

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SURVJUSTICE INC., et al.,

 Plaintiffs,
 v.
ELISABETH D. DEVOS, et al.,

 Defendants.

Case No. [18-cv-00535-JSC](#)

**ORDER RE: DEFENDANTS’ MOTION
TO DISMISS**

Re: Dkt. No. 40

Plaintiffs SurvJustice, Inc., Equal Rights Advocates, and Victim Rights Law Center (collectively, “Plaintiffs”) bring this action for injunctive relief against Defendants U.S. Department of Education (“the Department”), Secretary Elisabeth D. DeVos, and Acting Assistant Secretary for Civil Rights Kenneth L. Marcus (collectively, “Defendants”).¹ Plaintiffs seek to vacate the Department’s new policy regarding enforcement of Title IX of the Education Amendments of 1972, as detailed in Department guidance issued on September 22, 2017. (Dkt. No. 23 at ¶ 1.)² Defendants move to dismiss under Federal Rules of Civil Procedure 12(b)(1) for lack of standing and 12(b)(6) for failure to state claims upon which relief can be granted. (Dkt. No. 40.) After carefully considering the arguments and briefing submitted, and having had the benefit of oral argument on July 19, 2018, the Court grants Defendants’ motion to dismiss. The allegations are insufficient to show standing to bring an equal protection claim, the 2017 Guidance

¹ All parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 18 & 36.)

² Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 does not constitute final agency action for purposes of the APA claim, and the allegations do not
 2 plausibly suggest that Defendants acted outside their authority for the *ultra vires* claim.

3 BACKGROUND

4 I. Factual Background

5 A. Title IX Generally

6 Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, prohibits any
 7 educational program or activity that receives federal funding from discriminating on the basis of
 8 sex. 20 U.S.C. § 1681(a). Sexual harassment, including sexual violence, is a form of sex
 9 discrimination that educational institutions must address and remedy under Title IX. (Dkt No. 23
 10 at ¶ 45) (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista*
 11 *Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin v. Gwinnett Cty. Pub. Schools*, 503 U.S. 60, 75
 12 (1992)). The Department, acting through its Office of Civil Rights is “the administrative agency
 13 charged with administering Title IX.” *Neal v. Bd. of Trs. of California State Univ.*, 198 F.3d 763,
 14 770 (9th Cir. 1999) (internal quotation marks and citation omitted). This responsibility includes
 15 “establishing rules, regulations, and procedures that implement Title IX and define the ways in
 16 which educational institutions comply with Title IX’s requirements.” (Dkt No. 23 at ¶ 46.) The
 17 Office of Civil Rights requires recipients of federal funding to “adopt and publish grievance
 18 procedures providing for prompt and equitable resolution of student and employee complaints
 19 alleging any action” prohibited under Title IX. 34 C.F.R. § 106.8(b).

20 B. The 1997 Guidance

21 In 1997, the Department published its first guidance (“1997 Guidance”) “addressing
 22 educational institutions’ obligations to address sexual harassment” following “a public notice and
 23 comment period” that included ““extensive consultation with interested parties.”” (Dkt. No. 23 at
 24 ¶ 52) (quoting Sexual Harassment Guidance, 62 Fed. Reg. 12,034, 12035 (Mar. 13, 1997)). The
 25 1997 Guidance established “principles for how educational institutions should address sexual
 26 harassment” and “provided information regarding the standards used by the Department’s Office
 27 of Civil Rights to investigate student complaints regarding educational institutions’ responses to
 28 sexual harassment.” (*Id.* at ¶¶ 52-53.) The 1997 Guidance provided that ““informal mechanisms’

1 for resolving complaints,” such as mediation, “may be used by mutual consent of the parties but
 2 that it was inappropriate for a complaining student to be required to work out the problem directly
 3 with the individual accused of harassment.” (*Id.* at ¶ 54.) Furthermore, in cases involving sexual
 4 assault, “mediation would be inappropriate even on a voluntary basis.” (*Id.*) Schools
 5 investigating complaints were permitted to “take appropriate interim and remedial measures . . .
 6 designed to minimize, as much as possible, the burden on the student who was harassed.” (*Id.* at ¶
 7 55.) The 1997 Guidance also explained that police investigations into the alleged criminal
 8 conduct of an accused perpetrator could not substitute for a school utilizing its own sexual
 9 harassment processes. (*Id.* at ¶ 58.)

10 C. The 2001 Guidance

11 The Department issued revised guidance in 2001 that largely reaffirmed the requirements
 12 and guidelines established under the 1997 Guidance. (*Id.* at ¶¶ 59-60) (citing Notice of Revised
 13 Sexual Harassment Guidance, 66 Fed. Reg. 5512 (Jan. 19, 2001) (“Notice”). The revised
 14 guidance, like the 1997 Guidance, “followed a public notice and comment period.” (*Id.* at ¶ 60.)

15 As stated in the Notice:

16 The revised guidance reaffirms the compliance standards that OCR
 17 applies in investigations and administrative enforcement of Title IX
 18 of the Education Amendments of 1972 (Title IX) regarding sexual
 19 harassment. The revised guidance re-grounds these standards in the
 20 Title IX regulations, distinguishing them from the standards
 applicable to private litigation for money damages and clarifying
 their regulatory basis as distinct from Title VII of the Civil Rights
 Act of 1964 agency law. In most other respects the revised guidance
 is identical to the 1997 guidance.

21 Notice, 66 Fed. Reg. 5512. The revised guidance also noted that “[p]rocedures that ensure the
 22 Title IX rights of the complainant, while at the same time according due process to both parties
 23 involved, will lead to sound and supportable decisions.” U.S. Dep’t of Educ., Revised Sexual
 24 Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third
 25 Parties 22 (Jan. 2001) (“2001 Guidance”).³ The 2001 Guidance cautioned, however, that “schools

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 27
 28 ³ <https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf>

1 should ensure that steps to accord due process rights do not restrict or unnecessarily delay the
2 protections provided by Title IX to the complainant.” *Id.*

3 **D. The 2011 Letter and the 2014 Q&A**

4 In 2011, the Department issued a “Dear Colleague Letter on Sexual Violence,” followed
5 by a set of questions and answers in 2014 in response to “additional concerns raised by schools
6 and students.” (*Id.* at ¶ 70) (citing U.S. Dep’t of Educ., Ltr. From Ass’t Sec’y Russlynn Ali (Apr.
7 4, 2011) (“2011 Letter”)⁴; U.S. Dep’t of Educ., Questions and Answers on Title IX and Sexual
8 Violence (Apr. 29, 2014) (“2014 Q&A”)).⁵ The 2011 Letter and 2014 Q&A were not subject to
9 public notice and comment. (*Id.* at ¶ 81.) In addition to reaffirming the 2001 Guidance, the 2011
10 Letter discouraged schools from allowing the complainant and the alleged perpetrator from cross-
11 examining each other in adjudicative proceedings. (*Id.* at ¶ 74.) The 2011 letter also clarified that
12 “in order for a school’s grievance procedures to be consistent with Title IX standards, the school
13 must use a preponderance of the evidence standard (i.e., it is highly probable or reasonably certain
14 that the sexual harassment or violence occurred).” 2011 Letter at 11. The letter explained:

15 The “clear and convincing” standard (i.e., it is highly probable or
16 reasonably certain that the sexual harassment or violence occurred),
17 currently used by some schools, is a higher standard of proof.
18 Grievance procedures that use this higher standard are inconsistent
19 with the standard of proof established for violations of the civil
rights laws, and are thus not equitable under Title IX. Therefore,
preponderance of the evidence is the appropriate standard for
investigating allegations of sexual harassment or violence.

20 *Id.* The 2014 Q&A opined, among other things, that Title IX required schools to take “interim
21 measures before the final outcome of an investigation.” 2014 Q&A at 32. Such measures
22 included “allow[ing] the complainant to avoid contact with the alleged perpetrator and . . .
23 ‘chang[ing] academic and extracurricular activities . . . as appropriate.’” (Dkt. No. 23 at ¶ 79)
24 (quoting the 2014 Q&A). The 2014 Q&A also directed that “the appeals process must be equal
25 for both parties,” thus, “[i]f a school chooses to provide for an appeal of the findings or remedy or
26 both, it must do so equally for both parties.” 2014 Q&A at 37-38. The 2014 Q&A reiterated “that
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28 ⁴ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

⁵ <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

1 schools should provide the same rights and opportunities to complainants and respondents.” (*Id.*
2 at ¶ 80.)

3 **E. The 2017 Guidance**

4 On September 22, 2017, the Department issued a “Dear Colleague Letter” rescinding the
5 2011 Letter and the 2014 Q&A (together, “Rescinded Guidance”). (*Id.* at ¶ 105) (citing U.S.
6 Dep’t of Educ., Ltr. From Ass’t Sec’y Candice Jackson (Sept. 22, 2017) (“2017 Letter”).⁶ That
7 same day, the Department issued questions and answers on “Campus Sexual Misconduct.” (*Id.*)
8 (citing U.S. Dep’t of Educ., Q&A on Campus Sexual Misconduct (Sept. 22, 2017) (“2017
9 Q&A”).⁷ The stated purpose of the 2017 documents (collectively, “2017 Guidance”) was to
10 withdraw the “new mandates” imposed by the 2011 letter and 2014 Q&A “related to the
11 procedures by which educational institutions investigate, adjudicate, and resolve allegations of
12 student-on-student sexual misconduct.” 2017 Letter at 1. The 2017 Letter singles-out as flawed
13 the following procedures set forth in the 2011 Letter: (i) requiring “schools to adopt a minimal
14 standard of proof—the preponderance-of-the-evidence standard—in administering student
15 discipline, even though many schools had traditionally employed a higher clear-and-convincing-
16 evidence standard”; (ii) “insist[ing] that schools with an appeals process allow complainants to
17 appeal not-guilty findings, even though many schools had previously followed procedures
18 reserving appeal for accused students”; (iii) “discourag[ing] cross-examination by the parties,
19 suggesting that to recognize a right to such cross-examination might violate Title IX”; (iv)
20 “forb[idding] schools from relying on investigations of criminal conduct by law-enforcement
21 authorities to resolve Title IX complaints, forcing schools to establish policing and judicial
22 systems while at the same time directing schools to resolve complaints on an expedited basis;” and
23 (v) “provid[ing] that any due-process protections afforded to accused students should not
24 ‘unnecessarily delay’ resolving the charges against them.” *Id.*

25 The 2017 Letter notes that “[t]he Department imposed these regulatory burdens without
26 affording notice and the opportunity for public comment.” *Id.* at 2. The 2017 Letter continues:

27 _____
28 ⁶ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>).

⁷ <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>

1 Under these circumstances, the Department has decided to withdraw
 2 the above-referenced guidance documents in order to develop an
 3 approach to student sexual misconduct that responds to the concerns
 4 of stakeholders and that aligns with the purpose of Title IX to
 achieve fair access to educational benefits. The Department intends
 to implement such a policy through a rulemaking process that
 responds to public comment. The Department will not rely on the
 withdrawn documents in its enforcement of Title IX.

5 *Id.* In the interim, the 2017 Letter directs readers to the 2017 Q&A, and states that the Department
 6 “will continue to rely on [the 2001 Guidance], which was informed by a notice-and-comment
 7 process,” and a 2006 Dear Colleague Letter⁸ on Sexual Harassment that reaffirmed the 2001
 8 Guidance. *Id.*

9 **i. Substantive changes under the new policy**

10 The 2017 Q&A rescinds the 2014 Q&A’s mandate that schools must take interim measures
 11 during the investigation of a complaint, and instead returns to the 2001 Guidance, which provided
 12 that “[i]t may be appropriate for a school to take interim measures during the investigation of a
 13 complaint.” *See* 2001 Guidance at 16; *see also* 2017 Q&A at 3. The 2017 Guidance also returns
 14 to the pre-2011 policy of giving schools discretion over the standard it employs in evaluating
 15 evidence, permitting schools to use either the “preponderance” or a “clear and convincing”
 16 standard.⁹ 2017 Q&A at 5. The 2017 Guidance allows for voluntary “informal resolution” where
 17 the parties have “receiv[ed] a full disclosure of the allegations and their options for formal
 18 resolution and if a school determines that the particular Title IX complaint is appropriate for such
 19 a process.” 2017 Q&A at 4. As for the appeals process, the 2017 Guidance allows schools to
 20 “choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case
 21 any appeal procedures must be equally available to both parties.” *Id.* at 7.

22 The 2017 Q&A reiterates the Department’s intent to “engage in rulemaking on the topic of
 23 schools’ Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-
 24 peer sexual harassment and sexual violence.” 2017 Q&A at 1.

25 _____
 26 ⁸ The 2006 Letter provides no substantive guidance, and merely directs readers to the 2001
 27 Guidance. *See* U.S. Dep’t of Educ., Ltr. From Ass’t Sec’y Stephanie Monroe (Jan. 25, 2006)
<https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>

28 ⁹ The 2017 Q&A clarifies, however, that “the standard of evidence for evaluating a claim of sexual
 misconduct should be consistent with the standard the school applies in other student misconduct
 cases.” 2017 Q&A at 5 n.19.

1 **II. Complaint Allegations**

2 Plaintiffs are three non-profit advocacy organizations; each brings this action on its own
3 behalf. The gravamen of Plaintiffs’ collective allegations is that the 2017 Guidance: (i) requires a
4 diversion of resources that impedes Plaintiffs’ daily operations; (ii) “limits the efficacy” of the
5 avenues of redress available to Plaintiffs’ clients; (iii) increases the costs borne by Plaintiffs in
6 providing their services; and (iv) “directly conflicts with, impairs, and frustrates [Plaintiffs’]
7 organizational mission and priorities.” (Dkt. No. 23 at ¶¶ 14, 25, 30.)

8 **A. SurvJustice, Inc.**

9 Plaintiff SurvJustice, Inc.’s “mission is to increase the prospect of justice for survivors of
10 sexual violence.” (*Id.* at ¶ 10.) SurvJustice “pursues this goal through legal assistance [to
11 complainants], policy advocacy, and institutional training.” (*Id.*) “The majority of requests for
12 legal assistance that SurvJustice receives are from students at institutions of higher education.”
13 (*Id.* at ¶ 11.) However, “SurvJustice also engages in policy advocacy by providing technical
14 assistance and advice to legislators and policymakers on various state and federal legislation and
15 policy efforts regarding sexual violence, and working with changemakers within their
16 communities on local policy efforts, especially on college and university campuses.” (*Id.* at ¶ 13.)

17 **B. Equal Rights Advocates**

18 Plaintiff Equal Rights Advocates’ mission is to “protect[] and expand[] economic
19 educational access and opportunities for women and girls.” (*Id.* at ¶ 23.) In furthering its mission,
20 Equal Rights Advocates “engag[es] in public education efforts, as well as policy reform and
21 legislative advocacy; provid[es] free legal information and counseling; and litigat[es] cases
22 involving issues of gender discrimination in employment and education at all stages.” (*Id.* at ¶
23 24.) Equal Rights Advocates also “counsels and represents women who have been victims of
24 sexual harassment and/or sexual assault in matters pursuant to Title IX.” (*Id.*)

25 **C. Victim Rights Law Center**

26 Plaintiff Victim Rights Law Center’s “mission is to provide legal representation to victims
27 of rape and sexual assault to help rebuild their lives and to promote a national movement
28 committed to seeking justice for every rape and sexual victim.” (*Id.* at ¶ 28.) In furthering its

1 mission, Victim Rights Law Center provides free legal services to victims, a “substantial portion”
 2 of whom are students. (*Id.* at ¶ 29.) The Law Center’s “attorneys represent campus victims to
 3 communicate effectively with campus administrators, acquire interim measures and
 4 accommodations to secure their education, prepare and attend disciplinary hearings, file appeals,
 5 and if necessary, file complaints with the [the Department’s] Office of Civil Rights.” (*Id.*)

6 **III. Procedural History**

7 In January 2018, Plaintiffs filed their initial complaint for injunctive relief against
 8 Defendants Elisabeth D. DeVos and Candice Jackson in their official capacities,¹⁰ and the
 9 Department. (Dkt. No. 1.) Plaintiffs filed an amended complaint the following month, seeking
 10 injunctive relief and alleging causes of action for: (i) violation of the Administrative Procedure
 11 Act, 5 U.S.C. § 706; (ii) *ultra vires* action; and (iii) violation of the equal protection guarantee
 12 under the Fifth Amendment. (Dkt. No. 23.)

13 Defendants now move to dismiss these causes of action pursuant to Federal Rules of Civil
 14 Procedure 12(b)(1) and 12(b)(6). (Dkt. No. 40.) In addition, six advocacy organizations—
 15 Women’s and Children’s Advocacy Project, Equal Means Equal, National Coalition against
 16 Violent Athletes, Allies Reaching for Equality, Women Matter, and We Are Woman—submitted
 17 an amicus curiae brief. (Dkt. No. 47.)

18 **LEGAL STANDARD**

19 **A. Rule 12(b)(1)**

20 Pursuant to Rule 12(b)(1), a district court must dismiss an action if it lacks jurisdiction
 21 over the subject matter of the suit. *See* Fed. R. Civ. P. 12(b)(1). “Subject matter jurisdiction can
 22 never be forfeited or waived and federal courts have a continuing independent obligation to
 23 determine whether subject matter jurisdiction exists.” *Leeson v. Transamerica Disability Income*
 24 *Plan*, 671 F.3d 969, 975 n.12 (9th Cir. 2012) (internal quotation marks and citation omitted). “A
 25 party invoking federal jurisdiction has the burden of establishing that it has satisfied the ‘case-or-
 26

27 ¹⁰ On June 25, 2018, Kenneth L. Marcus succeeded Candice Jackson as Assistant Secretary for
 28 Civil Rights; he is automatically substituted as a party pursuant to Federal Rule of Civil Procedure
 25(d).

1 controversy’ requirement of Article III of the Constitution [and] standing is a ‘core component’ of
2 that requirement.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To satisfy that
3 requirement and establish standing, a plaintiff must show: “(1) an injury in fact that is (a) concrete
4 and particularized and (b) actual or imminent; (2) causation; and (3) a likelihood that a favorable
5 decision will redress the injury.” *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th Cir. 2010). In
6 ruling on a motion to dismiss under Rule 12(b)(1), the court must “accept as true all material
7 allegations of the complaint, and . . . construe the complaint in favor of the complaining party.”
8 *Levine v. Vilsack*, 587 F.3d 986, 991 (9th Cir. 2009) (internal quotation marks and citation
9 omitted).

10 **B. Rule 12(b)(6)**

11 A Rule 12(b)(6) motion challenges the sufficiency of a complaint as failing to allege
12 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
13 550 U.S. 544, 570 (2007). A facial plausibility standard is not a “probability requirement” but
14 mandates “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*,
15 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted). For purposes of ruling
16 on a Rule 12(b)(6) motion, a court must “accept factual allegations in the complaint as true and
17 construe the pleadings in the light most favorable to the non-moving party.” *Manzarek v. St. Paul*
18 *Fire & Mar. Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not bound, however, “to
19 accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678.

20 “[D]ismissal may be based on either a lack of a cognizable legal theory or the absence of
21 sufficient facts alleged under a cognizable legal theory.” *Johnson v. Riverside Healthcare*
22 *Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008) (internal quotation marks and citation omitted); *see*
23 *also Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes a court to dismiss a
24 claim on the basis of a dispositive issue of law”). The court must be able to “draw the reasonable
25 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 663.
26 “Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task
27 that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at
28 663-64.

1 **DISCUSSION**

2 Plaintiff brings three causes of action: (i) violation of the Administrative Procedure Act
3 (“APA”), 5 U.S.C. section 706; (ii) *ultra vires* action; and (iii) violation of the equal protection
4 guarantee under the Fifth Amendment. Defendants’ motion to dismiss is two-fold. First,
5 Defendants contend that Plaintiffs lack standing because: (i) they have not alleged a cognizable
6 injury; and (ii) they have failed to plead facts that support third party standing for their Fifth
7 Amendment claim. Alternatively, Defendants argue that Plaintiffs fail to state a claim upon which
8 relief can be granted because: (i) the 2017 Guidance does not constitute final agency action and
9 Plaintiffs have another adequate remedy for purposes of the APA claim; (ii) Plaintiffs fail to
10 plausibly allege that Defendants engaged in *ultra vires* action; and (iii) Plaintiffs fail to plausibly
11 allege that Defendants’ acted with discriminatory purpose. The Court addresses each contention
12 in turn.

13 **I. Standing**

14 To establish constitutional standing a “plaintiff must have (1) suffered an injury in fact, (2)
15 that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be
16 redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).
17 Here, Defendants challenge only the first prong of the standing inquiry—whether Plaintiffs have
18 adequately alleged a legally cognizable injury.¹¹

19 **A. APA and *Ultra Vires* Action Claims**

20 “[O]rganizations are entitled to sue on their own behalf for injuries they have sustained.”
21 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982). “[A]n organization may satisfy
22 the Article III requirement of injury in fact if it can demonstrate: (1) frustration of its
23 organizational mission [by defendant’s actions]; and (2) diversion of its resources to combat [that
24 frustration].” *Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004).
25 However, “[a]n organization cannot manufacture [an] injury by incurring litigation costs or simply
26 choosing to spend money fixing a problem that otherwise would not affect the organization at all.”

27 _____
28 ¹¹ Defendants also challenge Plaintiffs’ Fifth Amendment claim on the grounds that Plaintiffs lack prudential standing. The Court addresses that argument below.

1 *Fair Hous. Council of San Fernando Valley*, 666 F.3d 1216, 1219 (9th Cir. 2012) (internal
2 quotation marks and citation omitted).

3 **i. Frustration of Organizational Mission**

4 Where a defendant’s conduct has “perceptibly impaired” an organizational plaintiff’s
5 “ability to provide [services to its clients], there can be no question that the organization has
6 suffered injury in fact.” *Havens*, 455 U.S. at 379. Here, Plaintiffs SurvJustice and Victim Rights
7 Law Center allege that the 2017 Guidance has frustrated their individual missions, in part, because
8 the Guidance discourages survivors of sexual harassment and sexual violence from filing
9 complaints. (Dkt. No. 23 at ¶ 119.) Because Plaintiffs are organizations that advocate for
10 survivors of sexual harassment, this “chilling effect” on the filing of complaints makes it
11 increasingly difficult for them to fulfill their organizational missions. (*Id.* at ¶ 121.) Defendants
12 counter that Plaintiffs’ speculative allegations of a subjective “chilling effect” are insufficient to
13 show frustration of organizational mission for purposes of standing.¹² (Dkt. No. 40 at 13) (citing
14 *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1129 (9th Cir. 1996) (noting that
15 “[a]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present
16 objective harm or a threat of specific future harm.”) (internal quotation marks and citation
17 omitted).

18 Here, however, Plaintiffs do not allege a “subjective chill”; instead, Plaintiffs allege an
19 *observed* decrease in student-filed complaints following issuance of the 2017 Guidance.
20 Furthermore, Plaintiffs allege that their clients have directly attributed their hesitancy in filing
21 complaints to the 2017 Guidance. Specifically, SurvJustice alleges:

22 Following and as a result of the 2017 Title IX policy change,
23 SurvJustice experienced a decrease in the number of sexual violence

24 _____
25 ¹² Defendants “do not dispute the truth of Plaintiffs’ factual allegations,” but instead, “take issue
26 with Plaintiffs’ mischaracterization of the 2017 guidance.” (Dkt. No. 48 at 3.) Defendants note
27 that the “Court should only accept as true the ‘non-conclusory ‘factual content’” in the
28 amended complaint.” (*Id.*) (quoting *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009)).
Defendants further contend that “[i]nterpretation of the 2017 guidance is a legal analysis, not a
factual one.” (*Id.*) The Court agrees with Defendants that it need not accept as true Plaintiffs’
characterization of the content of the 2017 Guidance; however, at the pleading stage the Court
must accept as true Plaintiffs’ factual allegations regarding Plaintiffs’ observed effects of the 2017
Guidance.

1 survivors seeking its services. This trend is borne out by
 2 SurvJustice’s interactions with particular college and university
 3 students who have questioned whether they should continue with
 their plans to report sexual violence given the uncertainty regarding
 their legal protections and an anticipated lowered likelihood of
 success created by the policy change.

4 (Dkt. No. 23 at ¶ 16.) Victim Rights Law Center alleges:

5 [A]s a result of the 2017 Title IX policy, sexual violence and assault
 6 victims have expressed an unwillingness to report harassment and
 assault to campus authorities, denying VRLC the ability to achieve
 7 its mission. VRLC saw an immediate chilling effect after the
 Department issued its 2017 . . . Title IX policy. VRLC has seen a
 8 decline in the number of sexual violence and assault survivors
 willing to pursue justice through campus processes.

9 (*Id.* at ¶ 31.) Victim Rights Law Center further states that “[s]uch declines in reporting and
 10 hesitance to participate in the grievance process either through educational institutions or at the
 11 Department . . . directly threaten and frustrate VRLC’s mission and purpose.” (*Id.*) Based on
 12 these allegations, SurvJustice and Victim Rights Law Center have plausibly alleged a frustration
 13 of their missions as a result of the 2017 Guidance.

14 Plaintiff Equal Rights Advocates has similarly pleaded a frustration of its mission due to
 15 the 2017 Guidance. As part of its stated mission, Equal Rights Advocates “counsels and
 16 represents women who have been victims of sexual harassment and/or sexual assault in matters
 17 pursuant to Title IX.” (*Id.* at ¶ 24.) Equal Rights Advocates alleges that the changes to the
 18 Department’s Title IX enforcement policy have made it more difficult to obtain beneficial
 19 outcomes for its clients. Specifically, Equal Rights Advocates alleges that the policy change
 20 permitting schools to offer appellate rights to only the accused “inhibit[s] ERA’s ability to obtain
 21 redress and achieve results for its clients.” (*Id.* at ¶ 27.) Equal Rights Advocates’ allegations,
 22 coupled with its alleged diversion of resources (discussed below), is sufficient to establish
 23 frustration of its mission. *See El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Rev.*,
 24 959 F.2d 742, 748 (9th Cir. 1982) (organizations “established to assist Central American refugee
 25 clients” suffered injury in fact where “their efforts to obtain asylum and withholding of
 26 deportation in immigration court proceedings” were frustrated by defendant’s policy and required
 27 a diversion of resources).

28 //

1 **ii. Diversion of Resources**

2 “[A] diversion-of-resources injury is sufficient to establish organizational standing at the
3 pleading stage, even when it is ‘broadly alleged.’” *Nat’l Council of La Raza v. Cegavske*, 800
4 F.3d 1032, 1040 (9th Cir. 2015) (quoting *Havens*, 455 U.S. at 379). Here, Plaintiffs have
5 sufficiently pleaded a diversion-of-resources injury to survive a motion to dismiss.

6 SurvJustice alleges that the 2017 Guidance has required it to divert resources by: (i)
7 increasing the number of its “student rights trainings at college and university campuses”; (ii)
8 “devot[ing] significant staff time to reviewing and understanding the 2017 Title IX policy in order
9 to advise clients in ongoing campus investigations and advocate on their behalf”; and (iii)
10 spend[ing] additional staff time and resources that it has not had to spend in the past attempting to
11 get school officials to respond to a survivor’s complaint of sexual violence.” (Dkt. No. 23 at ¶¶
12 16-18, 21.) Similarly, Equal Rights Advocates alleges that it has “divert[ed] staff time and
13 resources away from core programmatic activities . . . in order to step up its efforts to assist
14 victims of sexual harassment and assault in educational settings obtain redress,” due to the 2017
15 Guidance. (*Id.* at ¶ 26.) Equal Rights Advocates’ diversion of resources includes “launch[ing] a
16 national initiative to End Sexual Violence in Education” that expands Equal Rights Advocates’
17 counseling program, re-designs its intake process, and “establish[es] a network of attorneys to
18 provide pro bono counseling and other assistance to victims of sexual harassment and assault in
19 schools.” (*Id.*) The 2017 Guidance has required Victim Rights Law Center “to spend additional
20 staff time and resources that it has not had to spend in the past attempting to get school officials to
21 respond [to its clients’ complaints].” (*Id.* at ¶ 33.) Furthermore, Victim Rights Law Center has
22 devoted “staff time to reviewing and understanding the 2017 Title IX policy in order to advise
23 clients in ongoing campus investigations,” thereby reducing “the amount of time that it has
24 available to provide legal services, including work on ongoing civil litigation.” (*Id.* at ¶ 34.)

25 Defendants argue that Plaintiffs have failed to show that their alleged diversion of
26 resources was necessary to avoid “some other injury.” (Dkt. No. 40 at 10) (citing *La Asociacion*
27 *de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)
28 (noting that a plaintiff must “show that it would have suffered some other injury if it had not

1 diverted resources to counteracting the problem.”). Avoidance of “some other injury” is
2 sufficiently alleged, however, where an organization contends that the challenged policy required
3 it to divert resources it “otherwise would spend in other ways” to further its mission. *El Rescate*,
4 959 F.2d at 748 (“The allegation that [defendant’s] policy frustrates [plaintiff-organizations’]
5 goals and requires the organizations to expend resources in representing clients they otherwise
6 would spend in other ways is enough to establish standing.”) (citing *Havens*, 455 U.S. at 379); *see*
7 *also Smith*, 358 F.3d at 1105 (allegations of diversion of resources sufficient to survive motion to
8 dismiss where plaintiff-organization “specifically stated in its complaint that ‘in order to monitor
9 the violations and educate the public regarding the discrimination at issue, [plaintiff] has had (and,
10 until the discrimination is corrected, will continue) to divert its scarce resources from other efforts
11 to [further its mission]”).

12 Plaintiffs have sufficiently alleged that the 2017 Guidance has required them to divert
13 resources that otherwise “would have been spent on some other activity that advances their goals.”
14 *See Nat’l Council of La Raza*, 800 F.3d at 1040 (finding organizational standing where plaintiffs
15 were not “simply going about their ‘business as usual,’ unaffected by [defendant’s] conduct.”).
16 Because there is no dispute that Plaintiffs have met the other two prongs of the standing inquiry—
17 causation and redressability—Plaintiffs have adequately alleged standing at the pleading stage
18 with respect to their APA and *ultra vires* causes of action. *See Lujan*, 504 U.S. at 561 (“At the
19 pleading stage, general factual allegations of injury resulting from the defendant’s conduct may
20 suffice, for on a motion to dismiss we presume that general allegations embrace those specific
21 facts that are necessary to support the claim.”) (internal quotation marks and citation omitted).

22 Accordingly, the Court denies Defendants’ motion to dismiss the first and second causes of
23 action for lack of standing.

24 **B. Fifth Amendment Claim**

25 Defendants challenge Plaintiffs’ prudential standing with regard to the third cause of action
26 under the Due Process Clause of the Fifth Amendment, arguing that Plaintiffs “do not allege that
27 Defendants discriminated against *them* on the basis of sex,” but “[r]ather, they allege that
28 Defendants discriminated against women.” (Dkt. No. 40 at 23.) Thus, Defendants insist the claim

1 must be dismissed because Plaintiffs are resting their claim for relief on the legal rights of third
2 parties but have failed to plead facts supporting third party¹³ or associational¹⁴ standing. The
3 Court agrees.

4 Plaintiffs' allegations do not discuss gender discrimination against Plaintiffs in their
5 capacity as organizations, but more generally allege that the 2017 Guidance discriminates against
6 women in violation of the equal protection guarantee under the Due Process Clause of the Fifth
7 Amendment. (Dkt. No. 23 at ¶¶ 135-40.) Plaintiffs do not, however, invoke associational or third
8 party standing to litigate this claim on behalf of their female members or clients. Instead,
9 Plaintiffs reiterate the same allegations set forth in support of their own organizational standing.¹⁵
10 (*See id.* at ¶ 140) ("As a result of Defendants' unlawful actions, Plaintiffs have been harmed and
11 their missions frustrated, as outlined more fully in paragraphs 10-34 above.") Those allegations
12 are insufficient for their equal protection claim, however, because Plaintiffs are not seeking to
13 vindicate their *own* rights as an organization, but the constitutional rights of women in general.¹⁶
14 *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[E]ven when the plaintiff has alleged injury
15 sufficient to meet the 'case or controversy' requirement, [the Supreme] Court has held that the
16 plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief
17 on the legal rights and interests third parties.").

18
19 ¹³ A plaintiff asserting third party standing "must show his own injury, a close relationship
20 between himself and the parties whose rights he asserts, and the inability of the parties to assert
21 their own rights." *McCullum v. Cal. Dep't. of Corr.*, 647 F.3d 870, 879 (9th Cir. 2011).

22 ¹⁴ "[A]n association has standing to bring suit on behalf of its members when: (a) its members
23 would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are
24 germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested
25 requires the participation of individual members in the lawsuit." *United Food & Commercial
26 Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996) (internal quotation marks
27 and citation omitted).

28 ¹⁵ At oral argument on July 19, 2018, Plaintiffs suggested that the complaint's allegations were
sufficient to *infer* third-party standing based on the Plaintiff-organizations' close relationship with
women. The Court is not persuaded.

¹⁶ The Court need not consider whether the "zone of interests" test set forth in *Lexmark Int'l v.
Static Control Components, Inc.*, 124 S. Ct. 1377 (2014) is applicable to the prudential standing
issue raised here. In *Lexmark*, the Supreme Court did not address the issue of third-party standing.
See 124 S. Ct. at 1387 n.3; *see also Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1118 n.9 (9th
Cir. 2015) ("conclud[ing], in unison with all other courts to have spoken on the issue [after
Lexmark], that the third-party standing doctrine continues to remain in the realm of prudential
standing.").

1 Accordingly, the Court grants without prejudice Defendants' motion to dismiss the third
2 cause of action for lack of standing.

3 **II. Failure to State a Claim**

4 **A. APA Claim**

5 Under the APA, a plaintiff may seek judicial review of "final agency action for which there
6 is no other adequate remedy in a court." 5 U.S.C. § 704. Determining whether an agency action is
7 "final" is a two-step process. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The action must
8 first "mark the consummation of the agency's decisionmaking process." *Id.* (internal quotation
9 marks and citation omitted). Next, "the action must be one by which rights or obligations have
10 been determined, or from which legal consequences will flow." *Id.* at 178 (internal quotation
11 marks and citation omitted). Defendants argue that the 2017 Title IX policy does not constitute
12 final agency action, but is instead merely "guidance" and is therefore non-reviewable under the
13 APA.

14 In determining whether the challenged agency action is "final" under the first prong of the
15 *Bennett* test, the Court must "look to see whether the agency has rendered its last word on the
16 matter." *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 984 (9th Cir. 2006)
17 (internal quotation marks and citation omitted). In doing so, the Court must consider "the effect of
18 the action and not its label." *Id.* at 985 (internal quotation marks and citation omitted). Thus,
19 "finality is to be interpreted in a pragmatic way." *Oregon v. Ashcroft*, 368 F.3d 1118, 1147 (9th
20 Cir. 2004) (internal quotation marks and citation omitted).

21 The 2017 Letter notes that it "does not add requirements to applicable law," and that it
22 "intends to implement [a revised Title IX policy] through a rulemaking process that responds to
23 public comment." 2017 Letter at 2. Likewise, the 2017 Q&A states, in pertinent part:

24 The Department of Education intends to engage in rulemaking on
25 the topic of schools' Title IX responsibilities concerning complaints
26 of sexual misconduct, including peer-on-peer sexual harassment and
27 sexual violence. The Department will solicit input from stakeholders
28 and the public during that rulemaking process. In the interim, these
questions and answers—along with the [2001 Guidance] previously
issued by [OCR]—provide information about how OCR will assess
a school's compliance with Title IX.

1 2017 Q&A at 1. Nonetheless, the Department’s stated intention to engage in future rulemaking
 2 through notice and comment is not dispositive as to whether the 2017 Guidance reflects the
 3 consummation of the Department’s decision-making process regarding OCR’s *current* Title IX
 4 enforcement policy. *See Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th
 5 Cir. 2014) (“[A]n agency’s characterization of its action . . . is not necessarily dispositive, and
 6 courts consider whether the practical effects of an agency’s decision make it a final agency
 7 action”). In other words, because the 2017 Guidance consummates the Department’s decision to
 8 rescind the previous guidance and thereby effect several substantive changes, it reflects a
 9 definitive statement regarding the Department’s current Title IX enforcement policy. Whether the
 10 Department intends to engage in future rulemaking does not affect the finality of that particular
 11 decision. *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 593 (9th
 12 Cir. 2008) (rejecting defendant’s argument against finality that “conflate[d] one . . . decision with
 13 a future yet distinct administrative process.”).

14 The Court next considers whether the action is “one by which rights or obligations have
 15 been determined, or from which legal consequences will flow.” *Bennett*, 520 U.S. at 178 (internal
 16 quotation marks and citation omitted). Similarly, the Court need not blindly accept that the 2017
 17 Guidance “does not add requirements to applicable law” merely because the documents say so.
 18 *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000) (rejecting as
 19 “boilerplate” a disclaimer contained in EPA guidance documents stating that the “policies set forth
 20 in this paper are intended solely as guidance, do not represent Agency action, and cannot be relied
 21 upon to create rights enforceable by any party.”). Instead, relevant considerations in this regard
 22 include: (i) whether the agency action has a “direct and immediate effect on the complaining
 23 parties,” (ii) “whether it has the status of law,” and (d) “whether it requires immediate
 24 compliance.” *Ashcroft*, 368 F.3d at 1146-47 (internal quotation marks and citation omitted).
 25 Although it is a close call, drawing all inferences in Plaintiffs’ favor, the 2017 Guidance does not
 26 satisfy the second *Bennett* prong.

27 Plaintiffs contend that if schools do not comply with the Department’s guidance, they risk
 28 an enforcement action by OCR and loss of federal funding. Plaintiffs also allege that some

1 schools have responded accordingly, citing the 2017 Guidance as the impetus for revising their
2 Title IX policies. (Dkt. No. 23 at ¶¶ 116-117.) Defendants argue that the 2017 Guidance
3 constitutes a “bare statement of the agency’s opinion’ and does not produce legal consequences.”
4 (Dkt. No. 40 at 24) (quoting *Fairbanks*, 543 F.3d at 593-94). The Court agrees.

5 The 2017 Letter states that “the Department’s enforcement efforts proceed from Title IX
6 itself and its implementing regulations.” 2017 Letter at 2. And although the Court need not
7 accept that assertion on its face, *see Appalachian Power Co.*, 208 F.3d at 1022-23, the direct effect
8 of the 2017 Guidance does not suggest otherwise. The 2017 Q&A states that the guidance
9 “provide[s] information about how [the Department’s Office of Civil Rights] will assess a school’s
10 compliance with Title IX” for enforcement purposes, however, it does not suggest that schools are
11 immediately required to comply with the Department’s guidance or else face legal consequences.
12 2017 Q&A at 1. Rather, the plain language of the 2017 Guidance suggests just the opposite—
13 legal consequences continue to flow only from a school’s noncompliance with Title IX and its
14 implementing regulations, and the guidance merely provides “information” for schools regarding
15 how the Department’s Office of Civil Rights will assess compliance with *those* existing laws.
16 Therefore, if a school is in compliance with Title IX and its regulations, it need not change its
17 policies in response to the 2017 Guidance. Plaintiffs plausibly allege that some schools have done
18 just that; however, voluntarily changing a policy in response to an agency’s nonbinding
19 enforcement guidance is not the same as being required to do so by the guidance itself.

20 Nor does the 2017 Guidance suggest that it creates new obligations for schools. The
21 language is instead discretionary, and largely *relieves* schools of previous obligations under the
22 Rescinded Guidance. Plaintiffs’ reference to “mandatory language” in the 2017 Guidance as
23 evidence of its legal effect is unavailing. Simply put, if a school disagreed with the 2017
24 Guidance and chose not to follow it, it would suffer no legal consequences as long as it continued
25 to comply with Title IX and its implementing regulations.

26 At the hearing on July 19, 2018, Plaintiffs raised a new argument that the 2017 Guidance
27 creates legal consequences—and thus satisfies the second prong of *Bennett*—because it provides
28

1 safe harbor from deliberate indifference claims. The Court requested supplemental briefing from
2 the parties on that specific issue.¹⁷ (*See* Dkt. No. 67 at 42-43; 84-85.)

3 The gravamen of Plaintiffs’ supplemental argument is that a school could rely on its
4 compliance with the 2017 Guidance to defend against a private right of action in which the
5 plaintiff claimed that the school was deliberately indifferent to discrimination. (*See* Dkt. No. 68 at
6 5) (citing *U.S. Army Corps of Eng. v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016)). Thus, in
7 Plaintiffs’ view, a school’s compliance with the 2017 Guidance provides the type of “safe harbor”
8 recognized by the Supreme Court in *Hawkes* as giving rise to legal consequences sufficient to
9 satisfy the second prong of *Bennett*. The Court disagrees.

10 The challenged agency action in *Hawkes* stemmed from a U.S. Army Corps of Engineers’
11 jurisdictional determination designating a particular waterway as within the scope of the Clean
12 Water Act. 136 S. Ct. at 1813. As relevant here, the Supreme Court concluded that the
13 jurisdictional determination met *Bennett*’s second prong, and in doing so discussed “the effect of
14 an approved [jurisdictional determination] stating that a party’s property does not contain
15 jurisdictional waters—a ‘negative’ [jurisdictional determination] in Corps parlance.” *Id.* at 1814.
16 The *Hawkes* Court noted that “such a [jurisdictional determination] will generally bind the Corps
17 for five years.” *Id.* Because an approved jurisdictional determination was thus “binding on the
18 Government and [would] represent the Government’s position in any subsequent Federal action or
19 litigation concerning that [jurisdictional] determination,” the negative jurisdictional determination
20 created a safe harbor from civil enforcement proceedings brought by the Government under the
21 Clean Water Act against a property owner whose property fell within the scope of the
22 jurisdictional determination. *Id.* The *Hawkes* Court deemed such safe harbor from liability “a
23 legal consequence[] satisfying the second *Bennett* prong.” *Id.* (internal quotation marks and
24 citation omitted).

25 _____
26 ¹⁷ Plaintiffs’ supplemental papers set forth additional arguments beyond the scope of the discrete
27 issue on which the Court requested briefing. (*See generally* Dkt. No. 68 at 5-11.) Defendants
28 argue that Plaintiffs’ additional arguments “constitute[] unauthorized supplementary material” in
violation of Civil Local Rule 7-3(d). (Dkt. No. 70 at 6.) The Court agrees, and will only consider
Plaintiffs’ supplemental argument related to the issue of safe harbor from deliberate indifference
claims.

1 *Hawkes* does not help Plaintiffs. First, and as previously discussed, the 2017 Guidance is
 2 not binding. Further, it does not create the kind of complete immunity from suit discussed in
 3 *Hawkes*. The situation contemplated in *Hawkes*—where a defendant-property owner could rely
 4 entirely on a negative jurisdictional determination as providing safe harbor—does not exist here.
 5 A school defending a deliberate indifference claim under Title IX could not simply point to its
 6 compliance with the 2017 Guidance and escape liability. As Defendants note, courts in this
 7 district have clearly held that while compliance or noncompliance with Department guidance is a
 8 consideration in deliberate indifference claims, it is not legally dispositive. (*See* Dkt. No. 70 at 7)
 9 (citing *Moore v. Regents of the Univ. of Cal.*, No. 15-cv-05779-RS, 2016 WL 4917103, at *3
 10 (N.D. Cal. Sept. 15, 2016) (“Adherence to the [Dear Colleague Letter] might be good policy, but
 11 failure to adhere, standing alone, does not constitute deliberate indifference.”); *Karasek v. Regents*
 12 *of the Univ. of Cal.*, No. 15-cv-03717-WHO, 2015 WL 8527338, at *14 (N.D. Cal. Dec. 11, 2015)
 13 (“Plaintiffs do not cite, and I have not found, any case in which a plaintiff has successfully relied
 14 on the [Dear Colleague Letter] to establish deliberate indifference under Title IX.”). The Court
 15 finds this authority persuasive and on point as to whether Department guidance provides the same
 16 safe harbor from liability as the type of binding agency action at issue in *Hawkes*. It does not.

17 Accordingly, the 2017 Guidance does not constitute “final agency action” for purposes of
 18 review under the APA because it fails to satisfy the second *Bennett* prong. The Court need not
 19 address the existence of other adequate remedies or Plaintiffs’ cause of action for arbitrary and
 20 capricious action under 5 U.S.C. section 706.

21 **B. *Ultra Vires* Action**

22 Non-statutory review of agency action is available when the action is *ultra vires*; that is,
 23 when an agency has violated an unambiguous and mandatory legal requirement. *Leedom v. Kyne*,
 24 358 U.S. 184, 188-89 (1958). Plaintiffs allege that the Defendants “acted in excess of their legal
 25 authority” in adopting the 2017 Guidance. (Dkt. No. 23 at ¶ 134.) Defendants argue that
 26 Plaintiffs fail to plead any allegations describing how Defendants—who are charged with
 27 enforcing Title IX—acted outside their authority by “issuing guidance describing how [the
 28

United States District Court
Northern District of California

1 Department] will exercise [that] enforcement authority.” (Dkt. No. 40 at 28.) The Court agrees.
2 Plaintiffs provide wholly conclusory allegations in support of this claim.

3 In the absence of plausible allegations that Defendants acted outside their legal authority in
4 issuing the 2017 Guidance, the Court grants Defendants motion to dismiss the claim for *ultra vires*
5 action.

6 **CONCLUSION**

7 For the reasons set forth above, the Court GRANTS Defendants’ motion to dismiss. The
8 allegations are insufficient to show standing to bring an equal protection claim, the 2017 Guidance
9 does not constitute final agency action for purposes of an APA claim, and the allegations do not
10 plausibly suggest that Defendants acted outside their authority for the *ultra vires* action claim.
11 Plaintiffs’ equal protection and *ultra vires* action claims are dismissed without prejudice and with
12 leave to amend. The dismissal of Plaintiffs’ APA claim is with prejudice given that amendment
13 would be futile because the 2017 Guidance does not satisfy the second *Bennett* prong as a matter
14 of law. Plaintiffs’ amended complaint, if any, shall be filed within 30 days of the date of this
15 Order.

16 **IT IS SO ORDERED.**

17 Dated: October 1, 2018

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20 JACQUELINE SCOTT CORLEY
21 United States Magistrate Judge
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