

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

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

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

THE WOMEN’S STUDENT UNION,
 Plaintiff,
 vs.
 U.S. DEPARTMENT OF
 EDUCATION,
 Defendant.
 and
 STATE OF TEXAS,
 [Proposed] Intervenor-
 Defendant.

Case No. 3:21-cv-01626-EMC
**COMBINED REPLY IN SUPPORT
 OF TEXAS’ MOTION TO
 INTERVENE**
 Judge: Hon. Edward M. Chen
Date: May 20, 2021
Time: 1:30 p.m.
Crtrm: 5, 17th Floor



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ARGUMENT

I. Texas does not need Article III standing to intervene as defendant, but it has standing in any event.

Generally, plaintiffs, not defendants, bear the burden of demonstrating standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016) (noting that the burden falls on the party invoking the court’s jurisdiction). In accordance with this principle, a party who “intervene[s] in support of *defendants* in the trial court” does “not need to establish standing” due to its “defensive posture.” *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019). After all, an intervenor needs to establish standing only “to pursue relief that is different from that which is sought by a party with standing.” *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017); *see also Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998) (“Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so.”). And Texas, as an intervenor-defendant, would not be seeking any relief. “The term ‘relief’ is linked to affirmative claims, not defenses.” *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 938 n.3 (N.D. Tex. 2019).

Plaintiff does not assert that intervenor-defendants, as a rule, require standing. Plaintiff instead asserts that Texas specifically must demonstrate standing because: (1) Texas seeks relief beyond that requested by Plaintiff; (2) Texas raises an affirmative defense; and (3) Texas seeks to preserve its right to appeal. ECF 27 at 5–7. As an initial matter, Texas is not seeking relief for purposes of intervention. *See Franciscan All., Inc.*, 414 F. Supp. 3d at 938 n.3. A defendant asking for litigation “costs” and related “relief” is not “seeking relief” for purposes of intervention because it is not invoking the jurisdiction of the court independent of the plaintiff-initiated litigation. But even if Texas had sought relief, Plaintiff would be wrong. The court’s

1 analysis looks at the relief requested by all parties, not just Plaintiff. *See Bethune-Hill*,
2 139 S. Ct. at 1952. Texas is seeking no more than what any reasonable defendant
3 would seek. Plaintiff makes no effort to show that the Department, which has not yet
4 filed an answer, will seek less.

5 As for Plaintiff's second contention, Texas' assertion that Plaintiff's requested
6 relief violates the Constitution addresses the elements of Plaintiff's cause of action; it
7 therefore does not constitute an affirmative defense. *Gomez v. J. Jacobo Farm Labor*
8 *Contractor, Inc.*, 188 F. Supp. 3d 986, 991 (E.D. Cal. 2016). However, even if it were
9 an affirmative defense, raising an affirmative defense is not an attempt to seek relief.
10 It is an attempt to prevent the plaintiff from obtaining relief. It thus does not trigger a
11 requirement to prove standing. *See Franciscan All., Inc.*, 414 F. Supp. 3d at 938 n.3.

12 Plaintiff cites two non-binding cases requiring standing for an affirmative
13 defense, but both rulings were issued before *Bethune-Hill* and do not apply to the facts
14 at hand. In *United States v. Dunifer*, the court required standing because the
15 affirmative defense required the litigation of issues not encompassed in the plaintiff's
16 case-in-chief. 997 F. Supp. 1235, 1239 (N.D. Cal. 1998), *aff'd on other grounds*, 219
17 F.3d 1004 (9th Cir. 2000). That is not the case here. Plaintiff raises an Administrative
18 Procedure Act (APA) claim, arguing that four provisions in the Final Rule are
19 arbitrary and capricious. To evaluate that claim, the reviewing court "must consider
20 whether the [Department's] decision was based on a consideration of the relevant
21 factors and whether there has been a clear error of judgment." *Marsh v. Oregon Nat.*
22 *Res. Council*, 490 U.S. 360, 378 (1989). The relevant factors include the
23 constitutionality of alternative rules and compliance with federal law. *See, e.g.,*
24 *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1146–50 (9th Cir. 2010).
25 Hence, Texas' defense raises issues that must be resolved as part of Plaintiff's case-
26 in-chief.

27 Plaintiff also cites to *MHC Fin. Ltd. P' ship v. City of San Rafael*, but that case
28 considered a statute-of-limitations defense, which is "a personal right" specific to the

1 defendant, who had waived it. C-00-3785 VRW, 2006 WL 8431310, at *9 (N.D. Cal.
2 Jan. 27, 2006). In this case, Texas raises constitutional limitations on governmental
3 activity, not a personal benefit intended for but waived by the federal government. In
4 any event, courts consider standing on a claim-by-claim basis. *Mehr v. Fed'n*
5 *Internationale de Football Ass'n*, 115 F. Supp. 3d 1035, 1055 (N.D. Cal. 2015) (citing
6 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). Should Texas lack
7 standing to raise an affirmative defense or pursue a certain type of relief, that would
8 not preclude Texas from proceeding on the remainder.

9 As for Plaintiff's third contention, Texas seeks intervention because the
10 Department has an invested interest in entering a collusive settlement and is therefore
11 unlikely to defend the challenged regulations at trial. *Perry v. Schwarzenegger*, 630
12 F.3d 898, 906 (9th Cir. 2011) (denying intervention because movant's only expressed
13 interest in the litigation was to ensure appellate review). It does not need to prove
14 appellate standing unless and until it moves to appeal.

15 The Court, however, need not answer these questions because Texas has Article
16 III standing. Public institutions of higher education in Texas constitute "arms" and
17 "instrumentalities" of the State, which Plaintiff does not contest. *Daniel v. Univ. of*
18 *Tex. Sw. Med. Ctr.*, 960 F.3d 253, 257 (5th Cir. 2020). Each of these institutions
19 receives federal funding and, as a result, is subject to Title IX, along with any
20 effectuating regulations, including the challenged provisions of the Final Rule.
21 Plaintiff does not refute this fact either. Texas, in other words, is subject to the Final
22 Rule and "the direct object of regulatory action challenged as unlawful." *Los Angeles*
23 *Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 655 (9th Cir. 2011). Standing in such
24 scenarios is presumed. *Id.*

25 Enjoining the four challenged regulations will have a concrete, immediate
26 effect on Texas. Plaintiff does not contest that by enjoining the regulations, this Court
27 would increase recipients', and thereby Texas', obligations and liability under Title
28 IX. Its Complaint in fact objects to the challenged regulations precisely because the

1 regulations “narrowed” the definition of “sexual harassment” and “program or
 2 activity,” relieving recipients of certain responsibilities. ECF 1 ¶¶ 37, 38, 46, 48. If
 3 this Court were to grant the requested injunction, Texas would again be tasked with
 4 these responsibilities. For instance, it would have to investigate alleged incidents of
 5 sexual misconduct that currently fall outside of its duty, such as online harassment or
 6 harassment that occurs at locations not within an academic institution’s substantial
 7 control. Investigating and adjudicating these incidents will require Texas to incur
 8 additional costs. Such costs of compliance are an injury-in-fact giving rise to Article
 9 III standing. *Cal. Trucking Ass’n v. Becerra*, 433 F. Supp. 3d 1154, 1160 (S.D. Cal.
 10 2020), *rev’d on other grounds, Cal. Trucking Ass’n v. Bonta*, -- F.3d --, 2021 WL
 11 1656283, at *1 (9th Cir. Apr. 28, 2021).

12 Moreover, Plaintiffs’ requested injunction would have collateral consequences
 13 for Texas. As Texas explains in its motion, an alternative rule will result in increased
 14 litigation from both victims and the accused and in academic institutions revising their
 15 policies in ways that violate the Constitution. ECF 19-1 at 7–8. In light of the
 16 prevalence of these policies, and in light of the growing frequency of litigation in this
 17 space,¹ Texas will suffer these harms with “reasonable probability.”² *California v.*
 18 *Azar*, 911 F.3d 558, 571 (9th Cir. 2018) (“Just because a causal chain links the states
 19 to the harm does not foreclose standing.”); *see also Maya v. Centex Corp.*, 658 F.3d
 20 1060, 1070 (9th Cir. 2011) (“A causation chain does not fail simply because it has
 21 several links, provided those links are not hypothetical or tenuous.”) (internal
 22 quotation marks omitted). The costs of litigation are an additional injury-in-fact, as
 23

24 ¹ See Jonathan Taylor, Milestone: 700+ Title IX/Due Process Lawsuits by Accused Students, Title
 25 IX for All (May 13, 2020), <https://titleixforall.com/milestone-700-title-ix-due-process-lawsuits-by-accused-students/>.

26 ² *See, e.g., Walsh v. Hodge*, 975 F.3d 475, 478 (5th Cir. 2020); *Plummer v. Univ. of Houston*,
 27 860 F.3d 767, 770 (5th Cir. 2017), as revised (June 26, 2017); *see also Oliver v. Univ. of Tex. Sw.*
 28 *Med. Sch.*, 3:18-CV-1549-B, 2019 WL 536376, at *13 (N.D. Tex. Feb. 11, 2019).

(footnote continued)

1 are the costs of liability for policies that violate students’ constitutional rights.³

2 **II. Texas Has A Right To Intervene Under Rule 24(A)(2).**

3 Texas satisfies the four-part test stipulated in Federal Rule of Civil Procedure
4 24(a)(2)⁴. This Court should therefore grant Texas’ motion to intervene as of right.

5 **A. Texas has a significantly protectable interest related to this case.**

6 Texas is a common provider of education, whose “arms” and
7 “instrumentalities” receive federal funds. *Daniel*, 960 F.3d at 257. It is subject to the
8 challenged regulations and will suffer a concrete financial injury if the regulations are
9 enjoined as well as a host of collateral consequences that will have a deleterious
10 impact on the State, its citizens, and the quality of education that Texas provides.
11 *Supra* at Part I. Accordingly, Texas holds a number of protected interests that will be
12 affected by the resolution of Plaintiff’s claim. *See Arakaki v. Cayetano*, 324 F.3d
13 1078, 1084 (9th Cir. 2003), as amended (May 13, 2003). In arguing otherwise,
14 Plaintiff appears to miscomprehend Texas’ relationship with public institutions of
15 higher education, which are “inarguably” state agencies. *Sissom v. Univ. of Tex. High*
16 *Sch.*, 927 F.3d 343, 348 (5th Cir. 2019). Plaintiff also gets bogged down in technical
17 distinctions at the expense of “practical and equitable considerations,” which are the
18 nucleus of the court’s Rule 21(a)(2) analysis. *Arakaki*, 324 F.3d at 1083; *see*
19 *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)
20 (rejecting notion that Rule 24(a)(2) requires a specific legal or equitable interest).

21 In *California v. Health & Human Services*, State of Oregon sought to intervene
22 in a lawsuit challenging federal regulations related to the contraception mandate. 330

23 _____
24 ³ If, contrary to Texas’s argument, the Court concludes that intervention is improper due to the
25 generic language in Texas’s proposed answer seeking “costs” and “all other relief the Court deems
26 appropriate,” Texas is willing to delete that language and forgo such requests.

27 ⁴ Texas sought intervention within one month of the Complaint being filed and before the
28 Department appeared. Its motion is timely, which neither party contests.

1 F.R.D. 248, 253 (N.D. Cal. 2019). This Court concluded that the regulations’ impact
2 on Oregon’s finances, public health, and sovereignty constituted significant
3 protectable interests. *Id.* Setting aside the four challenged regulations would have
4 similar implications for Texas. The rationale for intervention is even stronger here, as
5 Texas, by means of its public universities, would be bound to take certain actions to
6 remain compliant with Title IX if an injunction were granted. Yet Plaintiff has not
7 explained why the court’s reasoning in *Health & Human Services* should not control.
8 At the end of the day, Texas will suffer a practical impairment as result of the pending
9 litigation should Plaintiff’s claim succeed. It therefore satisfies the requirement that it
10 have significantly protectable interests.

11 **B. There are no reasonable alternatives to intervention that would**
12 **protect Texas’ interests.**

13 As a general matter, if a proposed intervenor has a significant protectable
14 interest, courts have “little difficulty concluding” that the disposition of the case
15 “may, as a practical matter, affect it.” *California ex rel. Lockyer*, 450 F.3d at 442. The
16 regulations at issue in Plaintiff’s complaint provide important benefits to Texas, as
17 explained above. An adverse ruling, which enjoins these regulations, would eliminate
18 these benefits and force Texas to assume additional duties and liability under Title
19 IX. Courts *may* make an exception when the movant has at its disposal alternative
20 avenues of relief. *See UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408, 415
21 (N.D. Cal. 2004) (noting that the availability of alternatives is “hardly dispositive”).
22 But for the exception to apply, the alternative forum must be reasonable and allow the
23 movant the opportunity to “mount a robust defense” of its interests. *Id.* In its
24 opposition to Texas’ motion, Plaintiff claims that Texas has two alternatives avenues
25 by which to obtain relief. Neither of the two options Plaintiff identifies, however,
26 would redress Texas’ impairment; nor are they reasonable.

27 First, Plaintiff argues that “if the Court strikes down the four provisions WSU
28 challenges, and the Department initiates rulemaking to replace those provisions,

1 Texas will have the opportunity to make its views known in the notice and comment
2 period.” ECF 27 at 17. As Plaintiff indicates with its phrasing, the availability of this
3 option is speculative. There is no guarantee that the Department will initiate
4 rulemaking in response to the resolution of this lawsuit. However, even if the
5 Department did initiate rulemaking, the notice and comment period is open to all
6 interested persons. Texas’ comments would be submitted alongside thousands of
7 others. The option is a far cry from the court-run proceeding available in *United States*
8 *v. Alisal Water Corp.*, which Plaintiff cites in support. 370 F.3d 915, 921 (9th Cir.
9 2004); *see also In re Charles Schwab Corp. Sec. Litig.*, C 08-01510 WHA, 2011 WL
10 633308, at *4 (N.D. Cal. Feb. 11, 2011) (noting that movant’s objection was
11 previously heard and considered by the court at a hearing). In addition, notice and
12 comment rulemaking takes years. Plaintiff has not explained how Texas will remedy
13 its impaired interests during the interim.

14 Second, Plaintiff claims that Texas can pursue administrative remedies in the
15 event one of its academic institutions is believed to be non-compliant and at risk of
16 losing federal funds. ECF 27 at 17. This supposed remedy is almost completely non-
17 responsive to the harms that Texas would experience should the four challenged
18 provisions be enjoined. Under the status quo, Texas academic institutions have a
19 smaller likelihood of triggering a federal enforcement action. Indeed, Texas has
20 sought intervention, in part, to prevent Plaintiff from expanding recipients’ potential
21 liability by means of its lawsuit, so Plaintiff’s proposed remedy demands that Texas
22 participate in a proceeding that it sought to avoid and that would not have been
23 necessary but for disposition of this lawsuit. In any event, the proposed remedy only
24 addresses the worst-case scenario: the possible loss of federal funds. It does nothing
25 to redress the collateral consequences of expanding liability under Title IX, such as
26 private litigation, monetary judgments, and the (often unconstitutional) changes that
27 publicly funded institutions make to their sexual harassment policies to avoid the
28 stigma of noncompliance. *See Doe v. Univ. of Scis.*, 961 F.3d 203, 213 (3d Cir. 2020)

1 (describing the pressure universities faced as a result of earlier Title IX policies).

2 Relegation to the status of amicus curiae also would not provide a satisfactory
 3 means of protecting Texas’ interests. The above-captioned suit bears characteristics
 4 of sue and settle litigation, where an advocacy or interest group files a lawsuit against
 5 a like-minded agency for the purpose of negotiating a collusive settlement.⁵ Even if
 6 that was not Plaintiff’s original intention, the Biden Administration has established
 7 its willingness to undermine the federal government’s defense of Trump
 8 Administration policies, when doing so enabled it to circumvent the need for notice
 9 and comment rulemaking. *See* Press Release, U.S. Dep’t. of Homeland Security, *DHS*
 10 *Secretary Statement on the 2019 Public Charge Rule* (March 9, 2021) (withdrawing
 11 from the defense of the 2019 public charge rule, thereby allowing an adverse
 12 judgment to go into effect), [https://www.dhs.gov/news/2021/03/09/dhs-secretary-](https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule)
 13 [statement-2019-public-charge-rule](https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule). As amici, Texas’ participation would be limited.
 14 Not only would it be precluded from filing motions or introducing an issue or defense
 15 not raised by the parties, but it also would lack standing to object to a collusive
 16 settlement or to appeal. *S.F. NAACP v. S.F. Unified Sch. Dist.*, 59 F. Supp. 2d 1021,
 17 1033 (N.D. Cal. 1999); *cf. S.E.C. v. Private Equity Mgmt. Group, Inc.*, CV 09-2901
 18 PSG (EX), 2009 WL 2488044, at *6 n.5 (C.D. Cal. Aug. 10, 2009) (describing amicus
 19 curiae “as non-parties who can only provide general information and assistance” to
 20 the court). Texas would have no means of defending the status quo.

21 Should the challenged provisions be enjoined, Texas would be unable to
 22 revitalize the Final Rule or recover the benefits it enjoyed under the Final Rule.
 23 Intervention is the only way Texas may sufficiently protect its interests.

24 **C. The Department is not capable of representing Texas’ interests or**
 25 **providing an adequate defense of the regulations.**

26 ⁵ *See* A Time to Reform: Oversight of the Activities of the Justice Department’s Civil, Tax, and
 27 Environment and Natural Resources Divisions and the U.S. Trustee Program, *Hearing Before the*
 28 *Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*,
 115th Cong. 2 (2017) (statement of Andrew M. Grossman, Partner, Baker & Hostetler LLP).

1 The Biden Administration (erroneously) views the Final Rule, including the
2 challenged provisions, as a “a green light to ignore sexual violence and strip survivors
3 of their civil rights under Title IX.” *The Biden Agenda for Women*, JOEBIDEN.COM,
4 <https://joebiden.com/womens-agenda/> (last visited May 11, 2021). It has promised to
5 put the Final Rule “to a quick end,” *Id.*, and more importantly, it has taken immediate
6 and unmistakable strides to fulfill that promise. *See* ECF 19-1 at 10–11. Nevertheless,
7 the parties contend that Texas must rely on the Department to represent Texas’
8 interests in defending the Final Rule simply because the Department is a
9 governmental entity and has the nominal designation of being the named defendant
10 in this action. Rule 24(a)(2), however, does not require that the courts close their eyes
11 to reality, nor does the case law in this jurisdiction. The Ninth Circuit recognizes a
12 presumption of adequate representation when “the government is acting on behalf of
13 a constituency that it represents,” but it also has held that an intervenor may rebut this
14 presumption with a “clear showing” to the contrary. *Citizens for Balanced Use v.*
15 *Montana Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011). Texas has made such
16 a showing here.

17 As the Department acknowledges, “[t]he most important factor” in determining
18 whether adequate representation exists is “how the [intervenor's] interest compares
19 with the interests of existing parties.” ECF 28 at 2 (quoting *Perry v. Proposition 8*
20 *Official Proponents*, 587 F.3d 947, 950–51 (9th Cir. 2009)). Applying that factor here,
21 the analysis clearly falls on the side of intervention. The Department is charged with
22 implementing the Biden Administration’s Title IX policy. To that end, it has been
23 instructed by the Administration to conduct a thorough review of the Final Rule and
24 suspend, revise, or rescind any portion that the Department finds inconsistent with the
25 Biden Administration’s objectives.⁶ Exec. Order No. 14021 (Mar. 8, 2021). This
26

27 ⁶ Pursuant to the March 8, 2021 Executive Order, the Department issued a letter, stating that the
28 Department intends to hold a hearing as part of its review and anticipates filing a proposed
(footnote continued)

1 review comes on the heels of President Biden’s pledge to repeal the Final Rule and
 2 reinstitute the Dear Colleague Letter.⁷ The Department therefore has a stake in seeing
 3 the four challenged provisions fail, which “would preclude [the Department’s]
 4 vigorous defense of the” regulations. *Int’l Fur Trade Fed’n v. City & County of San*
 5 *Francisco*, 20-CV-00242-RS, 2020 WL 6931066, at *2 (N.D. Cal. Apr. 17, 2020)
 6 (inquiring whether government defendants have “a conflict of interest”).

7 Texas, in contrast, is a common provider of education, directly subject to Title
 8 IX, that has greatly benefited from the challenged provisions because they reduce
 9 liability and remove the incentive for Texas academic institutions to violate the due
 10 process and free speech rights of their students and faculty. As Texas explained in its
 11 motion, even prior to the change in presidential administration, the Department would
 12 have been hard-pressed to represent Texas’ full interests. Texas, after all, incurs a
 13 financial cost when carrying out its obligations under Title IX and the Final Rule. Not
 14 only does the Department not share in this financial burden, but the Department also
 15 represents constituencies whose interests may be at odds with Texas’ need to conserve
 16 taxpayer money. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 539
 17 (1972). The federal government’s about-face on Title IX policy has only widened that
 18 divide. There is now an unavoidable, fundamental split between Texas and the
 19 Department, whereby the Department has an incentive to compromise its defense of
 20 the challenged provisions, if not abandon its defense of the provisions altogether, and
 21 Texas does not.

22 Plaintiff responds to this obvious divergence of interest by mischaracterizing
 23

24 rulemaking to amend the Department’s Title IX regulations. Suzanne B. Goldberg, U.S. Dep’t. of
 25 Educ., *Letter to Students, Educators, and other Stakeholders re Executive Order 14021* (Apr. 6,
 26 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/2020406-titleix-eo-14021.pdf>

27 ⁷ E.g. Joe Biden, *Statement on the Trump Administration Rule to Undermine Title IX and Campus*
 28 *Safety* (May 6, 2020), <https://medium.com/@JoeBiden/statement-by-vice-president-joe-biden-on-the-trump-administration-rule-to-undermine-title-ix-and-e5dbc545daa>

1 Texas’ argument as a mere “belief that the Defendant will make different legal
2 strategic decisions.” *See* ECF 27 at 19. However, if that was the extent of Texas’
3 motivation, then Texas would have sought intervention in the other cases challenging
4 the Final Rule when they were initially filed. Instead, Texas left the defense of the
5 Final Rule to the Department, then under the control of the Trump Administration,
6 and relied on amicus briefs to supplement the Department’s arguments when
7 necessary. Texas only moved to intervene in those cases and here when it became
8 apparent that the Department’s priorities had changed in the wake of the election.
9 Texas’ argument, in other words, is not that the Department will adopt a different
10 approach to litigation than Texas would have. Texas’ argument is that the Department
11 is “unable or unwilling to pursue vigorously all available arguments in support of”
12 Texas’ interests in light of the Biden Administration’s ongoing effort to repeal and
13 revise the Final Rule. *Montana Wilderness Ass’n*, 647 F.3d at 900. Texas in fact
14 asserts that the Department is unlikely to defend the challenged provisions at all
15 because an injunction would allow the Department to achieve its policy objectives
16 without going through notice and comment rulemaking. *See* ECF 19–1 at 11.

17 Rather than confronting this argument head-on, Plaintiff instead spends three
18 paragraphs theorizing about possible legal strategies that Texas might take. *See* ECF
19 19–20. Even assuming *arguendo* that Plaintiff described Texas’ litigation strategy
20 accurately,⁸ it has no bearing on this Court’s consideration of Texas’ motion.
21 Adequate representation turns on the parties and the proposed intervenor’s interests.
22 *See Arakaki*, 324 F.3d at 1086 (stating that the courts looks at whether the parties
23 “interest[s] [are] such that it will undoubtedly make all of a proposed intervenor's
24 arguments”). Plaintiff counters that the Department has continued its defense of the
25 Final Rule in *Victim Rights Law Center (VRLC) v. Cardona*, No. 1:20-cv-11104

26 _____
27 ⁸ Plaintiff theorizes that Texas intends to advance a legal strategy based on constitutional
28 arguments—an assumption it spun from a single line of text within Texas’ answer that identifies the
First, Fifth, and Fourteenth Amendments as possible affirmative defenses. *See* ECF 19–20.

1 (D.Mass), which raises similar claims as the one at issue here. But the argument is
2 unpersuasive. The court in *VRLC* conducted a full trial on the merits months before
3 the change in administration. The parties merely wait for the court to issue its final
4 judgment. Should the *VRLC* court rule in favor of the plaintiffs, the Department need
5 only let the adverse judgement stand for the relevant provisions in the Final Rule to
6 be effectively repealed. It therefore suits the federal government’s new policy agenda
7 for the Department to adopt a wait and see approach and withdraw from the Final
8 Rule’s defense in *VRLC* only after obtaining a ruling.

9 The Biden Administration in fact adopted this exact strategy to get rid of the
10 2019 public charge rule. *See* Press Release, U.S. Dep’t. of Homeland Security, *DHS*
11 *Secretary Statement on the 2019 Public Charge Rule* (March 9, 2021),
12 [https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-](https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule)
13 [rule](https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule). There, the Department of Homeland Security ordered DOJ to dismiss pending
14 appeals in multiple circuits, which permitted a judgment from the Northern District
15 of Illinois, vacating the 2019 public charge rule, to go into effect. *Id.* Crucially, the
16 announcement came one month after the President ordered a review of the policy. The
17 same danger is present here. Absent Texas’ intervention, there is nothing preventing
18 the Department from ordering DOJ to enter into a settlement agreement with Plaintiff
19 that enjoins the challenged provisions. *See Sagebrush Rebellion, Inc. v. Watt*, 713
20 F.2d 525, 529 (9th Cir. 1983) (finding inadequate representation because agency had
21 a conflict of interest and DOJ did not act “totally independent of the administration's
22 concerns”).⁹

23 For these reasons, Texas’ motion can be distinguished from the two motions
24

25 ⁹ It should also be noted that any argument establishing the challenged provisions as reasonable,
26 effective, or beneficial to students undermines the Department’s effort to overhaul the Final Rule
27 since it provides evidence that changing the policy, as Biden Administration urges, is irrational. *See*
28 *Allentown Mack Sales & Serv., Inc. v. NLRB.*, 522 U.S. 359, 374 (1998) (requiring administrative
agencies to in “reasoned decisionmaking” that is both “logical and rational”); *see also California v.*
Wheeler, 467 F. Supp. 3d 864, 872 (N.D. Cal. 2020).

1 filed by the Foundation for Individual Rights in Education (FIRE) in *VRLC* and *New*
 2 *York v. United States Dep't of Educ.*, 20-CV-4260 (JGK), 2020 WL 3962110
 3 (S.D.N.Y. July 10, 2020). In both of those instances, FIRE sought intervention well
 4 before the current administration assumed office, when the Department and FIRE
 5 shared the “same ultimate objective.” *Freedom from Religion Found., Inc. v.*
 6 *Geithner*, 644 F.3d 836, 841 (9th Cir. 2011). A better touchstone is *Commonwealth*
 7 *of Pennsylvania v. DeVos*, where the D.C. District Court granted Texas motion
 8 because it filed the motion “near the time its interests diverged from the Department
 9 of Education” 1:20-cv-01468-CJN (D.D.C. Feb. 4, 2021). The evidence of the
 10 Department’s hostility to the Final Rule has only grown more compelling since then.
 11 Both the Biden Administration and the Department have taken specific and deliberate
 12 steps towards the Final Rule’s appeal. The Biden Administration additionally has
 13 shown a willingness to withdraw from the defense of its predecessor’s policies when
 14 doing so enables it to evade notice and comment rule making. Hence, this is not an
 15 occasion where the proposed intervenor’s only support is a change in administration
 16 and campaign statements. *United States v. City of Los Angeles, Cal.*, 288 F.3d 391,
 17 403 (9th Cir. 2002) (noting that campaign statements and a change in administration
 18 are “insufficient by themselves”). The totality of the Biden Administration’s actions
 19 establish that the federal government is unable adequately represent Texas. Any
 20 presumption to the contrary has been rebutted.

21
 22 **III. In The Alternative, The Court Should Grant Permissive Intervention.**

23 Neither party has presented a credible argument as to why this Court should
 24 deny permissive intervention. As recently as two years ago, this Court allowed the
 25 State of Oregon to intervene in a similar challenge under the APA against federal
 26 regulations related to the contraception mandate. *See Health & Human Servs*, 330
 27 F.R.D. at 255 (allowing Oregon to permissively intervene in a state challenge under
 28 the APA against federal rules). Many of the considerations that this Court found

1 persuasive in that case apply here as well. Additionally, the D.C. District Court
2 granted Texas’ motion to intervene in a parallel suit contesting the Final Rule. *See*
3 *Commonwealth of Pennsylvania v. DeVos*, 1:20-cv-01468-CJN (D.D.C. Feb. 4,
4 2021). The rationale for granting intervention here is even stronger, as Texas filed its
5 motion much earlier in the litigation, and the Biden Administration has since initiated
6 the process for repealing the Final Rule. *See Scholl v. Mnuchin*, 483 F. Supp. 3d 822,
7 825 (N.D. Cal. 2020) (listing timeliness and adequate representation as relevant
8 factors).

9 Allowing Texas to intervene also would not unduly delay or prejudice the
10 parties in this suit. Texas’ intervention, if anything, would avert a potential disruption
11 to this case should the federal government withdraw its support of the Final Rule and
12 refuse to defend it, which the Biden Administration’s recent actions regarding the
13 2019 public charge rule suggest is likely. *See infra* Part I.C. Plaintiff frets that Texas
14 may turn this litigation into “a referendum on the constitutional bounds of sexual
15 harassment law or a freewheeling policy debate.” ECF 27 at 23. However, its fears
16 are a product of its own imagination. Plaintiff has no basis to assume that Texas will
17 tender any specific argument, including the assertion “that any alternative to the 2020
18 Regulations would be unconstitutional.” *Id.* In any event, Plaintiff’s complaint rests
19 on the assertion that the four challenged regulations are arbitrary and capricious. It
20 goes without saying that constitutional and policy considerations bear on the question
21 of whether a government agency acted rationally when promulgating policy. *See State*
22 *v. U.S. Dep’t of Homeland Sec.*, 19-CV-04975-PJH, 2020 WL 1557424, at *2 (N.D.
23 Cal. Apr. 1, 2020) (requiring agency to consider “all relevant factors”). Thus, if Texas
24 were to raise such arguments, they would build naturally from Plaintiff’s own
25 assertions. There would be no prejudice.

26 ///

27 ///

28 ///

1 Finally, the Department alleges that Texas has not identified a common
 2 question of law, but this allegation is in fact a jurisdictional argument in disguise. The
 3 Department argues that because “no plaintiff could bring an APA claim against any
 4 entity other than the federal government,” Texas could not be a defendant in this case.
 5 ECF 28 at 4. While usually a party seeking to intervene must demonstrate an
 6 independent jurisdictional basis, the Ninth Circuit has previously held that “the
 7 jurisdictional requirement . . . [is meant to] prevent the enlargement of federal
 8 jurisdiction in such cases only where a proposed intervenor seeks to bring new state
 9 law claims,” and that “the independent jurisdictional grounds requirement does not
 10 apply to proposed intervenors in federal-question cases when the proposed intervenor
 11 is not raising new claims.” *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d
 12 836, 844 (9th Cir. 2011) (concluding that a district court erred when it denied a private
 13 citizen permissive intervention as a defendant in an Establishment Clause claim on
 14 the basis of standing). Because Texas does not seek to raise additional claims, the
 15 Department’s argument is unavailing. *See Id.* Hence, this Court would be well within
 16 its discretion to grant Texas’ intervention under Rule 24(b).

CONCLUSION

17
 18 The State of Texas respectfully requests that the Court grant its motion to
 19 intervene as a matter of right under Rule 24(a) or, in the alterative, for permissive
 20 intervention under Rule 24(b).

21 DATED: May 13, 2021

Respectfully submitted.

LEWIS BRISBOIS BISGAARD & SMITH
 LLP

/s/ Michael K. Johnson

Michael K. Johnson

Attorneys for Defendant

KEN PAXTON IN HIS OFFICIAL

CAPACITY AS ATTORNEY

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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

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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 May 13, 2021, I served the following document:

COMBINED REPLY IN SUPPORT OF TEXAS’ 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: May 13, 2021

/s/ Sandra Hayes
Sandra Hayes