**No. 23-50491**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

CAREER COLLEGES AND SCHOOLS OF TEXAS,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, Secretary, U.S. Department of Education, in his official capacity as the Secretary of Education,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division No. 1:23-cv-00433-RP

# BRIEF FOR APPELLEES

*Of Counsel:*

LISA BROWN
*General Counsel*

TOBY MERRILL
*Deputy General Counsel*

JOHN PATRICK BAILEY
*Senior Counsel*

BRIAN SIEGEL
*Assistant General Counsel for Postsecondary Education*

TODD DAVIS
*Attorney*
*U.S. Department of Education*

BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney General*

MARK B. STERN
JOSHUA M. SALZMAN
JENNIFER L. UTRECHT
*Attorneys, Appellate Staff*
*Civil Division, Room 7710*
*U.S. Department of Justice*
*950 Pennsylvania Avenue NW*
*Washington, DC 20530*
*(202) 353-9039*

## CERTIFICATE OF INTERESTED PERSONS

A certificate of interested persons is not required, as defendants-appellees are all governmental parties. 5th Cir. R. 28.2.1

## STATEMENT REGARDING ORAL ARGUMENT

This case has been scheduled for oral argument on November 6, 2023. Given the significance and complexity of the regulatory scheme, the government believes this Court will benefit from oral argument.

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## INTRODUCTION

At issue in this case is a Department of Education rule revising regulations that effectuate statutory remedies available to federal student loan borrowers when the borrower's school acts wrongfully or closes abruptly. First, the Rule revises the Department's borrower-defense regulations, which provide a process for seeking relief from loans induced by the wrongful acts or omissions of the borrower's school. *See* 20 U.S.C. § 1087e(h). Second, the Rule revises regulations governing discharges of loans for unfinished programs cut short by a school's closure. *Id.* § 1087(c). These rights—which have been a feature of direct student loans since their inception—resemble familiar remedies available to debtors whose underlying transactions are defective due to fraud or non-performance.

Congress tasked the Department with promulgating regulations that give content to these statutory protections for federal student loan borrowers. To that end, the Department's regulations have long defined the acts or omissions that give rise to borrower defenses to repayment, as well as which borrowers qualify for discharge because they were unable to complete their education due to a school's closure. Because those regulations have been revised over the years, the applicable regulatory standards and procedures vary depending upon the date of a loan's disbursement. Critically, however, each version of the regulations has retained a common adjudicatory framework. First, the Department determines a borrower's eligibility for relief through a non-adversarial process between the Department and

the borrower. Although the Department will consider evidence provided by schools during these loan-discharge proceedings, the only question to be resolved is the borrower's eligibility for relief from their repayment obligations; the Department neither adjudicates any rights of nor imposes any duties upon schools during this process. Then, for approved claims, the Department may initiate a proceeding to recoup discharged loan amounts from the school whose conduct necessitated discharge—thereby ensuring taxpayers do not bear costs attributable to the school's conduct.

The challenged Rule maintains this long-standing framework but makes several much-needed updates to existing regulations, which have proven inadequate to address the significant influx in claims that began in 2015 after multiple revelations of widespread fraud by a now-defunct chain of for-profit colleges. Plaintiff Career Colleges and Schools of Texas (CCST)—a trade association—seeks to enjoin the Rule and, in doing so, thwart these much-needed regulatory improvements. CCST has not shown that it has standing to obtain the extraordinary relief that it seeks, and its challenges to the Rule—which rest upon contingencies and speculation about how the Rule may be applied—are unripe for judicial review. Even if CCST's alleged injuries were sufficient to support standing, the district court correctly determined that CCST has not shown that a preliminary injunction is necessary to avoid irreparable harm.

CCST has also failed to demonstrate that it is likely to succeed on the merits of its challenge or that the wholesale nationwide injunction it seeks is in the public

interest. The challenged Rule represents the Department's considered judgment on the best means of fulfilling its obligation to provide timely relief to student borrowers harmed by schools' conduct. A stay of that Rule—which could postpone its implementation by a year or more—would leave the Department with a regulatory regime whose inconsistent standards and procedures are inadequate to timely address the growing volume of incoming claims and, in turn, leave borrowers who have meritorious claims for relief in an indefinite state of financial uncertainty. In contrast to these significant harms to the public and the government, CCST's claimed harm rests upon speculation about its members' potential financial liability at the end of an uncertain chain of contingencies that CCST has made no attempt to show is likely to ever occur, much less during the pendency of this litigation. No injunction should issue in these circumstances, much less one that applies beyond the named parties.

## STATEMENT OF JURISDICTION

CCST invoked the district court's jurisdiction under 28 U.S.C. § 1331. As discussed further *infra*, 19-27, the government disputes CCST's standing. The district court denied CCST's motion for a preliminary injunction on June 30, 2023. ROA.1352-72. CCST filed a timely notice of appeal that same day. ROA.1373. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

## STATEMENT OF THE ISSUES

1. Whether CCST has identified a cognizable injury sufficient to support standing.

2. Whether the district court abused its discretion in finding, after an evidentiary hearing, that CCST failed to demonstrate that the Rule was likely to cause irreparable harm.

3. Whether CCST has established a likelihood of success on the merits or otherwise shown that the remaining equitable factors warrant a preliminary injunction.

## STATEMENT OF THE CASE

### I. Statutory and Regulatory Background

#### A. The Higher Education Act

The Department of Education administers federal student loan programs under Title IV of the Higher Education Act of 1965 (HEA), 20 U.S.C. § 1070 *et seq.* Those programs include the Willian D. Ford Federal Direct Loan Program (Direct Loans), 20 U.S.C. §§ 1087a-1087j, under which the federal government lends money directly to students, and the Federal Family Education Loan Program (FFEL), 20 U.S.C. §§ 1071 to 1087-4, under which non-federal lenders issue loans guaranteed by entities reinsured by the federal government. FFEL loans are no longer issued, but borrowers may "consolidate" their outstanding FFEL loans into Direct Loans. 34 C.F.R. § 685.220.

The HEA also grants the Department broad authority to promulgate regulations to carry out its duties under Title IV, *see, e.g.*, 20 U.S.C. §§ 1082, 1221e-3, 3441, including the authority to promulgate regulations that identify certain

circumstances in which borrowers may be relieved of their repayment obligations. Two of those circumstances are relevant here.

### 1. Borrower-Defense Regulations

**a.** The HEA requires that the Secretary "shall specify in regulations which acts or omissions of an institution of higher education a [Direct Loan] borrower may assert as a defense to repayment of a loan." 20 U.S.C. § 1087e(h). In so doing, Congress codified the Department's "long-standing authority" previously exercised under the FFEL program to relieve borrowers from their repayment obligations based on a school's misconduct. 59 Fed. Reg. 42,646, 42,649 (Aug. 18, 1994); *see also Sweet v. DeVos*, 2019 WL 5595171, at *2 (N.D. Cal. Oct. 30, 2019).

The Department first promulgated regulations carrying out the statutory directive to identify borrower defenses for Direct Loans in the 1990s. 59 Fed. Reg. 61,664 (Dec. 1, 1994); 60 Fed. Reg. 37,768 (July 21, 1995). Relatively few borrowers invoked such a defense until 2015, when widespread fraud by one of the country's largest chains of for-profit colleges led to the chain's collapse and the Department began to receive an unprecedented "flood of borrower defense claims" that has not meaningfully abated. 81 Fed. Reg. 75,926, 75,926 (Nov. 1, 2016). To address this influx of claims, the Department amended its regulations in 2016. 81 Fed. Reg. 75,926. Following additional amendments in 2019, 84 Fed. Reg. 49,788 (Sept. 23, 2019), the regulations set forth two sets of procedures that could apply to the Department's review of borrower-defense claims and multiple different standards for

relief—including, in some cases, by drawing on state law—depending upon a loan's disbursement date. *See* 34 C.F.R. § 685.206(c)(1), (e)(2); *id.* § 685.222(b)-(d). The challenge Rule revised these regulations to, among other things, create a uniform standard for relief that does not depend upon state law causes of action and streamline the procedures governing the Department's review. 87 Fed. Reg. 65,904 (Nov. 1, 2022).

Although the substantive grounds that a borrower may invoke as a defense and the procedures that the Department will use to evaluate those defenses have varied over the years, every version of the Department's regulations has retained a common framework. *See* 34 C.F.R. §§ 685.206(c), (d), (e), 685.222(a)(1)-(2). First, the regulations set forth grounds that borrowers may assert as a defense to repayment, such as, for example, that the borrower's school made certain material misrepresentations related to the borrower's loan or the provision of educational services. *Id.* §§ 685.206(c)(1), (e)(2), 685.222(d). Second, the regulations permit the Department to receive and process "affirmative" requests for relief—that is, requests made before a borrower defaults. *E.g.*, 81 Fed. Reg. at 75,956 (noting that the 1995 regulation permitted borrowers to assert "both claims and defenses to repayment, without regard as to whether such claims or defenses could only be brought in the context of debt collection proceedings" (emphasis omitted)); 84 Fed. Reg. at 49,795-96. Although the Department has generally permitted schools to submit evidence during these loan-discharge proceedings, the only question to be resolved is the

borrower's eligibility for relief from their repayment obligations; the Department neither adjudicates any rights of nor imposes any duties upon schools during this process. Finally, the regulations have all provided that the Department may initiate a proceeding to recoup the discharged amounts from the school, in which the school is entitled to a hearing and the opportunity to litigate the issue de novo. *See, e.g.*, 84 Fed. Reg. at 49,790; 34 C.F.R. §§ 668.87(a)-(b), 685.308(a)(3); *see also* 34 C.F.R. §§ 685.206(c)(3)-(4), 685.222(e)(7).

**b.** At the time the Department initiated the current rulemaking, flaws in the existing regulatory framework operated as a barrier to the Department's obligation to address borrower-defense claims in a fair and timely manner. A large volume of unaddressed claims gave rise to a class-action by hundreds of thousands of borrowers whose applications for relief had remained pending, in some cases, for several years. *See generally Sweet v. Cardona*, 2023 WL 2213610, at *14 (N.D. Cal. Feb. 24, 2023); *Vara v. DeVos*, 2020 WL 3489679, at *2 (D. Mass. June 25, 2020) (holding that the Secretary has a non-discretionary duty to adjudicate borrower's applications). To resolve that long-running litigation and address its extensive backlog, the Department agreed to settle the class-action and review the claims subject to that settlement under different substantive standards and expedited procedures. *See* Settlement Agreement, *Sweet v. Cardona*, No. 3:19-cv-03674-WHA, *available at* https://studentaid.gov/sites/default/files/sweet-v-cardona-settlement-agreement.pdf (last accessed Sept. 30, 2023). That

settlement does not, however, govern consideration of any applications for relief filed after the settlement's effective date.

### 2. Closed-School Discharge Regulations

The HEA also requires the Department to "discharge [a] borrower's liability on [a] loan" where that borrower is "unable to complete the program in which such student is enrolled due to the closure of the institution." 20 U.S.C. §§ 1087(c)(1), 1087e(a)(1), 1087dd(g)(1). In the event of such discharge, the HEA also requires the Department to "subsequently pursue any claim available to such borrower against the institution and its affiliates and principals or settle the loan obligation pursuant to the financial responsibility authority." *Id.* §§ 1087(c)(1), 1087e(a)(1).

The Department's regulations have long authorized the Secretary to determine the date of closure for a school which has ceased operations and have required borrowers' cooperation in administrative proceedings to recoup the cost of closed-school discharges. *See, e.g.*, 59 Fed. Reg. at 61,701. Prior to the challenged Rule, the regulation generally provided that a borrower who attended a closed school is eligible for relief if the borrower could not complete their program of study either because the school closed while the student was enrolled or because the student withdrew shortly before the school closed. *See* 34 C.F.R. § 685.214(c) (2020). To determine such eligibility, the regulations defined a school's closure date as the date, as determined by the Secretary, "that the school ceases to provide educational instruction in all programs." *Id.* § 685.214(a)(2)(i) (2020).

### B. The Challenged Rule

In a continued effort to address its backlog of requests for statutorily authorized loan discharges, in July 2022, the Department initiated a statutory negotiated rulemaking process that, as relevant here, drew upon the Department's experience reviewing "hundreds of thousands of claims" to propose "several significant improvements" to the borrower-defense and closed-school discharge regulations with a goal of streamlining the Department's processing of pending and future requests for relief. 87 Fed. Reg. at 41,878, 41,879, 41,889 (July 13, 2022). After receiving more than 4,000 public comments, the Department issued a final rule in November 2022.

#### 1. Borrower-Defense Provisions

To avoid the patchwork of regulatory standards that previously governed the Department's consideration of borrower-defense claims, the challenged Rule creates a uniform standard defining the acts and omissions that a Direct Loan borrower can assert as a defense to repayment that applies to all requests for relief received on or after July 1, 2023, and with respect to all applications pending as of that date. Under the Rule, the following categories of acts or omissions can give rise to a defense to repayment: (i) substantial misrepresentations that mislead a borrower, (ii) substantial omissions of fact, (iii) failures to perform contract obligations, (iv) uses of aggressive and deceptive recruitment methods, (v) conduct resulting in a judgment by a court or administrative tribunal favorable to the borrower, or (vi) adverse action by the

Department against the institution based on an act or omission that could give rise to a borrower defense. 87 Fed. Reg. at 66,068-69. The Rule further provides that a borrower is not entitled to relief unless the Department concludes "by a preponderance of the evidence" that (i) the borrower's school committed an act or omission falling within these categories, (ii) this misconduct caused the borrower detriment, and (iii) the totality of the circumstances, including the "nature and degree of the acts or omissions" and the borrower's overall detriment, warrants relief. *Id.*

Although schools are permitted to provide input during the loan-discharge proceeding, the Rule makes clear that the loan-discharge process is a not an adversarial process between the borrower and their school and that it is entirely "separate from any recoupment proceeding" the Department may choose to pursue. 87 Fed. Reg. at 65,913. Among other things, if the Department approves a borrower defense and later chooses to seek recoupment from the school for that discharged debt, it must provide the school with separate written notice, an opportunity to present evidence, and a de novo hearing during which the school may argue that the decision to discharge the loans was incorrect or that the school is not liable for the amounts discharged. *Id.* at 66,041, 66,072-73. In addition, the Rule does not permit recoupment unless "the actions or omissions that led to" the approval of a borrower defense "would also have violated the borrower defense regulations in effect when those loans were first disbursed." *Id.* at 65,913, 65,951.

### 2. Closed-School Discharge Provisions

The Rule also amended portions of the closed-school discharge regulations that establish the school-closure date that the Secretary uses to determine a borrower's eligibility for discharge. 87 Fed. Reg. at 65,966. That provision, now codified at 34 C.F.R. § 685.214(a)(2)(i), establishes that "[i]f a school has closed, the school's closure date is the earlier of: the date, determined by the Secretary, that the school ceased to provide educational instruction in programs in which most students at the school were enrolled, or a date determined by the Secretary that reflects when the school ceased to provide educational instruction for all of its students." The Department also amended the regulations to standardize the eligibility window for all borrowers and to provide for discharges under certain circumstances one year after a school's closure. 87 Fed. Reg. at 65,966; 34 C.F.R. § 685.214(c)(1).

Notably, however, the Rule does not alter the definition of a "closed" school. As the Department explained, a school is closed only if it "has ceased overall operations," and discharges will not be granted if the borrower's school "remain[s] open." 87 Fed. Reg. at 65,966. The Rule also does not amend the regulatory provisions that authorize recoupment of closed-school discharge amounts. Those regulations continue to provide that "[t]he Secretary may require the repayment of funds and the purchase of loans by the school if the Secretary determines that the school is liable as a result of[] . . . [t]he school's actions that gave rise to a successful claim for which the Secretary discharged a loan," 34 C.F.R. § 685.308(a)(3), and that

the school may dispute this through a formal hearing, subject to administrative appeals and judicial review, *id.* §§ 668.113-.122, 668.124.

## II. Factual and Procedural Background

**A.** Career Colleges and Schools of Texas is a trade association for Texas-based, for-profit, higher education institutions. Five months after the Rule's promulgation, CCST initiated this lawsuit and moved for a preliminary injunction. On June 30, 2023—after holding an evidentiary hearing and oral argument—the district court denied CCST's motion, concluding that it had failed to establish irreparable harm.

The district court began by considering whether CCST had carried its burden at this preliminary stage to show that at least one of CCST's member schools would likely have individual standing to challenge the Rule. ROA.1360-1361. The court noted that CCST's members are "among the objects of the regulation at issue," and that the Rule "broadens the kinds of school actions that can give rise to a borrower defense claim (and potentially recoupment)" so as to "require at least some degree of preparatory analysis, staff training, and reviews of existing compliance protocols." ROA.1360-1361.

The court concluded, however, that CCST's alleged injuries were not sufficiently certain or immediate to establish irreparable harm. The court emphasized "the remoteness of any recoupment liability" for CCST members resulting from the Rule, ROA.1364, noting that CCST had "not identified any pending or anticipated" borrower-defense claims alleging misconduct by its members, much less any claims

likely to be granted by the Department. ROA.1363. And if the Department ever granted relief to a student who attended a member school, CCST's members would not face financial liability unless the Department initiated and subsequently prevailed in a "separate recoupment action" against the school, subject to the exhaustion of an administrative review process and an opportunity to seek judicial review. ROA.1364-1365; *see also* ROA.1365 ("[T]here is no concrete evidence that any CCST member school faces an imminent borrower claim—much less a threat of recoupment for any discharged loans.").

The court found equally unpersuasive CCST's claim that its members will suffer irreparable harm from ongoing compliance costs. As the court explained, "the record indicates that most of the costs described by CCST and its members have already been incurred" as part of preparatory efforts beginning in November 2022. ROA.1368. And CCST "provide[d] no meaningful information about the specific nature or extent" of any ongoing costs, much less any "concrete indication" that the Rule imposes "more than a de minimis burden in comparison to the schools' pre-existing compliance expenses." ROA.1369.

The district court likewise found no irreparable harm resulting from the Rule's closed-school discharge provisions. The court noted CCST's allegations that schools were abandoning plans to build, expand, or consolidate certain facilities or programs based on an alleged uncertainty about whether those actions would trigger liability. The court explained, however, that CCST cannot base a claim of irreparable harm on

"[m]ere 'uncertainty' about what the Rule actually requires" rather than by explaining the likely impact of any changes made by the Rule to the closed-school discharge regulations. ROA.1366. The court further found that "any concrete harm that CCST's members might suffer from the closed school discharge provisions remains several steps away" and was too speculative to constitute irreparable harm. ROA.1366.

**B.** Shortly before the district court denied CCST's motion, CCST filed an original action in this Court, *In re Career Colls.*, No. 23-50489 (5th Cir.), and requested an administrative stay of the Rule as well as an injunction pending appeal. Thereafter, CCST filed this notice of appeal. This Court issued a 21-day administrative injunction, limited to CCST and its member schools, and set a briefing schedule that would apply to any renewed motion for an injunction pending appeal in this case. CCST's renewed motion was fully briefed as of July 14 and was referred to the merits panel. On August 7, 2023, this Court granted CCST's motion for an injunction pending appeal and invited the parties to "supplement" their previous briefing on this matter. Dkt. No. 42-1, at 2.[1]

[1] CCST's brief accepts this Court's invitation to "incorporate[]" by reference the arguments in its prior motions. Br. 23 n.4. This brief likewise incorporates the government's previous responses.

## SUMMARY OF ARGUMENT

**I.** The district court correctly held that CCST has failed to demonstrate irreparable injury that would entitle it to the extraordinary relief of a preliminary injunction. CCST has also failed to demonstrate a concrete, imminent injury that would satisfy the requirements for Article III standing.

CCST challenges certain substantive and procedural changes to existing borrower-defense and closed-school discharge regulations which govern the repayment obligations of federal student loan borrowers. But when the Department reviews a borrower's request for relief from repayment obligations, the only question resolved in that adjudication is whether the borrower meets the standards for statutory relief; the resolution of that question does not adjudicate schools' rights or impose any liability on them. To seek recoupment from a borrower's school, the Department must decide to institute separate proceedings in which the schools would be entitled to de novo hearings and may argue that the decision to discharge the loans was incorrect or that the institution is not liable for the amounts discharged, subject to administrative appeals and judicial review. *E.g.*, 87 Fed. Reg. at 66,041.

CCST does not claim that the Department is likely to take any steps to initiate recoupment against its members. Instead, CCST urges that its members are injured because, in its view, more borrowers will likely apply (and qualify for) repayment relief under the Rule's standards, which allegedly increases schools' overall risk of financial liability for discharged debts. But CCST's principal theory of harm from increased

financial exposure in the event of an (entirely hypothetical) recoupment proceeding depends entirely upon an "attenuated chain of inferences" involving the "unfettered choices made by independent actors." *Clapper v. Amnesty Intern'l*, 568 U.S. 398, 410 n.5 (2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)). First, a student who attended one of CCST's member schools must request relief based upon conduct that would not have qualified under prior versions of the borrower-defense or closed-school-discharge regulations. Second, the Department must determine that the student has met the regulatory standards for granting relief. Third, the Department must then exercise its discretion to initiate a recoupment action against the school. Finally, the Department must prevail in that action, a determination that would be subject to judicial review.

That speculative chain cannot satisfy the constitutional requirement that any injury be actual or imminent, rather than conjectural or hypothetical. In any event, the district court clearly did not abuse its discretion in determining that CCST's alleged injuries—which may never occur, much less during the pendency of this litigation—were far too remote and speculative to constitute irreparable harm.

**II.** CCST has also failed to show that it is likely to succeed on the merits of its challenges to the borrower-defense and closed-school discharge provisions.

CCST's primary argument is that the Department lacks authority to grant borrowers relief from their repayment obligations based upon a valid borrower defense. Instead, in CCST's view, the only way that a borrower may obtain such relief

is to default on their loans, wait for the Department to initiate a debt-collection proceeding, and raise their defense in court. That interpretation of the Higher Education Act defies statutory text, reason, and the Department's decades-long practice of affording relief from repayment obligations based upon its independent review of a borrower's eligibility. CCST's argument that the Secretary lacks authority to hold schools financially liable for any discharges that resulted from their misconduct likewise cannot be squared with the statutory text or the Department's longstanding practices. 20 U.S.C. §§ 1087d(a)(3), 1094(b). And CCST's undeveloped arguments that these longstanding procedures are somehow unconstitutional are without foundation.

CCST's remaining challenges to the borrower-defense and closed-school discharge provisions all involve claims that the Department's revised standards and procedures are unreasonable or else not adequately explained. The Department reasonably and amply explained the reasons for its changes, and CCST's bare disagreement with the Department's policy choices cannot support an injunction.

**III.** Finally, equitable relief is not warranted because CCST cannot carry its "burden" to show that the public interest and other equitable factors "justify an exercise of [this Court's] discretion" to grant a stay or preliminary injunction. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The Department is the administrator of the nation's largest consumer-lending portfolio, and, like any lender, it must have a viable process for resolving disputes over fraudulent or defective debts. As the Rule explains,

however, deficiencies in the Department's prior regulations contributed to a massive, ever-expanding backlog of hundreds of thousands of applications for relief that far exceeded the Department's adjudicatory capacity.

The challenged Rule represents a comprehensive effort to correct these deficiencies so that the Department may fulfill its statutory obligations in a timely manner. A stay of that Rule—which could postpone its implementation by a year or more—would require the Department to continue processing the ever-growing collection of claims under the inadequate standards and procedures that necessitated the Rule's changes. Both the government and the public have a strong interest in the Rule's implementation to ensure that the mistakes of the past do not repeat themselves. By contrast, CCST's claimed harm rests upon speculation about its members' potential financial liability if a borrower who attended one of CCST's member schools eventually requests (and is granted) relief that would not have issued under prior versions of the regulations. No injunction should issue in these circumstances, much less one that applies beyond the named parties.

## STANDARD OF REVIEW

This Court reviews the grant or denial of a preliminary injunction for abuse of discretion, with any underlying legal determinations reviewed de novo and factual findings, including findings about irreparable harm, for clear error. *Topletz v. Skinner*, 7 F.4th 284, 293 (5th Cir. 2021).

## ARGUMENT

### I. CCST Has Not Demonstrated an Injury that Would Satisfy the Requirements of Standing and Ripeness, Much Less Irreparable Harm Entitling it to a Preliminary Injunction

CCST must "clearly show" that it has standing to bring each of its claims on the merits. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 329-30 (5th Cir. 2020). Even assuming it could satisfy that burden, it would be further required to show that a preliminary injunction is necessary to redress irreparable harm that is "certainly impending" during the pendency of this litigation. *Aransas Project v. Shaw*, 775 F.3d 641, 664 (5th Cir. 2014) (per curiam) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (A preliminary injunction is an "extraordinary remedy" that may not be granted unless the movant establishes, among other things, that it is "likely to suffer irreparable harm before a decision on the merits can be rendered.").

The district court correctly found that CCST has not demonstrated that a preliminary injunction is necessary to prevent irreparable harm. At a minimum, that holding does not reflect an abuse of discretion. As a threshold matter, however, the court's analysis also demonstrates that CCST has failed to meet even the requirements of Article III standing. Because the discussion of injury relevant to Article III in many respects overlaps with the discussion of injury for purposes of a preliminary injunction, we have consolidated that discussion to avoid unnecessary repetition.

### A. CCST Has Not Established Injury Resulting from the Borrower-Defense Regulations Sufficient to Support Standing, Much Less Irreparable Harm

**1.** Under the challenged Rule—as was the case under previous borrower-defense regulations—the Department's adjudication of a borrower's request for relief is a non-adversarial proceeding between the Department and the borrower. The only question resolved in that adjudication is whether the borrower meets the Department's standards for statutory relief, and the government's resolution of that question does not deny schools any procedural rights or impose any liability on them.

As under previous regulations, the Department may, in its discretion, later seek recoupment from schools to recover discharged amounts. But the Rule makes clear that this process is entirely "separate from" the Department's adjudication of a student's claim for relief. 87 Fed. Reg. at 65,913. If the Department approves a borrower's request and chooses to seek recoupment from the school, it must provide the institution with written notice, an opportunity to present evidence, and a hearing during which the institution may argue that the decision to discharge the loans was incorrect or that the institution is not liable for the amounts discharged. *Id.* at 66,041, 66,072-73. In addition, the Rule does not permit recoupment unless the acts or omissions that led to the approval of a borrower defense "would also have violated the borrower defense regulations in effect when those loans were first disbursed." *Id.* at 65,913, 65,951.

CCST claims that, by making certain substantive and procedural changes to the Department's existing borrower-defense regulations, the challenged Rule potentially increases the number of borrowers who apply (and qualify for) relief, which increases its members' overall risk of financial exposure in future recoupment proceedings. But as the Supreme Court made clear in *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), premising standing even on an "objectively reasonable likelihood" of injury at some unspecified point in the future is "inconsistent with [the] requirement that 'threatened injury must be certainly impending,'" *id.* at 410, particularly where, as here, any threatened injury hinges upon the independent actions of third parties (student borrowers), *see id.* at 410, 415. In other words, to establish standing, CCST must show more than a genuine concern about future financial harm—it must show that such harm is certainly impending. *See, e.g.*, *Shrimpers & Fishermen of RGV v. Texas Comm'n on Envtl. Quality*, 968 F.3d 419, 424 (5th Cir. 2020) ("Increased-risk claims—even when they are particularized—often cannot satisfy the 'actual or imminent' requirement."); *E.T. v. Paxton*, 41 F.4th 709, 714-15 (5th Cir. 2022); *see also California Ass'n of Private Postsecondary Sch. v. DeVos*, 344 F. Supp. 3d 158, 180-81 (D.D.C. 2018) (*CAPPS*) (holding that association of for-profit schools lacked standing and did not present ripe challenges to the 2016 borrower defense rule). CCST has not made this showing.

CCST acknowledges (Br. 35) that it has not identified any borrower who has requested or is likely to request relief from repayment based upon the acts or

omissions of a CCST member school.[2] Thus, any future injury to CCST's members depends on several other contingencies. First, a student who attended one of CCST's member schools must seek relief that would not have been available under previous versions of the borrower-defense regulations. Second, the Department must decide to grant that requested relief. Third, the Department must exercise its discretion to seek recoupment from the school. Finally, the Department must prevail in any recoupment action, a determination that would be subject to judicial review. This speculative chain does not establish a certainly impending threat of financial injury that is fairly traceable to the Rule.

The district court nevertheless found that—at least at this preliminary stage of litigation—CCST had met its burden to demonstrate associational standing based upon allegations that CCST's member schools have allocated staff and resources to prepare for future hypothetical recoupment actions. ROA.1361. Critically, however, CCST has nowhere explained why its members' increased expenditures are fairly traceable to the Rule. To the contrary, the record establishes that CCST member

[2] CCST asserts (Br. 35) that one of its members is statistically likely to have been identified in the 206,000 applications for relief filed between the execution and final approval of the class-action settlement in *Sweet v. Cardona*, No. C-19-03674 (N.D. Cal. Feb. 24, 2023). But those claims will be resolved under the terms of the settlement, not the substantive or procedural provisions of the challenged Rule. *See* Settlement Agreement at 7-8, *supra*. Accordingly, CCST's speculation that its members may be identified in the settlement claims cannot support standing or irreparable harm arising under the Rule.

schools *already* employ significant staff whose job duties include ensuring compliance with Title IV and other state and federal regulations. *See* ROA.1369-1370. Nothing in the Rule requires schools to increase the amounts spent on these activities.

In this regard, CCST's alleged injury parallels the claims the Supreme Court found insufficient to establish standing in *Clapper*, where the plaintiffs challenged a statute establishing procedures to authorize foreign surveillance, asserting that there was an "objectively reasonable likelihood" that they would be subject to this surveillance based on their extensive contacts with foreign nationals, and also asserting that they had incurred certain reasonable costs to avoid that objective risk. 568 U.S. at 410. The Court rejected the plaintiffs' probabilistic approach to standing and stressed that the costs they had incurred to avoid surveillance also could not support a claim of imminent injury. As the Court explained, plaintiffs may not "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Id.* at 402.[3]

So too here, CCST has not shown that its participation in any future borrower-defense proceeding or resulting recoupment action is actual or imminent. And its

[3] The Court also noted that its cases had, on occasion, found standing where plaintiffs had "reasonably incur[red] costs to mitigate or avoid" a "substantial risk" of future harm. *Clapper*, 568 U.S. at 414 n.5 (quotation marks omitted). But as here, the *Clapper* plaintiffs' probabilistic theory of future harm depended entirely upon an "attenuated chain of inferences" involving the "unfettered choices made by independent actors not before the court," which was insufficient to show that the plaintiffs faced even a substantial risk of harm. *Id.* (quoting *Lujan*, 504 U.S. at 562).

argument that the Rule increases the risk that one of its members may be identified in a borrower-defense claim—which depends upon CCST's unsubstantiated speculation about borrowers' future behavior—cannot support standing. *Clapper*, 568 U.S. at 410, 414 n.5; *Shrimpers*, 968 F.3d at 424-25; *Paxton*, 41 F.4th at 714-15; *Central & Sw. Servs., Inc. v. EPA*, 220 F.3d 683, 700 (5th Cir. 2000) ("[I]t is the reality of the threat of [impending] injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions" (second alteration in original) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983))). CCST's efforts to prepare for those hypothetical enforcement actions cannot manufacture standing that does not otherwise exist. *Clapper*, 568 U.S. at 402.

**2.** At a minimum, the district court plainly did not abuse its discretion in finding that CCST's allegations do not constitute irreparable injury warranting preliminary relief. As discussed, CCST has not shown that application of the Rule's standards to a claim alleging misconduct by one of its members is "certainly impending," much less that the Department will invoke the Rule to pursue recoupment against one of CCST's members during this litigation. *See* ROA.1368 (quoting *Aransas*, 775 F.3d at 664); *see also* ROA.1365 ("[T]here is no concrete evidence that any CCST member school faces an imminent borrower claim—much less a threat of recoupment for any discharged loan."); *Paxton*, 41 F.4th at 716 (noting that the concept of "imminence" cannot cover circumstances "'where, as here, the plaintiff alleges only an injury at some indefinite future time'"); *Google, Inc. v. Hood*, 822

F.3d 212, 228 (5th Cir. 2016) (holding that "the possibility of some future enforcement action" at an unspecified point in time does not "create[] an imminent threat of irreparable injury ripe for adjudication").

CCST also has not substantiated its claim of irreparable injury in the form of compliance costs. As the district court explained, "the record indicates that most of the costs described by CCST and its members have already been incurred" as part of preparatory efforts beginning in November 2022; these already incurred costs cannot form the basis for injunctive relief. ROA.1368. Further, CCST provides only "nebulous and conclusory descriptions" of any allegedly ongoing costs, without any attempt to explain why these costs are tied to the Rule's substantive provisions. ROA.1368. This case thus stands in stark contrast to *Restaurant Law Center v. U.S. Department of Labor*, 66 F.4th 593 (5th Cir. 2023), on which CCST relies (Br.25), in which this Court found irreparable harm based upon evidence that plaintiffs had incurred "exactly the kinds of continuing compliance costs" that the challenged regulation predicted would be required to ensure compliance. *Id.* at 598. No equivalent evidence exists here.

CCST does not correct this failure on appeal through reliance upon isolated testimony (Br. 27-28 (quoting ROA.1408:8-9)) that in recent months, ECPI University (ECPI) has spent "two to three times" as much money on staff training. As the district court found, ECPI's witness confirmed during the evidentiary hearing that it has "operated for years with adequate staff, policies, and procedures to guard against

misrepresentations and ensure compliance with [borrower-defense] regulations." ROA.1369-70. Despite this, CCST never explained why its existing efforts are not sufficient to guard against the types of misrepresentations that give rise to a borrower defense under the current Rule, 87 Fed. Reg. at 66,068-69, or why any of the Rule's substantive or procedural changes require more costly ongoing training.

For this reason, the district court appropriately found that CCST failed to provide "concrete evidence to show that its member schools face more than a de minimis injury that is traceable to the new Rule." ROA.1370. And even assuming ECPI altered training in anticipation of future recoupment proceedings—proceedings that may not occur at all, much less during the pendency of this litigation—its concerns that these efforts are necessary to avoid future liability would not be redressed by a preliminary injunction, which grants only temporary relief.

CCST also argues (Br. 27, 35-36) that its members are injured by the borrower-defense provisions based upon the "threat" of having to participate in what it believes to be unlawful administrative hearings. CCST notes that—like previous regulations—the Rule contemplates that institutions will be notified and provided an opportunity to respond whenever a borrower submits a claim for relief based upon the conduct of that institution. Again, however, CCST has not identified any borrower claim naming its members, much less shown that an adjudication of that claim under the Rule is likely to be initiated during the pendency of this litigation. ROA.1365. Thus, even assuming that its claimed injury is not entirely conjectural, CCST has not shown that a

preliminary injunction is required to avoid its members' potential participation in a loan-discharge adjudication at some unspecified point in the future.

In any event, CCST is mistaken to assert (Br. 35) that it will cost an average of $17,611 to respond to "each" borrower-defense claim. CCST cites a portion of the Rule that calculates the average cost to respond if the Secretary determines it is appropriate to hold a single proceeding to resolve the claims of a "group of borrowers from one institution or commonly owned institutions," based upon, *inter alia*, the existence of common facts between the claims and the likelihood of pervasive actionable acts or omissions by the borrowers' common institution. 34 C.F.R. § 685.402(a). CCST—which has not identified even a single borrower that has or is likely to invoke a borrower defense based upon the acts or omissions of a CCST member school—makes no effort to show that such claims are sufficiently widespread to warrant a group adjudication during the pendency of this litigation.

### B. CCST Has Not Established Injury from the Closed-School Discharge Provisions Sufficient to Support Standing, Much Less Irreparable Harm

CCST's claim of injury from the closed-school discharge provisions is even more vague and attenuated.[4] Under those regulations, a borrower may obtain discharge only if they attended a school that is "closed"—that is, a school that has

[4] A fully briefed motion to dismiss this portion of CCST's complaint for lack of standing remains pending in district court.

entirely ceased operations. As the district court found, however, no CCST member is alleged to be a closed school or is allegedly planning to close. ROA.1366. And any potential second-order consequences of a closed-school discharge, like the imposition of recoupment liability, is even more speculative and remote in time. ROA.1366-1367. As with determinations regarding borrower defenses, a subsequent recoupment proceeding for closed-school discharges is a process entirely separate from the Department's adjudication of a student's claim for relief.

CCST claims that the Rule's changes "could" increase the number of borrowers who receive discharges for which CCST's members would be liable if one of CCST's member schools were to "close at some point in the future." Br. 32. But that claim of possible injury attaching based on events that may never occur supports—rather than undermines—the conclusion that CCST has not demonstrated a cognizable injury, much less irreparable harm requiring preliminary relief. *Paxton*, 41 F.4th at 715-16; *Central & S.W. Servs.*, 220 F.3d at 700.[5]

[5] In a footnote (Br. 34 n.7), CCST asks this Court to take judicial notice of the fact that CCST members have closed locations. But CCST does not allege that any of these locations would be considered "closed schools" within the meaning of the regulation. In any event, the existence of such closed locations is relevant to CCST's claim of irreparable harm only if CCST is correct in its unsupported assumption that the closed-school discharge provisions may be applied to retroactively impose liability on schools that closed prior to the effective date of the Rule. As discussed further below, the Department has never indicated that the regulation may be applied in that manner, which only underscores the speculative nature of CCST's alleged harm.

CCST also asserts that its members have "abandon[ed] plans to build, expand, or consolidate campuses or facilities" because of their perceived risk of liability. ROA.1365; *see also* ROA.1399:4-1400:2 (discussing ECPI's tentative plans to "consolidate" its three campuses in Richmond, Virginia). CCST's concern appears to be that these actions might lead to those schools being considered "closed' within the meaning of the regulation, which could potentially result in liability if a borrower who attended that school seeks discharge. But CCST's alleged uncertainty about what actions might one day lead to liability suggests that any controversy involving the closed-school discharge provisions does not support standing or irreparable harm. Instead, it shows that CCST's concerns are not yet ripe for review, and that they should be litigated in the context of a concrete controversy regarding recoupment if such controversy ever arises. *See Texas v. United States*, 523 U.S. 296, 300 (1998); *CAPPS*, 344 F. Supp. 3d at 181-82 (finding challenge to 2016 borrower-defense rule unripe given the "undisputed availability of [Administrative Procedure Act] review of any final recoupment decision").

CCST's other substantive arguments regarding the closed-school discharge provisions further underscore the absence of a ripe controversy. For example, CCST asserts that the Rule's revisions are "impermissibly retroactive." Br. 21. Although it is not entirely clear what CCST means by this unexplained assertion, it presumably is concerned that the Department will seek to hold schools that closed prior to the effective date of the Rule liable for discharges that could not have been granted under

the prior standards. But the Rule's preamble disavows any intent to impose liability on institutions for conduct occurring prior to the effective date of the Rule, *see, e.g.*, 87 Fed. Reg. at 65,915, 65,992, and any concern about retroactive liability could properly be litigated if a concrete controversy ever arises.

In any event, as with the borrower-defense provisions, any imposition of liability against apparently open schools based on their hypothetical plans to build, expand, or consolidate campuses—in addition to being unlikely—could occur only after the Department grants relief to eligible student borrowers and then prevails in an administrative proceeding against a school. Because CCST has not shown that any such recoupment action is likely during the pendency of this litigation, the district court did not abuse its discretion in finding no irreparable harm.

## II. CCST Has Failed to Show a Likelihood of Success on the Merits

As discussed above, even if CCST has demonstrated standing, the district court's finding that CCST failed to establish irreparable harm was correct and certainly not an abuse of discretion. The other preliminary injunction factors also independently require denial of the requested injunction and vacatur of the injunction pending appeal.

### A. The Borrower-Defense Provisions Are Lawful

#### 1. The HEA authorizes the Department to review borrowers' defenses to repayment

The HEA provides the Department of Education broad authority to promulgate regulations to administer federal student loan programs and carry out its duties under Title IV. *See, e.g.*, 20 U.S.C. §§ 1082, 1221e-3, 3441, 3471, 3474. These duties include the obligation to specify by regulation "which acts or omissions of an institution of higher education" may be asserted "as a defense to repayment of a [Direct] loan." 20 U.S.C. § 1087e(h).

Although the Department's borrower-defense regulations have been revised multiple times over the past 30 years, each iteration has maintained the same basic framework. Every version of the regulation has defined the acts or omissions giving rise to a defense to repayment. Every version of the regulation likewise contemplated that the Department would accept "affirmative" requests for relief from borrowers who had not yet defaulted on their loans and make determinations regarding whether to discharge those borrowers' loans by applying regulatory standards. *See* 84 Fed. Reg. at 49,796 (continuing this practice in the 2019 regulation because "throughout the history of the [original] borrower defense repayment regulation," the Department evaluated and approved "affirmative borrower defense to repayment requests."). And finally, every version has contemplated that schools participating in Title IV whose conduct resulted in a successful borrower defense would face the possibility of

financial liability for losses to the taxpayer after an administrative hearing and appeals process, subject to judicial review. *E.g.*, *id.* at 49,795-97.

Notwithstanding this consistent practice, CCST's primary challenge to the Rule's borrower-defense provisions is that the Department lacks authority to grant borrowers relief from their repayment obligations. In CCST's view, the Department's authority is limited to specifying through regulations standards a court should apply if a borrower raises a defense to repayment in a debt-collection proceeding. Under its understanding of the statute, borrowers would refuse to make required payments; the Department would then initiate collection proceedings; borrowers would assert the Department's regulatory criteria as a defense to collection; and courts would then determine whether discharge was proper. Nothing in the statute provides support for CCST's preference for debt-collection litigation that would require courts to adjudicate hundreds of thousands of borrower defenses under the Department's regulatory standards.

**a.** CCST's understanding of the statute rests on two equally flawed assumptions. First, CCST incorrectly assumes that the statute prohibits borrowers from asserting a defense to repayment until after they have defaulted on a loan. The statute contains no such limitation. Instead, it provides "[n]otwithstanding any other provision of State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part." 20 U.S.C. § 1087e(h). As the Rule

explains, "the concept of 'repayment' is widely understood to encompass not just borrowers in default but also those actively repaying their loans." 87 Fed. Reg. at 65,914. It is the "existing obligation to repay"—not the pendency of a formal action to collect a defaulted loan—that gives rise to a "defense to repayment." *Id.* Indeed, limiting borrowers to so-called "defensive" assertions of their right against repayment would be "illogical" because it would "place borrowers in an unfair situation of either intentionally defaulting in the hopes that [their defense] is successful or repaying a loan that potentially should be discharged." *Id.*; *see also* 84 Fed. Reg. at 49,796.

Second, CCST erroneously assumes that only courts can provide borrowers relief from their obligation to repay their federal debt. In effect, CCST argues that, even though Congress explicitly authorized borrowers to assert defenses to their ongoing repayment obligations based upon school misconduct, Congress made no provision for the Department to apply its own regulatory standards to review those assertions or to provide relief from the referenced repayment obligations.

CCST fails to recognize that, even before the creation of the Direct Loan Program, borrowers were permitted to assert "both claims *and* defenses to repayment" of FFEL loans "without regard as to whether such claims or defenses could only be brought in the context of debt collection proceedings." 81 Fed. Reg. at 75,956. And when Congress enacted 20 U.S.C. § 1087e(h) and provided for the Department to promulgate regulations governing a borrowers' assertion of a defense to repayment, it cast no doubt on the validity of the Department's practice or its

"long-standing authority" to relieve borrowers of their "obligation to repay a loan on the basis of an act or omission of the borrower's school." 59 Fed. Reg. at 42,649; *see also Vara v. DeVos*, 2020 WL 3489679, at *3 (D. Mass. June 25, 2020); *Sweet v. Cardona*, 641 F. Supp. 3d 814, 820 (N.D. Cal. 2022).

The Department has never understood the HEA to limit relief to those borrowers who have defaulted—an inefficient process that would require the Department to initiate debt-collection efforts even when it knows or reasonably suspects the borrower to have a valid defense to those efforts. In arguing to the contrary, CCST notes (Br. 40) that the original borrower-defense rule contained a list of court proceedings in which a borrower could assert the defense. But that list was never intended to be exhaustive, 59 Fed. Reg. at 61,696, and the fact that the regulation contemplated that borrowers may assert a defense during collection proceedings did not in any way limit borrowers' ability to assert the defense prior to collection efforts. Indeed, when the Department issued its first interpretation of the original borrower-defense regulation, it clarified that the Department "will acknowledge" a borrower defense that meets the regulatory standards during adjudication. 60 Fed. Reg. 37,768, 37,769 (July 21, 1995); *see also Vara*, 2020 WL 3489679, at *3. And "throughout the history of the [original] borrower defense repayment regulation," the Department evaluated and approved "affirmative borrower defense to repayment requests." 84 Fed. Reg. at 49,796. That practice, which has been in place without incident since the inception of the Direct Loan

program, supports the Department's approach in the challenged Rule. *See Biden v. Missouri*, 595 U.S. 87, 93-94 (2022) (recognizing that an agency's longstanding practice can help inform the scope of the agency's authority).

**b.** CCST also asserts (Br. 42) that any power of adjudication must be "explicitly" granted to agencies. But *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563 (D.C. Cir. 1987), the case on which it principally relies for that proposition, is inapposite. That case involved the level of deference to be accorded to an agency's understanding of a settlement agreement and recognized the general principle that "where Congress has made an explicit *or implicit* grant of power to an agency over certain matters, that grant of power . . . compels deference from the courts in reviewing how that power is exercised." *Id.* at 1570 (emphasis added).

Other cited cases (Br. 42-43) similarly fail to advance CCST's argument. They stand for the proposition that Congress typically speaks clearly when it intends to grant agencies the "authority to adjudicate *private* claims"—that is, disputes between private parties. *Bank One Chi., N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 274 (1996) (emphasis added); *Coit Indep. Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 572-73 (1989); *Equitable Equip. Co. v. Director, Office of Worker's Comp. Programs*, 191 F.3d 630, 632-33 (5th Cir. 1999). But the borrower-defense provisions of the Rule do not permit the Department to resolve or adjudicate private claims. Instead, loan-discharge proceedings are between the borrower and the government;

they involve only the question of whether a borrower qualifies for statutory relief from their federal repayment obligations based upon established regulatory standards.

For similar reasons, CCST is mistaken to suggest (Br. 43) that loan discharge requires a waiver of sovereign immunity. Sovereign immunity is a defense to be asserted by the United States in court proceedings initiated against the federal government, *see, e.g.*, *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983); it is not a limitation on an agency's ability to disburse benefits according to a congressionally created scheme. When federal student loan borrowers assert defenses against their repayment obligations, they are not bringing suits against the United States in which the sovereign immunity defense might apply. *See Sweet*, 641 F. Supp. 3d at 832 ("Discharge of an obligation to repay a debt does not constitute monetary damages."). In any event, the HEA waives sovereign immunity with respect to any civil action relating to the Secretary's performance of "the functions, powers, and duties, vested in him by" the FFEL and Direct Loan Programs. 20 U.S.C. §§ 1082(a), 1087e(a)(1).

**2. The HEA authorizes administrative recoupment**

CCST next argues (Br. 44-45) that the Department lacks the authority to seek recoupment after a borrower-defense claim has been granted. As CCST appears to recognize (Br. 44), the HEA expressly requires each institution participating in Title IV to "accept[] responsibility and financial liability stemming from its failure to perform the functions" set forth in its participation agreement with the Department.

20 U.S.C. § 1087d(a)(3). And as discussed above, the Department's borrower-defense regulations have long provided that schools may contest this liability in an administrative hearing and appeals process, subject to judicial review. Thus, an injunction of the Rule would not protect CCST's member schools from a potential recoupment action. 81 Fed. Reg. at 75,931 (the Department has "from the inception of the Direct Loan Program, considered its administrative authority under the HEA . . . to authorize the Department to hold schools liable for losses incurred through borrower defenses, and to adopt administrative procedures to determine and liquidate those claims").

In a single sentence, CCST asserts (Br. 44) that the Department may not administratively assess a school's financial liability because section 1087d(a)(3) does not expressly "authorize the Department to adjudicate alleged breaches." But that ignores the broader context of the HEA, which expressly identifies remedial actions available to the Department in response to violations of program requirements, *e.g.*, 20 U.S.C. §§ 1094(c), 1099c-1(a)(1), including auditing institutions or initiating "program reviews" to assess liability for damages resulting from violations of loan program requirements. In addition, 20 U.S.C. § 1094(b) provides that schools may seek review of the Department's liability determinations and that the Department must conduct hearings to administer this review. Taken together, these provisions clearly establish the Department's authority to administratively assess an institution's liability under Title IV, subject to administrative appeals and judicial review under the

Administrative Procedure Act. *See, e.g.*, *Chauffeur's Training Sch., Inc. v. Spellings*, 478 F.3d 117, 125-30 (2d Cir. 2007) (upholding Department's authority to "administratively assess a liability for loan program violations" even where the HEA was "silent" with respect to the particular type of violation).

### 3. The borrower-defense provisions are constitutional and do not implicate the major-questions doctrine

In various portions of its brief, CCST alludes to the specter of constitutional infirmities in the borrower-defense provisions. None of these arguments—which are largely presented without explanation or support—has merit.

First, in a single sentence, CCST argues that the borrower-defense provisions violate Article III and the Seventh Amendment insofar as they contemplate proceedings to "adjudicat[e] . . . state-law claims." Br. 43. That fundamentally misunderstands the regulatory regime. As discussed above, the Rule's loan-discharge proceedings are not adjudications of state law causes of action. Instead, they are an adjudication of a borrower's assertion of a defense recognized by the Department against the government's otherwise prevailing right to recover on student-loan debts. 20 U.S.C. § 1087e(h). The grounds for relief in some adjudications might resemble state law causes of action because the Department has chosen to recognize such standards as indicative of acts or omissions that can justify a defense to repayment. But what is being adjudicated in the loan-discharge proceeding is the borrower's obligation to repay the federal government. Neither Article III nor the Seventh

Amendment pose any limitation on agency adjudication of this public right. *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018).

*Chamber of Commerce v. Department of Labor*, 885 F.3d 360 (5th Cir. 2018), cited by this Court in issuing an injunction pending appeal, concerned a regulation issued by the Department of Labor that, among other things, required brokers and insurance salespeople who provided retirement investment advice to contractually agree to take on the same duties of prudence and loyalty that bind fiduciaries of employer-sponsored retirement plans. *Id.* at 382, 384. In holding this provision to be unreasonable, this Court noted that Congress expressly created a private cause of action for investors to sue employer-sponsored plan fiduciaries for breaches of fiduciary duties and did not authorize such private lawsuits for other types of investment advisors. *Id.* at 383-84. This Court thus determined that by requiring that investment-advice fiduciaries contractually accept the "extensive duties and liabilities" of employer-sponsored fiduciaries, the regulation created a "vehicle[] for private lawsuits" that created an "end run around Congress's refusal to authorize private rights of action" against investment-advice fiduciaries. *Id.* at 384.

Unlike the rule at issue in *Commerce*, the challenged Rule's loan-discharge provisions do not "create vehicles for private lawsuits." 885 F.3d at 384. Indeed, nothing in the Rule contemplates that borrowers may sue schools or other private parties, nor does the Rule permit the Department to adjudicate any private rights. Instead, as Congress directed, the Rule specifies the circumstances under which

borrowers may request that the federal government relieve them from their obligations to repay a federal debt. That loan-discharge proceeding is between the borrower and the federal government, and the government's resolution of a borrower's eligibility for that statutory relief does not dispose of or otherwise affect any related claims or defenses that the borrower or the borrower's institution might assert in collateral litigation.

CCST further asserts (Br. 44-45) that the Rule's recoupment proceedings violate the Seventh Amendment's guarantee of a jury trial. As the Supreme Court has explained, however, "Congress is free to provide an administrative enforcement scheme without the intervention of a jury." *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 448 (1977) (quotation marks omitted). And as already discussed, *supra* 36-38, the HEA expressly anticipates that such a scheme will apply to schools participating in the Title IV federal student financial aid programs. *E.g.*, 20 U.S.C. § 1087d(a)(3). This requirement is an important aspect of the Department's stewardship of the public fisc; the Department loans billions of dollars to students attending participating institutions every year to further their higher education and being able to recoup from schools the "discharge-related liabilities" that their acts or omissions create is a "critical tool" for protecting that taxpayer investment. 87 Fed. Reg. at 65,948; 84 Fed. Reg. at 49,838. It is thus clear that administrative recoupment is "so closely integrated with [the] comprehensive regulatory scheme" governing the administration of federal student loan programs

that they are "appropriate for agency resolution." *Jarkesy v. SEC*, 34 F.4th 446, 453 (5th Cir. 2022), *cert. granted* No. 22-859 (U.S. June 30, 2023); *cf. Oil States*, 138 S. Ct. at 1373 ("[T]he public-rights doctrine applies to matters arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.").[6]

Finally, there is no basis for CCST's assertion (Br. 45-46) that the challenged borrower-defense provisions violate the major questions doctrine. That doctrine is reserved for "extraordinary cases" involving assertions of "extravagant statutory power over the national economy" or "highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quotation marks omitted). But here, the features of the Rule that CCST challenges—one providing for adjudication of borrower defenses and another providing for administrative recoupment actions—have been in effect for more than 30 years and were enacted pursuant to a statutory provision that expressly requires the Department to define the circumstances under which borrowers can obtain relief from their obligations to repay federal Direct Loans based on institutional misconduct. To the extent these provisions affect schools at all, they operate as a condition on the receipt of federal funds, applicable only to the entities

[6] In a single sentence CCST also alludes to the possibility that the Rule burdens schools' "constitutionally protected non-fraudulent speech." Br. 24. This argument, which is never developed in CCST's brief, entirely lacks foundation.

that choose to participate in a federal program administered by the Department. The Rule does not apply outside the Department's contractual relationships or the field of federal student financial aid and is thus in the heartland of the Department's statutory expertise.

### B. The Borrower-Defense Provisions are Reasonable

CCST is equally wide of the mark in urging that the borrower-defense regulations are substantively unreasonable and do not survive scrutiny under the "narrow and highly deferential" arbitrary-and-capricious standard of review, *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 449 (5th Cir. 2021) (quotation marks omitted), which requires only "that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision," *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

As set forth in the Rule's preamble, the Department has received a flood of new borrower-defense claims that has not meaningfully abated since 2015, which revealed significant inadequacies in the existing regulations. 87 Fed. Reg. at 65,910. In light of these concerns, the Department elected to promulgate standards that would balance "transparency, clarity, and ease of administration" with "adequate protections to borrowers, institutions, the Department, and the public monies that fund Federal student loans." *Id.* at 65,908. This response to changed circumstances, carefully explained in response to commenters, falls well within the "zone of

reasonableness," even if CCST might have "weighed the evidence differently." *Huawei Techs.*, 2 F.4th at 449, 451.

**1.** CCST urges (Br. 46-49) that the five common-sense categories adopted by the Department as institutional acts and omissions that may give rise to a meritorious borrower defense lack sufficient "specificity" to allow schools to "conform their conduct." But the Administrative Procedure Act does not require the Department to list every conceivable act or omission that could fall within these definitional categories. Indeed, the definitional ambiguity to which CCST objects is a "familiar problem in administrative law," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2410 (2019), and case-by-case evaluation of how the law should apply to particular facts is a well-established method for resolving edge applications of a regulation, *see id.* at 2413. That is particularly true where, as here, the regulation provides robust procedural protections to parties subject to the administrative proceedings. 87 Fed. Reg. at 66,072-73.

Furthermore, CCST's caricature of the Rule (Br. 47-48) as a "strict-liability regime" that sanctions schools for innocent or unintentional misstatements bears no resemblance to the Rule's actual standards, which plainly require culpable conduct by a borrower's institution. In particular, the Department may not grant a borrower relief from repayment unless it determines that the "totality of the circumstances, including the *nature and degree* of the acts or omissions and of the detriment caused to borrowers" warrants that relief. 34 C.F.R. § 685.401(e) (emphasis added). Defenses

to repayment based on "harmless and inadvertent errors are unlikely to be approved." 87 Fed. Reg. at 65,921.

Similarly, there is no support for CCST's argument (Br. 48-49) that the Rule permits discharge even when there is "no causal nexus between the act or omission of the school and the incurrence of that debt." To the contrary, the Rule expressly requires a "causal link between the school's conduct and the borrower's injury" before the Department will discharge a loan. 87 Fed. Reg. at 65,920; *see also id.* at 65,922 ("[A]pproved claims must be based on a showing that a school's actionable act or omission caused the borrower detriment."). That belies CCST's concerns (Br. 49) that the Rule might lead to discharge of loans disbursed before a school's culpable act or omission.

At bottom, CCST's overall complaint is that it would prefer that borrowers obtain relief from repayment obligations only if they can prove that the school had an intent to deceive. But the HEA does not require the Department to condition a borrower defense upon a finding that a school knew of or intended to cause harm to the borrower. And the Department reasonably explained that the determination whether to discharge an individual borrower's loan should be based upon findings regarding a causal link between the nature and degree of the school's acts or omissions and the borrower's detriment, rather than the institution's subjective state of mind. That CCST would prefer the Department to have made a different policy choice is not a sufficient basis to invalidate the Rule. *Huawei Techs.*, 2 F.4th at 451.

**2.** CCST next argues (Br. 50-53) that the Rule's provisions permitting group adjudications are unreasonable. Under those provisions, the Secretary may consider together claims of similarly situated borrowers who attended a common institution and who have defenses to repayment based upon related acts or omissions of that institution. *See* 34 C.F.R. § 685.402(a). Once a group is approved, the Secretary reviews the borrowers' applications together to determine whether the necessary elements are met—that is, whether the common institution committed actionable acts or omissions that are causally linked to the borrowers' harm.

Then, as with individual claims, the Department determines whether the totality of the circumstances warrants discharge of the borrowers' loans. But because the decision to approve a group adjudication arises out of allegations that borrowers are similarly situated, the Rule provides for a "rebuttable presumption" that "the act or omission giving rise to the borrower defense affected each member of the group in deciding to attend, or continue attending, the institution, and that such reliance was reasonable." 34 C.F.R. § 685.406(b)(2). That reflects the Department's experience that widely disseminated misrepresentations (such as misrepresenting employment rates in mass communications to prospective students) will often affect many borrowers in substantially the same way. 87 Fed. Reg. at 65,937.

There is nothing substantively unreasonable about the Department's determination to efficiently resolve virtually identical claims without the need for individual adjudications. *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 102 (2015)

("[C]ourts lack authority 'to impose upon an agency its own notion of which procedures are "best . . . ."'") (alteration omitted)). Moreover, the Department amply explained the reasons for its adoption of this rebuttable presumption of reliance. As the preamble explains, "a recommendation to consider certain borrowers' claims as a group" necessarily stems from allegations that the borrowers are similarly situated, including allegations that the acts or omissions were likely pervasive or widely disseminated. 87 Fed. Reg. at 65,922. Those same facts also "support[] a logical inference that certain acts or omissions impacted members of the group in similar ways." *Id.*

CCST's concern (Br. 51) that a presumption of reliance should not apply to a group of borrowers alleging "picayune" misrepresentations only demonstrates the soundness of the Department's position. The Department will only consider claims as a group if the totality of the circumstances supports such a group adjudication. Thus, if an actionable misrepresentation is not likely to affect claimants in a similar way, the Department is not likely to approve a group adjudication—in which case, no presumption of reliance will apply.

Further, the rebuttable presumption "does not change the burden of persuasion, which will still require that the evidence show an entitlement to relief by a preponderance of the evidence." 87 Fed. Reg. at 65,922. In other words, even if the Department one day approved a hypothetical group claim involving minor misrepresentations that are unlikely to influence widespread borrower decisions—an

unlikely prospect to begin with—an affected school would still have a full opportunity to argue that any presumption of reliance is inappropriate due to the nature of the acts or omissions alleged. *Id.* ("For purposes of schools' liabilities" schools may "rebut the presumption as to individuals in the identified group, or as to the group as a whole."). That approach, which provides robust protections for schools before any liability attaches, carefully balances the various interests involved, and complies with the constitutional requirements of due process.

### C. The Closed-School Discharge Provisions Are Lawful

There is also no merit to CCST's challenge to the Rule's closed-school discharge provisions. As relevant here, the HEA provides that the Department "shall discharge" the loan of a borrower when the student "is unable to complete the program in which such student is enrolled due to the closure of the institution." 20 U.S.C. § 1087(c)(1). The HEA further requires that, if a borrower's liability on a loan is discharged based on the closure of a school, the Department must "subsequently pursue any claim available to such borrower against the institution and its affiliates and principals or settle the loan obligation pursuant to the [Department's] financial responsibility authority." *Id.* (referring to authorities described in 20 U.S.C. § 1099c(c)); *Id.* § 1087e(a)(1) (providing for the same terms and conditions to apply to Direct Loans).

To comply with these statutory directives, the Department has long maintained regulations that permit the Secretary to determine the date of closure for a school

which has ceased operations and required borrowers' cooperation in administrative proceedings to recoup the cost of closed-school discharges. *See, e.g.*, 59 Fed. Reg. at 61,701. Prior to the challenged Rule, the regulations generally provided that a borrower was eligible for relief if the borrower could not complete their program of study at the school either because the school closed while the student was enrolled, or because the student withdrew from the school shortly before the date that the school closed. 34 C.F.R. § 685.214(c) (2020). For the purpose of determining such eligibility, those regulations defined a school's closure date as the date, as determined by the Secretary, "that the school ceases to provide educational instruction in all programs." *Id.* § 685.214(a)(2)(i) (2020).

The Rule amends the regulatory provision establishing a school's closure date for the purpose of determining a borrower's eligibility for discharge. 87 Fed. Reg. at 65,966. That provision, now codified at 34 C.F.R. § 685.214(a)(2)(i), establishes that "[i]f a school has closed, the school's closure date is the earlier of: the date, determined by the Secretary, that the school ceased to provide educational instruction in programs in which most students at the school were enrolled, or a date determined by the Secretary that reflects when the school ceased to provide educational instruction for all of its students." As the Department explained, this "protect[s] against a situation" where borrowers would be denied discharge simply because the borrowers withdrew from the school after the school abruptly ceased providing most instruction and did not provide borrowers with a clear path to finishing their studies

but "intentionally ke[pt] a single, small program open long enough to avoid the [eligibility] window." 87 Fed. Reg. at 65,966.

CCST argues (Br. 53) that this revision is improper because, in its view, "'[c]losed' is an unambiguous term" that cannot encompass a school that is still open and providing education. But the Rule does not expand the overall scope of which schools are considered "closed"; borrowers can obtain discharge only after a school has entirely ceased operations.

CCST's concern appears to be that—like previous versions of the regulations—the Rule permits discharges for students who withdrew before a school entirely ceased operations. But that choice reflects the Department's reasoned opinion regarding which borrowers are unable to complete a program "due to" a school's eventual closure. As the Department explained, although "many institutions announce their ultimate closure with no warning, there are almost always warning signs along the way that an institution may be struggling." 87 Fed. Reg. at 65,965. It is thus reasonable to infer that borrowers who withdraw within the school's final term were "concerned about [the] school's situation . . . and decided to leave." *Id.*

CCST's challenge to the automatic-discharge provisions (Br. 55) fails for similar reasons. That provision permits the Department to grant a discharge without requiring an application from the borrower if the Department determines, based upon information already in its possession, that the borrower qualifies for discharge. 34 C.F.R. § 685.214(c). Here too, CCST argues that the Department should not

discharge a loan without specific evidentiary proof regarding the reason a student withdrew. But although CCST would prefer the Department to demand that borrowers who fall within this lookback window prove that they did not withdraw for other, unrelated reasons, the HEA does not foreclose the Department's approach, and CCST's policy preference is not a sufficient basis to invalidate the Rule.

## III. The Remaining Equitable Factors Weigh Against CCST's Requested Relief

Even if CCST could satisfy the other requirements, it cannot carry its "burden" to show that the public interest and other equitable factors "justify an exercise [of this Court's discretion" to grant a stay or preliminary injunction. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

**A.** The Department is the administrator of the nation's largest consumer-lending portfolio, and, like any lender, it must have a viable process for resolving disputes over fraudulent or defective debts. The Rule explains that deficiencies in the Department's prior borrower-defense regulations created a massive, ever-expanding backlog of hundreds of thousands of applications for relief that far exceeded the Department's adjudicatory capacity. After years of litigation, the Department reached a settlement with a large class of borrower-defense applicants to timely process unresolved claims, but that settlement does not correct for the process deficiencies that contributed to the backlog in the first place.

The challenged Rule represents a comprehensive effort to ensure that the Department may fulfill its obligations in a timely manner. A stay of that Rule—which could postpone its implementation by a year or more—would require the Department to process incoming claims under an inadequate regulatory framework that will risk recreating another unresolvable backlog of claims. *See, e.g.*, 87 Fed. Reg. at 65,912 (describing "implementation challenges with administering the 2019 regulation and reviewing claims under the standards and processes it would require"). Both the government and the public thus have a strong interest in implementing the Rule so that the Department can manageably handle incoming claims and ensure that borrowers with valid claims do not remain in an extended state of financial uncertainty. That interest far outweighs CCST's speculative fear that the Department may one day seek recoupment from one of CCST's member schools for loan amounts that could not have been discharged under existing regulations. *See supra*, 18-30.

The significant and irreparable harm to the government and the public is underscored by CCST's extraordinary request for relief that would encompass not only its member institutions but would prohibit application of the Rule to loan discharge requests of all borrowers nationwide. The requested injunction would also apply to the borrower-defense and closed-school discharge regulations in their entirety, including provisions that CCST has not challenged. For example, the Rule's borrower-defense provisions provide that an applicant's loans stop accruing interest after the claim has gone unadjudicated for 180 days. 34 C.F.R. § 685.403(d)(2), (e)(2).

The Rule also provides a path for applicants whose loans are in default to avoid collection on their defaulted loans. *Id.* § 685.403(c). These provisions—which CCST does not challenge—are crucial to protecting borrowers who request and may have valid defenses to repayment. CCST's request that this Court stay the borrower-defense and closed-school discharge provisions entirely would thus substantially harm borrowers with valid defenses without any attendant benefit to CCST or its members.

**B.** In any event, constitutional and equitable principles require this Court to limit any relief to the named parties in this case. Under Article III, "a plaintiff's remedy must be 'limited to the inadequacy that produced his injury.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (alteration omitted). Principles of equity reinforce that constitutional limitation. A federal court's authority is generally confined to the relief "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). Such relief must be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc) (plurality op.). Thus, English and early American courts of equity typically "did not provide relief beyond the parties to the case." *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring). These same principles suggest that any equitable relief issued here must be limited to CCST and its members.

In arguing to the contrary, CCST argues (Br. 56-58) that 5 U.S.C. § 705 permits this Court to "postpone" the effective date of an agency action in its entirety. That argument proves too much. Given the Rule's indications that the Department intended for its provisions to be severable, *e.g.*, 87 Fed. Reg. at 66,042, 66,073, it would be entirely improper to enjoin portions of the Rule that are unchallenged or for which it has not demonstrated a likelihood of success on the merits, *e.g.*, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988) (invalidating only the regulatory provision found to exceed an agency's statutory authority). For example, the Rule contains multiple provisions governing the Public Service Loan Forgiveness program that are not challenged here, 87 Fed. Reg. at 66,063-65, and CCST sensibly does not claim that the universal relief it seeks under section 705 requires a stay of these provisions. This demonstrates that any "necessary and appropriate" relief awarded under 5 U.S.C. § 705 should be based upon traditional equitable principles and should be no broader than is necessary to redress the plaintiff's particular injury.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

*Of Counsel:*

LISA BROWN
*General Counsel*

TOBY MERRILL
*Deputy General Counsel*

JOHN PATRICK BAILEY
*Senior Counsel*

BRIAN SIEGEL
*Assistant General Counsel for Postsecondary Education*

TODD DAVIS
*Attorney*
*U.S. Department of Education*

BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney General*

MARK B. STERN
JOSHUA M. SALZMAN

*/s/ Jennifer L. Utrecht*
JENNIFER L. UTRECHT
*Attorneys, Appellate Staff*
*Civil Division, Room 7710*
*U.S. Department of Justice*
*950 Pennsylvania Avenue NW*
*Washington, DC 20530*
*(202) 353-9039*

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## CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

*/s/ Jennifer L. Utrecht*
Jennifer L. Utrecht

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,977 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

*/s/ Jennifer L. Utrecht*
Jennifer L. Utrecht