BRIAN M. BOYNTON
Acting Assistant Attorney General
MARCIA BERMAN
Assistant Director, Federal Programs Branch
KATHRYN L. WYER (Utah Bar No. 9846)
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Tel. (202) 616-8475
kathryn.wyer@usdoj.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. Xavier Becerra, Attorney General of California, Plaintiff, **v.** **UNITED STATES DEPARTMENT OF EDUCATION** and **MIGUEL CARDONA**, in his official capacity as the United States Secretary of Education, Defendants.	Case No. 3:21-cv-384-JD **DEFENDANTS' NOTICE OF MOTION, MOTION TO DISMISS, AND MEMORANDUM IN SUPPORT** **Date: June 10, 2021** **Time: 10:00 a.m.** **Courtroom: 11**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ADMINISTRATIVE MATERIALS

SECONDARY SOURCES

NOTICE OF MOTION

PLEASE TAKE NOTICE that on June 10, 2021, at 10:00 a.m. in the United States Courthouse, San Jose, California, Defendants Miguel Cardona, in his official capacity as Secretary of Education, and the U.S. Department of Education ("Department"), by and through undersigned counsel, will move the Court to dismiss this action.

MOTION TO DISMISS

Defendants hereby move to dismiss this action in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(1), for the reasons set forth in the following Memorandum.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In this case, the State of California (the "State") brings Administrative Procedure Act ("APA") challenges to a 2020 final rule revising the Department's regulations under Title IV of the Higher Education Act ("HEA") related to distance education, *see* 85 Fed. Reg. 54742 (Sept. 2, 2020) ("2020 Rule"). The State focuses on two discrete revisions and their alleged impact on proprietary schools. Protecting students and regulating schools—including proprietary schools—is a critical part of the Department's mission, and the Department has begun a review to determine how best to meet that mandate. However, this litigation is not a proper vehicle for such an effort. Both of the State's claims should be dismissed for lack of standing because neither of the challenged revisions is likely to cause a cognizable injury to the State. Longstanding authority bars states from suing the federal government *parens patriae*, on behalf of their residents, as the State attempts to do. It cannot do so because the federal government has its own sovereign relationship with the nation's citizens.

The State also asserts a supposed competitive injury to State schools and alleged burdens on its consumer protection law enforcement and its Cal Grant program, but those injuries cannot support standing. They depend on the highly speculative premise that, as a result of the two challenged revisions, proprietary schools will remain eligible for the Department's Title IV financial aid programs when they otherwise would not have, and more students will then attend

proprietary rather than California public schools. However, the State fails to show that any such impact is likely, or even reasonably probable. The first revision allows for automatic renewal of a school's eligibility certification if its application has remained pending without a decision by the Department for at least a year. But schools could already get monthly extensions before the 2020 Rule, calling into question the State's premise that automatic renewal would affect a school's eligible status—much less the even more speculative impact on State school enrollments. The second revision removes a 50% cap that had limited the number of credits students enrolled at one Title IV-eligible school may earn from courses at other Title IV-eligible schools under common ownership. But again, the State fails to show that removal of the 50% cap would likely impact any given school's Title IV eligibility or have a downstream impact on the State. The Court should therefore dismiss this action for lack of standing.

STATEMENT OF THE ISSUES

Whether the State's allegations of injury caused by the regulatory revisions they challenge confer standing to proceed in this Court as required by Article III of the Constitution.

BACKGROUND

I. Statutory Background

The HEA's Title IV, 20 U.S.C. §§ 1070 *et seq*., authorizes the Department to enter into agreements with certain public, non-profit, and proprietary postsecondary schools that allow students at those schools to receive federal financial aid, including grants, loans and work-study funds. *See* 20 U.S.C. §§ 1001, 1002. The HEA vests in the Secretary the responsibility to certify postsecondary schools as qualified for Title IV participation, for periods up to six years, subject to renewal. 20 U.S.C. § 1099c(a), (g)(1).

II. Regulatory Background

Congress has vested the Secretary with broad authority to "make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department." 20 U.S.C. § 1221e-3; *see id*. § 3474. Pursuant to this authority, the Department has promulgated regulations governing a school's

Title IV participation. 34 C.F.R. §§ 668.1 –.29. Following a negotiated rulemaking process, which resulted in consensus language in the proposed rule, *see* 85 Fed. Reg. 18638, 18642 (Apr. 2, 2020), the Department promulgated the 2020 Rule at issue here on September 2, 2020. The Rule will go into effect on July 1, 2021. Pursuant to 20 U.S.C. § 1089(c)(2)(A), the Secretary also designated the 2020 Rule for early implementation. 85 Fed. Reg. at 54743.

The first provision challenged by the State is a revision to 34 C.F.R. § 668.13. That provision implements Congress's grant of authority to the Department to certify a school's Title IV eligibility. *See* 20 U.S.C. § 1099c(g)(1). In accord with the statute, the regulation provides that a school's period of participation following certification is generally "no more than six years after the date [of certification]," 34 C.F.R. § 668.13(b)(1), but is subject to renewal. Once a school submits a materially complete renewal application, an expired certification will be extended month to month until the Secretary issues a decision. *Id.* § 668.13(b)(2). The 2020 Rule retains those provisions while further providing that, if the Secretary fails to "make a determination to grant or deny certification within 12 months" of the prior certification period's expiration, the school "will automatically be granted renewal of certification, which may be provisional." *See* 34 C.F.R. § 668.13(b)(3). A provisional certification may not last beyond the end of the following award year, *id.* § 668.13(b)(2)(i), and may be revoked, *id.* § 668.13(d).

The second challenged provision is a revision to 34 C.F.R. § 668.5, which addresses schools' entry into written arrangements with each other to share in providing educational programs to their students. Before the 2020 Rule, when Title IV-eligible schools under common ownership or control entered into such an arrangement, the school granting the degree had to provide more than 50 percent of the educational program. *See id.* § 668.5(a)(2)(ii) (until July 1, 2021). The 2020 Rule removed that requirement. *See id.* § 668.5(a)(2) (effective July 1, 2021).

III. The State's Complaint

The State filed the instant action on January 15, 2021, asserting two APA claims. Claim 1 asserts, pursuant to 5 U.S.C. § 706(2)(A) and (C), that the 2020 Rule's revision of 34 C.F.R. § 668.13 to allow for automatic certification renewal after 12 months' inaction (the "Automatic Renewal Provision") is not in accordance with law and in excess of statutory authority. Compl.

¶ 112. Claim 2 asserts, again pursuant to § 706(2)(A), that the Automatic Renewal Provision as well as the removal of the 50 percent requirement in § 668.5 for Title IV-eligible schools under common ownership (the "Common Ownership Provision") are arbitrary, capricious, or otherwise not in accordance with law because, the State alleges, the Department failed to "provid[e] a reasoned explanation" for these revisions. Compl. ¶¶ 114–17. The State asks the Court to set aside the two provisions and declare them in violation of the APA. Compl. at 19.

ARGUMENT

I. Legal Standard

Plaintiffs bear the burden to establish each element of the "irreducible constitutional minimum of standing[.]" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs must show that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). At the pleading stage, plaintiffs must "clearly allege facts demonstrating each element." *Id.* (citation omitted). Moreover, these elements must be satisfied "for each claim [a plaintiff] seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1647 (2017) (citation omitted). Because the State's challenges with respect to the Automatic Renewal Provision and the Common Ownership Provision are "legally distinct," the State must establish standing to raise each of those challenges independently. *Ctr. for Biological Diversity v. Bernhardt,* 946 F.3d 553, 560 (9th Cir. 2019) (recognizing challenges to different provisions of the same statute presented "legally distinct" claims that required separate showings of standing).

Here, the State bears a heightened burden because it challenges the Department's regulation of independent third parties—proprietary schools unaffiliated with the State. *See Lujan*, 504 U.S. at 562 ("When, . . . as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed."). The State thus must "adduce facts showing" that the causation and redressability prongs are satisfied despite the exercise of discretion by such schools, which "the courts cannot

presume either to control or to predict." *See id.* (internal quotation omitted). Such a showing is "substantially more difficult to establish." *Id.* (internal quotation omitted).

II. The State Lacks Standing

A. The State Fails To Identify a Viable Injury Fairly Traceable to the 2020 Rule

1. The State Cannot Sue the Federal Government on Behalf of Its Residents Under a Theory of *Parens Patriae* or Other Third-Party Standing

"A State does not have standing as *parens patriae* to bring an action against the Federal Government." *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607, 610 n.16 (1982). The federal government has its own sovereign relationship with the nation's citizens, which precludes states from asserting those same citizens' interests *against* the federal government. *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923) ("[I]t is no part of [a state's] duty or power to enforce [the rights of its citizens] in respect of their relations with the federal government."); *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (state has no standing "to protect her citizens from the operation of federal statutes"). By expressly invoking a "quasi-sovereign interest" in "the health and well-being" of its residents, Compl. ¶ 87, the State invites the Court to ignore this long-standing bar—but that is the very interest that courts have repeatedly recognized is unavailable against the federal government. *E.g.*, *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990) (rejecting state's asserted "quasi-sovereign interest in the health and well-being" of its residents—the interest at issue in *Snapp*—as proper basis to sue federal government). This clear authority precludes the State's standing on this basis. Nor does the State's assertion of APA claims suggest otherwise. *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 181 (D.C. Cir. 2019) ("[T]he APA evinces no congressional intent to authorize a State as *parens patriae* to sue the federal government."); *Maryland v. U.S. Dep't of Educ.*, 474 F. Supp. 3d 13, 44 (D.D.C. 2020), *vacated on other grounds*, 2020 WL 7868112 (D.C. Cir. Dec. 22, 2020) ("The APA never explicitly mentions a state or state agency, much less expressly authorizes a state or state entity to sue the federal government in their role as *parens patriae*.").[1]

[1] The State's suggestion that the 2020 Rule concedes that the challenged provisions may harm students is also flawed because it relies on language in the Rule relating to a different provision, 34 C.F.R. § 668.5(c), not at issue in this case. *See* Compl. ¶ 91 (citing 85 Fed. Reg. 54772).

Nor does the third-party standing doctrine allow the State to circumvent the *parens patriae* bar. In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), the Ninth Circuit recognized that state colleges could assert interests of *their own* identifiable students and faculty. *Id.* at 1160–61. That case provides no mechanism for a state to invoke the interests of its residents in general, or even the subset of those residents generally seeking higher education, against the federal government. Indeed, the State's theory hinges on the notion that students and prospective students at *non-state* schools are at risk. *E.g.*, Compl. ¶ 89 (alleging "for-profit schools" "take advantage of and defraud" their students). This is nothing other than an assertion of *parens patriae* standing, which is precluded for the reasons already explained.[2]

The State also asserts a quasi-sovereign interest in enforcing its consumer protection laws. Compl. ¶¶ 97–98. But this is not a situation like that in *New York v. United States*, 505 U.S. 144 (1992), where the Court recognized a state's quasi-sovereign interest in not being commandeered by the federal government to enforce federal law. *See id*. at 160. Nor do either of the two challenged provisions interfere with the State's power to "create and enforce a legal code." *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268–70 (4th Cir. 2011). As another court explained, a state's investment in investigating fraudulent proprietary programs is not attributable to the Department. *Maryland*, 474 F. Supp. 3d at 36. "Instead, *the States' legislatures* have presumably passed laws that protect consumers and that authorize the investigation and prosecution of fraudulent [proprietary p]rograms, and the state officials who enforce such laws have elected to use their prosecutorial discretion to target, investigate, and prosecute [such] Programs for running afoul of state law." *Id.* Although the State identifies its enforcement of consumer protection laws as one of its contributions to postsecondary education regulation, Compl. ¶ 97, the Department imposes no obligation on states to undertake that role, nor does it purport to direct states' exercise of their enforcement discretion. The State cannot

[2] Nor are the requirements for third-party standing otherwise satisfied here. *See McCollum v. Cal. Dep't. of Corr. & Rehab*., 647 F.3d 870, 879 (9th Cir. 2011) ("[T]o demonstrate third party standing, a plaintiff must show his own injury, a close relationship between himself and the parties whose rights he asserts, and the inability of the parties to assert their own rights." (citation omitted)). For example, students with standing could bring the same challenge.

circumvent the *parens patriae* bar here by invoking an interest in enforcing its own laws.

2. The State Does Not Identify a Cognizable Proprietary Interest That Could Support Its Standing Here

The State's theory of competitive injury is equally flawed. *See* Compl. ¶¶ 57–77. The State alleges that the two challenged provisions "deregulate and ease federal oversight of the proprietary-school industry," Compl. ¶ 67, and that students may then "enroll in schools and programs that would otherwise be inaccessible due to Title IV ineligibility," *id.* ¶ 68. The State goes so far as to suggest that the diversity of public school students will be affected. *See id.* ¶ 71.

The State's theory does not fall into any accepted category of proprietary harm, and its reliance on a speculative and attenuated chain of possible actions by third parties is also fatal to its standing. Courts have recognized that states can establish standing when they show a concrete and particularized injury to a proprietary interest of their own state institutions. Thus in *Trump*, the Ninth Circuit held that the state plaintiffs could challenge an Executive Order restricting the admission of citizens of certain foreign countries into the United States because state universities had faculty or students who were citizens of those countries, had expended funds on those individuals' visa applications and other arrangements, and relied on those foreign faculty and students to achieve their mission of "global engagement." *See* 858 F.3d at 1159–60; *cf. Regents v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1033–34 (N.D. Cal. 2018) (state university established proprietary harm where it invested in its own student DACA recipients).

But here the State does not allege that the two challenged provisions will directly impact State schools or their students. To the contrary, the State posits competitive harm based on the provisions' application to proprietary schools. This theory should be rejected because, for one thing, the competitor standing doctrine is inapplicable here. Competitor standing may be appropriate in instances where businesses bid against each other for government contracts or grants. *See Planned Parenthood v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1108 (9th Cir. 2020) (relevant injury-in-fact for competitor standing is "the inability to compete on an equal footing in [a] bidding process" (internal quotation omitted)). Thus, in *Planned Parenthood*, the court held the plaintiff could challenge certain federal grant requirements even though it had

not participated in the grant competition. *Id.* at 1109; *see also City of L.A. v. Barr*, 929 F.3d 1163, 1170–74 (9th Cir. 2019) (sanctuary city's alleged disadvantage in federal policing grant competition conferred standing). Courts have also recognized competitor standing where the government provided a direct regulatory benefit to the plaintiff's marketplace competitor by authorizing its operation in the United States, *Int'l Brotherhood of Teamsters v. U.S. Dep't of Transp.*, 861 F.3d 944, 951 (9th Cir. 2017), or approving its utility rates, *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998).

In contrast to those cases, the State does not bid against proprietary schools for Title IV funds. Nor are individual students comparable to federal grant dollars or market share in a product or service. For one thing, students make independent decisions about what schools to attend. One proprietary school's loss of Title IV eligibility does not translate to an automatic transfer of its students to State schools. Such students may choose to attend a different proprietary school, a public school in another state, or forego higher education altogether. Any supposed impact on State school enrollments therefore is purely speculative—particularly in the context of distance education, where even more options are available. Moreover, the premise that the State reaps a financial benefit from student enrollments at its schools is backwards. In fact, as the State concedes, State school enrollments cost the State *more* money. *E.g.*, Compl. ¶ 61 (citing budgetary request for additional $175 million to accommodate "additional, expected enrollments [at California community colleges] from veterans returning from Iraq and Afghanistan and the closure of several for-profit schools"); *see also* 79 Fed. Reg. 64890, 65081 (Oct. 31, 2014) (recognizing "[s]tate and local governments may experience increased costs" if students transfer from proprietary to public schools). The possibility of additional State school students' participation in the Federal Work-Study Program, Compl. ¶ 76, does not change the fact that, on balance, the higher enrollment at State schools would yield a net financial loss to the State.

The State's further assumption that the challenged provisions will save some proprietary schools from losing their eligibility for Title IV participation is also speculative. The Automatic Renewal Provision would only come into play once the Department had failed to act on a school's certification for a year. *See* 34 C.F.R. § 668.13(b)(3). But even without that provision, a

school would have received indefinite monthly extensions of its certification as long as it submitted a materially complete application at least 90 days before its current certification expired. *See id.* § 668.13(b)(2). The State thus has failed to show any likelihood that the provision will impact schools' Title IV eligibility, much less that it might impact the distribution of students between State and proprietary schools. Indeed, the Complaint identifies no instance before the 2020 Rule where a proprietary school lost Title IV eligibility because the Department failed to act on its renewal application within a year, nor where such a result caused an increase in State school enrollments.

With respect to the Common Ownership Provision, the State similarly fails to show that any proprietary school lost Title IV eligibility due to the 50% cap that was in place prior to the 2020 Rule, or that such a loss increased State school enrollments. The notion that schools would nevertheless have lost eligibility in the future, had the 50% cap remained in effect, is pure conjecture. After all, a school faced with such a cap could simply ensure that it did not approve attendance at other commonly-owned schools beyond the 50% limit.

The State's theory of competitive standing is thus far more speculative, and the causal chain far more attenuated, than that in *California v. U.S. Dep't of Educ.* ("*California I*"), No. 17-cv-7106, 2018 WL 10345668 (N.D. Cal. Jun. 27, 2018). There, the court rejected the sufficiency of the State's allegations regarding an injury to its proprietary interests in its public colleges and universities because the complaint contained no plausible allegation "that any individual was unable to attend one of California's public universities" because of the debt relief rule that the State sought to challenge. *See id.* at *7 ("The most that Plaintiff alleges is that students who might theoretically want to attend one of California's public universities might not be able to make an informed decision."). The court later held, after the State amended its complaint, that it had established harm to a proprietary interest that was sufficiently concrete and nonspeculative to support standing. *California v. U.S. Dep't of Educ*. ("*California II*"), No. 17-cv-7106, 2019 WL 7669767, at *6–7 (N.D. Cal. Mar. 4, 2019). However, that case challenged the Department's implementation of its borrower-defense ("BD") regulation for students who had already attended a specific proprietary school that had since closed, and had already incurred debt. *See id.* at *1–3.

The State thus identified specific students who wished to attend a State school but could not because of undischarged loan debt. *See id.* at *3–4. The court held that the State "has met its burden to show that students cannot attend California's public colleges and universities because their federal loan debt from attending [the proprietary] schools remains undischarged." *Id.* at *6. Here, the State has not demonstrated a similar concrete impact of the challenged provisions on identifiable students at State schools. The State's assertion of standing based on a supposed competitive or proprietary harm therefore should be rejected.

3. The State Fails To Show That Its Choice To Tie Cal Grant Eligibility to Title IV Eligibility Supports Its Standing Here

The State's final asserted injury is also economic but arises from the fact that the State expressly ties eligibility for its own Cal Grant financial aid to Title IV eligibility. *See* Compl. ¶¶ 78–86; *see* Cal. Code Regs. tit. 5, § 30009(d) (cross-referencing 34 C.F.R. Part 600). The State posits that, if the challenged provisions allow certain proprietary schools to remain Title IV eligible, the State could end up providing Cal Grants to students at those schools. Compl. ¶ 85.

This theory fails for the reasons explained above; that is, it is too speculative to assume that the challenged provisions will impact the Title IV eligibility of any proprietary school. Moreover, the State's theory of injury is flawed as a matter of law. The situation that the State describes directly parallels that in *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam), where the plaintiff states chose to provide tax credits to their residents that were tied to the defendant states' tax levels. *Id.* at 664. In that case, the Supreme Court rejected the plaintiff states' theory of injury as "self-inflicted." *See id.* As in *Pennsylvania*, nothing in federal law requires the State to condition its own grants on a school's satisfaction of a federal standard. Another court, considering a similar argument, concluded that the plaintiff states in that case (including California) were under no federal obligation to "link their fiscs to federal practices," or to provide financial aid to students enrolling in proprietary programs that the states deemed problematic *Maryland,* 474 F. Supp. 3d at *36. Here as well any injury resulting from the State's decision to cross-reference the Department's regulation in its own law is "self-inflicted," resulting from the State's choices regarding allocation of resources and enforcement efforts,

rather than a result of any direct burden imposed upon it by the Department. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013). The State's own actions in creating the alleged "self-inflicted" harm "break the causal chain," preventing them from supporting the State's Article III standing. *See Maryland,* 474 F. Supp. 3d at *35.

Moreover, even aside from the self-inflicted nature of the State's alleged injury, both the Supreme Court and other courts have more broadly rejected collateral impacts of federal laws on states' economies as insufficient to confer state standing. *Florida v. Mellon*, 273 U.S. 12, 17 (1927) (no standing to challenge federal inheritance tax based on economic impact on state's property tax revenues); *Massachusetts v. Mellon*, 262 U.S. at 484–85 (no standing to challenge the Maternity Act, which provided for appropriations to states for cooperative efforts to enhance maternal and infant health, where "[n]o rights of the state falling within the scope of the judicial power have been brought within the actual or threatened operation of the statute"); *Pennsylvania v. Kleppe*, 533 F.2d 668, 671–72 (D.C. Cir. 1976) (no standing to challenge discontinuation of federal disaster relief program based on economic impact on state). After all, "virtually all federal policies" may have "unavoidable economic repercussions" on states, *see id.* at 672, so deeming an economic impact to be sufficient would eviscerate long-recognized limitations on states' standing to sue the federal government. *See Snapp*, 458 U.S. at 609–10.

B. A Procedural Rights Standing Analysis Is Inapplicable Here and in Any Event Would Not Confer Jurisdiction Over Claim 2

In Claim 2, the State characterizes its "arbitrary and capricious" challenge under the APA, 5 U.S.C. § 706(2)(A), as asserting that the Department "failed to follow the basic procedural requirement of providing a reasoned explanation" for the two challenged provisions. Compl. ¶ 115. The State evidently seeks to invoke a "procedural rights" standing analysis, in which the causation and redressability prongs are somewhat relaxed. But as discussed below, such an analysis is inapposite here because the State's Claim 2 is substantive rather than procedural. Moreover, the same defects identified above would be fatal to the State's standing even under a procedural rights standing analysis.

The Ninth Circuit has applied a slightly modified standing analysis to claims seeking to

vindicate procedural rights conferred by statute, such as those set forth in the National Environmental Policy Act ("NEPA"), *see W. Watersheds Project v. Grimm*, 921 F.3d 1141, 1146 (9th Cir. 2019); Section 402 of the National Historic Preservation Act, *see Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 817 (9th Cir. 2017); or the APA's express requirements in 5 U.S.C. § 553 related to notice and comment rulemaking, *see California v. Azar*, 911 F.3d 558, 570–71 (9th Cir. 2018). In *Azar*, for example, the court applied a procedural rights standing analysis in connection with the State's claim that the Department's issuance of interim final rules without prior notice and consideration of public comments improperly bypassed the procedures identified in § 553. 911 F.3d at 575 (citing obligations to "issue a general notice of proposed rulemaking" in § 553(b) and to "'give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments" in § 553(c)).

In contrast to *Azar*, the State here does not allege that the Department violated any procedural step set forth in § 553. To the contrary, the State acknowledges that the Department went through a notice and comment rulemaking process and ultimately gave an "explanation" for the two challenged provisions. Compl. ¶ 116. Rather than § 553, the State relies on § 706(2)(A) as imposing a procedural requirement. Compl. ¶¶ 38, 51. But § 706(2)(A), by its plain terms, sets forth a deferential "standard of review" for judicial review of final agency action, allowing agency actions to be set aside if they are "arbitrary" or "capricious." *In re Big Thorne Project*, 857 F.3d 968, 973 (9th Cir. 2017). This standard calls on a court to "simply ensure[] that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Proj*., No. 19-1231, 2021 WL 1215716, at *5 (U.S. Apr. 1, 2021).

A court's application of this standard flows "'not from the APA's *procedural* dictates, but from its *substantive* command that agency decisionmaking not be "arbitrary" or "capricious."'" *Nat'l Ass'n of Home Builders* ("*NAHB*") *v. EPA*, 682 F.3d 1032, 1042 (D.C. Cir. 2012) (emphasis added) (quoting Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 530 (1985)). The standard is intended to ensure that a court's review under § 706(2)(A), though substantive, also be deferential. In other words, the court would *only*

evaluate whether the agency reasonably considered its decision, without "substitut[ing] [the court's] judgment for that of the agency." *Ctr. for Bio. Diversity v. Zinke*, 868 F.3d 1054, 1057 (9th Cir. 2017). To be sure, the Supreme Court has identified factors to assist a court's review. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42–44 (1983). But judicial review under § 706(2)(A), even when applying the *State Farm* factors, focuses "'not on the kind of *procedure* that an agency must use . . . , but rather on the kind of *decisionmaking record* the agency must produce.'" *NAHB*, 682 F.3d at 1042 (emphasis added) (quoting Garland, 98 Harv. L. Rev. at 530).

Indeed, a court cannot use the § 706(2)(A) reasonableness standard to "improperly impose[] nonstatutory procedural requirements." *See FCC*, 2021 WL 1215716, at *8 (Thomas, J., concurring). Rather, "[c]ourts have no authority to impose 'judge-made procedur[es]' on agencies." *Id.* (quoting *Perez v. Mtg. Bankers Ass'n*, 575 U.S. 92, 102 (2015)). The crux of the State's argument is thus not that the Department failed to follow statutory rulemaking procedures but that its ultimate decision was substantively deficient for various reasons.

Other courts have recognized the difference between procedural rights conferred by statute, on the one hand, and deferential judicial review pursuant to § 706(2)(A), on the other. Where only the § 706(2)(A) standard is at issue, without an independent statutory right such as that conferred by NEPA or § 553, courts apply regular standing analysis. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019); *City & Cty. of S.F. v. USCIS*, 944 F.3d 773, 787 (9th Cir. 2019). Thus, in *New Mexico v. McAleenan*, 450 F. Supp. 3d 1130 (D.N.M. 2020), the court distinguished between an allegation that "Defendants failed to comply with a procedural right that a statute or regulation provides" and "the APA's arbitrary and capricious standard, against which the Court may evaluate its claims." *Id.* at 1181 (applying regular standing analysis).

The State will no doubt seek to rely on *California v. Bernhardt*, 460 F. Supp. 3d 875, 890 (N.D. Cal. 2020), where the court conflated § 706(2)(A) with a statutory right. But that case is wrongly decided and contrary to the controlling authority identified here. The court in that case cited *Massachusetts v. EPA*, 549 U.S. 497. *Bernhardt*, 460 F. Supp. 3d at 890. However, the claim in *Massachusetts* arose under the Clean Air Act, not the APA. As the Court explained,

unlike § 706, the Clean Air Act is more than a cause of action; rather, through the Act, "Congress has ordered EPA to protect Massachusetts (among others) by prescribing [air emissions] standards." *Massachusetts v. EPA*, 549 U.S. at 519. The Court thus understood the Act as granting "a concomitant procedural *right*" to challenge the EPA's failure to fulfill that statutory obligation. *See id.* at 520 (emphasis added). The Clean Air Act thus bundles the right of action and statutory procedural right together while § 706 does not. Instead, any procedural right at issue in a § 706(2)(A) claim must derive from a separate statutory source—which here is lacking. Another court recognized precisely this distinction when explaining why it was evaluating standing to assert a claim under § 706(2)(A) under a regular rather than relaxed standing analysis. *See Ctr. for Biological Diversity v. EPA*, 90 F. Supp. 3d 1177, 1190 n.8 (W.D. Wash. 2015) ("lower standard" of *Massachusetts* "does not apply . . . because [t]he Clean Water Act's citizen suit provision . . . is inapplicable" to the case before it).

The court in *Bernhardt* also relied on *Encino Motocars LLC v. Navarro*, 136 S Ct. 2117 (2016). *Bernhardt*, 460 F. Supp. 3d at 890. But that decision did not consider the plaintiff's standing and thus did not address the proper standard for evaluating standing to bring a claim under § 706(2)(A). The decision's reference to an agency's "procedural requirement" to provide "adequate reasons for its decisions," in a context that had nothing to do with standing, cannot be taken as the Supreme Court's authoritative decision that standing for § 706(2)(A) claims should be evaluated under a relaxed "procedural rights" framework, particularly when the Court has never applied that framework to a § 706(2)(A) claim. Indeed, *after Encino Motocars* was decided, the Court applied a regular standing analysis in *Dep't of Commerce*, 139 S. Ct. at 2565–66. And the Court's recent decision in *FCC* did not characterize § 706(2)(A) as imposing procedural requirements. *See FCC*, 2021 WL 1215716, at *5. Significantly, despite the prevalence of suits brought against federal agencies pursuant to § 706(2)(A), the court in *Bernhardt* was unable to identify a *single case* (other than a prior decision issued by the same judge, where the issue was discussed but not resolved) where a court has applied a "procedural rights" standing analysis to a claim under § 706(2)(A) where no separate statutory procedural right was at issue. This Court should decline to follow *Bernhardt* and should instead reject the

State's attempt to invoke a procedural rights standing analysis here.

In the end, the distinction between regular and "procedural rights" standing does not matter here because the same defects described *supra* Part A would be equally fatal in a procedural rights analysis. Under such an analysis, a plaintiff still must demonstrate "(1) that he has a procedural right that, if exercised, could have protected his concrete interests, (2) that the procedures in question are designed to protect those concrete interests, and (3) that the challenged action's threat to the plaintiff's concrete interests is reasonably probable." *Azar*, 911 F.3d at 570. The required "concrete interest" is akin to the injury-in-fact required in a traditional standing analysis. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496–97 (2009) ("Unlike redressability, . . . the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."). A plaintiff therefore cannot rely merely on the alleged violation of a procedural right as an injury but must establish an independent Article III injury, just as in a regular standing analysis. *See Azar*, 911 F.3d at 571. Moreover, "[n]othing in the procedural-injury jurisprudence relaxes" the heavy burden to show causation where, as here, independent actors, such as proprietary schools and students, are involved. *See Coal. for a Sustainable Delta v. FEMA*, 711 F. Supp. 2d 1152, 1167 (E.D. Cal. 2010). Although a plaintiff "need not prove that the substantive result would have been different had he received proper procedure," *Azar*, 911 F.3d at 571, a "reasonably probable" link between the challenged action and the plaintiff's alleged injury is still required, *id.* at 570; *see also Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664–66 (D.C. Cir. 1996) (recognizing that the Supreme Court "has never freed a plaintiff alleging a procedural violation from showing a causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury to its particularized interest"). Here, the State fails to show a "reasonably probable" link between either of the challenged provisions and any cognizable Article III injury and thus lacks standing.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be granted.

DATED: March 22, 2021 Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General
MARCIA BERMAN
Assistant Director, Federal Programs Branch

/s/ Kathryn L. Wyer
KATHRYN L. WYER (Utah Bar No. 9846)
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Tel. (202) 616-8475
kathryn.wyer@usdoj.gov
Attorneys for Defendants

BRIAN M. BOYNTON
Acting Assistant Attorney General
MARCIA BERMAN
Assistant Director, Federal Programs Branch
KATHRYN L. WYER (Utah Bar No. 9846)
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Tel. (202) 616-8475
kathryn.wyer@usdoj.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. Xavier Becerra, Attorney General of California,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF EDUCATION and **MIGUEL CARDONA**, in his official capacity as the United States Secretary of Education,

Defendants.

Case No. 3:21-cv-384-JD

[proposed] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

For the reasons set forth in Defendants' Motion to Dismiss, it is hereby

ORDERED that Defendants' Motion to Dismiss is GRANTED; and it is

FURTHER ORDERED that this action is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED: _____, 20__

_____
JAMES DONATO
United States District Judge