contains assertions of law, conclusory statements, and/or argument to  
2 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.  
3 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
4 in their entirety.

5           57. Texas denies the allegation that the Department failed to provide adequate  
6 justification or explanation. The remaining allegations in Paragraph 57 purports to characterize the  
7 Final Rule, the Department's prior guidance, and other legal authority, which speak for themselves.  
8 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
9 in their entirety.

10           58. Texas denies the allegations in Paragraph 58 of the Complaint.

11                           ***Limiting how the Department will determine whether a school district***  
12                           ***has appropriately responded to sexual harassment under Title IX***

13           59. Paragraph 59 purports to characterize the Final Rule, which speaks for itself. To the  
14 extent that this Paragraph contains any allegations requiring a response, Texas denies them in their  
15 entirety.

16           60. Paragraph 60 purports to characterize the Final Rule, which speaks for itself. To the  
17 extent that this Paragraph contains any allegations requiring a response, Texas denies them in their  
18 entirety.

19           61. Texas denies the allegation that the Department failed to provide adequate  
20 justification or explanation. The remaining allegations in Paragraph 61 either contain assertions of  
21 law, conclusory statements, and/or argument to which no response is required or purport to  
22 characterize the Department's prior guidance and other legal authority, which speak for themselves.  
23 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
24 in their entirety.

25           62. Paragraph 62 contains assertions of law, conclusory statements, and/or argument to  
26 which no response is required. It also purports to characterize the Final Rule and other legal  
27 authority, which speak for themselves. To the extent that this Paragraph contains any allegations  
28 requiring a response, Texas denies them in their entirety.



1           72. Texas denies the allegations in Paragraph 72 of the Complaint.

2           73. Paragraph 73 contains assertions of law, conclusory statements, and/or argument to  
3 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.  
4 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
5 in their entirety.

6           74. Texas denies the allegations in Paragraph 74 of the Complaint.

7                           ***Additional Injuries Caused by the 2020 Regulations Specifically to WSU***

8           75. Paragraph 75 purports to characterize the Final Rule, which speaks for itself. To the  
9 extent that this Paragraph contains any allegations requiring a response, Texas lacks sufficient  
10 knowledge or information about WSU to form a belief about the truth of the allegations in Paragraph  
11 75; on that basis, it denies the allegations in their entirety.

12           76. Paragraph 76 contains assertions of law, conclusory statements, and/or argument to  
13 which no response is required. It also purports to characterize multiple regulations, which speak for  
14 themselves. To the extent that this Paragraph contains any allegations requiring a response, Texas  
15 denies them in their entirety.

16           77. Texas lacks sufficient knowledge or information to form a belief about the truth of  
17 the allegations in Paragraph 77; on that basis, it denies the allegations in their entirety.

18           78. Paragraph 78 contains assertions of law, conclusory statements, and/or argument to  
19 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.  
20 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
21 in their entirety.

22           79. Paragraph 79 contains assertions of law, conclusory statements, and/or argument to  
23 which no response is required. To the extent that this Paragraph contains any allegations requiring  
24 a response, Texas denies them in their entirety.

25           80. Texas lacks sufficient knowledge or information to form a belief about the truth of  
26 the allegations in Paragraph 80; on that basis, it denies the allegations in their entirety.

27  
28



1 88. Paragraph 88 contains assertions of law, conclusory statements, and/or argument to  
2 which no response is required. It also purports to characterize the Final Rule and other legal  
3 authority, which speak for themselves. To the extent that this Paragraph contains any allegations  
4 requiring a response, Texas denies them in their entirety.

5 89. Paragraph 88 contains assertions of law, conclusory statements, and/or argument to  
6 which no response is required. It also purports to characterize the Final Rule, which speaks for itself.  
7 To the extent that this Paragraph contains any allegations requiring a response, Texas denies them  
8 in their entirety.

9 **PRAYER FOR RELIEF**

10 Paragraphs (A)–(D) of this section contain Plaintiff’s recitation of the relief sought in this  
11 action, assertions of law, conclusory statements, and/or argument to which no response is required.  
12 To the extent that Paragraphs (A)–(D) contain any allegations requiring a response, Texas denies  
13 those allegations in their entirety. Texas further denies that Plaintiff is entitled to any relief from this  
14 Court.

15 **DEFENSES AND AFFIRMATIVE DEFENSES**

- 16 1. Plaintiff has failed to state a claim upon which relief can be granted.
- 17 2. Some or all of the relief Plaintiff seeks would violate the First, Fifth, or Fourteenth  
18 Amendments of the United States Constitution.
- 19 3. Texas reserves the right to amend these defenses or raise additional defenses as they  
20 become known to Texas during the development of this case.

21 **DEFENDANT’S PRAYER**

22 For the foregoing reasons, Texas asks the Court to enter judgment that Plaintiff takes  
23 nothing, dismiss Plaintiff’s suit with prejudice, assess costs against Plaintiff, and award Defendant  
24 all other relief the Court deems appropriate.

25 ///  
26 ///  
27 ///  
28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DATED: \_\_\_\_\_

Respectfully submitted.

LEWIS BRISBOIS BISGAARD & SMITH LLP

Michael K. Johnson  
Attorneys for Defendant  
KEN PAXTON IN HIS OFFICIAL  
CAPACITY AS ATTORNEY GENERAL  
OF TEXAS

Patrick K. Sweeten  
Deputy Attorney General  
for Special Litigation  
Ken Paxton  
Attorney General of Texas  
Brent Webster  
First Assistant Attorney General  
Grant Dorfman  
Deputy First Assistant Attorney General  
William T. Thompson  
Deputy Chief, Special Litigation Unit  
Kathleen T. Hunker  
Special Counsel  
Attorneys for Defendant  
KEN PAXTON IN HIS OFFICIAL  
CAPACITY AS ATTORNEY GENERAL  
OF TEXAS