

1 Hillary Benham-Baker
2 Benham-Baker Legal
3 935 Moraga Road, Suite 200
4 Lafayette, CA 94549
5 hillary@benhambaker.com
6 CA Bar No.: 265019
7 Telephone: (415) 373-5333

8 Aaron S. Ament (*pro hac vice forthcoming*)
9 Alexander S. Elson (*pro hac vice forthcoming*)
10 NATIONAL STUDENT LEGAL DEFENSE NETWORK
11 1015 15th Street N.W., Suite 600
12 Washington, D.C. 20005
13 aaron@defendstudents.org
14 alex@defendstudents.org
15 Telephone: (202) 734-7495

16 *Counsel for Proposed Intervenor-Plaintiff*

17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**

19 PEOPLE OF THE STATE OF
20 CALIFORNIA,

21 *Plaintiff,*

22 and

23 NATIONAL STUDENT LEGAL
24 DEFENSE NETWORK,

25 *Intervenor-Plaintiff,*

26 vs.

27 UNITED STATES DEPARTMENT OF
28 EDUCATION and MITCHELL ZAIS, *in*
his official capacity as Acting Secretary of
Education,

Defendants.

Case No.: 21-cv-00384-JD

**NOTICE OF MOTION AND MOTION
FOR PERMISSIVE INTERVENTION
OF NATIONAL STUDENT LEGAL
DEFENSE NETWORK;
MEMORANDUM IN SUPPORT**

[Administrative Procedure Act Case]

Date: February 25, 2021

Time: 10:00 a.m.

Courtroom: 11

TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES ii

3 NOTICE OF MOTION AND MOTION..... 1

4 MEMORANDUM..... 1

5 I. Introduction..... 1

6 II. Statement of the Issue 3

7 III. Factual Background..... 3

8 A. Proposed Intervenors 3

9 B. Student Defense’s Challenge to the 2020 Regulation..... 4

10 IV. Legal Standard..... 6

11 V. Student Defense Should be Allowed to Intervene, Pursuant to

12 Fed. R. Civ. P. 24(b)(1)(B) 7

13 A. Student Defense Satisfies the Three Threshold Requirements

14 for Permissive Intervention 8

15 1. Student Defense has an Independent Ground for

16 Jurisdiction 8

17 2. The Motion to Intervene is Timely..... 8

18 3. Student Defense’s Claims Share Common Questions

19 of Law and Fact with the Main Action..... 9

20 B. The Court Should Use Its Discretion to Permit Student

21 Defense to Intervene 10

22 VI. Conclusion 12

23

24

25

26

27

28

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 *Am. Civil Liberties Union of N. Cal. v. Burwell*, No. 16-CV-03539-LB, 2017
4 WL 492833 (N.D. Cal. Feb. 7, 2017)6–7, 11, 12

5 *Az. State Legis. v. Az. Indep. Redist. Comm’n*, 576 U.S. 787 (2015)11

6 *Blum v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 712 F.3d 1349 (9th Cir.
7 2013).....6

8 *Buffin v. City & Cty. of San Francisco*, No. 15-CV-04959-YGR, 2017 WL
9 889543 (N.D. Cal. Mar. 6, 2017).8

10 *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152
11 F.3d 1184 (9th Cir. 1998)10–11

12 *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893 (9th Cir.
13 2011)..... 8–9, 10

14 *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, No. 15-CV-00658-JCS,
15 2015 WL 3903133 (N.D. Cal. June 24, 2015)7

16 *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836 (9th Cir.
17 2011).....8

18 *In re Grupo Unidos Por El Canal S.A.*, No. 14-mc-80277-JST (DMR), 2015 WL
19 1815251 (N.D. Cal. Apr. 21, 2015)7, 10

20 *New York v. Scalia*, 464 F. Supp. 3d 528 (S.D.N.Y. 2020)11

21 *Nikon Corp. v. ASM Lithography B.V.*, 222 F.R.D. 647 (N.D. Cal. 2004) ... 9–10

22 *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825 (9th Cir. 1996)9

23 *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016)8

24 *PG&E v. Lynch*, 216 F. Supp. 2d 1016 (N.D. Cal. 2002)10

25 *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001).....6

26 **STATUTES**

27 5 U.S.C. § 706.....1

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

REGULATIONS

Distance Education and Innovation, 85 Fed. Reg. 54,742 (Sept. 2, 2020) 1, 2, 5

Program Integrity Issues, 75 Fed. Reg. 34,806 (June 18, 2010)6

Program Integrity Issues, 75 Fed. Reg. 66,832 (Oct. 29, 2010)5-6

OTHER AUTHORITIES

Fed. R. Civ. P. 129

Fed. R. Civ. P. 24 3, 6, 10

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on February 25, 2021 or as soon thereafter as
3 counsel may be heard, proposed Plaintiff-Intervenor, the National Student Legal
4 Defense Network (“Student Defense”) will, and hereby does, move pursuant to
5 Federal Rule of Civil Procedure 24(b) for an order permitting it to intervene as a
6 plaintiff in this action (“Main Action”), in which Plaintiff The State of California
7 (“California”) challenges two provisions of the Distance Education and Innovation
8 Final Rule, 85 Fed. Reg. 54,742 (Sept. 2, 2020), promulgated by Defendants United
9 States Department of Education and Acting Secretary of Education Mitchell
10 (“Mick”) Zais (collectively, the “Department” or “Defendants”). This motion is
11 supported by the accompanying Memorandum of Points and Authorities and
12 proposed Complaint in Intervention.

13 **MEMORANDUM**

14 **I. INTRODUCTION**

15 On September 2, 2020, the Department published a new rule that reduces
16 government oversight of online higher education and strips away critical protections
17 for students enrolling in distance education programs. *See* Distance Education and
18 Innovation Final Rule, 85 Fed. Reg. 54,742 (Sept. 2, 2020) (“2020 Regulation”).
19 The Main Action, brought by California, seeks a declaration that two provisions of
20 the 2020 Regulation violate the Administrative Procedure Act (“APA”), 5 U.S.C.
21 § 706, and that the Court vacate and set aside these provisions.

22 First, 34 C.F.R. § 668.13(b)(3), as published in the 2020 Regulation, allows
23 institutions of higher education to be automatically certified to receive federal funds
24 if the Department does not resolve the school’s certification application within 12
25 months. California alleges that this is an “abdication of federal oversight that runs
26 afoul of the Higher Education Act, which mandates that the Secretary affirmatively
27 determine that a school has the administrative capability and financial
28

1 responsibility to receive federal funds, among other critical statutory requirements.”

2 *See* California Complaint ¶¶ 4, 34-44.

3 Second, 34 C.F.R. § 668.5(a)(2), as published in the 2020 Regulation, allows a
4 degree granting institution to completely outsource an entire educational program
5 to another entity, as long as the other entity is Title IV eligible and has shared
6 ownership with the degree granting institution. 34 C.F.R § 668.5(a)(2). Previously,
7 the Department found that it was necessary to limit such outsourcing to 50 percent
8 of an educational program in order to, among other things, protect students from
9 bait-and-switch tactics by ensuring that that the institution providing most of the
10 instruction is the one in which the student actually enrolled. Under the
11 Department’s new rule, a student can now enroll in and receive a degree from an
12 institution that provided none of the education for which the degree was conferred.
13 California claims that removal of the 50 percent cap was arbitrary and capricious,
14 in violation of the APA. *See* California Complaint ¶¶ 5, 45-56.

15 Plaintiff-Intervenor Student Defense shares these concerns. Student Defense
16 is a non-profit organization that has represented students in California and
17 throughout the country who have enrolled in programs of higher education,
18 including distance education. Student Defense has also advocated for thousands of
19 others who are at risk of being harmed by the 2020 Regulation. Like California,
20 Student Defense alleges that the challenged provisions of the 2020 Regulation
21 violate federal law, and will result in significant harm to students who enroll in
22 online programs.

23 While Student Defense and California have overlapping constituencies and
24 multiple common interests, their interests are not identical. Indeed, California’s
25 interest in protecting its public colleges and universities from competitive harm, *see*
26 California Compl. ¶¶ 57-77, may at times be distinct from that of students, whose
27 educational and financial futures are jeopardized by the provisions at issue. For
28 example, as set forth in more detail below, the automatic recertification provision of

1 the 2020 Regulation will unlawfully permit institutions to serve as conduits for
2 their students to incur massive student debt burdens, even when the institution has
3 not been specifically qualified to do so by the Department. Moreover, with removal
4 of the 50 percent outsourcing threshold, students may not be provided *any* of the
5 instruction or educational program they believed they signed up for. Intervention
6 will therefore permit Student Defense to advocate for the unique and particular
7 interests of students who are enrolled—or who are seeking to enroll—in distance
8 education programs in a way that the state may not always be positioned to do.

9 For these reasons, Student Defense’s intervention will add important
10 dimensions to the Main Action, without unduly complicating or multiplying the
11 issues presented by California. Accordingly, and as explained in greater detail
12 below, Student Defense’s Complaint in Intervention “shares with the main action a
13 common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). Student Defense should
14 therefore be permitted to intervene in this action.

15 **II. STATEMENT OF THE ISSUE**

16 Whether the Court should grant Student Defense permission to intervene
17 pursuant to Fed. R. Civ. P. 24(b)(1)(B).

18 **III. FACTUAL BACKGROUND**

19 **A. Proposed Intervenors**

20 Proposed intervenor Student Defense is a non-profit, non-partisan 501(c)(3)
21 organization that works to advance students’ rights to educational opportunity and
22 to ensure that higher education provides a launching point for economic mobility.
23 Student Defense Compl. ¶ 25. Student Defense has represented numerous students
24 and prospective students residing in California who have been harmed by the
25 Department’s recent deregulation of institutions of higher education, including
26 those regulations specifically related to distance education. *Id.* ¶ 27.¹ Student
27

28 ¹ For example, Student Defense successfully represented California residents

1 Defense frequently represents students who are targeted by for-profit, often online
2 institutions of higher education, including veterans, students of color, students with
3 young children, and those with financial hardships. Such students are the most
4 likely to be harmed by the provisions of the 2020 Regulation at issue here, and
5 should therefore have a voice in this litigation, and in formulating any remedy.

6 Student Defense participated in the public process for the 2020 Regulation
7 by submitting extensive comments on the Department’s Notice of Proposed
8 Rulemaking. *Id.* ¶ 36. (citing National Student Legal Defense Network, Comment
9 on NPRM on Student Assistance General Provisions, Distance Education and
10 Innovation Regulations, Docket ID ED-2018-OPE-0076 (May 4, 2020) (“Student
11 Defense Comment”), available at: [https://www.regulations.gov/document?D=ED-
12 2018-OPE-0076-1080](https://www.regulations.gov/document?D=ED-2018-OPE-0076-1080)).

13 **B. Student Defense’s Challenge to the 2020 Regulation**

14 Even before the COVID-19 crisis, a growing number of Americans were
15 enrolling in distance-based higher education, including through online learning.
16 Student Defense Compl. ¶ 1. Since the pandemic, many online for-profit institutions
17 have dramatically increased their marketing budgets to target potential students—
18 frequently targeting students of color, low-income students, student parents, and
19 veterans—who were recently laid off. *Id.* ¶ 7. While overall higher education
20

21
22 _____
23 harmed by the Department’s delay of rules relating to distance education and the
24 state authorization of online programs. *Id.* ¶ 28 (citing *See Nat’l Educ. Ass’n v.*
25 *DeVos*, 379 F. Supp. 3d 1001 (N.D. Cal. 2019), *appeal dismissed*, No. 19-16260, 2019
26 WL 4656199 (9th Cir. Aug. 13, 2019)). Student Defense currently represents two
27 California residents who are prospective enrollees in higher education programs
28 and who have been harmed by the Department’s repeal of the Gainful Employment
regulations that established eligibility, disclosure, and certification requirements
for career and for profit college programs, including those conducted online. *Id.* ¶ 29
(citing *Am. Fed’n of Tchrs. v. DeVos*, No. 5:20-cv-00455, (N.D. Cal. Jan. 22, 2020)).

1 enrollment is down, for-profit college enrollment is on the rise at levels not seen
2 since the Great Recession. *Id.* ¶ 8.

3 Despite the need for increased attention to and oversight of distance
4 education, on September 2, 2020, in the middle of the pandemic, the Department
5 published the 2020 Regulation, which reduced government oversight of online
6 education, deregulated the industry, and stripped away critical protections for
7 students enrolling in distance education programs. *Id.* ¶ 10.

8 Student Defense seeks to challenge the same two provisions of the 2020
9 Regulation as California challenges in the Main Action.

10 *First*, the 2020 Regulation provides that “[i]n the event that the Secretary
11 does not make a determination to grant or deny certification within 12 months of
12 the expiration date of [an institution’s] current period of participation, the
13 institution will automatically be granted renewal of certification, which may be
14 provisional.” 34 C.F.R § 668.13(b)(3). Student Defense contends that this provision
15 is contrary to law and is therefore unlawful under the APA because it eviscerates
16 the Higher Education Act’s (“HEA”) clear requirement that the Secretary “qualif[y]”
17 an institution for participation in Title IV, HEA programs by “determin[ing]” an
18 institution’s “legal authority to operate within a State, [its] accreditation status,
19 and [its] administrative capability and financial responsibility. . . in accordance
20 with the requirements” of the HEA. HEA § 498(a), 20 U.S.C. § 1099c(a). *See*
21 *generally* Student Defense Compl. ¶¶ 38–58.

22 *Second*, the 2020 Regulation allows a degree granting institution to outsource
23 100 percent of its educational program to another entity, as long as the other entity
24 is Title IV eligible and has shared ownership with the degree granting institution.
25 34 C.F.R § 668.5(a)(2). Previously, the Department found that it was necessary to
26 limit such outsourcing to 50 percent of an educational program in order to, among
27 other things, ensure that the “institution providing most of the program will be the
28 one associated with the students that are taking the program.” 75 Fed. Reg. 66,832

1 (Oct. 29, 2010); *see also* 75 Fed. Reg. 34,806, 34,814 (June 18, 2010) (providing many
2 other reasons why the 50 percent threshold was necessary). In removing the 50
3 percent threshold, the Department acted unlawfully due to its arbitrary and
4 capricious failures to: (i) explain the departure from its reasoning in the 2010
5 Regulation; (ii) consider reasonable alternatives to elimination of the threshold; and
6 (iii) provide adequate factual support for its decision. *See generally* Student Defense
7 Compl. ¶¶ 59–84.

8 **IV. LEGAL STANDARD**

9 Under Federal Rule of Civil Procedure 24(b)(1)(B), the Court may permit
10 intervention by any party who “has a claim or defense that shares with the main
11 action a common question of law or fact.” Courts in the Ninth Circuit require three
12 threshold elements in order to grant a motion for permissive intervention: (1) an
13 independent ground for jurisdiction; (2) a timely motion; and (3) a common question
14 of law and fact between the movant’s claim or defense and the Main Action. *See,*
15 *e.g., Blum v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 712 F.3d 1349, 1353 (9th
16 Cir. 2013) (citing *Beckman Indus. v. Int’l Ins. Co.*, 966 F.2d 470, 473 (9th Cir.
17 1992)).²

18 Once these threshold requirements are satisfied, the Court may grant
19 permissive intervention in its discretion. *Id.* “In exercising its discretion, the court
20 must consider whether the intervention will unduly delay or prejudice the
21 adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3); *accord Blum*,
22 712 F.3d at 1354. *See also, e.g., Am. Civil Liberties Union of N. Cal. v. Burwell*, No.
23 16-CV-03539-LB, 2017 WL 492833, at *3 (N.D. Cal. Feb. 7, 2017) (granting
24 permissive intervention because the intervening party’s “participation [would have]

25
26 ² In addition, a motion to intervene “must state the grounds for intervention,” and
27 must “be accompanied by a pleading that sets out the claim or defense for which
28 intervention is sought.” Fed. R. Civ. P. 24(c). The court is required to accept as true
the non-conclusory allegations made in support of the intervention motion. *Sw. Ctr.*
for Biological Diversity v. Berg, 268 F.3d 810, 819-20 (9th Cir. 2001).

1 contribute[d] to the development of the factual and legal landscape” of the case and
2 would not have prejudiced the existing parties’ rights); *Ctr. for Biological Diversity*
3 *v. U.S. Dep’t of Interior*, No. 15-CV-00658-JCS, 2015 WL 3903133, at *5 (N.D. Cal.
4 June 24, 2015) (granting permissive intervention after finding that none of the
5 existing parties’ rights would have been prejudiced, as evidenced by neither party
6 objecting to the motion to intervene); *In re Grupo Unidos Por El Canal S.A.*, No. 14-
7 mc-80277-JST (DMR), 2015 WL 1815251, at *6 (N.D. Cal. Apr. 21, 2015) (existing
8 parties would not be prejudiced by permissive intervention because the intervenor
9 would not bring any new claims into the dispute and additional motion practice is
10 “alone insufficient to show undue delay”).

11 **V. STUDENT DEFENSE SHOULD BE ALLOWED TO INTERVENE,**
12 **PURSUANT TO FED. R. CIV. P. 24(b)(1)(B)**

13 Student Defense seeks to intervene at the start of this litigation because the
14 regulatory provisions at issue will cause significant harm to the students it exists to
15 protect, especially students of color, veterans, low-income students and student
16 parents. Student Defense asserts legal claims already presented in the Main Action
17 and seeks the same relief—namely, a declaration that the challenged provisions in
18 the 2020 Regulation are arbitrary, capricious, and contrary to law pursuant to the
19 APA, and an order vacating those provisions in their entirety. For these reasons,
20 intervention presents no jurisdictional concerns and poses no risk of delaying the
21 Main Action or prejudicing the original parties to the case.

22 In addition, Student Defense brings unique perspective and subject matter
23 expertise to this case. Not only is Student Defense a voice for the individuals—
24 students—whose lives are most impacted by these regulatory provisions, but it also
25 is staffed by individuals who are experts at the intersection of consumer protection
26 and higher education, including individuals with high level government experience
27 working on issues related to those impacted by the 2020 Regulation. For all of these
28

1 reasons, the Court should exercise its discretion to permit Student Defense to
2 intervene and participate as a plaintiff in this case.

3 **A. Student Defense Satisfies the Three Threshold Requirements**
4 **for Permissive Intervention**

5 **1. Student Defense has an Independent Ground for**
6 **Jurisdiction**

7 With respect to the “independent ground for jurisdiction” requirement, there
8 are no jurisdictional concerns where, as here, an intervenor in a federal question
9 case brings no new claims. *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d
10 836, 844 (9th Cir. 2011) (“[I]n federal-question cases, the identity of the parties is
11 irrelevant and the district court’s jurisdiction is grounded in the federal question(s)
12 raised by the plaintiff.”). For this reason, the independent jurisdictional grounds
13 requirement “does not apply to proposed intervenors in federal-question cases when
14 the proposed intervenor is not raising new claims.” *Id.*; see also *Buffin v. City & Cty.*
15 *of San Francisco*, No. 15-CV-04959-YGR, 2017 WL 889543, at *3 (N.D. Cal. Mar. 6,
16 2017).

17 Here, California brings claims under federal law (the APA), and Student
18 Defense is not raising any new claims. Thus, the independent jurisdictional
19 requirement “does not apply.”

20 **2. The Motion to Intervene is Timely**

21 This Motion is undeniably timely. The Ninth Circuit has identified three
22 factors relevant to determining whether a motion is timely: “(1) the stage of the
23 proceeding at which an applicant seeks to intervene; (2) the prejudice to other
24 parties; and (3) the reason for and length of any delay.” *Peruta v. Cty. of San Diego*,
25 824 F.3d 919, 940 (9th Cir. 2016) (en banc) (citation omitted). Moving to intervene
26 “at an early stage of the proceedings,” and when “intervention would not cause
27 disruption or delay in the proceedings,” “are traditional features of a timely motion.”
28 *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir.
2011) (citing *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996));

1 *see also Nikon Corp. v. ASM Lithography B.V.*, 222 F.R.D. 647, 649 (N.D. Cal. 2004)
2 (finding a motion timely when filed in “a period well before the court has addressed
3 any of the parties’ many anticipated dispositive motions” and where “the real
4 substance of this litigation has not been engaged”).

5 Just days into the Main Action, this motion is timely. Defendants have not
6 yet filed a responsive pleading, and the deadline to do so is approximately sixty
7 days away. *See* Fed. R. Civ. P. 12(a)(2). Granting this motion will therefore not
8 delay any proceedings and it will not prejudice any party. *See, e.g., Glickman*, 82
9 F.3d at 837 (holding that a motion to intervene was timely where it was filed less
10 than a week after the complaint, “before the [Defendant] had filed an answer, and
11 before any proceedings had taken place”).

12 **3. Student Defense’s Claims Share Common Questions of** 13 **Law and Fact with the Main Action**

14 Finally, in order to qualify for permissive intervention, a potential intervenor
15 “need only show that it has a ‘claim or defense that shares with the main action a
16 common question of law or fact.’” *In re Grupo Unidos Por El Canal S.A.* 2015 WL
17 1815251, at *5 (quoting Fed. R. Civ. P. 24(b)(1)(B)).

18 Student Defense’s proposed complaint in intervention shares multiple
19 common questions of law and fact with the Main Action. For example, both
20 complaints assert that the Department violated the APA with respect to the same
21 two provisions of the 2020 Regulation, and both complaints seek the same relief: a
22 declaration that the challenged provisions are arbitrary, capricious, and contrary to
23 law pursuant to the APA, and an order vacating those provisions. This is more than
24 sufficient to establish that Student Defense has claims that share common
25 questions of law or fact with the Main Action. *See, e.g., Nikon Corp.*, 222 F.R.D. at
26 651 (finding common questions of law or fact to exist where proposed intervenor
27 “seeks precisely the same relief” and where the facts and “much of the law” are
28 identical).

1 **B. The Court Should Use Its Discretion to Permit Student Defense**
2 **to Intervene**

3 Because Student Defense satisfies the threshold factors, the Court has
4 discretion to grant permissive intervention unless intervention would unduly delay
5 or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(3).
6 The Court should exercise that discretion here.

7 *First*, as set forth above, because this motion was filed shortly after
8 California filed the Main Action, Defendants have ample time before a responsive
9 pleading is due in the Main Action. Similarly, the claims and relief sought are the
10 same. There is, therefore, no prejudicial delay. *See, e.g., Citizens for Balanced Use*,
11 647 F.3d at 897 (finding no prejudice where intervention was granted "less than
12 three months after the complaint was filed and less than two weeks after the
13 [defendant] filed its answer to the complaint"); *In re Grupo Unidos Por El Canal*
14 *S.A.*, 2015 WL 1815251, at *5 (finding no prejudice where intervenor would not
15 have brought any new claims into the dispute).

16 *Second*, intervention is particularly appropriate where the original party may
17 be "unable or unwilling to pursue vigorously all available arguments in support of
18 the [intervenor's] interest." *Citizens for Balanced Use*, 647 F.3d at 898-900
19 (reversing denial of intervention where, despite sharing an ultimate objective, the
20 original defendant might not adequately represent the applicant's interests). This
21 factor is satisfied where, as here, Student Defense and the state of California "do
22 not have coextensive interests and serve different, if overlapping, constituencies."
23 *PG&E v. Lynch*, 216 F. Supp. 2d 1016, 1025 (N.D. Cal. 2002); *see also Californians*
24 *for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th
25 Cir. 1998) (affirming intervention by a labor union seeking to defend application of
26 wage law where the original defendant may not have adequately represented the
27 union's interests); *Berg*, 268 F.3d at 823 ("Just as the City could not successfully
28 negotiate the Plans without some private sector participation from Applicants, so

1 too the City in this case cannot be expected successfully to safeguard Applicants'
2 legally protectable interests.”).

3 While California is, of course, perfectly capable of representing the interests
4 of its students, whether states have standing to do so is unsettled. *See, e.g., New*
5 *York v. Scalia*, 464 F. Supp. 3d 528, 546 (S.D.N.Y. 2020) (noting decisions about this
6 issue are hard to reconcile and declining to “wade into this doctrinal morass”) (citing
7 cases); *Az. State Legis. v. Az. Indep. Redist. Comm’n*, 576 U.S. 787, 802 n.10 (2015)
8 (explaining that “the standing of states to sue the federal government[,]” including
9 questions of parens patriae standing, “are hard to reconcile”) (quotation omitted).
10 By contrast, there is no dispute that Student Defense is an organization that can,
11 and does, represent the interests of students.

12 In addition, while Student’s Defense’s proposed Complaint in Intervention
13 has the same factual underpinnings and legal claims as the Main Action, Student
14 Defense and California do not have “coextensive interests.” For example,
15 California’s interest in protecting its public colleges and universities from
16 competitive harm is distinct from Student Defense’s singular interest in ensuring
17 that the 2020 Regulation does not harm students’ educational and financial futures
18 by, among other things, causing them to take on federal student loan debt to attend
19 schools that should not be eligible to participate in the Title IV program.

20 *Third*, intervention is appropriate where the proposed intervenor “would
21 likely offer important elements to the proceedings that the existing parties would
22 likely neglect.” *Berg*, 268 F.3d at 822; *see also Burwell*, 2017 WL 492833, at *3
23 (granting motion of United States Conference of Catholic Bishop’s motion to
24 intervene in Establishment Clause challenge where intervention “will contribute to
25 the development of the factual and legal landscape”). Given its close work with
26 students who will be impacted by the challenged provisions of 2020 Regulation,
27 Student Defense stands in a position to offer important perspectives for the Court’s
28 consideration. As set forth above, it is students who have the most at stake, and

1 therefore the most to lose, if these provisions remain in effect. In addition, as noted
2 *supra*, Student Defense can contribute to “the development of the . . . legal
3 landscape” because its personnel have unique legal subject matter expertise
4 regarding a highly regulated industry. *Burwell*, 2017 WL 492833, at *3.
5 Accordingly, if Student Defense is allowed to participate, it will assist the Court and
6 the parties in framing the issues at stake in this litigation.

7 **VI. CONCLUSION**

8 Plaintiff-Intervenor Student Defense respectfully requests that the Court
9 grant its motion for permissive intervention. Student Defense meets all of the
10 requirements of permissive intervention under Federal Rule of Civil Procedure
11 24(b)(1)(B) and its participation will materially assist the resolution of issues in this
12 case.

13 Respectfully submitted,

14 */s/ Hillary Benham-Baker*

15 Hillary Benham-Baker
16 Benham-Baker Legal
17 935 Moraga Road, Suite 200
18 Lafayette, CA 94549
19 hillary@benhambaker.com
20 CA Bar No.: 265019
21 Telephone: (415) 373-5333

22 Aaron S. Ament (*pro hac vice forthcoming*)
23 Alexander S. Elson (*pro hac vice*
24 *forthcoming*)
25 NATIONAL STUDENT LEGAL
26 DEFENSE NETWORK
27 1015 15th Street N.W., Suite 600
28 Washington, D.C. 20005
aaron@defendstudents.org
alex@defendstudents.org
Telephone: (202) 734-7495

Dated: January 19, 2021