APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Case: 22-3252- Order and Judgment dated August 7, 2023

FILED

United States Court of Appeals Tenth Circuit August 7, 2023

Christopher M. Wolpert Clerk of Court

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KENT THOMAS WARREN,

Plaintiff - Appellant,

v.

U.S. DEPARTMENT OF EDUCATION,

Defendant- Appellee

No. 22-3252
(D.C. No. 5:21-CV-04085-JAR-ADM) (D. Kan.)

ORDER AND JUDGMENT□

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

Before **HOLMES**, Chief Judge, **MATHESON**, and **McHUGH**, Circuit Judges.

Plaintiff-Appellant Kent Thomas Warren sought judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, of decisions by the Department of Education (the "Department") denying his applications for administrative discharge of student loans on which he has defaulted. The district court affirmed the agency's actions, and Mr. Warren appeals, proceeding pro se. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

The Department holds nine loans issued to Mr. Warren in conjunction with his enrollment at four universities from 2006 to 2014, including the University of Arizona, Northern Arizona University, Southern Illinois University, and Western Governors University ("WGU"). Those loans are now in default, and Mr. Warren applied to the Department seeking discharge under two

This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

separate programs.

First, on March 24 and April 24, 2017, he submitted loan discharge applications to the Department under the "false certification" (or "ability to benefit") program. Under this program, a borrower may be eligible for discharge if the school falsely certified the student's eligibility for the loan based on the student's ability to benefit from the training. The Department denied these applications on September 6, 2018.

Second, Mr. Warren applied at least twice for discharge under the "borrower defense" program. Under this program, a borrower may be eligible for discharge if the school engaged in certain misconduct, as set out by regulation. *See generally* 20 U.S.C. § 1087e(h); 34 C.F.R. §§ 685.400–411 (2023). On October 6, 2020, the Department sent Mr. Warren a decision denying his borrower defense application as to WGU. This is the only final agency decision on his borrower defense applications that is in the administrative record now before the court.[1] In its decision, the

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[1] The administrative record includes two borrower defense applications submitted by Mr. Warren, dated November 1 and November 6, 2018. Both list all four universities.
However, the record shows that the Department advised Mr. Warren it was processing his applications only for loans disbursed at WGU, and that he would need to submit separate applications to seek discharge related to loans for other schools. At some point the Department assigned additional discharge application ID numbers to Mr. Warren, but on December 20, 2018, it told him that "[a]s of right now, the only application that is on file is for Western

Department concluded that Mr. Warren's claims of misconduct by WGU failed to state a legal claim, and therefore denied his application for discharge.

Mr. Warren sought judicial review under the APA. He alleged the Department's actions were "not in accordance with law," citing 42 U.S.C. § 2000d (Title VI of the Civil Rights Act of 1964), 20 U.S.C. § 1414(b)(3)(A)(iii) (a subpart of the Individuals with Disabilities Education Act), and the Equal Protection Clause of the Fourteenth Amendment. R. vol. I at 27. He asked the court to declare his loans void and for other injunctive relief. The district court affirmed the Department's decision, and Mr. Warren appeals.

II. Discussion

This is at least the fifth case in which Mr. Warren has brought claims alleging he has been discriminated against based on his U.S. citizenship while seeking to obtain a teaching license without first completing a bachelor's

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Governors University. If there are other schools that you would like to apply for the Borrower Defense to Repayment, you will need to submit an application for each school." R. vol. IV at 314.

In any event, the Department takes the position that its October 6, 2020, denial of borrower defense discharge for loans incurred at WGU is the only final agency decision issued on Mr. Warren's borrower defense applications. Aplee. Br. at 4. The district court reached the same conclusion. R. vol. I at 156, 159 & n.13. We agree, and Mr. Warren has not argued otherwise.

degree.[2] His overarching claim is that he has not been granted either a bachelor's degree or a teaching license on the basis of "work and/or life experience," in lieu of completing university coursework, while non-citizens allegedly may pursue teaching occupations on the basis of such experience. *See generally* R. vol. I at 23–28. [3]

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[2] *See Warren v. Univ. of Ill.-Champaign/Urbana*, No. 19- 4094-SAC-ADM, 2020 WL 1043637, at *1, *3 (D. Kan. Mar. 4, 2020) (dismissing discrimination claims brought against universities Mr. Warren attended in which he alleged, in part, that they "subjected [him] to discrimination by reason of national origin through failure to provide non- discriminatory admissions requirements (work/life experience equitable to degree standing) to an United States citizen . . . comparable to that of a foreign national"); Order at 2, *Warren v. State of Kansas*, No. 18-4030-SAC-KGS, (D. Kan. June 8, 2018), ECF No. 15 ("the essence of [Mr. Warren's] complaint appears to be a contention that . . . Kansas has . . . discrimina[ted] against plaintiff as a United States citizen by refusing to issue [him] a teacher's license...."; ordering Mr. Warren to show cause why his complaint should not be dismissed); *Warren v. United States*, No. 17- 1784C, 2017 WL 6032312, at *1, *2 (Fed. Cl. Dec. 6, 2017) (dismissing claims against the United States alleging violation of constitutional rights because "federal regulations allow foreign nationals to qualify for employment through the use [of] specialized experience instead of formal degrees or training," and seeking "discharge of his student loans" and monetary damages); *Warren v. Warren*, No. 15-4878- SAC, 2015 WL 3440483, at *1, *3 (D. Kan. May 28, 2015) (dismissing action filed by Mr. Warren naming himself as defendant and alleging, in part, that Kansas's "state licensing of teachers is discriminatory" against United States citizens).

[3] Because Mr. Warren proceeds pro se, we "liberally

Now before us in this appeal is Mr. Warren's APA claim seeking to set aside the Department's final agency actions, specifically its September 6, 2018, denial of his false certification/ability to benefit applications and its October 6, 2020, denial of his borrower defense application as to WGU. To the extent Mr. Warren seeks relief as to any other loan or decision by the Department, the record does not reflect any other final action subject to review, or that he has administratively exhausted any other requests for relief, and therefore any other claim or request is unripe. *See Ark Initiative v. U.S. Forest Serv.*, 660 F.3d 1256, 1261 (10th Cir.2011) ("Parties must exhaust available administrative remedies before the [agency] prior to bringing their grievances to federal court." (internal quotation marks omitted)).

For the reasons below, we affirm the district court's decision upholding the Department's denials of Mr. Warren's applications for administrative discharge.

A. APA Review

Our review of agency decisions under the APA is narrow and "very deferential to the agency." *Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1264 (10th Cir. 2020) (internal quotation marks

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construe" his filings, "but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

omitted). We presume agency actions are valid unless the party challenging them proves otherwise. *Id.* Matters of law are reviewed de novo while factual determinations are set aside only if unsupported by substantial evidence.

Trimmer v. U.S. Dep't of Lab., 174 F.3d 1098, 1102 (10th Cir. 1999). We sustain agency decisions unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Hays*, 956 F.3d at

1263.

In his Reply brief, Mr. Warren seems to concede that the Department was correct to deny his applications for loan discharge under both the false certification and borrower defense programs. *See* Aplt. Reply Br. at 3 ("[Mr.Warren] confirms that these [two types of applications] should not have been taken, let alone pursued in the manner they were presented. [Mr. Warren] does not deny the arguments presented to [the] U.S. Department of Education should have been declined.").

Although we deem his APA challenge effectively abandoned, we explain below why we will affirm the district court and uphold the agency's decisions and why Mr. Warren's claims are unavailing (even if not abandoned).

1. False Certification/Ability to Benefit

Pursuant to 20 U.S.C. §1087(c)(1), if a student borrower's "eligibility to borrow . . . was falsely certified by the eligible [educational] institution . . . then the Secretary [of Education] shall discharge the borrower's liability on the loan (including interest and collection fees) by repaying the amount owed . . . ." The governing regulation in effect when Mr. Warren applied for false certification discharge provided that "a student *has* the ability to benefit from the training offered by the school if the student received a high school diploma or its recognized equivalent prior to enrollment at the school." 34 C.F.R. § 682.402(e)(13)(iv) (2016) (emphasis added).

As Mr. Warren himself alleges, he graduated from high school prior to enrolling at any of the relevant universities, R. vol. I at 12, ¶11, and this is corroborated in the administrative record, R. vol. II at 605. Because he falls within the definition of a person able to benefit from the coursework he pursued, Mr. Warren was ineligible for false certification/ability to benefit discharge. *See* 34 C.F.R. § 682.402(e)(13)(iv) (2016). The Department's denial of his applications therefore was not arbitrary, capricious, or otherwise contrary to law.

2. Borrower Defense

The borrower defense provisions for discharge arise from the Higher Education Act, in which Congress provided that the Department of Education "shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan . . . ." 20 U.S.C.§ 1087e(h).[4] The relevant implementing regulation provides that for loans first disbursed prior to July 1, 2017, a borrower defense includes "any act or omission of the school attended . . . that relates to the making of the loan . . . or the provision of educational services . . . *that would give rise to a cause of action against the school under applicable State law*." 34 C.F.R. § 685.206(c)(1) (2020) (emphasis added).

Mr. Warren, who bears the burden of showing the Department acted contrary to law, *Hays*, 956 F.3d at 1264, has not identified any state-law cause of action to support his borrower defense application. In fact, he emphasizes that his claims are based only on federal law. *See* Aplt. Reply Br. at 5. Because he does not identify any state law violation arising from WGU's actions to support his borrower defense application under the governing regulation, he has not shown the Department's action was arbitrary, capricious, or contrary to law.

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[4] It is undisputed that Mr. Warren's WGU loan was a direct loan to which the borrower defense program could apply.

Moreover, even if we were to construe Mr. Warren's allegations of discrimination as potentially supporting his borrower defense application, his argument fails. Mr. Warren's main premise is that non-citizens are treated more favorably than himself and other citizens who are seeking a degree and/or a teaching license. But neither his own allegations nor anything in the record support his theory. Mr. Warren cites and relies on scattered federal immigration statutes, regulations, and a related Federal Register entry. *See* Aplt. Br. at 6–7 (citing 8 U.S.C. § 1182(a), 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), and Labor Certification for the Permanent Employment of Aliens in the United States, 69 Fed. Reg. 77377 (Dec. 27, 2004)). But these provisions relate to providing visas for non-citizens (particularly those seeking to work in the United States). These authorities do not control either how Kansas (or any other state) licenses its teachers, or how WGU (or any other school) evaluates "work and/or life experience." Neither Mr. Warren's factual allegations nor any evidence in the record show that WGU treated non-citizens more favorably than citizens or engaged in any other unlawful discrimination.[5] The Department's denial

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[5] Furthermore, as the Department points out, administrative regulations in Kansas, where Mr. Warren sought a teaching license, require all applicants to verify they have obtained a bachelor's degree, without distinction based on citizenship or national origin. *See* Kan. Admin.

of Mr. Warren's borrower defense application for failure to state a legal claim was therefore not arbitrary, capricious, or contrary to law.

B. Consitutional and Other Arguments

As noted above, we read Mr. Warren's Reply brief as abandoning his APA arguments. He instead focuses on arguing that his student loans "should never have been disbursed," and requesting that the loans "be declared void." Aplt. Reply Br. at 3, 4. To the extent this argument differs from his APA claim, it is unavailing. The only claim resolved in the district court and now pending in this appeal is Mr. Warren's APA challenge to the Department's decisions denying administrative discharge. The relief available on that claim, even if Mr. Warren had prevailed, would extend no further than for the court to set aside the agency actions. *See* 5 U.S.C. § 706(2). Mr. Warren has not identified any authority allowing the court to now declare the underlying loans (disbursed between 2007 and 2014) to be "void." Moreover, his request for such relief is based on his claim of illegal discrimination, but as explained in Part II.A.2, above, his allegations are unfounded.

As to Mr. Warren's constitutional equal

Regs. § 91-1-203(a)(1)(A). Indeed, "foreign applicants" must take additional steps to support evaluation of credentials obtained outside the United States and to show English proficiency. *See id.* § 91-1-204(e).

protection claim, he expressly withdrew that claim before the district court, and we will not revive it here. *See* R. vol. I at. 67–68; *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011) ("If [a legal] theory was intentionally relinquished or abandoned in the district court, we usually deem it waived and refuse to consider it.").[6]

III. Conclusion

Because Mr. Warren has not shown the Department's final actions to be arbitrary, capricious, or contrary to law, we affirm the district court's decision upholding the Department's September 6, 2018, and October 6, 2020, denials of his requests for discharge.

Mr. Warren's two "Motions for Entry of Final Judgment," filed July 10, 2023, and July 17, 2023, are denied as moot.

Entered for the Court

Jerome A. Holmes Chief Judge

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[6] Mr. Warren's passing references to "due process" are insufficient to raise a separate constitutional claim. *See United States v. Hardman,* 297 F.3d 1116, 1131 (10th Cir. 2002) ("Arguments raised in a perfunctory manner . . . are waived.").

APPENDIX B
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
Case No. 21-4085-JAR-ADM Memorandum and Order dated 10/24/2022

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

KENT THOMAS WARREN,

Plaintiff,

v.

U.S. DEPARTMENT OF EDUCATION,

Defendant.

Case No. 21-4085-JAR-ADM

MEMORANDUM AND ORDER

Plaintiff Kent Thomas Warren, who proceeds *pro se*, applied for discharge of nine student loans that are in default as a result of his failure to make payments. The loans are held by Defendant U.S. Department of Education ("the Department").

Plaintiff filed this administrative appeal, challenging the Department's decisions denying his applications for discharge. He asserts that his student loans should be declared void, citing 42 U.S.C. § 2000d and 20 U.S.C. § 1414(b)(3)(A)(iii), under either a false certification (ability to benefit) theory or the "borrower defense." The appeal is fully briefed and the Court is prepared to rule. As described more fully below, the Court affirms the Department's final agency decisions denying Plaintiff's applications for discharge.

I. Background

The following facts are undisputed and supported by the Administrative Record. Plaintiff attended four universities from 2006 to 2014: Southern Illinois University of Carbondale, University of Arizona, Northern Arizona University, and Western Governors University-Utah ("WGU"). The Department holds nine loans that are in default as a result of Plaintiff's failure to make payments as required by the executed promissory notes. Five of these loans are Direct

Stafford Loans. Two loans are Federal Family Education Loan Program ("FFELP") loans. The total balance on these loans as of February 15, 2022, is $33,135.

Plaintiff applied for two types of discharge of his student loans. First, Plaintiff submitted two applications for administrative discharge of his student loans based on false certification/ability to benefit on March 24, 2017, and April 24, 2017. The Department denied these applications for discharge on September 6, 2018. In its denial letter, the Department explained that Plaintiff did not qualify for false certification discharge because he had received a high school diploma prior to enrollment.[1] Because he had a high school diploma, the Department explained, he was an eligible borrower and the schools could not have falsely certified his eligibility unless he had some sort of physical, mental, or legal status or condition at the time of his enrollment.

Second, Plaintiff submitted at least two applications for discharge based on the borrower defense on November 1, 2018, and November 6, 2018. The Department denied Plaintiff's requests in connection with his enrollment at WGU on October 6, 2020, for "Failure to State a Legal Claim."[2] This is the only agency decision in the record adjudicating Plaintiff's borrower defense applications.

II. Standard

Because Plaintiff proceeds *pro se*, the Court construes his submissions liberally.[3] But the Court

does not assume the role of Plaintiff's advocate, and he still bears "the burden of alleging sufficient facts on which a recognized legal claim could be based."[4] Under a liberal

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[1] Doc. 14-3 at 1–2.

[2] Doc. 14-17 at 1–2.

[3] *See Requena v. Roberts*, 893 F.3d 1195, 1205 (10th Cir. 2018).

[4] *Id.* (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)).

construction, Plaintiff's Opening Brief seeks judicial review of the Department's final agency decisions denying his applications for discharge.[5] Plaintiff argues that requiring him to repay his student loans is not in accordance with law because he was discriminated against by the universities he attended due to his status as a United States citizen. Specifically, Plaintiff contends that he was not credited with work and/or life experience as special education and elementary education degree equivalencies, unlike noncitizens who are allowed such credit. Given the universities' discriminatory policies of denying him degrees based on his life and work experience, Plaintiff contends that his loans should be discharged and deemed void.

The Administrative Procedure Act ("APA") allows federal courts to review final agency decisions like the student loan discharge denials in this case.[6] The Court may set aside an agency action or finding if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[7] The Court may find that an agency decision is "arbitrary and capricious" if it "entirely failed to consider an important aspect of the problem," or if it "runs counter to the evidence before [it] or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[8] The scope of this review is narrow and the Court may not substitute its own judgment for that of the agency.[9] In considering Plaintiff's challenge, the Department's "decision is entitled to a presumption of regularity, and the

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[5] In his Opening Brief, Plaintiff expressly withdraws two other claims asserted in his Complaint—that the decisions violate the Equal Protection Clause and that the Department unduly delayed decision making on his applications. Because Plaintiff withdraws these claims, the Court does not consider them.

[6] 5 U.S.C. § 702; *see, e.g.*, *Price v. United States Dep't of Educ.*, 209 F. Supp. 3d 925 (S.D. Tex. 2016) (reviewing challenge to Department of Education decision denying discharge of student loans under the APA).

[7] *Id.* § 706(2)(A).

[8] *Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1263–64 (10th Cir. 2020) (alteration in original) (quoting *Ukeiley v. EPA*, 896 F.3d 1158, 1164 (10th Cir. 2018)).

[9] *Id.* at 1264; *see also Schreiber v. McCament*, 349 F. Supp. 3d 1063, 1069–70 (D. Kan. 2018) (citations omitted), *aff'd sub nom. Schreiber v. Cuccinelli*, 981 F.3d 766 (10th Cir. 2020).

burden of persuasion."[10] The Court considers only "the agency's contemporaneous explanation in light of the existing administrative record."[11]

III. Discussion

There are two final agency decisions at issue: the Department's September 6, 2018 decision denying Plaintiff's applications for discharge under a false certification/ability to benefit theory, and the Department's October 6, 2020 denial of his application under the borrower defense as to WGU. The Court finds that neither decision was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.

A. False Certification/Ability to Benefit Denial

The Department denied Plaintiff's false certification/ability to benefit applications because he held a high school diploma at the time he applied for his loans. Under the governing regulations, a borrower asserting false certification/ability to benefit cannot prevail if he has a high school diploma or GED.[12] The administrative record shows that Plaintiff had a high school diploma, and this was the stated basis for the Department's decision denying him discharge.

Plaintiff therefore fails to establish that the Department's September 6, 2018 discharge denial was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law.

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[10] *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1060 (10th Cir. 2014) (quoting *San Juan Citizens All. v. Stiles,* 654 F.3d 1038, 1045 (10th Cir. 2011)).

[11] *Hays Med. Ctr.*, 956 F.3d at 1263 (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019)).

[12] *See* 34 C.F.R. § 682.402(e)(13) (iv) ("[A] student has the ability to benefit from the training offered by the school if the student received a high school diploma or its recognized equivalent prior to enrollment at the school."). As for FFELP loans, a student does not have the ability to benefit if the school certified his eligibility *and* "[a]t the time of certification, the student would not meet the requirements for employment (in the student's State of residence) in the occupation for which the training program supported by the loan was intended because of a physical or mental condition, age, or criminal record or other reason accepted by the Secretary." *Id.* § 682.402(e)(13)(iii).

B. Borrower Defense Denial

The October 6, 2020 final agency action denied Plaintiff's application for a borrower defense discharge as to WGU only because he failed to state a legal claim. Therefore, the Court must confine its review to that decision. To the extent Plaintiff asserts a borrower defense based on the conduct of any other university he attended, such claims are not ripe for review.[13]

Plaintiff's WGU loan was a Direct Loan. The Higher Education Act ("HEA") provides that with respect to Direct Loans, the Department "shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under [the FDLP]."[14] Under this provision, the Department promulgated regulations that provide an opportunity for borrowers to obtain discharge if the school they attended engaged in misconduct. For loans disbursed prior to July 1, 2017, a borrower is eligible for such a discharge if "any act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational services for which the loan was provided that . . . would give rise to a cause of action against the school under applicable State law."[15]

Plaintiff alleges in his Opening Brief that the universities discriminated against him on the basis of his United States citizenship when he was denied teaching credentials and/or college credit based on his life and work experiences. Thus, the Court must

determine if it was arbitrary

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[13] Plaintiff's borrower defense application dated November 1, 2018, was assigned Application Number 01291344. The October 6, 2020 final agency decision for WGU reflects this application number. Plaintiff was notified by the Department on November 23, 2018, that his application would be processed for WGU only, even though he had listed multiple schools on the application, that each school requires a separate borrower defense application number, and that he needed to submit a separate application for each school. There are no other borrower defense decisions in the record other than the October 6, 2020 decision as to WGU. Doc. 14-17 at 1.

[14] 20 U.S.C. § 1087e(h).

[15] 34 C.F.R. § 685.206(c)(1).

and capricious or otherwise not in accordance with law for the Department to deny Plaintiff's borrower defense application for failure to state a legal claim in light of his allegations that WGU discriminated against him on the basis of his citizenship. Plaintiff cannot meet his burden of showing that this decision should be overturned under the APA.

First, as described above, the Department was required to consider whether WGU's alleged misconduct would give rise to a cause of action against the school under applicable State law.

Plaintiff currently resides in Kansas.[16] The Kansas Act Against Discrimination protects equal opportunities to all citizens without regard to race, religion, color, sex, disability, familial status, national origin or ancestry.[17] Citizenship is not a protected class. Also, Plaintiff is mistaken that Kansas teaching requirements are less onerous for foreign citizens than they are for United States citizens. In Kansas, a bachelor's degree is universally required for all initial teaching license applicants.[18] Foreign exchange teaching license applicants must satisfy different licensing requirements, including an official credential by an evaluator approved by the state board, "verification of employment from the local education agency, including the teaching assignment, which shall be to teach in the content area of the applicant's teacher preparation or to teach the applicant's native language," and "verification of the applicant's participation in the foreign exchange teaching program."[19] A foreign exchange teaching license is only renewable

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16 The Court acknowledge that WGU, the only university addressed by the Department's final agency action, is located in Utah. Plaintiff provides no authority that a cause of action based on the type of discrimination alleged by Plaintiff here would be available to him under Utah law.

17 K.S.A. § 44-1001.

18 K.A.R. § 91-1-203(a)(1)(A).

19 *See id.* § 91-1-203(g)(1)(C)–(D).

for a maximum of two additional school years.[20] Therefore, the Department's decision that Plaintiff's borrower defense failed to state a legal claim was not contrary to law.

Plaintiff's reliance on 42 U.S.C. § 2000d is misplaced even if the Department should have considered this federal law when denying Plaintiff's borrower defense application. This provision of Title VI of the Civil Rights Act states that: "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[21] While Plaintiff is correct that this provision of Title VI addresses unlawful discrimination in federally funded education programs. But just like Title VII, Title VI does not list citizenship as a protected class.[22] Indeed, Plaintiff's attempt to litigate this claim against the universities directly was dismissed in part for failure to state a claim because citizenship is not a protected class under Title VI.[23]

Plaintiff attempts to avoid this result by couching the alleged discrimination as based on national origin. National origin discrimination, which is unlawful under Title VI, is not the same as discrimination on the basis of citizenship.[24] Plaintiff's factual allegations do not assert his ancestry beyond the fact of his United States citizenship. He therefore fails to allege facts to

[20] *Id.* § 91-1-203(g)(2).

[21] 42 U.S.C. § 2000d.

[22] *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) ("[N]othing in the [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage."); *Pathria v. Univ. of Texas Health Sci. Ctr. at San Antonio*, 531 F. App'x 454, 455–56 (5th Cir. 2013) ("We have held that citizenship and national origin should not be conflated, and that citizenship is not a protected category under Title VI." (citing *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1059–60 (5th Cir. 1998))).

[23] *See Warren v. Univ. of Illinois-Champaign/Urbana*, No. 19-4094-SAC-ADM, 2020 WL 1043637, at *3 (D. Kan. Mar. 4, 2020).

[24] *Espinoza*, 414 U.S. at 95 & n.6; *see also*!*Cortezano v. Salin Bank & Tr. Co.*, 680 F.3d 936, 940 (7th Cir. 2012) ("Thus, national origin discrimination as defined in Title VII encompasses discrimination based on one's ancestry, but not discrimination based on citizenship or immigration status."); *Pathria*, 531 F. App'x at 456 (explaining that there is a difference between national origin and citizenship discrimination under Title VI) (citation omitted).

support a claim that he was subjected to national origin discrimination. Plaintiff's position is that foreign citizens are treated more favorably by the universities he attended than United States citizens. Because citizenship is not a protected class under Title VI, this provision would not render the final agency decision contrary to law even if the Department was required to consider it under the applicable regulations.

Plaintiff also cites 20 U.S.C. § 1414(b)(3)(A)(iii) for the proposition that the final agency actions here are not in accordance with law. This provision deals with evaluation procedures for children with disabilities as a prerequisite for special education classes and related services. It has no application to Plaintiff's claims in this case.

C. New Arguments in the Reply

Finally, the Court briefly addresses Plaintiff's assertion in the Reply that the Department's decisions run afoul of the Fourteenth Amendment, despite the fact that he explicitly withdrew that claim in the Opening Brief.[25] Plaintiff contends that the Department's focus on Kansas law ignores the equal protection and due process protections of the Fourteenth Amendment, which he asserts the Department violated by not permitting discharge of his student loans to schools that declined to credit his work and/or life experience as a valid means of expertise in becoming a teacher. As stated above, when considering Plaintiff's borrower defense applications, the Department was required to consider

whether WGU's alleged misconduct would give rise to a cause of action against the school under applicable State law. It was not arbitrary or capricious for the Department to deny Plaintiff's discharge applications for failure to meet this governing standard. Moreover, Plaintiff's new claim of a due process violation is based on conclusory allegations that the Department did not provide him with notice, an

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[25] Doc. 16 at 1.

opportunity for hearing, and an unbiased decisionmaker. The administrative record does not support these conclusory assertions.

Finally, Plaintiff asks in the Reply brief why his wages have not been garnished despite the denial of his discharge applications. As the Department states in its Response, it is not currently collecting against any borrowers due to student loan relief measures in place in response to COVID-19. The Department's collection efforts, or lack thereof, have no bearing on the narrow issue before this Court: whether the Department's final agency decisions are arbitrary and capricious, an abuse of discretion, or contrary to law. For all of the reasons explained above, the Court affirms the Department's final agency decisions denying Plaintiff's applications for discharge of his student loans.

IT IS THEREFORE ORDERED BY THE COURT that the U.S. Department of Education's decisions denying Plaintiff's applications for student loan discharge are **affirmed**.

IT IS SO ORDERED.

Dated: October 24, 2022

S/ Julie A. Robinson JULIE A. ROBINSON UNITED STATES DISTRICT JUDGE