No.

In the Supreme Court of the United States

DEPARTMENT OF EDUCATION, ET AL.,
PETITIONERS

v.

CAREER COLLEGES AND SCHOOLS OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Higher Education Act of 1965 (Education Act or Act), 20 U.S.C. 1070 *et seq.*, permits borrowers of federal student loans to assert defenses to their federal repayment obligations based on, *inter alia*, misconduct of the borrower's school. See 20 U.S.C. 1087e(h). The Act also directs the Secretary of Education to "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." *Ibid.*

For decades, the Department of Education has permitted borrowers to present such defenses directly to the Department prior to and during formal collection efforts. At issue in this case is a rule that refines the administrative processes the Department uses to review asserted defenses, including by strengthening the process for group resolution of defenses with common facts, in response to substantial backlogs and related problems that have impaired the Department's operations. In this suit brought by an association of schools in Texas, the Fifth Circuit suspended the implementation of those provisions of the regulation on a universal basis. The questions presented are:

1. Whether the court of appeals erred in holding that the Education Act does not permit the assessment of borrower defenses to repayment before default, in administrative proceedings, or on a group basis.

2. Whether the court of appeals erred in ordering the district court to enter preliminary relief on a universal basis.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are the United States Department of Education and Miguel Cardona in his official capacity as the Secretary of Education.

Respondent (plaintiff-appellant below) is Career Colleges and Schools of Texas.

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

Career Colleges & Schools of Texas v. *Department of Educ.*, No. 23-cv-433 (June 30, 2023)

United States Court of Appeals (5th Cir.):

In re Career Colleges & Schools of Texas, No. 23-50489 (June 30, 2023) (order issuing administrative stay)

Career Colleges & Schools of Texas v. *Department of Educ.*, No. 23-50491 (July 20, 2023) (order extending administrative stay)

Career Colleges & Schools of Texas v. *Department of Educ.*, No. 23-50491 (July 28, 2023) (order carrying administrative stay with the case)

Career Colleges & Schools of Texas v. *United States Department of Educ.*, No. 23-50491 (Aug. 7, 2023) (order issuing stay pending appeal)

Career Colleges & Schools of Texas v. *United States Department of Educ.*, No. 23-50491 (Apr. 4, 2024) (panel opinion)

Career Colleges & Schools of Texas v. *United States Department of Educ.*, No. 23-50491 (June 12, 2024) (order denying petition for rehearing)

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of Education and Miguel Cardona, Secretary of Education, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-64a) is reported at 98 F.4th 220. A prior order of the court of appeals is not published in the Federal Reporter but is available at 2023 WL 9864371. An order of the district court (App., *infra*, 65a-89a) is reported at 681 F. Supp. 3d 647.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2024. A petition for rehearing was denied on

June 12, 2024 (App., *infra*, 90a-91a). On August 29, 2024, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including October 10, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 92a-95a.

STATEMENT

A. Legal Background

1. The Department of Education administers various student loan programs under Title IV of the Higher Education Act of 1965 (Education Act or Act), 20 U.S.C. 1070 *et seq.* Those programs include the William D. Ford Federal Direct Loan Program (Direct Loans), 20 U.S.C. 1087a-1087j, under which the federal government lends money directly to students, as well as the Federal Family Education Loan Program (Family Education Loans), 20 U.S.C. 1071 to 1087-4, and the Federal Perkins Loan Program, 20 U.S.C. 1087aa-1087ii, under which non-federal lenders issued loans that qualified for certain Federal benefits. Although authority to issue new loans under the latter two programs has expired, many loans made under those programs remain outstanding. Borrowers generally may take out Direct Consolidation Loans to pay off non-Direct Loans and replace them with Direct Loans issued by the federal government. 34 C.F.R. 685.220.

The Education Act charges the Secretary of Education with implementing federal student loan programs. 20 U.S.C 1070(b). The Act grants the Secretary substantial "powers and responsibilities," including the power to "prescribe such regulations as may be neces-

sary to carry out the purposes" of the federal student loan programs, 20 U.S.C. 1082, and to issue regulations "governing the manner of operation of, and governing the applicable programs administered by, the Department," 20 U.S.C. 1221e-3; see 20 U.S.C. 3441, 3471. In addition to those general authorities, the Act specifically provides the Secretary with the ability to collect on defaulted loans through a variety of administrative enforcement mechanisms, see 20 U.S.C. 1080a(c)(4); 31 U.S.C. 3711(e) (credit bureau reporting); 5 U.S.C. 5514 (federal salary offset); 20 U.S.C. 1095; 31 U.S.C. 3720D (wage garnishment); 31 U.S.C. 3716, 3720B (federal payment offset). And the Act permits the Secretary to "compromise, waive, or release any right, title, claim, lien, or demand" acquired in the Secretary's performance of his "functions, powers, and duties" in administering the Department's portfolio of loans. 20 U.S.C. 1082(a)(6).

The Education Act also expressly "authorizes the Secretary to cancel or reduce loans" in "certain limited circumstances." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2363 (2023). Two such circumstances are relevant here. First, in 1993, Congress amended the Education Act to require the Secretary to "specify in regulations" "which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [Direct] [L]oan." Student Loan Reform Act of 1993, Pub. L. No. 103-66, Tit. IV, Subtit. A, ch. 1, sec. 4011, § 455, 107 Stat. 351 (20 U.S.C. 1087e(h)). The amended Act further provides that a borrower asserting such a defense may not "recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan." *Ibid.* Second, the Education

Act directs the Secretary to discharge the loan of a borrower who is unable to complete the program in which she enrolled "due to the closure of the [borrower's] institution." 20 U.S.C. 1087(c)(1). The statute further directs the Secretary to "subsequently pursue any claim available to such borrower against the institution and its affiliates and principals or settle the loan obligation pursuant to the financial responsibility authority under [20 U.S.C. 1099c]." 20 U.S.C.1087(c)(1).

2. a. The Department of Education first promulgated permanent regulations implementing the Direct Loan program in 1994. 59 Fed. Reg. 61,664 (Dec. 1, 1994) (1994 Rule). In the notice of proposed rulemaking, the Department stated that it would permit borrowers to "request that the Secretary exercise [the] long-standing authority" previously exercised under the Family Education Loan program "to relieve the borrower of his or her obligation to repay a loan on the basis of an act or omission of the borrower's school." 59 Fed. Reg. 42,646, 42,649 (Aug. 18, 1994); see 60 Fed. Reg. 37,768, 37,769-37,770 (July 21, 1995) (clarifying that the rule parallels the defenses to repayment available under the Family Education Loan Program). Doing so was consistent with Congress's mandate that Direct Loans "have the same terms, conditions, and benefits" as Family Education Loans. 20 U.S.C. 1087a(b)(2).

To that end, the 1994 Rule stated that a borrower could assert as a defense to repayment "any act or omission * * * that would give rise to a cause of action against the school under applicable State law." 59 Fed. Reg. at 61,696. The 1994 Rule specified that those defenses could be raised "[i]n any proceeding to collect on a Direct Loan," including, but not limited to, federal administrative offset and wage garnishment proceedings.

Ibid. The 1994 Rule also stated that, if a borrower's defense is successful, the Secretary "may initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies." *Ibid.*

b. In the early years of the Direct Loan program, relatively few borrowers presented repayment defenses to the Department. Even so, "throughout the history of the [original] borrower defense repayment regulation," the Department administratively evaluated and approved defenses presented to the Department, before default and outside of collection proceedings. 84 Fed. Reg. 49,788, 49,796 (Sept. 23, 2019) (2019 Rule); see Letter from Elieen Connor, Dir. of Litigation for Harvard Law School's Project on Predatory Student Lending, to Jean-Didier Gaina, U.S. Dep't of Educ. 6-41 (Aug. 2, 2018) (Comment Letter), https://www.regulations.gov/comment/ED-2018-OPE-0027-0011 (providing examples of instances in which the Department recognized such submissions in decisions rendered in October 1998, October 2000, February 2001, and February 2003).

Beginning in 2015—after revelations of widespread fraud led to the collapse of Corinthian Colleges, one of the country's largest chains of for-profit colleges—there was an unprecedented "flood of borrower defense claims." 81 Fed. Reg. 75,926, 75,926 (Nov. 1, 2016) (2016 Rule). In response, the Department promulgated a rule that (i) revised the set of acts or omissions that could be asserted as a defense to repayment to create a uniform federal standard that did not rely upon state law, *id.* at 75,935-75,959, and (ii) formalized administrative procedures that the Department would use to review bor-

rower defense claims submitted to it, *id.* at 75,959-75,964. Those procedures included a process for the Department to consider together defenses asserted by similarly situated borrowers. *Id.* at 75,964-75,974. In 2019, the Department again revised the set of acts and omissions the Department would recognize as a defense, as well as the procedures the Department would use to review borrowers' requests to be relieved of their repayment obligations based on those defenses. See 84 Fed. Reg. 49,788. The 2019 Rule reaffirmed the Department's authority to resolve borrower defense requests administratively before default, *id.* at 49,796, but eliminated the provision for consideration of such defenses on a group basis, *id.* at 49,798.

Unfortunately, the regulatory changes proved unable to handle the sustained influx of borrower claims. By June 2019, the Department's backlog of claims had grown to more than 210,000 pending applications, giving rise to a class-action suit alleging that the Department had unlawfully withheld—or was unreasonably delaying—adjudications of the pending claims. See *Sweet* v. *Cardona*, No. 19-cv-3674 (N.D. Cal.). To resolve that litigation and address its extensive backlog, the Department agreed to settle the class action and review the claims of remaining class members using streamlined procedures under specified deadlines. See Settlement Agreement, D. Ct. Doc. 246-1, *Sweet*, *supra*, (No. 19-cv-03674), https://perma.cc/XDG9-AHNH (*Sweet* Settlement). The settlement does not, however, govern the Department's consideration of any applications submitted after the settlement's final approval date (November 16, 2022), nor does it resolve the operational difficulties that led to the *Sweet* suit.

3. To address those continuing operational difficulties and prevent a similar backlog of claims from recurring, the Department promulgated a new rule to establish a more efficient process for reviewing pending and future requests for statutorily authorized loan discharges. 87 Fed. Reg. 65,904 (Nov. 1, 2022) (2022 Rule).

a. In the 2022 Rule's preamble, the Department explained that the 2019 Rule had left in place a patchwork of regulatory standards and procedures that could apply to the Department's review of a borrower's defense to repayment depending on a loan's disbursement date. 87 Fed. Reg. at 65,912; see 34 C.F.R. 685.206(c)(1) and (e)(2) (2020); 34 C.F.R. 685.222(b)-(d) (2020). The 2022 Rule replaces that patchwork with a uniform standard defining the acts and omissions that a borrower can assert as a defense to repayment, regardless of when the borrower's loans were first disbursed. 87 Fed. Reg. at 65,992-65,993. The rule specifies several categories of acts or omissions that can give rise to a defense to repayment, *id.* at 66,068-66,069, and provides that a borrower can obtain a loan discharge based on those asserted defenses if the Department concludes "by a preponderance of the evidence" that (i) the borrower's school committed an act or omission falling within the specified categories, (ii) the misconduct caused the borrower detriment, and (iii) the totality of the circumstances, including the "nature and degree of the acts or omissions" and the borrower's overall detriment, warrant a discharge. *Ibid.* The rule also eliminates procedural steps required by the 2019 Rule that proved impractical (if not infeasible) to implement, *id.* at 65,912, reinstated a process for efficiently considering submissions of a common defense among similarly situated borrowers on a group basis, *id.* at 65,937, and created a

process to screen facially deficient applications for relief so that the Department could focus its resources on defenses that were more likely to have merit, *id.* at 65,943.

Like the Department's prior regulations, the 2022 Rule provided that the Department may initiate appropriate proceedings to recoup funds from a school when its misconduct resulted in the discharge of the loan of a student at the school, 87 Fed. Reg. at 66,041, 66,072-66,073, so long as the "actions or omissions that led to" the Department's approval of a discharge based on a borrower defense "would also have violated the borrower defense regulations in effect when those loans were first distributed," *id.* at 65,913, 65,951.

b. The 2022 Rule also revised regulations that define when a student borrower is "unable to complete the program in which [such student] is enrolled due to the closure of the institution" for the purpose of reviewing requests for closed-school discharges under the Act. 20 U.S.C. 1087(c)(1); see 20 U.S.C. 1087e(a)(1), 1087dd(g)(1); 87 Fed. Reg. at 65,966, 66,049. Previously, those regulations specified that a borrower who attended a school that ceased providing educational instruction is eligible for loan discharge if the borrower "[d]id not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school" within a short period of time—either 120 or 180 days, depending on the date of the loan's disbursement—before the school closed. 34 C.F.R. 685.214(c)(1)(i)(B) and (c)(2)(i)(B) (2020). The 2022 Rule amended that regulation to provide that borrowers who attended a closed school would also be eligible for a closed-school discharge if the borrower "[d]id not complete the program of study at that school because" the

student withdrew from the now-closed school not more than 180 days before "the school had ceased to provide educational instruction for most of its students." 87 Fed. Reg. at 65,966, 66,061.

B. Proceedings Below

1. Respondent is a trade association for Texas-based, for-profit higher education institutions. App., *infra*, 66a. Five months after the 2022 Rule's promulgation, respondent brought suit against the Department and the Secretary in the United States District Court for the Western District of Texas and moved for a preliminary injunction.

The district court denied respondent's motion. App., *infra*, 65a-89a. Without addressing the merits, the court concluded that respondent had failed to establish irreparable harm that would warrant preliminary injunctive relief. *Id.* at 77a-89a. The court explained that respondent could not establish harm caused by the rule on behalf of a member school unless the Department first discharged loans to the school's students that would not have been discharged under prior regulations and then successfully recouped any lost funds from that school. *Id.* at 79a-80a. The court found that harm "too conjectural to support preliminary injunctive relief." *Id.* at 79a. While respondent also relied on what it asserted to be unrecoverable costs its member schools would incur in assuring compliance with the rule, the court held that respondent had failed to show that any such projected costs are "'more than an unfounded fear' or 'more than de minimis.'" *Id.* at 88a (citation omitted); see *id.* at 83a-88a. The court was also unpersuaded by respondent's reliance on asserted "uncertainty" about how the rule's provisions for closed-school discharges would operate and how that uncertainty would affect a

member school's plans to expand or consolidate programs or campuses. *Id.* at 82a (citation omitted).

2. Respondent filed a notice of appeal and requested an administrative stay of the rule as well as an injunction pending appeal. The court of appeals initially issued an administrative stay limited to respondent and its member schools. 23-50489 C.A. Doc. 16-1 (June 30, 2023). The court later granted respondent's motion for an injunction pending appeal and enjoined the rule on a universal basis. 23-50491 C.A. Doc. 42-1 (Aug. 7, 2023). The court ultimately reversed the district court's denial of the preliminary injunction. App., *infra*, 1a-64a.

The court of appeals held that respondent had adequately demonstrated irreparable harm because there was a substantial risk that at least one of respondent's member schools could be subject to recoupment for loans discharged under the rule's standards, and that its member schools were expending funds to avoid that risk. App., *infra*, 19a-28a.

Turning to the likelihood of success on the merits, the court of appeals held that respondent is likely to succeed in each of its challenges to the rule. App., *infra*, 28a-61a.

The court of appeals first held that respondent was likely to succeed on its contention that the Department lacks authority to review requests for an administrative discharge based on a borrower's defense to repayment and to discharge a borrower's loan when the Department finds a defense valid. App., *infra*, 30a-36a. The court acknowledged that the Department had recognized the validity of such claims in a number of prior instances, dating at least to 1998. *Id.* at 34a. But the court viewed the Education Act's language permitting borrowers to assert a "defense to repayment of a loan,"

20 U.S.C. 1087e(h), as limited to a defense raised "*after* collection proceedings have been instituted." App., *infra*, 32a.

The court of appeals next held that the Department's administrative procedures to assess borrower defenses and seek recoupment for discharged loans from the relevant schools were likely unlawful. App., *infra*, 44-48a. With respect to borrower defenses, the court viewed Section 1087e(h)'s reference to a borrower's recovering "in any *action* arising from or relating to a loan," to encompass only a lawsuit brought in court. *Id.* at 46a (citation omitted). The court of appeals likewise considered administrative recoupment procedures to be inconsistent with the Education Act and described them as improperly replacing conventional civil litigation between borrowers and schools. *Id.* at 46a-50a. In addition, the court declared that the portions of the rule that reinstated procedures to consider defenses of similarly situated borrowers as a group are not statutorily authorized and are "incompatib[le]" with the Federal Rules of Civil Procedure governing class actions in federal court. *Id.* at 53a; see *id.* at 50a-54a.[1]

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[1] The court of appeals also held that various aspects of the 2022 Rule are arbitrary and capricious. App., *infra*, 38a-44a, 50a-61a. The court held invalid the rule's articulation of the acts or omissions that can be asserted as borrower defenses on the theory that they are insufficiently specific and should have required borrowers to show that a school acted with knowledge or reckless disregard of the false or misleading nature of its representations. *Id.* at 38a-44a. The court further understood the rule to improperly permit the Department to discharge loans without a causal connection between the school's misconduct and the loan. *Id.* at 36a-38a. The court likewise held that the rule's new trigger date for school-closure discharges was unlawful based on the court's view that the rule would

As to the remaining preliminary injunction factors, the court of appeals held that borrowers with pending claims would not "be unfairly prejudiced or financially injured" by a preliminary injunction because the Department could continue to review and process applications for relief under the 2019 Rule's standards and procedures. App., *infra*, 61a.

The court of appeals thus concluded that the criteria for entering a preliminary injunction were satisfied. On that basis, it reversed the district court's decision and remanded the case to the district court with instructions to postpone the effective date of the challenged provisions of the rule pending final judgment. The court of appeals declined to limit its relief to respondent, or even more broadly to student loans affiliated with students who attended respondent's member schools. App., *infra*, 62a-63. Instead, the court relied on its understanding of the provision in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, allowing courts to "issue all necessary and appropriate process to postpone the effective date of an agency action" that is pending judicial review. App., *infra*, 62a (quoting 5 U.S.C. 705). The court reasoned that the relief it ordered the district court to enter "aligns with the scope of ultimate relief" available under 5 U.S.C. 706, which under circuit precedent "is not party-restricted and allows a court to 'set aside' an unlawful agency action" nationwide. App., *infra*, 62a.

3. The court of appeals subsequently denied rehearing en banc. App., *infra*, 90a-91a.

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allow for discharges even if the school does not actually close. *Id.* at 57a-58a.

REASONS FOR GRANTING THE PETITION

Congress granted the Department of Education broad authority to operationalize and administer the Direct Loan program, including to specify by regulation "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). Since the early days of that program, the Department has permitted borrowers to present those defenses to the Department to be resolved administratively. Indeed, courts have held that when borrowers assert such defenses, the Department has a non-discretionary duty to address them. See, *e.g.*, *Vara* v. *DeVos*, No. 19-cv-12175, 2020 WL 3489679, at *2 (D. Mass. June 25, 2020). The Department adopted the rule at issue here to address the intractable operational difficulties that gave rise to a massive backlog in claims and a class action settlement. By postponing that rule on a universal basis, the court of appeals has halted efforts to resolve problems that have plagued the Department's operations to the detriment of potentially hundreds of thousands of borrowers with no connection to this litigation.

The court of appeals' reasoning essentially invalidates the regime for assessing borrower defenses as it has existed since the Direct Loan program's inception. Notwithstanding the broad authority the Education Act vests in the Secretary to administer the program and contrary to the Department's longstanding interpretation, the court held that a borrower's defense to repayment may be asserted only in court, during a post-default collection proceeding—the equivalent of preventing credit card holders from disputing a fraudulent charge until the credit card company sues them to recover delinquent payments. Under that strained read-

ing of the Act, judicial, borrower, and taxpayer resources would be spent resolving hundreds of thousands of collection suits in which there is no real controversy because both the lender and the borrower agree that the borrower has a valid defense to repayment. And vulnerable borrowers who are subject to fraudulent schemes would be saddled with debt that they cannot discharge without first risking wage garnishment, credit-report damage, and offsets against federal benefits. That holding is without basis in the Education Act, and if the resulting scheme were viable at all, it would place extraordinary burdens on borrowers, the Department, and the federal Judiciary.

The court of appeals compounded its errors by refusing to limit its relief to the parties in this case. The court has barred invocation of the borrower defense and closed-school discharge portions of the rule by every Direct Loan borrower in the Nation—which includes millions of borrowers who have no relationship to respondent or its member schools. The universal scope of the ordered relief flouts the fundamental principle that equitable relief "must not be 'more burdensome to the defendant than necessary to redress' the plaintiff's injuries." *Labrador* v. *Poe*, 144 S. Ct. 921, 927 (2024) (Gorsuch, J., concurring in the grant of stay) (brackets and citation omitted).

Although the Department disputes the court of appeals' conclusions regarding the likely unlawfulness of other aspects of the 2022 Rule, the Department is seeking certiorari on the merits at this time only on the issues addressed by the court that would fundamentally inhibit the Department's ability to administer an important aspect of the Direct Loan program by administratively discharging loans of borrowers who have es-

tablished a valid defense to repayment. The merits of the remaining issues—including the Department's ability to seek recoupment from schools through administrative proceedings—will be subject to additional proceedings in the district court before final judgment, and may be affected by a decision from this Court, including a decision properly narrowing the sweeping relief ordered by the court of appeals.[2]

The questions presented warrant this Court's review now, however, given the significance of the court of appeals' novel and erroneous interpretation of the Education Act and the importance of the issues to the functioning of the Direct Loan program. This Court frequently grants plenary review in response to lower-court decisions invalidating or blocking important federal regulations or policies, especially on a universal basis. See, *e.g.*, *Garland* v. *VanDerStok*, 144 S. Ct. 1390 (2024) (No. 23-852); *Biden* v. *Nebraska*, 143 S. Ct. 477 (2022) (No.22-506 (22A444)); *Becerra* v. *Gresham*, 142 S. Ct. 1665 (2022) (No. 20-37). It should do the same here.

A. The Court Of Appeals' Decision Is Incorrect

The court of appeals concluded that the Department lacks statutory authority to consider borrower defenses

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[2] In addition, many of the court of appeals' conclusions are grounded in misunderstandings regarding the way in which the 2022 Rule functions, which the Department can clarify in further proceedings in district court and, if necessary, in the court of appeals. See, *e.g.*, App., *infra*, 58a (holding that the portions of the rule governing closed-school discharges improperly authorize discharge even if a school "still operates and educates 49 percent of students"); but see 87 Fed. Reg. at 65,966 (explaining that no closed-school discharges will be granted unless the borrower's school "has ceased overall operations").

to repayment administratively and prior to default, and that it cannot do so on a group basis. App., *infra*, 30a-36a, 45a-46a, 50a-54a. Those conclusions are incorrect and rest on illogical and unjustifiably narrow readings of the statutory text.

1. The court of appeals erred in holding that the Education Act prohibits the Department's regime for considering borrower defenses

a. The Education Act charges the Secretary of Education with "carry[ing] out" federal student-aid programs. 20 U.S.C. 1070(b). And it grants the Secretary substantial "powers and responsibilities" for doing so, including to "prescribe such regulations as may be necessary to carry out the purposes of" the student loan program. 20 U.S.C. 1082. Congress directed the Secretary to identify by regulation "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). And the Act further authorizes the Secretary to "compromise, waive, or release any right, title, claim, lien, or demand" acquired in the Secretary's performance of his "functions, powers, and duties" in administering the Department's portfolio of loans. 20 U.S.C. 1082(a)(6). Those statutory authorities permit borrowers to present defenses to repayment to the Department by seeking discharge prior to default; allow the Department to consider those defenses administratively; and enable the Department to provide for consideration of those defenses on a group basis in appropriate circumstances.

i. Since the inception of the Direct Loan program, the Department has understood that a "defense to repayment of a loan" is a defense to the "existing obligation to repay" the loan. 87 Fed. Reg. at 65,914. Accord-

ingly, throughout the history of the Direct Loan program, the Department has interpreted the statutory provisions to permit it to discharge a loan when the borrower proactively asserts recognized defenses in a request to the Department for discharge, without first having to default on the loan—and thus outside of any collection proceeding, in court or otherwise. 84 Fed. Reg. at 49,796; see Comment Letter (providing examples of instances in which the Department recognized such defenses in October 1998, October 2000, February 2001, and February 2003).

In common legal usage, the term "defense" can refer to any basis a person may assert to deny a legal obligation, not only to a response to a claim filed in court. For example, *Black's Law Dictionary* defines a "defense" in the context of a commercial instrument (similar to the loan agreements at issue here) as "a legally recognized basis for avoiding liability either on the instrument itself or on the obligation underlying the instrument." *Black's Law Dictionary* 419 (6th ed. 1990). The defense at issue here is expressly to "repayment"—a term used throughout the Education Act to refer to borrowers' obligation to make periodic payments on their loans. See, *e.g.*, 20 U.S.C. 1087e(b)(9) ("Repayment incentives"); 20 U.S.C. 1087e(d) ("Repayment plans"); 20 U.S.C. 1087e(e) ("Income contingent repayment"). As the Department has explained, the "concept of 'repayment' is widely understood to encompass not just borrowers in default but also those actively repaying their loans." 87 Fed. Reg. at 65,914. Thus, the Education Act refers to the grounds that borrowers may advance in contesting the obligation to make periodic payments on their loans.

Nothing in that language suggests that defenses to repayment may be asserted only after a borrower has

defaulted on her loan. Indeed, the Education Act has a separate provision governing "[r]epayment after default," 20 U.S.C. 1087e(d)(5), which demonstrates that Congress knew how to limit a provision's applicability to loans in default when it intended to do so. See *DHS* v. *MacLean*, 574 U.S. 383, 391 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.").

Congress's choice not to limit Section 1087e(h) to post-default circumstances makes good sense. Parties to contracts have long sought affirmative relief to determine whether they have a contractual obligation in certain circumstances or to establish the contract's unenforceability; they need not wait for the counterparty to take formal action to enforce the contract. See, *e.g.*, *Keener Oil & Gas Co.* v. *Consolidated Gas Util. Corp.*, 190 F.2d 985, 989 (10th Cir. 1951) ("[A] party to a contract is not compelled to wait until he has committed an act which the other party asserts will constitute a breach, but may seek relief by declaratory judgment and have the controversy adjudicated in order that he may avoid the risk of damages or other untoward consequences."); see also 26 C.J.S. *Declaratory Judgments* § 60 (2024). Congress, in establishing a loan program to benefit students in the United States, would not have placed that program's beneficiaries in a uniquely compromised and vulnerable position compared to borrowers in conventional consumer-lending contexts. Yet, under the court of appeals' holding, borrowers would be placed "in an unfair situation of either intentionally defaulting"—and thus facing potential wage garnishment, credit-report damage, and seizure of federal benefits—or continuing to make payments on a loan that both the Department and the borrower may agree "should be

discharged." 87 Fed. Reg. at 65,914; see 84 Fed. Reg. at 49,796 (noting problems with interpreting the Education Act to "provide borrowers with an incentive to default").

The history of 20 U.S.C. 1087e(h) and the Department's implementation of the related Family Education Loan program confirms the Department's reading. Congress mandated that Direct Loans "have the same terms, conditions, and benefits" as Family Education Loans. 20 U.S.C. 1087a(b)(2). When Congress enacted Section 1087e(h), it was aware that borrowers in the Family Education Loan program were not limited to raising defenses to repayment in post-default collection proceedings. Indeed, the year before enacting Section 1087e(h), Congress directed the Secretary to conduct a "study of the impact of fraud-based defenses on the Federal Family Education Loan Program." Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1403(a), 106 Stat. 817. That study was to include, among other things, "an analysis of statutory, regulatory, and case law regarding the use of fraud-based defenses against repayment of such loans" and an "estimate of the total number of borrowers *filing for relief* from repayment of such loans using a fraud-based defense." *Ibid.* (emphasis added). Congress thus understood that "fraud-based defenses" to repayment of a loan could be affirmatively raised by borrowers seeking relief from their repayment obligations. *Ibid.* In then mandating that the Direct Loan program must operate in the same manner as the Family Education Loan program, see 20 U.S.C. 1087a(b)(2), Congress understood that "defenses to repayment" of Direct Loans could likewise be raised outside the context of post-default collection efforts. See *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We

assume that Congress is aware of existing law when it passes legislation.").

ii. The Education Act also makes clear that the Department may assess borrower defenses in administrative proceedings invoked by a borrower's request. Indeed, Congress necessarily would have understood that the agency would assess borrower defenses because Congress mandated that the agency conduct a predeprivation hearing before disclosing a borrower's past-due loan to credit reporting agencies, see 20 U.S.C. 1080a(c)(4), 31 U.S.C. 3711(e), or attempting to collect on the loan through federal salary or payment offsets or wage garnishment, see 5 U.S.C. 5514 (federal salary offset); 20 U.S.C. 1095, 31 U.S.C. 3720D (wage garnishment); 31 U.S.C. 3716, 3720B (federal payment offset). Those predeprivation proceedings before the agency are a natural forum in which the borrower would assert any defense to repayment that would prevent the agency from pursuing the reporting or collection action. Accordingly, in the original borrower-defense regulations, the Department expressly provided that such defenses may be raised in administrative proceedings, "includ[ing], but not limited to," administrative wage garnishment and offset proceedings. See 59 Fed. Reg. at 61,696.

Even beyond the administrative proceedings specified by the Education Act, the Act provides ample authority for the Department to set forth other administrative procedures through which borrowers may assert defenses to repayment. In addition to directing the Secretary to promulgate regulations detailing the particular "acts or omissions" of an institution that a borrower may assert as a defense, 20 U.S.C. 1087e(h), Congress gave the Department broad authority to promulgate

regulations to administer and operationalize the student loan program, see, *e.g.*, 20 U.S.C. 1221e-3, 1082, 3441, 3474, and to "compromise, waive, or release any right, title, claim, lien, or demand" that the Secretary has acquired in administering student loans, 20 U.S.C. 1082(a)(6).

The Department exercised those authorities in 2016 to standardize procedures for borrowers to assert defenses outside of credit-reporting or collection proceedings, thereby seeking to ensure that the borrower-defense program could continue to operate efficiently in the wake of the for-profit school collapse. See pp. 5-6, *supra*; see 81 Fed. Reg. at 75,959-75,964. Pursuant to those procedures, just as private parties may resolve contractual disputes between themselves without recourse to litigation, the Department and the borrower may likewise resolve issues involving ongoing payment obligations between themselves. Such procedures are well within the scope of the Department's statutory authority.

iii. Those same statutory authorities likewise permit the Department to assess borrower defenses submitted on behalf of a group of similarly situated borrowers. See 87 Fed. Reg. at 65,936. Such group defenses are simply another procedural mechanism to allow the Direct Loan program to operate efficiently, and regulations standardizing those claims thus fall within the Department's general authority to administer the program. *Ibid.*

Congress effectively endorsed that view when it enacted a statute that expressly recognized that borrower defenses may be assessed on a group basis. In 2020—four years after the Department first promulgated standardized procedures for group borrower defense claims,

see 81 Fed. Reg. at 75,965—Congress amended the Education Act to provide that, if a student receives a Pell Grant and a loan to attend a school for a period of time, that time would not count against the 12-semester cap on Pell Grants if the loan is discharged "under [Section 1087e(h)] due to the student's successful assertion of a defense to repayment of the loan, including defenses provided to any applicable groups of students." FAFSA Simplification Act, Pub. L. No. 116-260, Div. FF, Tit. VII, sec. 703, § 401(d)(5)(B)(ii)(II)(bb)(CC), 134 Stat. 3198. That amendment demonstrates Congress's awareness of the Department's ability to consider borrower defenses asserted on behalf of a group and further supports the Department's understanding of its statutory authority to provide for such procedures. Cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (recognizing that later-enacted statutes may confirm or affect the meaning of an earlier statute, "particularly where Congress has spoken subsequently and more specifically to the topic at hand").

b. In holding that the Education Act does not authorize pre-default defenses to repayment and does not permit the Department to review such defenses administratively or on a group basis, the court of appeals adopted a view that no court and no Secretary has ever endorsed. That view rests on an unduly narrow interpretation of Section 1087e(h) and ignores the broader statutory context.

i. Despite the agency's decades-long understanding that the Direct Loan program permits the submission of borrower defenses to the agency prior to default, the court of appeals held that a defense to repayment can be asserted only "*after* collection proceedings have been instituted—*i.e.*, when the borrower has stopped making

his or her required payments" and the Department has instituted a formal "action" to collect on the delinquent loan. App., *infra*, 32a. That limitation appears nowhere in the statutory text.

The court of appeals premised its holding on its understanding of the statutory term "defenses," which the court limited to a borrower's response to a collection proceeding. App., *infra*, 31a-36a. The court adopted that cramped interpretation based on its view that "defenses"—as distinguished from "claims"—are typically a "reactive measure," rather than a "proactive" basis for relief. *Id.* at 32a. But whether a borrower asserts a defense to repayment in response to ongoing monthly bills or in response to a formal proceeding to collect on a delinquent loan, the borrower is "react[ing]" to the government's request for repayment. *Ibid.* There is thus no basis for the court's reductive assertion that a "defense to repayment" can be raised only during a legal proceeding. *Ibid.* (brackets omitted).

ii. The court of appeals imposed yet further limitations on the Direct Loan program by interpreting Section 1087e(h) to preclude any administrative assessment of borrower defenses, regardless of when such defenses are raised. The court rested that limitation on the statute's specification that borrowers may not "recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan." 20 U.S.C. 1087e(h); see App., *infra*, 46a. The court viewed that provision as "essentially contradict[ing]" the Department's position that it may independently determine the merits of a borrower's asserted defense to repayment because, according to the court, an "'action'" is "'a lawsuit brought in a court,' which is distinct

from an adjudication brought in an administrative tribunal." App., *infra*, 46a (citation omitted).

But while an "action" may refer to a proceeding brought in court, it may also refer to other forms of a "proceeding" or "legal process." See, *e.g.*, *Webster's Third New International Dictionary* 21 (1993) ("[A] deliberative or authorized proceeding"); 1 *The Oxford English Dictionary* 128 (2d ed. 1989) ("A legal process or suit"); *Random House Unabridged Dictionary* 20 (2d ed. 1993) ("[A] proceeding instituted by one party against another."). Those definitions encompass administrative proceedings. And the term "action" may also refer to the result of an administrative proceeding. Of significance to that understanding, Congress has defined the term "'agency action'" in the APA to include an agency "order," "relief," or the "equivalent or denial thereof," 5 U.S.C. 551(13), which encompasses the Department's decision on a request for discharge based on a borrower's valid defense.

Here, the context of the Education Act demonstrates that an "action" encompasses an administrative proceeding and the result of such a proceeding. Congress expressly provided the Department with authority to collect on defaulted loans through a variety of administrative means. See 5 U.S.C. 5514 (federal salary offset); 20 U.S.C. 1095, 31 U.S.C. 3720D (wage garnishment); 31 U.S.C. 3716, 3720B (federal payment offset). At a minimum, the phrase "any action arising from or relating to" a Direct Loan must encompass such administrative proceedings and their results. See 59 Fed. Reg. at 61,696 (original borrower defense regulation expressly providing that borrower defenses may be raised in administrative wage garnishment and offset proceedings).

The court of appeals also gave short shrift to the Department's broad regulatory authority to operationalize the Direct Loan program. See App., *infra*, 47a-48a. As explained, see pp. 20-21, *supra*, that authority likewise enables the Department to provide for administrative proceedings to facilitate the program. The court erred in dismissing those provisions because they do not "specifically mention[] the Department's authority to adjudicate claims." App., *infra*, 48a. That level of specificity is not required when the plain meaning of the broader language clearly encompasses such authority, as is the case here.

iii. The court of appeals' holding regarding the asserted lack of statutory authority to assess group defenses rests on the same failure to adequately consider Congress's grant of broad regulatory authority to the Department. Indeed, the court described its rejection of the Department's authority as a "necessary implication from [its] earlier conclusion that the Department lacks power to adjudicate claims" by borrowers for discharge administratively. App., *infra*, 51a. The court's error on its "earlier conclusion" thus infects its conclusion with respect to group claims as well. *Ibid.* Just as the authority to promulgate regulations for the operation and administration of the Direct Loan program permits the Department to provide for administrative assessment of borrower defenses, those authorities likewise permit the Department to create a group-based process for adjudicating the defenses of similarly situated borrowers.

2. The court of appeals' ordering of universal relief was improper

Separate and apart from the court of appeals' errors on the merits, the court seriously erred in barring im-

plementation of the challenged provisions of the 2022 Rule on a universal basis. Indeed, regardless of this Court's view of the merits, review would be warranted to narrow the vastly overbroad relief the court of appeals ordered. Because the government is not seeking review of every aspect of the court of appeals' ruling, some part of the relief the court ordered may ultimately remain in effect. But that relief should be appropriately limited. As Members of this Court have recognized, universal remedies are "inconsistent with longstanding limits on equitable relief and the power of Article III courts" and impose a severe "toll on the federal court system." *Trump* v. *Hawaii*, 585 U.S. 667, 713 (2018) (Thomas, J., concurring); see *DHS* v. *New York*, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring in the grant of stay).

Under Article III, "a plaintiff's remedy must be 'limited to the inadequacy that produced his injury.'" *Gill* v. *Whitford*, 585 U.S. 48, 66 (2018) (brackets and citation omitted). The Court recently granted a stay of an injunction to the extent it provided relief to nonparties. *Labrador* v. *Poe*, 144 S. Ct. 921 (2024). Justice Gorsuch described the Court's action as "remind[ing] lower courts of th[at] foundational rule" with respect to a "universal injunction" that swept far more broadly than necessary to prevent harms to the plaintiffs. *Id.* at 927 (Gorsuch, J., concurring in the grant of stay); see *Lewis* v. *Casey*, 518 U.S. 343, 360 (1996) (narrowing an injunction that "improper[ly]" "grant[ed] a remedy beyond what was necessary to provide relief to [the injured parties]").

Principles of equity reinforce that constitutional limitation. A federal court's authority generally must be grounded in the relief "traditionally accorded by courts

of equity" in 1789. *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). Such relief must be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). Thus, English and early American "courts of equity" typically "did not provide relief beyond the parties to the case." *Hawaii*, 585 U.S. at 717 (Thomas, J., concurring).

Universal relief is irreconcilable with those limitations. By definition, it extends to nonparties who were not "plaintiff[s] in th[e] lawsuit, and hence were not the proper object of th[e court's] remediation." *Lewis*, 518 U.S. at 358. And when a court awards relief to nonparties, it exceeds the relief "traditionally accorded by courts of equity" in 1789. *Grupo Mexicano*, 527 U.S. at 319; see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 424-445 (2017) (detailing historical practices).

Universal relief also creates other legal and practical problems. It circumvents the rules governing class actions in federal court. See Fed. R. Civ. P. 23. It encourages forum shopping. It empowers a single district court to pretermit meaningful litigation on the same issues in other courts—even in circuits where the court of appeals previously upheld the government action—thereby preventing further percolation of the issues before this Court decides whether to step in. See *Poe*, 144 S. Ct. at 927 (Gorsuch, J., concurring in the grant of stay). And it operates asymmetrically: the government must prevail in every suit to keep its policy in force, but plaintiffs can derail a federal program nationwide with just a single lower-court victory. *New York*, 140 S. Ct. at 601 (Gorsuch, J., concurring in the grant of stay).

In this case, the court of appeals sought to justify its universal remedy by pointing to the APA—specifically, to 5 U.S.C. 705, which, the court noted, authorizes a reviewing court to "issue all necessary and appropriate process to postpone the effective date of an agency action" pending judicial review. App., *infra*, 62a (quoting 5 U.S.C. 705).[3] But universal relief is improper under Section 705 just as a universal injunction is improper as a general matter.

First, Section 705 authorizes interim relief only "to the extent necessary to prevent irreparable injury." Universal relief running to every school in the nation that has students with Direct Loans is in no way called for to "prevent irreparable injury" to respondent and its member schools in Texas. Second, the final clause of Section 705, which the court of appeals only partially quoted, provides in full that a reviewing court "may issue all necessary and appropriate process to postpone the effective date of an agency action *or* to preserve status or rights pending completion of the review proceedings." 5 U.S.C. 705 (emphasis added). The statute thus provides courts with two options that may be appropri-

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[3] Notably, although the court of appeals purported to "postpone" the effective date of the rule, App., *infra*, 62a, the rule took effect (except as to respondent and its members) on July 1, 2023, more than a month before the court issued a universal stay pending appeal and nine months before the court directed the postponement of the rule's effective date. The court never explained how it could "postpone" the effective date of a rule that had already become effective. To "postpone" means "to defer to a future or later time; to put off; delay." *Webster's New International Dictionary* 1682 (1928) (def. 1); see *Black's Law Dictionary* 1389 (3d ed. 1933) ("To put off; defer, delay"). Section 705 thus requires that any postponement be contemporaneous with or predate the effective date of the challenged agency action.

ate during judicial review. *Ibid.* But here, in a suit brought by respondent on behalf of its members schools in Texas, postponing the effective date of the 2022 Rule on a universal basis was not "necessary and appropriate," given that schools elsewhere in the country are not members of respondent and cannot properly be represented by it.

There are some circumstances, of course, in which postponing the effective date of an agency action may be appropriate. For example, Section 705 provides for relief pending judicial review of any "agency action," which includes both orders and rules. 5 U.S.C. 551(8), (10), and (13). Some orders may affect only one or several parties. In that situation, a court could postpone the effective date of the agency action without extending relief to nonparties. But where a judicial challenge is to a rule that applies nationwide to many persons beyond the plaintiff, universal postponing of the rule's effective date would be contrary to Section 705's focus on "prevent[ing] irreparable harm" to the challenging party and to general principles of equity, and is therefore improper. A preliminary injunction for the benefit of the named plaintiffs, if otherwise warranted, would be sufficient to "prevent irreparable injury" to those plaintiffs and preserve any "status or right" they may have. 5 U.S.C.705. That is the type of tailored relief Congress intended under Section 705. As the Senate Report explained, the authority granted by what is now Section 705 "is equitable" and "would normally, if not always, be limited to the parties complainant." S. Rep. No. 1980, 79th Cong., 2d Sess. 43 (1946).

Even assuming, however, that 5 U.S.C. 705 would permit universal relief from application of a rule in some exceptional circumstance, the court of appeals provided

no justification for its failure to even consider the "foundational principles" discussed above that "constrain[]" a court's remedial discretion. *Poe*, 144 S. Ct. at 923 (Gorsuch, J., concurring in the grant of stay). Instead, the court stated that relief under Section 705 "aligns with" the ultimate scope of relief under 5 U.S.C. 706, which in the court's view "is not party-restricted." App., *infra*, 62a. In that sense, this case is the latest in a long string of Fifth Circuit decisions that openly disregard traditional equitable principles and hold that universal injunctions are the "default" remedy under the APA, without any need to consider the various equities in granting relief. See, *e.g.*, *Texas Med. Ass'n* v. *United States Dep't of Health & Human Servs.*, No. 23-40217, 2024 WL 3633795, *11-*12 (5th Cir. Aug. 2, 2024) (holding that the APA "empowers and commands courts to 'set aside' unlawful agency actions" on a universal basis (quoting *Texas* v. *Biden*, 20 F.4th 928, 957 (5th Cir. 2021), rev'd, 597 U.S. 785 (2022)); *Braidwood Mgmt., Inc.* v. *Becerra*, 104 F.4th 930, 952 (5th Cir. 2024) ("[W]e do not read our precedent to require consideration of the various equities at stake before determining whether a party is entitled to vacatur."), petition for cert. pending, No. 24-316 (filed Sept. 19, 2024); *Data Mktg. P'ship, LP* v. *United States Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022) ("The default rule is that vacatur is the appropriate remedy.").

The extent to which the court of appeals' approach departs from traditional equitable standards is particularly clear here, where a narrower injunction would obviously have provided complete relief from the irreparable harm that the court identified. The court held that respondent faced irreparable harm because its members were training staff to avoid misrepresentations

that might lead to the eventual discharge of borrowers' loans and then, potentially, future recoupment liability. See App., *infra*, 23a-25a. But even accepting that such internal measures by a school based on the speculative possibility of a future recoupment effort suffices to constitute irreparable injury, that injury could be completely avoided by enjoining the Secretary from seeking administrative recoupment against respondents' members for loan discharges that would not have been granted under earlier regulations, or even by enjoining the Secretary from applying the 2022 Rule's standards to borrower defenses based on allegations of misconduct involving respondent's members. Instead, the court enjoined the borrower-defense and closed-school discharge provisions in their entirety, even as to borrowers with no connection to respondents, and to schools that have not demonstrated that they face irreparable harm.

B. The Decision Below Warrants Further Review

The court of appeals' decision erroneously invalidating the Department's interpretation of its statutory authority presents an issue of exceptional importance to the federal government as the administrator of the Nation's largest consumer-lending portfolio. And the court's sweeping and improper relief halts the Department's efforts to address problems that have severely plagued the operation of the Direct Loan program for nearly a decade, frustrating borrowers' statutory right to assert defenses to repayment and subjecting vulnerable borrowers who face the prospect of delinquency and default (and thus non-judicial wage garnishment, credit-report damage, and seizure of federal benefits) to an indefinite state of financial uncertainty regarding their repayment obligations. Such vastly overbroad re-

lief blocking important federal regulations warrants this Court's review even in the absence of a circuit conflict. See, e.g., *Garland* v. *VanDerStok*, 144 S. Ct. 44 (2023) (No. 23A82); *Biden* v. *Nebraska*, 143 S. Ct. 477 (2022) (No. 22-506 (22A444)); *Becerra* v. *Gresham*, 142 S. Ct. 1665 (2022) (No. 20-37).

Under the regulatory framework that the court of appeals' decision leaves in place, the Department lacks the operational capacity to timely address a substantial and growing backlog of borrower-defense filings—a reality that gave rise in the past to a class action by hundreds of thousands of borrowers whose applications for relief had remained pending for extended periods of time (in some cases, for years). After years of costly litigation, the Department reached a settlement and agreed to process many unresolved claims using streamlined procedures on a specified timetable. See *Sweet* v. *Cardona*, 641 F. Supp. 3d 814 (N.D. Cal. 2022), appeals pending, No. 23-15049, No. 23-15050, No. 23-15051 (9th Cir. filed Jan. 17, 2023). Without the ability to implement the 2022 Rule's solutions to the difficulties underlying *Sweet*—including the ability to administratively assess borrower defenses on a group basis—the Department would be broadly hampered in resolving more than 150,000 applications currently pending, increasing the risk of yet another class action.

The implications of the court of appeals' novel and misguided interpretation of the Education Act also reach far beyond the court's already-expansive nationwide relief. Although the court's order leaves in place the Department's prior borrower-defense regulations, those regulations contain many of the features that the court held to be unlawful—including the ability of the Department to administratively assess borrower defenses

raised before default. The court's decision thus casts doubt upon the validity of the Department's decades-long practices, threatening still further disruptions to the Department's efforts to timely process borrower defenses. Unsurprisingly, institutions implicated by borrower defenses have taken notice of the court's decision and are already invoking it to challenge the Department's authority under earlier regulations as well. See, e.g., D. Ct. Doc. 56, at 17, 44-45, *DeVry Univ., Inc.* v. *United States Dep't of Educ.*, No. 22-cv-05549 (Aug. 7, 2024) (challenging the Department's ability to administratively assess borrower defenses under the prior borrower-defense regulations).

Taken to its logical conclusion, the court of appeals' decision would require wasteful litigation to resolve every asserted borrower defense—even when the Department and the borrower agree that the loan should be discharged—imposing significant burdens on borrowers, the Department, and the federal Judiciary. That threat and the growing backlog of unresolved borrower defense applications under the 2022 Rule impose current harms on the Department and on borrowers entitled to efficient resolution of their assertions of entitlement to relief. The Court should not permit the Fifth Circuit to continue its practice of contravening foundational equitable principles by ordering universal relief. This Court's review is warranted now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-50491

CAREER COLLEGES AND SCHOOLS OF TEXAS,
PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF EDUCATION;
MIGUEL CARDONA, SECRETARY, U.S. DEPARTMENT OF
EDUCATION, IN HIS OFFICIAL CAPACITY AS THE
SECRETARY OF EDUCATION, DEFENDANTS-APPELLEES

Filed: Apr. 4, 2024

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:23-CV-433

Before JONES, DUNCAN, and WILSON, *Circuit Judges*.

EDITH H. JONES, *Circuit Judge*:

An association of Texas career colleges and schools challenges the Department of Education's new regulations that will significantly facilitate certain student loan discharges while creating uncertainty, complexity and potentially huge liability for the association's members. The Rule overturns recent regulations issued by the previous Administration and upends thirty years of regulatory practice. The district court declined to issue a preliminary injunction against the Rule solely on the ba-

sis that the plaintiffs had not shown irreparable harm. Not only do we disagree with that finding, but we assess a strong likelihood that the plaintiffs will succeed on the merits in demonstrating the Rule's numerous statutory and regulatory shortcomings.[1] Therefore, we REVERSE the district court's order denying a preliminary injunction and REMAND with instructions to enjoin and postpone the effective date of the challenged provisions pending final judgment. Our stay pending appeal remains in effect until the district court imposes a preliminary injunction consistent herewith.

I. BACKGROUND

A. The 2022 Rule

On November 1, 2022, the Department promulgated a final rule that revamped various aspects of the federal student loan program, including provisions governing student loan discharges based on the acts, omissions, or

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[1] It is not this court's prerogative to assess regulatory motives. *Compare Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18, 97 S. Ct. 555, 565 n.18 (1977) (judicial inquiries into legislative or executive motives are ordinarily disfavored) *with Dep't of Com. v. New York*, 588 U.S.___, 139 S. Ct. 2551, 2575-76 (2019) (concluding that there was a "disconnect between the decision made and the explanation given" because the agency's purported reasoning "was more of a distraction" and pretextual). But given the manifest legal shortcomings of the challenged portions of this Rule, it seems to be of a piece with the Executive Branch's larger goal to sidestep, to the greatest extent possible, the Supreme Court decision holding Presidential student loan discharges illegal in *Biden v. Nebraska*, 600 U.S. ___, 143 S. Ct. 2355 (2023). *See generally* Andrew Gillen, *The State of Student Loan Forgiveness: April 2024*, CATO Institute (April 1, 2024, 5:34 PM) (cataloguing various recent programs to forgive or significantly reduce billions in students' loan obligations).

closures of higher education institutions. *See* Institutional Eligibility Under the Higher Education Act of 1965, 87 Fed. Reg. 65,904 (Nov. 1., 2022) (final rule) ("Rule"). Appellant Career Colleges and Schools of Texas ("CCST"), an association of private postsecondary career schools in Texas, sued the Department and Secretary Miguel Cardona, challenging various provisions of the rule, including those relating to borrower defenses against repayment and closed school loan discharges.

1. Borrower-Defense Provision

Under the borrower-defense provision of the Rule, student loan borrowers can apply to the Department for a full discharge of their student debt[2] when they meet certain criteria. Borrowers with a balance due on their loans are eligible for full discharge if the Department concludes "by a preponderance of the evidence that the institution committed an actionable act or omission and, as a result, the borrower suffered detriment of a nature and degree warranting" full discharge. 34 C.F.R. § 685.401(b).

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[2] This includes both a defense to repayment of all outstanding loan amounts owed to the Secretary as well as a reimbursement of all payments previously made on the Direct Loan or a loan repaid by the Direct Consolidation Loan. 34 C.F.R. § 685.401(a). Under the William D. Ford Direct Loan Program, eligible students and eligible parents of such students borrow funds directly from the U.S. Department of Education to facilitate enrollment at higher education institutions selected by the Secretary. *See* 20 U.S.C. § 1087a, *et seq*. Federal Direct Consolidation Loans allow borrowers to consolidate multiple federal student loan into one loan with a single monthly payment. *See id*. §§ 1087e(a)(2)(C), 1078-3.

The Rule identifies various categories of "actionable act[s] or omission[s]" that give rise to borrower discharge claims:

- A school's "substantial misrepresentation . . . that misled the borrower in connection with the borrower's decision to attend, or to continue attending, the institution or the borrower's decision to take out a covered loan," or a "substantial omission of fact" by the school that had the same misleading effect on the borrower and was also connected "with the student's decision to attend or continue attending the school, or to take out a covered loan." 34 C.F.R. § 685.401(b)(1-2).[3]
- A school's "fail[ure] to perform its obligations under the terms of a contract with the student [if] such obligation was undertaken as consideration or in exchange for the borrower's decision to attend, or to continue attending, the institution, for the borrower's decision to take out a covered loan, or for funds disbursed in connection with a covered loan." *Id.* § 685.401(b)(3).
- A school's "engage[ment] in aggressive or deceptive recruitment conduct or tactics as defined in [34 C.F.R. §§ 668.500, .501] in connection with the borrower's decision to attend, or continue attending, the institution or the borrower's decision to take out a covered loan." *Id.* § 685.401(b)(4).
- A governmental agency's or the borrower's (as an individual or a member of a class) obtainment of a

[3] The standards outlining covered "omissions of fact" and "misrepresentations" are defined in other parts of the Rule. 34 C.F.R. §§ 668.71-668.75.

favorable judgment against the school on a state or federal law claim for an act or omission related to the borrower's loan or the educational services for which it was disbursed. *Id.* § 685.401(b)(5)(i).

- The Department's denial of the school's Title IV recertification or revocation of the school's program participation agreement due to "acts or omissions that could give rise to a borrower defense claim," for misrepresentation, omission, aggressive and deceptive recruitment tactics, or breach of contract. *Id.*

§ 685.401(b)(5)(ii).

If a borrower's discharge claim is successful in the administrative adjudication process established by the Rule (a process discussed at further length below), then the Department can seek recoupment from the school of the full amount discharged. *Id.* § 668.125, 685.409. In these proceedings, the school bears the burden of proof "to demonstrate that the decision to discharge the loans was incorrect or inconsistent with law and that the institution is not liable for the loan amounts discharged or reimbursed." *Id.* § 668.125(e)(2). Further, the only evidence parties may submit during recoupment proceedings consists of:

(i) Materials submitted to the Department during the process of adjudicating claims by borrowers relating to alleged acts or omissions of the institution, including materials submitted by the borrowers, the institution or any third parties;

(ii) Any material on which the Department relied in adjudicating claims by borrowers relating to alleged

> acts or omissions of the institution and provided by the Department to the institution; and
>
> (iii) The institution may submit any other relevant documentary evidence that relates to the bases cited by the Department in approving the borrower defense claims and pursuing recoupment from the institution.

Id. § 668.125(e).

The Rule also establishes an adjudication process for addressing borrower discharge claims, which can be brought by borrowers individually or as members of a group. *Id.* § 685.402-403. Under the group claims process, the 2022 Rule establishes "a rebuttable presumption that the act or omission giving rise to the borrower defense affected *each member of the group* in deciding to attend, or continue attending, the institution, and that such reliance was reasonable." *Id.* § 685.406(b)(2) (emphasis added). Thus, the Rule *presumes* damages. Schools are not provided with any discovery or cross-examination rights in either the borrower-defense or recoupment stage of the adjudication proceedings established by the Rule despite the fact that a successful borrower discharge claim would give rise to a presumption of liability against the schools in subsequent recoupment proceedings. *Id.* §§ 668.125(e)(2), 685.405, .406(b)-(c). Nor is there any requirement in the Rule that the Department official(s) in charge of the borrower defense or recoupment adjudication proceedings have any legal training. *See id.* § 685.401(a) (defining "Department official").

2. Closed School Provision

The Rule also ushers in multiple changes to the closed-school discharge provision of existing regulations, under which the Department will either cancel a Direct Loan or pay a federally insured loan on a borrower's behalf if the student was unable to complete his or her course of study due to a school's shutdown. *See id.* §§ 685.214 (Direct Loan), 674.33(g) (Federal Perkins Loan), 682.402(d) (Federal Family Education Loan ("FFEL")).

First, the new closed-school discharge provision redefines a location's "closure date":

> [T]he school's closure date is the earlier of: *the date, determined by the Secretary, that the school ceased to provide educational instruction in programs in which most students at the school were enrolled*, or a date determined by the Secretary that reflects when the school ceased to provide educational instruction for all of its students[.]

Id. § 685.214(a)(2)(i) (emphasis added).

Second, the Rule's new closed-school discharge provision substantially enlarges the scope of automatic discharges by expanding the types of borrowers who would be eligible for a closed school discharge without applying to the Department for such relief. Under the 2022 Rule, borrowers are eligible for an automatic discharge one year after *either* (1) the newly defined closure date if the student did not complete a program at another branch or location of the school or through a teach-out agreement at another school with the same accreditation and state authorization, *or* (2) the student's last date of attendance at that continuation program if he failed

to complete the program for *any reason*. *Id.* § 685.214(c) (emphasis added).

Third, the Rule's closed-school discharge provision allows automatic discharges of all loans disbursed to students who withdrew up to 180 days before the newly defined "closure date," regardless of when the loans were disbursed. *Id.* § 685.214(d)(1)(i)(B).

Fourth, the Rule also substantially narrows the class of borrowers ineligible for a closed school discharge. The 2022 Rule only renders a borrower ineligible only if he completes a program "at another branch or location of the school or through a teach-out agreement at another school, approved by the state's accrediting agency, and if applicable, the school's State authorizing agency." *Id.* § 685.214(d)(1)(i)(C). Thus, a student who completed a comparable but non-identical program, or who transferred credits outside a formal teach-out agreement approved by state regulators, would still be eligible for a full discharge under the Rule.

B. Statutory and Regulatory History

To examine CCST's arguments properly, it is necessary to begin at the beginning of the regulatory structure governing federally assisted student loans.

The Department asserts its authority to promulgate the challenged provisions of the Rule under several sections of the Higher Education Act: 20 U.S.C. § 1087(c) (authorizing the Secretary to discharge loans for a student who "is unable to complete the program in which such student is enrolled due to the closure of the institution"); 20 U.S.C. § 1087e(h) (Section 455(h) of the Higher Education Act) (specifying that "the Secretary 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 this part")[4]; and 20 U.S.C. § 1094(c)(3)(B) (authorizing the Secretary to impose a civil penalty for an institution that "has engaged in substantial misrepresentation of the nature of its educational program, its financial charges, and the employability of its graduates").[5]

In 1994, the Department promulgated initial implementing regulations for borrower-defenses under Section 455(h), which are consistent with the circumscribed statutory authorization of borrower defenses in collection proceedings:

Borrower defenses.

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[4] Hereafter, we will refer to this provision as Section 455(h)—consistent with its enumeration in the Higher Education Act. This provision was originally passed as part of the Student Loan Reform Act of 1993, Pub. L. 103-66, 107 Stat. 351.

[5] The Department's statutory authority to discharge loans for students at closed schools and promulgate borrower defense regulations is distinct from its authority to "cancel" loan balances for other classes of borrowers. These include borrowers who are employed full time "in an area of national need," 20 U.S.C. § 1078-11(a)(2)(B); borrowers who are employed in a public service job, *id.* § 1087e(m)(1); and borrowers employed as teachers, *id.* § 1087j(b). Concurrently, Congress specified that loans issued under the FFEL program are eligible for discharge if the student is "unable to complete the program in which such student is enrolled due to the closure of the institution." *Id.* § 1087(c)(1). The statute also directs the Secretary to "pursue any claims available to such borrower against the institution and its affiliates and principals" or settle the loan obligation with those financially responsible for the school. *Id.* This statutory language is also applicable to Direct Loans because Congress provided that such loans shall have the same "terms, conditions, and benefits" as FFEL loans. *Id.* §§ 1087a(b)(2), 1087e(a)(1).

> (1) In any proceeding to collect on a Direct Loan, the borrower *may assert as a defense against repayment, any act or omission* of the school attended by the student *that would give rise to a cause of action against the school under applicable State law*. These proceedings include, but are not limited to, the following:
>
> (i) Tax refund offset proceedings under 34 CFR 30.33.
>
> (ii) Wage garnishment proceedings under section 488A of the Act.
>
> (iii) Salary offset proceedings for Federal employees under 34 CFR Part 31.
>
> (iv) Credit bureau reporting proceedings under 31 U.S.C. 3711(f).

William D. Ford Federal Direct Loan Program, 59 Fed. Reg. 61,664, 61,696 (Dec. 1, 1994) (final rule) (emphasis added). The Clinton Administration's subsequent Notice of Interpretation confirmed that the borrower defense provision of the 1994 Rule "does not provide a private right of action for a borrower and is not intended to create new Federal rights in this area." Office of Postsecondary Education, 60 Fed. Reg. 37,768, 37,769 (July 21, 1995).

The regulations governing borrower defense claims were "rarely used" from the 1990s until the mid-2010s. 87 Fed. Reg. at 65,979. In that era, the Department of Education played a limited role in student lending, principally by subsidizing and insuring student loans issued by other lenders. Things changed in 2010. That year, Congress completed the transition from loan insurance to the Direct Loan program and thus transformed the

Department into the primary issuer of student loans in the United States. *See* Health Care and Reconciliation Act of 2010, Pub. L. 111-152, §§ 2201-13, 124 Stat. 1029, 1074-81.

The 2015 collapse of Corinthian Colleges (a proprietary institution) led to an influx of discharge claims from borrowers. *See* Student Assistance General Provisions, 81 Fed. Reg. 75,926, 76,047 (Nov. 1, 2016) (final rule). In response, the Obama Administration promulgated a new federal standard governing borrower defense and school closure claims, and it established a new adjudication regime for addressing borrower-defense claims. *Id.* at 75,927 (2016 Rule). Following protracted litigation brought by various borrowers, the Trump Administration promulgated its own version of the Rule in 2019. *See* Student Assistance General Provisions, 84 Fed. Reg. 49,788 (Sept. 23, 2019) (final rule).[6]

While several Administrations evolved new regulations addressing borrower defenses, the Department's backlog of pending student loan discharge requests continued to mount. Eventually, in 2022, the Biden Administration's Department of Education agreed to a class action settlement affecting hundreds of thousands of pending borrower discharge claims. *See Sweet v.*

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[6] Many provisions of the 1994, 2016, and 2019 Rules still apply depending on the disbursement date of the loan in question, which means that different borrowers seeking discharge have different remedies currently available to them. *See, e.g.*, 34 C.F.R. § 685.206(c) (borrower defense for repayment of loans first disbursed before July 1, 2017); *id.* § 685.206(d) (borrower defense for repayment of loans disbursed after July 1, 2017, and before July 1, 2020); *id.* § 685.206(e) (borrower defense for repayment of loans first disbursed after July 1, 2020, and before July 1, 2023).

Cardona, 641 F. Supp. 3d 814 (N.D. Cal. 2022) (approving settlement between borrowers and the Biden Administration and denying objections of intervenor schools); *Sweet v. Cardona*, 657 F. Supp. 3d 1260 (N.D. Cal. 2023) (denying intervenor schools a stay pending appeal). CCST asserts that according to a statistical analysis, it is virtually certain that at least one of its 54 participating schools is among the 4,000 schools (about 65 percent of the 6,200 Title IV participating institutions) that are subject to the 206,000 borrower defense claims filed between the *Sweet* settlement's execution and its approval.[7] *See Swee*t, 657 F. Supp. 3d at 1265. While the *Sweet* settlement agreement requires the Department to apply the 2016 "standard" to those 206,000 claims, CCST argues that the adjudication procedures promulgated by the 2022 Rule would still apply to those claims, as those claims are "pending with the Secretary on July 1, 2023." 34 C.F.R. § 685.401(b). The Department, however, criticizes these estimates as unfounded "speculation," because the settlement agreement allegedly provides both "substantive" and "procedural provisions" relevant to the settlement of those 206,000 claims.

The Department's current version of the Rule, provisions of which have been briefly described above, became effective July 1, 2023. 87 Fed. Reg. at 65,904. As implied at the outset of this discussion, the new Rule dramatically alters the borrower discharge and closed school provisions that had been promulgated only three years previously. In contrast to the 2019 regulations,

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[7] CCST asserts that the probability that at least one of CCST's 54 participating schools is among the 4,000 schools with pending claims in the *Sweet* settlement is about 99.999 percent, or (1-(1-0.645)^{54}).

the 2022 Rule eliminates the Department's authority to issue partial loan discharges in favor of granting full discharge of entire loan balances. *See* 87 Fed. Reg. at 65,946. Additionally, under the 2022 Rule, there is no time limit within which borrowers must file an affirmative discharge claim so long as they maintain outstanding loans related to attendance at a school. *Id.* at 65,935. Indeed, the Department's final Rule explicitly rejected a bright-line three-year limitation that was consistent with the 2019 regulations and proposed by some commentators. *Id.*; *see* 34 C.F.R. § 685.206(e)(6).[8]

The 2022 Rule also worked a sea change in the treatment of closed school discharges. First, the 2019 Rule offered a more conventional definition of "closure date": "the date that the school ceases to provide educational instruction in all programs, as determined by the Secretary." *Id.* § 685.214(a)(2)(i) (July 1, 2020). Second, the 2019 Rule authorized automatic discharges in far more limited circumstances. As a result, borrowers could receive automatic discharges only *three years* after a location's closure date if (1) the student did not "subsequently re-enroll in any title IV-eligible institution" during those three years, *and* (2) if the closure date lay between November 1, 2013 and July 1, 2020. *Id.* § 685.214(c) (July 1, 2020). But under the 2022 Rule, borrowers are eligible for an automatic discharge *one year* after *either* (1) the newly defined closure date if the student did not complete a "program at another

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[8] The 2019 Rule's three-year limitations period for defensive, but not affirmative, borrower-defense claims was remanded to the Department, though not vacated, by the Southern District of New York in *N.Y. Legal Assistance Grp. v. DeVos*, 527 F. Supp. 3d 593, 602-04 (S.D.N.Y. 2021).

branch or location of the school or through a teach-out agreement at another school" with the same accreditation and state authorization, *or* (2) the student's last date of attendance at that continuation program if he failed to complete the program for *any reason*. *Id.* § 685.214(c). Third, the 2019 regulations only authorized closed school discharges for students who withdrew up to 120 days before the location's official closure date and had loans disbursed before July 1, 2020, or who withdrew up to 180 days before closure for loans disbursed after July 1, 2020. *Id.* § 685.214(c)(1)(i)(B), (c)(2)(i)(B) (July 1, 2020). Last, the 2019 Rule rendered a much broader class of borrowers ineligible for a closed school discharge. In essence, borrowers were ineligible for discharge if they "complete[d] the[ir] program of study through a teach-out agreement at another school or by transferring academic credits or hours earned at the closed school to another school" if their loans were disbursed prior to July 1, 2020. *Id.* § 685.214(c)(1)(i)(C) (July 1, 2020). For loans disbursed after that date, borrowers were ineligible to receive a closed school discharge if they completed the program of study "*or a comparable program* through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school[.]" *Id.* § 685.214(c)(2)(i)(C) (July 1, 2020) (emphasis added).

C. Procedural History

CCST attacks the 2022 Rule's borrower defense provision, including its adjudication procedures, and the closed school provisions on multiple grounds, but it does not seek to postpone other provisions of the Rule.

As to the borrower-defense provision, CCST contends that Section 455(h) does not authorize the Department to create affirmative borrower "claims" against the United States or recoupment actions against schools and that the Rule's strict liability and full-discharge standards are unlawful under the Higher Education Act and the APA. CCST also challenges the Department's newly promulgated adjudication process and procedures because Congress did not authorize the Department to adjudicate borrower defense or recoupment claims against schools.

CCST also charges that the closed school provisions are inconsistent with the Higher Education Act to the extent they allow a student to obtain a full loan discharge even if the school closure was not the reason the student failed to complete its program. *See id.* § 685.214. CCST also argues that it is arbitrary and capricious for the Department to equate a student's withdrawal any time up to 180 days before its newly defined "closure date" with its being caused by that closure. *See id.* § 685.214(a)(2)(i). Last, CCST argues that the statute is violated by the Rule's allowing automatic discharges for all borrowers (1) one year after the closure date if the student does not accept "a program at another branch or location of the school or through a teach-out agreement" at another comparable school, or (2) one year after the student's last attendance at a continuation program, without in either case requiring proof that the closure actually caused the students not to complete their program. *See id.* § 685.214(c).

In the district court, CCST sought a preliminary injunction to postpone the effective date of the challenged portions of the Rule under Section 705 of the Adminis-

trative Procedure Act ("APA"). 5 U.S.C. § 705. The district court held a hearing and denied the motion without addressing CCST's likelihood of success on the merits because it determined that CCST had not shown a likelihood of irreparable harm if the Rule were allowed to go into effect.

On appeal, this court granted a temporary administrative injunction limited to CCST and its members, and later approved a motion to postpone the Rule's effective date pending appeal without party limitation.

II. Discussion

This court reviews the denial of a preliminary injunction for abuse of discretion; underlying legal determinations are reviewed *de novo* and factual findings for clear error. *Topletz v. Skinner*, 7 F.4th 284, 293 (5th Cir. 2021) (citation omitted). "A district court by definition abuses its discretion when it makes an error of law." *Def. Distributed v. Bruck*, 30 F.4th 414, 427 (5th Cir. 2022) (quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996)). In deciding a motion for a preliminary injunction, a court must consider four factors: (1) a substantial threat of irreparable harm to the movant absent the injunction, (2) the likelihood of the movant's ultimate success on the merits, (3) the balance of harms to the parties, and (4) the public interest. *Rest. L. Ctr. v. U.S. Dep't of Lab.*, 66 F.4th 593, 597 (5th Cir. 2023). The "first two factors of the traditional standard are the most critical." *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 1761 (2009). And "[t]here is authority" that "likelihood of success on the merits . . . is the most important of the preliminary injunction factors." *Mock v. Garland*, 75 F.4th 563,

587 n.60 (5th Cir. 2023); *see also Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2005).

The APA also provides two relevant standards of review. Under Section 705, "the reviewing court, including the court to which a case may be taken on appeal . . . , may issue all necessary and appropriate process to postpone the effective date of an agency action." 5 U.S.C. § 705. On the merits, we review final agency actions under Section 706, which allows the reviewing court to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). "An agency decision" runs afoul of this provision if it "applies an incorrect legal standard." *Gen. Land Off. v. United States Dep't of the Interior*, 947 F.3d 309, 320 (5th Cir. 2020) (citing *Koon*, 518 U.S. at 100, 116 S. Ct. at 2047).

A. CCST Has Standing

"A preliminary injunction, like final relief, cannot be requested by a plaintiff who lacks standing to sue. . . . At the preliminary injunction stage, the movant must clearly show only that each element of standing is likely to obtain in the case at hand." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 329-30 (5th Cir. 2020), as revised (Oct. 30, 2020). One way CCST can demonstrate standing is as a representative of its members ("associational standing"). *See Ctr. for Bio. Diversity v. EPA*, 937 F.3d 533, 536 (5th Cir. 2019). "Associational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief re-

quested requires participation of individual members." *Id.* (quoting *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006)). *See also Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977). An individual member's standing is determined by the "familiar three-part test for Article III testing." *Gill v. Whitford*, 585 U.S. 48, 65, 138 S. Ct. 1916, 1929 (2018). That member must 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." *Id.* (quotation marks and citation omitted).

The district court had no trouble determining that CCST satisfied the requirements of Article III associational standing. *Career Colleges & Sch. Of Texas v. United States Dep't of Educ.*, No. 1:23-CV-433-RP, 2023 WL 4291992, at *4-*5 (W.D. Tex. June 30, 2023). The Department, curiously, disagrees, and devotes nearly one third of its argument to insisting that the plaintiffs lack standing. This contention is more bewildering than persuasive.

"An increased regulatory burden typically satisfies the injury in fact requirement." *Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019) (quoting *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015)). Notwithstanding the Department's view, the challenged provisions of the Rule impose an immediate increase in regulatory burden on the plaintiffs, which is neither speculative nor contingent nor dependent on the independent actions of third parties. The district court correctly found that CCST had proven through evidence in the record that the Rule broadened the kinds of actions that can give rise to a borrower defense claim

against a school, and the new Rule requires "at least some degree of preparatory analysis, staff training, and reviews of existing compliance protocols." *Career Colleges*, 2023 WL 4291992, at *5. These are precisely the types of concrete injuries that this court has consistently deemed adequate to provide standing in regulatory challenges. *Texas v. EEOC*, 933 F.3d at 446.[9] CCST has standing to sue.

B. CCST Demonstrated Irreparable Harm

We move to consider the requirements for a preliminary injunction. Although the district court correctly determined that CCST showed real injuries in fact for purposes of Article III standing, it erred in concluding that CCST failed to show sufficient irreparable harm to justify a preliminary injunction. The record demonstrates that CCST's members would face irreparable harm stemming from the Rule's borrower defense and school closure provisions in the absence of preliminary relief delaying the Rule's effective date.

The district court characterized CCST's proof of financial and reputational injuries as "too remote," "speculation built upon further speculation," and "too conjectural to support preliminary injunctive relief." *Career Colleges*, 2023 WL 4291992, at *6-7. But read *in toto*, the causal chain created by the Rule is not conjectural, but is highly integrated. For instance, borrowers who receive a closed school discharge of their debt must "cooperate with the Secretary in any judicial or administrative proceeding brought by the Secretary to recover

[9] Traceability of the injuries to the Rule and redressability through judicial action, the other two elements of Art. III standing, are not at issue.

amounts discharged or to take other enforcement action with respect to the conduct on which the discharge was based." 34 C.F.R. § 685.214(e)(1). Further, after a borrower's loan has been discharged because of a school's alleged actionable act or omission, the school must bear the burden to prove in recoupment proceedings that "the decision to discharge the loans was incorrect or inconsistent with the law and that the institution is not liable for the loan amounts discharged or reimbursed." *Id.* § 668.125(e)(2). Thus, under both the borrower defense and school closure provisions, a successful claim leads to full discharge of the borrower's loans, which leads to actions for recoupment from the schools. Combining this series of events with the greatly expanded number of claims and potential claimants, it is clear that the Rule contemplates the imposition of significant financial charges on CCST and its members.

Three specific, immediate, and irreparable injuries developed by CCST's evidence satisfy the standard for a preliminary injunction. These include the increased costs of compliance, necessary alterations in operating procedures, and immediate threats of costly and unlawful adjudications of liability all inflicted by the Rule's new provisions.

1. Compelled Compliance and Compliance Costs

The Rule's new borrower-defense regulations expand the category of actionable misrepresentations, adopt strict liability, and remove any limitations period, leading to heightened compliance costs for CCST's member schools. The schools will be required to scale-up and redesign their defensive recordkeeping dramatically in order to protect against future borrower de-

fense and recoupment proceedings. Contrary to the district court's finding, these harms are far from speculative.

a. Expanded Recordkeeping Requirements

This circuit recently held that enhanced recordkeeping requirements inflict a kind of irreparable harm that warrants the issuance of a preliminary injunction. *Rest. Law Ctr.*, 66 F.4th at 598-99. The Rule's broad definitions of actionable misrepresentations and omissions apply to all communications between schools and their representatives with current or prospective students. Under the Rule, schools are liable for "false, erroneous, or misleading statements" about their "size, location, facilities, equipment, or institutionally-provided equipment, software technology, books, or supplies," the "number, availability, and qualifications, including the training and experience, of [their] faculty, instructors, and other personnel," and whether a former student's testimonial was unsolicited. 34 C.F.R. §§ 668.72(e)(1), (f), (h). Consequently, schools must begin to retain records of virtually *every* written or oral communication with a student, lest the Department later deem it actionable in discharge and recoupment proceedings. *See id.* §§ 668.71, 668.72, 668.75, 685.401(b)(1)-(2).

The Rule also imposes strict liability on "aggressive and deceptive recruitment standards or conduct," by schools, their representatives, and contractors. However, its list of such conduct is deliberately non-exhaustive and specifies no limitations period for enforcement actions by the Department. *Id.* §§ 668.500, 668.501. Running afoul of these vague, brand-new standards that the Department intends to enforce retroactively is potentially catastrophic for schools, which could lose their

Title IV certification, their ability to participate in federal student loan programs, and the majority of their income. *See id.* § 668.500(b).

Specific evidence in the record underscores the enormous burdens imposed by enhanced recordkeeping made necessary for self-preservation under the Rule. One affidavit was filed by Jeff Arthur, Vice President of Regulatory Affairs and Chief Information Officer at ECPI University, a member of CCST. Arthur stated that in anticipation of the Rule's July 1, 2023 effective date, ECPI "has already taken and continues to undertake significant efforts to comply with the Rule's requirements," including "[i]mplementing new recordkeeping policies" and "[i]mplementing and dramatically expanding systems that monitor representations made by hundreds of staff both in recruiting processes and to our tens of thousands of students, including verbal and digital communications, including engaging in extensive legal reviews of the monitored content." Similarly, ECPI's President, Mark Dreyfus, testified that as a result of the Rule, ECPI had to make "sure that [its employees] are aware of every communication and know[] that they have to retain this information even for some kind of inadvertent claim—or statement . . . and these claims from my opinion are *existential* because the bar is so much lower and we do have this opportunity of a group claim."[10]

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[10] As CCST notes, the expanded recordkeeping requirements and other compliance measures that its members must take on in order to avoid liability under the 2022 Rule's misstatements provisions contrast with the limited recordkeeping and compliance costs imposed by the 2019 Rule. *See* 34 C.F.R. § 685.206(e)(3). Under that Rule, schools were liable only for knowing and reckless misstate-

As *Restaurant Law Center* holds, it was error to discount these affidavits and continuing costs for purposes of establishing irreparable harm. 66 F.4th at 600. To the extent that the district court also categorized these descriptions of harms as "nebulous and conclusory," its analysis also conflicts with *Restaurant Law Center*, where the court advised that plaintiffs need not "convert each allegation of harm into a specific dollar amount." *Id.* Alleged compliance costs need only be "more than de minimis." *Id.* (quoting *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022) and *Enter. Int'l. Inc v. Corporacion Estatal Petrolera Ecuadoriana*, 762 F.2d 464, 472 (5th Cir. 1985)). Moreover, the ongoing costs of preserving and organizing virtually all communications between CCST's member institutions and students, which is amply substantiated and is traceable to the borrower defense provision, readily satisfy the requirement that irreparable harms be "future or continuing." *Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014); *In re Stewart*, 547 F.3d 553, 557 (5th Cir. 2011).

b. Expanded Staff Training

CCST has also provided specific evidence that its members have had to expend more time and resources to train their staff due to the Rule. Specifically, ECPI's President testified that his institution has had to "significantly ramp[] up" training for its staff by "a magnitude of . . . two to three times." This training, according to ECPI's Vice President of Regulatory Affairs, is ongoing for hundreds of ECPI's employees, including approximately 60 staff members responsible

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ments and omissions and only to the extent the misstatement or omission caused the borrower financial harm. *Id.*

for compliance, 95 staff members responsible for assisting students with obtaining Direct Loans, and 100 staff members responsible for new student engagement.

The Department's retort, like the district court opinion, is built on a mischaracterization of the record and relevant precedent. The fact that *some* of the compliance costs borne by CCST's members have already been realized does not change the fact that *some* of those costs are ongoing, and as such, are financially burdensome, irrecoverable and more than de minimis. For instance, *every* current and new staff member involved in compliance, new student engagement, or loan assistance will require substantially more training under the 2022 Rule than under the 2019 regulations. Those costs are ongoing, built on more than just "unfounded fear," and more than sufficient to satisfy the irreparable harm standard in this circuit. *Louisiana v. Biden*, 55 F.4th at 1034 (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)).

ECPI's President also testified that ECPI planned to hire additional compliance staff following the effective date of the Rule. That is a purely prospective financial injury of the type this court has previously recognized as an irreparable harm in the regulatory context. *See Rest. L. Ctr.*, 66 F.4th at 599-600 (holding that the need to hire additional managers constituted an ongoing irreparable harm).

The fact that CCST members, including ECPI, already devoted significant resources to compliance under previous iterations of borrower-defense regulations does not undermine their ability to obtain a preliminary injunction to delay the effective date of a new Rule that dramatically increases their regulatory burden. Par-

ties who have made substantial efforts to comply with existing regulations and who operate in highly regulated industries do not face a heightened burden of showing irreparable harm compared to entities operating in previously unregulated fields and those that have previously under-resourced their compliance efforts.

2. Altered Business Operations and Missed Opportunities

By the Department's own admission, the closed-school provision of the Rule "will increase the number of borrowers who receive forgiveness." 87 Fed. Reg. at 65,962. This, in combination with the Department's view that the Higher Education Act *requires* it to pursue recoupment for discharges associated with school closures, exposes schools to enormous new liabilities when they consider straightforward operational decisions about whether to consolidate campuses or relocate programs—changes that can often benefit students. *Id.* at 65,968. Because the new closed-school provision defines a school closure as the school's ceasing instruction in programs in which a majority of a location's students are enrolled and provide for automatic discharge, ECPI's President testified that his institution was unable to consolidate campuses in Richmond, Virginia, despite student support for doing so.[11] At the same time, the increased financial liability associated with the Rule's school-closure and borrower-defense provisions have

[11] Although ECPI's San Antonio campus is a member of CCST, ECPI is a single entity and its San Antonio campus is not a legally separate person. Because ECPI's interests in this litigation are represented by CCST, we assume without deciding that for preliminary injunction purposes, an injury suffered by ECPI through any of its campuses constitutes an injury of a CCST member.

forced ECPI to abandon plans to open a location in Dallas. The district court's decision to ignore this specific evidence of injury in the record was clear error. So, too, was its dismissal of CCST's arguments about altered business operations and missed opportunities as too speculative or remote to support irreparable harm. *Career Colleges*, 2023 WL 4291992, at *7.

3. Imminent Threats of Costly and Unlawful Adjudications

The new borrower-defense adjudication process applies to all applications received or *pending* with the Secretary on July 1, 2023, and as such includes the 206,000 applications pending with the Secretary from the *Sweet* settlement—which arise from 4,000 different schools. These new adjudication procedures are most likely substantively and procedurally unlawful.

As noted above, CCST's uncontroverted statistical evidence makes it virtually certain, to a probability of 99.999%, *see* fn. 7 *supra*, that at least one of its 545 member schools has discharge claims currently pending with the Department. Thus, at least one of its members will be subjected to the new adjudication procedures. The Department would dismiss this evidence as "probabilistic," and it went unacknowledged by the district court. A simple records search by the Department would have ascertained whether any of CCST's members is in fact caught in the aftermath of the *Sweet* settlement. But we conclude that, barring any challenge to the statistical accuracy, CCST has sufficiently proven at this stage the involvement of one or more members in upcoming adjudications under the challenged procedures. This evidence is far more probative than the vague and general assertions by the Sierra Club in *Summers v. Earth Is-*

land Inst., 555 U.S. 488, 498-501, 129 S. Ct. 1142, 1152-53 (2009). In *Summers,* there was no certainty that any of the club members would actually encounter the challenged foresting activities in hundreds of national parks managed by the U.S. Forest Service. *Id.* Here, the settlement of over 200,000 student claims across 4,000 schools makes it virtually inevitable that at least one or more CCST members will have to abide by the new procedures.

If CCST's members have "an independent right to adjudication in a constitutionally proper forum," *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 579-80, 105 S. Ct. 3325, 3332-3333 (1985), then subjecting them to costly and dubiously authorized administrative adjudications amounts to irreparable harm. *See Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.") (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21, 114 S. Ct. 771, 783 (1994) (Scalia, J., concurring in part and in the judgment)). "When determining whether injury is irreparable, it is not so much the magnitude but the irreparability that counts." *Id.* at 433-34 (internal quotation marks and citation omitted). The Department's counterarguments dwelling on notice and opportunity to respond cannot cure defects inherent in the Rule's adjudication procedures, nor do they ameliorate the underlying injury from the threat of being subjected to such unauthorized procedures.

Finally, CCST members are likely to face substantial financial costs associated with unlawful adjudication procedures. The Department itself posits that defend-

ing each group claim will cost *each* school $17,611.02.[12] The Department argues that CCST has not identified any possible or certainly impending group claims, but the rub is this: the Secretary has sole discretion to authorize borrowers to adjudicate their claims on a group basis. *See* 34 C.F.R. § 685.402. The Secretary cannot predict away his/her own discretion, and in any event, any group claims are also subject to unlawful adjudication procedures.

The district court erred as a matter of law by ignoring the irreparable injury CCST's members will likely suffer from merely being subjected to such unlawful proceedings.

In all these respects, CCST has met its burden of showing irreparable harm from the failure to delay the effective date of the Rule.

C. Likelihood of Success on the Merits

Although the district court did not examine the remaining factors required for injunctive relief, they are all based primarily on legal analysis, and we have no hes-

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[12] This figure is based on an estimate of 378 hours to "review and respond to the proposed group claim" with a cost estimate of $46.59 per hour. 87 Fed. Reg. at 66,030-31. The Department did not provide any estimate for how much each individual claim would cost to defend, and there is no reason to believe that the costs for responding to an individual claim would be significantly different. CCST also convincingly argues that this cost estimate is "wildly low," as "schools would likely retain counsel, who, in Texas, charge a median hourly fee of about $300." State Bar of Texas, *2019 Income and Hourly Rates* 3, available at https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=54237 (last visited April 4, 2024).

itation in concluding that CCST met its burden. The likelihood of success on the merits "is arguably the most important" of the remaining equitable factors required for injunctive relief. *Tesfamichael*, 411 F.3d at 176. We turn to that factor.

CCST's challenges to the merits are posed in three parts, each with subparts. First, we consider whether the Department lacked authority under Section 455(h) to promulgate affirmative borrower rights against repayment; second, whether the Department had authority to adjudicate claims against lenders; and third, the scope of the new closed-school regulation.

1. Borrower-Defense Provision

Section 455(h) of the Higher Education Act authorizes the Department to promulgate defenses to repayment of student loans as follows:

> **(h) Borrower defenses**
>
> Notwithstanding any other provision of State or Federal law, the Secretary *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 this part, except that in no event may a borrower recover from the Secretary, *in any action* arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan.

20 U.S.C. § 1087e(h) (emphasis added). Three aspects of the Rule are within the purview of this statutory provision. CCST contends that Section 455(h) does not authorize the Department to define affirmative borrower defense "claims" against the United States or enable recoupment actions against schools. CCST also contends

that the Rule does not lawfully permit full discharge of a student's loan if a borrower defense under the Rule is successfully invoked. Third, CCST argues that the Rule's prohibitions on "aggressive and deceptive recruitment tactics or conduct" and on "actionable omissions of information" are too vague to provide regulated entities with sufficient notice and inflict strict liability.

a. "Affirmative" Borrower Claims for Full Discharge

As outlined more fully above, the 2022 Rule authorizes several types of affirmative "claims" for full borrower discharge. Very generally, these include misrepresentations or omissions in connection with loans or the decision to attend schools; a school's default in its contracts with the student; a school's use of aggressive or deceptive recruitment tactics; the result of an adverse judgment against a school; and the school's loss of Title IV certification based on the above misconduct. To note that these "defenses" are vague and broad is to understate their implications.

In deciding whether Section 455(h) authorized the Department to recognize these affirmative borrower claims, "[w]e start where we always do: with the text of the statute." *Bartenwerfer v. Buckley*, 598 U.S. 69, 74; 143 S. Ct. 665, 671 (2023) (quoting *Van Buren v. United States*, 593 U.S. 374, 381, 141 S. Ct. 1648, 1654 (2021)). Other sources that are helpful in determining what Congress meant when it passed Section 455(h) in 1993[13] include contemporaneous dictionaries, related statutes, and past statements of the Department. We must also be conscious of separation of powers issues

[13] Student Loan Reform Act of 1993, Pub. L. 103-66, 107 Stat. 351.

raised by the Department's interpretation of the Rule, to the extent it may run afoul of the constitutional principle that "[o]nly Congress may create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates." *Chamber of Commerce v. Dep't of Labor*, 885 F.3d 360, 384 (5th Cir. 2018). The issue here is whether the Department could expand "defenses" to repayment of student loans into affirmative "claims" for relief.

To begin, the Higher Education Act does not define the word "defense," but it has a well-established common law meaning. This "triggers the settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'" *Id.* at 369-70 (quoting *United States v. Castleman*, 572 U.S. 157, 162, 134 S. Ct. 1405, 1410 (2014) and *Sekhar v. United States*, 570 U.S. 729, 732, 133 S. Ct. 2720, 2724 (2013)). *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 320 (2012) ("A statute that uses a common-law term, without defining it, adopts its common law meaning.") Dictionaries are aids in ascertaining the common law meaning of "defense" as used in the statute. *United States v. Hildenbrand*, 527 F.3d 466, 476 (5th Cir. 2008). The leading definition in the contemporaneous edition of BLACK'S LAW DICTIONARY states: "[t]hat which is offered and alleged by the party proceeded against in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks. That which is put forward to diminish plaintiff's cause of action or defeat recovery." (6th ed. 1990). Concurrently, BALLENTINE'S LAW DICTIONARY defines "defense" as "protection against attack; a matter pleaded

by a defendant in an action either to delay the action without destroying the cause or right of action or to defeat the action for all time." (3d ed. 1969).

Both dictionary definitions are consistent with the interpretation proffered by CCST: that Section 455(h) authorizes the Department to set out regulations governing borrower defenses to repayment *after* collection proceedings have been instituted—*i.e.*, when the borrower has stopped making his or her required payments. It does not authorize the Department to draft regulations spelling out affirmative "claims" that borrowers can assert against schools to avoid their obligations. A "defense" is a reactive measure, not a proactive basis for a borrower's suit.

This reactive definition is also consistent with the language of other consumer protection statutes, in which Congress routinely distinguishes between the assertion of claims and defenses. *See, e.g.*, 15 U.S.C. § 1641 ("any person who purchases or is otherwise assigned a mortgage . . . shall be subject to all *claims and defenses* with respect to that mortgage . . . "); *id.* § 1666i(b) ("[t]he amount of *claims or defenses* asserted by the cardholder . . . ").

Even more probative is the contrast between other provisions of the Higher Education Act and Section 455(h)'s relatively modest statutory language about "defense[s] to repayment." Congress, after all, unambiguously authorized the Department to "cancel" or "discharge" student debt obligations in limited circumstances. *See, e.g.*, 20 U.S.C. § 1078-11(a)(2)(B) (authorizing the Department to "*cancel* a qualified loan amount" for individuals employed full time "in an area of national need") (emphasis added); *id.* § 1087e(m)(1)

(stating that the Department "shall *cancel* the balance of interest and principal due" for borrowers employed in a public service job) (emphasis added); *id.* § 1087j(b) (directing the Department to "*cancel*[] the obligation to repay a qualified loan amount" for teachers) (emphasis added). We construe these comparative provisions as having distinct meanings, which would be blurred by treating a "defense" to repayment as a means to "cancel" a student loan.

The Department, in contrast to CCST and the Department's amici, makes no attempt to engage the plain text arguments urged by CCST. Instead, the Department rests entirely on how the Department has interpreted the statute over the last three decades. But although an agency's "longstanding practice . . . in implementing the relevant statutory authorities" is relevant to ascertaining the meaning of those relevant statutory authorities, it cannot be the *only e*vidence used to evaluate an agency's power to act under a statute. *Biden v. Missouri*, 595 U.S. 87, 94, 142 S. Ct. 647, 652 (2022). To hold otherwise would greenlight the aggregation of Executive power "through adverse possession by engaging in a *consistent* and *unchallenged* practice over a long period of time." *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 613-14, 134 S. Ct. 2550, 2617 (2014) (Scalia, J., concurring in judgment). The Department's near-exclusive reliance on agency custom is irreconcilable with the judicial obligation to interpret the statute that Congress actually enacted.

Regardless, the history of borrower defense regulations is more favorable to CCST than it is to the Department. Before 2016, the Department authorized borrowers to assert affirmative claims only in very limited

circumstances, and it *never* previously asserted the broad statutory authority under Section 455(h) that it now claims it has always possessed.

Before promulgating the 2016 Rule, the Department had recognized borrower claims covering fewer than 100 persons between 1998 and 2009. These involved highly unusual circumstances including unpaid refunds, litigation settlements, or factual stipulations in judgments that established a defense.[14] In the 2019 Rule, while acknowledging these outliers from before 2015, the Department explained that its "interpretation of the existing regulation has been that it was *meant to serve primarily as a means for a borrower to assert a defense to repayment during the course of a collection proceeding*." 84 Fed. Reg. at 49,796 (emphasis added). This admission is consistent with the Department's longstanding positions expressed in the 1994 Rule and 1995 Notice of Interpretation. In the 1994 Rule[15], the De-

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[14] *See* Project on Predatory Student Lending at the Legal Services Center of Harvard Law School, Comment Letter on Proposed Rule (Aug. 2, 2018), available at https://www.regulations.gov/comment/ED-2018-OPE-0027-0011 (attachments).

[15] The full text of the relevant provision states: Borrower defenses.

> (1) In any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law. These proceedings include, but are not limited to, the following:
>
> (i) Tax refund offset proceedings under 34 CFR 30.33.
>
> (ii) Wage garnishment proceedings under section 488A of the Act.
>
> (iii) Salary offset proceedings for Federal employees under 34 CFR Part 31.

partment outlined four non-exclusive types of "proceedings" in which borrowers could "assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law." 59 Fed. Reg. at 61,696. In 1995, the Department clarified that this reference to a "a cause of action under applicable State law" was of "limited scope," as "[t]he regulation does not provide a private right of action for a borrower and is not intended to create new Federal rights in this area." 60 Fed. Reg. at 37,769. The Notice of Interpretation included other limiting language, stating that any such state law cause of action must "directly relate[] to the loan or to the school's provision of educational services for which the loan was provided." *Id.*

The Department and its amici seek to turn this limited assertion of authority in the 1990s into a justification for the far-reaching scope of the 2022 Rule. That argument fails. The 1994 Rule confined the recognition of borrower defenses to the four delineated "proceedings," and in all of them, the student would be in a reactive or defensive posture. Tax refund offset proceedings under Section 30.33 of Title 34 of the Code of Federal Regulations are only initiated after a debt is past due. 3 4 C.F.R. § 30.33(b)(1). Wage garnishment proceedings under Section 488A of the Higher Education Act can only be initiated against an individual "if he or she is not currently making required repayment." 20 U.S.C. § 1095a(a). Salary offset proceedings against federal employees can only be initiated after the Secre-

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(iv) Credit bureau reporting proceedings under 31 U.S.C. 3711(f).

tary sends written notice to the debtor demanding repayment in a pre-offset notice. 34 C.F.R. § 31.3. Although credit bureau proceedings could be commenced pre-default, there is no indication that this possibility was contemplated in the 1994 Rule. Ultimately, because "words grouped in a list should be given related meanings," the 1994 Rule clearly assumed that borrower defenses would only be invoked post-default; any pre-default proceedings, if they occurred, would be extremely rare. *Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312, 322, 97 S. Ct. 2307, 2313 (1977).

For these reasons, the promulgation of broad affirmative defenses to repayment in the Rule likely violate Section 455(h).

b. Full Discharge of Outstanding Loan

In connection with the broadened affirmative borrower claims, the Rule's authorization of full discharge also likely violates Section 455(h). In providing that borrowers may assert their "defenses . . . in any action arising from or relating to a loan," the statute implies a causal connection between the school's actionable misconduct and the loans to be discharged. Yet the Rule allows borrowers to receive full discharge of their *consolidated* loans if their discharge claims have been successfully adjudicated. 87 Fed. Reg. at 65,916. This would allow the Department to discharge loans without requiring the borrower to show causation. The Rule thus opens the door for a student to receive discharge for all four years of loans if he can show that injury by a school's misrepresentation or omission committed during his fourth year. In fact, because the Rule does not provide for partial discharges, a full dis-

charge would be the *only* remedy available under the Rule.

The Department does not dispute that the Rule allows borrowers to consolidate all preexisting debt when obtaining a full discharge. Instead, it merely recites the Rule's purported requirement of a causal link between the new affirmative claims and remedial discharge. The Department ignores, however, that loan consolidation often will eliminate the need to show a causal link between the entirety of the debt and a discrete misrepresentation or omission that occurred at a discrete time during the student's enrollment. *See* 87 Fed. Reg. at 65,920, 65,922. By allowing students to discharge loans that were disbursed before an actionable act or omission by a school, the Rule confers on students substantially greater benefits than necessary to compensate for any injuries. The combination of full discharge with the absence of a causation requirement essentially constitutes a punitive damage remedy arising from the borrower-defense provision. There is no basis for such outsize compensation under Section 455(h).

In the end, the Rule's transformation of borrower defenses into affirmative borrower claims raises separation of powers concerns because it establishes new federal causes of action without clear congressional authorization. "[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291, 121 S. Ct. 1511, 1522 (2001). *See also Chamber of Commerce*, 885 F.3d at 384 ("Only Congress may

create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates.") After all, "[a]gencies have only those powers given to them by Congress and enabling legislation is generally not an open book to which the agency may add pages and change the plot line." *West Virginia v. EPA*, 597 U.S. 697, 723, 142 S. Ct. 2587, 2609 (2022) (internal quotation marks and citation omitted). By transforming defenses that may be asserted against student loan repayment into affirmative claims, and enabling full discharges and consolidated loan discharges that expand into a damages remedy, the Rule likely violates the limits placed on the Department in Section 455(h).

c. Insufficiently Specific Strict Liability Standards

Even if the creation of new affirmative borrower-defense claims survives scrutiny when tested against the statute, another problem arises from the Rule's language articulating those claims. Section 455(h) requires the Department to "specify in regulations which acts or omissions an institution of higher education" can be asserted as borrower defenses to repayment. *See* 20 U.S.C. § 1087e(h). The verb "specify" connotes specificity, which means a precise definition of the prohibited acts or omissions. *Specify*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 2187 (3d ed. 1981) ("to mention or name in a specific or explicit manner: tell or state precisely or in detail . . . ").[16]

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[16] *See also* CAMBRIDGE DICTIONARY, available at https://dictionary.cambridge.org/us/dictionary/english/specify ("to explain or describe something clearly and exactly"); Oxford English Dictionary, availa-

The Rule's extremely broad definitions of actionable acts or omissions are deliberately nonspecific. The definitional defects are magnified because the Rule affixes strict liability on schools for undefined misconduct. As a result, CCST contends that these standards are contrary to law and arbitrary and capricious in violation of the APA. CCST is likely to succeed on the merits of its contentions.

The Rule defines actionable conduct as misrepresentations or omissions by any employee, representative or contractor of a school "in connection with the borrower's decision to attend, or continuing to attend . . . [or] to take out a covered loan." 34 C.F.R. §§ 668.71, 668.75, 685.401(b)(1),(2). Potential liability runs the gamut of a student's interactions with the school, as it includes "but [is] not limited to" misrepresentations or omissions concerning educational programming, financial charges and assistance, and the employability of graduates. *Id.* §§ 668.72-668.74. Especially glaring are the prohibitions on "aggressive and deceptive recruitment tactics or conduct." 34 C.F.R. § 668.501. These prohibitions also "include but are not limited to" six enumerated categories of tactics or conduct," with many of the key terms left undefined.[17] For instance,

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ble at https://www.oed.com/dictionary/specify_v?tab=meaning_and_use#21658843 ("to mention, speak of, or name (something) definitely or explicitly; to set down or state categorically or particularly; to relate in detail").

[17] The full text of 34 C.F.R. § 668.501 states:

(a) Aggressive and deceptive recruitment tactics or conduct include but are not limited to actions by the institution, any of its representatives, or any institution, organization, or person with whom the institution has an agreement to provide educational programs, marketing, recruitment, or lead generation that:

a school may not "take *unreasonable advantage* of a student's or prospective student's lack of knowledge about, or experience with, postsecondary institutions, postsecondary programs, or financial aid to pressure the student into enrollment or borrowing funds to attend the institution." *Id.* § 668.501(2) (emphasis added). But there is no definition of what amounts to an "unreasonable advantage." The same goes for the Rule's prohibition on "us[ing] *threatening or abusive language or behavior* toward the student or prospective student," which does not define the key terms. *Id.* § 668.501(5) (emphasis added).

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(1) Demand or pressure the student or prospective student to make enrollment or loan-related decisions immediately, including falsely claiming that the student or prospective student would lose their opportunity to attend;

(2) Take unreasonable advantage of a student's or prospective student's lack of knowledge about, or experience with, postsecondary institutions, postsecondary programs, or financial aid to pressure the student into enrollment or borrowing funds to attend the institution;

(3) Discourage the student or prospective student from consulting an adviser, a family member, or other resource or individual prior to making enrollment or loan-related decisions;

(4) Obtain the student's or prospective student's contact information through websites or other means that:

(i) Falsely offer assistance to individuals seeking Federal, state or local benefits;

(ii) Falsely advertise employment opportunities; or,

(iii) Present false rankings of the institution or its programs;

(5) Use threatening or abusive language or behavior toward the student or prospective student; or,

(6) Repeatedly engage in unsolicited contact for the purpose of enrolling or reenrolling after the student or prospective student has requested not to be contacted further.

We hold that the Rule's standards for actionable misrepresentations or omissions or aggressive or deceptive recruiting tactics most likely do not comply with the specificity requirement of Section 455(h). The statute does not permit the Department to promulgate vague standards full of nonexclusive examples and undefined terms. The unbridled scope of these prohibitions enables the Department to hold schools liable for conduct that it defines only with future "guidance" documents or in the course of adjudication. Simply put, the statute does not permit the Department to terrify first and clarify later. The vagueness of the Rule's liability standards is contrary to Section 455(h) and thus likely violates the APA.

Further exacerbating the consequences of vague liability standards based on a promiscuously broad definition of covered personnel is the absence of any requirement of scienter or even negligence associated with the newly actionable violations. The Department acknowledges that "this rule removes the requirement that [it] conclude that the act or omission was made with knowledge of its false, misleading or deceptive nature, or with reckless disregard for the truth." *See* 87 Fed. Reg. at 66,014. Further, in this respect the Rule contrasts starkly with the 2019 regulations, governing loans disbursed or after July 1, 2020, which require a student borrower to prove reckless or knowing misrepresentations or omissions "that directly and clearly relate to" enrollment, continuing enrollment, or educational services for which the loan was made. 34 C.F.R. § 668.206(e)(3) (July 1, 2020).

For several reasons, the strict liability standard established by the Rule almost surely cannot survive re-

view under the APA. Obviously, imposing liability without any level of intent is in tension with the Section 455(h) requirement of specificity in the definition of actionable acts or omissions. If the Department were to "specify" which acts or omissions were actionable, there would rarely be an occasion for inadvertent misconduct, and there would be no ground to hold schools liable for wholly innocent but actionable misconduct. Imposing strict liability may well conflict with the statute.

In addition, although the standard for setting aside agency actions as arbitrary and capricious may be "narrow and highly deferential," it is not toothless. *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 449 (5th Cir. 2021) (quotation marks and citation omitted). The strict liability standards, encompassing even *inadvertent* misrepresentations by a school's contractors not subject to its day-to-day supervision, open the door to arbitrary and inconsistent enforcement by agency officials unable or unwilling to distinguish between close calls and deranged ones. *See Angel Bros. Enters. v. Walsh*, 18 F.4th 827, 834 (5th Cir. 2021) (Jones, J., dissenting).

The Department argues that "harmless and inadvertent errors" are "unlikely" to lead to the full discharge of a borrower's debt. *See* 87 Fed. Reg. at 65,921. This is wholly unpersuasive. As was explained above, by authorizing full discharge and disallowing partial discharges of all loans—including loans disbursed to a borrower prior to any actionable act or omission by the school—the Rule eviscerates the need for a causal link between the school's conduct and a borrower's injury. Thus, the Department's contention that the Rule *requires* a causal link is simply erroneous. *See id.* at

65,920. This argument, founded on what is "unlikely," also implicitly concedes the unbounded, and illegal, enforcement discretion embedded in the Rule's failure to promulgate specific terms of actionable acts or omission.

Also arbitrary and capricious is the Department's inadequate explanation of its decision to eliminate an intent requirement that existed in previous regulations. The APA requires an agency to reach "reasonable and reasonably explained" decisions. *See* 5 U.S.C. § 706(2)(A); *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423, 141 S. Ct. 1150, 1158 (2021). Here, however, the Department absurdly states that "[r]equiring intent would place too great a burden on an individual borrower." 87 Fed. Reg. at 65,921. But proof of intent is ubiquitously required throughout the law and can be proven through circumstantial evidence. *See Crowe v. Henry*, 115 F.3d 294, 297 (5th Cir. 1994). The Department's explanation of the Rule itself acknowledges that many state Unfair, Deceptive, or Abusive Practices ("UDAP") statutes, which continue to be relevant in borrower defense claims involving loans disbursed prior to July 1, 2017, "require proof of intent, knowledge, or recklessness—requirements that are not present in the Federal standard." 87 Fed. Reg. at 65,934.

The Department's further rationale, that "if the action resulted in detriment to the borrower that warrants relief," then knowledge or intent are irrelevant, is equally unsatisfactory. *Id.* at 65,921. According to the Department's own estimates, in 30 to 80 percent of borrower-initiated cases, claims against proprietary schools will arise from the group claims process, in which the injury is presumed, rather than proven on an individual basis. *Id.* at 66,016; 34 C.F.R. § 685.406(b)(2). In other

words, many borrowers who receive full discharges will be third-party beneficiaries of liability for misconduct that inflicted *no injury* on them. In sum, the Department's decision to eliminate mens rea from the Rule is not adequately justified or reasonably explained. The decision also conflicts with the Supreme Court's holding that agencies must offer a "reasoned explanation," rather than a mere "summary discussion" when they depart from a "longstanding earlier position." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222-24, 136 S. Ct. 2117, 2126, 2127 (2016).

2. Agency Adjudication of Loan Discharge Claims

The Rule claims to authorize the Department to adjudicate (a) borrower claims for loan discharges and (b) recoupment claims against schools. The Department is the "party against which borrowers assert a defense to repayment." 87 Fed. Reg. at 65,923. Both individual and group adjudications may occur. 34 C.F.R. §§ 685.402, .403. The schools, which could face recoupment liability following discharge, *id.* § 685.409(a)(1), must respond to the borrower proceedings within 90 days or be deemed not to contest the borrower defense. *Id.* § 685.405(d). Because "claims" may be brought "at any time," there is no regulatory limitation of actions. *Id.* § 685.401(b). The evident goal of these adjudications is to shift student debt liability to the schools.

CCST protests that these procedures are *ultra vires* and violate due process. The organization is substantially likely to prevail.

a. Administrative Adjudications for Borrowers and Recoupment

CCST is likely to succeed on the merits of its argument that the Higher Education Act does not allow the Department to adjudicate borrower defense claims or recoupment claims by the Department against schools. First, the text of Section 455(h) speaks only to the Secretary's power to promulgate *regulations*—not the power to *adjudicate* cases based on its regulations. The Supreme Court has repeatedly emphasized that "when Congress meant to confer adjudicatory authority . . . it did so explicitly and set forth the relevant procedures in considerable detail." *Bank One Chi., N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 274, 116 S. Ct. 637, 643 (1996) (quoting *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp*, 489 U.S. 561, 574, 109 S. Ct. 1361, 1369 (1989)); *see also Equitable Equip. Co. v. Dir., Off. Of Worker's Comp. Programs*, 191 F.3d 630, 632-33 (5th Cir. 1999) (holding that the ALJ lacked jurisdiction to adjudicate a claim for attorney's fees because the statute only vested ALJ jurisdiction over "a claim for compensation"). As CCST correctly argues, this "run-of-the-mill grant of rulemaking authority" does not support "reading into [Section 455(h)] . . . the authority to adjudicate" borrower discharge claims. *RLC Indus. Co v. C.I.R.*, 58 F.3d 413, 418 (9th Cir. 1995). "[W]e find no secure signal here that Congress intended to assign to the [Department of Education] responsibility for the adjudication of private claims." *Bank One*, 516 U.S. at 274, 116 S. Ct. at 643.[18]

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[18] The Rule also purports to authorize administrative adjudications of borrower defense claims against the government. 87 Fed. Reg. at 65,910; 65,941; 65,945. Because such claims are, in the De-

Indeed, Section 455(h) essentially contradicts a grant of adjudicatory power in stating that borrower defenses can be asserted "in any *action* arising from or relating to a loan made under this part." 20 U.S.C. § 1087e(h) (emphasis added). The contemporaneous legal definition of "action" is "a lawsuit brought in a court," which is distinct from an adjudication brought in an administrative tribunal. *Action*, BLACK'S LAW DICTIONARY (6th ed. 1990).[19] The Department does not respond to this meaningful choice of language.

Regarding recoupment adjudications against schools based on borrower defense claim adjudications, the Department asserts authority under a provision requiring schools to accept "responsibility and financial liability" for breaching participation agreements *with the Department*, 20 U.S.C.§ 1087d(a)(3). That this provision and related audit and liability functions are performed within the Department and are subject to administrative hearings is simply not the same as the adjudications au-

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partment's view, analogous to claims for restitution or rescission, 87 Fed. Reg. 65,914, they are subject to sovereign immunity. *Edelman v. Jordan,* 415 U.S. 651, 668-69, 94 S. Ct. 1347, 1358 (1974). But Congress did not waive sovereign immunity for these claims.

[19] BALLENTINE'S LAW DICTIONARY is consistent with this definition:

> A judicial proceeding either in law or in equity, to obtain relief at the hands of a court. A judicial remedy for the enforcement or protection of a right, or a legal proceeding in which a plaintiff claims against a defendant or fund the enforcement of some obligation toward the plaintiff which is binding upon the defendant or the fund. A prosecution in a court by one party against another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, without regard to the particular form of the procedure.

(3d ed. 1969).

thorized by the Rule for individual or group claims alleging violations of the newly created borrower defenses. The new claims function to shortcut conventional civil litigation between private parties, not to resolve schools' more general compliance under agreements with the Department that enabled federally backed student loans in the first place.

The Department attempts to rely on the "broader context" of the Higher Education Act in support of its newly crafted authority. *See* 20 U.S.C. §§ 1094(b), 1094(c), 1099c-1(a)(1)). In so doing, it principally relies on *Chauffeur's Training Sch., Inc v. Spellings*, 478 F.3d 117, 125-30 (2d Cir. 2007), which upheld the Department's implicit statutory authority to conduct an administrative proceeding that assessed liability against a school for loan program violations. *Chauffeur's* is distinguishable from this case. First, *Chauffeur's* did not turn on Section 455(h), the relevant statutory provision here. Second, the Department, acting in *Chauffeur's*, had grafted additional remedies onto a statutorily authorized proceeding under Section 1094(c). *Id.* at 127. The *Chauffeur's* court did not review an adjudicatory regime created out of whole cloth and lacking any statutory basis. Moreover, under the Rule before us, schools facing recoupment proceedings are denied a hearing under Subpart G of Part 668 of its regulations, which implement Section 1094(c). *See* 87 Fed. Reg. at 65,949; 34 C.F.R. § 668.81-100. Third, the statutory interpretation in *Chauffeur's* relied on *Chevron*[20] deference to the Department; but the Department makes no *Chevron* ar-

[20] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-45, 104 S. Ct. 2778, 2782-83 (1984).

gument here, and Section 455(h)'s plain statutory language belies deference to agency interpretation.

The Department's "broader context" argument is far from compelling. Nothing in the text of Section 1094(c) or Section 1099(c)-1(a)(1) specifically mentions the Department's authority to adjudicate claims, much less the authority to adjudicate borrower-defense or recoupment claims. The closest the Department comes to identifying a provision in the Higher Education Act that authorizes it to adjudicate borrower-defense claims is Section 1094(b). But this provision only allows the Department to hold hearings concerning "final audit[s] or program review determination[s]" relevant to an institution's ability to participate in Title IV. The subject matter and structure of those proceedings is distinguishable from the borrower defense claims or recoupment claims at issue here.

b. Constitutional Problems Surrounding Administrative Adjudications

Accepted principles of judicial restraint counsel against our deciding constitutional issues where, as here, the absence of statutory authority for the Department's assumption of adjudicatory authority and its violation of the APA are most likely to succeed. We note, however, inherent tension between the adjudication of "borrower defenses" to their loans insofar as a borrower's success will regularly lead to a *de facto transfer from the school to the borrower* following recoupment proceedings. The adjudication process resembles administrative decisions involving "private rights" rather than "public rights." The Supreme Court, however, has made clear that Congress may not withdraw adjudication of "private rights" cases from Article III courts.

See Stern v. Marshall, 564 U.S. 462, 482-95, 131 S. Ct. 2594, 2608-2615 (2011); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855). Yet, especially where "borrower defense[s]" under the Rule include breaches of state law and contract rights, these are the very paradigm of private rights. *See* 34 C.F.R. § 685.401(b)(3) (establishing a borrower defense for state breach of contract claims), *id.* § 685.401(c) (allowing borrowers to seek discharge on the basis of other state law causes of action).

To be sure, the Department seeks to disaggregate the integrated process of borrower-defense and recoupment, and it focuses on recoupment against the school in favor of the Department as a quintessential "public right." But its adjudication procedures render the two proceedings dependent on each other, because the legal claims and facts that authorize the Department to discharge the borrower's debt under the Rule are *the same* as those underpinning the Department's authority to pursue recoupment against the school. *See* 34 C.F.R. § 668.125(e)(2) (the school bears the burden to prove that "the decision to discharge the loans was incorrect or inconsistent with the law and that the institution is not liable for the loan amounts discharged or reimbursed" in the subsequent recoupment proceedings), *id.* § 668.125(e)(3) (the only evidence that may be submitted in recoupment proceedings concerns the bases cited by the Department in adjudicating the borrower discharge claims and materials submitted to the Department or relied on in the borrower discharge proceedings). For practical purposes, as summarized by CCST, these procedures act to shift debt liability to schools.

The Department also contends that the loan discharge derives from the relationship between the borrower and the federal government, and a grant of administrative relief through its adjudicative process will not dispose of or otherwise affect any related claims or defenses that the borrower or the borrower's institution might assert in collateral litigation. We take no position on whether these propositions are correct,[21] but even so, they do not necessarily trump the Article III concerns by embracing the possibility of non-final administrative outcomes or duplicative proceedings.

c. Rebuttable Presumptions and Group Claims Adjudications

For group claims, the Rule establishes a rebuttable presumption that "the act or omission giving rise to the borrower defense affected each member of the group

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[21] Nonetheless, it is difficult to reconcile the Department's position that these administrative adjudications would not be dispositive in collateral litigation with the rest of the Rule. Indeed, if collateral estoppel would not attach to the outcome of any administrative adjudication under the Rule, then the adjudication regime established by the Rule would open the door to potential double recovery for borrowers against schools after their loans have successfully been discharged, and rather than simplifying the process, would lead to duplication of proceedings. *See* 87 Fed. Reg. at 65,908 (stating that the Department sought to "strike[] a balance between providing transparency, clarity, and ease of administration while simultaneously giving adequate protections to borrowers, institutions, the Department, and the public monies that fund Federal student loans."). Moreover, once the borrower's debts have been discharged, it is difficult to see what the borrower's remaining potential damages for any subsequent civil suit governed by state law would be, especially for a borrower whose claims sounded in contract rather than tort law, as punitive damages are only available in the latter.

in deciding to attend, or continue attending, the institution, and that such reliance was reasonable." *Id.* § 685.406(b)(2).[22] This regulation embodies three "rebuttable" presumptions: that each member of the group *knew* about the particular claimed borrower defense; that each member *relied on* the representation, omission, or other act; and that each member's reliance was *reasonable*. *Id.* Further, related regulations largely undercut schools' ability to rebut the presumptions, as they have no independent right to probe these facts through discovery or witness examinations. *Id.* §§ 685.402-406, 668.125. Indeed, the Department explained that it need not share with a school related evidence in its possession. 87 Fed. Reg. at 65,912.

CCST is likely to prevail in its contentions that the Department has no statutory authority to create evidentiary requirements, that the presumptions are effectively unrebuttable, and that the Department cannot use evidentiary devices to achieve substantive results. The first argument concerning statutory authority would seem to follow as a necessary implication from our earlier conclusion that the Department lacks power to adjudicate claims. Further, we agree with CCST that it is unreasonable to presume that every borrower involved in a group claim is likely to satisfy all three presumptions. It suffices to take just one of them, that a challenged act or omission *affected* a student's decision to attend or continue attending an institution. 34 C.F.R. § 685.406(b)(2). Attendance decisions are highly fact-

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[22] For closed schools, the Rule also establishes a rebuttable presumption that the actionable act or omission of the school that caused the borrower detriment "warrants relief" being afforded to the borrower. 34 C.F.R. § 685.401(e).

specific, and many of the actionable misrepresentations explicitly listed in the Rule, such as a faculty member's qualifications or whether a particular charge is customary, are too discrete to justify a universal presumption —particularly given that the only available remedy is full discharge of the loan. *Id.* §§ 668.72(h), 668.73(b).

The Rule's group claims process involves applying presumptions to matters requiring individualized proof and extrapolating them collectively. Thus, formulating a group under the Rule is far easier than the process required by Federal Rule of Civil Procedure 23. *See* 34 C.F.R. § 685.402. Rule 23 protects the integrity of civil class actions for money damages by requiring, at a minimum, that the class representative's claim is "typical" of that of the class and that common questions of law and fact "predominate" in the case. Fed. R. Civ. P. 23(a)(2), (b)(3). As a result, this court has repeatedly rejected certifying class actions, including for fraud, where damages and reliance issues are highly individualized. *See Castano v Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue."); *McManus v. Fleetwood Enters. Inc.*, 320 F.3d 545, 550 (5th Cir. 2003) ("Reliance will vary from plaintiff to plaintiff."); *Patterson v. Mobil Oil Co.*, 241 F.3d 417, 419 (5th Cir. 2001) ("Claims for money damages in which individual reliance is an element are poor candidates for class treatment, at best."). Handling group claims under the Rule thus lacks due process protections available under the class action process.

The Department's defense of the rebuttable presumptions and the group claims process primarily reflects the Department's determination to resolve what it

discretionarily decides are "virtually identical claims" on an aggregate basis. But the Department's explanation of its "reasonable" policy conclusions in the Federal Register commentary does not remedy the incompatibility of its procedures with standard civil litigation practice. As CCST notes, presumptions in the law result when "proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact . . . until the adversary disproves it." *Chem. Mfrs. Ass'n. v. Dep't. of Transp.*, 105 F.3d 702, 705 (D.C. Cir. 1997) (quotation marks and citation omitted). The Department's attempt to substitute its unexplained "experience" regarding "widespread and pervasive" misstatements for proof justifying the presumptions is arbitrary and capricious. "[T]he argument for agency expertise and judgment does not get [the Department] very far," as "falling back on unexplained claims of agency expertise does not carry the [Department's] burden" under the APA. *El Paso Elec. Co. v. FERC*, 76 F.4th 352, 364 (5th Cir. 2023). Presumptions, especially in administrative proceedings that may generate institution-destroying liability, cannot be a matter of Department *ipse dixit.*

Further evidence of incompatibility lies in the Rule's liability standard for both individual and group claims: totality of the circumstances. 34 C.F.R. § 685.401(e). What is the "totality of the circumstances," and how, if at all, does it differ from "preponderance of the evidence"? This standard amounts to another loophole affording immense non-reviewable discretion to the Department.

The Department also contends that none of the presumptions change the burden of persuasion, which will

still require proof by a preponderance of the evidence. 87 Fed. Reg. at 65,922. First, as just noted, the liability standard in the Rule is "totality of the circumstances," not "preponderance of the evidence." Second, that an affected school would still have a "full opportunity" to rebut a presumption, showing it to be "inappropriate" under the circumstances, does not remedy the harm associated with the erroneous requirement of any presumption. By its terms, a rebuttable presumption displaces the ordinary burden of proof and means that if the evidence is of equal weight between the parties, the school will lose because it has failed to rebut the presumption. Third, contrary to the Department's attempt to cabin presumptions for the sake of this approach, there is nothing in the text of the Rule to suggest that group claims involving minor misrepresentations are "unlikely" to be brought or that the rebuttable presumptions would be applied differently in those proceedings. Again, the Department urges this court to defer to commentary rather than the unlimited text of the Rule.

Ultimately, the evidentiary presumptions and group-claim procedures built into the Rule are not designed to further the truth-seeking process. Instead, these are policy-driven mechanisms designed to selectively target proprietary schools, as the Department expects that 75 percent of all borrower claims associated with proprietary schools will be group claims. *Id.* at 65,993. The Department has stated outright that it sees driving enrollment away from these schools to be a "benefit." *Id.* at. 65,996.

In sum, CCST is likely to succeed in challenging the rebuttable presumptions and group claims procedures

as arbitrary and capricious. "Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224, 73 S. Ct. 625, 635 (1953) (Jackson, J., joined by Frankfurter, J., dissenting).

3. Closed-School Provision

Not least in this pantheon of legal problems associated with the Rule is its closed-school provision, which is likely unlawful on several grounds. First, the closed-school provision exceeds the Department's statutory authority by re-defining a school closure to contradict the clear text of the statute. Second, the closed-school provision arbitrarily authorizes automatic, full discharges of debt *without proof of causation* (a) for students who withdrew from their programs up to 180 days prior to the Department's newly invented closure date, and (b) for borrowers who did not accept or complete "a program at another branch or location of the school or through a teach-out agreement" at another comparable school one year after the school "closure" or their last day of attendance at a continuation program. Borrowers are presumed to have withdrawn without needing to prove causation, and they are presumed to have suffered financial "detriment" as well.

a. Redefinition of School "Closure"

The authority for discharging student debt associated with school closures derives from 20 U.S.C. § 1087(c), which states in pertinent part:

(c) Discharge

(1) In general

> If . . . the student borrower, or the student on whose behalf a parent borrowed, is *unable to complete the program in which such student is enrolled due to the closure of the institution* . . . *then the Secretary shall discharge* the borrower's liability on the loan (including interest and collection fees) by repaying the amount owed on the loan and *shall subsequently pursue any claim available to such borrower against the institution and its affiliates and principals or settle the loan obligation*. . . .
>
> **(2) Assignment**
>
> A borrower whose loan has been discharged pursuant to this subsection shall be deemed to have assigned to the United States the right to a loan refund up to the amount discharged against the institution and its affiliates and principals.

(emphases added).

The Rule is a striking contrast, as it redefines a school or institutional "closure" as follows:

> the school's closure date is the earlier of: *the date, determined by the Secretary, that the school ceased to provide educational instruction in programs in which most students at the school were enrolled*, or a date determined by the Secretary that reflects when the school ceased to provide educational instruction for all of its students[.]

34 C.F.R. § 685.214(a)(2)(i) (emphasis added).

"We start with the key statutory term: ["closure"]. As usual, our job is to interpret the words consistent with their ordinary meaning . . . at the time Con-

gress enacted the statute." *Wisconsin Cent. Ltd. v. United States*, 585 U.S. 274, 277, 138 S. Ct. 2067, 2070 (2018) (internal quotation marks and citation omitted). There is nothing in the text or context of the statute to indicate that the word "closure" bears anything other than its ordinary meaning, which in relevant part provides that a closure is "a bringing of some activity to a stop: cessation of operations." *Closure*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 428 (3d ed. 1981).[23]

Under the Rule's definition of "closure," the commonsense and dictionary meaning is at best an afterthought in the regulatory language. The most significant part of the Rule confers discretion on the Secretary to "determine" when the school "ceased to provide" "programs" in which "most students" were enrolled. Each of the additional terms is vague, subject to arbitrary and unequal enforcement, and potentially sweeping.

A straightforward hypothetical shows how the Rule's expanded definition of "closure" exposes a school to financial liability for actions that Congress clearly did not intend to cover. Consider a campus with one thousand students that previously offered two programs: a culinary program with 490 students and a cybersecurity program with 510 students. The school chooses to relocate the cybersecurity program to a new campus so that the original campus can be retrofitted to enhance

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[23] *See also* CAMBRIDGE DICTIONARY, available at https://dictionary.cambridge.org/us/dictionary/english/closure?q=closure+ ("the fact of a business, organization, etc. stopping operating"); OXFORD ENGLISH DICTIONARY, available at https://www.oed.com/dictionary/closure_n?tab=meaning_and_use#9161981 ("the act of closing or shutting; closed condition; a bringing to a conclusion; end, close").

culinary education. In doing so, the school has "closed" the original campus according to the Rule merely by choosing to reorganize its operations. Under the statutory text of Section 1087(c), none of the cybersecurity students who had to relocate to other campuses would be eligible for discharge, and the school would not be exposed to any financial liability to the Department. But the newly minted Rule subjects the school[24] to enormous financial exposure[25] for "closing" even if it is still operates and educates 49 percent of the students who were enrolled at that location prior to the reorganization. Such an expansion in the Department's power and ability to impose liability on schools not only conflicts with the statute, but it also eviscerates schools' ability to reduce or relocate certain programing at certain locations in response to legitimate business and educational needs.

In defense of this expanded definition of "closure," the Department argues first that the change is necessary to protect borrowers from a situation where they would be denied discharge after the school ceased to provide most programming but "intentionally ke[pt] a single, small program open long enough to avoid the [lookback] window." *See* 87 Fed. Reg. at 65,966. This

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[24] A "school" is defined in the closed-school discharge regulations as "a school's main campus or any location or branch of the main campus." 34 C.F.R. § 685.214(a)(2)(ii).

[25] Under this hypothetical, all the cybersecurity students who did not complete the same program at another branch or location of the school, or through a teach-out agreement approved by the school's accrediting agency and, if applicable, the school's State authorizing agency, within one year of this reorganization (or their last date of attendance at a continuation program that they started but failed to complete), would be eligible for automatic discharge.

argument, however, impermissibly substitutes a global presumption of dischargeability (again) for the statute's explicit requirement of proof that the student's inability to complete a program was "due to" the closure. 20 U.S.C. § 1087(c)(1). Second, the Department asserts, with no supporting citation, that the Rule does not expand the overall scope of which schools are considered "closed" because borrowers can obtain discharge only after a school has entirely ceased operations. The plain text of the Rule, as explained in the above hypothetical, contradicts that assertion.

For the same reasons that "[a] roof is not a floor," a school that is "open" is not "closed." *Diamond Roofing Co v. Occupational Safety & Health Rev. Comm'n*, 528 F.2d 645, 647 (5th Cir. 1976). We conclude that any challenge to the Department's statutory authority to promulgate 34 C.F.R. § 685.214(a)(2)(i) is likely to succeed on the merits.

b. A School's Closure Must Be the Actual Reason for Withdrawal

The closed-school provision of the Rule provides for automatic discharges for students who "withdrew from the school not more than 180 calendar days before the school closed." *Id.* § 685.214(d)(1)(i)(B). In doing so, the Rule does not require borrowers to show that they were unable to complete their program "*due to the closure* of the institution." 20 U.S.C. § 1087(c)(1) (emphasis added). Instead, the Rule allows the Secretary to discharge an eligible borrower's loan under the closed school provision without an application or any statement from the borrower 1 year after the institution's closure

date[26] if the borrower did not complete the program at another branch or location of the school or through a teach-out agreement at another school. 34 C.F.R. § 685.214(c).

This substantial expansion in the number of borrowers eligible for discharge exceeds the agency's statutory authority because it eliminates the causation requirement Congress included in the statute in favor of an arbitrary temporal presumption. The closed-school provision provides automatic discharge to borrowers despite personal or financial or educational reasons completely unrelated to the school's decision to shut down or suspend instruction in certain locations or programs. *Id.*

The closed-school provision also automatically discharges the debt held by borrowers who did not complete a "program at another branch or location of the school or through a teach-out agreement" at another comparable school, or one year after their last day of attendance at a continuation program. 34 C.F.R. § 685.214(c). Again, no proof is required that the closure actually caused the students not to complete the program. This abandonment of the causation requirement, like the 180-day "inference," is overinclusive and exceeds the Department's statutory authority. The Department may not justify the Rule by stating that the Higher Education Act does not foreclose the Department's approach, or that CCST's policy preference is not a sufficient basis to invalidate the Rule. An agency's

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[26] Borrowers who accepted but did not complete a continuation program are eligible for automatic discharge one year after their last date of attendance at the other branch or location or in the teach-out program. 34 C.F.R. § 685.214(c)(2).

burden is to establish that its governing statute *enables* its regulations. The Department's burden here is insurmountable given the clarity of the relevant statutory provisions.

This adds yet another reason why CCST is likely to succeed on the merits of its challenge to the closed-school provisions.

D. The Balance of Harms and the Public Interest

The balance-of-harms and public-interest factors merge when the government opposes an injunction. *See Nken*, 556 U.S. at 435, 129 S. Ct. at 1762; *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 353 (5th Cir. 2022).

First, the harms CCST and its members face by the failure to maintain the status quo are substantially more severe than those faced by the Department and borrowers with pending discharge claims. We are not convinced by the Department's arguments that the 2019 Rule provides an inadequate framework for its work administering and reviewing pending claims, or that borrowers with pending claims would be unfairly prejudiced or financially injured by the granting of a preliminary injunction pending final judgment.

The burden imposed on the public favors a stay as well. A failure to stay the borrower-defense and closed-school provisions of the Rule would immediately hit CCST's members (and other schools) with enormous and unrecoverable compliance costs—which would inevitably be passed on to students. Evidence CCST points to in the record shows that a failure to stay the Rule would significantly constrain schools' operations and prevent them from devoting resources to educating their students, upgrading facilities, and constructing new

ones. The only alternative to incurring these costs is for the school to withdraw from Title IV entirely, which would be to the detriment of students who rely on the availability of Direct Loans. Such a consequence would harm the public at large.

We thus conclude that all the equitable factors favor the granting of a preliminary injunction.

E. Relief Should Not Be Party Restricted

Section 705 of the APA authorizes a reviewing court to "issue all necessary and appropriate process to postpone the effective date of an agency action" that is pending review. 5 U.S.C. § 705. Nothing in the text of Section 705, nor of Section 706, suggests that either preliminary or ultimate relief under the APA needs to be limited to CCST or its members. Instead, we conclude that the scope of preliminary relief under Section 705 aligns with the scope of ultimate relief under Section 706, which is not party-restricted and allows a court to "set aside" an unlawful agency action. *See Griffin v. HM Florida-ORL, LLC*, 144 S. Ct. 1, 1 n.1 (Mem) (2023) (Kavanaugh, J., concurring in the denial of the application for stay); Mila Sohoni, *The Power to Vacate A Rule*, 88 GEO. WASH. L. REV. 1121, 1173 (2020) ("The term 'set aside' means invalidation—and an invalid rule may not be applied to anyone.") (footnote omitted); Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1012-13 (2018) ("Unlike judicial review of statutes, in which courts enter judgments and decrees only against litigants, the APA . . . go[es] further by empowering the judiciary to act directly against the challenged agency action. This statutory power to 'set aside' agency action is more than a mere non-enforcement remedy. . . . In these situations, the courts *do*

hold the power to 'strike down' an agency's work, and the disapproved agency action is treated as though it had never happened.").

The almost certainly unlawful provisions of the Rule that CCST challenges apply to all Title IV participants and are thus almost certainly unlawful as to all Title IV participants. Thus, the stay provided here mirrors the relief granted by the Supreme Court in 2016, when it stayed the Clean Power Plan without party limitation, *West Virginia v. EPA*, 577 U.S. 1126, 136 S. Ct. 1000 (2016), and by this court in 2021, when it stayed OSHA's vaccine mandate without party limitation, *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021). The Department's protests against nationwide relief are incoherent in light of its use of the Rule to prescribe uniform federal standards. "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989).

Against this backdrop of specific statutory text and longstanding administrative law principles, the Department's arguments that general equitable and constitutional principles require the panel to limit any relief to the named parties do not hold water. "Necessary and appropriate process" does not mean that the relief awarded under Section 705 can only be specific to the plaintiff. 5 U.S.C. § 705. Rather, it means, as the Department acknowledges in its own briefing, that the relief should only involve postponing the effective date of the portions of the Rule that CCST *actually challenges* and for which it has shown a likelihood of success on the

merits. The Department's argument that it would be improper to enjoin portions of the Rule that are unchallenged or for which CCST has not shown a likelihood of success on the merits is correct. But it is also irrelevant, as the preliminary injunction sought by CCST, and granted in this opinion, does not affect portions of the Rule that do not relate to borrower-defenses, closed-schools, or adjudication procedures.

III. Conclusion

CCST has met the criteria to satisfy a preliminary injunction, and the district court erred by concluding that CCST faced no irreparable harm. We REVERSE the district court's judgment, REMAND, and instruct the district court to postpone the effective date of the borrower-defense and closed-school discharge provisions of the Rule pending final judgment as specified above. The stay pending appeal remains in effect until the district court enters the preliminary injunction.

STAY PENDING APPEAL MAINTAINED PENDING ENTRY OF PRELIMINARY INJUNCTION, CASE REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1:23-cv-433-RP

CAREER COLLEGES & SCHOOLS OF TEXAS, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF EDUCATION, AND MIGUEL CARDONA, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF EDUCATION, DEFENDANTS

Filed: June 30, 2023

ORDER

Before the Court is Plaintiff Career Colleges & Schools of Texas's ("CCST" or "Plaintiff") motion for preliminary injunction, (the "Motion"). (Dkt. 23). Defendants United States Department of Education ("DOE") and Secretary Miguel Cardona (collectively "Defendants") filed a response, (Dkt. 56), Plaintiff filed a reply, (Dkt. 64), and the Court held an evidentiary hearing on the motion on May 31, 2023. Having considered the briefing, the arguments made at the hearing, the evidence, and the relevant law, the Court will deny the motion.

I. BACKGROUND

A. Parties

CCST is a trade association a trade association dedicated to the interests of for-profit colleges and similar post-secondary institutions in Texas. (*See* England Decl., Dkt. 25, at 25). Its membership is comprised of more than 70 schools located throughout Texas. (*Id.*) Like many other public and nonprofit schools, the majority of CCST's members participate in Title IV programs under the Higher Education Act of 1965 ("HEA"), which allows their enrolled students to pay for tuition using federal student loans. (*Id.* at 27). The U.S. Department of Education ("DOE") is an executive agency of the United States government, 5 U.S.C. §§ 101, 105, subject to the Administrative Procedure Act ("APA"), *id.* § 551(1). Defendant Miguel Cardona is the current Secretary of Education and is responsible for DOE's promulgation and administration of the challenged regulations. He is sued in his official capacity only.

B. Statutory & Regulatory Background

DOE distributes federal student loans via Title IV of the HEA. Most funding is disbursed through the William D. Ford Federal "Direct Loan Program," in which DOE issues federal loans directly to eligible students who attend institutions of higher education that participate in Title IV. 20 U.S.C. § 1087a. In 1993, Congress amended the HEA by adding a provision that enables students who have been the victims of certain types of institutional misconduct to have their federal student loans forgiven. Specifically, Section 455(h) of the HEA provides:

> Notwithstanding any other provision of State or Federal law, the Secretary 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 this part, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan.

20 U.S.C. § 1087e(h). In a separate provision, the HEA also requires the Department to "discharge [a] borrower's liability on [a] loan" where that borrower "is unable to complete the program in which such student is enrolled due to the closure of the institution." *Id.* § 1087(c) (the "Closed-School Discharge").

Over the next 30 years, DOE published four different iterations of regulations governing borrower defense to repayment ("BDR"). The first BDR rule was published in 1994. *See* 59 Fed. Reg. at 61,664 (Dec. 1, 1994). The 1994 rule allowed borrowers to "assert as a defense against repayment . . . any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law," but did not specify a process by which a student could assert a borrower defense claim. The rule also provided a non-exhaustive list of proceedings in which the borrower could assert a defense, *id.*, and created a "system for adjudicating claims by borrowers that have a defense against repayment of a loan based on the acts or omissions of the school," *id.* at 61,671. The 1994 rule left to the Secretary's discretion the relief to be afforded to successful borrower defense applicants. *See id.* at 61,696.

For the next 20 years, DOE received few requests for discharges under the BDR. *See* 81 Fed. Reg. at 75,926 (Nov. 1, 2016). However, in 2015 the number of BDR applications increased significantly following the collapse of a large network of proprietary schools owned by Corinthian Colleges, Inc. *See id.* In response to this influx of claims, DOE commenced a negotiated rulemaking process to update its BDR regulations and published a final rulemaking on November 1, 2016. *See id.* Among other changes, the 2016 rule adopted a federal standard for actionable misstatements, permitting borrowers to obtain debt relief upon showing that their school made a "substantial misrepresentation," defined as (1) intentional falsehoods and (2) statements that have "the likelihood or tendency to mislead under the circumstances," including statements that omit information in a "false, erroneous, or misleading" way. 34 C.F.R. §§ 668.71(c), 668.222(d) (2016). The 2016 rule also allowed DOE to begin adjudicating factually similar BDR claims together on a groupwide basis. *Id.* §§ 685.206(c)(2), 685.222(e) (2016).

Following a change in presidential administrations, DOE again amended its BDR regulations, publishing a new final rulemaking on September 23, 2019. *See* 84 Fed. Reg. at 49,788 (Sept. 23, 2019). Among other changes, the 2019 rule narrowed the 2016 rule's definition of actionable "misrepresentations" to require evidence of an institution's intent to mislead or its reckless regard of the truth. It also restricted actionable misrepresentations to those made in writing, and it required borrowers to prove financial harm other than their student loan debt. *See* 34 C.F.R. § 685.206(e)(3), (e)(4) (2019). The 2019 rule also abolished the group

claim process and required that DOE consider each borrower claim independently. *See* 84 Fed. Reg. at 49,799.

C. The 2022 Final Rule

DOE initiated the latest BDR rulemaking in 2021. *See* 86 Fed. Reg. 28,299 (May 26, 2021). After engaging in a negotiated rulemaking process, the Department published a notice of proposed rulemaking (NPRM) in July 2022 proposing "several significant improvements to existing programs authorized under the [HEA] that grant discharges to borrowers who meet specific eligibility conditions." 87 Fed. Reg. at 41,879. After a public comment period, DOE issued its final rule, updating regulations governing borrower defense and closed school discharges, along with a number of other provisions affecting a broad swath of statutory programs. *See* 87 Fed. Reg. 65,904 (Nov. 1, 2022) (the "Rule").

According to CCST, the new Rule "upends critical regulations governing borrower defenses" and "greatly broadens the substantive grounds for relief to borrowers (and liability for schools)" by imposing borrower-friendly standards, new adjudicatory schemes, and prejudicial evidentiary presumptions. (Complaint, Dkt. 1, at 2). CCST claims the Rule is designed "to accomplish massive loan forgiveness for borrowers and to reallocate the correspondingly massive financial liability to institutions of higher education." (*Id.*). The Complaint discusses various aspects of the Rule, but the specific provisions challenged in CCST's motion can be grouped into the following categories.

1. Borrower Defenses to Repayment

The Rule amends the substantive grounds for borrower relief by recognizing five types of "acts" or "omis-

sions" by an institution that can give rise to a BDR claim: (1) a substantial misrepresentation; (2) a substantial omission of fact; (3) breach of contract; (4) "aggressive or deceptive" recruitment tactics; or (5) a state or federal judgment or final Department action against an institution that could give rise to a borrower defense claim. *See* 34 C.F.R. § 685.401(b)(1)-(5) (2022). A misrepresentation is deemed "substantial" if a borrower reasonably relied upon it or "could reasonably be expected to rely" upon it to his or her detriment. 34 C.F.R. § 668.71. Because a misrepresentation need not be intentional, knowing, or negligent, 87 Fed. Reg. at 65,921, and any "absence of material information" is actionable, CCST contends the Rule effectively imposes "strict liability" on schools for even erroneous or non-material representations or omissions. (Compl, Dkt. 1, at 24-25).

2. Borrower Claim Adjudication

The Rule establishes new adjudicative procedures by which DOE receives and adjudicates borrowers' BDR claims. While institutions do not participate in the BDR claim adjudication process, DOE must give institutions notice of any claims against them, and the Rule provides a 90-day window for the school to respond by submitting relevant materials relating to the claim. 34 C.F.R. § 685.405. Moreover, during the initial BDR claim adjudication, the institution cannot engage in discovery or otherwise test evidence submitted by the borrower. 34 C.F.R. §§ 685.405, 685.406(b), (c). The Rule also reinstates a procedure for the groupwide adjudication of BDR claims. *Id.* §§ 685.402, 685.403. For group claims, the Rule creates a "rebuttable presumption that the act or omission giving rise to [the

claim] affected each member of the group in deciding to attend, or continue attending, the institution, and that such reliance was reasonable." *Id.* § 685.406(b)(2). Similarly, for "Closed-School" claims, the Rule creates a presumption "that the detriment suffered warrants relief." *Id.* § 685.401(e). The Rule does not prescribe a limitation period for BDR claims; they may be filed "at any time," so long as the borrower has a balance due on a direct loan or any loan that may be consolidated into a direct loan. *Id.* § 685.401(b).

3. Full Discharge

The Rule removes the previous requirement for borrowers to prove financial harm. It also requires DOE to award a full discharge of the borrower's total paid and unpaid debt upon a successful BDR claim, with no requirement for the borrower to prove the entire debt was caused by the act or omission. *See* 34 C.F.R. § 685.401(b)

4. Recoupment Adjudication

If the Department approves a BDR claim, the Rule provides DOE discretion to initiate a separate administrative proceeding to recoup the value of discharged loan directly from schools. *See* 34 C.F.R. § 668.125. If DOE opts to initiate a recoupment proceeding, it must give written notice to the school of the borrower-defense determination, the basis of liability, and the amount of the discharge. 34 C.F.R. § 668.125(a). The institution can request review by a designated DOE official. Id. § 668.125(b). If it does request review, an administrative hearing will be held. *Id.* § 668.125(c)-(d). To prevail in a recoupment action, DOE has "the burden of production to demonstrate that loans made to students to attend the institution were discharged on the basis of a borrower

defense to repayment claim." *Id.* § 668.125(e)(1). By contrast, "[t]he institution has the burden of proof to demonstrate that the decision to discharge the loans was incorrect or inconsistent with law and that the institution is not liable for the loan amounts discharged or reimbursed." *Id.* § 668.125(e)(2). According to CCST, the evidence allowed in recoupment proceedings is "extremely restricted" and consists only of: (1) materials submitted to DOE in the BDR process by the borrowers, the institution, or third parties; (2) any materials that the Department relied on that it chooses to provide to the institution; and (3) any "documentary evidence" that the institution submits that relates to the bases of the borrower defense or recoupment claim. *Id.* § 668.125(e)(3). There is no mechanism for the school to seek discovery from the borrower or examine witnesses.

5. Closed School Discharge

Finally, the Rule amends DOE's "closed-school discharge" regulations to "expand borrower eligibility for automatic discharges," 87 Fed. Reg. at 65,904, by changing the criteria for determining the "closure date for a school that has ceased overall operations," *id.* at 65,966. The Rule provides that a school closure date is, as determined by the Secretary, the earlier of the date "that the school ceased to provide educational instruction in programs in which most students at the school were enrolled" or the date "that reflects when the school ceased to provide educational instruction for all of its students." *Id.* at 66,060.

D. This Action

On February 28, 2023, CCST filed this action, alleging that the Rule exceeds DOE's statutory authority under the HEA; is arbitrary and capricious under the APA; and violates Article III, the Seventh and Tenth Amendments, and principles of separation of powers and federalism. (Compl., Dkt. 1, at 78-84). On these grounds, CCST seeks declaratory relief and an order vacating the Rule and enjoining Defendants from enforcing it. *Id.*

On April 5, 2023, CCST filed a motion for preliminary injunction, (Dkt. 23), seeking to enjoin Defendants from enforcing, applying, or implementing the Rule pending resolution of this suit. The Rule is scheduled to become effective on July 1, 2023.

II. LEGAL STANDARD

"A preliminary injunction is an extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren,* 553 U.S. 674, 689-90 (2008) (citation omitted). To demonstrate eligibility for such relief, a plaintiff must clearly show (1) "a substantial threat of irreparable injury," (2) "a substantial likelihood of success on the merits," (3) "that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted," and (4) "that the grant of an injunction will not disserve the public interest." *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016) (citation omitted). Whether to grant preliminary injunctive relief is committed to the district court's sound discretion. *Miss. Power & Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir. 1985).

III. DISCUSSION

A. Standing

A preliminary injunction cannot be requested by a plaintiff who lacks standing to sue, although, at earlier stages of litigation, "the manner and degree of evidence required to show standing is less than at later stages." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 329 (5th Cir. 2020). Before analyzing the merits of CCST's motion, the Court must first decide whether CCST has met its burden to demonstrate its standing to challenge the Rule.

Article III of the Constitution limits "[t]he judicial power of the United States" to "cases" or "controversies." To state a case or controversy, a plaintiff must establish standing. *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 133 (2011). That, in turn, requires a plaintiff to demonstrate that it has "(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*, 578 U. S. 330, 338 (2016). At the preliminary injunction stage, the movant must clearly show only that each element of standing is "likely to obtain in the case at hand." *Speech First*, 979 F.3d at 330.

A plaintiff that is an organization can demonstrate standing in two ways: it can assert standing as the representative of its members (*i.e.*, "associational standing"), or, alternatively, it can claim that it suffered an injury in its own right (*i.e.*, "organizational standing"). *Warth v. Seldin*, 422 U.S. 490, 511 (1975). For associational standing, a plaintiff must show that: (1) its mem-

bers themselves would have standing; (2) the interests it seeks to protect are germane to its organizational purpose; and (3) participation of its members is not required. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). A plaintiff establishes organizational standing by "meet[ing] the same standing test that applies to individuals." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017). Here, CCST claims standing under both theories.

Defendants argue CCST lacks associational standing because it cannot show that at least one of its members themselves would have standing.[1] (Def's Resp., Dkt. 56, at 9-10). They argue that CCST members' alleged injuries are "conjectural or hypothetical," and that there is no evidence that any CCST member faces the type of concrete injury required to support individual standing. (*Id.*) CCST contends that its members would have individual standing because, as the "objects of the challenged regulations," its members face direct injuries from the Rule in the form of new regulatory burdens, increased risk of financial liability in the future, and violations of their procedural rights. (Pl's Reply, Dkt. 64, at 2-6).

The Court agrees that CCST has sufficiently shown its members would likely have individual standing to challenge the Rule. There is no real dispute that CCST's member schools are among the objects of the regulation at issue. When a challenged regulation applies to a plaintiff directly, "there is ordinarily little question" that the

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[1] Defendants do not dispute that CCST has met the other two elements of associational standing.

plaintiff has standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992); *see also Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015) ("[W]e find no reason to depart from the ordinary rule that Contender Farms and McGartland, as objects of the Regulation, may challenge it."). Indeed, CCST submits declarations from two of its member schools stating that they have expended time conducting "preparatory activities" to ensure compliance with the Rule and mitigate future liability. Among other things, they contend that the Rule broadens the kinds of school actions that can give rise to a borrower defense claim (and potentially recoupment), including new prohibitions on "aggressive recruitment" and in other areas that require at least some degree of preparatory analysis, staff training, and reviews of existing compliance protocols. (*See* Shaw Decl., Dkt. 25, at App-33-34; Arthur Decl., Dkt. 25, at App-39-40). This is the type of concrete injury that the Fifth Circuit has deemed adequate to provide standing in other regulatory challenges. *Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019) (quoting *Contender Farms*, 779 F.3d at 266) (an "increased regulatory burden typically satisfies the injury in fact requirement"). Accordingly, the Court finds that CCST has met its burden to demonstrate associational standing.

Because the Court finds CCST has adequately shown associational standing to request a preliminary injunction on its members' behalf, the Court need not resolve the question of organizational standing at this juncture. *See United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 551 n.4 (1996).

B. Irreparable Harm

An injury that suffices to establish Article III standing does not necessarily equate to a likelihood of irreparable harm that justifies preliminary injunctive relief. In this case, the Court's analysis begins and ends with its finding that CCST has not met its burden to make this required showing. CCST describes three categories of irreparable harms stemming from the Rule: (1) financial and reputational harms associated with anticipated BDR claims and recoupment actions; (2) abandoned plans for expansion and consolidation, and (3) unrecoverable compliance costs. (Brief, Dkt. 24, at 23-24). The Court will examine each category in turn.

1. Financial & Reputational Harm

CCST first claims to face a threat of "financial and reputational harm" resulting from its member schools having to "defend against a deluge of borrower defense claims." (Brief, Dkt. 24, at 21). Pointing to the Rule's new "borrower-friendly standard," groupwide-claims process, full-discharge requirement, and evidentiary presumptions, CCST says that, starting July 1, proprietary schools "are almost certain" to be "inundated by tens of thousands of borrower defense claims that will be subject to a rubber-stamp process that presumes [schools'] liability." (*Id.*) For smaller schools within its membership, CCST contends that imposing liability for discharged loans, especially on a group-claim basis, would pose an "existential threat." (*Id.* at 22). Defendants respond by noting that CCST has not identified any actual or anticipated BDR claims affecting its members, so the threat of injury arising from future BDR claims and recoupment actions is purely speculative. (Defs' Resp., Dkt 56, at 33-34).

At the outset, the Court notes that CCST waited over five months after the Rule's passage before seeking a temporary injunction. (Def's Resp., Dkt. 56, at 32-33). While not determinative, undue delay on the movant's part "militates against the issuance of a preliminary injunction." *Massimo Motor Sports LLC v. Shandong Odes Indus. Co.*, 2021 WL 6135455, at *2 (N.D. Tex. Dec. 28, 2021) (citation omitted); *see also id.* (citing *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th Cir. 1975) (plaintiff's three-month delay in seeking preliminary injunction provided "some evidence that the detrimental effects of the [agency action] have already taken their toll") (citations omitted); *H.D. Vest, Inc. v. H.D. Vest Mgmt & Servs., LLC*, No. 3:09-cv-390-L (N.D. Tex. June 23, 2009) ("Plaintiff's undue delay [of five months] is sufficient to rebut a presumption of irreparable harm.") (citations omitted).

Putting this delay aside, there are more substantial problems with CCST's claims of impending financial injury. In general, "economic harms cannot, as a matter of law, constitute irreparable harm." *Optimus Steel, LLC v. U.S. Army Corps of Eng'rs*, 492 F. Supp. 3d 701, 725 (E.D. Tex. 2020). The Fifth Circuit has recognized an exception in cases "where the [monetary] loss threatens the very existence of the movant's business," *Texas v. EPA*, 829 F.3d 405, 434 n.1 (5th Cir. 2016). Still, "a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury," *Johnson v. Owens*, 2013 WL 12177176, at *1 (W.D. Tex. Aug. 5, 2013). Rather, a movant must affirmatively demonstrate a substantial likelihood that, in the absence of the extraordinary remedy it seeks, it will suffer injury that is "both certain and great," "actual and not theoretical." *Rozelle v. Lowe*, No. 5:15-CV-108-RP, 2015 WL

13236273, at *1 (W.D. Tex. June 1, 2015) (citation omitted).

With these principles in mind, the Court finds that CCST's asserted financial and reputational injuries are too conjectural to support preliminary injunctive relief. Regarding financial harm, CCST generally states that the Rule could one day "subject [its members] to potential liability for discharged loans, to revocation or denial of eligibility to participate in the federal student loan programs, and to restrictions upon participation," and leave them facing "enormous financial liability." (England Decl., Dkt. 25, at 28). But these outcomes are hypothetical at best. Before any CCST member would come close to facing these prospects, several events would have to occur first. For one, a student at a CCST member school would have to assert a BDR claim after July 1, 2023. CCST has not identified any pending or anticipated BDR claims against its members, much less any reason to believe such claims will be "meritless" or "rubber-stamped" by DOE. Even assuming that a "deluge" of such claims is imminent, DOE would have to adjudicate the claims in the borrowers' favor. Even then, CCST members would face no risk of financial liability because "the grant of a borrower-defense application has no binding effect on the school." *Sweet v. Cardona*, No. C19-03674 WHA, 2022 WL 16966513, at *9 (N.D. Cal. Nov. 16, 2022) (emphasis removed). Instead, DOE would have to initiate a separate recoupment action against the school, then eventually prevail in that administrative proceeding. At that point, a school would still have the opportunity to seek judicial review before it would be compelled to pay recoupment. "[S]peculation built upon further speculation does not amount to a 'reasonably certain threat of imminent

harm'" and does not warrant injunctive relief. *Friends of Lydia Ann Channel v. United States Army Corps of Engineers*, 701 F. App'x 352, 357 (5th Cir. 2017) (quoting *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991)).

Notwithstanding the remoteness of any recoupment liability, CCST argues that its smaller schools face an immediate burden on July 1 because the costs of merely *responding* to a potential group based BDR claim could overwhelm their administrative resources. In its motion and during the hearing, CCST proffered the expert testimony of Diane Auer Jones to opine on the irreparable harms that the Rule would impose on "small proprietary schools" (*i.e.*, "schools that have 150, or 200, or 300 students as opposed to schools that have 8,000 students or 10,000 students, or 12,000 students.") (Tr. at 39:12-40:15.) Ms. Jones opines that responding to a group claim notice would be "disproportionately burdensome" on smaller schools because they have smaller staffs and fewer resources (Tr. 58:20-22). Ms. Jones also opines that, under the Rule's group claim procedure, DOE could theoretically seek recoupment to a degree that would push smaller schools into bankruptcy. (Tr. 44:17-51:24). While Ms. Jones undoubtedly has experience in the sector, the Court finds her testimony in support of the instant motion to be less than compelling because her opinions are based entirely on her prior work experience at a non-CCST school. Indeed, Ms. Jones acknowledged during the hearing that she did not speak with *any* CCST member schools in preparation for her testimony (Tr. 57:11-58:13), nor did she review any records of any CCST member schools. *Id.* As far as the Court can discern on the current record, there is no concrete evidence that any CCST member school faces an

imminent borrower claim—much less a threat of recoupment for any discharged loans. As such, the Court cannot conclude that the Rule poses any immediate existential threat to CCST or its members.

CCST's claims of reputational harm are equally thin because they are premised on the same speculative injuries and lack evidentiary support. *See Cal. Ass'n of Private Postsecondary Schs. v. DeVos* ("*CAPPS*"), 344 F. Supp. 3d 158, 182-83 (D.D.C. 2018) (rejecting similar theory of reputational injury); *Sweet v. Cardona*, 2023 WL 2213610 (N.D. Cal. Feb. 24, 2023) (rejecting claims of irreparable reputational harm from borrower defense applications); *Pruvit Ventures, Inc. v. Forevergreen Int'l LLC*, No. 4:15-CV-571, 2015 WL 9876952, at *5 (E.D. Tex. Dec. 23, 2015) (to constitute irreparable injury, "showing of reputational harm must be concrete and corroborated, not merely speculative" (citation omitted)).

At bottom, the testimony of CCST's witnesses and declarants reflects a "concern that the potential liability that schools face has increased significantly under the Final Rule." (Arthur Decl., Dkt. 25, at 39). While this concern may be genuine and credible, CCST must show that irreparable financial or reputational harm is "likely." It has not done so. *See CAPPS*, 344 F. Supp. 3d at 182-83 (finding that association of for-profit schools failed to demonstrate irreparable harm from 2016 borrower defense provisions for similar reasons).

2. Abandoned Plans for Expansion and Consolidation

CCST next asserts that member schools have "abandon[ed] plans to build, expand, or consolidate campuses or facilities" because doing so might trigger liability un-

der the Rule's new "Closed-School Discharge" provisions. (Brief, Dkt. 24, at 23 (citing Arthur Decl., Dkt. 25, at 43 ("ECPI University has been forced to abandon plans to build new or upgrade existing schools"); Shaw Decl., Dkt. 25, at 35 (stating that Lincoln Tech schools "will be forced to reconsider the opening of new campuses and upgrading of existing ones")).

But CCST's declarations do not identify any specific plans that have been or may be delayed or abandoned, nor explain why the Rule's closed school discharge provisions would necessitate any such changes in the first place. During the hearing, CCST's witness John Dreyfus testified that EPCI University, since 2019 "had been in the process of selecting a site [to build a new campus] in Dallas and when this rule was promulgated, we basically put a halt to it." (Tr. at 9:24-10:1). However, Mr. Dreyfus confirmed that ECPI's abandonment of this plan was motivated by its desire to "conserve our funds" in preparation for potential future recoupment actions—not because of the Rule's changes to the closed school discharge provisions. (*See* Tr. at 27:1-4 (acknowledging that opening Dallas campus would not provide San Antonio students a basis for a closed-school discharge)). Mere "uncertainty" about what the Rule actually requires "falls short of the type of actual and imminent threat needed to show" CCST's entitlement to relief. *CAPPS*, 344 F. Supp. 3d at 172. This is particularly so when, as here, DOE has stated its intention to provide further guidance on the "closed school" definition. *See* 87 Fed. Reg. at 41,924.

As with the borrower-defense provisions, any concrete harm that CCST's members might suffer from the closed school discharge provisions remains several steps

away. To start, CCST does not allege that any member school has closed or plans to close. And the imposition of closed school liability against apparently open schools based on hypothetical future plans to "build, expand, or consolidate campuses," (Br., Dkt. 24, at 3), could occur only after DOE prevails in an administrative proceeding, after having granted relief to eligible borrowers. (*Cf.* Arthur Decl., Dkt. 25 at 46 (contending that "a 'closed school discharge' *could* be triggered by consolidating facilities," for which a school "would be *presumptively* held liable" if DOE "determin[es] that the criteria is met") (emphases added)). Such claims are too remote to constitute irreparable harm.

3. Unrecoverable Compliance Costs

Finally, CCST claims its members will suffer irreparable harm in the form of "substantial time and financial resources" that must now be diverted toward complying with the impending Rule.

(Brief, Dkt. 24, at 23). In response, Defendants argue that CCST member schools are under no obligation to participate in the Title IV program; as such, they can simply decline such funds and obviate the need to comply with the Rule's funding conditions. Furthermore, Defendants argue that ordinary compliance costs are typically insufficient to constitute irreparable harm. (Def's Resp., Dkt. 56, at 35). While this category of harm presents a closer question, the Court finds that the specific compliance costs shown by CCST and its members do not constitute irreparable harm sufficient to justify preliminary injunctive relief.

The Fifth Circuit has held that "complying with a regulation later held invalid almost always produces the

irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment)). Thus, "[w]here costs are nonrecoverable because the government-defendant enjoys sovereign immunity from monetary damages . . . irreparable harm is generally satisfied." *VanDerStok v. Garland*, No. 4:22-CV-00691-O, 2022 WL 4809376, at *3 (N.D. Tex. Oct. 1, 2022) (citing W*ages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021)). Nonetheless, such harm "must be more than speculative; there must be more than an unfounded fear on the part of the applicant." *Louisiana v. Biden*, 55 F.4th 1017, 1034 (5th Cir. 2022) (internal quotations omitted). And, while "it is not so much the magnitude but the irreparability that counts," the scale of the projected harm must be "more than de minimis." *Id.* at 1035 (quotations omitted). Finally, showing irreparable harm requires more than vague or conclusory statements. *See, e.g.*, *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991) (conclusory allegations do not establish irreparable harm); *Coleman v. Bank of New York Mellon*, 2013 WL 1187158 at *8 (N.D. Tex. Mar. 4, 2013) ("[U]nsupported, conclusory statements are insufficient to demonstrate entitlement to the extraordinary relief of a . . . . preliminary injunction."); *Mitchell v. Sizemore*, No. 6:09cv348, 2010 WL 457145, at *3 (E.D. Tex. Feb. 5, 2010) ("[V]ague and conclusory allegation that [the plaintiff] is undergoing 'a number of problems' is insufficient to show entitlement to injunctive relief.").

For several reasons, the compliance costs shown by CCST do not meet these standards. First, the record indicates that most of the costs described by CCST and

its members have already been incurred. *Aransas Project v. Shaw*, 775 F.3d 641, 664 (5th Cir. 2014) (injunctions are forward-looking remedies that may issue "only if future injury is certainly impending.") (internal quotes omitted). CCST's declarants and witnesses confirm that their preparatory compliance efforts have been underway for months, and at least since the final Rule was published in November 2022. For example, CCST's Chairperson Nikki England attests that CCST "has *already* expended approximately three hundred staff hours working on issues integral to the Final Rule," and that its members "have *already* expended and continue to expend significant resources in anticipation of the Final Rule's effective date." (England Decl., Dkt. 25, at 30-31) (emphases added). Declarant Jeff Arthur (Vice President of CCST member ECPI University) states that his school "has *already* undertaken and continues to undertake significant efforts to comply" in anticipation of the Rule's effective date. (Arthur Decl., Dkt. 25, at 41-43) (emphasis added). Compliance costs that have already been incurred in anticipation of the Rule cannot form the basis for injunctive relief.

To the extent CCST references costs that will arise starting on July 1, it provides only nebulous and conclusory descriptions. For example, declarant Scott Shaw (CEO of CCST member Lincoln Educational Services Corp.) avers that CCST schools "are being forced to expend time and resources" on compliance activities, including: (1) training staff on the Rule's requirements; (2) reviewing marketing, advertising, and recruitment materials; (3) "allocating staff and resources to handle the anticipated flood of meritless borrower defense claims;" and (4) developing and upgrading recordkeep-

ing systems to maintain student records "for perpetuity," given the alleged lack of any limitation period for future BDR claims. (Shaw Decl., Dkt 25, at 35-37). Similarly, declarant Jeff Arthur states ECPI University has "expended significant time and effort preparing and training staff to comply," including by: (1) educating staff on the Rule's requirements; (2) reviewing recruiting materials and communications; (3) expanding the school's record-keeping policies; and (4) "expanding systems that monitor representations made by hundreds of staff." (Arthur Decl., Dkt. 25, at 42).

Even if the Court assumes these compliance burdens are entirely forward-looking, these statements provide no meaningful information about the specific nature or extent of these costs, nor any concrete indication that they impose more than a de minimis burden in comparison to the schools' pre-existing compliance expenses. *See CAPPS*, 344 F. Supp. 3d at 171 (finding that similar declarations from schools about the compliance-related costs of the 2016 borrower defense rule failed to present the requite "specific details regarding the extent to which [their] business will suffer" (citation omitted)). Notably, there is clear evidence that CCST's member schools have historically devoted resources to compliance with Title IV programming requirements, including previous iterations of the BDR rules. For example, ECPI University already employs significant staff whose job duties include ensuring compliance with Title IV and other state and federal regulations. (*See* Arthur Decl., Dkt. 25, at 41-43). During the hearing, CCST's witness John Dreyfus confirmed that EPCI University has operated for years with adequate staff, policies, and procedures to guard against misrepresentations and ensure compliance with BDR regulations.

(*See* Tr. at 18:7-23:1; *see also* Tr. at 84:5-16 (CCST counsel acknowledging, "Nobody is suggesting that there aren't current compliance costs . . . [associated with] the existing regime."). Given these pre-existing compliance costs, CCST must provide more concrete evidence to show that its member schools face more than a de minimis injury that is traceable to the new Rule.

CCST relies heavily on *Texas v. EPA* for the principle that "complying with [an agency order] later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." 829 F.3d 405, 433 (5th Cir. 2016). Defendants have not argued that CCST's members would ever be able to recover such costs, even if they ultimately prevail on the merits. "That's probably because federal agencies generally enjoy sovereign immunity for any monetary damages." *Wages & White Lion Invs., L.L.C. v. U.S. Food & Drug Admin.*, 16 F.4th 1130, 1142 (5th Cir. 2021). But a cursory review of the compliance costs examined in *Texas v. EPA* shows that they are not comparable to those shown in this case. For starters, the economic impact in *Texas v. EPA* was vastly larger, as petitioners proved the rule "would impose $2 billion in costs on power companies, businesses, and consumers." *Texas v. EPA*, 829 F.3d at 433. Moreover, the EPA rule at issue required the regulated companies to immediately begin constructing extensive emission-controls measures—a process that would take years to complete, raise energy costs for millions of consumers, and severely impair ERCOT's reliability. *Id.* By contrast, CCST offers only nebulous descriptions of "increased regulatory burdens and compliance costs," (England Decl., Dkt. 25, at 29), without attempting to quantify them or tie them to specific requirements within the Rule.

Moreover, the Fifth Circuit has been "less generous with private-sector plaintiffs' efforts to show irreparable harm" based on the costs of complying with agency regulations. *Texas v. EPA*, No. 3:23-cv-17, 2023 WL 2574591, at *10 (S.D. Tex. Mar. 19, 2023) (emphasizing that private plaintiffs must show "more specificity" and "ascribe more urgency to the consequences of a challenged action" than a state plaintiff). That is not to say movants must always "convert each allegation of [financial] harm into a specific dollar amount," which would "reflect[] an exactitude our law does not require." *Restaurant Law Ctr. v. U.S. Dep't of Labor*, 66 F.4th 593, 600 (5th Cir. 2023) (finding sufficient evidence of compliance costs where "witnesses offered specific estimates of the additional time that managers would incur to comply with the rule" and described plans to "hire additional managers to perform ongoing monitoring of tasks, audits, and correct back pay when servers, bartenders, and bussers do not clock in and out correctly."). Here, CCST has not attempted to quantify its anticipated compliance costs, nor has it described them with a level of specificity courts in this circuit have historically required. *See Div. 80, LLC v. Garland*, No. 3:22-cv-148, 2022 WL 3648454, at *2-5 (S.D. Tex. Aug. 23, 2022) (distinguishing *Texas v. EPA* and declining to find irreparable harm based on alleged cost of complying with agency regulation). Based on the current record, CCST has not clearly shown that its projected compliance costs are "more than an unfounded fear" or "more than de minimis," which precludes a finding of irreparable harm. *Louisiana v. Biden*, 55 F.4th 1017, 1034-35. (5th Cir. 2022) (internal quotations omitted).

IV. CONCLUSION

The Court finds that CCST has failed to meet its burden of clearly establishing that it or its members face irreparable harm in the absence of a preliminary injunction. Because CCST has not satisfied this essential requirement, "the court need not address the remaining three factors" of likelihood on the merits, balance of equities, and public interest. *Lee v. Verizon Commc'ns Inc.*, No. 3:12-CV-4834-D, 2012 WL 6089041, at *6 (N.D. Tex. Dec. 7, 2012) (citing *DFW Metro Line Servs. v. Sw. Bell Tel. Co.*, 901 F.2d 1267, 1269 (5th Cir. 1990)).

For these reasons, **IT IS ORDERED** that CCST's motion for preliminary injunction (Dkt. 23) is **DENIED**.

SIGNED on June 30, 2023.

/s/ ROBERT PITMAN
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-50491

CAREER COLLEGES AND SCHOOLS OF TEXAS,
PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF EDUCATION;
MIGUEL CARDONA, SECRETARY, U.S. DEPARTMENT OF
EDUCATION, IN HIS OFFICIAL CAPACITY AS THE
SECRETARY OF EDUCATION, DEFENDANTS-APPELLEES

Filed: June 12, 2024

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:23-CV-433

ON PETITION FOR REHEARING EN BANC

Before JONES, DUNCAN, and WILSON, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc

(FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX D

1. 20 U.S.C. 1082(a) provides:

Legal powers and responsibilities

(a) General powers

In the performance of, and with respect to, the functions, powers, and duties, vested in him by this part, the Secretary may—

(1) prescribe such regulations as may be necessary to carry out the purposes of this part, including regulations applicable to third party servicers (including regulations concerning financial responsibility standards for, and the assessment of liabilities for program violations against, such servicers) to establish minimum standards with respect to sound management and accountability of programs under this part, except that in no case shall damages be assessed against the United States for the actions or inactions of such servicers;

(2) sue and be sued in any court of record of a State having general jurisdiction or in any district court of the United States, and such district courts shall have jurisdiction of civil actions arising under this part without regard to the amount in controversy, and action instituted under this subsection by or against the Secretary shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in that office; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Secretary or property under the Secretary's control and nothing herein shall be construed to except litigation

arising out of activities under this part from the application of sections 509, 517, 547, and 2679 of title 28;

(3) include in any contract for Federal loan insurance such terms, conditions, and covenants relating to repayment of principal and payment of interest, relating to the Secretary's obligations and rights to those of eligible lenders, and borrowers in case of default, and relating to such other matters as the Secretary determines to be necessary to assure that the purposes of this part will be achieved; and any term, condition, and covenant made pursuant to this paragraph or pursuant to any other provision of this part may be modified by the Secretary, after notice and opportunity for a hearing, if the Secretary finds that the modification is necessary to protect the United States from the risk of unreasonable loss;

(4) subject to the specific limitations in this part, consent to modification, with respect to rate of interest, time of payment of any installment of principal and interest or any portion thereof, or any other provision of any note or other instrument evidencing a loan which has been insured by the Secretary under this part;

(5) enforce, pay, or compromise, any claim on, or arising because of, any such insurance or any guaranty agreement under section 1078(c) of this title; and

(6) enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption.

2. 20 U.S.C. 1087e provides in pertinent part:

Terms and conditions of loans

(a) In general

(1) Parallel terms, conditions, benefits, and amounts

Unless otherwise specified in this part, loans made to borrowers under this part shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers, and first disbursed on June 30, 2010, under sections 1078, 1078-2, 1078-3, and 1078-8 of this title.

* * * * *

(h) Borrower defenses

Notwithstanding any other provision of State or Federal law, the Secretary 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 this part, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan.

* * * * *

3. 20 U.S.C. 1221e-3 provides:

General authority of Secretary

The Secretary, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law, is authorized 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.

4. 20 U.S.C. 3474 provides:

Rules and regulations

The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.