Glenn Rothner (SBN 67353)
ROTHNER SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, CA 91101
grothner@rsglabor.com
Telephone: (626) 796-7555
Facsimile: (626) 577-0124

Daniel A. Zibel (*admitted pro hac vice*)
Aaron S. Ament (*admitted pro hac vice*)
Robyn K. Bitner (*admitted pro hac vice*)
NATIONAL STUDENT LEGAL DEFENSE NETWORK
1015 15th Street Northwest, Suite 600
Washington, D.C. 20005
dan@defendstudents.org
aaron@defendstudents.org
robyn@defendstudents.org
Telephone: (202) 734-7495

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AMERICAN FEDERATION OF TEACHERS, CALIFORNIA FEDERATION OF TEACHERS, ISAI BALTEZAR, & JULIE CHO,

Plaintiffs,

vs.

ELISABETH DEVOS, *in her official capacity as Secretary of Education*, & UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.

Case No. 20-cv-00455-EJD

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: August 27, 2020
Time: 9:00 A.M.
Place: Courtroom 4, 5th Floor
Judge: Hon. Edward J. Davila

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INTRODUCTION

In 2014, the United States Department of Education ("Department") promulgated the Gainful Employment Rule to protect prospective and enrolled students from "unaffordable levels of [student] loan debt in relation to their earnings." Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890, 64,890 (Oct. 31, 2014), *corrected by* 79 Fed. Reg. 71,957 (Dec. 4, 2014) (collectively, the "Rule" or "Gainful Employment Rule"). The Department based the Rule on persuasive evidence that programs the Rule addressed failed to provide proper training, imposed high costs out of proportion to graduates' low wages, and demonstrated low completion rates, all of which led students to default. 79 Fed. Reg. at 64,890. The Department believed that, as a result of the Rule, "[s]tudents w[ould] benefit from lower costs, . . . lower debt, and better program quality as institutions improve[d] programs that fail[ed]" the regulatory requirements. 79 Fed. Reg. at 65,080. But in 2019, the Department reversed course and revoked the Rule, expressly recognizing that students would no longer be protected from the harms the Rule sought to prevent and would instead face the increased risk of enrolling in "sub-optimal programs" with a "demonstrated . . . lower return on . . . investment." Program Integrity: Gainful Employment, 84 Fed. Reg. 31,392, 31,445 (July 1, 2019) (the "Repeal"); *see also* Compl. ¶ 6.

Plaintiffs Isai Baltezar and Julie Cho ("Individual Plaintiffs") are precisely the types of students that the Gainful Employment Rule benefitted. They, together with the American Federation of Teachers ("AFT") and the California Federation of Teachers ("CFT") (collectively, "Plaintiffs"), bring this lawsuit to challenge the lawfulness of the Repeal. The Department and Secretary of Education Elisabeth DeVos (collectively, "Defendants") moved to dismiss Plaintiffs' Complaint by claiming that the very students the Rule protected do not have standing to challenge its rescission. In doing so, Defendants not only take the remarkable step of repeatedly disregarding its own findings regarding the benefits of the Rule, but also ignore the concrete harms the Repeal has caused, many of which the Department predicted. Plaintiffs have sufficiently alleged Article III standing because they have suffered injuries in fact that are fairly traceable to the Repeal, which this Court can redress.

STATEMENT OF THE ISSUE

Whether Plaintiffs have plausibly alleged facts to establish Article III standing.

STATEMENT OF FACTS

Statutory Background

Each year, under Title IV of the Higher Education Act of 1965 (as amended) ("HEA"), 20 U.S.C. § 1070 *et seq.*, the Department provides billions of dollars in grants (*e.g.*, Pell Grants) and loans (*e.g.*, Direct Loans) to help students pay for postsecondary education. Compl. ¶¶ 68–70. The HEA establishes requirements for institutions and, in some cases, specific programs to participate in those Title IV programs. *Id*. Students attending programs or institutions that are ineligible to participate in Title IV cannot use federal student aid to pay for their enrollment. *Id.*

As a condition of eligibility to participate in Title IV, certain postsecondary programs (hereinafter, "GE programs") must provide "training to prepare students for gainful employment in a recognized occupation." 20 U.S.C. §§ 1001(b)(1), 1002(a)(1), 1002(b)(1)(A)(i); *see also* Compl. ¶ 70 (defining GE programs). This requirement—which covers nearly all programs at for-profit institutions and non-degree programs at public and non-profit institutions—was "intended to ensure that participating schools actually prepare their students for employment, such that those students can repay their loans." *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176, 181 (D.D.C. 2014) (quoting *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 344 (D.C. Cir. 2012)).

For years, the Department left this statutory phrase—"prepare students for gainful employment in a recognized occupation"—undefined. Compl. ¶ 71. In 2009, the Department recognized a need to protect prospective and enrolled students attending, or considering attending, GE programs. *Id*. ¶¶ 72–73. This effort culminated in the publication of the Gainful Employment Rule in 2014. *Id.* ¶¶ 73–84.

The Gainful Employment Rule

The Gainful Employment Rule " address[ed] growing concerns about educational programs that . . . are required by statute to provide training that prepares students for gainful employment in a recognized occupation . . . , but instead are leaving students with unaffordable

levels of loan debt in relation to their earnings, or leading to default." 79 Fed. Reg. at 64,890; *see also* Compl. ¶ 83 (noting that concern in the 2014 Notice of Proposed Rulemaking). In 2014, the Department found that "a number of GE programs: (1) [did] not train students in the skills they need[ed] to obtain and maintain jobs in the occupation for which the program purport[ed] to provide training[;] (2) provide[d] training for an occupation for which low wages d[id] not justify program costs[;] and (3) [we]re experiencing a high number of withdrawals or 'churn' because relatively large numbers of students enroll[ed] but few, or none, complete[d] the program, which . . . often le[d] to default." 79 Fed. Reg. at 64,890. The Department also voiced "concern" about:

> [G]rowing evidence, from Federal and State investigations and qui tam lawsuits, that many GE programs [we]re engaging in aggressive and deceptive marketing and recruiting practices. As a result of these practices, prospective students and their families [we]re potentially being pressured and misled into critical decisions regarding their educational investments that [we]re against their interests.

79 Fed. Reg. at 64,890.

To address these concerns, the Department "define[d] what it mean[t] to prepare students for gainful employment in a recognized occupation by establishing measures by which the Department w[ould] evaluate whether a GE program remain[ed] eligible" to participate in Title IV. 79 Fed. Reg. at 64,890. The Department created a system of metrics, using "debt-to-earnings" ("D/E") rates and thresholds that drew upon annual earnings data from the Social Security Administration ("SSA"), to measure programs' performance and determine their continuing Title IV eligibility. Compl. ¶¶ 101–12 (describing 34 C.F.R. §§ 668.403, 668.404, 668.410). The Department also created an "independent pillar" of accountability, called the Certification Requirement, *id*. ¶¶ 98–100 (describing 34 C.F.R. § 668.414), which required programs to certify their initial and continuing eligibility to participate in Title IV.

In addition, the Department established a warning system that required institutions with potentially ineligible programs—including any program that failed the eligibility threshold for either of the two preceding years—to notify prospective and enrolled students that it had "not passed standards established by the [Department] . . . [regarding] the amounts students borrow for enrollment . . . and their reported earnings." 34 C.F.R. § 668.410(a)(2)(i); *see also* 79 Fed. Reg. at 64,964. The Rule specified the trigger, content, and means of delivery for these warnings.

34 C.F.R. § 668.410(a)(1) (trigger); *id.* § 668.410(a)(2) (content); *id.* § 668.410(a)(5)–(6) (means of delivery to enrolled and prospective students, respectfully). The Rule also mandated a "cooling-off period" whereby an institution could not "enroll[], register[], or enter[] into a financial commitment with a prospective student" until at least three days, and no more than thirty days, after it provided a warning to that student. *Id.* § 668.410(6)(ii); *see also* 79 Fed. Reg. at 64,911. The Department created this warning system both because it was "essential" to warn prospective students before "enroll[ing] in a program that [wa]s failing or consistently resulting in poor student outcomes" and because it recognized the "potentially serious consequences" for enrolled students if a program lost eligibility. 79 Fed. Reg. at 64,964. Either could result in students "amassing unmanageable levels of debt." 79 Fed. Reg. at 64,964; *see also* 74 Fed. Reg. 64,964 (recognizing that "ensuring that students have [these warnings] is necessary, even if it may be more difficult for programs . . . to attract and retain students"); Compl. ¶¶ 113–14.

The Rule also sought to "increase the quality and availability of information about the outcomes of students enrolled in GE programs," which the Department found beneficial for students "mak[ing] critical decisions about their educational investments" and institutions working to "improve student outcomes in their programs." 79 Fed. Reg. at 64,890. Pursuant to the Rule, institutions had to "use a disclosure template provided by the Secretary to disclose information about each of [their] GE programs to enrolled and prospective students." 34 C.F.R. § 668.412(a); *see also id.* (requiring the Secretary to "identif[y] the information that must be included in the template").[1] These disclosures were "update[d] at least annually . . . with the most

[1] The precise contents of the disclosures were flexible in order to benefit students. *See, e.g.*, 79 Fed. Reg. at 64,977 (describing how the Rule gave the Department "flexibility to adjust the disclosures as [it] learn[ed] more about what information w[ould] be most helpful to students and prospective students"). The Rule specified the following types of information that the template "[could] include, but [wa]s not limited to:" (i) the primary occupations that the program prepares students to enter; (ii) programmatic completion rates (as calculated by the Department); (iii) length of the program; (iv) number of clock or credit hours required; (v) number of

recent data available for each . . . GE program[].” *Id.* § 668.412(b)(1). The regulations also contained instructions on the use of disclosures on program web pages, *id.* § 668.412(c), in promotional materials, *id.* § 668.412(d), and through direct distribution to prospective students, *id.* § 668.412(e). With respect to “direct distribution,” the Rule regulated the timing of distribution, *id.* § 668.412(e)(1), the means of distribution, *id.* § 668.412(e)(2), and the methods used to ensure that prospective students received the disclosures, *id.* § 668.412(e)(3)–(4).

On July 1, 2019, Defendants revoked the Rule, effective July 1, 2020, and designated nearly all of the Repeal for “early implementation,” which allowed institutions to stop complying with the Rule immediately. Compl. ¶ 185; *see also* 84 Fed. Reg. at 31,395–96.

Individual Plaintiffs

Plaintiff Isai Baltezar is a fifth grade teacher at De La Vega Elementary School in Santa Cruz, California. Compl. ¶ 27. He plans to apply to and enroll in a certificate program in K-12 School Administration to boost his earnings potential and move into an administrative leadership position. *Id.* ¶ 28. He is currently researching such programs and plans to borrow federal student loans to finance his attendance. *Id*. Mr. Baltezar is a member of both AFT and CFT. *Id*. ¶ 27.

Plaintiff Julie Cho is a part-time university lecturer at the University of California at Irvine, where she teaches both Film and Media Studies and Asian American Studies. Compl. ¶ 35. She is considering a career change into either disability services counseling or teaching students with special needs. *Id.* ¶ 36. To facilitate this change, she is researching and considering attending a number of postsecondary programs, including certificate programs in Special

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individuals enrolled in the program in the most recent year; (vi) loan repayment rate, as calculated by the Secretary for various cohorts; (vii) information on the cost of tuition, books, fees, etc.; (viii) job placement rates; (ix) percentage of students receiving Title IV funds; (x) median loan debt for certain groups; (xi) median earnings of certain groups; (xii) most recent program-level cohort default rate; (xiii) most recent annual earnings rate; (xiv) information regarding licensure requirements; (xv) information regarding accreditation; and (xvi) link to the Department’s College Navigator website or other similar federal resource. 34 C.F.R. § 668.412; *see also* Compl. ¶¶ 136–38.

Education or Special Education Psychology. *Id.* She plans to borrow federal student loans to finance her attendance. *Id*. Ms. Cho is a member of both AFT and CFT. *Id.* ¶ 35.

American Federation of Teachers

AFT filed this lawsuit both as a membership organization and to redress its own organizational injuries. Compl. ¶¶ 22, 53. AFT has long taken a leading role in fighting for the financial rights of its members, who are public service workers, particularly as it relates to the cost of higher education and student loan debt. *Id*. ¶¶ 15–17. Because the Repeal has impaired AFT's mission of securing these financial rights and leaves its members, including Individual Plaintiffs, at substantially higher risk for incurring debt that they will be unable to repay, AFT has been forced to divert its resources to guard against the likely increase in members in need of counseling to remedy student debt-related problems. *Id.* ¶¶ 57–64.

California Federation of Teachers

CFT filed this lawsuit as a membership organization. Compl. ¶ 25. CFT is a labor organization that is affiliated with AFT and represents more than 120,000 employees at educational institutions working at every level of public and private education. *Id*. ¶ 23. Like AFT, CFT has taken a leading role in fighting for the financial rights of public service workers, including when it comes to the growing cost of higher education and student loan debt. *Id.* ¶ 24.

STANDARD OF REVIEW

Defendants seek dismissal pursuant to Rule 12(b)(1), asserting that Plaintiffs do not have Article III standing to challenge the Repeal. A plaintiff satisfies Article III's standing requirements by showing that the conduct of the agency—in this case, the promulgation of the Repeal—(1) caused it to suffer "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000) (citation omitted).

Plaintiffs are only required to allege a plausible claim that each of the standing elements is present. *Jimenez v. Tsai*, No. 5:16-CV-04434-EJD, 2017 WL 4877442, at *5 (N.D. Cal. Oct.

30, 2017) (Davila, J.); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach element [of standing] must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice.") (citations omitted).[2] "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47, 52 n.2 (2006).

ARGUMENT

I. This lawsuit disputes the lawfulness of a single final agency action with numerous deficiencies.

Defendants' suggestion that Plaintiffs' "eleven separate challenges" to the Repeal "present[] 'legally distinct' claims," requiring Plaintiffs to "identify a cognizable injury fairly traceable to each," is wrong. Defs.' Br. at 10–11. Although Defendants are correct that a plaintiff must have standing as to each claim asserted, they ignore the fact that all claims challenge—and the injuries all stem from—a single final agency action: the Repeal. With respect to core components of the Rule (*i.e.*, the eligibility, certification, disclosure, and warning requirements), the Repeal provides that the entire regulatory subpart be "remove[d] and reserve[d]." 84 Fed.

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[2] Defendants assert that *Lujan* requires Plaintiffs to "adduce facts showing" Article III standing. Defs.' Br. at 10. Not so. At this stage, *Lujan* only requires Plaintiffs to allege plausible facts to state a claim for relief, including with respect to Article III standing. 504 U.S. at 561–62; *see also Jimenez*, 2017 WL 4877442, at *5. Nor does *Lujan* create a "heightened burden." Defs.' Br. at 10. Although *Lujan* surmised that "more is needed" when a plaintiff's asserted injury arises from the alleged unlawful regulation of a third party, 504 U.S. at 562, there remained an "open [redressability] question" about whether third parties could be bound by the regulations at issue. In contrast, the Gainful Employment Rule undeniably binds institutions. Vacatur would therefore have a "determinative or coercive effect" on entities operating GE programs. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1170 (9th Cir. 2011); *cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (noting that theories of standing can rely "on the predictable effect of Government action on the decisions of third parties").

Reg. at 31,453 (repealing 34 C.F.R. Part 688, Subpart Q). The fact that Plaintiffs divided *the reasons why* the Repeal is unlawful into different causes of action should not alter this Court's analysis of Plaintiffs' standing, as Defendants repeatedly suggest.[3] *See, e.g.*, *Sierra Club v. FERC*, 867 F.3d 1357, 1365–66, n.2 (D.C. Cir. 2017) (noting that because the alleged injury was caused by the final agency action, and because that action was "based on numerous deficiencies, plaintiffs' standing is premised on the injury itself and can challenge any deficiency, even if it is one that is "not . . . directly tied to the [plaintiffs'] specific injuries").[4]

The question at this stage of the case is thus remarkably straightforward. Did Plaintiffs plausibly allege that the Repeal—and not any specific component thereof—cause an injury in fact, fairly traceable to Defendants' conduct, which this Court can redress? If so, the case proceeds. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308, n.3 (D.C. Cir. 2013) ("The familiar principle that a plaintiff must demonstrate standing for each form of relief sought[] is not to the

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[3] Essentially, Defendants ask this Court to determine at the pleadings stage whether the Repeal is severable. Such an approach is inconsistent with how courts typically address issues of severability, where the "default remedy" is to "vacate the entire rule, including those portions that the court did not hold unlawful." Admin. Conf. of the U.S., Recommendation 2018-2, *Severability in Agency Rulemaking*, 83 Fed. Reg. 30,685, 30,685 (June 29, 2018); *see also, e.g.*, *Flores v. Barr*, 407 F. Supp. 3d 909, 930 (C.D. Cal. 2019) ("A court may not sever part of a final rule if doing so would 'undercut the whole structure of the rule'—*e.g.*, by 'severely distort[ing] the . . . program' at issue and 'produc[ing] a rule strikingly different from any the [agency] has ever considered or promulgated.") (quoting *MD/DC/DE Broads. Ass'n v. Fed. Comm'ns Comm'n*, 236 F.3d 13, 22–23 (D.C. Cir. 2001)). Here, by choosing to "remove and reserve" all of Subpart Q, Defendants repealed the entire Rule without distinction as to its component parts.

[4] The Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq*., confers subject matter jurisdiction here because Plaintiffs have challenged a "final agency action." *Id.* § 704. The APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." *Fed. Comm'ns Comm'n v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

contrary. [Plaintiffs] seek only one type of relief relevant here—the vacatur of the [agency's final] decision. They simply advance several arguments in support of that claim."); *cf. Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 46–47 (D.C. Cir. 2019) ("When a party alleges concrete injury from promulgation of an agency rule, it has standing to challenge essential components of that rule, invoked by the agency to justify the ultimate action, even if they are not directly linked to Petitioners' injuries.") (citing *Sierra Club*, 867 F.3d at 1366–67).

II. Individual Plaintiffs have Article III standing to challenge the Repeal.

A. Individual Plaintiffs have alleged three distinct injuries in fact.

Individual Plaintiffs have adequately alleged injuries in fact. "To establish [such an injury], a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). As alleged, the Repeal caused Individual Plaintiffs three distinct injuries that satisfy Article III: (1) the substantial risk of making poor educational investments, along with the resultant economic harms; (2) an informational injury due to the loss of student warnings and required disclosures; and (3) an increased burden of seeking out information that interests them—and that would have been disclosed but-for the Repeal—about the GE programs they are considering. Defendants identified each of these injuries as either a purpose of the Gainful Employment Rule or a cost of the Repeal. Such injuries are therefore plausible. *California v. Azar*, 911 F.3d 558, 572 (9th Cir. 2018) (relying on an agency's statements in its Regulatory Impact Analysis ("RIA") to establish standing); *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 104 (2d Cir. 2018) (relying on an agency's "[prior] pronouncements" to establish standing).

1. The Repeal created the substantial risk of Individual Plaintiffs choosing suboptimal GE programs.

The Repeal has exposed Individual Plaintiffs to the substantial risk of "mak[ing a] poor educational investment[]." Compl. ¶ 51; *see also id.* ¶ 293 (quoting 84 Fed. Reg. at 31,394). Far from being "wholly unsupported" or "entirely speculative," Defs.' Br. at 17, this risk is exactly what the Department sought to prevent when it adopted the Rule in 2014. *See, e.g.*, 79 Fed. Reg.

at 64,891–92 (highlighting how the Rule would create a "better return" on student investment and improve "market information" to "assist students" in making "critical decisions about their educational investment[s]"). It is also precisely the type of risk the Department predicted would result from the Repeal. Compl. ¶ 293 (quoting the Repeal's statement that it would cause "students [to] be more likely to make poor educational investments"); 84 Fed. Reg. at 31,445 ("To the extent non-passing programs remain accessible with the rescission of the Rule, some students may choose sub-optimal programs."). Nor does such an injury "depend[] on the [speculative] premise" that the Rule "would have tangibly reduced the risk that Individual Plaintiffs . . . would incur student loan debt that they later would not be able to repay." Defs.' Br. at 17 (emphasis removed). In fact, that is exactly what the Rule was designed to do. 79 Fed. Reg. at 64,891 (highlighting how the Rule tied a GE program's Title IV eligibility to "whether [it] has indeed prepared students to earn enough to repay their loans"); *see also, e.g.*, 84 Fed. Reg. at 31,455 (describing how "non-passing programs [would] remain accessible with the [Repeal,] . . . [which] could lead to greater difficulty in repaying loans, . . . risking defaults").

The Department's "prior pronouncements" aside, the Rule prevented—and the Repeal exacerbates—the substantial risk of making poor educational investments for two reasons. First, the Repeal eliminated the eligibility criteria for GE programs, removing the incentive for low-quality programs to improve student outcomes or close. Compl. ¶¶ 47, 101–11. Indeed, the Department conceded that the Repeal had a "net budget impact" of $6.2 billion due to the "elimination of the ineligibility provision," which would allow "programs with non-passing results . . . [to] avoid[] ineligibility" and students to incur federal debt to attend those programs. 84 Fed. Reg. at 31,446, 31,447; *see also Dist. of Columbia v. U.S. Dep't of Agric.*, __ F. Supp. 3d. __, No. CV 20-119-BAH, 2020 WL 1236657, at *25 (D.D.C. Mar. 13, 2020) (relying on an agency's burden calculation as evidence of an Article III injury). Second, the Repeal deprived Individual Plaintiffs of the warnings and disclosures, which prevents them from assessing and comparing the relative value of GE programs. Compl. ¶¶ 32–33, 40–41, 44–46, 113–14, 137; *see also* 79 Fed. Reg. at 64,891 (highlighting how the disclosures would give students "access to meaningful and comparable information about student outcomes and the overall performance of

GE programs"). Both increase the risk that students will make poor educational investments.

Individual Plaintiffs are prospective students who the Rule was designed to benefit and who have been harmed by its repeal. They want to base their postsecondary enrollment decisions on information about the comparative costs, benefits, and value of a particular GE program. Compl. ¶¶ 30, 38. Neither knows whether programs they are considering provide training that leads to earnings that are sufficient to allow them to repay their student loan debts. *Id.* ¶¶ 32, 40. Both want to compare the amount of debt incurred by program graduates with their post-graduation earnings and are concerned about their ability to pay back any federal student loans they borrow. *Id.* ¶¶ 28, 36. Individual Plaintiffs also seek information about whether the GE programs they are considering are in danger of losing Title IV funding. *Id.* ¶¶ 33, 41. They would review all of this information carefully, if it were available. *Id.* ¶¶ 34, 42. Such a review would ultimately influence their decision whether to enroll in a particular GE program. *Id.*

Without this information, and with the continued Title IV participation of programs offering a "lower return . . . on investment," 84 Fed. Reg. at 31,445, Individual Plaintiffs face the substantial risk of attending, and the resultant economic harms associated with attending, such programs. *See* Comp. ¶¶ 7, 15 (describing risks associated with the Repeal); *id.* ¶ 84 (describing benefits of the Rule). Both have thus alleged an injury in fact sufficient for Article III standing. *See, e.g.*, *In re Zappos.com*, 888 F.3d 1020, 1024 (9th Cir. 2018) (holding that "[a] plaintiff threatened with future injury has standing to sue . . . [if] 'there is a 'substantial risk that the harm will occur'") (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014)); *Churchill Cty. v. Babbitt*, 150 F.3d 1072, 1078 (9th Cir. 1998), *as amended*, 158 F.3d 491 (9th Cir. 1998) (holding that a plaintiff need only establish a "*reasonable probability* of the challenged action's *threat* to [his or her] concrete interest") (emphasis added) (internal quotation marks omitted).[5]

[5] *Davidson v. Kimberly-Clark Corporation*, 889 F.3d 956 (9th Cir. 2018) does not hold otherwise. Defs.' Br. at 16–17. There, the Ninth Circuit held that a plaintiff had standing to challenge the false advertising of a product where she alleged her "stated intent" to purchase that

2. The Repeal deprived Individual Plaintiffs of their right to information.

Under the Rule, Individual Plaintiffs had a legal right to receive information, namely the warnings and disclosures critical to selecting postsecondary programs. The Repeal eliminates that right, imposing on Individual Plaintiffs a consummate informational injury sufficient for Article III standing. *See, e.g.*, *Nat'l Educ. Ass'n v. DeVos*, 345 F. Supp. 3d 1127, 1140–41 (N.D. Cal. 2018) ("*NEA*"); *Wilderness Soc'y v. Rey*, 622 F.3d 1251, 1257–60 (9th Cir. 2010).

The loss of warnings and disclosures is similar to the informational injury *NEA* found sufficient to establish standing. In that case, plaintiffs challenged a Department rule delaying implementation of regulations that required institutions offering distance education programs to provide disclosures to prospective and enrolled students. 345 F. Supp. 3d at 1131, 1136–37. The court held that the delayed regulations had "afford[ed] individuals . . . a generous flow of information," which the Department's delay had "significantly restrict[ed]." *Id.* at 1146 (internal citations omitted). The court explained that "the fact that the right to information stem[med] from a regulation, as opposed to a statute, d[id] not mean that it c[ould not] form the basis for an [Article III] injury in fact[.]" *Id.* To the contrary, plaintiffs could sue over the Department's illegal delay, even though the regulations that gave rise to their right to information had never been implemented. *Id.* at 1140.[6] Here, the situation is no different. Individual Plaintiffs had a

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product. 889 F.3d at 966, 971–72. Because the complaint was "devoid" of grounds to "discount" that intent, plaintiff's injury was "concrete," "real," and "not merely abstract." *Id.* Here, Individual Plaintiffs alleged an intent to enroll and the Department has acknowledged the Repeal has created risks associated with enrollment. To decry those risks now as "speculative" borders on an admission that its statements about the Repeal's costs lacked support when published.

[6] Defendants attempt to evade judicial review by arguing that Plaintiffs cannot "invoke an existing [regulatory] right [to information] at all" since the Gainful Employment Rule "has been superseded" by the Repeal. Defs.' Br. at 13. This argument contradicts the APA, which establishes review of the type of final agency action at issue here. *See supra* note 4.

right to information conferred by regulation, Defendants impeded that right, and Individual Plaintiffs sued to reinstate "the generous flow of information."

Defendants contend, contrary to *NEA*, that deprivation of a regulatory right to information is an insufficient injury for Article III standing. Defs.' Br. at 11–12. They suggest—without support and through selective quotations—that the Ninth Circuit has held that an informational right must be conferred by statute, but they fail to explain why *NEA* erred by rejecting an identical argument.[7] *Id.* at 11–15. As *NEA* correctly remarked: "The Ninth Circuit [in *Wilderness Society*] observed that deprivation of a statutory right to information can provide a basis for standing. It did not hold that the deprivation of a regulatory right to information cannot." 345 F. Supp. 3d at 1142–46.

Although, as *NEA* noted, the Ninth Circuit has not addressed the issue, the D.C. Circuit determined nearly thirty years ago that a regulation could create an Article III right to information. In *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, plaintiffs challenged the U.S. Department of Health and Human Services ("HHS")'s implementation of the Age Discrimination Act ("ADA"). 789 F.2d 931, 934–35 (D.C. Cir. 1986). The ADA required HHS to issue model government-wide regulations, after which each federal agency that administered any program that provided financial assistance, including HHS, had to issue its own agency-specific regulations. *Id.* at 935. HHS's government-wide regulations: "(1) required programs that receive[d] federal financial assistance to provide HHS with a self-evaluation listing all age distinctions they used and the justification for each[;] and (2) directed agencies to require the recipient programs to provide the agencies with information about their compliance." *Id.* HHS's agency-specific regulations, however: "(1) did not require programs to provide a self-

[7] Both cases Defendants cite discuss a right to information created by statute, without regard to whether a regulation can also create that right. *See Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858, 867 (9th Cir. 2019) (discussing informational rights conferred by the Freedom of Information Act); *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (holding that the plaintiff did not have standing because it sought to enforce "a statutory deadline provision that by its terms d[id] not require the public disclosure of information").

evaluation[;] and (2) required programs to provide compliance information only upon request by HHS (without specifying when, if ever, HHS would make such a request)." *Id.* Writing for the panel, then-Judge Ruth Bader Ginsberg rejected HHS's arguments that plaintiffs lacked standing, holding that the loss of "[t]he information secured by the general regulations, but cut short by the HHS-specific regulations," could serve as the basis for an Article III injury. *Id.* at 937. Individual Plaintiffs' right to warnings and disclosures were likewise "cut short" by the Repeal.

In a case also relied upon by *NEA*, the D.C. Circuit recently reaffirmed *Action Alliance*, demonstrating its continued applicability. In *PETA v. United States Department of Agriculture* (*"USDA"*), the animal rights organization challenged the USDA's implementation of the Animal Welfare Act. 797 F.3d 1087, 1089 (D.C. Cir. 2015). The D.C. Circuit reiterated its holding in *Action Alliance* that when "government-wide regulations . . . afforded interested individuals and organizations a generous flow of information," but "specific regulations significantly restricted that flow," plaintiffs who relied on that information to conduct their routine activities might be able to plead an injury for Article III standing. *Id.* at 1094 (internal quotation marks and ellipsis omitted) (quoting *Action Alliance*, 789 F.2d at 935–37). The D.C. Circuit held that "[b]ecause PETA's alleged injuries," including denial of "investigatory information" regarding "complaints of bird mistreatment," were "concrete and specific to the work in which [PETA was] engaged,' . . . PETA ha[d] alleged a cognizable injury sufficient to support standing." *Id.* at 1095 (citing *Action Alliance*, 789 F.2d at 938). Individual Plaintiffs have similarly been denied access to information needed to make wise educational investments.[8]

Defendants contend that the rescission of Individual Plaintiffs' informational rights is insufficient to establish an Article III injury for two additional reasons. First, they argue that no such right exists where a regulation does not require disclosure of specific information, but instead "leaves any decision regarding what should be disclosed to the Secretary's discretion."

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[8] The Seventh Circuit also suggested in *dicta* that a regulation may give rise to an informational injury, stating that "[i]t need not be fatal to the plaintiffs' claim . . . that an explicit right to information is not within the [statutory] text or history." *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 958–59 (7th Cir. 2005).

Defs.' Br. at 15. Defendants further assert that the Secretary exercised her discretion to eliminate disclosures by implementing the Repeal early. *Id*. Even assuming, *arguendo*, that every institution chose to implement early, the loss of those disclosures is a consequence of the Repeal that Individual Plaintiffs challenge, not a tool for Defendants to circumvent judicial review. Moreover, Defendants' argument has no application to the loss of warnings because the Rule specified the trigger, content, and methods of delivery. Compl. ¶¶ 33–34, 41–42.

Second, Defendants contend an informational injury cannot be sustained "based on the loss of information that no longer exists or could not be meaningful" because, "under the 2019 Rule, the Department will no longer deem GE programs ineligible for Title IV participation." Defs.' Br. at 13. But the warnings are still useful because they require institutions to warn prospective and enrolled students that a particular program has not passed the Department's standards that compare the "amounts students borrow for enrollment" with "their reported earnings." 34 C.F.R. § 668.410(a)(2)(i); *see also* 79 Fed. Reg. at 64,967, n.172 (discussing, *inter alia*, Congressional findings about having the institution disclose "timely and accurate data" to students). Moreover, the required disclosures—even without *any* information provided by SSA—are still useful for Individual Plaintiffs who want to base their enrollment decisions on the kinds of information the Rule required GE programs to disclose, such as program cost and completion rates, job placement rates, program accreditation, and whether the program meets state licensure requirements, among others. Compl. ¶¶ 29, 37. Although Defendants contend that the disclosures "could not be meaningful" absent SSA data, Defs.' Br. at 13, this is flatly at odds with their 2019 statement that the Department's newest disclosure template, which did not use SSA data, still provided information "especially meaningful to students." Compl. ¶ 118.[9]

3. The Repeal harmed Individual Plaintiffs by imposing the burden of having to find information about prospective GE programs on their own.

The Repeal also injured Individual Plaintiffs by burdening them with seeking out relevant

[9] *See* U.S. Dep't of Educ., *Gainful Employment Electronic Announcement #119 – Release of the 2019 GE Disclosure Template* (May 9, 2019), https://ifap.ed.gov/electronic-announcements/05-09-2019-geannounce119release2019gedisclosuretemplate.

information about GE programs, if it can be found at all. Compl. ¶¶ 44–46. This too is a harm the Department specifically acknowledged in the Repeal. 84 Fed. Reg. at 31,444–45 ("With the elimination of the disclosures and the ineligibility sanction that would have removed students' program choices, students, their parents, and other interested members of the public will have to seek out the information that interests them about programs they are considering."). Defendants now expect prospective students to find this information themselves, despite arguing that the Repeal was necessary precisely because disclosures were too burdensome and costly for institutions to provide. Compl. ¶ 386; *see also* 84 Fed. Reg. at 31,418. Indeed, "[i]t takes chutzpah for the Department to . . . claim that it would be too hard for educational institutions to research and disclose the required information, on the one hand, while arguing that students lack standing to challenge the Department's [agency action] because they should be able to hunt down this undisclosed information on their own, on the other." *NEA*, 345 F. Supp. 3d at 1150. Given the time and effort Individual Plaintiffs have spent attempting to locate information about GE programs, Compl. ¶¶ 31, 39, they have adequately alleged another Article III injury.[10]

Contrary to Defendants' suggestions, this harm is not mitigated by the Department's purported expansion of the "College Scorecard to provide program-level information." Defs.' Br. at 14 n.7. The College Scorecard's data is an insufficient replacement for the Gainful Employment Rule for numerous reasons, including its failure to use information as specific and precise as required under the Rule. Compl. ¶¶ 328–37, 381–85. Moreover, a non-binding,

[10] Awareness of other sources to obtain non-standardized information about some GE programs is not a substitute for the Rule's requirement that institutions provide a "standardized . . . format for students, prospective students, and their families to obtain information about the outcomes of students who enroll in GE programs[,] such as cost, debt, earnings, completion, and repayment outcomes." 79 Fed. Reg. at 65,080; *see also* 79 Fed. Reg. at 64,983 ("We believe that the disclosure template is effective because it is standardized in its appearance."). Directing students to various sources to find various types of information does not replace the "extensive, comparable, and reliable information" provided by the Rule. 79 Fed. Reg. at 65,080.

voluntary update to the Department's website does not change the fact that the Repeal eliminates students' *right* to certain information. *Id*. ¶ 306. Regardless, recent reports suggest that the Department has already eliminated or made it more difficult to find certain information, like a program's loan repayment rates or graduates' median earnings.[11] This type of vague, non-binding plan does not ameliorate Individual Plaintiffs' injuries. *Cf. Texas v. U.S.*, 809 F.3d 134, 155–56 (5th Cir. 2015) ("We consider only those offsetting benefits that are of the same type and arise from the same transaction as the costs. . . . Our standing analysis is not an accounting exercise.") (internal quotations and citations omitted).

B. Individual Plaintiffs' injuries are fairly traceable to the Repeal.

Individual Plaintiffs' injuries are fairly traceable to Defendants' conduct. What matters for the causal connection put forward for standing purposes is the "plausibility of the links that comprise the chain" of causation, not the "length of the chain" itself. *Mendia v. Garcia*, 768 F.3d 1009, 1012–13 (9th Cir. 2014) (citing *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002)) (internal quotations and citation omitted); *see also, e.g.*, *Sierra Club v. Trump*, __ F.3d __, 2020 WL 3478900, at *8 (9th Cir. June 26, 2020). Here, the "chain of causation" is simple: the Repeal eliminated all of the benefits and protections afforded by the Rule, which deprived Individual Plaintiffs of information, imposed the burden of seeking that information out on their own, and created the substantial risk that they would make poor educational investments. Indeed, the Department conceded as much in the Repeal, 84 Fed. Reg. at 31,444–45 (explaining, in the RIA, that "this rescission *will result in costs . . . to students*," including, *inter alia*, "the costs associated with continued enrollment in zone and failing GE programs," the "cost if the investment is not as fruitful as it might be at a similar nearby program," and the cost of "hav[ing] to seek out the information that interests them about programs they are considering"); *see also* 84 Fed. Reg. at 31,437 (discussing the standards for the RIA's statement of costs). Despite their

[11] Aarthi Swarminathan, *College Scorecard ex-director says Trump Administration is scrubbing important information*, Yahoo!Finance (June 15, 2020), https://finance.yahoo.com/news/trump-administration-college-scorecard-information-145318348.html.

attempts to minimize those concessions now, Defs.' Br. at 17–18 (discussing 84 Fed. Reg. at 31,444–45), Individual Plaintiffs are entitled to rely upon the RIA to establish a causal nexus between the Repeal and their injuries in fact. *Nat. Res. Def. Council*, 894 F.3d at 104 (finding the "required nexus" between an agency action and plaintiffs' injuries to be "established by the agency's own pronouncements").

C. Vacatur of the Repeal will redress Individual Plaintiffs' injuries.

Vacatur of the Repeal will restore the status quo and redress Individual Plaintiffs' injuries. Individual Plaintiffs' "relatively modest" burden is to show that a court order could create a "change in legal status," a "'practical consequence of [which] would [be] a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)). If Individual Plaintiffs prevail, the Court will likely order the Department to rescind the Repeal. Compl., Prayer for Relief ¶¶ B, C. The Rule will then take effect, redressing all three of Individual Plaintiffs' injuries. *See, e.g.*, *NEA*, 345 F. Supp. 3d at 1151 (holding that implementing a delayed regulation that required institutions to provide disclosures to prospective and enrolled students would redress harms caused by the delay). SSA earnings data are not required to redress Individual Plaintiffs' injuries.

1. Vacatur will redress Individual Plaintiffs' harms.

Vacatur of the Repeal will redress Individual Plaintiffs' injuries in at least three ways. First, vacatur will make it less likely that suboptimal programs will continue to operate, thereby substantially reducing the likelihood that Individual Plaintiffs will choose to attend, and potentially remain in, such programs. *See, e.g.*, 84 Fed. Reg. at 31,445 (noting how programs that failed the D/E metrics "would be most significantly affected by the proposed removal of GE sanctions as they would continue to be eligible to participate in [T]itle IV, HEA programs"). Not only will programs be subject to the eligibility metrics and sanctions again, but institutions will also have to periodically certify that their GE programs are meeting the regulatory standards.

Second, vacatur will ensure that Individual Plaintiffs will receive warnings that will inform them: (1) whether a program has "passed [or failed] standards established by the

Department" that are "based on the amounts students borrow for enrollment in th[e] program and their reported earnings," *id.* § 668.410(a)(2)(i); and (2) which programs are at risk of losing Title IV eligibility due to a failure to pass.[12] Such warnings will be in place until "the Secretary [fails to] calculate D/E rates for the program for four or more consecutive award years." *Id.* § 668.403(c)(5). Individual Plaintiffs will no longer have to search for this information and will be able to review it to make sound decisions about whether to enroll in a particular GE program.

Finally, vacatur will redress Individual Plaintiffs' injuries because institutions will be required to comply, once again, with the Disclosure Requirements. 34 C.F.R. § 668.412. There is no question that some information must be disclosed, 79 Fed. Reg. at 64,976, even if it includes different information than prior disclosure templates. *See supra* note 1. Although "the Secretary w[ill] still have . . . discretion . . . to determine what information should be included in programs' disclosures," Defs.' Br. at 15, that discretion is not unlimited and does not make it "unlikely" that vacatur will redress Individual Plaintiffs' injuries. *Cf. White v. Univ. of California*, 765 F.3d 1010, 1022 (9th Cir. 2014) (noting that, to satisfy the redressability prong, "a plaintiff 'must show only that a favorable decision is *likely* to redress his injury, not that a favorable decision *will inevitably* redress his injury'") (quoting *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994)) (emphasis added); *see also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (finding that an injury can be redressable even if an agency "might later, in the exercise of its lawful discretion, reach the same result for a different reason"). Because vacatur will require institutions to comply with the Disclosure Requirements, "[t]hat w[ill] redress the plaintiffs' injuries." *NEA*, 345 F. Supp. 3d at 1151.[13]

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[12] Because of the Repeal's "early implementation," institutions could stop providing these warnings before July 1, 2020. 84 Fed. Reg. at 31,395–96; *see also* Compl. ¶ 185.

[13] *Cf. Renee*, 686 F.3d at 1015 (noting the court's "unwillingness to assume" that a non-party will violate the law for purposes of redressability, even if the court was not "absolutely certain" of the result of its decision).

2. The Gainful Employment Rule can function without SSA earnings data.

Contrary to Defendants' suggestion that the entire Gainful Employment Rule is null and void if the Department does not receive SSA earnings data for a given year, Defs.' Br. at 19–20, the regulation explicitly contemplates the absence of such data. Although the Rule requires the Department to seek earnings data from SSA "for each award year," 34 C.F.R. § 668.405,[14] the Rule also establishes that the status quo will not change during a period in which SSA does not provide data. In such a situation, the Department "does not issue draft or final D/E rates," *id.* § 668.404(f)(2), the program "receives no result under the D/E rates measure for that award year[,] *and [it] remains in the same status under the D/E rates measure as the previous award year*," *id.* § 668.403(c)(5) (emphasis added). Absent the Repeal, until the Secretary issues new D/E rates—or "if the Secretary does not calculate D/E rates for the program for four or more consecutive award years," *id.* § 668.403(c)(5)—institutions that failed the D/E rates in 2017 (for Award Year 2015) still "could become ineligible based on its final D/E rates measure for the next award year" and must, therefore, still warn prospective and enrolled students about their prior failure to meet Departmental standards. *Id.* § 668.410(a); *see also* 79 Fed. Reg. 64,928 ("[W]here a program receives its first failing result and the institution is required to give student warnings as a result, the program will still be considered to be a first time failing program and the institution will be required to give student warnings[,] *even if the program's next D/E rates are not calculated*.") (emphasis added). In other words, the Rule continues to function.

As with the warnings, neither the Disclosure nor Certification Requirements depend on SSA data. With respect to the Disclosure Requirements, the Rule's description of disclosures includes only one reference to SSA data. *See* 34 C.F.R. § 668.412(a)(13) (referencing "the most recent annual earnings rate"). Regardless of whether that data is available, the Secretary must still require disclosures, which she did in 2019 when she released a new version of the template without any SSA data. *See supra* note 9 and accompanying text. Similarly, as to the Certification Requirement, lack of SSA earnings data does not limit an institution's ability to certify that its

[14] SSA data establishes the "annual earnings" component of the formula to determine the D/E rates. 34 C.F.R. § 668.404(c).

GE programs are accredited and meet professional licensure or certification standards. *Id.* § 668.414(d).

Because the Gainful Employment Rule can operate without the use of SSA earnings data, the absence of such data does not defeat redressability. Warnings about the potential loss of Title IV eligibility will still be issued, disclosures will still be made, and institutions will still have to certify their continued eligibility.[15]

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[15] Motions brought under Rule 12(b)(1) can be either facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citation omitted). Defendants have introduced no facts to "dispute the truth of [Plaintiffs'] allegations," so the motion is properly treated as facial. This applies with equal force to redressability, where Defendants insert new facts in the form of a declaration from a Department official, Diane Auer Jones. *See* Dkt. 26-1 ("Auer Jones Decl."). Ms. Auer Jones affirms—based not on her personal knowledge, but rather on her "understanding [of what] SSA communicated orally to attorneys in the Department's Office of the General Counsel"—that SSA unilaterally declined to renew a Memorandum of Understanding ("MOU") governing data sharing with the Department after allegations that the Department used that data illegally. Auer Jones Decl. ¶¶ 5–6 (declaring that, despite "requests" from the Department, "SSA declined . . . to provide any written response confirming it would not renew the MOU"). According to Ms. Auer Jones, this eliminated the Department's ability to comply with the Gainful Employment Rule. *Id.* Of course, neither Ms. Auer Jones nor this Court can reliably predict whether SSA will provide earnings data in the future. *Cf. Davidson*, 889 F.3d at 969 (noting that the fact of something being true or false in the past "does not equate to knowledge that it will remain [so] in the future"). Regardless, none of the declared facts, even if accepted as true, alter the fact that vacatur will redress Individual Plaintiffs' injuries.

If the Court disagrees, Plaintiffs object to the declaration on two grounds. First, the declaration does not challenge the truthfulness of Plaintiffs' allegations; rather, it impermissibly attempts to buttress the Repeal in ways not set forth in the Repeal itself. *Cf. Nat. Res. Def. Council v. Pritzker*, 828 F.3d 1125, 1133–34 (9th Cir. 2016) (citing *SEC v. Chenery Corp.*, 332

III. Plaintiffs have separate standing to challenge injuries in Count 11.

Unchallenged by Defendants, Plaintiffs have standing to protect their APA right to comment meaningfully on the Repeal. The standing inquiry "is softened when a plaintiff asserts a violation of a procedural right." *Friends of Santa Clara River v. U.S. Army Corps. of Engineers*, 887 F.3d 906, 918 (9th Cir. 2018) (quoting *San Luis & Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1232 (9th Cir. 2017)). To properly state a claim for a procedural injury, a plaintiff must allege: (1) "the agency violated certain procedural rules;" (2) the "rules protect a plaintiff's concrete interests;" and (3) "it is reasonably probable that the challenged action will threaten their concrete interests." *Haugrud*, 848 F.3d at 1232 (internal marks omitted).

Irrespective of whether Plaintiffs' other claims are substantive or procedural, Count 11 alleges that Defendants failed to afford an adequate opportunity to comment by repeatedly citing—in both the proposed and final Repeal—to unnamed sources and an undisclosed "analysis" of its loan portfolio. Compl. ¶ 445 (referencing *id.* ¶¶ 216–18, 284–92). "An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006); *see also, e.g.*, *Penobscot Indian Nation v. U.S. Dep't of Hous. & Urban Dev.*, 539 F. Supp. 40, 49 (D.D.C. 2008) (finding an agency violated the APA's procedural requirements by promulgating a rule relying upon an undisclosed "internal analysis of

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U.S. 194, 196 (1947)) (barring *post hoc* justifications). Second, the declaration relies on substantial hearsay. *Bryant v. Yosemite Falls Cafe*, No. 1:17-CV-01455-LJO, 2018 WL 372704, at *3 (E.D. Cal. Jan. 11, 2018) (declining to consider hearsay when ruling on a Rule 12(b)(1) motion to dismiss). If the Court finds the declaration relevant and potentially admissible, Plaintiffs request an opportunity for limited discovery into the facts known only to the government, *i.e.*, the past and future availability of SSA data. *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) ("[D]iscovery should be granted when, as here, the jurisdictional facts are contested or more facts are needed."). At the conclusion of such discovery, Plaintiffs would respond to the facts averred by Ms. Auer Jones and, if appropriate, present facts to oppose her submission.

its loan portfolio"). Given that error, Plaintiffs have adequately alleged standing to challenge the violation of their right to meaningfully comment.

IV. AFT and CFT have associational standing.

Defendants attack CFT's and AFT's standing as membership organizations by arguing solely that their members—including Individual Plaintiffs—do not have standing to sue in their own right. Defs.' Br. at 11. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Defendants do not dispute that AFT and CFT satisfy the second and third prongs of associational standing. Accordingly, because Individual Plaintiffs have standing in their own right, so too do AFT and CFT.[16]

V. AFT has organizational standing.

AFT has also alleged standing in its own right because the Repeal caused organizational injuries that can be redressed by this Court.[17] "An organization suing on its own behalf can establish an injury when it [has] suffered 'both [(1)] a diversion of its resources[;] and [(2)] a frustration of its mission.'" *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (quoting *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). The "[Supreme] Court has . . . made clear that a diversion of resources injury is sufficient to establish organizational standing at the pleading stage, even when it is

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[16] The Gainful Employment Rule is undeniably "germane" to the missions of AFT and CFT. Compl ¶¶ 15–21 (describing AFT's history of working on the Rule); *id.* ¶¶ 55–64 (describing AFT's activities surrounding student debt and educating its members about choosing high-quality programs); *id.* ¶¶ 23–24 (describing CFT's mission to fight for the financial rights of public service workers, including around student debt); *id.* ¶ 26 (describing how AFT and CFT members may be eligible for salary increases after completing postsecondary programs).

[17] As to causation and redressability, Defendants make no arguments other than those made with respect to Individual Plaintiffs. Likewise, we do not separately address those arguments.

'broadly alleged.'" *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). AFT has met that burden.

A. AFT has adequately alleged a frustration of its mission.

Contrary to Defendants' claim that "AFT identifies no direct connection between its mission and the 2019 Rule," Defs.' Br. at 21, the Complaint specifically alleges that the Repeal has frustrated one of AFT's core missions, which is to fight for the financial rights of public service workers, particularly when it comes to the cost of higher education and student loan debt. Compl. ¶ 15. Because the Repeal will leave AFT members, including Individual Plaintiffs, at substantially higher risk for incurring student loan debt that they will never be able to repay, leading, for example, to an increased risk of loan default, *id.* ¶ 186 (citing 84 Fed. Reg. at 31,445), the Repeal has frustrated AFT's mission.[18]

B. AFT has adequately alleged a diversion of resources.

AFT has also alleged that the Repeal caused a diversion of resources. "[T]he Ninth Circuit has specifically found that diversion of resources for 'outreach campaigns' and educating the public [is] sufficient to establish organizational standing." *Serv. Women's Action Network v. Mattis*, 352 F. Supp. 3d 977, 985 (N.D. Cal. 2018) (quoting *Nat'l Council of La Raza*, 800 F.3d at 1040); *see also Valle del Sol v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (finding organizational standing where the plaintiffs "had to divert resources to educational programs to address its members' and volunteers' concerns about the [challenged] law's effect"). This is precisely what AFT has been forced to do.

To counteract the harms of the Repeal, AFT diverted resources to launch the #doyourhomework campaign. Compl. ¶ 57. This campaign included developing and promoting a

[18] Defendants also claim that the Repeal "would, if anything, increase [AFT's] opportunity to provide assistance" to its members, "not impair its ability to do so." Defs.' Br. at 21. But that ignores that AFT has had to reallocate scarce resources to do so. *Cf. Fair Hous. Council of San Fernando Valley v. Roommate.com*, 666 F.3d 1216, 1219 (9th Cir. 2012) (finding organizational standing where the plaintiff "started new education and outreach campaigns targeted" to counteract the illegal conduct).

website to its members and staff that provides information relevant to choosing programs of higher education that are likely to lead to earnings that will allow students to afford their loan repayment obligations. *Id.* ¶¶ 58–59. AFT also hosted webinars for members and staff to learn more about the campaign. *Id* ¶ 60. In addition, AFT developed content for its local affiliates, including CFT, to use in webinars and other materials to educate their members on making quality choices regarding higher education programs. *Id.* ¶ 62. Each of these efforts required AFT to divert resources from other mission-centric efforts. *Id.* ¶ 61.

Defendants argue that the Complaint "does not suggest that any such expenditures were more than minimal" and try to mischaracterize AFT's efforts as creating a website that "merely provides links, through a video and text content, to other websites." Defs.' Br. at 22–23. Even if that were true, Defendants wholly ignore the time and money AFT spent to "develop original content" and "host[] webinars" for its members and staff to learn more about the #doyourhomework campaign. At this stage of the proceedings, AFT "is not require[d] to provide detailed financial information" regarding its diversion of resources. *See, e.g.*, *Jimenez*, 2017 WL 4877442, at *6. Nor is there "[any] requirement that the economic harm be of a certain magnitude." *Azar*, 911 F.3d at 572 (citing *U.S. v. Students Challenging Regulatory Action Procedures*, 412 U.S. 669, 689 n.14 (1973)).

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

Glenn Rothner (SBN 67353)
ROTHNER SEGALL & GREENSTONE

Daniel A. Zibel (admitted *pro hac vice*)
Aaron S. Ament (admitted *pro hac vice*)
Robyn K. Bitner (admitted *pro hac vice*)
NATIONAL STUDENT LEGAL DEFENSE NETWORK

By: /s/ Daniel A. Zibel
DANIEL A. ZIBEL

Counsel for Plaintiffs

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