UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MEAGHAN BAUER and STEPHANO DEL ROSE, *Plaintiffs*, v. ELISABETH DEVOS, Secretary, U.S. Department of Education, *et al*., *Defendants*.	)	Civil Action No. 17-1330 (RDM) c/w Civil Action No. 17-1331 (RDM)

PLAINTIFFS' SECOND RENEWED MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiffs Meaghan Bauer and Stephano Del Rose hereby move for summary judgment on the ground that there is no genuine issue of disputed material fact and that they are entitled to judgment as a matter of law.

In support of this motion, plaintiffs submit the accompanying (1) memorandum of points and authorities; (2) declarations of attorney Toby R. Merrill and plaintiffs Meaghan Bauer and Stephano Del Rose; and (3) a proposed order.

Dated: March 16, 2018

Respectfully submitted,

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Plaintiffs,	)	
v.	)	Civil Action No. 17-1330 (RDM)
ELISABETH DEVOS, Secretary, U.S. Department of Education, *et al*.,	)	c/w Civil Action No. 17-1331 (RDM)
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' SECOND RENEWED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The need to protect federal student loan borrowers from predatory for-profit educational institutions has become ever more apparent over the past several years, as investigations have revealed fraud and misrepresentation that lured students into amassing significant student loan debt while providing low-quality and often useless educations. Thus, on November 1, 2016, after undertaking the negotiated rulemaking and notice-and-comment processes required by law, the Department of Education (ED) issued a 150-page final rule aimed at combating these predatory practices and protecting students who are harmed by them, with an effective date of July 1, 2017. *See* ED, Final Regulations, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75926 (Nov. 1, 2016) (Borrower Defense Rule or 2016 Rule). The 2016 Rule clarifies and strengthens procedures by which borrowers can raise claims of misrepresentation and fraud as defenses against loan repayment and obtain loan discharges when schools close; clarifies ED's ability to recoup from schools when their conduct is the predicate for loan discharge; disallows participation in certain federal student loan programs by schools that rely on forced arbitration clauses or class action waivers when students sue them over loan-funded education; requires schools to provide a letter of credit or otherwise demonstrate financial soundness when their solvency is in doubt; and requires for-profit schools to publicly disclose when their median borrower has been unable to reduce his or her loan balance by even one dollar three years after leaving the institution.

For the next six months, the 2016 Rule was scheduled to go into effect on its published effective date. Only five weeks before that date, a group of proprietary schools commenced a chal-

lenge to the 2016 Rule. *CAPPS v. DeVos*, No. 17-999 (D.D.C. filed May 24, 2017) (*CAPPS* litigation). Three weeks later, ED issued the first of three rules purporting to delay the 2016 Rule's effective date (collectively, the Delay Rules)—each of which has independent force and each of which is challenged here. All three Delay Rules are explicitly intended to allow the agency time to complete new rulemaking to prevent the 2016 Rule from taking effect. But that purpose is not a sufficient basis for delaying a validly promulgated rule. *See California v. Bureau of Land Mgmt.*, --- F. Supp. 3d ---, No. 17-CV-07186-WHO, 2018 WL 1014644, at *6 (N.D. Cal. Feb. 22, 2018) (*California v. BLM II*). All three Delay Rules evade the principles of reasoned decisionmaking by which an agency must abide when changing a rule. All three Delay Rules are procedurally and substantively unlawful.

First, in June 2017, ED arbitrarily and improperly invoked section 705 of the Administrative Procedure Act (APA), 5 U.S.C. § 705, to issue an indefinite "stay" of the 2016 Rule pending resolution of the now-stayed *CAPPS* litigation. *See* ED, Final rule; Notification of Partial Delay of Effective Dates, 82 Fed. Reg. 27621 (Jun. 16, 2017) (Section 705 Rule). In the Section 705 Rule, ED did not acknowledge the four-factor test that courts have held agencies are required to apply in determining whether to issue a section 705 stay. *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30-31 (D.D.C. 2012). Instead, ED offered a one-page discussion that contained illogical and poorly reasoned explanations that fail under any conceivable standard. ED failed to acknowledge any negative impacts of delay on students, the public, and the government itself. The purported harm it identified is unsupported by the administrative record and does not rise to the level of the non-speculative, irreparable serious injury that would justify a stay. Nowhere in the Section 705 Rule did ED provide any explanation for, or even acknowledgment of, the reversal of its view of the costs and benefits of the 2016 Rule or its legal basis. Rather, it stated the improper

purpose of delaying the 2016 Rule so that it could rewrite it. Because the Section 705 Rule is not a lawful exercise of section 705 authority, there was no basis for ED to act without negotiated rulemaking and/or notice and comment. The Section 705 Rule remains in effect and, regardless of ED's subsequent delay actions, prevents the 2016 Rule from going into effect until the *CAPPS* litigation is finally resolved.

Second, in February 2018, ED explicitly relied on its intent to prevent the 2016 Rule from taking effect as the basis for a final rule delaying the effective date of the 2016 Rule to July 1, 2019. *See* Final Regulations, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 83 Fed. Reg. 6458, 6459, 6464 (Feb. 14, 2018) (2018 Delay Rule). Indeed, the agency used this consideration to justify both the substance of the rule and its failure to comply with the Higher Education Act's negotiated rulemaking requirement. *Id.* But as one court has recently explained, an agency "cannot use [a] purported proposed future revision, which has yet to be passed, as a justification for [a delay rule]." *California v. BLM II*, 2018 WL 1014644, at *6. None of the other purported rationales reflects reasoned decisionmaking, and none sufficiently explains the agency's reversal of position from the 2016 Rule. Moreover, ED's cursory dismissal of the harms identified by commenters is arbitrary and capricious. The 2018 Delay Rule, together with the Section 705 Rule, has the effect of preventing the 2016 Rule from going into effect until July 1, 2019, or the end of the *CAPPS* litigation—whichever is later.

Finally, between its issuance of the Section 705 Rule and the 2018 Delay Rule, ED issued an Interim Final Rule (IFR), delaying the effective date of the 2016 Rule until July 1, 2018. *See* ED, Interim final rule; Delay of Effective Date, 82 Fed. Reg. 49114 (Oct. 24, 2017) (Interim Final

Rule or IFR). That delay was based solely on ED's novel "interpretation" of a provision of the HEA known as the "master calendar requirement." 20 U.S.C. § 1089. In the IFR, for the first time, ED asserted that the master calendar requirement mandates that no regulation under Title IV of the HEA can take effect on *any* date other than July 1. But that interpretation is unsupported by the statute's text, and ED's citations to the "goals" of the statute are insufficient to alter the statute's plain meaning. The master calendar requirement states only that a rule must be published "in final form" by November 1 to take effect on *or after* the following July 1. ED's new interpretation, which merits no deference, would allow the agency arbitrarily to "stay" any rule it does not like and create an unreviewable one-year delay. The HEA does not permit—much less require—such an end-run around the principles and procedures of reasoned decisionmaking. Because the Interim Final Rule relied solely on this flawed interpretation of law to conclude that the Section 705 Rule, which kept the 2016 Rule from taking effect on July 1, 2017, necessarily advanced the effective date to no earlier than July 1, 2018, the IFR is unlawful and should also be vacated. The IFR is also unlawful due to its failure to provide an accurate analysis of the consequences of delay, and its failure to comply with the requirements of notice and comment or negotiated rulemaking.

ED's unlawful actions harm not only borrowers like plaintiffs Meaghan Bauer and Stephano Del Rose, who have already left predatory institutions saddled with debt and worthless educations, but also current and future students. The 2016 Rule should thus be allowed to take effect immediately to ameliorate this ongoing harm. Borrowers like plaintiffs did not receive any preparatory period before the agency's unlawful actions delaying the rule on two weeks' notice, and regulated entities, which have been on notice of the Rules' requirements for well over a year, have no need to receive anything more.

STATEMENT OF FACTS

I. Statutory and Regulatory Background[1]

A. The Title IV Aid Program and Predatory Schools

The federal government spends more than $120 billion annually on student aid distributed under Title IV of the HEA, 20 U.S.C. § 1070 *et seq*. *See* ED, Federal Student Aid Office, 2017 Annual Report, https://www2.ed.gov/about/reports/annual/2017report/fsa-report.pdf. Students use Title IV, the largest stream of federal postsecondary education funding, to attend colleges, career training programs, and graduate schools. To receive Title IV funds, participating schools must enter into contracts called Program Participation Agreements (PPAs) with ED and agree to comply with the HEA and all applicable regulations. *See* 20 U.S.C. §§ 1094, 1087c(a); 34 C.F.R. §§ 668.14, 685.300(b).

Recent years have seen many revelations of fraud and misrepresentations by Title IV schools regarding educational offerings and student outcomes. *See* ED, Notice of Proposed Rule-making, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 39330, 39335 (Jun. 16, 2016) (2016 NPRM) (discussing fraudulent practices of Corinthian College); Comments of 32

[1] In light of the intertwined relationship between the 2016 Rule and the Delay Rules, comments and other documents from the 2016 rulemaking, contained in the administrative record in the related *CAPPS* litigation, are permissibly cited for background purposes. *See, e.g.*, *Tindal v. McHugh*, 945 F. Supp. 2d 111, 127 (D.D.C. 2013) (citing *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996), and *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285-86 (D.C. Cir. 1981)).

Organizations, ED-2017-OPE-0112-0008 at 4 (Nov. 19, 2017).[2] Predatory schools, generally concentrated in for-profit education, target vulnerable populations of students, including low-income students, students of color, first-generation and "non-traditional" students. *See* Comments of 32 Organizations at 4. Targeted by aggressive recruitment tactics, including "false information about the value of the credential or the cost of attendance," students take out federal student loans to enroll in programs they otherwise would not attend. *Id.* at 4-5. Once enrolled, students often find substandard, outdated, or insufficient equipment and materials. *See, e.g.*, *id.* at 4; Bauer Decl. ¶ 10; Del Rose Decl. ¶ 10; Many students drop out of such predatory schools for reasons including schools' failures to live up to promises regarding facilities and services. Many students come to realize they were admitted to programs from which the school should have known they could not benefit. *See* 2016 NPRM, 81 Fed. Reg. at 39366. Students who drop out, and even those who graduate, often find themselves in *worse* positions than they were in before attending—having not only wasted time, but also accrued massive debts that they cannot possibly repay given the low-paying jobs for which they qualify. *See* Comments of 32 Organizations at 5, 8-9. Not surprisingly, nearly half of students at for-profit institutions default on their student loans within five years of entering repayment. *Id.*; *see also* 2016 NPRM, 81 Fed. Reg. at 39373.

By statute, regulation, and the terms of their loan contracts, students who are harmed by a Title IV school's violation of certain laws, including prohibitions on fraud, may be entitled to cancellation of their federal Direct Loans through a process known as "borrower defense" to repayment. *See* 20 U.S.C. § 1087e(h); preexisting 34 C.F.R. § 685.206(c). Moreover, students who attend a Title IV school that closes because of mismanagement or wrongdoing are entitled to a

[2] These and other comments submitted as part of the rulemaking that resulted in the 2018 Delay Rule are available at https://www.regulations.gov/docket?D=ED-2017-OPE-0112 (searchable by provided docket number).

"closed-school" discharge of their federal loans if they do not reenroll in another program. 34 C.F.R. § 685.214 (new and preexisting rule).

Unfortunately, students who have been injured by their school's wrongdoing often have little recourse to be made whole by the school itself. Predatory schools have been remarkably successful at insulating themselves from liability through forced arbitration and class action waiver provisions buried in their enrollment contracts. *See* Comments of 32 Organizations, *supra*, at 12.

B. ED's Consideration of the Borrower Defense Rule

In 2015, ED announced that it intended to amend its Title IV regulations to address the borrower defense process, including its consequences for borrowers, schools, and the agency. *See* ED, Negotiated Rulemaking Committee; Public Hearings, 80 Fed. Reg. 50588, 50588 (Aug. 20, 2015). The HEA generally requires the agency to adopt rules through consensus-based negotiated rulemaking. 20 U.S.C. § 1098a(b). If the negotiators fail to reach agreement on a rule, ED may propose a rule of its own choosing on the subjects covered by the negotiated rulemaking and follow normal APA notice-and-comment procedures.

Consistent with the HEA, ED established a negotiated rulemaking committee with representatives selected from groups of stakeholders with an interest in the rule, including borrowers, veterans' groups, consumer groups, legal aid providers, state attorneys general, and a broad array of schools, including for-profit institutions. *See* 2016 NPRM, 81 Fed. Reg. at 39333. The negotiators, however, ultimately did not reach consensus on a rule. *See id.* at 39334-35. Accordingly, in June 2016, ED published an NPRM setting forth its own proposal and set a deadline for public comments of August 1, 2016. *Id.* at 39330. The NPRM stated that ED intended to issue a final rule to take effect on July 1, 2017, *see, e.g.*, *id.* at 39331, 39337, the beginning of the next "award year"

for Title IV funding, *see* 20 U.S.C. § 1088(a)(1); 34 C.F.R. § 600.2. ED received more than 10,000 comments on the proposed rule.

C. The 2016 Borrower Defense Rule

On November 1, 2016, ED published its final Borrower Defense Rule, "effective July 1, 2017." 81 Fed. Reg. at 75926. The 2016 Rule has four key parts, and ED explained in detail the benefits each was expected to provide to student borrowers and the public.

1. The borrower defense process. The 2016 Rule provides revised procedures to better enable student loan borrowers to vindicate their right to seek cancellation of federal loans through the "borrower defense" process. *Id.* at 75961-64. The rule requires ED to utilize "a fact-finding process" that includes consideration of "Department records" and "[a]ny additional information or argument that may be obtained by" ED—*i.e.*, not just the evidence available to and provided by borrowers—in resolving borrower defense applications. *Id.* at 76084 (new § 685.222(e)(3)(i)). The rule also obligates ED, "[u]pon the borrower's request," to identify "the records the Department official considers relevant to the borrower defense" and, upon request, provide them to the borrower. *Id.* (new § 685.222(e)(3)(ii)). If ED denies cancellation in full or part, it must issue "a written decision" notifying the applicant "of the reasons for the denial, the evidence that was relied upon, any portion of the loan that is due and payable to the Secretary, and whether the Secretary will reimburse any amounts previously collected." *Id.* (new § 685.222(e)(4)). While a borrower defense application is pending, the 2016 Rule requires ED to provide automatic forbearance on payments toward any non-defaulted loans for which cancellation is sought. *See id.* at 76083 (new § 685.222(e)(2)(i)); *see also id.* at 76080 (new § 685.205(b)(6)(i), (vi)).

ED explained that these new provisions "give students access to consistent, clear, fair, and transparent processes to seek debt relief," and reduce obstacles to borrower defense claims. *Id.* at 76047. The streamlined borrower defense process also aids institutions: "[T]hrough clarification of circumstances that could lead to a valid claim, institutions may better avoid behavior that could result in a valid claim and future borrowers may be less likely to face such behavior," which would also benefit both borrowers and the federal government. *Id.* at 76049. ED also noted the extensive benefits to "borrowers who ultimately have their loans discharged," explaining that discharge would ameliorate the well-documented hardships associated with high student debt, while also providing "spillover economic benefits." *Id.* at 76051. By allowing more students to return to school, discharge would benefit both students and the public. *Id.*

2. Arbitration and other contractual barriers to justice. The 2016 Rule amends 34 C.F.R. § 685.300 to address the use of predispute arbitration agreements or class action waiver provisions by schools choosing to participate in the Direct Loan Program. *See* 81 Fed. Reg. at 76021-31. The rule provides that a participating school may not "enter into a predispute agreement [with a student] to arbitrate a borrower defense claim, or rely in any way on a predispute arbitration agreement with respect to any aspect of a borrower defense claim." *Id.* at 76088 (new § 685.300(f)(i)). It similarly amends § 685.300 to require a participating school to forgo reliance on any predispute agreement with a student that waives the student's right to participate in a class action against the school related to a borrower defense claim. *Id.* (new § 685.300(e)). The 2016 Rule requires that schools participating in the Direct Loan Program include language incorporating the policy into any new contracts with students. *Id.* at 76087, 76088 (new § 685.300(e)(3)(i), (f)(3)(i)). Schools may either amend contracts predating the rule's effective date or notify affected

students or former students that the schools will no longer rely on predispute arbitration or class action waiver provisions. *Id.* at 76087, 76088 (new § 685.300(e)(3)(ii)-(iii), (f)(3)(ii)-(iii)).

ED explained that "prohibiting predispute arbitration clauses will enable more borrowers to seek redress in court" through individual or class actions. 81 Fed. Reg. at 75939. ED found that forced arbitration clauses "jeopardize the taxpayer investment in Direct Loans," by allowing institutions to "insulat[e] themselves from direct and effective accountability for their misconduct, … deter[] publicity that would prompt government oversight agencies to react, and … shift[] the risk of loss for that misconduct to the taxpayer." *Id.* at 76022. ED also concluded that class action waivers "effectively removed any deterrent effect that the risk of … lawsuits would have provided," and shifted the risk to taxpayers by foreclosing meaningful options for redress other than the borrower defense process. *Id.* ED found that "class action waivers for these claims substantially harm the financial interest of the United States and thwart achievement of the purpose of the Direct Loan Program." *Id.* Limiting the use of arbitration clauses and class action waivers by Title IV-eligible institutions would thus benefit both borrowers and federal taxpayers, given ED's findings of "widespread and aggressive use of class action waivers and predispute arbitration agreements [that] coincided with widespread abuse by schools over recent years, and effects of that abuse on the Direct Loan Program." *Id*. at 76025.

3. Financial responsibility triggers. The 2016 Rule amends the standards by which ED determines whether an institution is "financially responsible." Institutions must meet these standards to be eligible for Title IV programs unless they obtain a letter of credit or demonstrate another form of financial protection. *See* 81 Fed. Reg. at 76075-76 (new 34 C.F.R. § 668.175).

The prior regulations focused solely on an institution's equity, reserve, and net income ratios and calculated a "composite score" on that basis. The new regulations also consider six

"triggering" events indicating an institution is at significant risk of financial instability, including litigation-related events and actions by accreditors or regulators. 81 Fed. Reg. at 76073 (new § 668.171(c)). If any of these six triggers is met, the Rule requires recalculation of the institution's "composite score," accounting for potential losses that could result. *Id.* The Rule also includes two automatic triggers for a finding of financial irresponsibility: (1) violating the statute's 90/10 rule, which provides that for-profit schools can receive no more than 90 percent of their revenue from Title IV funds, *id*. at 76074 (new § 668.171(d)); and (2) having two official cohort default rates of 30 percent or more, *id.* (new § 668.171(f)). For publicly traded institutions, certain actions by the SEC or the exchange on which the institution is traded are also automatic triggers. *Id.* (new § 668.171(e)). The Rule also provides that an institution may be deemed not financially responsible if the Secretary determines that an event or condition is "reasonably likely to have a material adverse effect on the financial condition, business, or results of operations of the institution." *Id.* at 76074 (new § 668.171(g)). The Rule lists eight examples of possible "discretionary triggers." *Id.* (new § 668.171(g)(1)–(8)).

ED determined that these financial responsibility provisions "introduce far stronger incentives for schools to avoid committing acts or making omissions that could lead to a valid borrower defense claim than currently exist." *Id.* at 76049. Associated disclosure provisions allow "borrowers to receive early warning signs about an institution's risk for students, and therefore borrowers may be able to select a different college, or withdraw or transfer to an institution in better standing in lieu of continuing to work towards earning credentials that may have limited value." *Id.* at 76051. ED found that, together, these provisions "provide some protection for taxpayers as well as potential direction for the Department and other Federal and State investigatory agencies to focus their enforcement efforts." *Id.* at 76055.

4. Disclosures of loan repayment rates. The fourth major provision of the 2016 Rule creates an additional disclosure requirement for proprietary institutions. 81 Fed. Reg. at 76070-72 (new 34 C.F.R. § 668.41). Under this provision, the Secretary will calculate a final loan repayment rate for each institution over a two-year cohort period. *Id.* at 76070-71 (new § 668.41(h)(1)). If that calculation shows that the median borrower has neither fully repaid his or her Title IV loans, nor made payments sufficient to reduce the balance on each such loan by at least one dollar, the institution must include a prescribed disclosure in its promotional materials. *Id.* at 76071 (new § 668.41(h)(3)). The institution must also use this language to notify enrolled and prospective students, and must post the language on its website. *Id.* at 76071-72 (new § 668.41(i)).

These provisions, ED explained, "give borrowers more information with which they can make informed decisions about the institutions they choose to attend." *Id.* at 76051; *see also id.* at 76014–15. ED determined that "all students deserve to have information about their prospective outcomes after leaving the institution." *Id.* at 76015. Based on cited research, ED found that such information would have meaningful benefits, as "students and families react to information about the costs and especially the value of higher education, including by making different decisions." *Id.* ED concluded that "this information is critical to ensure students and families have the information they need to make well-informed decisions about where to go to college." *Id.* at 76018.

II. The *CAPPS* Litigation and the Section 705 Rule

In May 2017, just weeks before the 2016 Rule was to take effect, the California Association of Private Postsecondary Schools (CAPPS), an industry group representing private schools, including many for-profit institutions, filed suit in this Court, challenging parts of the Rule's four major provisions, and seeking invalidation and vacatur of the Rule in its entirety. *See* Complaint, *CAPPS v. DeVos*, No. 17-999, Dkt. No. 1. CAPPS also moved for a preliminary injunction solely

against the Rule's provisions regarding predispute arbitration clauses and class action waivers. Pls.' Mot. for Prelim. Inj., *CAPPS*, Dkt. No. 6, 6-1.

The next month, ED published a two-page "Final Rule" delaying the effective date of many of the 2016 Rule's provisions, "pending judicial review" in the *CAPPS* litigation. *See* 82 Fed. Reg. at 27621. ED invoked its authority under section 705 of the APA, which allows an agency to "postpone the effective date of action taken by it, pending judicial review," if the "agency finds that justice so requires." 5 U.S.C. § 705. ED stated that it had "concluded that justice require[d] it to postpone the effectiveness of certain provisions of the final regulations until the judicial challenges to the final regulations are resolved." 82 Fed. Reg. at 27621.

The Section 705 Rule only delays parts of the 2016 Rule, including several provisions not directly challenged in the *CAPPS* litigation. For example, ED delayed provisions related to closed-school discharges, new 34 C.F.R. § 685.214(c)(2) & (f)(4)–(7), and provisions requiring schools to provide ED with judicial and arbitral records from proceedings involving students and borrower defense claims, new § 685.300—provisions CAPPS did not specifically challenge. *See* Section 705 Rule, 82 Fed. Reg. at 27622. Yet ED did not delay other portions of the 2016 Rule—including provisions on death discharges, nursing loans, severability, and technical amendments—that took effect on July 1, 2017, even though those portions would also be vacated if CAPPS were to obtain the complete relief it sought. *See id*. ED did not explain how it identified which parts to delay.

ED stated that delaying portions of the Rule would "preserve the regulatory status quo while the litigation is pending and the Court decides whether to uphold the final regulations." *Id.* at 27621. It contended without elaboration that CAPPS had "raised serious questions concerning the validity of certain provisions of the final regulations." *Id.* Which provisions, or what serious

questions were raised, ED did not say.[3] ED also stated that CAPPS had "identified substantial injuries that could result if the final regulations go into effect before those questions are resolved." *Id.* The only injuries that ED described involved (1) modification of schools' "contracts in accordance with the arbitration and class action waiver regulations," which would impose costs on schools "in making these changes," and (2) imposition of "financial responsibility trigger provisions" that identify adverse events involving a school's finances and require the school to provide a letter of credit or other financial protection against later liabilities to ED. *Id.* ED did not determine that these purported injuries, if they occurred, would be irreparable. *Id.*

In addition, ED stated that the United States would "suffer no significant harm from postponing the effectiveness of the final regulations while the litigation is pending." *Id.* It stated that the borrower defense and closed-school discharge provisions (the latter of which were not expressly challenged by CAPPS) were the costliest portions of the 2016 Rule, and that postponing the 2016 Rule would "help to avoid these significant costs." *Id.* at 27622. ED did not acknowledge that these costs were solely attributable to the increased numbers of students ED estimated would have repayment liabilities cancelled under the Rule and, instead, inexplicably stated that delaying the final rule would "not prevent student borrowers from obtaining relief because the Department will continue to process borrower defense claims under existing regulations that will remain in effect during the postponement." *Id.* at 27621.

ED also stated that the delay of the 2016 Rule "w[ould] allow" it to "review and revise the final regulations" through a new negotiated rulemaking. *Id.* at 27622 (citing 20 U.S.C. § 1098a). In a separate Federal Register notice that same day, ED provided additional information about its

[3] ED;s answer to CAPPS's complaint likewise identifies no "serious questions": It avers that CAPPS failed to state a claim upon which relief may be granted and that ED's actions were "fully consistent with applicable law." *CAPPS*, Dkt. No. 52 at 41.

intent to initiate a new negotiated rulemaking to revise the Borrower Defense Rule. *See* 82 Fed. Reg. 27640 (June 16, 2017). That negotiated rulemaking concluded in February 2018 and resulted in impasse. *See* Andrew Kreighbaum, *After Borrower Defense Negotiation Fails, Department to Craft New Rule*, Inside Higher Ed, Feb. 16, 2018, https://www.insidehighered.com/quick-takes/2018/02/16/after-borrower-defense-negotiation-fails-department-craft-new-rule. A notice of proposed rulemaking is expected to follow. *Id.*

After ED announced the Section 705 Rule, CAPPS withdrew its motion for a preliminary injunction. After multiple delays, ED filed an answer (*CAPPS* Dkt. No. 52), and the Administrative Record (Dkt. No. 54). Neither party took any action to advance the case over the next five months, even though the Section 705 Rule was explicitly intended to allow that matter to be resolved. On March 1, 2018, the Court *sua sponte* stayed the CAPPS case pending resolution of this matter. *CAPPS*, Mar. 1, 2018 Minute Order.

III. The Initiation of this Litigation, the First Motion for Summary Judgment, and the Interim Final Rule

Plaintiffs filed this action on July 6, 2017. Dkt. No. 1. On August 30, 2017, defendants moved for a six-week extension of time to answer the complaint. Dkt. No. 12. Their motion did not refer to pending regulatory action as a basis for the extension. *Id.* The Court granted the motion. *See* Minute Order dated Aug. 30, 2017. Plaintiffs filed a motion for summary judgment on September 26, 2017. Dkt. No. 15. The parties agreed upon a briefing schedule, and defendants filed an unopposed motion to extend their time to respond to both the motion for summary judgment and the complaint to October 31, 2017. Dkt. No. 21. Again, defendants did not mention any pending regulatory action. *Id.* The Court granted that motion. *See* Minute Order dated October 5, 2017.

On October 24, 2017, one week before defendants' filings were due, ED published the Interim Final Rule, which purports to amend the effective date of the sections of the 2016 Rule

that were subject to the Section 705 Rule, setting a new effective date of July 1, 2018. 82 Fed. Reg. at 49115. The IFR does not supersede the Section 705 Rule, but is purportedly necessary *because* of the Section 705 Rule. ED stated, "Because the final regulations have been postponed beyond July 1, 2017, pursuant to the 705 Notice, the postponement of the final regulations must be for at least one year to comply with section 482 of the HEA (20 U.S.C. 1089)," a provision referred to as the master calendar requirement. *Id.* In ED's view, "to be consistent with the HEA, … the effective date of the Borrower Defense Rule must be July 1, 2018 (or July 1 of a later year)." 82 Fed. Reg. at 49116. ED pronounced that "even if the [CAPPS] litigation concludes before July 1, 2018"—in which case the Section 705 Rule's purported stay would expire by its terms—the 2016 Rule would still not take effect until that date. *Id.* In the IFR, ED did not explain why this pronouncement was issued four months after the Section 705 Rule itself. It again invoked ED's intent to initiate a negotiated rulemaking, along with ED's "reevaluati[on] [of] its regulations in this area," pursuant to Executive Order 13777. 82 Fed. Reg. at 49116. ED also cursorily discussed the costs of delay, highlighting cost savings to the federal government, while disregarding any impacts on borrowers and the economy at large. *Id.* at 49115, 49118-19.

As for why it was proceeding without notice and comment as required by the APA, 5 U.S.C. § 553, or negotiated rulemaking as required by the HEA, 20 U.S.C. § 1098a, ED claimed both were "unnecessary and impracticable." 82 Fed. Reg. at 49117. The agency said these procedures were unnecessary because, as a matter of law, "July 1, 2018, would be the earliest the regulations could take effect," and thus the agency "lacked discretion." 82 Fed. Reg. at 49117. It also stated that it would have been impracticable to conduct notice-and-comment or negotiated rulemaking between the filing of the CAPPS case in May 2017 and the original July 1, 2017, effective date, without explaining why that was relevant to an *October 2017* action. *Id*.

Within three days of the publication of the Interim Final Rule, plaintiffs filed their First Amended Complaint pursuant to Fed. R. Civ. P. 15(a)(1)(B), adding claims challenging the Interim Final Rule. Dkt. No. 25. Plaintiffs consented to defendants' request to set a new briefing schedule for cross-motions for summary judgment, Dkt. No. 27, and filed a renewed motion for summary judgment on November 10, 2017—less than three weeks after the Interim Final Rule was issued, Dkt. No. 29. The parties completed briefing on January 19, 2018. Dkt. Nos. 29-50.

V. The 2018 Delay Rule and Plaintiffs' Second Amended Complaint

On the same day it published the Interim Final Rule, ED published a notice of proposed rulemaking seeking to further postpone the 2016 Rule's effective date to July 1, 2019, *solely* for the purpose of having "adequate time" to revoke the 2016 Rule. ED, Notice of Proposed Rulemaking; Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 82 Fed. Reg. 49155, 49155 (Oct. 24, 2017) (2017 NPRM). The NPRM did not say what about the 2016 Rule needed to be changed or why. The NPRM acknowledged that a one-year delay of the 2016 Rule was subject to the negotiated rulemaking requirements of section 492 of the HEA, 20 U.S.C. § 1098a, but invoked the "good cause" exemption of that statute. 82 Fed. Reg. at 49157.

In the 30-day comment period that concluded on November 25, 2017, fourteen comments were submitted. 83 Fed. Reg. at 6460. Only two commenters supported the proposed further delay: CAPPS and Career Education Colleges and Universities (CECU), a trade group of largely for-profit colleges. *See* Comments of CAPPS, ED-2017-OPE-0112-0015 (Nov. 24, 2017) and Comments of CECU, ED-2017-OPE-0112-0012 (Nov. 22, 2017). The majority of commenters—in-

cluding 32 legal aid, civil rights, and consumer organizations; 19 state attorneys general; and several individual students, as well as plaintiffs' counsel—opposed further delay, citing the harm to students that delay would perpetuate, ED's failure to identify any reason for delaying the rule other than its desire to change the rule, and ED's failure to accurately analyze the costs and benefits of delay. *See, e.g.*, Comments of 32 Organizations, *supra*; Comments of 19 Attorneys General, ED-2017-OPE-0112-0014 (Nov. 25, 2017); Comments of Project on Predatory Student Lending and Public Citizen, ED-2017-OPE-0112-0013 (Nov. 22, 2017); Comments of "Worried Law Student," ED-2017-OPE-0112-0009 (Nov. 20, 2017); Comments of Brian Nettle, ED-2017-OPE-0112-0011 (Nov. 20, 2017); Comments of Paola Orta, ED-2017-OPE-0112-0010 (Nov. 20, 2017); Anonymous Comments, ED-2017-OPE-0112-0007 (Oct. 30, 2017); Anonymous Comments, ED-2017-OPE-0112-0003 (Oct. 25, 2017).

Three weeks after briefing was complete on the plaintiffs' second motion for summary judgment and defendants' cross-motion, ED published the 2018 Final Rule, instituting the further one-year delay as proposed. 83 Fed. Reg. 6458. The agency reiterated that its purpose was to give it "adequate time" to rewrite the 2016 Rule. *Id.* at 6459. ED also cited "confusion," "uncertainty," and a lack of "consistency" or "clarity" that would result if the Borrower Defense Rule were to go into effect as published in November 2016, and ED were to promulgate a different rule in the future. *See, e.g.*, *id.* at 6461, 6462, 6464, 6465, 6467. The agency asserted that it was not required to identify any deficiency in the 2016 Rule because it was only delaying the Rule (so it could rescind it) rather than actually rescinding it. *Id.* at 6464. Likewise, ED maintained it was not required to solicit or consider any comment as to whether rescinding the 2016 Rule was justified. *Id.* *But see* 83 Fed. Reg. at 6465 (discussing comments criticizing 2016 Rule).

ED acknowledged the comments identifying the harms associated with further delay, but

rejected them, stating that "[t]he Department does not agree that borrowers will be significantly harmed by changing the effective date of the 2016 final regulations to July 1, 2019." 83 Fed. Reg. at 6461. Incongruously, ED then "acknowledge[d] that certain benefits of the 2016 final regulations will be delayed," but found "those benefits are outweighed by the administrative and transaction costs for regulated entities and borrowers of having those regulations go into effect only to be changed a short while later." *Id.* ED also stated that it did "not share the commenters' concern that borrowers will be subject to certain institutions' predatory practices" absent the 2016 Rule, pointing to the pre-existing regime, including "other existing protections for borrowers" like state regulators. *Id.* It similarly dismissed claims of increased harm to the public fisc based on the sufficiency of the pre-2016 regulations, while also stating that any "slightly reduced" impacts would be justified in the name of "clarity." 83 Fed. Reg. at 6462.

ED "acknowledge[d]" that individual borrowers' statutes of limitations to bring claims against predatory institutions may run out during the extended delay, thus depriving them of ever taking advantage of the prohibition on forced arbitration and class action waivers contained in the 2016 Rule. 83 Fed. Reg. at 6462. ED justified the ensuing harm by pointing to unspecified "serious questions regarding the legality" of those provisions of the 2016 Rule, and asserting, without support, that it was "likely" that this Court would overturn those provisions. *Id.*

Plaintiffs promptly moved to amend their complaint to add claims challenging ED's latest delay, as well as for expedited resolution of motions for summary judgment. Dkt. No. 52. At a status conference on March 1, 2018, the Court granted the motion for leave to amend, set a briefing schedule, and ordered this case consolidated with the related challenge to ED's three delays brought by nineteen states and the District of Columbia, *Massachusetts v. United States Department of Education*, Civil Action No. 17-1331. Minute Order dated March 1, 2018.

VI. The Plaintiffs

Plaintiffs Meaghan Bauer and Stephano Del Rose, who attended the for-profit New England Institute of Art (NEIA) in Brookline, Massachusetts, have been injured in at least two distinct ways by the Delay Rules' postponement of the Borrower Defense Rule's effective date.

First, the Delay Rules harm Ms. Bauer and Mr. Del Rose because each has submitted and has pending a "borrower defense" application to ED seeking cancellation of their federal loans. Ms. Bauer and Mr. Del Rose relied on numerous representations made by NEIA with respect to the quality of instruction and equipment, the school's industry connections, NEIA graduates' job prospects, the school's job placement assistance, and the school's affordability, especially in relation to its graduates' purported success at landing well-paying jobs. Bauer Decl. ¶ 6; Del Rose Decl. ¶ 7. They later learned that many of these representations were untrue. Bauer Decl. ¶ 10; Del Rose Decl. ¶ 10. They also claim that their loans were structurally unfair, and thus void under state law, because the education provided by NEIA would not allow them to earn income sufficient to repay them. Bauer Decl. ¶ 19; Del Rose Decl. ¶ 21. Each currently owes tens of thousands of dollars to ED for federal Direct Loans used to attend NEIA. Bauer Decl. ¶ 13; Del Rose Decl. ¶ 13.

Although the preexisting regulations specified substantive standards that Ms. Bauer and Mr. Del Rose must meet to obtain cancellation of their loans based on school misconduct, they lacked clarity with respect to the process that ED will use to adjudicate these borrower defense applications and Ms. Bauer's and Mr. Del Rose's rights should ED deny their applications. *See* preexisting 34 C.F.R. § 685.206(c). The preexisting regulations specify the relief ED may provide upon a successful application, but are silent as to the process for appealing a denial. *Id.* By contrast, if the 2016 Rule took effect, ED would be required to provide Ms. Bauer and Mr. Del Rose with

significant protections in the adjudication of their borrower defense applications, including an automatic forbearance, the right to any information ED considers relevant to the defense, and the right to an explanation of any denial. *See* 81 Fed. Reg. at 76080 (new § 685.206(c)(2)), 76083-84 (new § 685.222(e)); *see also* discussion *supra*, pp. 12-13.

Second, Ms. Bauer and Mr. Del Rose have been harmed by the delay of the arbitration and class action waiver provisions of the 2016 Rule. On behalf of themselves and other former NEIA students, Ms. Bauer and Mr. Del Rose are preparing to file a class action lawsuit under the Massachusetts Consumer Protection Act against NEIA and its corporate parent, Education Management Corporation (EDMC), both of which participate in Title IV programs. Bauer Decl. ¶¶ 16-17; Del Rose Decl. ¶¶ 18-19; Merrill Decl. ¶¶ 3-8. They have sent a demand letter to NEIA and EDMC as required by Mass. Gen. Laws ch. 93A, § 9(3), describing the defendants' illegal and unfair practices, including defendants' misrepresentations to and targeting of vulnerable and low-income students and families to take advantage of their desire for educational attainment. Bauer Decl. ¶¶ 16-21, Exh. 1; Del Rose Decl. ¶¶ 18-23, Exh. 2. The letter details the injuries to the students and their families, including unaffordable and unmanageable debt, which in turn have hindered students' later attempts to obtain meaningful education and training. *Id.*

Both Ms. Bauer and Mr. Del Rose signed enrollment contracts with NEIA that include a forced arbitration clause purporting to cover future claims between students and the school and to bar students from participating in a class action against the school. Bauer Decl. ¶ 8; Del Rose Decl. ¶ 8, Exh. 1. In their demand letter, Ms. Bauer and Mr. Del Rose called upon NEIA and EDMC not to enforce these provisions, so that they and other former NEIA students could proceed in court collectively. Bauer Decl. ¶ 21, Exh. 1; Del Rose Decl.¶ 23, Exh. 2. NEIA and EDMC responded

by explicitly refusing to agree not to enforce the arbitration and class action waiver provisions in their enrollment contracts. Bauer Decl. ¶ 23; Del Rose Decl. ¶ 25.

If the 2016 Rule were to take effect, NEIA's participation in the Direct Loan Program would, under the Rule and NEIA's PPA, be conditioned on NEIA's forgoing any reliance on forced arbitration or class action waiver agreements with students participating in the Direct Loan Program. *See* new 34 C.F.R. §§ 668.14, 685.300; Merrill Decl. ¶¶ 3-8 (discussing NEIA's current participation). This condition will apply to claims related to its misrepresentations to Ms. Bauer and Mr. Del Rose. Absent the 2016 Rule, however, Ms. Bauer and Mr. Del Rose would have to succeed in opposing NEIA and EDMC's efforts to compel them to resolve their claims in individual arbitrations in order to access the court on behalf of themselves and a class of similarly situated borrowers. *See* Bauer Decl.¶ 23; Del Rose Decl. ¶ 25. The delay of the 2016 Rule thus forces them to choose between (a) initiating litigation and facing the prospect of a contest over being compelled into arbitration, and (b) delaying the initiation of their action as applicable statutes of limitations continue to run on their claims. Bauer Decl. ¶¶ 26-27; Del Rose Decl. ¶¶ 28-29.

STANDARD OF REVIEW

Under the APA, this Court "shall hold unlawful and set aside agency action" that is "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations," or "without observance of procedure required by law." 5 U.S.C. §706(2)(A), (C)-(D).

ARGUMENT

All three Delay Rules are final agency actions that affect the rights and obligations of both student borrowers and Title IV-eligible institutions. The delay of a rule's effective date is "tantamount to amending or revoking a rule." *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017);

Open Communities Alliance v. Carson, --- F. Supp. 3d ---, Civ. No. 17-2192 (BAH), 2017 WL 6558502, at *10 (D.D.C. Dec. 23, 2017). An agency has no "inherent authority" to delay the effective date of a promulgated rule, *Clean Air Council*, 862 F.3d at 9, but can do so only through procedures authorized by Congress. Even then, any delay must be the product of reasoned decisionmaking, and neither arbitrary nor capricious. The Delay Rules fail to meet these standards.

I. The Section 705 Rule should be set aside.

Unless it is set aside, the Section 705 Rule will prevent the Borrower Defense Rule from going into effect until the now-stayed *CAPPS* litigation ends—even if the other two Delay Rules are set aside. Although section 705 authorizes delays pending judicial review where "justice requires," ED's failure even to address the appropriate considerations that courts have held govern such a determination, as well as the irrationality of its cursory attempt to justify delay, requires that the Section 705 Rule be set aside as arbitrary and capricious and contrary to law. In addition, ED's explicit acknowledgment that the delay is designed to allow the agency to repeal the 2016 Rule represents an impermissible purpose, confirmed by ED's failure to take any steps to resolve the pending litigation that is ostensibly the basis for the "stay." Because the agency's invocation of section 705 was unlawful, and the agency did not comply with either the HEA's negotiated rulemaking requirements, 20 U.S.C. § 1098a, or the APA's notice-and-comment requirements, 5 U.S.C. § 553, the Section 705 Rule is unlawful and must be vacated.

A. ED's invocation of section 705 was arbitrary, capricious, and contrary to law.

Section 705 provides:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or

> other writ to 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 conclusion of the review proceedings.

5 U.S.C. § 705. The provision's meaning is plain on its face: Both courts and agencies may postpone the effective date of agency action (1) if and only if specified circumstances are met and (2) to allow for judicial review. Here, the requisite circumstances do not exist, and the agency's attempted justifications for finding the statute's criteria satisfied fail to acknowledge the applicable legal standard and are arbitrary and capricious. Moreover, the agency has conceded—both explicitly and by its conduct—that the purpose of the Section 705 Rule was not to allow for judicial review, but to allow ED to rewrite the 2016 Rule—an improper purpose under the statute.

1. ED's failure to apply the appropriate four-part standard was arbitrary and capricious.

Critical to any assessment of whether an agency has acted arbitrarily and capriciously is whether it has considered the factors that, by law, must guide its decision, and articulated a rational connection between those factors and the decision. "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency action must be set aside if it was not "based on a consideration of the relevant factors." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *accord, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 53 (2011). Here, ED's decision on its face failed to set forth, analyze, or otherwise satisfy the standard that, as a matter of law, must guide an agency's decision whether to postpone a rule's effective

date under section 705—namely, the familiar four-part equitable test used to determine whether to grant a request for interim relief pending litigation.

In determining whether a *judicial* stay is appropriate under section 705, courts utilize "the same standards used to evaluate requests for interim injunctive relief." *Affinity Healthcare Servs., Inc. v. Sebelius*, 720 F. Supp. 2d 12, 15 n.4 (D.D.C. 2010) (citing *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985)); *see also Va. Petroleum Jobbers Ass'n v. Fed. Power Comm.*, 259 F.2d 921, 925 (D.C. Cir. 1958); *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 823 F. Supp. 2d 36, 43 n.14 (D.D.C. 2011). These factors are (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm absent relief; (3) the balance of equities; and (4) the public interest. *See, e.g.*, *Affinity Healthcare*, 720 F. Supp. 2d at 15 (quoting *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). In a leading decision construing section 705, this Court held in *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012), that the standard for a stay at the *agency* level under section 705 "is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test applied in this Circuit."

Sierra Club held that the four-part standard applies to an agency's determination whether a section 705 stay is appropriate because neither the text nor policies of the APA suggest that courts and agencies should apply different standards. 833 F. Supp. 3d at 31. To the contrary, legislative history "makes clear the intent" that "the standard for the issuance of a stay pending judicial review is the same whether a request is made to an agency or a court." *Id.* (citing APA, Legislative History, Pub. L. 1944-46, S. Doc. 248 at 277 (1946) ("This section permits *either agencies or courts*, if the proper showing be made, to maintain the status quo. … The authority granted is equitable and should be used by *both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy*.") (emphasis in original)). Allowing an agency to stay its own

rule with less justification than a court would need to do the same would encourage agencies to "circumvent the rulemaking process through litigation concessions," *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015), and would undermine the notice-and-comment process. "If an agency could engage in rescission by concession, the doctrine requiring agencies to give reasons before they rescind rules would be a dead letter." *Id.* (citing *State Farm*, 463 U.S. at 52); *see also Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 4-5 (D.D.C. 2009) (agency cannot agree to vacate rule to resolve litigation without a judicial finding on the merits). The four-factor test avoids this outcome by ensuring that an agency provides reasons for a court to review.[4]

In *Sierra Club*, the Court held that an agency's failure to "employ[] [or] mention[] the four-part test" in its explanation for the delay "is arbitrary and capricious" and thus alone warrants setting aside the delay. 833 F. Supp. 2d at 31. Here, in the brief text accompanying the Section 705 Rule, ED similarly did not acknowledge this standard, analyze the determinative factors, or otherwise explain how a stay was justified under the four-part test. *See* 82 Fed. Reg. at 27621-22. The "'complete absence of any discussion' of … statutorily mandated factor[s] 'leaves … no alternative but to conclude that the agency failed to take account of th[ese] statutory limit[s] on its au-

[4] Agencies have also recognized that the four-part test governs agency actions under section 705. *See McCafferty v. Centerior Energy*, No. 96-ERA-6, 1996 WL 897658 (Dep't of Labor Admin. Rev. Bd. Oct. 16, 1996) (collecting cases); *see also* EPA, National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 76 Fed. Reg. 28318, 28326 (May 17, 2011); FERC, Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 74 Fed. Reg. 30924, 30931 (Jun. 29, 2009); *In re Pub. Serv. Co. of New Hampshire, et al.*, 1 E.A.D. 389 (EPA Aug. 12, 1977).

thority,' making the agency's reasoning arbitrary and capricious." *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) (quoting *United Mine Workers v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989)).

2. ED's explanation is unreasonable and insufficient under any standard.

Even if ED's failure to acknowledge or apply the four-factor test were not in itself a basis for vacatur, the agency's action must be set aside as arbitrary and capricious. Whether examined against the four factors or the more nebulous standard of "justice" referred to by the agency, ED's reasoning "failed to consider … important aspect[s] of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, [and] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. ED's brief explanation did little more than "merely recite the terms" of section 705, *see State Farm*, 463 U.S. at 52, and conclude "that justice require[d]" a delay, 82 Fed. Reg. at 27621. That assertion, in turn, rested only on a conclusory and unexplained reference to "serious issues" raised by CAPPS's legal challenge to the regulations, a factually flawed and arbitrary discussion of the potential irreparable harm, virtually no serious consideration of the impact of the delay on borrowers like Ms. Bauer and Mr. Del Rose, and an incomplete and illogical analysis of the implications for the public interest. Each part of the agency's explanation, moreover, directly contradicted its previous findings about the benefits of the Borrower Defense Rule, its impacts on schools, and the harms to borrowers, the federal government, and the general public that it is designed to prevent. The agency neither acknowledged its change of mind nor provided the "reasoned explanation … needed for disregarding facts and circumstances that underlay … the prior policy"—hallmarks of arbitrary and capricious action. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009);

see also California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017) (*California v. BLM I*) (holding that *Fox* applies to section 705 invocations).

a. ED's bare reference to "serious questions" fails to justify the delay.

Any non-arbitrary decision to delay a rule pending judicial review would consider the challenge's likelihood of success on the merits: "Justice" does not require staying a rule pending a frivolous challenge. ED, however, did not evaluate the likelihood of success of CAPPS's claims. It stated only that "the plaintiffs [sic] have raised serious questions concerning the validity of certain provisions of the final regulations." 82 Fed. Reg. at 27621. It did not say what those questions were, or what made them serious. ED's assertion fails the most basic test for reasoned explanation: It explains exactly nothing. *Cf. Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin*., 494 F.3d 188, 206 (D.C. Cir. 2007) (finding an "agency's failure of explanation renders [regulatory action] arbitrary and capricious"); *N.Y. State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110 (D.D.C. 2003) (failure to articulate any explanation is arbitrary and capricious).

Moreover, to the extent that ED now asserts that there are "serious questions" about the validity of any portion of the Borrower Defense Rule, that view reflects a change in agency position from November 2016. In its final rulemaking notice for the 2016 Rule, the agency extensively discussed and refuted challenges to its legal authority to promulgate the provisions of the proposed rule, specifically addressing the challenges asserted in CAPPS's complaint. *See, e.g.*, 81 Fed. Reg. at 75945-46, 75964-65, 75973-78 (borrower defense provisions); *id.* at 75978-80, 76005, 76010 (financial responsibility provisions); *id.* at 76014-21 (repayment warnings); *id.* at 76021-31 (forced arbitration and class action waiver provisions). Nowhere in its cursory statement does ED acknowledge that it dismissed these questions as insubstantial only months earlier. An agency is not precluded from changing its positions, but when doing so, it must "display awareness that it is changing position" and provide "reasoned explication." *Encino Motorcars, LLC v. Navarro*, 136

S. Ct. 2117, 2126-27 (2016); *see also Fox Television*, 556 U.S. at 516. The agency's statements here fall far short of that standard. That the agency is merely "delaying" the rule, moreover, is of no moment: The position expressed by ED remains inconsistent with its prior position. As one district court recently explained, to the extent the reasoning underlying an agency's delay rule "contradicts the reasoning underlying the [rule it is delaying], it must be prepared to provide the requisite good reasons and detailed justification." *California v. BLM II*, 2018 WL 1014644 at *6.

The circumstances here are analogous to those in *International Union, United Mine Workers of America v. U.S. Department of Labor*, 358 F.3d 40 (D.C. Cir. 2004). There, MSHA had withdrawn a proposed rule because of the "possible adverse effect" of an Eleventh Circuit decision about another rule. *Id.* at 44. But although the agency had earlier said it could promulgate a rule that was consistent with that same decision, it provided no explanation of "why it came to deem the Eleventh Circuit decision fatal to that effort." *Id.* MSHA's failure to explain its change of heart, which the D.C. Circuit held was arbitrary and capricious, is not meaningfully different from ED's action here, cryptically referring to "serious questions" without explanation.

b. ED did not establish imminent, serious harm to regulated entities.

Both "justice" and the four-factor test require consideration of what would happen pending judicial review if a challenged rule were *not* stayed. If no substantial harm would result absent delay, or if any such harm were easily reparable, there would be no need for a stay. Here, before staying the rule, the agency was required to consider whether imminent or certain harms would be irreparably suffered while the *CAPPS* litigation was pending. *See ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 47 (D.D.C. 2014). ED claimed "substantial injuries" identified by CAPPS sufficed to justify

invocation of section 705, but the purported harms ED discussed were insubstantial, speculative, and unsupported or contradicted by the record.[5]

The first purported harm ED referenced in the Section 705 Rule was that institutions "would be required, as of July 1, to modify their contracts in accordance with the arbitration and class action waiver regulations, which may be contrary to their interests." 82 Fed. Reg. at 27621. That contracts will be modified, however, is no more than a description of the consequences of the Borrower Defense Rule; it is not, in itself, a harm. The vague assertion that such modifications "may" be "contrary to the[] interests" of schools does not elevate it to the level of imminent, irreparable harm. Notably, ED did not assert, let alone substantiate, that institutions will be prejudiced in their defense or otherwise irreparably harmed if they litigate claims in court rather than arbitrate them. And to the extent ED is concerned about the cost of modifying contracts and providing notices required in the 2016 Rule, that cost hardly rises to the level of harm that would justify a stay: ED estimated modifying contracts would take 10 minutes per student—a drop in the bucket compared to the amount of time spent cajoling and recruiting students. 81 Fed. Reg. at 76067.

Second, ED asserted that "institutions would be subject to financial responsibility trigger provisions that could impose substantial costs." 82 Fed. Reg. at 27621. ED did not attempt to substantiate the existence or quantum of these potential costs beyond stating that the plaintiff in the CAPPS case had "identified substantial injuries that could result if the final regulations go into effect." *Id*. But CAPPS's preliminary injunction motion did no such thing; indeed, CAPPS did *not* seek to enjoin the financial responsibility provisions or assert that CAPPS's members would be

[5] ED also referenced "uncertainty," 82 Fed. Reg. at 27621, but "uncertainty" alone is not a non-speculative irreparable harm. *See, e.g.*, *Sunday Sch. Bd. v. U.S. Postal Serv.,* No. 99-5018, 1999 WL 322746, at *1 (D.D.C. Apr. 30, 1999); *Freeman v. Cavazos*, No. CIV. A. 90-2175-LFO, 1990 WL 141483, at *3 (D.D.C. Sept. 20, 1990). Moreover, a stay, by its nature, does not eliminate uncertainty.

irreparably injured if those provisions went into effect pending litigation. *See CAPPS*, Dkt. No. 6 at 19-23. There is thus no support in the Administrative Record for ED's speculated harms. ED's reliance on such harms is arbitrary and capricious.

Even if CAPPS *had* claimed such harms, any harm attributable to the financial responsibility provisions would be both too speculative and too minimal to justify a stay. Under the 2016 Rule, an institution would be required to strengthen its financial stability by obtaining a letter of credit only upon the occurrence of a specified event, such as a court judgment, the imposition of a teach-out plan, or the de-listing of its stock on an exchange. *See* 81 Fed. Reg. at 76073-74 (new § 668.171). Whether any of these events will occur is inherently speculative. And the agency has not attempted to explain or demonstrate how obtaining a letter of credit—which brings benefits to institutions—would be so costly as to inflict the kind of irreparable financial injury the D.C. Circuit has concluded is necessary for a stay. *See, e.g.*, *ConverDyn*, 68 F. Supp. 3d at 47 (noting "the only circumstance in which this Circuit has endorsed a finding of irreparable harm based on monetary loss" is where such a loss would "threaten the very existence of [the] business"). Additionally, the agency considered the argument that the financial responsibility provisions would impose unjustified substantial costs on institutions in the Final Rule—and rejected it. *See* 81 Fed. Reg. at 76007-08. The agency's failure to acknowledge, let alone give reasons for, this reversal of position is arbitrary and capricious.

c. ED's balancing of harm was unreasonable.

Consistent with both longstanding principles of equity and any reasonable notion of "justice," a determination that a stay is required entails balancing any harms to the regulated industry with the interests of both the government and other interested parties, including student borrowers, in the implementation of the Rule. *See, e.g.*, *Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 124-25 (D.D.C. 2012); *Va. Petroleum Jobbers Ass'n*, 259 F.2d at 925. ED's purported balancing of

those interests does not meet minimal standards of rational explanation, for two fundamental reasons: First, the agency's assertion that delay will not harm borrowers is contradicted by its simultaneous claim that the delay will benefit the government by reducing transfers of funds from the government to students resulting from loan cancellations. Second, ED completely ignores other harms that both student borrowers and the federal government will suffer as a result of delaying the 2016 Rule and disregards its own prior findings that substantiate the existence of those harms. As one court recently held with respect to another section 705 stay, whether under the four-part test or any other test, such a failure to adequately consider the "foregone benefits" of the delayed rule is arbitrary and capricious. *California v. BLM I*, 277 F. Supp. 3d at 1123-25.

i. ED ignored the obvious harm to borrowers caused by delay of the borrower defense provisions.

In justifying the Section 705 Rule, ED asserted that the government would benefit financially by preventing the 2016 Rule from going into effect. 82 Fed. Reg. at 27621-22. Specifically, ED stated that it would save billions of dollars over ten years that would be attributable to the "discharge of borrowers' loans" if the Rule went into effect. *Id.* at 27621. But the agency completely ignored the inherent harm that goes hand-in-hand with this cost savings: Borrowers whose loans would have been, but now will not be, discharged are significantly harmed by the Section 705 Rule. ED cited the Borrower Defense Rule's regulatory impact analysis for this $16.6 billion "cost" savings. *Id.* (citing regulatory impact analysis). That analysis explains at length that those costs are the result of increased "transfers" to student borrowers—more of whom will receive discharges under the 2016 Rule, particularly since that Rule would automatically grant discharges to students who attended schools that closed, rather than requiring eligible borrowers from closed schools to apply for discharges. *See* 81 Fed. Reg. at 76055-76060. Thus, any cost savings to the government necessarily come at the expense of the borrowers who were to be protected by the

Rule. ED's discussion of costs was also incomplete, referencing language from the 2016 Rule stating that "the largest quantified impact of the regulations is the transfer of funds from the Federal government to borrowers who succeed in a borrower defense claim," 81 Fed. Reg. at 76050 (referenced at 82 Fed. Reg. at 27621), while ignoring the second half of that sentence: "a significant share of which will be offset by the recovery of funds from institutions whose conduct gave rise to the claims," *id.*

ED's "balancing" of harms ignored this obvious consequence and rested entirely on the illogical and inconsistent statement that students would not be harmed at all by an indefinite stay of the 2016 Rule. ED also ignored that every dollar saved by the government—the claimed benefit of the Section 705 Rule—represents more than a dollar of harm to a student borrower. Whereas the government would recover some of the costs associated with discharge from the institutions students attended, *see* 81 Fed. Reg. at 75930-32, student borrowers—who can withstand the budgetary impact far less than the federal government—have limited avenues for relief, particularly in light of the class action waivers and forced arbitration clauses that institutions are free to invoke during the indefinite stay. For an agency to claim the benefit of cost savings, while entirely ignoring the interests of the borrowers at whose expense those savings would come, is arbitrary and capricious.

Likewise, the government ignored its own prior conclusion that the benefits to students of the new provisions amply justify the costs of the Borrower Defense Rule. In promulgating the 2016 Rule, ED noted that existing regulations had "led to much confusion among borrowers regarding what protections and actions for recourse are available to them when dealing with cases of wrongdoing by their institutions." 82 Fed. Reg. at 76047. The 2016 Rule, therefore, gives "students access to consistent, clear, fair, and transparent processes to seek debt relief," not just with

respect to the borrower defense provision of the statute, but also the closed-school discharge and other provisions. *Id.* ED provides no explanation whatsoever as to why it is ignoring these findings, made only eight months earlier, as well as its own 15-page, detailed regulatory impact analysis, which concluded that costs to the public fisc are outweighed by the benefits of the 2016 Rule. *See id.* at 76046-61.

The harm to student borrowers caused by the delay is real and irreparable. For example, Mr. Del Rose and Ms. Bauer have had borrower defense applications pending with ED since August 2015 and September 2015, respectively. Del Rose Decl. ¶¶ 30-31; Bauer Decl. ¶¶ 28-29. Had the 2016 Rule gone into place, ED would have been required to provide automatic forbearance on payments toward any non-defaulted loans for which cancellation is sought through the borrower defense process. *See* 81 Fed. Reg. at 76083 (new § 685.222(e)(2)(i)); *see also id.* at 76080 (new § 685.205(b)(6)(i), (vi)). Ms. Bauer requested that ED place loans at issue in her borrower defense application in forbearance in June 2017, but that request was not granted until February 27, 2018; in the interim, she was forced to use up some of her limited "suspended payment" forbearance to keep the loans from becoming delinquent. *See* Bauer Decl. ¶¶ 31-32. The loans at issue in Mr. Del Rose's borrower defense application have been placed in forbearance, the renewal of which has been at ED's sole discretion during the pendency of his borrower defense application. *See* Del Rose Decl. ¶¶ 32-34.

Notably, in the Borrower Defense Rule, ED recognized that the economic and psychological harms of continuing debt are well-established. *See* 81 Fed. Reg. at 76051. Each month that passes causes borrowers like Ms. Bauer and Mr. Del Rose additional anguish as they wait for ED to rule on their borrower defense applications—currently in an opaque and confusing process—while interest continues to accrue. Had the Rule gone into effect, each of them would have been

able to take advantage of a clarified and expanded process—one that would have provided them access to records ED considered in the process, new § 685.222(e)(3)(ii)), and a reasoned, written decision if their requests were denied, new § 685.222(e)(4)).

ED failed to consider *any* of these harms to student borrowers. The *only* statement it made about harm to student borrowers was that they would not be harmed "because the Department will continue to process borrower defense claims under existing regulations that will remain in effect during the postponement." 82 Fed. Reg. at 27621. But in the 2016 Rule, the agency had concluded that the existing regulations were not good enough to properly protect student borrowers. ED's explanation was thus an unacknowledged reversal of position, and therefore arbitrary and capricious. *See Encino Motorcars*, 136 S. Ct. at 2125-26.

ii. ED ignored other harms caused by an indefinite delay of other provisions of the 2016 Rule.

ED also "failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, when it failed to give any consideration at all to the harm to borrowers of delaying provisions of the Rule other than the ones clarifying the procedural and substantive standards for asserting borrower defenses. The most obvious such provision is the one concerning forced arbitration clauses and class action waivers. It was arbitrary and capricious for ED to consider the harms that institutions would face if the ban on forced arbitration and class action waivers went into effect, but not the harms that borrowers would suffer if it did not. These harms are irreparable.

As noted above, Ms. Bauer and Mr. Del Rose intend to sue the school they attended, NEIA, and its corporate parent, EDMC. If the 2016 Rule were in effect, they could bring a class action in Massachusetts state court under the Massachusetts Consumer Protection Act, and NEIA and EDMC would be forced to defend that suit on the merits. With the Rule delayed, NEIA's and EDMC's explicit statements demonstrate that they would respond to such a suit by moving to

compel arbitration and bar Ms. Bauer and Mr. Del Rose from pursuing classwide relief. If the school prevailed, Ms. Bauer and Mr. Del Rose would be forced to either abandon their claims, as so many borrowers do, or confront the difficulties associated with individual arbitration. ED has explained at length the harms these options impose on borrowers and the public:

> [C]lass action lawsuits not only provide a vehicle for addressing a multitude of relatively small claims that would otherwise not be raised—or raised only as borrower defense claims—but create a strong financial incentive for both a defendant school and other similarly situated schools to comply with the law in their business operations. Pre-dispute arbitration agreements coupled with class action waivers eliminate this incentive by preventing the aggregation of small claims that may reflect widespread wrongdoing. We believe that banning class action waivers as they pertain to potential borrower defense claims would promote direct relief to borrowers from the party responsible for injury, encourage schools' self-corrective actions, and, by both these actions, lessen the amount of financial risk to the taxpayer in discharging loans through the defense to repayment process.

2016 NPRM, 81 Fed. Reg. at 39383; *see also id.* at 39384-85; 81 Fed. Reg. at 76022-23. The agency's failure even to acknowledge its prior findings about the harmful impact of arbitration and class action waiver provisions on students, let alone explain its change in view, is arbitrary and capricious. *See, e.g.*, *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 928 (D.C. Cir. 2017); *California v. BLM II*, 2018 WL 1014644, at *6.

Moreover, Ms. Bauer, Mr. Del Rose, and other borrowers in comparable situations cannot avoid the harms imposed by arbitration agreements and class action waivers by simply waiting until the unspecified end of the stay to take legal action. Their claims are subject to statutes of limitations. Those statutes of limitations continue to run. If they expire before the stay is lifted, the harm will be irreparable.

The stay of other provisions also causes harms to borrowers not addressed by ED. One such provision is the closed-school discharge provision, which is not even discussed in CAPPS's Complaint. In light of the recent closure of for-profit Charlotte School of Law, ED has issued

guidance that makes clear that it will not be providing students of that institution the benefits they would have received under the Rule (including, for example, automatic closed-school discharges). *See* ED, Fact Sheet: School Closure, Charlotte School of Law Located in Charlotte, North Carolina at 2, https://studentaid.ed.gov/sa/sites/default/files/charlotte-law.pdf. Staying the Rule's loan repayment disclosure requirement will also irreparably harm students. Students who enroll in institutions, taking out loans without knowing about the abysmal repayment rate of those institutions' borrowers, cannot go back in time and reverse their enrollment once the repayment disclosures go into effect.

ED also ignored the harms to the government caused by other provisions delayed by the Section 705 Rule. Parts of the 2016 Rule like the financial responsibility provisions and loan repayment disclosure requirement *protect* the public fisc by preventing a new generation of students from being saddled with debt they will be unable to repay because their degrees are worthless. As the agency noted when issuing the Borrower Defense Rule, the financial responsibility provisions "introduce far stronger incentives for schools to avoid committing acts or making omissions that could lead to a valid borrower defense claim than currently exist." 81 Fed. Reg. at 76050. ED also concluded that the Borrower Defense Rule, as a whole, would lead to a reduction in school closures over time. *Id.* at 76051. Delaying the applicability of these provisions is bad for the American taxpayer—as recognized in the agency's previous conclusions that it now ignores. The Section 705 Rule's utterly incomplete consideration of the harms of delay defies the norms and requirements of reasoned decisionmaking.

d. ED insufficiently analyzed the public interest.

Although ED asserted that "the public interest" required the indefinite delay of the Rule, 82 Fed. Reg. at 27621, the accompanying discussion was woefully inadequate, as it failed to consider the impact on borrowers—who are members of the public—and disregarded all "public interests" other than the savings to the government that would result from granting fewer discharges to distressed student borrowers. 82 Fed. Reg. at 27621-22. As discussed above, delaying implementation of the Borrower Defense Rule imposes real harms on both borrowers and the public fisc itself. "The public interest may, of course, have many faces." *Va. Petroleum Jobbers Ass'n*, 259 F.2d at 925. But ED's simplistic conclusion that "the United States will suffer no significant harm from postponing the effectiveness of the final regulations," 82 Fed. Reg. at 27621, ignores the fact that American students and borrowers will suffer, and provides no coherent account of how it is genuinely in the public interest for the government to save money by denying student borrowers discharges to which they are entitled under the governing legal standard. Completely ignoring the impact that an indefinite stay of the *Borrower* Defense Rule would have on *borrowers* when analyzing the "public interest" is the epitome of arbitrary and capricious decisonmaking—particularly because it represents a *sub silentio*, unreasoned reversal of position from the November 2016 Final Rule. *Cf. Fox Television*, 556 U.S. at 516; *see also St. Lawrence Seaway Pilots Ass'n, Inc. v. U.S. Coast Guard*, 85 F. Supp. 3d 197, 207 (D.D.C. 2015).

Equally important, ED already considered the costs and benefits of delaying the Borrower Defense Rule when promulgating it, and found that the public interest did *not* justify delay:

> The Department has weighed the benefits of delay against these costs in making the decision to proceed with the regulation. With respect to borrower defense, if the Department did not proceed with the final regulations, the existing borrower defense provisions would remain in effect and some of the costs associated with potential claims would be incurred whether or not the final regulations go into effect. The final regulations build in more clarity and add accountability and transparency provisions that are

> designed to shift risk from the taxpayers to institutions. … Delaying the regulations would delay the improved clarity and accountability from the regulations without developing additional data within a definite timeframe, and we do not believe the benefits of such a delay outweigh the costs.

81 Fed. Reg. at 76049. ED's reversal of its view of the public interest arbitrarily and capriciously failed to acknowledge or explain why it had abandoned its previous findings on exactly the same point. *See Am. Wild Horse*, 873 F.3d at 928; *California v. BLM II*, 2018 WL 1014644, at *6.

3. Section 705 does not authorize an agency to delay a rule for the purpose of undertaking a new rulemaking.

In publishing the Delay Rule, ED stated:

> The postponement will allow the Department to consider and conduct a rulemaking process to review and revise the final regulations and ensures regulated parties will not incur costs that could be eliminated under any future regulations the Department promulgates on these matters.

82 Fed. Reg. at 27622.

The agency's reliance on its interest in revising the rule is impermissible under section 705. Section 705 is specifically tied to judicial review. Although ED may find it inconvenient that the HEA and APA create a lengthy process for promulgating (or revising) rules, section 705 is not a means of evading those requirements. *Cf. Am. Trucking Ass'ns, Inc. v. Reich*, 955 F. Supp. 4, 7 (D.D.C. 1997) ("salutary as its motive may be," an agency cannot "avoid the rulemaking process, thereby silencing any … opposition and saving it the cost, delay, and uncertainty associated with such proceedings"). The agency's intention to engage in new rulemaking was an impermissible consideration under section 705, and requires vacatur of the Section 705 Rule. *See Public Citizen, Inc. v. Lew*, 127 F. Supp. 2d 1, 7 (D.D.C. 2000) (where agency "has relied on impermissible factors … the court must undo its action").

As its plain text demonstrates, section 705 exists for one purpose—to provide for a stay of a regulation where justice so warrants during a period of judicial review. A Section 705 stay is not

warranted "simply because litigation … *happens to be pending*." *Sierra Club*, 833 F. Supp. 2d at 34 (emphasis in original). The agency "must [articulate], at a minimum, a rational connection between its stay and the underlying litigation." *Id.*; *see also Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) (citing *State Farm*, 463 U.S. at 43) (agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"). Here, ED's failure to explain why the *CAPPS* litigation necessitates any stay at all, much less the specific stay it imposed, shows that the agency improperly sought to use section 705 as a mechanism to allow it to revoke Borrower Defense Rule.

In *Sierra Club*, the Court concluded that EPA's invocation of section 705 violated the APA because the agency only "paid lip service to the pending litigation" and was actually focused on plans to reconsider the rules. *Id.* at 34. ED's actions here are no different: Not only did ED explicitly acknowledge that its desire to change the rule motivated its action, but the scope of its stay confirms that the action had little relation to the *CAPPS* litigation. The Section 705 Rule postpones the effective date of more than twenty provisions (but not every provision) of the Borrower Defense Rule. *See* 82 Fed. Reg. at 27622. At a minimum, ED was required to explain how the litigation justified a stay of each of the major provisions of the Rule it subjected to delay. It did not. Instead, it referenced generic "serious questions" and relied solely on the injuries asserted by CAPPS in connection with its preliminary injunction motion—although CAPPS only sought a preliminary injunction of one of the Rule's four major provisions (the arbitration and class action waiver ban). *See CAPPS*, Dkt. No. 6 at 25. In staying parts of the rule that CAPPS did not seek to preliminarily enjoin, ED showed its hand. If imminent injury revealed in the *CAPPS* litigation were genuinely the reason for the delay, the Section 705 Rule would be more narrowly tailored. The disproportionate scope reveals that the Section 705 Rule is not about allowing judicial review,

but merely a pretext for anticipated deregulation—a conclusion bolstered by the agency's failure to take any steps to resolve CAPPS's challenge. The APA requires more than a pretextual justification. *See State Farm*, 463 U.S. at 52.

B. The Section 705 Rule is invalid without negotiated rulemaking, notice, and an opportunity for public comment.

"The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553." *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983); *see also Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984). Although this Court stated in *Sierra Club* that a stay authorized under section 705 does not require notice-and-comment rulemaking, *see* 833 F. Supp. 2d at 28, ED's action cannot, as demonstrated above, be justified as a lawful or rational application of section 705. Thus, its delay of the Rule's effective date could be sustained only if ED had followed the notice-and-comment procedures set forth in the APA, *as well* as the negotiated rulemaking precursors required by the HEA, 20 U.S.C. § 1098a. It indisputably failed to do so.

The effective date of a regulation is a substantive element that triggers the HEA and APA procedural requirements for rulemaking. *See, e.g.*, *Envtl. Def. Fund, Inc.*, 716 F.2d at 920; *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981); *Open Communities Alliance v. Carson*, --- F. Supp. 3d ---, Civ. No. 17-2192 (BAH), 2017 WL 6558502, at *10 (D.D.C. Dec. 23, 2017). The July 1, 2017 effective date was an integral part of the proposed rule considered by ED and addressed by interested parties during the comment period on the 2016 Rule. *See, e.g.*, 2016 NPRM, 81 Fed. Reg. at 39331, 39337. This date was incorporated into specific provisions of the NPRM that would have significant implications for regulated entities' obligations and borrowers' rights. The agency's issuance of the final rule reflected its determination that the July 1, 2017 effective date was an important element of the Borrower Defense Rule.

Because, as demonstrated above, section 705 cannot justify the agency's action here, and because ED has invoked no exception to notice-and-comment requirements that could otherwise justify altering a substantive term of the Borrower Defense Rule without compliance with the rule-making procedures normally required by law, the Section 705 Rule must be vacated because it was issued without observance of procedure required by law. 5 U.S.C § 706(2); *see, e.g.*, *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 90-91 (D.D.C. 2007).

II. The 2018 Delay Rule is Unlawful.

The 2018 Delay Rule, which further delays the 2016 Rule for the express purpose of giving ED time to revoke it, is unlawful and must be vacated. On the most basic level, a plan to revoke a rule in the future is not a valid reason to delay an existing rule. *See California v. BLM II*, 2018 WL 1014644, at *6. If an agency believes an existing rule is problematic, it must say so and explain why. *Id.* Here, ED explicitly disclaimed any such obligation and refused to acknowledge or explain its reversal of position from 2016. The reasoning ED did provide is arbitrary and capricious: It is internally inconsistent, fails to accurately consider the costs and benefits of a delay, and contradicts—without explanation—the agency's previous positions. In addition, ED's proffered "good cause" for evading the negotiated rulemaking requirements of the HEA—its desire to move more quickly than those procedures allow—fails to meet the high bar required.

A. The 2018 Delay Rule is arbitrary, capricious, and contrary to law.

1. The potential revocation of the 2016 Rule does not justify delay.

Throughout the 2018 Delay Rule, ED straightforwardly admits that the purpose of the delay is to allow it time to revoke the 2016 Rule before it goes into effect. *See, e.g.*, 83 Fed. Reg. at 6459. But as one court recently explained, an agency "cannot use [a] purported proposed future revision, which has yet to be passed, as a justification for [a delay rule]." *California v. BLM II*, 2018 WL

1014644, at *6. If an agency could do so, it could effectively rescind any final rule, by indefinitely "delaying" it.

The facts in *California v. BLM II* are similar to those here. There, the Bureau of Land Management published a final rule in November 2016 ("Waste Prevention Rule"), and regulated entities commenced suit to challenge it that same month. 2018 WL 1014644 at *1. After issuing a section 705 rule later declared unlawful in *California v. BLM I*, 277 F. Supp. 3d 1106, BLM issued a notice of proposed rulemaking to delay for one year the effective date of the rule and issued a final delay rule in December 2017. *Id.* at *2. "BLM's primary rationale" for the delay was its "concerns regarding" the Waste Prevention Rule, and its desire "to avoid imposing temporary or permanent compliance costs on operators for requirements that might be rescinded or significantly revised in the near future." *Id.* at *7 (quoting Bureau of Land Management, Final Rule; Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58050, 58050 (Dec. 8, 2017)). Issuing a preliminary injunction against the delay rule, the district court concluded that potential revision of the Rule did not alone provide "good reasons" for delay, explaining that "[t]o the extent that [BLM's] reasoning contradicts the reasoning underlying the Waste Prevention Rule, it must be prepared to provide the requisite good reasons and detailed justification." *Id.* at *6.

The rationale of *California v. BLM II* is consistent with well-established principles of administrative law and D.C. Circuit precedent, and is a natural consequence of the principle that a rule's effective date is a substantive part of a rule, subject to the same requirements of the APA as any other part of a rule. *See, e.g.*, *Clean Air Council*, 862 F.3d at 6; *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983); *Open Communities Alliance*, 2017 WL 6558502, at *10. Applying that principle, the D.C. Circuit has explicitly rejected the argument that suspensions

of a rule are not subject to the requirements of reasoned decisionmaking set forth in *State Farm* and its progeny, including the requirement that an agency acknowledge and explain a change in position. *See Pub. Citizen v. Steed*, 733 F.2d at 98-99. If the law were otherwise, "it would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date." *NRDC v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982). That ED purports to delay the 2016 Rule for only one additional year does not change the applicability of reasoned decisionmaking requirement; as ED's action is explicitly intended to ensure that the 2016 Rule *never* takes effect.

The case law thus forecloses the argument raised by the government in *BLM* and in the 2018 Delay Rule: that an agency may invoke its intent to revoke a rule to support a delay of that rule, without explaining the need for such a revocation, on the grounds that the explanation will come in the later revocation rulemaking. 83 Fed. Reg. at 6464. As made clear by *Public Citizen v. Steed*, the delay or suspension of a rule to allow for revisiting it is itself a reversal of the agency's prior position, 733 F.2d at 98, and thus the agency is required to "display awareness that it is changing position and show that there are good reasons for the new policy," *Encino Motorcars*, 136 S. Ct. at 2126. In rejecting the Bureau of Land Management's argument that its delay rule need not comply with the "good reasons" requirement because it was not a revocation of the rule, the court in *California v. BLM II* explained that the agency

> need not provide a level of analysis equivalent to the Waste Prevention Rule in support of the Suspension or equivalent to any future revision rule. But it must provide at least some basis—indeed, a "detailed justification"—to explain why it is changing course after its three years of study and deliberation resulting in the Waste Prevention Rule. New facts or evidence coming to light, considerations that BLM left out in its previous analysis, or some other concrete basis supported in the record—these are the types of "good reasons" that the law seeks. Instead, it appears that BLM is simply "casually ignoring" all of its previous findings and arbitrarily changing course.

2018 WL 1014644, at *10 *(citing Action for Children's Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987)).

Delaying the effective date is an abandonment of the position that the 2016 Rule is lawful, justified by the considerations relevant under the applicable statutory framework, and should go into effect. The only reason ED provided—that it hopes to revoke some unspecified portions of the 2016 Rule—is not an explanation, but a statement of a generic change in the agency's position. ED's failure to acknowledge that it was changing its position, and to explain the extent of and reasons for the change, reflects an arbitrary and capricious failure to engage in reasoned decisionmaking.

2. The need for "clarity and consistency" is not a valid basis for delay.

ED repeatedly refers to a need for "clarity and consistency" or "confusion and disruption" as a justification for the 2018 Delay Rule. *See* 83 Fed. Reg. at 6461, 6462, 6464, 6465, 6467. These arguments are premised on the presupposition that ED will revoke the 2016 Rule in future rulemaking. But ED cannot rely on a lack of clarity that exists simply because it wants to change the 2016 Rule in the future, particularly because it has failed to explain why any rule change is necessary. The potential of a future change of a rule *always* exists. Here, ED has not even issued a notice of proposed rulemaking, and given the magnitude of the comments ED received on the 2016 Rule and the likelihood of litigation over any rule ED ultimately promulgates, there is no "certainty" that the 2016 Rule will ever be revoked. *See California v. BLM I*, 277 F. Supp. 3d at 1127.

Moreover, any lack of clarity is ED's own fault. ED could have let the 2016 Rule go into effect in 2017. Indeed, both students and the regulated industry rightfully assumed the lawfully promulgated November 2016 Rule would go into effect on July 1, 2017. ED itself disrupted that

certainty by issuing the Section 705 Rule weeks before the 2016 Rule was scheduled to go into effect, and now by its two further delays.

ED also failed to acknowledge the role of the master calendar rule in addressing the potential for confusion or lack of clarity resulting from regulatory changes. Whether read according to its plain text or ED's flawed new interpretation, that provision specifies Congress's method of dealing with the potential confusion or disruption caused by rule changes. Given publication of the underlying rule nearly 18 months ago, prompt implementation of the 2016 Rule should pose no problems of confusion or lack of notice. Although ED may be able to take actions to minimize confusion, reasoned decisionmaking requires it to explain why Congress's method of doing so is insufficient. *Cf. Int'l Ladies Garment Workers' Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983) (failure to explain why alternative is insufficient is arbitrary and capricious).

Finally, the need for clarity cuts both ways. In 2016, ED stated that the new rule was necessary to provide "students access to consistent, clear, fair, and transparent processes to seek debt relief." 81 Fed Reg. at 76047. ED has not explained its reversal of this conclusion. And student borrowers like plaintiffs have relied on the expectation that the 2016 Rule would go into effect as published. ED does not acknowledge that its actions have deprived student borrowers of clarity and consistency. *Cf. Nat'l Venture Capital Ass'n v. Duke*, --- F. Supp. 3d ---, No. CV 17-1912 (JEB), 2017 WL 5990122, at *11 (D.D.C. Dec. 1, 2017) (invalidating delay rule and discussing two-way nature of "confusion" argument). ED's supposed interests in clarity and consistency would be equally served by letting the 2016 Rule go into effect as contemplated. ED's presupposition that it will revoke that rule in the future, without explaining why such a revocation is merited, does not justify its action.

3. ED's analysis of the costs and benefits of further delay was arbitrary and capricious.

ED relied on potential revision of the 2016 Rule not only as the reason for delay, but also as its basis for concluding the benefits of further delay outweigh the costs. *See, e.g.*, 83 Fed. Reg. at 6461 ("acknowledging" that benefits of 2016 Rule would be foregone but concluding they were "outweighed by the administrative and transaction costs for regulated entities and borrowers of having those regulations go into effect only to be changed a short while later"). ED's discussion of the costs and benefits did not reflect reasoned decisionmaking and is an independent basis for vacating the 2018 Delay Rule.

a. The agency's cost-benefit analysis is internally inconsistent.

ED concluded that any foregone benefits were "marginal" because the 2018 Delay rule "merely delays" them and "does not revoke them." 83 Fed. Reg. 6461. But ED cannot minimize the burden of its actions on student borrowers by saying it is not revoking the 2016 Rule, while basing the claimed *benefits* of the delay on its presupposition that the 2016 Rule will be revoked. *See NRDC v. NRC*, 879 F.3d 1202, 1214 (D.C. Cir. 2018) ("Of course, it would be arbitrary and capricious for the agency's decision making to be 'internally inconsistent.'" (citation omitted); *ACA Int'l v. FCC*, No. 15-1211, slip op. at 7 (D.C. Cir. Mar. 16, 2018) (agency cannot, "consistent with reasoned decisionmaking, espouse both competing interpretations in the same order"). In *California v. BLM II*, the court found a similar inconsistency sufficient to invalidate the rule, explaining:

> BLM cannot have it both ways: either the air quality and climate benefits will be lost indefinitely and not for only one year because the Waste Prevention Rule is not going into effect, and thus industry will never incur the compliance costs, or the air quality and climate benefits are lost for only one year, and there are no reductions in compliance cost because those costs are simply delayed for one year. BLM cannot base its calculations on inconsistent assumptions to inflate its calculation of the net benefits.

2018 WL 1014644, at *10.

b. ED's conclusion that the preexisting regime adequately protected borrowers is an unexplained departure from prior position and is unsupported by the record.

In the 2018 Delay Rule, ED took the remarkable position that it "does not agree that borrowers will be significantly harmed by changing the effective date of the 2016 final regulations to July 1, 2019." 83 Fed. Reg. at 6461. ED also stated that it did "not share the commenters' concern that borrowers will be subject to certain institutions' predatory practices" absent the 2016 Rule, because the pre-existing regime, including "other existing protections for borrowers" like state regulators, already provides adequate protection. *Id.* These conclusions are entirely inconsistent with ED's previous position.

As discussed *supra* at pp. 5-12, the factual predicate underlying the 2016 Rule was that the existing regime was *not* sufficient to protect student borrowers and the public fisc, and that the changes in the 2016 Rule were necessary. *See, e.g.*, 81 Fed. Reg. at 76047 (new borrower defense process would reduce obstacles to pursuing claims); 81 Fed. Reg. at 76049 (new process would assist institutions to avoid behavior that could result in a future borrower defense claim); 81 Fed. Reg. at 76022 (forced arbitration clauses and class action waivers had allowed institutions to "insulat[e] themselves from direct and effective accountability for their misconduct," "effectively removed any deterrent effect that the risk of … lawsuits would have provided," and "substantially harm the financial interest of the United States and thwart achievement of the purpose of the Direct Loan Program"); 81 Fed. Reg. at 76018 (disclosure provisions were "critical to ensure students and families have the information they need to make well-informed decisions about where to go to college."). ED's failure to acknowledge and explain this inconsistency is arbitrary and capricious. As the Supreme Court has held, "a reasoned explanation is needed for disregarding facts

and circumstances that underlay or were engendered by the prior policy." *Fox Television*, 556 U.S. at 516. "If instead 'an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.'" *Am. Wild Horse Preservation*, 873 F.3d at 928.

ED's conclusion that borrowers will not be significantly harmed also fails to adequately respond to comments submitted explaining that delays of the Rule do just that. *See, e.g.*, Comments of 32 Organizations, *supra*, at 5-10. ED's response that some borrower defense claims will continue to be processed and granted, 83 Fed. Reg. at 6461, is a *non sequitur*. Both the 2016 Rule and each of the three Delay Rules presume that substantially less student debt will be forgiven pursuant to the Borrower Defense process under the existing regime than if the 2016 Rule went into effect. *See, e.g.*, 83 Fed. Reg. at 6467-69; 81 Fed. Reg. at 76050 (referenced at 82 Fed. Reg. at 27621); *see also* pp. 32-35, *supra*. As with the Section 705 Rule, ED's assertion that students with borrower defense claims will not suffer contradicts its own explanation of the supposed benefits of delay (including savings to the government as a result of decreased relief to students).

c. ED's dismissal of harms caused by the delay of the prohibitions on forced arbitration and class action waivers was arbitrary and capricious

ED "acknowledge[d]" that individual borrowers' statutes of limitations to bring claims against predatory institutions may run out during the delay, thus depriving them of the ability ever to take advantage of the prohibition on forced arbitration and class action waivers in the 2016 Rule. 83 Fed. Reg. at 6462. ED nonetheless argued the ensuing harm to borrowers was justified by unspecified "serious questions regarding the legality" of those provisions and its assertion that it was "likely" that this Court would overturn those provisions. *Id.* ED's unsupported speculation as to what this Court might or might not do in the *CAPPS* litigation cannot provide a basis for harming borrowers. ED has explicitly stated that "[t]he CAPPS litigation is not the basis for the" 2018

Delay Rule. 83 Fed. Reg. at 6465. If that is the case, ED cannot rely on what might happen in that litigation to justify the harms of the 2018 Delay Rule.

Moreover, to the extent ED now believes the forced arbitration and class action provisions are unlawful, its position is an unquestionable reversal not only from that set forth in the lengthy discussion of the legality of those provisions in the 2016 Final Rule, but of ED's position in the *CAPPS* litigation. *See* 2016 Rule, 81 Fed. Reg. 76021-25 (five-page discussion of lawfulness of provisions); Defs.' Answer, *CAPPS* Dkt. No. 52 at 41 (2016 Rule was "fully consistent with applicable law"). ED does not recognize this reversal or explain it at all, and thus its reasoning cannot justify harming student borrowers.

4. The 2018 Delay Rule incorporates the two prior unlawful delay rules.

The 2018 Delay Rule is explicitly premised on the two earlier Delay Rules and presumes their validity. *See, e.g.*, 83 Fed. Reg. at 6464 (relying on IFR's interpretation of the master calendar provision); 83 Fed. Reg. at 6462 (relying on Section 705 Rule's invocation of "serious questions"). Thus, if this Court finds either of those two rules unlawful, it should, at a minimum, vacate the 2018 Delay Rule and remand it to the agency. *See, e.g.*, *Affinity Healthcare Servs., Inc. v. Sebelius*, 746 F. Supp. 2d 106, 120 (D.D.C. 2010) (calculations based on regulation declared invalid are also invalid and unlawful); *Hawaii Longline Ass'n. v. Nat'l Marine Fisheries Serv.*, 281 F. Supp. 2d 1, 26-28 (D.D.C. 2003) (regulations based on subsequently vacated agency rule are "by definition arbitrary and capricious").

B. ED's failure to proceed with negotiated rulemaking lacked good cause.

ED concedes that the negotiated rulemaking requirement of the HEA applied to the 2018 Delay Rule but claims that it had "good cause" to avoid it. 83 Fed. Reg. at 6464.[6] The D.C. Circuit

[6] The HEA expressly adopts the good cause exception of the APA. 20 U.S.C. § 1098a(b)(2).

has "repeatedly made clear that the good cause exception is to be narrowly construed and only reluctantly countenanced," *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (citations omitted), and an agency's invocation of the exception is owed no deference, *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014).

In the NPRM, ED's sole attempt at identifying good cause was that "it would not be practicable, before the July 1, 2018 effective date specified in the IFR, to engage in negotiated rulemaking and publish final regulations."[7] 82 Fed. Reg. at 49157. This statement is not a reasoned basis for invoking good cause. At most, it suggests that the agency found compliance with the procedures impracticable because it wanted to move faster than it thought they would allow. But impracticability requires more than an agency's desire to make a policy change more quickly than it would otherwise be able to. "Impracticability" applies "'when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required in [§ 553],' as when a safety investigation shows that a new safety rule must be put in place immediately." *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) (quoting U.S. Dep't of Justice, Att'y Gen.'s Manual on the Admin. Proc. Act 30–31). The D.C. Circuit has found this exception to apply, for example, in circumstances "where delay would imminently threaten life or physical property." *Sorenson Commc'ns*, 755 F.3d at 706; *see also Mack Trucks*, 682 F.3d at 93 (providing examples where this exception would apply). The facts here obviously present no such threat.

The recent decision in *National Venture Capital Ass'n v. Duke*, 2017 WL 5990122, is directly on point. There, the Department of Homeland Security invoked "good cause" to delay the

[7] The HEA, 20 U.S.C. § 1098a, requires the Secretary to provide the basis for failing to proceed with negotiated rulemaking "at the same time as the proposed regulations in question are first published." ED therefore can rely only on the justification for good cause stated in the NPRM.

effective date of a rule without proper procedure, because it intended to issue a proposal to rescind that rule. DHS argued it had good cause because it would "sow confusion" and require unnecessary expenditure of resources if the rule at issue were to go into effect, only to be revoked later, and thus it "needed" to act quickly to delay the rule. The court rejected this argument in its entirety, noting there was no need to delay the rule *at all*—it could simply go into effect. *Id.* at *9-11. The same is true here.

III. The Interim Final Rule is Unlawful.

If the Court sets aside the Section 705 Rule and/or the 2018 Delay Rule before July 1, 2018, it must also consider whether the Interim Final Rule is lawful, as it independently purports to bar the law from going into effect. Even if the Court so rules after July 1, 2018, it must address ED's interpretation of the master calendar requirement as set forth in the IFR, as that interpretation is expressly incorporated into the 2018 Delay Rule and is relevant to the question of remedy. Either way, ED's view of the master calendar requirement is contrary to the plain text of the HEA. Thus, the IFR, based solely on ED's conclusion based on that view that ED's earlier invocation of section 705 compelled a one-year delay, is likewise contrary to law. In addition, the Interim Final Rule is arbitrary and capricious because ED considered only benefits to predatory institutions, and not costs to borrowers and the public fisc. Moreover, ED failed to establish "good cause" to evade the statutory requirements of negotiated rulemaking and notice-and-comment procedures.

A. ED's rationale was arbitrary, capricious, and contrary to law.

1. The master calendar requirement is not a "July 1 only" rule.

ED bases the Interim Final Rule entirely on its view that, as a matter of law, no rule issued pursuant to Title IV may take effect on any date other than July 1 of a given year, pursuant to the

master calendar requirement. 82 Fed. Reg. at 49115-16 (citing 20 U.S.C. § 1089(c)(1)). Thus, because the Section 705 Rule had prevented the Borrower Defense Rule from taking effect on July 1, 2017, the Interim Final Rule advanced the effective date of the Borrower Defense Rule to July 1, 2018. *Id.* But the HEA's master calendar provision requires no such thing, and indeed ED itself has never before advanced this interpretation.

Nowhere in the IFR does ED identify what language in the statute prohibits rules from becoming effective on days of the year other than July 1. Only one section in the master calendar provision of the HEA addresses the effective date of regulations. That section, in its entirety, states:

> (c) Delay of effective date of late publications
>
> (1) Except as provided in paragraph (2), any regulatory changes initiated by the Secretary affecting the programs under this subchapter that have not been published in final form by November 1 prior to the start of the award year shall not become effective until the beginning of the second award year after such November 1 date.
>
> (2)(A) The Secretary may designate any regulatory provision that affects the programs under this subchapter and is published in final form after November 1 as one that an entity subject to the provision may, in the entity's discretion, choose to implement prior to the effective date described in paragraph (1). The Secretary may specify in the designation when, and under what conditions, an entity may implement the provision prior to that effective date. The Secretary shall publish any designation under this subparagraph in the Federal Register.
>
> (B) If an entity chooses to implement a regulatory provision prior to the effective date described in paragraph (1), as permitted by subparagraph (A), the provision shall be effective with respect to that entity in accordance with the terms of the Secretary's designation.

20 U.S.C. § 1089(c). Paragraph 2 is plainly not implicated here. The only question is what paragraph 1 requires.

The meaning of the text is straightforward: Because the Borrower Defense Rule was not published in final form by November 1, 2015, it could not become effective "until" July 1, 2017—the start of the second award year after that date. Section 1089(c)(1) says nothing else. Because the Rule *was* published in final form by November 1, 2016, nothing in the statute imposes

any limit on its becoming effective on July 1, 2017, *or any date thereafter*. When Congress states that an event cannot occur "until" a given occurrence, it does not mean that the event must occur *at* that time—it means that the occurrence marks the *earliest* time the action can occur. The Prison Litigation Reform Act, for example, prohibits prisoners from bringing lawsuits "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This language does not mean prisoners must bring a lawsuit at the exact moment their administrative remedies are exhausted—just that they cannot do so *before* then. As one court has explained, the word "until" has an "almost identical meaning" to the phrase "prior to," and there are no "common usages of the word 'until' that are synonymous with the word 'on,' meaning, among other things, 'indicating the day of an occurrence.'" *Claude E. Atkins Enters., Inc. v. United States*, 27 Fed. Cl. 142, 144, 144 n.4 (1992) (citing Oxford English Dictionary (2d ed. 1989)). Thus, when Congress says a rule cannot become effective "until" the start of the second award year, it is not saying the rule can only become effective *on* or *at* the start of the second award year.

The one D.C. Circuit case to discuss the master calendar requirement, *Career College Ass'n v. Riley*, 74 F.3d 1265 (D.C. Cir. 1996), supports this conclusion. At the relevant time, the master calendar provision required regulations to be "published in final form by May 1" to be effective the next award year (*i.e.*, the award year beginning July 1 of that same year). *Id.* at 1267 (citing 20 U.S.C. § 1089(c) (1992)). In an April 29 publication, ED issued an interim final rule, stating it would be effective July 1, except for certain provisions that would not be effective until after ED published a supplemental notice (relating to approval by the Office of Management and Budget as required by the Paperwork Reduction Act). *Id.* at 1268. ED did not publish the notice until July 7, seven days *after* the start of the award year. Nonetheless, the court of appeals agreed with ED that the relevant provisions could go into effect at that time—*after* July 1 of that award

year—because the "normative" provisions of the rule had been published prior to May 1. Likewise, here, because the normative provisions of the Borrower Defense Rule were published by November 1, 2016, the master calendar requirement does not prevent them from going into effect at any time on or after July 1, 2017. Put any other way, the lifting of the section 705 stay here would have the same effect as the notice ED published on July 7 in *Career College Ass'n*.

ED would convert the master calendar requirement into a rule that "no regulation may ever become effective on a date other than July 1." That is not what the statute says, and ED's contrary view is not owed any deference because the statutory language is clear. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1979 (2016) ("[W]e do not defer to the agency when the statute is unambiguous.").

Indeed, even if the statute were ambiguous, the agency would not be entitled to deference because ED proceeded as if its view was the *only* construction of the statute and used that view as a basis to evade notice-and-comment rulemaking, claiming it had no discretion. As the D.C. Circuit has repeatedly held, "deference to an agency's interpretation of a statute is not appropriate when the agency wrongly 'believes that interpretation is compelled by Congress.'" *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.,* 471 F.3d 1350, 1354 (D.C. Cir. 2006) (quoting *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004)); *see also Sec'y of Labor v. Nat'l Cement Co. of Cal., Inc.*, 494 F.3d 1066 (D.C. Cir. 2007). Because the premise of ED's action was that the statute clearly foreclosed any interpretative discretion, its action cannot be upheld as an *exercise* of discretion entitled to deference. *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002). Moreover, the IFR is *not* a regulation setting forth ED's interpretation of the master calendar requirement; the IFR only changes the effective date of the Borrower Defense Rule. ED's interpre-

tation of the master calendar requirement exists nowhere in its regulations. Deference is unwarranted for this reason as well. *Fox v. Clinton*, 684 F.3d 67, 78 (D.C. Cir. 2012); *see also Fogo De Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1137 (D.C. Cir. 2014).[8]

Examined for its soundness, ED's new reading of the master calendar requirement would result in absurd consequences. That the Borrower Defense Rule did not become effective on July 1 is a problem of ED's own making—at the time ED acted, there was a preliminary injunction motion pending as to only one part of the rule. Adopting ED's interpretation would allow ED to delay the effective date of *any* Title IV regulation by at least one year without *any* process whatsoever—including without any judicial review. At any time, the agency could announce a "stay" or "postponement" or delay of a rule—by invoking section 705, perhaps, or by simply issuing an "interim final rule" or an order resting on nothing more than administrative fiat.[9] If that stay or postponement lasted a single day past July 1, it would automatically convert into a one-year delay, even if the delay were unlawful when issued. And ED could insulate the lawfulness of its initial order from judicial review by waiting until shortly before July 1 to make its pronouncement, as it did here. There is no indication that Congress intended to confer such unbridled discretion on the Secretary of Education. The master calendar requirement is about predictability, not about giving the agency a way to evade the procedural and review requirements of the APA.

ED argues that it would "frustrate the notice objectives of the HEA and deny schools the assurance of the master calendar" if, as the result of the dissolution of a stay, the Borrower Defense

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[8] In addition, as explained *infra*, the IFR was procedurally defective, and "*Chevron* deference is not warranted" in such scenarios. *Encino Motorcars*, 136 S. Ct. at 2125.

[9] Under ED's logic, if a court were to issue a preliminary injunction on July 1, it would also automatically lead to at least a one-year delay of the rule's effective date, even if the court were to vacate the preliminary injunction the next day.

Rule became effective in the middle of an award year. 82 Fed. Reg. at 49116. But ED fails to connect this policy argument to the text of the statute. *See, e.g.*, *Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986) ("Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action."). That ED chose to create more uncertainty by promulgating a stay pursuant to section 705 just days before the 2016 Rule was to go into effect is irrelevant to what the master calendar provision in the statute requires. The statute requires regulated entities and students have *at least* seven months' notice of the final form of the Rule. If the section 705 stay were lifted today, regulated entities and students would have had nearly 18 months to prepare for implementation of the Borrower Defense Rule—significantly more notice than the statute requires. As ED argued in *Career College Ass'n*, the master calendar provision "requires only that some advance notice be given of the regulations that will govern a particular award year," not "that regulations be issued with the belief that they are immutable" in future rulemakings. Brief for Appellees, *Career College Ass'n v. Riley*, No. 94-5270, 1995 WL 17204770, at *25 (D.C. Cir. 1996). The regulated community has been on notice of the normative standard since November 1, 2016. That ED has chosen not to enforce it does not mean the November 1, 2016 "publication was not 'final' within the meaning of the Master Calendar Provision." 74 F.3d at 1269. As in *Career College Ass'n*, "[t]he published regulation … gives a maximum regulatory exposure; an institution knows fully the substantive requirements." *Id.* at 1269 n.2.

Because the Interim Final Rule is based on an incorrect (and unreasonable) interpretation of the law, it must be vacated. *See, e.g.*, *Waterkeeper All. v. EPA*, 853 F.3d 527, 534 (D.C. Cir. 2017); *see also Daiichi Sankyo Co. v. Lee*, 791 F.3d 1373, 1379 (Fed. Cir. 2015) ("An agency abuses its discretion when its decision is based on an erroneous interpretation of the law.").

2. ED failed to adequately assess the impact of delay.

Even if ED's construction of the master calendar requirement were a permissible interpretation meriting deference, the agency would still have been required to comply with the basic principles of reasoned decisionmaking, including at least considering the consequences of its interpretation. *See, e.g.*, *Fox v. Clinton*, 684 F.3d at 77 (even if agency action warranted *Chevron* deference, it "would still fail for want of reasoned decisionmaking"). ED did not do so here, and failed to consider the impact of delay appropriately. By framing the reduced relief to borrowers as cost savings to the federal government, *see* 82 Fed. Reg. at 49119, ED disregarded the 2016 Rule's positive economic impacts on borrowers and the economy at large, discussed extensively above. *See* discussion *supra* at pp. 36-44; *see also* 2016 Rule, 81 Fed. Reg. at 76051. ED also failed to acknowledge that, for the many borrowers whose enrollment agreements include forced arbitration clauses and class action waivers, the delay would continue to preclude broad-scale relief that could be obtained in the courts through class-wide claims. Instead, ED minimized the costs of the delay to borrowers, asserting that neither the number of claims nor the amount recovered would "change greatly" as a result. 82 Fed. Reg. at 49119. This assertion is inconsistent with ED's analyses in issuing the Section 705 Rule, which assumed large costs savings to the government attributable solely to reduced numbers of loan discharges resulting from delaying the Borrower Defense Rule, 82 Fed. Reg. at 27622, as well as in issuing the 2016 Rule itself, which found that delaying the Rule would have significant costs to borrowers and would outweigh any benefits to be gained by gathering more data on its potential effects. *See* 81 Fed. Reg. at 76049. As with its analysis in the Section 705 Rule, ED's failure to acknowledge its previous findings and explain its reversal was arbitrary and capricious. *See Fox Television*, 556 U.S. at 516.

B. The Interim Final Rule is also invalid for a failure to comply with the procedural requirements of the APA and HEA.

ED acknowledges that the Interim Final Rule does not comply with either the notice-and-comment requirements of the APA, 5 U.S.C. § 553, or the negotiated rulemaking requirements of the HEA, 20 U.S.C. § 1098a. It argues that this noncompliance is excused under both statutes' "good cause" exceptions. 5 U.S.C. § 553(b)(3)(B); 20 U.S.C. § 1098a(b)(2). ED's assertion here that "notice-and-comment and negotiated rulemaking are unnecessary and impracticable," 82 Fed. Reg. at 49117, does not meet the high bar required to invoke the narrow good cause exception. *See* pp. 50-51, *supra*.

The "unnecessary" prong of the exception "is confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Mack Trucks*, 682 F.3d at 94 (quoting *Util. Solid Waste Activities Grp.*, 236 F.3d at 755). ED suggests that its issuance of the Interim Final Rule fits this paradigm because the master calendar provision left it no discretion to act differently. As explained above, this erroneous interpretation of the law cannot provide "good cause." And even if ED had discretion to *choose* to interpret the master calendar provision to allow a rule to go into effect only on July 1 (an incorrect interpretation, as explained above), the "unnecessary" exception would not apply because that interpretive choice would be neither routine, insignificant, nor inconsequential.

As to impracticability, ED argues only that following the statutory procedures would have been "impracticable" because CAPPS commenced its litigation on May 24, 2017, only a short amount of time before the initial effective date of July 1, 2017. 82 Fed. Reg. at 49117. Although correct as a factual matter, this statement has nothing to do with whether ED could have engaged in rulemaking procedures before issuing the October 24, 2017 Interim Final Rule. Clearly the IFR did not need to be published by July 1 if ED waited until October to do so. Notice and comment,

at the least, would have been possible in the five months between the commencement of litigation and the IFR, and would not have been "impracticable," under the high standard that governs. *See* pp. 51-52, *supra*.

IV. Immediate vacatur of the Delay Rules is the appropriate remedy.

The APA specifies that a court "shall … set aside" agency action that it finds unlawful under section 706. 5 U.S.C. § 706. Thus, "[w]hen a court concludes that agency action is unlawful, 'the practice of the court is ordinarily to vacate the rule.'" *Nat'l Venture Capital Ass'n*, 2017 WL 5990122, at *11 (quoting *Ill. Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997)); *see also Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Accordingly, the Court should vacate the unlawful Delay Rules and allow the Borrower Defense Rule published on November 1, 2016 to go into immediate effect.[10]

Although a court may depart from that presumption after weighing the "seriousness of the [rule]'s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change," *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), both considerations weigh strongly in favor of the presumptive remedy here. The procedural and substantive flaws of the Delay Rules are serious. As recently noted in *National Venture Capital Ass'n*, the absence of notice and comment is a "fundamental flaw that almost always requires a vacatur." 2017 WL 5990122, at *11 (quoting *Allina Health v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014)). This failure alone merits vacatur of the first two Delay Rules and, thus, the third. *See* discussion *supra* at 50 (explaining interrelationship).

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[10] As explained above, ED's new interpretation of the master calendar requirement is incorrect, and the master calendar requirement does not bar immediate implementation.

The substantive inadequacy of the agency's reasoning is equally fatal. This case is not one where the agency merely gave insufficient explanations; rather, it relied on impermissible considerations, internally contradictory accounts of the costs and benefits of its actions, and reasoning directly at odds with the findings that underlie the Borrower Defense Rule. Moreover, every day of delay causes continued harm to student borrowers. ED acknowledged the harm of further delay when it published the Borrower Defense Rule, and it has not coherently explained otherwise since.

Vacatur also would not be particularly disruptive. A challenge to a delay rule "is not a case in which 'the egg has been scrambled and there is no apparent way to restore the status quo ante.'" *Nat'l Venture Cap. Ass'n*, 2017 WL 5990122, at *11 (quoting *Sugar Cane Growers Co-op of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002)). Rather, vacating the Delay Rules "would simply allow the [2016 Rule] to take effect, as the agency originally intended." *Id.* Whereas the regulated community would have had seven months to prepare for the 2016 Rule had it gone into effect as scheduled, by the time briefing is completed, it will have had more than eighteen. Since the Section 705 Rule was issued only weeks before the scheduled effective date, most of the regulated community would have obviously commenced—and likely completed—preparation to comply. And there is little doubt that regulated schools have been aware that ED's delays have been challenged in court and could be set aside at any time.

That this Court has not ruled on CAPPS' challenge does not alter this calculus. CAPPS knew this challenge to the legitimacy of ED's delays was pending, yet it took no action to advance its case. Moreover, CAPPS waited more than six months after the 2016 Rule was issued to even commence its challenge. Notably, CAPPS only sought a preliminary injunction on a small piece of the Rule. Even if it had *won* that motion, the majority of the rule would have gone into effect

last July. It would be inequitable to the borrowers suffering every day to allow CAPPS and members of the regulated industry to reap an even greater windfall as a result of ED's unlawful actions than they would have achieved if CAPPS had *won* its motion for a preliminary injunction. Borrowers should not be forced to continue suffering as a result of CAPPS's delays and ED's unlawful rules. Notably, the pendency of litigation that had been the purported basis for delay rules has not stopped other courts from vacating unlawful delay rules. *See BLM II*, 2018 WL 1014644; *BLM I*, 277 F. Supp. 3d at 1125; *Sierra Club*, 833 F. Supp. 2d at 34-36; *see also Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 429-33, 437-38 (E.D.N.Y. 2018) (enjoining rescission of DACA program despite pendency of challenge to that program).

CONCLUSION

For the foregoing reasons, plaintiffs' second renewed motion for summary judgment should be granted and the Delay Rules should each be vacated.

Respectfully submitted,

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