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 APPELLANT

Philip Vickers
Katherine Hancock
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
pvickers@canteyhanger.com
(817) 877-2800

Stephen B. Kinnaird
Allyson B. Baker
Michael Murray
Sameer P. Sheikh
Tor Tarantola
PAUL HASTINGS LLP
2050 M Street NW
Washington, DC 20036
stephenkinnaird@paulhastings.com
(202) 551-1700

Counsel for Plaintiff-Appellant

CERTIFICATE OF INTERESTED PERSONS

No. 23-50491

Career Colleges and Schools of Texas v. U.S. Dep't of Educ., et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiff-Appellant:	Career Colleges and Schools of Texas
Counsel for Plaintiff-Appellant:	PAUL HASTINGS LLP Allyson B. Baker (allysonbaker@paulhastings.com) Stephen Kinnaird (stephenkinnaird@paulhastings.com) Michael Murray (michaelmurray@paulhastings.com) Sameer P. Sheikh (sameersheikh@paulhastings.com) Tor Tarantola (tortarantola@paulhastings.com) CANTEY HANGER LLP Philip Vickers (pvickers@canteyhanger.com) Katherine Hancock (khancock@canteyhanger.com)
Plaintiff-Appellant's member schools participating in the William D. Ford Federal Direct Loan Program:	Arlington Career Institute Asher College Auguste Escoffier School of Culinary Arts Avenue Five Institute Center for Advanced Legal Studies Collectiv Academy Concorde Career College, Dallas Concorde Career College, Grand Prairie Concorde Career College, San Antonio Culinary Institute LeNotre Deluxe Barber College ECPI University Fortis College, Houston South Fortis Institute, Houston North Lincoln College of Technology McAllen Careers Institute Ogle School Hair Skin Nails, Arlington Ogle School Hair Skin Nails, Dallas

	Ogle School Hair Skin Nails, Denton Ogle School Hair Skin Nails, Fort Worth Ogle School Hair Skin Nails, Houston Ogle School Hair Skin Nails, Hurst Ogle School Hair Skin Nails, North Dallas Ogle School Hair Skin Nails, San Antonio PCI Health Training Center, Dallas PCI Health Training Center, Richardson Pima Medical Institute Pima Medical Institute, San Antonio Southern Careers Institute, Austin Southern Careers Institute, Brownsville Southern Careers Institute, Corpus Christi Southern Careers Institute, Harlingen Southern Careers Institute, Pharr Southern Careers Institute, San Antonio North Southern Careers Institute, San Antonio South Southern Careers Institute, Waco Southwest University at El Paso The College of Health Care Professions, Austin The College of Health Care Professions, Dallas The College of Health Care Professions, Fort Worth The College of Health Care Professions, Houston Southwest The College of Health Care Professions, McAllen The College of Health Care Professions, Northwest The College of Health Care Professions, San Antonio The College of Health Care Professions, San Antonio South The Ocean Corporation Tulsa Welding School & Technology Center Vogue College of Cosmetology, Fredericksburg Rd. Vogue College of Cosmetology, Ingram Rd. Vogue College of Cosmetology, Lubbock Vogue College of Cosmetology, McAllen West Coast University Western Technical College, Main
Defendants-Appellees:	United States Department of Education Miguel Cardona, in his official capacity as Secretary of Education

Counsel for Defendants-Appellees:	United States Department of Justice Brian M. Boynton Marcia Berman Christine L. Coogle (christine.l.coogle@usdoj.gov) Cody T. Knapp (cody.t.knapp@usdoj.gov) R. Charlie Merritt (robert.c.merritt@usdoj.gov) Jennifer L. Utrecht (jennifer.l.utrecht@usdoj.gov)
Other interested entities:	Career Education Colleges and Universities Institutions that participate in Title IV programs (see list at https://fsapartners.ed.gov/knowledge-center/library/federal-school-code-lists/2023-08-10/2023-24-federal-school-code-list-participating-schools-august-2023)

/s/ *Stephen B. Kinnaird*
Stephen B. Kinnaird

Attorney of Record for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant CCST respectfully requests oral argument. Given the volume and complexity of the regulations at issue, as well as the importance of the requested relief to CCST's members and other Title IV schools across the country, CCST believes the Court would benefit from an opportunity to question counsel.

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INTRODUCTION

The Department of Education promulgated a final rule that, among other things, revamps the regulations governing student-loan discharges based on the acts, omissions, or closures of an institution of higher education. *See* Institutional Eligibility Under the Higher Education Act of 1965, 87 Fed. Reg. 65904 (Nov. 1, 2022) ("the Rule"), ROA.1173-1342.

The Rule represents an arbitrary arrogation of unauthorized administrative power. In Section 455(h) of the Higher Education Act ("HEA"), Congress granted the Department a limited rulemaking power: to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment" of loans under the William D. Ford Federal Direct Loan Program. 20 U.S.C. § 1087e(h). From that single sentence, the Department issued a sprawling rule that converts defenses into affirmative borrower "claims" that are not time-limited and proclaims the Department's authority to adjudicate not only borrower claims but also recoupment actions against schools. The Department even declares the power to adjudicate state-law claims such as breach of contract. These provisions both exceed the Department's statutory authority and are unconstitutional. Only Congress can authorize such administrative adjudications.

Moreover, state-law claims and recoupment actions are not public rights susceptible to administrative adjudication.

The Department compounded this overreach by stacking the deck in favor of borrowers and against schools. The Rule imposes strict liability upon schools for even unintentional omissions or misstatements, and it institutes a group-claim process that presumes that *every* borrower in the group was reasonably affected by the act or omission in deciding to attend or continue attending the school. Although reliance and injury are information possessed by the borrower, the Rule denies schools discovery or the opportunity to examine witnesses, thus rendering rebuttal of the presumptions practically impossible. And if a borrower claim is proven, the Rule declares that the borrower's entire student debt is discharged, without any proof of what financial harm, if any, actually resulted from the school's conduct. The Rule's purported objective is to "streamline" claim approval, without regard to actual proof—ultimately leaving schools and taxpayers to foot the bill for the Department's backdoor loan forgiveness program.

Career Colleges & Schools of Texas ("CCST"), an association of private postsecondary career schools in Texas, filed suit against the Department and Secretary Miguel Cardona (collectively, "the Department"). CCST challenged the borrower-defense, closed-school-discharge, and other provisions of the Rule, and

moved for a preliminary injunction to postpone the effective date of the Rule under 5 U.S.C. § 705. *See* ROA.91-96, 352-86.

The district court denied the motion without addressing the Rule's arbitrariness or lack of statutory authority and without balancing the equitable factors. Remarkably, even though the Rule directly and immediately regulates the conduct of CCST members, the district court held that CCST had not demonstrated a likelihood of irreparable injury if the Rule were allowed to go into effect.

The district court erred. CCST presented extensive evidence that its members face immediate irreparable injury from the costs of complying with the new and unlawful regulations, which regulate virtually all speech to current and prospective students about educational servicing, costs, financing, and enrollment, by a school or any school representative or contractor. And the evidence demonstrated that CCST members likewise face irreparable injury from the alteration of business plans to avoid expanded liability risks arising from the Rule and from immediate subjection to an unauthorized and unconstitutional adjudicatory forum that lacks due process.

This Court should reverse the district court's order and postpone the effective date of the Rule.

JURISDICTIONAL STATEMENT

The Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1). The district court, which properly exercises jurisdiction under 28 U.S.C. § 1331, denied CCST's motion for preliminary injunction on June 30, 2023. ROA.1352-72. CCST filed a timely notice of appeal the same day. ROA.1373.

STATEMENT OF ISSUES

1. Whether the district court abused its discretion by finding insufficient evidence of irreparable harm and denying CCST's motion for postponement of the Rule's effective date on that basis.

2. Whether this Court should direct the district court to postpone the effective date of the Rule.

STATEMENT OF THE CASE

I. Background

A. Statutory and Regulatory History

For many years, the Department's role in student lending principally involved subsidizing and insuring student loans issued by other lenders. Since 2010, when Congress completed the transition from loan insurance to the Direct Loan Program, the Department has become the primary issuer of student loans in the United States. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §§ 2201-13, 124 Stat. 1029, 1074-81.

Throughout the history of the federal student loan programs, Congress has carefully circumscribed the Department's powers with respect to collecting and forgiving debt and recouping losses.

For instance, when Congress wished for the Department to affirmatively forgive the debt on a Direct Loan, it authorized the Department to "cancel" the loan balances. *See, e.g.*, 20 U.S.C. § 1078-11(a)(2)(B) (authorizing the Department to "cancel a qualified loan amount" for borrowers in specified professions); *id.* § 1087e(m)(1) (same for public-service workers); *id.* § 1087j(b) (same for qualifying teachers).

By contrast, in Section 455(h), Congress did not authorize the Department to "cancel" loans, but rather required the Department to "specify in regulations which acts or omissions of an institution of higher education a borrower *may assert as a defense to repayment* of a [Direct] [L]oan." 20 U.S.C. § 1087e(h).[1] In its initial implementing regulations, the Department interpreted this provision to refer to defenses that a delinquent borrower could assert in collection proceedings:

> *Borrower defenses.* (1) *In any proceeding to collect on a Direct Loan*, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law. These proceedings include, but are not limited to, the following:

[1] All emphases in quotations in this brief are added unless noted otherwise.

> (i) Tax refund offset proceedings under 34 CFR 30.33.
>
> (ii) Wage garnishment proceedings under section 488A of the [HEA].
>
> (iii) Salary offset proceedings for Federal employees under 34 CFR Part 31.
>
> (iv) Credit bureau reporting proceedings under 31 U.S.C. 3711(f).

William D. Ford Federal Direct Loan Program, 59 Fed. Reg. 61664, 61696 (Dec. 1, 1994) (final rule) (setting out 34 C.F.R. § 685.206(c)) (first emphasis in original).

Each of these four exemplary adjudicatory proceedings were specifically authorized by statute and took place only after a borrower had failed to make timely payments. *See* 31 U.S.C. § 3720A(b) (tax-refund-offset proceedings); 20 U.S.C. § 1095a (wage-garnishment proceedings); 31 U.S.C. § 3716 (salary-offset proceedings for federal employees); 31 U.S.C. § 3711(e)(2) (current codification of credit-bureau reporting).

Congress also specified when and how the Department could impose liability on a school for acts or omissions without going to court:

> (i) Upon determination, after reasonable notice and opportunity for a hearing, that an eligible institution-
>
> > (I) has violated or failed to carry out any provision of this subchapter or any regulation prescribed under this subchapter; or
> >
> > (II) has engaged in substantial misrepresentation of the nature of its educational program, its financial charges, and the employability of its graduates,

> the Secretary may impose a civil penalty upon such institution of not to exceed $25,000 for each violation or misrepresentation.

20 U.S.C. § 1094(c)(3)(B).

For loans under the separate Federal Family Education Loan ("FFEL") Program, Congress has directed the Secretary to discharge the borrower's loan liability if the student is "unable to complete the program in which such student is enrolled due to the closure of the institution" and subsequently to "pursue any claim available to such borrower against the institution and its affiliates and principals" or settle the loan obligation with those financially responsible for the school. 20 U.S.C. § 1087(c)(1). The Department has declared that the discharge provisions of section 1087(c)(1) shall apply to Direct Loans because Congress provided that such loans shall have the same "terms, conditions, and benefits" as FFEL loans. *See* 87 Fed. Reg. at 65916 (quoting 20 U.S.C. §§ 1087a(b)(2), 1087e(a)(1)).

Although its borrower-defense regulation was "rarely used" in its first two decades, 87 Fed. Reg. at 65979, in 2016, in the wake of a large school bankruptcy, the Department formalized an adjudicatory procedure for borrower-defense decisions and established a new federal standard that schools were required to follow. *See* Student Assistance General Provisions, 81 Fed. Reg. 75926, 75927 (Nov. 1, 2016) (final rule). It also made changes to the Department's closed-

school-discharge provisions. *Id.* at 76081-82. After legal challenges delayed the effective date of several provisions, the Department amended these regulations again in 2019. *See* 84 Fed. Reg. 49788, 49788 (Sept. 23, 2019) (final rule). Many provisions of the 1994, 2016, and 2019 rules still apply depending on the disbursement date of the loan in question. *See, e.g.*, 34 C.F.R. § 685.206(c), (d), (e). The Rule at issue in this case altered the borrower-defense and closed-school-discharge regulatory schemes once again.

B. The Rule

As pertinent here, the Rule makes several changes to both the Department's borrower-defense regulations and its closed-school-discharge regulations.

1. Changes to Borrower-Defense Regulations

The Rule made five primary changes to the borrower-defense regulations.

1. *School Conduct Triggering Discharge*. Under the 2019 regulations, for loans disbursed on or after July 1, 2020, a borrower must prove that a school knowingly or recklessly made a misstatement or omission "that directly and clearly relates to enrollment or continuing enrollment at the institution or the provision of educational services for which the loan was made." 34 C.F.R. § 685.206(e)(3) (July 1, 2020).

The Rule, by contrast, provides full discharge based on *any* misstatement or omission—whether knowing, reckless, or innocent—made by the school, its

representative, or its contractor. 34 C.F.R. § 668.71(c). Any of the following will also trigger a full discharge:

- The school's "fail[ure] to perform its obligations under the terms of a contract with the student [if] such obligation was undertaken as consideration or in exchange for the borrower's decision to attend, or to continue attending, the institution, for the borrower's decision to take out a covered loan, or for funds disbursed in connection with a covered loan," *id.* § 685.401(b)(3);
- "aggressive and deceptive" recruitment conduct "in connection with the borrower's decision to attend, or to continue attending, the institution or the borrower's decision to take out a covered loan," *id.* § 685.401(b)(4);
- a judgment against the school under state or federal law for an act or omission related to the borrower's loan or the educational services for which it was disbursed, *id.* § 685.401(b)(5)(i);
- the Department's denial of the school's Title IV recertification or revocation of the school's program participation agreement due to "acts or omissions that could give rise to a borrower defense claim" for misrepresentation, omission, aggressive and deceptive recruitment, or breach of contract, *id.* § 685.401(b)(5)(ii);

- a school's violation of state law (on reconsideration only, for loans disbursed before July 1, 2017), *id.* § 685.401(c).

2. *Adjudicatory Process*. The 2019 regulations provided only for individual adjudications of borrower defenses, requiring each borrower-claimant to prove that they reasonably relied on a misstatement or omission in deciding to take out a loan and suffered financial harm as a result. *See* 34 C.F.R. § 685.206(e) (July 1, 2020).

The Rule establishes both group and individual adjudicatory processes. 34 C.F.R. §§ 685.402-403. In either, the school must file a response within 90 days or is deemed not to contest the borrower defense, *id.* § 685.405(d), which would expose the school to recoupment liability, § 685.409(a)(1). For group claims, the Department presumes, without proof, that any act or omission giving rise to the borrower defense "affected each member of the group in deciding to attend, or continue attending, the institution, and that such reliance was reasonable." *Id.* § 685.406(b)(2). Even though evidence of injury and reliance are typically within the sole possession of the borrower, schools are not afforded discovery or cross-examination rights that might allow them to rebut this presumption. *See id.* §§ 685.405, 406(b)-(c).

3. *Full Discharge*. The Rule does away with the Department's authority to issue partial borrower-defense discharges, instead providing only for a full

discharge of the entire loan and a refund of payments already made. *See* 34 C.F.R. § 685.401(a)-(b); 87 Fed. Reg. at 65946.

4. *Recoupment Adjudications*. The Rule creates a separate adjudication process through which the Department seeks recoupment of discharged amounts from a borrower's school. *See* 34 C.F.R. §§ 668.125, 685.409. In these adjudications, the school has the burden to prove that the borrower-defense discharge decision was incorrect or unlawful and thus that the school should not be liable. *Id.* § 668.125(e)(2). Despite this burden, the Rule provides schools no discovery or witness-examination rights. *See id.* § 668.125(d), (e)(3); *id.* § 668.117(b).

5. *Limitations Periods.* Under the 2019 regulations, for loans disbursed on or after July 1, 2020, a borrower has three years from the last date of attendance at the school to bring an affirmative claim. 34 C.F.R. § 685.206(e)(6)(i) (July 1, 2020).[2]

The Rule eliminates all limitations periods on borrower claims, allowing claims to be brought decades after the fact. *See id*. § 685.401(b); 87 Fed. Reg. at 65935.

[2] In *N.Y. Legal Assistance Grp. v. DeVos*, 527 F.Supp.3d 593, 602-04 (S.D.N.Y. 2021), the district court remanded to the Department (but did not vacate) the 2019 regulations' three-year limitations period as applied to defensive (but not affirmative) borrower-defense claims.

2. Changes to Closed-School-Discharge Regulations

The Rule also expands the availability of closed-school discharges, by which the Department will either cancel a Direct Loan or pay a federally insured loan on a borrower's behalf if a student was unable to complete a program due to the closure of the school. *See* 34 C.F.R. § 685.214 (as applied to Direct Loans).[3] The Department counts the closure of "any location or branch of the main campus," even if the school itself remains open. *Id.* § 685.214(a)(2)(ii). The Department believes the statute requires it to seek recoupment for all closed-school discharges. *See* 87 Fed. Reg. at 65968.

The Rule makes four principal changes to these provisions.

1. *Borrower Ineligibility*. Under the 2019 regulations, the events that make a borrower ineligible depend on when the loan at issue was disbursed. For loans disbursed before July 1, 2020, a borrower is ineligible for a closed-school discharge if they still managed to complete their program "through a teach-out at another school[/location] or by transferring academic credits or hours earned at the closed school to another school." § 685.214(c)(1)(i)(C) (July 1, 2020). For newer loans, a borrower is ineligible upon completing the program "or a comparable

[3] CCST also challenges the amended closed-school-discharge provisions that apply to other loan types, including 34 C.F.R. §§ 674.33(g) and 682.402(d). For simplicity, citations are to the provisions that apply to Direct Loans.

program" through a teach-out or by transferring credits. *Id.* § 685.214(c)(2)(ii) (July 1, 2020).

Under the Rule, a borrower is rendered ineligible only by completing a program "at another branch or location of the school or through a teach-out agreement at another school, approved by the school's accrediting agency and, if applicable, the school's State authorizing agency." § 685.214(d)(1)(i)(C). A student who completed a comparable but non-identical program, or who transferred their credits outside of a formal teach-out agreement, would nonetheless qualify for a full discharge under the Rule.

2. *Look-back Period*. Under the 2019 regulations, for loans disbursed before July 1, 2020, a student may receive a closed-school discharge if they withdrew up to 120 days before the location's official closure date. 34 C.F.R. § 685.214(c)(1)(i)(B) (July 1, 2020). That "look-back period" is 180 days for loans disbursed on or after July 1, 2020. *Id.* § 685.214(c)(2)(i)(B) (July 1, 2020).

The Rule expands the look-back period to 180 days for all loans, regardless of disbursement date. *See* 34 C.F.R. § 685.214(d)(1)(i)(B).

3. *Closure Date*. The 2019 regulations define a location's "closure date" as "the date that the school ceases to provide educational instruction in all programs, as determined by the Secretary." 34 C.F.R. § 685.214(a)(2)(i) (July 1, 2020).

Under the Rule, "[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." 34 C.F.R. § 685.214(d)(1)(i)(B). The Department has explained that "a school has closed" only if it "has ceased overall operations," 87 Fed. Reg. at 65966, though the closure date could be much earlier.

4. *Automatic Discharges*. Under the 2019 regulations, a borrower receives a closed-school discharge automatically—that is, without an application—*three years* after the location's closure date (1) if the student did not enroll at a "title IV-eligible institution" during that time and (2) if the closure date was on or after November 1, 2013, and before July 1, 2020. § 685.214(c)(3)(ii) (July 1, 2020).

By contrast, the Rule entitles borrowers to an automatic discharge *one year* after either (1) the closure date (as newly defined) if the student does not accept a "program at another branch or location of the school or through a teach-out agreement at another school" with the same accreditation and state authorization, or (2) after their last date of attendance at that continuation program if they fail to complete the program for any reason. 34 C.F.R. § 685.214(c).

II. Procedural History

A. Proceedings Below

CCST's complaint challenges the Rule's borrower-defense provisions, its closed-school-discharge provisions, and its ban on arbitration agreements and class-action waivers. ROA.91-96.

On April 5, 2023, CCST moved for a preliminary injunction to postpone the Rule's effective date under 5 U.S.C. § 705, limited to the borrower-defense and closed-school-discharge provisions. ROA.352-86. Several school representatives, and CCST's Chair, submitted declarations describing the irreparable harms threatened by the Rule, including harms that have already begun to materialize. *See* ROA.387-434.

For example, Scott Shaw, President and Chief Executive Officer of Lincoln Educational Services, attested to several costs already incurred, including from

> reviewing every marketing and advertising material and training recruitment and admissions staff on account of the regulations' imposition of strict liability against schools; dedicating or allocating staff and resources to handle the anticipated flood of meritless borrower defense claims that will be submitted following the effective date and as a result of the lowered threshold for claim approval; and developing and upgrading recordkeeping systems to maintain student records for perpetuity ....

ROA.421-22 ¶ 20. Mr. Shaw also attested that "compliance-related costs and burdens to Lincoln Tech schools will increase substantially if the Rule is allowed to go into effect." ROA.422 ¶ 21; *see also* ROA.427-29 ¶¶ 16-20.

After the case was transferred to the Western District of Texas on the Department's motion, ROA.502-507, the district court scheduled a preliminary-injunction hearing for May 31, ROA.541. The court heard testimony from Mark Dreyfus, President of ECPI University, and Diane Auer Jones, CCST's expert. ROA.1389-1529. Among other things, Mr. Dreyfus testified to the increased training and recordkeeping burdens stemming from the Rule's new strict-liability standard and the removal of limitations periods for borrower-defense claims. *See, e.g.*, ROA.1396:1-1397:12, 1406:19-24, 1407:17-22, 1408:8-13, 1410:11-24, 1415:15-21. He also testified that ECPI would need to hire a new staff member to ensure compliance. ROA.1406:25-1407:9.

At the hearing, the district court questioned whether compliance costs would diminish student services or only institutions' profits. ROA.1475:5-1477:5. In response, Mr. Dreyfus described the Department's financial-responsibility regulations, which require proprietary schools to maintain sufficient revenues in order to remain in compliance with those specific Department regulations. *See* ROA.1484:14-16, 1486:14-1487:7. As a result, a significant increase in compliance costs would likely lead to tuition increases. *See* ROA.1487:5-7.

The court found that CCST would likely establish standing to challenge the Rule, but it denied CCST's motion on the limited ground that it had not met its burden to show a likelihood of irreparable harm. ROA.1360-61. The Department had not adduced any evidence at the hearing or with its briefing, and the court did not call into question the veracity of any of CCST's evidence. Nonetheless, the court denied the injunction without addressing any other preliminary-injunction factor. *See* ROA.1363, 1366, 1371.

B. Stay Proceedings

On June 27, having not yet received a ruling on its motion, and with the Rule set to take effect in less than four days, CCST requested that the district court issue a temporary administrative postponement of the Rule's effective date while the court considered the motion. ROA.788-90. On June 30, not having received a ruling on either motion, CCST requested emergency relief from this Court (No. 23-50489). That same day—at exactly 2:00 P.M., the deadline to seek emergency relief in this Court—the district court issued its denial of CCST's motion for preliminary injunction. *See* ROA.1352-72. CCST noticed its appeal minutes later, *see* ROA.1373, and this Court granted CCST's motion for a temporary administrative injunction later that evening, limited to CCST and its members, *see* ROA.1374-75. After CCST renewed its motion for postponement of the effective date pending appeal in this docket, this Court ultimately granted that motion in full,

staying the Rule without party limitation. *See* Order, No. 23-50491, ECF No. 42-1 (5th Cir. Aug. 7, 2023).

SUMMARY OF ARGUMENT

The district court erred in finding that CCST failed to show a substantial threat of irreparable injury and in denying a preliminary injunction to postpone the Rule's effective date.

A party establishes irreparable injury so long as it is unrecoverable and more than de minimis. Here, CCST established three kinds of irreparable injury.

First, CCST proved that it and its members, who are directly regulated by the Rule, suffered the injury of compelled compliance and compliance costs. The Rule governs virtually the entirety of schools' speech (through employees, representatives, and contractors) to current and prospective students regarding enrollment, educational services, financial charges, financial assistance, loans, and the employability of graduates. The Rule creates a strict-liability regime whereby even unintentional representations, omissions, or other violations can give rise to borrower-defense liability. It also authorizes borrower-defense claims that are subject to no limitations periods and can look back decades.

This Court has held that regulations almost always generate the irreparable injury of compliance costs, and representatives of CCST members gave concrete and uncontradicted evidence, both in declarations and hearing testimony, of

substantial ongoing and future compliance costs. They described setting up new compliance monitoring systems for all communications and marketing materials; increasing training to two or three times previous levels; needing to design new recordkeeping systems for the indefinite retention of information potentially relevant to future borrower claims; and planning to hire additional compliance staff after the Rule becomes effective. The district court's conclusion that CCST presented only speculative or de minimis costs cannot be reconciled with the record. The district court further committed legal error in suggesting that currently incurred costs cannot be considered; the law is clear that both ongoing and future costs count as irreparable injury. In any event, the record shows some compliance costs that are purely prospective.

Second, CCST members suffer irreparable injury to current business operations and foregone opportunities because of the closed-school-discharge provisions of the Rule, and because of the need to husband resources for expected increased liability.

Third, the district court also improperly discredited the irreparable injury of CCST members' compelled subjection to unlawful administrative adjudication. Schools must respond to every claim against them in borrower-defense proceedings at pain of forfeiting any defense to the claim. Not only is the compulsion to participate in an illegal proceeding irreparable injury, but the

Department itself acknowledges that, on average, schools will spend over $17,000 to respond to a claim. And, although the Department has not fully disclosed which schools are subject to pending borrower-defense claims, CCST has established to a statistical certainty that some of those claims are against its members, and more will follow under the lax standards of the new Rule that apply to past conduct without time limitation and promise students complete cancellation of their entire student debt. CCST proved more than a substantial threat of this irreparable injury.

Because CCST established irreparable injury, the district court erred in failing to consider CCST's likelihood of success on the merits and failing to weigh the equitable factors under this Court' sliding-scale test. Under 5 U.S.C. § 705 and general principles applicable to interlocutory review of preliminary-injunction denials, this Court should direct the district court to postpone the Rule's effective date as to all affected persons.

CCST has established an overwhelming likelihood of success on multiple grounds. The Department had no statutory authority to define borrower "claims" to affirmative relief or recoupment rights against schools, and *a fortiori* it has no authority to adjudicate such claims administratively (particularly claims involving state-law private rights, such as breach of contract). Its adoption of a strict-liability regime is arbitrary and capricious, as is its slanted presumption in group claims that *every* borrower reasonably made attendance decisions based on the act or

omission of the school at issue (without proof that the borrower even knew about it). The Rule erases the core injury requirement of the borrower-defense regulation without affording any procedural mechanism in either borrower-defense or recoupment proceedings to rebut the presumption. And, despite having no authority to prescribe rules governing discharge amounts, the Department unlawfully declared that students that prove a defense are entitled to the discharge of their entire student debt, even as to loans that preceded the act or omission in question.

Finally, the closed-school-discharge provisions (which are impermissibly retroactive) violate the statute because they (1) define the closure date as a time when the school is still open and (2) authorize automatic discharges of loans without proof that the student was unable to complete their program due to the school's closure. Because CCST proved irreparable injury and a strong likelihood of success on the merits, and because neither the Department nor the public would suffer countervailing injury from a temporary delay of the Rule, this Court should direct the district court to postpone the Rule's effective date.

STANDARD OF REVIEW

Section 705 of the Administrative Procedure Act ("APA") provides that "the reviewing court, including the court to which a case may be taken on appeal …, may issue all necessary and appropriate process to postpone the effective date of an

agency action ….” 5 U.S.C. § 705. Courts resolve postponement requests using the same standards applicable to motions for preliminary injunction. *See Texas v. EPA*, 829 F.3d 405, 424, 435 (5th Cir. 2016).

In deciding a motion for preliminary injunction, a district court considers four factors: (1) a substantial threat of irreparable harm to the movant absent the injunction, (2) the likelihood of the movant’s ultimate success on the merits, (3) the balance of harms to the parties, and (4) the public interest. *Rest. L. Ctr. v. U.S. Dep’t of Lab.*, 66 F.4th 593, 597 (5th Cir. 2023).

This Court reviews a district court’s denial of a preliminary injunction for abuse of discretion, reviewing factual findings for clear error and legal conclusions de novo. *Id.* “A district court by definition abuses its discretion when it makes an error of law.” *Koon v. United States*, 518 U.S. 81, 100 (1996). A mixed question of law and fact is reviewed de novo when the legal issue predominates. *See U.S. Bank Nat’l Ass’n ex rel. CWCapital Asset Mgmt. v. Vill. at Lakeridge, LLC*, 138 S.Ct. 960, 967 (2018).

ARGUMENT[4]

I. The District Court Erred in Finding No Irreparable Harm.

An irreparable harm is one that cannot later be recovered "in the course of the litigation." *Texas*, 829 F.3d at 434. "[I]t is not so much the magnitude but the irreparability [of harm] that counts for purposes of a preliminary injunction." *Canal Auth. v. Callaway*, 489 F.2d 567, 575 (5th Cir. 1974). Such harm need only "be more than de minimis." *Rest. L. Ctr.*, 66 F.4th at 600 (cleaned up).

CCST clearly established that at least some members would suffer three types of irreparable harm from the Rule: (1) compelled compliance and compliance costs; (2) altered business operations and missed opportunities; and (3) imminent threats of costly and unlawful adjudications.

A. Compelled Compliance and Compliance Costs

The Rule creates a strict-liability regime for misrepresentations or omissions in the entirety of speech attributable to a school—by any employee, representative, or contractor—"in connection with the borrower's decision to attend, or to continue attending, the institution or the borrower's decision to take out a covered loan." 34 C.F.R. §§ 668.71, 668.75, 685.401(b)(1), (2). Every Title IV participant must immediately conform to unlawful new proscriptions relating to speech

[4] Pursuant to this Court's invitation, *see* Order, ECF No. 42-1, at 2, CCST incorporates by reference the arguments in its briefs supporting its Motion for Injunction Pending Appeal, ECF Nos. 12, 34.

regarding educational programming, financial charges and assistance, and the employability of graduates, *id.* §§ 668.72-668.74, as well as brand new recruiting regulations, *id.* §§ 668.500-668.501. The unlawful Rule, which threatens potentially massive liability for noncompliance, irreparably burdens the schools' constitutionally protected non-fraudulent speech. *See Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1236 (10th Cir. 2005).

Further, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Rest. L. Ctr.*, 66 F.4th at 597 (cleaned up). The federal government's sovereign immunity prevents regulated parties from recovering those costs, making them irreparable. *See Wages & White Lion Invs. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021). Both future and continuing compliance costs qualify as irreparable harms. *See Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014) ("To seek injunctive relief, the plaintiff must show a real and immediate threat of future or continuing injury apart from any past injury.").

1. As CCST demonstrated in the district court, several CCST members, and CCST itself, will incur added compliance costs as a direct result of the Rule's changes to the borrower-defense regulations. These costs include (1) expanding monitoring and recordkeeping of communications with current and prospective students; (2) retaining records of such communications indefinitely; and (3)

training current staff and hiring new staff to ensure compliance with the Rule's new strict-liability standards.

First, in order to defend themselves in future borrower-defense and recoupment proceedings, schools will need to monitor and retain additional records of its communications with students. As this Court recently affirmed, defensive recordkeeping such as this is an irreparable harm. *See Rest. L. Ctr.*, 66 F.4th at 598-99.

The Rule makes schools strictly liable for even innocent misstatements and omissions made by school employees, representatives, and contractors. 34 C.F.R. §§ 668.71, 668.75, 685.401(b)(1)-(2). This includes mistakes about relatively minor facts, such as whether certain books or supplies are provided by the school, *id.* § 668.72(f), and whether a testimonial by a former student was unsolicited, *id.* § 668.72(e)(1). Such mistakes or omissions can trigger liability for the debts of an entire group of students without any proof of detrimental reliance. *See id.* §§ 685.401(b), 685.406(b)(2).

By contrast, under the standard set out in the 2019 regulations, a school is liable only for knowing and reckless misstatements and omissions, and only to the extent that the misstatement or omission caused the borrower economic harm. *See* 34 C.F.R. § 685.206(e)(3) (July 1, 2020). In addition, that standard does not

expressly impose liability for misstatements or omissions made by independent contractors.

The Rule also makes schools strictly liable for recruitment methods that the Department decides, after the fact, were "aggressive and deceptive." 34 C.F.R. §§ 668.500, 668.501. While "aggressive and deceptive" is not defined in the Rule, which provides only a non-exhaustive list of examples, the Department made clear that it encompasses statements that would not otherwise qualify as misstatements or omissions. *See* 87 Fed. Reg. at 65928. This prohibition is new to the Department's regulations and can also lead to revocation of the school's Title IV certification. *See* 34 C.F.R. § 668.500(b).

As several witnesses attested, these new standards require schools to record and preserve a much broader set of communications with students and prospective students in order to defend themselves and their reputations in potential proceedings. School representatives attested that their school must now "review[] *every* marketing and advertising material and train[] recruitment and admissions staff on account of the regulations' imposition of strict liability against schools." ROA.421-22 ¶¶ 20-21; *see also* ROA.1396:22-1397:5 (undertaking training to make sure staff "are aware of every communication" and "retain this information even for some kind of inadvertent claim"); ROA.427-29 ¶¶ 16-20, 1396:8-13, 1406:19-24, 1407:15-22, 1410:9-24, 1415:15-21, 1433:19-1434:19.

Second, the Rule removes the limitations periods for borrower-defense claims and applies the new standards to all loans, past and future. For example, for loans disbursed on or after July 1, 2020, the 2019 regulations generally give a borrower three years from the last date of attendance at the school to bring a claim. 34 C.F.R. § 685.206(e)(6)(i) (July 1, 2020). The Rule now allows a borrower to bring a claim at any time, regardless of when the loan was disbursed.

Furthermore, the Rule extends the limitations period for recoupment actions for recent loans from three to six years (and removes the limitations period altogether in some circumstances). *Compare* 34 C.F.R. § 685.409(c) *with* 34 C.F.R. § 685.206(e)(6)(i) (July 1, 2020). Even apart from defending against recoupment liability, a school may still be called on to defend its reputation (which is essential to ongoing operations) in a borrower-defense adjudication concerning much older loans. The district court received evidence that the removal of the borrower-defense limitations periods will impose upon schools the costs of redesigning recordkeeping systems for indefinite retention. *See* ROA.415 ¶ 30, 428 ¶ 16(d), 1410:9-24, 1415:15-21.

Third, the Rule's new standards have already caused CCST members to devote higher-than-normal resources to staff training. ECPI University, for example, has "significantly ramped up" its training by "a magnitude of … two to three times." ROA.1408:8-9. Its roughly 60 compliance employees "are being and

will need to be further trained" on the new regulations. ROA.428 ¶ 17. And its 95 employees who help students obtain Direct Loans, as well as more than 100 staff responsible for recruiting and marketing, "are being and will need to be constantly trained" as well. ROA.429 ¶¶ 18, 19; *see also* ROA.421-22 ¶¶ 20-21, 427-428 ¶ 16, 1396:1-1397:12.

Once the Rule goes into effect, ECPI will also need to hire a new staff member to assist with compliance. ROA.1406:25-1407:9. CCST itself has already spent about 300 staff hours working on issues raised by the Rule, ROA.415 ¶ 27, and will need to contract with third-party training providers to help its members comply with the Rule's new requirements, ROA.416 ¶ 32.

None of these costs is speculative or de minimis.

2. The district court committed at least two errors with respect to CCST's evidence of compliance costs.

First, the court appeared to assume that continuing compliance costs do not qualify as irreparable harm if they began to materialize before the preliminary-injunction motion was filed. Despite citing evidence that CCST and ECPI University are continuing to incur costs resulting from the Rule, ROA.1368, the court concluded that "[c]ompliance costs that have already been incurred in anticipation of the Rule cannot form the basis for injunctive relief," *id.*, and that only "costs that will arise starting on July 1" are worth crediting, *id.*

This was pure legal error. Irreparable harms can be "future *or continuing*." *Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014). And for good reason. Conscientious parties should take anticipatory measures to comply in good faith with new regulations, even as they challenge those regulations in court. If anything, evidence that a harm has already begun to materialize shows that such harm is not speculative.

The district court did not question the veracity of CCST's ample evidence of continuing costs. For example, CCST's chairperson attested that "both CCST and its member schools have already expended and *continue to expend* significant resources in anticipation of the Final Rule's effective date." ROA.413; *see also* ROA.1368. Similarly, "ECPI has already undertaken and c*ontinues to undertake* significant efforts to comply with the Rule's requirements," ROA.427-28; that "staff members are being and *will need to be* constantly trained," ROA.429, and that "the costs and burdens ... associated with the aforementioned activities *will only increase* further with incredible urgency if the Final Rule is permitted to go into effect," *id.* To the extent the district court simply overlooked evidence of ongoing costs, that, too, was reversible error. *See Rest. L. Ctr.*, 66 F.4th at 600.

Second, the district court abused its discretion by overlooking concrete evidence of continuing and future harms that were clearly more than de minimis. The court found that, "[t]o the extent CCST references costs that will arise starting

on July 1, it provides only nebulous and conclusory descriptions," ROA.1368, faulting CCST for not "attempting to quantify" those costs "or tie them to specific requirements within the Rule," ROA.1370. As a result, the court concluded that "CCST has not clearly shown that its projected compliance costs are 'more than an unfounded fear' or 'more than de minimis,' which precludes a finding of irreparable harm." ROA.1371 (quoting *Louisiana v. Biden*, 55 F.4th 1017, 1034-35 (5th Cir. 2022)).

To start, the district court failed to credit CCST's evidence of concrete future costs, such as ECPI University's need to hire one additional staff member to assist with compliance after the Rule's effective date. ROA.1406:25-1407:9; *see Rest. L. Ctr.*, 66 F.4th at 599 (the need to hire additional managers to ensure compliance was an irreparable harm). CCST was not required to "convert each allegation of harm into a specific dollar amount." *Rest. L. Ctr.*, 66 F.4th at 600. Rather, all CCST had to show was that harms would be "more than de minimis." *Id.* (citation omitted). The evidence before the court—the veracity of which the court did not question—clearly exceeded that threshold.

The district court held CCST to a higher standard than this Court's precedents demand. In distinguishing this Court's often-repeated holding that "[c]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs," the district court noted that

Texas v. EPA—which CCST had cited for that proposition—involved much larger costs than the compliance costs asserted here. *See* ROA.1370 (citing *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) ($2 billion in compliance costs)).

But compliance costs need not be of significant magnitude to justify a preliminary injunction—they need only be "more than de minimis." *Rest. L. Ctr.*, 66 F.4th at 600. Unlawful regulations "almost *always*" lead to irreparable harms not because compliance costs are almost always large, but because they are almost always unrecoverable. *Id.* at 597. Indeed, this Court has reaffirmed that observation in other cases involving much smaller asserted harms from a regulation. *See Rest. L. Ctr.*, 66 F.4th at 597, 599 (asserted harms were 8 or 10 hours of additional staff time per week).

The district court's conclusion that CCST failed to meet its burden with respect to irreparable compliance costs was premised on legal errors and an unreasonable or incomplete assessment of credible, uncontradicted evidence. It should be reversed.

B. Constrained Operations and Foregone Opportunities

1. The Rule's changes to the Department's closed-school-discharge regulations "will increase the number of borrowers who receive forgiveness." 87 Fed. Reg. at 65962. This will, in turn, dramatically increase the liability that a school will face for closing a location—particularly in light of the Department's

belief that "[i]t is a statutory requirement" that the Department seek recoupment for closed-school discharges. 87 Fed. Reg. at 65968.

As part of that expanded liability, the Rule introduces a new functional prohibition against terminating or even relocating programs in which a majority of a location's students are enrolled. *See* 34 C.F.R. § 685.214(a)(2)(i). Doing so could dramatically expand the number of students entitled to automatic discharges—for which the school would be liable—should the location close at some point in the future. At the preliminary-injunction hearing, Mark Dreyfus, President of ECPI University, testified that this change had constrained ECPI's ability to consolidate campuses in Richmond, Virginia.[5] ROA.1399:4-1400:2.

Increasing the cost of closing a location necessarily increases the risk of opening a new one. Each school location faces the possibility of closure due to economic downturns, changes in the local job market, or shifts in student demand, among other causes. Indeed, the Department has designated more than 10,000 locations as having closed since 2010 (with fewer than 6,200 schools currently participating in Title IV).[6] The Rule's increases to schools' total liability risk, of

[5] While ECPI University's San Antonio campus is a member of CCST, ECPI University is a single entity and the San Antonio campus is not a legally separate person. ROA.1485:13-20. ECPI University's interests are represented by CCST in this litigation, and an injury to ECPI University—through any of its campuses—thus injures a CCST member.

[6] *See* U.S. Dep't of Educ., Federal Student Aid, *Closed School Search Page* at rows 19532-44, https://www2.ed.gov/offices/OSFAP/PEPS/docs/

which closed-school-discharges are a part, have also caused ECPI University to scuttle plans to open a location in Dallas, Texas. *See* ROA.1397:21-1398:13.

2. The district court incorrectly concluded that CCST had not made a showing of likely irreparable harm from the Rule's closed-school-discharge provisions. ROA.1365-67. In that court's view, "CCST does not allege that any member school has closed or plans to close," and any liability is nonetheless speculative because it further requires that the Department "prevail[] in an administrative proceeding, after having granted relief to eligible borrowers." ROA.1366.

This conclusion was premised on two principal errors.

First, the court was factually incorrect that CCST had not shown that a member planned to close a location. Mark Dreyfus testified that ECPI University wanted to close a location in Richmond, Virginia, but had been constrained in its ability to do so by the Rule's closed-school-discharge provisions. ROA.1399:4-1400:2. The court either improperly disregarded or overlooked this testimony. Indeed, each CCST member school similarly faces harsher, mandatory liabilities

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closedschoolsearch.xlsx (Aug. 14, 2023) (listing the number of closure dates occurring between 2010 and 2022, inclusive); U.S. Dep't of Educ., *Federal Student Aid, 2023-24 Federal School Code List (August 2023)*, https://fsapartners.ed.gov/knowledge-center/library/federal-school-code-lists/2023-08-10/2023-24-federal-school-code-list-participating-schools-august-2023 (listing 6,154 Title IV schools).

for closing a location. The Rule affixes a contingent liability upon schools that causes present and irreparable injury by constraining current operating decisions to open and close locations or alter the school's program mix. Moreover, because the closed-school discharge rule (impermissibly) operates retroactively, it burdens CCST members that have closed locations.[7]

Second, the court inaccurately found that, even if a location were to close, the imposition of liability for that closure was nonetheless speculative and uncertain. ROA.1366-67. To the contrary, the Rule entitles many borrowers to discharges that are automatic. 34 C.F.R. § 685.214(c). And the Department has made clear that it believes it is required by statute to pursue recoupment for those discharges. 87 Fed. Reg. at 65968. Liability for a closed location under the Rule could scarcely be more certain.

These errors warrant reversal.

[7] This Court may take judicial notice of public Department records showing that CCST members have closed locations. Concorde Career Colleges has closed four Texas locations: a location in Arlington in 2014, a location in Dallas in 1993, and two Houston locations in 1992. *See* U.S. Dep't of Educ., Federal Student Aid, *Closed School Search Page*, https://www2.ed.gov/offices/OSFAP/PEPS/docs/closedschoolsearch.xlsx (Aug. 14, 2023). The Department's list also indicates several closures across the country by Pima Medical Institute, Vogue College of Cosmetology, Fortis College, Southern Careers Institute, and ECPI University, among others. *Id.*; *see also* ROA.103-04 (list of CCST's Title IV member schools).

C. Threats of Unlawful Adjudications

1. The Department has not disclosed the schools that are the targets of all pending borrower-defense claims. As CCST demonstrated to the district court, at least one CCST member will—with more than 99.999 percent probability, *see* ECF No. 12-1 at 20 n.1—be the subject of a borrower-defense claim. This is based on the Department's disclosure in *Sweet v. Cardona* that about 206,000 claims were filed against 65 percent of all Title IV schools in the few months between the *Sweet* settlement's execution and its approval. *See* ROA.435-36; *Sweet v. Cardona*, No. C 19-03674 WHA, 2023 WL 2213610, at *2 (N.D. Cal. Feb. 24, 2023). Thus, CCST has more than proven a "substantial threat" of irreparable injury to at least one member. *Rest. L. Ctr.*, 66 F.4th at 597.

Schools are effectively compelled to participate in borrower-defense proceedings. Under the Rule's new requirements, schools are required to respond to each claim (whether individual or group-based) within 90 days. 34 C.F.R. § 685.405(b)(2). If the school does not do so, the Department "will presume that the institution does not contest the borrower defense to repayment claim." *Id.* § 685.405(d).

The Department estimated that a school will incur an average of $17,611.02 in costs responding to each borrower-defense claim. 87 Fed. Reg. at 66030. Those costs alone establish irreparable injury. In addition to the fiscal costs, each school

that finds itself the subject of a borrower-defense claim must suffer the per-se harm of being subject to an ultra vires and unconstitutional proceeding without the protections of due process or the Seventh Amendment right to a jury trial. Violation of a litigant's "independent right to adjudication in a constitutionally proper forum" is injury, even "apart from any monetary injury sustained as a result." *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 579-80 (1985); *see also Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 5443 (5th Cir. 2008). And that injury cannot later be redressed in the course of this litigation. *Cf. Rest. L. Ctr.*, 66 F.4th at 597.

2. The district court made several errors with respect to this category of irreparable harm.

First, the district court adopted the incorrect legal premise that the only harms that a CCST member might suffer are recoupment liability or reputational harms from an adverse borrower-defense determination, which it deemed speculative because of the chain of events necessary for such outcomes. ROA.1363, 1365. But the district court ignored the irreparable injury recounted above from a school's *subjection* to an unlawful borrower-defense proceeding. And the unrecoverable $17,000+ economic cost of each institutional response is not de minimis. *See, e.g.*, *Rest. L. Ctr.*, 66 F.4th at 597, 599.

Second, the court made a clear factual error when it found that "CCST has not identified any pending or anticipated [borrower-defense] claims against its members." ROA.1363. In fact, CCST pointed to the 206,000 claims that the Department had reported in the *Sweet v. Cardona* litigation and the statistical near-certainty that at least one CCST member is the subject of at least one of those claims. *See* ROA.435-36, 718 n.4. This oversight was potentially the result of another factual error: the court's belief that only claims submitted "after July 1, 2023," would be subject to the Rule's procedures. ROA.1363. In reality, claims "pending with the Secretary on July 1, 2023"—including many if not all of the 206,000 claims identified in the *Sweet* litigation[8]—are also subject to the Rule's new procedures. 34 C.F.R. § 685.401(b). And the Rule's application to past institutional conduct, without temporal limitation, of its new strict-liability standards and relaxed procedures—with the promise of full debt discharge—guarantees that there will be an influx of new borrower-defense claims that schools will obliged to defend if the Rule is allowed to go into effect.

In short, there is a substantial threat that at least one CCST member will be the subject of at least one borrower-defense claim, which will require it to respond

[8] Under the terms of the *Sweet* settlement, the Department is to apply the 2016 "standards" to those claims. Settlement Agreement at 11, *Sweet v. Cardona*, No. C 19-03674 WHA (N.D. Cal. June 22, 2022), ECF No. 246-1. But the Department presumably will use the procedures that are in effect when the claims are ultimately adjudicated.

in an unlawful forum and expend a Department-estimated $17,611.02 to avoid conceding fault—a cost that cannot be recovered through this litigation. The district court abused its discretion by failing to find irreparable harm from compelled participation in borrower-defense proceedings.

II. This Court Should Direct the District Court to Postpone the Effective Date of the Rule Until Final Judgment.

If the district court had properly recognized the irreparable injury to CCST and its members, it should have applied the sliding-scale approach defined in this Court's precedents, wherein a strong showing on one equitable factor may reduce the showing necessary on others. *See Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975). The district court abused its discretion by failing to undertake the proper sliding-scale analysis and to postpone the Rule's effective date.

Based on the record, this Court should direct the district court to postpone the Rule's effective date. The APA vests the power of postponement equally in an appellate court and a reviewing court of original jurisdiction. *See* 5 U.S.C. § 705 ("the court to which a case may be taken on appeal … may issue all necessary and appropriate process to postpone the effective date of an agency action"). Even in ordinary interlocutory appeals, a court of appeals may direct entry of a preliminary injunction where only one conclusion is possible. *See La. Env't Soc'y v. Coleman*, 537 F.2d 79, 83 (5th Cir. 1976); *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 712 (3rd Cir. 2004) (citation omitted) ("Although a district court's application of

an incorrect legal standard 'would normally result in a remand, we need not remand' if application of the correct standard could support only one conclusion."); *Nat. Res. Def. Council v. Callaway*, 524 F.2d 79, 95 (2nd Cir. 1975) (directing entry of preliminary injunction where movant had made "a clear case on the merits" and established irreparable injury); *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 622 (D.C. Cir. 1980) (directing entry of preliminary injunction "in light of [the court's] evaluation of the merits"); 11A Charles Alan Wright et al., Fed. Prac. & Proc. § 2962 (3d ed. Apr. 2023 update) ("[I]n some instances the court of appeals may order the lower court to grant the injunction."). Because CCST's likelihood of success is overwhelming, and the balancing of equitable factors favor CCST, this Court should postpone the effective date of the Rule.

A. CCST Has a Strong Likelihood of Succeeding on the Merits.

1. Section 455(h) Does Not Authorize the Department to Define Borrower-Defense "Claims" Against the United States or Recoupment Actions Against Schools.

Section 455(h) of the HEA is limited in scope and plain in meaning. It provides that

> the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may *assert as a defense* to repayment of a loan ... except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part [the Direct Loan Program], an

> amount in excess of the amount such borrower has repaid on such loan.

20 U.S.C. § 1087e(h). The plain meaning of "defense" does not encompass an affirmative "claim." Congress commonly distinguishes between the assertion of claims and defenses. *See, e.g.*, 15 U.S.C. §§ 1641(d)(1), 1666i(b).

Indeed, the Department so interpreted Section 455(h) shortly after its enactment. In its initial rulemaking, the Department declared that, if the Secretary or other authorized person brings "an action" for repayment, the borrower "may assert as a defense" an institutional act or omission specified in Department regulations. 59 Fed. Reg. 61664, 61696 (Dec. 1, 1994). Such a "defense" would be asserted in existing collection proceedings: "*In any proceeding to collect on a Direct Loan,* the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law." *Id.* (setting out 34 C.F.R. § 685.206(c)). The Department commented that "the regulations identify *formal proceedings* in which borrowers may raise the acts or omissions of the school as a defense against collection of the loan," 59 Fed. Reg. at 61671 , including tax-refund-offset, wage-garnishment, salary-offset, and credit-bureau-reporting proceedings. *Id*. at 61696.

The Rule, by contrast, prescribes an elaborate system for the adjudication of "borrower defense claim[s]," *see* 34 C.F.R. § 685.406(a), and indeed allows such

claims to be brought and decided "at any time" (without any limitations period), *id.* § 685.401(b).

The Department's action exceeds its statutory authority. In issuing an injunction pending appeal, this Court relied on *Chamber of Commerce v. Department of Labor*, 885 F.3d 360, 384 (5th Cir. 2018), *judgment entered sub. nom. Chamber of Commerce of Am. v. U.S. Dep't of Labor*, No. 17-10238, 2018 WL 3301737 (5th Cir. June 21, 2018). *See* ECF No. 42-1, at 1-2. In *Chamber*, this Court held that "[o]nly Congress may create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates." 885 F.3d at 384. In Section 455(h), Congress authorized only the specification of defenses, not affirmative claims, and nowhere authorized recoupment actions against schools. Thus, the borrower-defense regulations are ultra vires.

2. Congress Did Not Authorize the Department to Adjudicate Borrower-Defense or Recoupment Claims.

Even if Section 455(h) authorized the creation of oxymoronic borrower-defense "claims," nothing in the statute authorizes the Department to adjudicate such claims. Borrowers have judicial fora for "any claim against the United States founded ... upon ... any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1); *see also id.* § 1346(a)(2); *cf.* 87 Fed. Reg. at 65923 ("the Department is the party against which borrowers assert a defense to repayment"). Indeed, Section 455(h) contemplates

that defenses may be asserted "in any *action* arising from or relating to a loan made under this part." 20 U.S.C. § 1087e(h). An "action" is a judicial proceeding. *See Action*, *Black's Law Dictionary* (11th ed. 2019).

The Department cannot adjudicate claims without congressional authorization. The judicial power of the United States is vested in federal courts, U.S. Const. art III, § 1, but Congress may assign to administrative tribunals the adjudication of "public rights"—namely, "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority." *Stern v. Marshall*, 564 U.S. 462, 490 (2011). But Congress alone "may or may not bring [public rights] within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855); *see also Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 452, 460–61 (1977). "Agencies have only those powers given to them by Congress," *West Virginia v. EPA*, 142 S.Ct. 2587, 2609 (2022), and Congress must *explicitly* grant the power of adjudication to agencies, *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C. Cir. 1987). The courts have repeatedly denied agencies adjudicatory powers not expressly conferred by Congress. *See*, *e.g.*, *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 273-75 (1996); *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*,

489 U.S. 561, 572-74 (1989); *Equitable Equip. Co. v. Director, Off. of Worker's Comp. Programs,* 191 F.3d 630, 632-33 (5th Cir. 1999). The power to make rules does not subsume the power to adjudicate violations of those rules. *RLC Indus. Co. v. CIR*, 58 F.3d 413, 417-18 (9th Cir. 1995). Section 455(h) grants the Department only rulemaking power, not adjudicatory power.

Furthermore, the Department's adjudication of state-law claims (including breach of contract), *see* 34 C.F.R. §§ 685.401(b)(3), 685.407(a)(1)-(2), which are not federal public rights, independently violates both Article III and the Seventh Amendment. *See Stern v. Marshall*, 564 U.S. at 490-91; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-52 (1989).

Congress also has not waived sovereign immunity as to any borrower-defense claims. The Rule purports to authorize administrative adjudication of claims for financial relief against the United States. *See* 87 Fed. Reg. at 65910 (borrower-defense claims assert rights against government, not schools); *id.* at 65941, 65945. Moreover, the Department has characterized discharges as equivalent to rescission and restitution claims, 87 Fed. Reg. at 65914, which are subject to sovereign immunity, *Edelman v. Jordan*, 415 U.S. 651, 668-69 (1974). Because sovereign immunity applies to administrative adjudication, *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760-61 (2002), congressional

authorization must be not only express but unequivocal, *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 37 (1992). Such authorization is absent here.

The Department claims adjudicatory authority because Congress has granted it rulemaking authority to "carry out functions otherwise vested in the Secretary," 20 U.S.C. § 1221e-3, and to "manage the functions of the Secretary or the Department," *id.* § 3474; *see also* 87 Fed. Reg. at 65910. Generalized rulemaking grants do not constitute the express authorization required for public-rights adjudications, much less waivers of sovereign immunity. Regardless, those provisions are inapplicable because Congress did not vest the Secretary with the "functions" of adjudicating borrower defenses to repayment. *See Contender Farms, LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 273 (5th Cir. 2015) (such provisions do not "validate any rule" the agency wants, but only ones that "carry out the other provisions" of the Act); *Global Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1295-96 (5th Cir. 1983). The adjudication of borrower-defense claims is beyond the Department's statutory authority and violates the separation of powers.

For the same reasons, the Department lacks authority to adjudicate its own recoupment claims against schools. While schools accept financial liability for participation-agreement breaches, 20 U.S.C. § 1087d(a)(3), this provision does not extend to borrower discharges or authorize the Department to adjudicate alleged breaches. The Department has no independent statutory recoupment authority, nor

can it rely on asserted common-law rights to recover damages for breach of fiduciary duty. 81 Fed. Reg. at 75931-32. Schools are not agents or fiduciaries of the Department in recruiting students or in most communications. Regardless, Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." *Murray's Lessee*, 59 U.S. at 284. And the Seventh Amendment guarantees a jury trial in common-law actions by the Government. *Jarkesy v. SEC*, 34 F.4th 446, 451 (5th Cir. 2022), *cert. granted*, No. 22-859, 2023 WL 4278448 (U.S. June 30, 2023).

3. The Major Questions Doctrine Militates Against Finding Statutory Authority for the Rule.

Not only is there no textual hook for the Department's novel adjudicatory and liability-shifting scheme, but one would not expect Congress to grant far-reaching authority on such a slender statutory basis. The fundamental inquiry into agency authority is "whether Congress in fact meant to confer the power the agency has asserted." *West Virginia*, 142 S.Ct. at 2608. Under the major questions doctrine, an act of vast "economic and political significance" must be viewed in light of the "history and the breadth of the authority ... asserted." *Id.* Delegations of extraordinary powers should not be gleaned readily from "ancillary" and "rarely used" statutory provisions. *Id.* at 2610-11.

Section 455(h) is a minor provision of the HEA that, in its first two decades of existence, had rarely been invoked. 87 Fed. Reg. at 65979 ("[T]he [borrower

defense] process ... was rarely used prior to 2015."). The Department cannot refashion its modest authority to define borrower defenses into a wellspring of power to achieve massive loan forgiveness, a controversial maneuver that may impose billions of dollars of burden on the public fisc and existential liability on postsecondary schools, which are vital to the country's economic future. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S.Ct. 2485, 2489 (2021) (holding that an economic impact of $50 billion had vast significance). As the Department in the last administration recognized when it disavowed the power to cancel loan debt *en masse*, "Congress does not impliedly delegate a policy decision of massive economic and political magnitude—as blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, or the material modification of the repayment terms or amounts thereof, surely would be—to an administrative agency." U.S. Dep't of Educ., Off. of the Gen. Couns., Memorandum to the Secretary Re: Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority, at 2 (Jan. 12, 2021). Nor did Congress delegate in obscure fashion the broad debt-cancellation and liability-shifting powers assumed in the Rule.

4. The Department's Strict-Liability and Full-Discharge Standards Are Unlawful.

First, Section 455(h) requires the Department to "*specify* in regulations *which acts or omissions* of an institution of higher education" can be asserted as

borrower defenses. 20 U.S.C. § 1087e(h). The Department must define acts or omissions with enough specificity for schools to conform their conduct.

The Rule does not do that. For instance, it prohibits "[a]ggressive and deceptive recruitment tactics or conduct," but it does not define that term, listing only non-exclusive examples. *See* 34 C.F.R. § 668.501. It does the same for actionable omissions of information. *Id.* § 668.75. Later defining these terms through guidance documents or adjudicatory precedent is not enough—acts or omissions must be set out "*in regulations*." 20 U.S.C. § 1087e(h).

Second, the APA requires the Department to reach reasonable and reasonably explained conclusions. *See* 5 U.S.C. § 706(2)(A); *FCC v. Prometheus Radio Project*, 141 S.Ct. 1150, 1158 (2021). The Department did not meet that requirement with respect to the Rule's extraordinary strict-liability standard for misrepresentations and omissions.

The Rule provides that a substantial misrepresentation by any school representative or contractor in connection with a borrower's attendance or loan decision is a defense to repayment. 34 C.F.R. § 685.401(a), (b)(1). The Rule defines a misrepresentation as "[a]ny false, erroneous or misleading statement," even if neither negligent nor intended to deceive. *Id.* § 668.71(c). Similarly, an innocent omission of information that "a reasonable person would have considered … in making a decision to enroll or continue attendance at the institution," *id.*

§ 668.75, affords a borrower a defense to repayment of the loan. These are strict-liability rules, with no required showing of intent or culpability.

The Department does not reasonably justify these standards. It claims that "[r]equiring intent would place too great a burden on an individual borrower." 87 Fed. Reg. at 65921. But intent is a common element of proof throughout the law, provable through circumstantial evidence. *See Crowe v. Henry*, 115 F.3d 294, 297 (5th Cir. 1994). The Department did not explain how relieving borrowers of this conventional burden could rationally justify the dramatically increased liability faced by schools whose employees or contractors make innocent mistakes.

The Department's second rationale is that, "if the action resulted in detriment to the borrower that warrants relief," knowledge or intent should be irrelevant. *Id.* But that rationale is unavailing because in most circumstances the Department also does not require that the borrower prove injury or detriment. The Department estimates that 30 to 80 percent of borrower-defense discharge volume against proprietary schools will arise from the group-claim process, 87 Fed. Reg. at 66016—in which injury is presumed, *see infra* § II.A.5.

The Department compounds the effects of its strict-liability regime by unlawfully discharging the borrower's *entire student debt*, even if there is no causal nexus between the act or omission of the school and the incurrence of that debt. *See* 34 C.F.R. § 685.401(a); 87 Fed. Reg. at 65916 (explaining that borrowers can

receive discharge of their entire debt by consolidating prior loans *after* a borrower-defense adjudication). As an initial matter, the Department's full-discharge rule is ultra vires. Nothing in Section 455(h) grants the Department the power to prescribe rules for assessing discharge amounts, which should be left to the appropriate tribunal.

Furthermore, as a matter of plain meaning, a school's act or omission can give rise to a "defense to repayment" only if it precedes and causes the repayment obligation. The Department has acknowledged that a borrower defense requires proof of injury and causation, 87 Fed. Reg. at 65908, but the full-discharge rule abrogates the causation requirement because it provides for the discharge even of an earlier loan. If, for example, there is a misrepresentation concerning the provision of educational services to a student in their senior year, there is no reason to discharge the entirety of that student's debt from the prior three years. Similarly, if the misrepresentation only concerned certain financial charges, *see* 34 C.F.R. § 668.73, then the injury is the overpayment, not the entirety of the debt. Because the Rule presumes a school's liability for a discharged loan and does not provide for partial discharges, *see* 34 C.F.R. §§ 668.125(e)(2), 685.401(a)-(b), this strict-liability standard dramatically and unlawfully increases schools' liability risks.

5. The Rule's Procedures and Substantive Presumptions Are Unlawful.

The Department has recognized that a "borrower defense to repayment" requires an act or omission of a school relating to enrollment or borrowing "that caused the borrower detriment warranting relief in the form of" full discharge of the student's debt and repayment of amounts already repaid. 34 C.F.R. § 685.401(a). Even though injury is the crux of any Section 455(h) defense, the Department has created unwarranted, far-reaching evidentiary presumptions of injury to favor borrowers that will affect most claims.

For any group claim "for which the Department official determines that there may be a borrower defense under § 685.401(b), there is a rebuttable presumption that the act or omission giving rise to the borrower defense affected each member of the group *in deciding to attend, or continue attending*, the institution, and that such reliance was reasonable." *Id.* § 685.406(b)(2); *see also id.* § 685.401(e) (presuming that detriment to a borrower who attended a closed school warrants full relief).

The Department has no statutory authority to create evidentiary presumptions. Even if it did, a presumption's "validity depends as a general rule upon a rational nexus between the proven facts and the presumed facts." *United Scenic Artists v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985). "Where such a nexus is lacking, the presumption is invalid." *Id.* Thus, "[a] presumption is

normally appropriate when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact ... until the adversary disproves it." *Chemical Mfrs. Ass'n v. Dep't of Transp.*, 105 F.3d 702, 705 (D.C. Cir. 1997) (cleaned up).

The Rule does not remotely meet that requirement. It is unreasonable to presume that *every* borrower would know about *any* given misrepresentation, much less that they would have chosen not to attend (or to continue attending) a school as a result. Attendance decisions are highly fact-specific. Many actionable misrepresentations—such as a faculty member's qualifications, 34 C.F.R. § 668.72(h), or whether a particular charge is customary, *id.* § 668.73(b)—are too picayune to justify such a universal presumption.

The Rule declares that the presumptions are rebuttable, but that is a mirage. The presumptions are rebuttable in name but irrebuttable in practice. The presumed facts concern matters, such as reliance and effects on attendance decisions, that are in the sole possession of the borrower. Yet at no time is a school afforded any discovery or witness-examination rights to be able to rebut the presumption. *See* 34 C.F.R. § 685.402-406, 668.125. Under the Rule, the Department will not even share with the school the related evidence in *the Department's* possession. 87 Fed. Reg. at 65912.

These unreasonable presumptions create an unreasonably high likelihood of false positives, which exacerbates the Rule's strict-liability regime and its policy of issuing only full discharges. Given the high potential liability and the likely errors caused by applying the presumptions, the Rule violates due process by denying the traditional safeguards of administrative adjudication. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Matters requiring individualized proof cannot be presumed or even determined collectively. *See Western Elec. Co, v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008), *partially abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

The Rule's presumptions and group-claim procedures are not designed to further the truth-seeking process. While Congress forbids judicial procedural rules that affect substantive rights, 28 U.S.C. § 2072, the Department has no such compunction. The group-claim provisions target proprietary schools, who are anticipated to face 75 percent of group claims. *See* 87 Fed. Reg. at 65993. The Department remarkably has declared that the new standards and group process in tandem will have the "benefit" of driving enrollment away from proprietary schools. *Id.* at 65996. These are not valid evidentiary presumptions and procedural rules, and they are impermissible policy mechanisms designed to maximize loan

forgiveness for borrowers at the expense of proprietary schools, even in the absence of any evidence of specific culpability or borrower injury.

6. The Rule's Closed-School-Discharge Provisions Are Unlawful.

The HEA authorizes a loan discharge if "the student borrower, or the student on whose behalf a parent borrowed, is unable to complete the program in which such student is enrolled *due to the closure of the institution*." 20 U.S.C. § 1087(c)(1). The Department has broadly defined a "school" as the "main campus or any location or branch of the main campus." 34 C.F.R. § 685.214(a)(2)(ii).

Under the Rule, the borrower qualifies for a discharge if the student was unable to complete the program or withdrew from the program up to 180 days before its "closure date." *Id.* § 685.214(d). But the Rule redefines the closure date as "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," if it precedes actual closure. *Id.* § 685.214(a)(2)(i).

The Rule flatly violates the statute, which requires that closure must be the reason the student was unable to complete the program. 20 U.S.C. § 1087(c)(1). "Closed" is an unambiguous term that plainly means "not open." *See, e.g.*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary /closed; Cambridge Dictionary, https://dictionary.cambridge.org/us/ dictionary/english/closed. But a school that is still open and providing education—

even if it is no longer doing so in the programs in which most students were enrolled—is not "closed," and thus any inability of students to complete their program is not presumptively "due to the closure of the institution" and not a basis for a statutory closed-school discharge. 20 U.S.C. § 1087(c)(1). By redefining the closure date to a time *before* actual closure, the Rule dramatically and unlawfully expands a school's potential liability for discharges if the school eventually closes. It also deprives schools of the flexibility to reduce programming at certain locations by appending high liability risks to such an act.

Further, it is arbitrary and capricious to treat any withdrawal that took place up to 180 days before this newly minted "closure date" as having been caused by the location's closure. The Rule makes no distinction between borrowers who may have left their schools for other reasons, such as family or job responsibilities, financial pressures, or a simple change of mind. Thus, the Rule arbitrarily allows discharges even where there is no causal connection between a student's decision to withdraw and a location's closure. The Department's attempt to rewrite the term "closure," and to expand discharges and discharge liability beyond that contemplated by the statute, is ultra vires. "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 325 (2014).

Similarly, an automatic discharge for all borrowers one year after the closure date if the student does not accept a "program at another branch or location of the school or through a teach-out agreement" at another comparable school, or one year after their last date of attendance at a continuation program, 34 CFR § 685.214(c)—all without proof that closure actually caused students not to complete their program—violates the statute. And the application of these new liability rules to past closures violates the rule against retroactive rulemaking. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988).

B. The Balance of Harms and the Public Interest Favor a Preliminary Injunction.

The balance-of-harms and public-interest factors merge when the government opposes an injunction. *See Nken v. Holder*, 556 U.S. 418, 435 (2009); *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 353 (5th Cir. 2022).

The Department has never shown how it or the public would be harmed by maintaining the status quo while this case is decided on the merits. Nor has the Department attempted to demonstrate why, should it ultimately prevail, it could not achieve the Rule's asserted benefits after final judgment. *Cf. Weingarten Realty Invs. v. Miller*, 661 F.3d 904, 913 (5th Cir. 2011).

By contrast, CCST's members will continue to incur costs and suffer other harms that cannot later be redressed. Their students are likely to bear the brunt of at least some of these costs. As the evidence shows, a significant increase in costs and

operational constraints could prevent schools from devoting resources in ways that benefit students, such as upgrading facilities. *See* ROA.1483:7-1484:21. And if a school is put to the "Hobson's choice" of incurring these costs and burdens or else leaving Title IV, the interests of potential students who rely on the availability of Direct Loans "would be seriously compromised." *See United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 40 (5th Cir. 1983) (similar holding with respect to a hospital's choice whether to give up Medicare and Medicaid funding).

C. Postponement of the Effective Date Should Not Be Party-Restricted.

A reviewing court may "issue all necessary and appropriate process to postpone the effective date of an agency action" pending review. 5 U.S.C. § 705. That relief should not be party-restricted. A postponement of a rule's effective date is effectively a stay of the rule. It differs from a typical injunction because it acts on the agency order, not on the party; whereas an injunction "directs the conduct of a party, and does so with the backing of its full coercive powers," a stay "postpon[es] some portion of the proceeding" or "temporarily divest[s] an order of enforceability" while review proceeds. *Nken v. Holder*, 556 U.S. 418, 428 (2009); *All. for Hippocratic Med. v. FDA*, No. 23-10362, 2023 WL 2913725, at *4 (5th Cir. Apr. 12, 2023) (declining in part to stay nationwide postponement of effective date of FDA ruling under § 705). "An APA stay issued under § 705 presumably has automatic, nationwide applicability" and does not create conflicting obligations

like a nationwide injunction. Frank Chang, Essay, *The Administrative Procedure Act's Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions*, 85 Geo. Wash. L. Rev. 1529, 1549 (2017). The Supreme Court did not limit its stay of the Clean Power Plan to the plaintiff in *West Virginia v. EPA*, 577 U.S. 1126 (2016), nor did this Court so limit the stay of OSHA's vaccine mandate, *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021); *see also In re EPA*, 803 F.3d 804 (6th Cir. 2015) (nationwide stay of Clean Water Rule), *vacated after decision by In re U.S. Dep't of Def.*, 713 F. App'x 489 (6th Cir. 2018).

Furthermore, the scope of preliminary relief under § 705 should match the scope of ultimate relief under § 706, which is not party-restricted. The Rule's flaws invalidate it as to all Title IV participants. Section 706 mandates that if CCST ultimately prevails, the district court "shall set aside" the Rule, without need for a permanent injunction requiring proof of the plaintiff's irreparable injury. 5 U.S.C. § 706; *Texas v. United States*, 40 F.4th 205, 219-220 (5th Cir. 2022) (distinguishing vacatur from injunction). "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C. Cir. 1989); *see also* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1129-85 (2020). None of the problems of nationwide injunctions requiring differential treatment of persons, or

constraint on executive discretion, is implicated by mere postponement of a rule's effective date. Regardless, the Department cannot protest nationwide relief when it uses the Rule to establish a uniform federal standard across the country. *Cf. Feds for Med. Freedom v. Biden*, 63 F.4th 366, 388 (5th Cir. 2023) (en banc).

Party-limited relief would undermine judicial review. It would be absurd and chaotic if, when relief under § 705 is warranted, every property owner aggrieved by a wetlands regulation; every small business or worker aggrieved by an OSHA regulation; or every veteran aggrieved by a benefits regulation would have to seek the same temporary relief from unlawful rules in individual or representative actions. Moreover, if some affected persons did not seek (or were denied) temporary relief, the administrative agency would face the chaos of determining when the rule is effective as to each person against whom it might be enforced. Accordingly, when it granted a temporary injunction postponing the Rule's effective date pending appeal, this Court properly did not restrict relief to CCST or its members. This Court should instruct the district court that neither preliminary relief nor any ultimate relief it might order should be so restricted.

CONCLUSION

For the reasons stated above and in its prior briefing to the Court, ECF Nos. 12 & 34, CCST respectfully asks that the Court (1) reverse the district court's decision; (2) instruct the district court to postpone the effective date of the

borrower-defense and closed-school-discharge provisions of the Rule pending final judgment, without limitation to specific parties; and (3) maintain this Court's temporary stay until the district court enters a subsequent order on remand.

Dated: September 5, 2023

Respectfully submitted,

/s/ Stephen B. Kinnaird

Stephen B. Kinnaird
Allyson B. Baker
Michael Murray
Sameer P. Sheikh
Tor Tarantola
PAUL HASTINGS LLP
2050 M Street NW
Washington, DC 20036
stephenkinnaird@paulhastings.com
(202) 551-1700

Philip Vickers
Katherine Hancock
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
pvickers@canteyhanger.com
(817) 877-2800

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on September 5, 2023, I caused the foregoing to be filed via the Court's CM/ECF system and served by email on the following counsel for Defendants-Appellees:

Christine L. Coogle (christine.l.coogle@usdoj.gov)
Cody T. Knapp (cody.t.knapp@usdoj.gov)
R. Charlie Merritt (robert.c.merritt@usdoj.gov)
U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street NW
Washington, DC 20005

Jennifer L. Utrecht (jennifer.l.utrecht@usdoj.gov)
U.S. Department of Justice
Civil Division
Appellate Staff
950 Pennsylvania Avenue NW
Room 7710
Washington, DC 20530

/s/ Stephen B. Kinnaird
Stephen B. Kinnaird
Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 12,992 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. Additionally, I certify that any required redactions have been made in compliance with 5th Cir. R. 25.2.13.

/s/ Stephen B. Kinnaird
Stephen B. Kinnaird
Attorney for Plaintiff-Appellant

Dated: September 5, 2023

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

APPELLANT'S RECORD EXCERPTS

Philip Vickers
Katherine Hancock
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
pvickers@canteyhanger.com
(817) 877-2800

Stephen B. Kinnaird
Allyson B. Baker
Michael Murray
Sameer P. Sheikh
Tor Tarantola
PAUL HASTINGS LLP
2050 M Street NW
Washington, DC 20036
stephenkinnaird@paulhastings.com
(202) 551-1700

Counsel for Plaintiff-Appellant

INDEX OF RECORD EXCERPTS

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Optional Contents

TAB 1

DH,INTAPP

U.S. District Court [LIVE]
Western District of Texas (Austin)
CIVIL DOCKET FOR CASE #: 1:23-cv-00433-RP

Career Colleges & Schools of Texas v. United States Department of Education et al
Assigned to: Judge Robert Pitman
Case in other court: USCA Fifth Circuit, 23-50489
Texas Northern, 4:23-cv-00206
Cause: 05:702 Administrative Procedure Act

Date Filed: 04/18/2023
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Plaintiff

Career Colleges & Schools of Texas represented by

Allyson B. Baker
Paul Hastings LLP
2050 M Street, N.W.
Washington, DC 20036
202-551-1700
Email: allysonbaker@paulhastings.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Meredith L. Boylan
Paul Hastings LLP
2050 M Street, N.W.
Washington, DC 20036
202-551-1831
Fax: 202-551-0331
Email: meredithboylan@paulhastings.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Michael Murray
Paul Hastings LLP
Paul Hastings LLP
2050 M Street NW
Washington, DC 20036
202-551-1730
Email: michaelmurray@paulhastings.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Philip Avery Vickers
Cantey Hanger LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102-3685
(817) 877-2849
Fax: (817) 877-2807
Email: pvickers@canteyhanger.com

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sameer P. Sheikh
Paul Hastings LLP
2050 M Street NW
Washington, DC 20037
202-551-1700
Email: sameersheikh@paulhastings.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Stephen Blake Kinnaird
Paul Hastings LLP
2050 M Street NW
Washington, DC 20036
202-551-1842
Fax: 202-551-1705
Email: stephenkinnaird@paulhastings.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Katherine R. Hancock
Cantey Hanger LLP
600 West 6th Street
Suite 300
Fort Worth, TX 76116
817-877-2800
Email: khancock@canteyhanger.com
ATTORNEY TO BE NOTICED

Tor Tarantola
Paul Hastings LLP
2050 M Street NW
Washington, DC 20036
202-551-1843
Email: tortarantola@paulhastings.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

V.

Defendant

United States Department of Education represented by **Cody T. Knapp**
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
(202) 514-5578
Email: cody.t.knapp@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Christine L. Coogle
U.S. Department of Justice
Federal Programs Branch, Civil Division
1100 L St. NW
Washington, DC 20005
202-880-0282
Email: christine.l.coogle@usdoj.gov
ATTORNEY TO BE NOTICED

Robert Charles Merritt
U.S. DOJ, Civil Divison, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
202-616-8098
Email: robert.c.merritt@usdoj.gov
ATTORNEY TO BE NOTICED

Defendant

Miguel Cardona
in his official capacity as the Secretary of Education

represented by

Cody T. Knapp
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Christine L. Coogle
(See above for address)
ATTORNEY TO BE NOTICED

Robert Charles Merritt
(See above for address)
ATTORNEY TO BE NOTICED

Amicus

Project on Predatory Student Lending
TERMINATED: 05/18/2023

represented by

Rebecca Clare Eisenbrey
Project on Predatory Student Lending
769 Centre Street
Jamaica Plain, MA 02130
617-322-2808
Email: reisenbrey@ppsl.org
TERMINATED: 05/18/2023
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Wendy Liu
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
202-588-1000
TERMINATED: 05/18/2023
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Public Citizen
TERMINATED: 05/18/2023

represented by **Rebecca Clare Eisenbrey**
(See above for address)
TERMINATED: 05/18/2023
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Wendy Liu
(See above for address)
TERMINATED: 05/18/2023
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
02/28/2023	1 (p.14)	COMPLAINT against All Defendants filed by Career Colleges & Schools of Texas. (Fee Paid - ATXNDC-13549972.) Clerk to issue summons(es). In each Notice of Electronic Filing, the judge assignment is indicated, and a link to the Judges Copy Requirements and Judge Specific Requirements is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Attachments: # 1 (p.14) Cover Sheet) (Vickers, Philip) Modified on 2/28/2023 (tjc). [Transferred from Texas Northern on 4/18/2023.] (Entered: 02/28/2023)
02/28/2023	2 (p.101)	CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Career Colleges & Schools of Texas. (Clerk QC note: Affiliate entry indicated). (Attachments: # 1 (p.14) Appendix to Certificate of Interested Parties) (Vickers, Philip) [Transferred from Texas Northern on 4/18/2023.] (Entered: 02/28/2023)
02/28/2023	3 (p.105)	New Case Notes: A filing fee has been paid. File to: Judge O Connor. Pursuant to Misc. Order 6, Plaintiff is provided the Notice of Right to Consent to Proceed Before A U.S. Magistrate Judge. Clerk to provide copy to plaintiff if not received electronically. Attorneys are further reminded that, if necessary, they must comply with Local Rule 83.10(a) within 14 days or risk the possible dismissal of this case without prejudice or without further notice. (tjc) [Transferred from Texas Northern on 4/18/2023.] (Entered: 02/28/2023)
02/28/2023	4 (p.107)	Summons issued as to Miguel Cardona, United States Department of Education, U.S. Attorney, and U.S. Attorney General. (tjc) [Transferred from Texas Northern on 4/18/2023.] (Entered: 02/28/2023)
02/28/2023	5 (p.119)	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number ATXNDC-13552310) filed by Career Colleges & Schools of Texas (Attachments: # 1 (p.14) Additional Page(s) Certificate of Good Standing)Attorney Sameer P Sheikh added to party Career Colleges & Schools of Texas(pty:pla) (Sheikh, Sameer) [Transferred from Texas Northern on 4/18/2023.] (Entered: 02/28/2023)

03/01/2023	6 (p.123)	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number ATXNDC-13554294) filed by Career Colleges & Schools of Texas (Attachments: # 1 (p.14) Additional Page(s) Certificate of Good Standing)Attorney Allyson B Baker added to party Career Colleges & Schools of Texas(pty:pla) (Baker, Allyson) [Transferred from Texas Northern on 4/18/2023.] (Entered: 03/01/2023)
03/01/2023	7 (p.127)	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number ATXNDC-13555355) filed by Career Colleges & Schools of Texas (Attachments: # 1 (p.14) Additional Page(s) Certificate of Good Standing)Attorney Michael Murray added to party Career Colleges & Schools of Texas(pty:pla) (Murray, Michael) [Transferred from Texas Northern on 4/18/2023.] (Entered: 03/01/2023)
03/08/2023	8 (p.131)	SUMMONS Returned Executed as to Miguel Cardona ; served on 2/28/2023; United States Department of Education ; served on 2/28/2023. (Hancock, Katherine) [Transferred from Texas Northern on 4/18/2023.] (Entered: 03/08/2023)
03/13/2023	9 (p.149)	Court Request for Recusal: Judge Reed C. O'Connor recused. Pursuant to instruction in Special Order 3-249, the Clerk has reassigned the case to Judge Mark Pittman for all further proceedings. Future filings should indicate the case number as: 4:23-cv-00206-P. (bcr) [Transferred from Texas Northern on 4/18/2023.] (Entered: 03/13/2023)
03/13/2023	10 (p.150)	New Case Notes: A filing fee has been paid. File to: Judge Pittman. Pursuant to Misc. Order 6, Plaintiff is provided the Notice of Right to Consent to Proceed Before A U.S. Magistrate Judge. Clerk to provide copy to plaintiff if not received electronically. Attorneys are further reminded that, if necessary, they must comply with Local Rule 83.10(a) within 14 days or risk the possible dismissal of this case without prejudice or without further notice. (bcr) [Transferred from Texas Northern on 4/18/2023.] (Entered: 03/13/2023)
03/17/2023	11 (p.152)	NOTICE of Attorney Appearance by Cody Taylor Knapp on behalf of Miguel Cardona, United States Department of Education. (Filer confirms contact info in ECF is current.) (Knapp, Cody) [Transferred from Texas Northern on 4/18/2023.] (Entered: 03/17/2023)
03/17/2023	12 (p.154)	MOTION to Dismiss *for Improper Venue*, MOTION to Transfer Case out of District/Division *to the District of Columbia or the Austin Division of the Western District of Texas* () filed by Miguel Cardona, United States Department of Education (Attachments: # 1 (p.14) Proposed Order)Attorney Cody Taylor Knapp added to party Miguel Cardona(pty:dft), Attorney Cody Taylor Knapp added to party United States Department of Education(pty:dft) (Knapp, Cody) [Transferred from Texas Northern on 4/18/2023.] (Entered: 03/17/2023)
03/17/2023	13 (p.158)	Brief/Memorandum in Support filed by Miguel Cardona, United States Department of Education re 12 (p.154) MOTION to Dismiss *for Improper Venue* MOTION to Transfer Case out of District/Division *to the District of Columbia or the Austin Division of the Western District of Texas* (Knapp, Cody) [Transferred from Texas Northern on 4/18/2023.] (Entered: 03/17/2023)
03/17/2023	14 (p.183)	Appendix in Support filed by Miguel Cardona, United States Department of Education re 12 (p.154) MOTION to Dismiss *for Improper Venue* MOTION to Transfer Case out of District/Division *to the District of Columbia or the Austin Division of the Western District of Texas* (Knapp, Cody) [Transferred from Texas

		Northern on 4/18/2023.] (Entered: 03/17/2023)
03/22/2023	15 (p.322)	SUMMONS Returned Executed as to All Defendants. (Hancock, Katherine) [Transferred from Texas Northern on 4/18/2023.] (Entered: 03/22/2023)
04/02/2023	16 (p.346)	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number ATXNDC-13632505) filed by Career Colleges & Schools of Texas (Attachments: # 1 (p.14) Exhibit(s) Certificate of Good Standing)Attorney Stephen Blake Kinnaird added to party Career Colleges & Schools of Texas(pty:pla) (Kinnaird, Stephen) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/02/2023)
04/03/2023	17	ELECTRONIC ORDER granting 16 (p.346) Application for Admission Pro Hac Vice of Stephen Kinnaird. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Mark Pittman on 4/3/2023) (rjh) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/03/2023)
04/03/2023	18 (p.350)	NOTICE of Attorney Appearance by Robert Charles Merritt on behalf of Miguel Cardona, United States Department of Education. (Filer confirms contact info in ECF is current.) (Merritt, Robert) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/03/2023)
04/04/2023	19	ELECTRONIC ORDER granting 5 (p.119) Application for Admission Pro Hac Vice of Sameer P. Sheikh. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Mark Pittman on 4/4/2023) (rjh) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/04/2023)
04/04/2023	20	ELECTRONIC ORDER granting 6 (p.123) Application for Admission Pro Hac Vice of Allyson B. Baker. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Mark Pittman on 4/4/2023) (rjh) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/04/2023)
04/04/2023	21	ELECTRONIC ORDER granting 7 (p.127) Application for Admission Pro Hac Vice of Michael Murray. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Mark Pittman on 4/4/2023) (rjh) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/04/2023)
04/04/2023	22 (p.351)	NOTICE of Attorney Appearance by Christine L. Coogle on behalf of Miguel Cardona, United States Department of Education. (Filer confirms contact info in ECF is current.) (Coogle, Christine) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/04/2023)
04/05/2023	23 (p.352)	MOTION for Injunction *Motion for Preliminary Injunction* filed by Career Colleges & Schools of Texas (Vickers, Philip) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/05/2023)
04/05/2023	24 (p.355)	Brief/Memorandum in Support filed by Career Colleges & Schools of Texas re 23 (p.352) MOTION for Injunction *Motion for Preliminary Injunction* (Vickers, Philip)

		[Transferred from Texas Northern on 4/18/2023.] (Entered: 04/05/2023)
04/05/2023	25 (p.387)	Appendix in Support filed by Career Colleges & Schools of Texas re 23 (p.352) MOTION for Injunction *Motion for Preliminary Injunction*, 24 (p.355) Brief/Memorandum in Support of Motion (Vickers, Philip) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/05/2023)
04/07/2023	26 (p.437)	RESPONSE filed by Career Colleges & Schools of Texas re: 12 (p.154) MOTION to Dismiss *for Improper Venue* MOTION to Transfer Case out of District/Division *to the District of Columbia or the Austin Division of the Western District of Texas* (Sheikh, Sameer) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/07/2023)
04/07/2023	27 (p.459)	Appendix in Support filed by Career Colleges & Schools of Texas re 26 (p.437) Response/Objection, *to Defendants' Motion to Dismiss or Transfer* (Sheikh, Sameer) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/07/2023)
04/10/2023	28 (p.476)	ORDER: Before the Court is Plaintiff's Response to Defendants' Motion to Dismiss for Improper Venue or to Transfer Out of District. ECF No. 26 (p.437) . The Court finds that an expedited reply from Defendants is necessary. Therefore, the Court ORDERS that on or before April 14, 2023, Defendants shall file their reply to Plaintiff's response. (Ordered by Judge Mark Pittman on 4/10/2023) (fba) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/10/2023)
04/11/2023	29 (p.477)	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number ATXNDC-13656716) filed by Career Colleges & Schools of Texas (Attachments: # 1 (p.14) Additional Page(s) Certificate of Good Standing)Attorney Tor Tarantola added to party Career Colleges & Schools of Texas(pty:pla) (Tarantola, Tor) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/11/2023)
04/12/2023	30	ELECTRONIC ORDER granting 29 (p.477) Application for Admission Pro Hac Vice of Tor Tarantola. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Mark Pittman on 4/12/2023) (rjh) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/12/2023)
04/14/2023	31 (p.481)	REPLY filed by Miguel Cardona, United States Department of Education re: 12 (p.154) MOTION to Dismiss *for Improper Venue* MOTION to Transfer Case out of District/Division *to the District of Columbia or the Austin Division of the Western District of Texas* (Knapp, Cody) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/14/2023)
04/17/2023	32 (p.494)	MOTION for Extension of Time to File Response/Reply to 23 (p.352) MOTION for Injunction *Motion for Preliminary Injunction* filed by Miguel Cardona, United States Department of Education (Attachments: # 1 (p.14) Proposed Order) (Knapp, Cody) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/17/2023)
04/17/2023	33 (p.502)	OPINION & ORDER: Before the Court is Defendants' Motion to Dismiss for Improper Venue or in the Alternative to Transfer. ECF No. 12 (p.154) . This Court GRANTS Defendants' motion in part and TRANSFERS this case to the Western District of Texas, Austin Division. (See order for specifics) (Ordered by Judge Mark Pittman on 4/17/2023) (fba) [Transferred from Texas Northern on 4/18/2023.] (Entered: 04/17/2023)

04/18/2023	34 (p.508)	Case electronically transferred in from Northern District of Texas-Fort Worth ; Case Number 4:23-cv-00206. (Entered: 04/18/2023)
04/18/2023		Case assigned to Judge Robert Pitman. CM WILL NOW REFLECT THE JUDGE INITIALS AS PART OF THE CASE NUMBER. PLEASE APPEND THESE JUDGE INITIALS TO THE CASE NUMBER ON EACH DOCUMENT THAT YOU FILE IN THIS CASE. (cr5) (Entered: 04/19/2023)
04/18/2023		If ordered by the court, all referrals and consents in this case will be assigned to Magistrate Judge Howell. (cr5) (Entered: 04/19/2023)
04/19/2023	35 (p.509)	Pro Hac Vice Letter to Allyson B. Baker, Meredith L. Boylan, Stephen B. Kinnaird, Michael Murray, Sameer P. Sheikh, and Tor Tarantola. (cr5) (Entered: 04/19/2023)
04/19/2023	36 (p.515)	Pro Hac Vice Letter to Katherine Hancock. (cr5) (Entered: 04/19/2023)
04/19/2023	37 (p.516)	Case Transfer and Opening Letter sent to all Counsel. (cr5) (Entered: 04/19/2023)
04/20/2023	38 (p.517)	MOTION to Appear Pro Hac Vice by Philip Avery Vickers *Allyson B. Baker's Motion for Admission Pro Hac Vice* (Filing fee $ 100 receipt number ATXWDC-17340006) by on behalf of Career Colleges & Schools of Texas. (Vickers, Philip) (Entered: 04/20/2023)
04/20/2023	39 (p.522)	MOTION to Appear Pro Hac Vice by Philip Avery Vickers *Sameer P. Sheikh's Motion for Admission Pro Hac Vice* (Filing fee $ 100 receipt number ATXWDC-17340057) by on behalf of Career Colleges & Schools of Texas. (Vickers, Philip) (Entered: 04/20/2023)
04/20/2023	40 (p.527)	MOTION to Appear Pro Hac Vice by Philip Avery Vickers *Michael Murray's Motion for Admission Pro Hac Vice* (Filing fee $ 100 receipt number BTXWDC-17340791) by on behalf of Career Colleges & Schools of Texas. (Vickers, Philip) (Entered: 04/20/2023)
04/24/2023	41 (p.532)	MOTION to Appear Pro Hac Vice by Philip Avery Vickers *Stephen Kinnaird's Motion for Admission Pro Hac Vice* (Filing fee $ 100 receipt number ATXWDC-17351996) by on behalf of Career Colleges & Schools of Texas. (Vickers, Philip) (Entered: 04/24/2023)
04/24/2023	42 (p.537)	Response in Opposition to Motion, filed by Career Colleges & Schools of Texas, re 32 (p.494) MOTION for Extension of Time to File Response/Reply to 23 (p.352) MOTION for Injunction *Motion for Preliminary Injunction* filed by Miguel Cardona, United States Department of Education (Vickers, Philip) (Entered: 04/24/2023)
04/25/2023		Text Order GRANTING 32 (p.494) Motion for Extension of Time to File Response/Reply to 23 (p.352) Motion for Preliminary Injunction entered by Judge Robert Pitman. IT IS ORDERED that Defendants shall respond to Plaintiff's Motion for Preliminary Injunction on or before May 15, 2023. IT IS FURTHER ORDERED that Plaintiff's reply, if any, shall be filed on or before May 22, 2023. (This is a text-only entry generated by the court. There is no document associated with this entry.) (Entered: 04/25/2023)
04/25/2023	43 (p.541)	ORDER SETTING PRELIMINARY INJUNCTION HEARING. Hearing set for 5/31/2023 at 09:00 AM before Judge Robert Pitman. Signed by Judge Robert

		Pitman. (jv2) (Entered: 04/25/2023)
05/01/2023	44 (p.542)	ORDER GRANTING 38 (p.517) Motion to Appear Pro Hac Vice for Attorney Allyson B. Baker for Career Colleges & Schools of Texas. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Registration is managed by the PACER Service Center Signed by Judge Robert Pitman. (jv2) (Entered: 05/01/2023)
05/01/2023	45 (p.543)	ORDER GRANTING 39 (p.522) Motion to Appear Pro Hac Vice for Attorney Sameer P Sheikh for Career Colleges & Schools of Texas. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Registration is managed by the PACER Service Center Signed by Judge Robert Pitman. (jv2) (Entered: 05/01/2023)
05/01/2023	46 (p.544)	ORDER GRANTING 40 (p.527) Motion to Appear Pro Hac Vice for Attorney Michael Murray for Career Colleges & Schools of Texas. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Registration is managed by the PACER Service Center Signed by Judge Robert Pitman. (jv2) (Entered: 05/01/2023)
05/01/2023	47 (p.545)	ORDER GRANTING 41 (p.532) Motion to Appear Pro Hac Vice for Attorney Stephen Blake Kinnaird for Career Colleges & Schools of Texas. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Registration is managed by the PACER Service Center Signed by Judge Robert Pitman. (jv2) (Entered: 05/01/2023)
05/01/2023	48 (p.546)	MOTION to Appear Pro Hac Vice by Philip Avery Vickers *Meredith Boylan's Motion for Admission Pro Hac Vice* (Filing fee $ 100 receipt number ATXWDC-17384692) by on behalf of Career Colleges & Schools of Texas. (Vickers, Philip) (Entered: 05/01/2023)
05/03/2023	49 (p.551)	MOTION to Appear Pro Hac Vice by Philip Avery Vickers *Tor Tarantola's Motion for Admission Pro Hac Vice* (Filing fee $ 100 receipt number ATXWDC-17397036) by on behalf of Career Colleges & Schools of Texas. (Vickers, Philip) (Entered: 05/03/2023)
05/04/2023	50 (p.556)	ORDER GRANTING 48 (p.546) Motion to Appear Pro Hac Vice as to MEREDITH L. BOYLAN. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Registration is managed by the PACER Service Center Signed by Judge Robert Pitman. (cc3) (Entered: 05/04/2023)
05/04/2023	51 (p.557)	ORDER GRANTING 49 (p.551) Motion to Appear Pro Hac Vice as to TOR TARANTOLA. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Registration is managed by the PACER Service Center Signed by Judge Robert Pitman. (cc3) (Entered: 05/04/2023)
05/10/2023	52 (p.558)	REQUEST FOR ISSUANCE OF SUMMONS by Career Colleges & Schools of Texas. (Vickers, Philip) (Entered: 05/10/2023)

05/11/2023	53 (p.562)	Summons Issued as to Miguel Cardona, United States Department of Education via U.S. Attorney (jv2) (Entered: 05/11/2023)
05/11/2023	54 (p.566)	Consent MOTION for Leave to Exceed Page Limitation by Miguel Cardona, United States Department of Education. (Attachments: # 1 (p.14) Proposed Order)(Merritt, Robert) (Entered: 05/11/2023)
05/15/2023	55 (p.570)	MOTION to Exclude *Expert Declaration* by Miguel Cardona, United States Department of Education. (Attachments: # 1 (p.14) Proposed Order)(Coogle, Christine) (Entered: 05/15/2023)
05/15/2023	56 (p.579)	Memorandum in Opposition to Motion, filed by Miguel Cardona, United States Department of Education, re 23 (p.352) MOTION for Injunction *Motion for Preliminary Injunction* filed by Career Colleges & Schools of Texas (Merritt, Robert) (Entered: 05/15/2023)
05/16/2023		Text Order GRANTING 54 (p.566) Motion for Leave to File Excess Pages entered by Judge Robert Pitman. IT IS ORDERED that Defendants' motion is GRANTED. (This is a text-only entry generated by the court. There is no document associated with this entry.) (lolc) (Entered: 05/16/2023)
05/16/2023	57 (p.630)	Unopposed MOTION for Leave to Exceed Page Limitation by Career Colleges & Schools of Texas. (Attachments: # 1 (p.14) Proposed Order)(Tarantola, Tor) (Entered: 05/16/2023)
05/17/2023	58 (p.634)	MOTION for Leave to File Amicus Brief by Project on Predatory Student Lending and Public Citizen Litigation Group (Attachments: # 1 (p.14) Brief, # 2 (p.101) Proposed Order)(Eisenbrey, Rebecca) Modified on 5/17/2023 (jv2). (Entered: 05/17/2023)
05/17/2023	59 (p.664)	MOTION to Appear Pro Hac Vice by Rebecca Clare Eisenbrey *for Wendy Liu* (Filing fee $ 100 receipt number ATXWDC-17447506) by on behalf of Project on Predatory Student Lending. (Eisenbrey, Rebecca) (Entered: 05/17/2023)
05/17/2023		Text Order GRANTING 57 (p.630) Motion for Leave to File Excess Pages entered by Judge Robert Pitman. For good cause shown, IT IS ORDERED that Plaintiff's reply shall not exceed 25-pages. (This is a text-only entry generated by the court. There is no document associated with this entry.) (lolc) (Entered: 05/17/2023)
05/17/2023	60 (p.670)	Response in Opposition to Motion, filed by Career Colleges & Schools of Texas, re 58 (p.634) MOTION for Leave to File Amicus Brief by Rebecca Eisenbrey. filed by Public Citizen Litigation Group, Amicus Project on Predatory Student Lending (Tarantola, Tor) (Entered: 05/17/2023)
05/18/2023	61 (p.673)	REPLY to Response to Motion, filed by Project on Predatory Student Lending, re 58 (p.634) MOTION for Leave to File Amicus Brief by Rebecca Eisenbrey. filed by Public Citizen Litigation Group, Amicus Project on Predatory Student Lending (Eisenbrey, Rebecca) (Entered: 05/18/2023)
05/18/2023	62 (p.676)	ORDER DENYING 58 (p.634) Motion for Leave to File Amicus Brief by non-parties Public Citizen and Project on Predatory Student Lending. Signed by Judge Robert Pitman. (jv2) (Entered: 05/18/2023)
05/22/2023	63 (p.679)	Response in Opposition to Motion, filed by Career Colleges & Schools of Texas, re 55 (p.570) MOTION to Exclude *Expert Declaration* filed by Defendant Miguel Cardona, Defendant United States Department of Education (Attachments: # 1

		(p.14) Exhibit A - Declaration Filed in Sweet v. Cardona)(Sheikh, Sameer) (Entered: 05/22/2023)
05/22/2023	64 (p.706)	REPLY to Response to Motion, filed by Career Colleges & Schools of Texas, re 23 (p.352) MOTION for Injunction *Motion for Preliminary Injunction* filed by Career Colleges & Schools of Texas (Sheikh, Sameer) (Entered: 05/22/2023)
05/24/2023		Text Order MOOTING 59 (p.664) Motion to Appear Pro Hac Vice entered by Judge Robert Pitman. See Order Dkt # 62 (p.676) denying amicus filing (This is a text-only entry generated by the court. There is no document associated with this entry.) (jg3) (Entered: 05/24/2023)
05/24/2023	65 (p.739)	Witness List by Career Colleges & Schools of Texas. (Sheikh, Sameer) (Entered: 05/24/2023)
05/26/2023	66 (p.742)	REPLY to Response to Motion, filed by Miguel Cardona, United States Department of Education, re 55 (p.570) MOTION to Exclude *Expert Declaration* filed by Defendant Miguel Cardona, Defendant United States Department of Education (Attachments: # 1 (p.14) Exhibit 1)(Coogle, Christine) (Entered: 05/26/2023)
05/31/2023	67	Minute Entry for proceedings held before Judge Robert Pitman: Motion Hearing held on 5/31/2023 re 23 (p.352) MOTION for Preliminary Injunction filed by Career Colleges & Schools of Texas. Taken under advisement. Written order forthcoming. (Minute entry documents are not available electronically.). (Court Reporter Lily Reznik.)(jv2) (Entered: 05/31/2023)
05/31/2023	68 (p.787)	Witness List for Preliminary Injunction Hearing held 05/31/2023 before Judge Robert Pitman. (jv2) (Entered: 05/31/2023)
05/31/2023	69 (p.1530)	EXHIBITS for Preliminary Injunction Hearing held 05/31/2023 before Judge Robert Pitman. (jv2) (Entered: 05/31/2023)
06/27/2023	70 (p.788)	Opposed MOTION to Stay by Career Colleges & Schools of Texas. (Tarantola, Tor) (Entered: 06/27/2023)
06/28/2023	71 (p.791)	Response in Opposition to Motion, filed by Miguel Cardona, United States Department of Education, re 70 (p.788) Opposed MOTION to Stay filed by Plaintiff Career Colleges & Schools of Texas (Knapp, Cody) (Entered: 06/28/2023)
06/29/2023	72 (p.796)	REPLY to Response to Motion, filed by Career Colleges & Schools of Texas, re 70 (p.788) Opposed MOTION to Stay filed by Plaintiff Career Colleges & Schools of Texas (Tarantola, Tor) (Entered: 06/29/2023)
06/30/2023	73 (p.799)	NOTICE *of Emergency Motions to Court of Appeals* by Career Colleges & Schools of Texas (Attachments: # 1 (p.14) Exhibit A: Plaintiff-Appellant's Opposed Emergency Motion for Injunction Pending Appeal, # 2 (p.101) Exhibit B: Plaintiff-Appellant's Opposed Emergency Motion for Administrative Injunction Pending Decision on Motion for Injunction Pending Appeal)(Tarantola, Tor) (Entered: 06/30/2023)
06/30/2023	74 (p.1352)	ORDER DENYING CCST'S 23 (p.352) Motion for Preliminary Injunction. Signed by Judge Robert Pitman. (pg) (Entered: 06/30/2023)
06/30/2023		Text Order MOOTING 70 (p.788) Motion to Stay entered by Judge Robert Pitman. In light of the Court's order denying Plaintiff's motion for a preliminary injunction, (Dkt. 74), this motion is MOOT. (This is a text-only entry generated by the court. There is no document associated with this entry.) (jllc) (Entered: 06/30/2023)

06/30/2023	75 (p.1373)	Appeal of Order entered by District Judge 74 (p.1352) by Career Colleges & Schools of Texas. (Filing fee $ 505 receipt number ATXWDC-17614000) (Tarantola, Tor) (Entered: 06/30/2023)
06/30/2023		NOTICE OF INTERLOCUTORY APPEAL as to 74 (p.1352) Order on Motion for Preliminary Injunction by Career Colleges & Schools of Texas. Filing fee $ 505, receipt number ATXWDC-17614000. Per 5th Circuit rules, the appellant has 14 days, from the filing of the Notice of Appeal, to order the transcript. To order a transcript, the appellant should fill out (Transcript Order) and follow the instructions set out on the form. This form is available in the Clerk's Office or by clicking the hyperlink above. (jv2) (Entered: 06/30/2023)
06/30/2023	77 (p.1374)	ORDER of USCA as to appeal 23-50489 GRANTING Appellants Opposed Emergency Motion for Administrative Injunction through and until July 21, 2023 limited to the Plaintiff in this case and its members. ORDER DENYING Appellants Opposed Emergency Motion for Injunction Pending Appeal. Any renewed motion for injunction pending appeal should be filed in case number 23-50491 by July 7, 2023 with the USCA, Fifth Circuit. Appellees response, if any, should be filed by July 12, 2023 with the USCA, Fifth Circuit. Appellants reply, in any, should be filed by July 14,2023 with the USCA, Fifth Circuit. (klw) (Entered: 07/05/2023)
07/03/2023	76 (p.1389)	Transcript filed of Proceedings held on May 31, 2023, Proceedings Transcribed: Motion Hearing. Court Reporter/Transcriber: Lily I. Reznik, Telephone number: 512-391-8792 or Lily_Reznik@txwd.uscourts.gov. Parties are notified of their duty to review the transcript to ensure compliance with the FRCP 5.2(a)/FRCrP 49.1(a). A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Notice of Redaction Request must be filed within 21 days. If no such Notice is filed, the transcript will be made available via PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed Redaction Request due 7/24/2023, Redacted Transcript Deadline set for 8/3/2023, Release of Transcript Restriction set for 10/2/2023, Appeal Record due by 7/18/2023, (lr) (Entered: 07/03/2023)
07/10/2023	78 (p.1377)	Opposed MOTION for Extension of Time to File Answer re 1 (p.14) Complaint,,,, by Miguel Cardona, United States Department of Education. (Attachments: # 1 (p.14) Proposed Order)(Knapp, Cody) (Entered: 07/10/2023)
07/14/2023	79 (p.1383)	Response in Opposition to Motion, filed by Career Colleges & Schools of Texas, re 78 (p.1377) Opposed MOTION for Extension of Time to File Answer re 1 (p.14) Complaint,,,, filed by Defendant Miguel Cardona, Defendant United States Department of Education (Tarantola, Tor) (Entered: 07/14/2023)
07/14/2023		Text Order GRANTING 78 (p.1377) Motion for Extension of Time to Answer entered by Judge Robert Pitman. For good cause shown, IT IS ORDERED that Defendants shall answer or otherwise respond to Plaintiff's complaint on or before July 28, 2023. IT IS FURTHER ORDERED that, on or before July 21, 2023, each party shall file a supplemental brief addressing Plaintiff's request that the administrative record be produced on or before July 28, 2023. The briefs shall be limited to no more than 5 pages. (This is a text-only entry generated by the court. There is no document associated with this entry.) (lolc) (Entered: 07/14/2023)
07/14/2023		Set/Reset Deadlines: All Defendants. (jv2) (Entered: 07/14/2023)
07/14/2023	80 (p.1387)	TRANSCRIPT REQUEST by Career Colleges & Schools of Texas for dates of May 31, 2023. Proceedings Transcribed: Preliminary Injunction Hearing. Court Reporter:

		Lily Reznik.. (Tarantola, Tor) (Entered: 07/14/2023)

TAB 2

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

CAREER COLLEGES & SCHOOLS OF TEXAS,

Plaintiff,

v.

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

Defendants.

Case No. 1:23-cv-00433-RP

PLAINTIFF'S NOTICE OF APPEAL

Plaintiff Career Colleges and Schools of Texas hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order entered on June 30, 2023, denying Plaintiff's motion for preliminary injunction.

Dated: June 30, 2023

Philip Vickers
Texas Bar No. 24051699
Katherine Hancock
Texas Bar No. 24106048
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
pvickers@canteyhanger.com
(817) 877-2800

/s *Allyson B. Baker*
Allyson B. Baker (*pro hac vice*)
Stephen Kinnaird (*pro hac vice*)
Michael Murray (*pro hac vice*)
Sameer P. Sheikh (*pro hac vice*)
Tor Tarantola (*pro hac vice*)
PAUL HASTINGS LLP
2050 M Street NW
Washington, DC 20036
allysonbaker@paulhastings.com
(202)-551-1830

Counsel for Plaintiff

TAB 3

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

CAREER COLLEGES & SCHOOLS OF TEXAS, Plaintiff, v. UNITED STATES DEPARTMENT OF EDUCATION, and MIGUEL CARDONA, in his official capacity as the Secretary of Education, Defendants.	§	1:23-cv-433-RP

ORDER

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

I. BACKGROUND

A. Parties

CCST is a trade association a trade association dedicated to the interests of for-profit colleges and similar post-secondary institutions in Texas. (*See* England Decl., Dkt. 25, at 25). Its membership is comprised of more than 70 schools located throughout Texas. (*Id.*) Like many other public and nonprofit schools, the majority of CCST's members participate in Title IV programs under the Higher Education Act of 1965 ("HEA"), which allows their enrolled students to pay for tuition using federal student loans. (*Id.* at 27). The U.S. Department of Education ("DOE") is an

executive agency of the United States government, 5 U.S.C. §§ 101, 105, subject to the Administrative Procedure Act ("APA"), *id.* § 551(1). Defendant Miguel Cardona is the current Secretary of Education and is responsible for DOE's promulgation and administration of the challenged regulations. He is sued in his official capacity only.

B. Statutory & Regulatory Background

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

> Notwithstanding any other provision of State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan.

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

Over the next 30 years, DOE published four different iterations of regulations governing borrower defense to repayment ("BDR"). The first BDR rule was published in 1994. *See* 59 Fed. Reg. at 61,664 (Dec. 1, 1994). The 1994 rule allowed borrowers to "assert as a defense against repayment . . . any act or omission of the school attended by the student that would give rise to a

cause of action against the school under applicable State law," but did not specify a process by which a student could assert a borrower defense claim. The rule also provided a non-exhaustive list of proceedings in which the borrower could assert a defense, *id.*, and created a "system for adjudicating claims by borrowers that have a defense against repayment of a loan based on the acts or omissions of the school," *id.* at 61,671. The 1994 rule left to the Secretary's discretion the relief to be afforded to successful borrower defense applicants. *See id.* at 61,696.

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

Following a change in presidential administrations, DOE again amended its BDR regulations, publishing a new final rulemaking on September 23, 2019. *See* 84 Fed. Reg. at 49,788 (Sept. 23, 2019). Among other changes, the 2019 rule narrowed the 2016 rule's definition of actionable "misrepresentations" to require evidence of an institution's intent to mislead or its reckless regard of the truth. It also restricted actionable misrepresentations to those made in writing,

and it required borrowers to prove financial harm other than their student loan debt. *See* 34 C.F.R. § 685.206(e)(3), (e)(4) (2019). The 2019 rule also abolished the group claim process and required that DOE consider each borrower claim independently. *See* 84 Fed. Reg. at 49,799.

C. The 2022 Final Rule

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

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

1. Borrower Defenses to Repayment

The Rule amends the substantive grounds for borrower relief by recognizing five types of "acts" or "omissions" by an institution that can give rise to a BDR claim: (1) a substantial

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

2. Borrower Claim Adjudication

The Rule establishes new adjudicative procedures by which DOE receives and adjudicates borrowers' BDR claims. While institutions do not participate in the BDR claim adjudication process, DOE must give institutions notice of any claims against them, and the Rule provides a 90-day window for the school to respond by submitting relevant materials relating to the claim. 34 C.F.R. § 685.405. Moreover, during the initial BDR claim adjudication, the institution cannot engage in discovery or otherwise test evidence submitted by the borrower. 34 C.F.R. §§ 685.405, 685.406(b), (c). The Rule also reinstates a procedure for the groupwide adjudication of BDR claims. *Id.* §§ 685.402, 685.403. For group claims, the Rule creates a "rebuttable presumption that the act or omission giving rise to [the claim] affected each member of the group in deciding to attend, or continue attending, the institution, and that such reliance was reasonable." *Id.* § 685.406(b)(2). Similarly, for "Closed-School" claims, the Rule creates a presumption "that the detriment suffered warrants relief." *Id.* § 685.401(e). The Rule does not prescribe a limitation period for BDR claims;

they may be filed "at any time," so long as the borrower has a balance due on a direct loan or any loan that may be consolidated into a direct loan. *Id.* § 685.401(b).

3. Full Discharge

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

4. Recoupment Adjudication

If the Department approves a BDR claim, the Rule provides DOE discretion to initiate a separate administrative proceeding to recoup the value of discharged loan directly from schools. *See* 34 C.F.R. § 668.125. If DOE opts to initiate a recoupment proceeding, it must give written notice to the school of the borrower-defense determination, the basis of liability, and the amount of the discharge. 34 C.F.R. § 668.125(a). The institution can request review by a designated DOE official. Id. § 668.125(b). If it does request review, an administrative hearing will be held. *Id.* § 668.125(c)-(d). To prevail in a recoupment action, DOE has "the burden of production to demonstrate that loans made to students to attend the institution were discharged on the basis of a borrower defense to repayment claim." *Id.* § 668.125(e)(1). By contrast, "[t]he institution has the burden of proof to demonstrate that the decision to discharge the loans was incorrect or inconsistent with law and that the institution is not liable for the loan amounts discharged or reimbursed." *Id.* § 668.125(e)(2). According to CCST, the evidence allowed in recoupment proceedings is "extremely restricted" and consists only of: (1) materials submitted to DOE in the BDR process by the borrowers, the institution, or third parties; (2) any materials that the Department relied on that it chooses to provide to the institution; and (3) any "documentary evidence" that the institution submits that relates to the

bases of the borrower defense or recoupment claim. *Id.* § 668.125(e)(3). There is no mechanism for the school to seek discovery from the borrower or examine witnesses.

5. Closed School Discharge

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

D. This Action

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

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

II. LEGAL STANDARD

"A preliminary injunction is an extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren,* 553 U.S. 674, 689–90 (2008) (citation omitted). To demonstrate eligibility for such relief, a plaintiff must clearly show (1) "a substantial threat of irreparable injury," (2) "a

substantial likelihood of success on the merits," (3) "that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted," and (4) "that the grant of an injunction will not disserve the public interest." *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016) (citation omitted). Whether to grant preliminary injunctive relief is committed to the district court's sound discretion. *Miss. Power & Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir. 1985).

III. DISCUSSION

A. Standing

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

Article III of the Constitution limits "[t]he judicial power of the United States" to "cases" or "controversies." To state a case or controversy, a plaintiff must establish standing. *Arizona Christian School Tuition Organization v. Winn*, 563 U. S. 125, 133 (2011). That, in turn, requires a plaintiff to demonstrate that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U. S. 330, 338 (2016). At the preliminary injunction stage, the movant must clearly show only that each element of standing is "likely to obtain in the case at hand." *Speech First*, 979 F.3d at 330.

A plaintiff that is an organization can demonstrate standing in two ways: it can assert standing as the representative of its members (*i.e.*, "associational standing"), or, alternatively, it can claim that it suffered an injury in its own right (*i.e.*, "organizational standing"). *Warth v. Seldin*, 422 U.

S. 490, 511 (1975). For associational standing, a plaintiff must show that: (1) its members themselves would have standing; (2) the interests it seeks to protect are germane to its organizational purpose; and (3) participation of its members is not required. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). A plaintiff establishes organizational standing by "meet[ing] the same standing test that applies to individuals." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017). Here, CCST claims standing under both theories.

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

The Court agrees that CCST has sufficiently shown its members would likely have individual standing to challenge the Rule. There is no real dispute that CCST's member schools are among the objects of the regulation at issue. When a challenged regulation applies to a plaintiff directly, "there is ordinarily little question" that the plaintiff has standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992); *see also Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015) ("[W]e find no reason to depart from the ordinary rule that Contender Farms and McGartland, as objects of the Regulation, may challenge it."). Indeed, CCST submits declarations from two of its

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

member schools stating that they have expended time conducting "preparatory activities" to ensure compliance with the Rule and mitigate future liability. Among other things, they contend that the Rule broadens the kinds of school actions that can give rise to a borrower defense claim (and potentially recoupment), including new prohibitions on "aggressive recruitment" and in other areas that require at least some degree of preparatory analysis, staff training, and reviews of existing compliance protocols. (*See* Shaw Decl., Dkt. 25, at App-33-34; Arthur Decl., Dkt. 25, at App-39-40). This is the type of concrete injury that the Fifth Circuit has deemed adequate to provide standing in other regulatory challenges. *Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019) (quoting *Contender Farms*, 779 F.3d at 266) (an "increased regulatory burden typically satisfies the injury in fact requirement"). Accordingly, the Court finds that CCST has met its burden to demonstrate associational standing.

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

B. Irreparable Harm

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

1. Financial & Reputational Harm

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

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

Putting this delay aside, there are more substantial problems with CCST's claims of impending financial injury. In general, "economic harms cannot, as a matter of law, constitute irreparable harm." *Optimus Steel, LLC v. U.S. Army Corps of Eng'rs*, 492 F. Supp. 3d 701, 725 (E.D. Tex. 2020). The Fifth Circuit has recognized an exception in cases "where the [monetary] loss threatens the very existence of the movant's business," *Texas v. EPA*, 829 F.3d 405, 434 n.1 (5th Cir. 2016). Still, "a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury," *Johnson v. Owens*, 2013 WL 12177176, at *1 (W.D. Tex. Aug. 5, 2013). Rather, a movant must affirmatively demonstrate a substantial likelihood that, in the absence of the extraordinary remedy it seeks, it will suffer injury that is "both certain and great," "actual and not theoretical." *Rozelle v. Lowe*, No. 5:15-CV-108-RP, 2015 WL 13236273, at *1 (W.D. Tex. June 1, 2015) (citation omitted).

With these principles in mind, the Court finds that CCST's asserted financial and reputational injuries are too conjectural to support preliminary injunctive relief. Regarding financial harm, CCST generally states that the Rule could one day "subject [its members] to potential liability for discharged loans, to revocation or denial of eligibility to participate in the federal student loan programs, and to restrictions upon participation," and leave them facing "enormous financial liability." (England Decl., Dkt. 25, at 28). But these outcomes are hypothetical at best. Before any CCST member would come close to facing these prospects, several events would have to occur first. For one, a student at a CCST member school would have to assert a BDR claim after July 1, 2023. CCST has not identified any pending or anticipated BDR claims against its members, much less any reason to believe such claims will be "meritless" or "rubber-stamped" by DOE. Even assuming that a "deluge" of such claims is imminent, DOE would have to adjudicate the claims in the borrowers' favor. Even then, CCST members would face no risk of financial liability because "the grant of a

borrower-defense application has no binding effect on the school." *Sweet v. Cardona*, No. C19-03674 WHA, 2022 WL 16966513, at *9 (N.D. Cal. Nov. 16, 2022) (emphasis removed). Instead, DOE would have to initiate a separate recoupment action against the school, then eventually prevail in that administrative proceeding. At that point, a school would still have the opportunity to seek judicial review before it would be compelled to pay recoupment. "[S]peculation built upon further speculation does not amount to a 'reasonably certain threat of imminent harm'" and does not warrant injunctive relief. *Friends of Lydia Ann Channel v. United States Army Corps of Engineers*, 701 F. App'x 352, 357 (5th Cir. 2017) (quoting *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991)).

Notwithstanding the remoteness of any recoupment liability, CCST argues that its smaller schools face an immediate burden on July 1 because the costs of merely *responding* to a potential group based BDR claim could overwhelm their administrative resources. In its motion and during the hearing, CCST proffered the expert testimony of Diane Auer Jones to opine on the irreparable harms that the Rule would impose on "small proprietary schools" (*i.e.*, "schools that have 150, or 200, or 300 students as opposed to schools that have 8,000 students or 10,000 students, or 12,000 students.") (Tr. at 39:12-40:15.) Ms. Jones opines that responding to a group claim notice would be "disproportionately burdensome" on smaller schools because they have smaller staffs and fewer resources (Tr. 58:20-22). Ms. Jones also opines that, under the Rule's group claim procedure, DOE could theoretically seek recoupment to a degree that would push smaller schools into bankruptcy. (Tr. 44:17-51:24). While Ms. Jones undoubtedly has experience in the sector, the Court finds her testimony in support of the instant motion to be less than compelling because her opinions are based entirely on her prior work experience at a non-CCST school. Indeed, Ms. Jones acknowledged during the hearing that she did not speak with *any* CCST member schools in preparation for her

testimony (Tr. 57:11-58:13), nor did she review any records of any CCST member schools. *Id.* As far as the Court can discern on the current record, there is no concrete evidence that any CCST member school faces an imminent borrower claim—much less a threat of recoupment for any discharged loans. As such, the Court cannot conclude that the Rule poses any immediate existential threat to CCST or its members.

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

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

2. Abandoned Plans for Expansion and Consolidation

CCST next asserts that member schools have "abandon[ed] plans to build, expand, or consolidate campuses or facilities" because doing so might trigger liability under the Rule's new "Closed-School Discharge" provisions. (Brief, Dkt. 24, at 23 (citing Arthur Decl., Dkt. 25, at 43

("ECPI University has been forced to abandon plans to build new or upgrade existing schools"); Shaw Decl., Dkt. 25, at 35 (stating that Lincoln Tech schools "will be forced to reconsider the opening of new campuses and upgrading of existing ones")).

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

As with the borrower-defense provisions, any concrete harm that CCST's members might suffer from the closed school discharge provisions remains several steps away. To start, CCST does not allege that any member school has closed or plans to close. And the imposition of closed school liability against apparently open schools based on hypothetical future plans to "build, expand, or consolidate campuses," (Br., Dkt. 24, at 3), could occur only after DOE prevails in an administrative proceeding, after having granted relief to eligible borrowers. (*Cf.* Arthur Decl., Dkt. 25 at 46 (contending that "a 'closed school discharge' *could* be triggered by consolidating facilities,"

for which a school "would be *presumptively* held liable" if DOE "determin[es] that the criteria is met") (emphases added)). Such claims are too remote to constitute irreparable harm.

3. Unrecoverable Compliance Costs

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

The Fifth Circuit has held that "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and in the judgment)). Thus, "[w]here costs are nonrecoverable because the government–defendant enjoys sovereign immunity from monetary damages . . . irreparable harm is generally satisfied." *VanDerStok v. Garland*, No. 4:22-CV-00691-O, 2022 WL 4809376, at *3 (N.D. Tex. Oct. 1, 2022) (citing W*ages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021)). Nonetheless, such harm "must be more than speculative; there must be more than an unfounded fear on the part of the applicant." *Louisiana v. Biden*, 55 F.4th 1017, 1034 (5th Cir. 2022) (internal quotations omitted). And, while "it is not so much the magnitude but the irreparability that counts," the scale of the projected harm must be "more than de minimis." *Id.* at 1035 (quotations

omitted). Finally, showing irreparable harm requires more than vague or conclusory statements. *See, e.g.*, *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991) (conclusory allegations do not establish irreparable harm); *Coleman v. Bank of New York Mellon*, 2013 WL 1187158 at *8 (N.D. Tex. Mar. 4, 2013) ("[U]nsupported, conclusory statements are insufficient to demonstrate entitlement to the extraordinary relief of a . . . . preliminary injunction."); *Mitchell v. Sizemore*, No. 6:09cv348, 2010 WL 457145, at *3 (E.D. Tex. Feb. 5, 2010) ("[V]ague and conclusory allegation that [the plaintiff] is undergoing 'a number of problems' is insufficient to show entitlement to injunctive relief.").

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

To the extent CCST references costs that will arise starting on July 1, it provides only nebulous and conclusory descriptions. For example, declarant Scott Shaw (CEO of CCST member

Lincoln Educational Services Corp.) avers that CCST schools "are being forced to expend time and resources" on compliance activities, including: (1) training staff on the Rule's requirements; (2) reviewing marketing, advertising, and recruitment materials; (3) "allocating staff and resources to handle the anticipated flood of meritless borrower defense claims;" and (4) developing and upgrading recordkeeping systems to maintain student records "for perpetuity," given the alleged lack of any limitation period for future BDR claims. (Shaw Decl., Dkt 25, at 35-37). Similarly, declarant Jeff Arthur states ECPI University has "expended significant time and effort preparing and training staff to comply," including by: (1) educating staff on the Rule's requirements; (2) reviewing recruiting materials and communications; (3) expanding the school's record-keeping policies; and (4) "expanding systems that monitor representations made by hundreds of staff." (Arthur Decl., Dkt. 25, at 42).

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

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

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

Moreover, the Fifth Circuit has been "less generous with private-sector plaintiffs' efforts to show irreparable harm" based on the costs of complying with agency regulations. *Texas v. EPA*, No. 3:23-cv-17, 2023 WL 2574591, at *10 (S.D. Tex. Mar. 19, 2023) (emphasizing that private plaintiffs

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

IV. CONCLUSION

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

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

SIGNED on June 30, 2023.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

TAB 4

08:59:57 1 back to me. Good morning, sir. Before you take a seat,
09:00:10 2 could you please raise your right hand to be sworn.
09:00:11 3 THE CLERK: You do solemnly swear or affirm that
09:00:11 4 the testimony which you may give in the case now before
09:00:11 5 the Court shall be the truth, the whole truth, and nothing
09:00:18 6 but the truth?
09:00:18 7 THE WITNESS: I do.
09:00:18 8 THE COURT: Thank you. Please be seated.
09:00:20 9 MARK DREYFUS, called by the Plaintiff, duly sworn.
09:00:20 10 DIRECT EXAMINATION
09:00:23 11 BY MS. BAKER:
09:00:23 12 Q. Good morning, Mr. Dreyfus.
09:00:27 13 A. Good morning.
09:00:28 14 Q. Can you hear me okay? Can you please state your full
09:00:31 15 name for the record?
09:00:31 16 A. Mark Dreyfus.
09:00:32 17 Q. Mr. Dreyfus, what do you currently do?
09:00:35 18 A. I am President of ECPI University.
09:00:38 19 Q. And for how long have you been President?
09:00:39 20 A. I've been President since 1992.
09:00:42 21 Q. And can you tell the Court, please, what ECPI
09:00:45 22 University is?
09:00:46 23 A. It is a career college which has about 12,000
09:00:49 24 students in five states and we primarily work with adults
09:00:57 25 in both healthcare nursing, in particular, as well as

09:01:00 1 information technology areas.
09:01:02 2 Q. Mr. Dreyfus, does ECPI have any campuses in the state
09:01:08 3 of Texas?
09:01:08 4 A. Yes, we do.
09:01:09 5 Q. How many?
09:01:10 6 A. One.
09:01:10 7 Q. And where is that campus located?
09:01:12 8 A. San Antonio.
09:01:12 9 Q. And what kinds of programs are offered to students at
09:01:17 10 the San Antonio campus?
09:01:19 11 A. Nursing, engineering technology, and our cyber
09:01:25 12 security program.
09:01:26 13 Q. Mr. Dreyfus, you're familiar with the declaration
09:01:31 14 that your colleague, Mr. Arthur, issued in this matter
09:01:35 15 previously?
09:01:36 16 A. Yes, I am.
09:01:36 17 Q. And have you had a chance to look at that
09:01:39 18 declaration?
09:01:40 19 A. I have.
09:01:40 20 Q. And you adopt it?
09:01:42 21 A. Yes.
09:01:43 22 Q. Is ECPI a participant in Title IV Department of
09:01:50 23 Education programs?
09:01:51 24 A. Yes, we are.
09:01:52 25 Q. For how long has ECPI been a participant?

09:01:55 A. Since approximately 1972.
09:01:58 Q. Mr. Dreyfus, can you tell us a bit about ECPI and its
09:02:03 history, please?
09:02:03 A. Sure. The university was founded by my father, who
09:02:09 is a holocaust survivor. He was fortunate enough to be in
09:02:13 Switzerland during the war and after the war, he was able
09:02:15 to take training as a technician, radio technician, came
09:02:20 to this country shortly thereafter and for about 20 years,
09:02:24 worked as a technician and then, realized that computers
09:02:28 were the future and decided to open up a school to teach
09:02:32 people how to program computers and that was in 1966. And
09:02:38 since that time, we've had 75,000 graduates and
09:02:42 approximately have about 12,000 students at this time.
09:02:49 Q. Mr. Dreyfus, are you familiar with the borrower
09:02:52 defense rule that is currently scheduled to take effect in
09:02:56 July, July 1 of this year?
09:02:59 A. Yes, I am.
09:03:00 Q. Mr. Dreyfus, how are you familiar with that rule?
09:03:04 A. I tried to read all 780 pages and I followed the
09:03:12 negotiated rulemaking and also followed through the
09:03:15 comment period, some of the comments that were made.
09:03:20 Q. And do you have an understanding of whether that rule
09:03:24 which is scheduled to take effect on July 1 will impact
09:03:28 ECPI?
09:03:30 A. It will have a significant impact.

09:03:32 1 Q. And when you say significant impact, can you tell the
09:03:34 2 Court, please, what you mean by that?
09:03:36 3 A. Well, already, we have had to retrain many of our
09:03:41 4 people. We have about 60 people that are currently
09:03:43 5 working in compliance. And there are new rules of
09:03:48 6 retaining information as well as the types of
09:03:52 7 communications that go back and forth between students and
09:03:56 8 staff. And as a result of some of the changes in the way
09:04:01 9 that claims will be brought forward, particularly the
09:04:04 10 lowering of the bar, we have to really maintain more
09:04:08 11 records, more communications, and our people have to be
09:04:12 12 aware of exactly what they are doing and saying to
09:04:17 13 students.
09:04:18 14 Q. And when you talk about the way that you understand
09:04:21 15 claims will be brought forward under this borrower defense
09:04:25 16 rule scheduled to take effect on July 1, what specifically
09:04:28 17 do you mean, Mr. Dreyfus?
09:04:30 18 A. So as I understand it, the bar is much lower. There
09:04:35 19 are group claims that can be made for classes of students,
09:04:41 20 some of whom may not even opt into the class, and these
09:04:44 21 group claims can be brought for a number of reasons,
09:04:49 22 whether it's a misrepresentation or an omission; and in
09:04:55 23 that case, training our people, making sure that they are
09:04:58 24 aware of every communication and knowing that they have to
09:05:01 25 retain this information even for some kind of inadvertent

09:05:04 claim -- or statement, a claim may be brought forward to
09:05:08 us and these claims from my opinion are existential
09:05:15 because the bar is so much lower and we do have this
09:05:18 opportunity of a group claim, it's very detrimental to the
09:05:22 institution.
09:05:23 Q. When you say the word "existential," what exactly do
09:05:30 you understand that to mean in this context?
09:05:34 A. There are only so many resources you have as an
09:05:36 institution, and in our case, we allocate resources to
09:05:41 support our students to get the best outcomes that we can.
09:05:45 We've already started diverting resources to training our
09:05:48 people and preparing for July 1st. In addition, we've had
09:05:54 to abandon a site that we were going to open in Texas, a
09:06:01 second site in Texas because the risk is just too high
09:06:05 when you only have limited resources and you have to make
09:06:08 sure that you're conservative with your resources.
09:06:11 So first of all, we are concerned about the
09:06:14 claims that will happen after July 1st, but also, we've
09:06:18 had to abandon plans for what we wanted to do in the state
09:06:34 of Texas.
09:06:34 Q. So you testified that ECPI had to abandon its plans
09:06:39 here in the state of Texas. Can you give the Court more
09:06:43 of an understanding of what specifically you mean by that?
09:06:48 A. We had been in the process of selecting a site in
09:06:51 Dallas and when this rule was promulgated, we basically

09:06:56 put a halt to it. And as we've seen the rule finalized,
09:07:02 we realize that the risk is so high that there could be a
09:07:05 claim and particular a recoupment of funds that we want to
09:07:10 make sure that we are able as an institution to be ready
09:07:15 to, you know, pay any recoupment claims that may come
09:07:18 against us. And so, we have to be very conservative. We
09:07:22 have to conserve our funds and we have to allocate
09:07:25 resources for that.
09:07:27 Q. Has ECPI abandoned -- well, let me ask you this. In
09:07:38 deciding not to open the campus in Dallas, when was that
09:07:41 decision made?
09:07:43 A. Decision was made after this rule started to be, you
09:07:47 know, put forth.
09:07:50 Q. Now, you talked about something else. You said that
09:07:54 the nature of claims that ECPI expects on and after July 1
09:08:02 are also another source of concern. Can you please
09:08:06 explain in more detail what you mean by that?
09:08:09 A. Yes. You know, there are now the ability of states
09:08:16 or other consumer groups can bring group claims of
09:08:20 students, even students that may have graduated and been
09:08:24 successful if they happen to be part of that group, they
09:08:27 don't even have to opt in, they can just, you know, be
09:08:31 classified as part of a group. And we're very concerned
09:08:34 about that because the bar is so much lower for someone to
09:08:39 opt in and, you know, any student that could get their

09:08:42 1 loans discharged would probably either opt in if they
09:08:47 2 could or they're not -- they don't have to opt in. They
09:08:50 3 could just be added to the group.
09:08:51 4 Additionally, we have a situation where we have
09:08:56 5 potentially a closed school situation in Richmond,
09:09:01 6 Virginia. We currently have three locations in Richmond.
09:09:06 7 About two years ago, we opened a brand-new location,
09:09:09 8 brand-new facility, has all the best equipment, has the
09:09:13 9 best faculty there in the -- with the idea that we were
09:09:18 10 going to consolidate three campuses to two. At this time,
09:09:22 11 we have students that would want to go to the better
09:09:25 12 resourced campus, the newer facility, yet, because of the
09:09:30 13 closed school definition, our third campus that would be
09:09:34 14 closing would be considered a closed school, and at that
09:09:39 15 point, the secretary determines when there was a decline
09:09:43 16 in students and it goes back six months and that then,
09:09:48 17 they assess a student discharge for any students that
09:09:53 18 didn't finish and then, they send the recoupment to the
09:09:56 19 institution.
09:09:57 20 So in essence, what will be best for students
09:10:01 21 where we could consolidate campuses, we can't do. Even
09:10:05 22 those students want to do that because if that facility
09:10:09 23 closes, that third facility and, you know, migrates into
09:10:13 24 the other two facilities, that is then considered a closed
09:10:17 25 school and we would get a recoupment letter and that is

09:10:20 1 the secretary's decision. It is a formulaic decision and
09:10:27 2 there's nothing we can do about it.
09:10:28 3 Q. I want to ask you a bit about a couple of things you
09:10:31 4 just said. First, I want to ask you some more about your
09:10:36 5 understanding of the claims process on July 1, and then,
09:10:40 6 I'm going to follow up on this closed school dynamic that
09:10:43 7 you're discussing.
09:10:44 8 So you talked about a group claims process. What
09:10:47 9 is your understanding of whether or how that group claims
09:10:51 10 process could impact ECPI on July 1.
09:10:55 11 A. If a group claim is presented and it gets adjudicated
09:11:01 12 at the department where there's a full discharge,
09:11:03 13 apparently the new rule, it's a hundred percent discharge.
09:11:07 14 There's no discharge -- partial discharges. There are
09:11:11 15 individuals that can be part of the group that never opted
09:11:13 16 in and we have then 90 days to respond to that group
09:11:19 17 claim. The process is very opaque at this point and will
09:11:23 18 continue to be opaque.
09:11:25 19 So as of July 1st, the claims that would be
09:11:28 20 presented to us could be in significant numbers that could
09:11:33 21 jeopardize the institution.
09:11:37 22 Q. Could the group claims you're talking about cost the
09:11:41 23 institution money?
09:11:43 24 A. Yes.
09:11:44 25 Q. How so?

09:11:45 A. There's a clause for recoupment. And in addition,
09:11:49 not only an institution, I am personally potentially
09:11:53 liable because if the institution cannot pay those claims,
09:11:57 then the way that this new rule is written that they now
09:12:01 hold the executives responsible for those claims.
09:12:07 Q. I want to ask you some more about the schools in
09:12:11 Richmond. What is your understanding of what the closed
09:12:16 school designation will mean on July 1?
09:12:23 A. Originally a closed school was a school that didn't
09:12:27 exist anymore. We have now the new definition is a
09:12:31 location that doesn't exist anymore. And a location that
09:12:35 we have, since we have three locations in Richmond and
09:12:39 want to consolidate because it's a better opportunity for
09:12:41 students, it's better for them to go to this new facility,
09:12:47 we can't do it. We have to continue our lease. We have
09:12:50 to keep it open because as the numbers dwindle, there is
09:12:55 an arbitrary date that is assigned by the secretary and
09:12:58 then, they will go back six months, and for any student
09:13:01 that doesn't finish, there is a complete discharge.
09:13:04 Now, students that don't finish for a year --
09:13:07 there's many reasons why students sometimes come back a
09:13:09 year later or whatever. But in this particular instance,
09:13:13 that third facility will be considered a closed school
09:13:18 even though we are still in existence, even though we have
09:13:20 a better opportunity for students, even though they would

09:13:23 prefer to be at the new facility, we can't do it and --
09:13:27 because we will get a recoupment letter.
09:13:34 Q. You say that this facility is better for students and
09:13:38 that they prefer to be at it. How do you know that?
09:13:41 A. We already have students migrating there. I mean, we
09:13:43 have students that take a class there and say, I would
09:13:46 rather go to this location rather than the old location
09:13:49 and that was the original intent. But since this rule has
09:13:52 come out, the liability that we will have at the old
09:13:57 location is significant because, as I said, any student
09:14:02 that leaves the school, or does not finish at the school,
09:14:06 or goes into a different program during that period, that
09:14:10 that period that the secretary determines it's a closed
09:14:15 school will get a full discharge. And even if they're 90
09:14:18 percent complete with their program, it's still a hundred
09:14:21 percent discharge and then, that discharge letter will be
09:14:23 sent to us for recoupment of those funds.
09:14:27 Q. The schools in Richmond, these campuses in Richmond,
09:14:34 can you just give us a sense of how close together they
09:14:37 are?
09:14:38 A. Each one of them's about 15 miles apart and we've had
09:14:42 students go between campuses all the time. It's not that
09:14:47 -- it's not a great distance for students to travel from
09:14:49 one to the other, particularly when there's a particular
09:14:52 course that they want to take, or it has some kind of

09:14:55 equipment or lab, or some kind of, you know, basically an
09:15:02 offering at that facility.
09:15:03 Q. And this new campus or facility that was recently or
09:15:06 not that recently perhaps built, when was it built?
09:15:10 A. It was built in 2021.
09:15:15 Q. And you say it's better for students. Why do you say
09:15:18 that?
09:15:18 A. It's a newer facility. It has, you know, brand-new
09:15:22 equipment. It has -- some of the faculty that we put
09:15:27 there are some of our best faculty because it was always
09:15:30 anticipated that we would consolidate to that -- to two
09:15:34 facilities. We still have another facility, but for that
09:15:37 facility in particular, we built out some new simulation
09:15:41 labs. We built out new labs for our cyber security, for
09:15:44 our mechatronics program and, you know, you can't
09:15:47 duplicate sometimes these things in three locations. You
09:15:50 have to, you know, put it in one location and that's what
09:15:52 we decided to do.
09:15:55 Q. Mr. Dreyfus, come January -- come July 1, what is
09:16:03 your expectation that this rule, borrower defense rule
09:16:08 will have -- what impact will the borrower defense rule
09:16:14 have on ECPI?
09:16:15 A. It will be devastating. We expect to have claims
09:16:19 brought to us because already, I think students have an
09:16:27 expectation of discharge of their loans and there's talk

09:16:32 of already of thousands of claims that have been prepared
09:16:37 at the department. We don't know if they're any of ours.
09:16:41 We haven't heard any of them. But we expect July 1 that
09:16:46 claims will come in against our institution.
09:16:48 Q. And when the claims come in against the institution
09:16:51 on July 1, what do you expect will be the impact of that?
09:16:54 A. We will have to prepare, you know, our defense for it
09:17:00 if they're adjudicated against us, which we expect, and we
09:17:03 will -- you know, we'll have 90 days to basically defend
09:17:09 ourselves, and in the event that we can't do that, then
09:17:12 there will be a recoupment proceeding.
09:17:14 Q. What is a recoupment proceeding?
09:17:16 A. As I understand it, we will have the opportunity to
09:17:23 go to the department and basically try and explain why
09:17:28 they shouldn't recoup funds from us. Even though they may
09:17:31 have discharged the funds to students, we have the
09:17:34 opportunity to basically defend ourselves so that we don't
09:17:37 get charged for those discharges.
09:17:39 Q. And what recoupment of funds do you anticipate would
09:17:44 be at issue here on July 1?
09:17:46 A. A significant amount of money. I mean, it's a
09:17:49 hundred percent for any student where there's a discharge.
09:17:53 So even if a student that may have graduated, may have
09:17:56 gotten a job, you know, we train people in nursing, we
09:17:59 train people in cyber security, our students have great

09:18:03 outcomes. I mean, that's what we're focused on. We're
09:18:05 focused on outcomes. And here, you have a situation where
09:18:09 you may have students that are part of a claim that want
09:18:13 to get a full discharge even though their outcome was
09:18:17 exactly what they anticipated when they came to school.
09:18:21 Q. No further questions. Thank you.
09:18:29 CROSS-EXAMINATION
09:18:39 BY MR. KNAPP:
09:18:39 Q. Good morning, Mr. Dreyfus.
09:18:41 A. Good morning.
09:18:41 Q. It's nice to meet you this morning.
09:18:44 You're here today on behalf of the San Antonio
09:18:47 campus of ECPI.
09:18:48 A. Correct.
09:18:49 Q. Could you explain to me the relationship between San
09:18:54 Antonio campus of ECPI and ECPI more broadly?
09:18:58 A. We are regionally accredited by the Southern
09:19:02 Association of Colleges & Schools. As such, we're able to
09:19:05 be in the southern region and in 2019, we opened the San
09:19:10 Antonio campus as a branch in Texas because of, actually,
09:19:16 a request by some employers in Texas that asked us to come
09:19:18 here.
09:19:20 Q. How many students are at ECPI campuses nationwide?
09:19:25 A. About 12,000.
09:19:27 Q. And how many are in San Antonio?

09:19:29 A. About 120.
09:19:32 Q. Has ECPI San Antonio always been a participant in the
09:19:37 Title IV student loan programs?
09:19:38 A. Yes.
09:19:39 Q. When did that campus open up?
09:19:41 A. 2018.
09:19:48 Q. You adopted the declaration of Mr. Arthur for
09:19:55 purposes of your testimony today?
09:19:57 A. Yes. He would be here except he's in Europe. So I
09:20:02 got the knot.
09:20:05 Q. That's nice of you. Is it your understanding that
09:20:08 when he describes the work of staff in his declaration,
09:20:12 he's describing the work of staff nationwide, not just at
09:20:16 San Antonio campus?
09:20:17 A. All of our campuses. Yes.
09:20:20 Q. Are there any legal or compliance officers who are
09:20:23 based in San Antonio with the San Antonio campus?
09:20:26 A. We have some compliance people, yes, but they're
09:20:30 scattered throughout the entire institution. Every one of
09:20:32 our campuses has somebody that's dealing with compliance.
09:20:37 Many campuses, multiple people.
09:20:39 Q. How many do you -- are you aware of how many are in
09:20:43 San Antonio?
09:20:44 A. I believe it's two.
09:20:50 Q. Are you familiar with the personnel decisions at the

09:20:54 1 San Antonio campus?
09:20:55 2 A. Yes.
09:20:56 3 Q. Have any new staff members been hired since the
09:20:59 4 promulgation of this latest rule?
09:21:02 5 A. Not yet.
09:21:04 6 Q. Are there plans to hire?
09:21:06 7 A. Yes.
09:21:07 8 Q. More staff? When would you expect them to be hired?
09:21:13 9 A. After July 1st.
09:21:14 10 Q. Do you have a timeframe in mind for that? Or...
09:21:16 11 A. No. You know, just after July 1st.
09:21:20 12 Q. Does ECPI currently train its staff on the
09:21:25 13 regulations that govern student loan programs?
09:21:27 14 A. Yes.
09:21:28 15 Q. Does ECPI currently train its staff with the -- in
09:21:34 16 the anticipation of facing borrower defense claims?
09:21:38 17 A. Yes. When the rule first came out, it was promoted.
09:21:43 18 We started explaining to our staff that this is a
09:21:45 19 possibility that could happen and explained to them that
09:21:49 20 every communication is vital and that they have to
09:21:53 21 basically start retaining more and more of the
09:21:56 22 communications that go back and forth with students. And,
09:22:00 23 you know, we also explained to our recruiting staff about
09:22:06 24 some of the issues that potentially could come up with
09:22:08 25 some inadvertent conversations. So we've been training

09:22:13 1 our people probably for the last three or four months.
09:22:16 2 Q. Did you do any trainings under the current
09:22:20 3 regulations?
09:22:24 4 A. Yes.
09:22:24 5 Q. That are in effect?
09:22:25 6 A. Yes.
09:22:26 7 Q. Before?
09:22:26 8 A. Before, but it's significantly ramped up. I would
09:22:30 9 say it's a magnitude of, you know, two to three times the
09:22:32 10 amount of time that we are spending educating our staff
09:22:37 11 and training our staff to be prepared for the new
09:22:40 12 regulations because of the potential for, you know, any
09:22:44 13 kind of claims in the future.
09:22:46 14 Q. As part of the trainings that you did before this
09:22:49 15 rule was promulgated, did you train staff to avoid
09:22:54 16 misrepresentation?
09:22:55 17 A. Yes. Yes. Absolutely.
09:22:59 18 Q. So could you be specific about the additional
09:23:05 19 misrepresentations that you're training staff on now that
09:23:10 20 were not a part of prior trainings under the current
09:23:13 21 regulations?
09:23:13 22 A. Well, misrepresentation is something that you always
09:23:18 23 want to avoid. As I understand the new rule, the evidence
09:23:25 24 that is needed to determine what misrepresentation is is
09:23:30 25 much lower, the bar is much lower. And more importantly,

09:23:33 it's the group claim that I'm concerned about. So if
09:23:36 there's an inadvertent misrepresentation by one of our
09:23:40 staff members, it could potentially be brought against an
09:23:44 entire group of claimants that in the past, as I
09:23:50 understand -- and I'm not a lawyer, I'm not an expert --
09:23:55 in the past, the individual would have to bring evidence
09:24:00 of that misrepresentation and now the bar is much lower
09:24:05 for that evidence.
09:24:07 Q. But you would agree with me that under the current
09:24:12 regulations, it's not permissible to misrepresent things
09:24:18 to students and borrowers?
09:24:19 A. No, it's not permissible.
09:24:25 Q. So would you agree, then, that the substantive
09:24:27 standard hasn't changed, meaning the types of
09:24:31 misrepresentations that need to be avoided?
09:24:36 A. Yes. I mean, misrepresentation is misrepresentation.
09:24:41 But I think that there has been a change in the definition
09:24:45 because in this rule, I don't know how any pages is
09:24:49 devoted to misrepresentation. If the current rule was
09:24:54 good enough, why would, you know, there be new regulations
09:24:58 about misrepresentation?
09:25:01 Q. Do ECPI staff currently review, you know,
09:25:06 advertisements?
09:25:07 A. Yes.
09:25:08 Q. Communications that go off promoting the programs?

09:25:11 A. Yes.
09:25:12 Q. Do ECPI staff currently keep records about those
09:25:17 communications?
09:25:18 A. Yes.
09:25:22 Q. Do ECPI staff currently keep records in preparation
09:25:25 to respond to borrower defense claims under the currently
09:25:29 effective regulations?
09:25:30 A. Yes.
09:25:30 Q. And do those records involve communications to
09:25:34 borrowers?
09:25:35 A. Yes. The difference is under the -- after July 1st,
09:25:41 the claim could come 20 years from now even after a
09:25:46 borrower has been out working for a long time. So the
09:25:49 types of communications and given that now you have text
09:25:53 messaging, you have voice messaging, you have all kinds of
09:25:57 ways to communicate with students, the totality of what we
09:25:59 have to maintain and any type of communication so that we
09:26:05 can provide a defense in the event of a discharge claim, I
09:26:10 mean now, the burden has shifted dramatically to us to
09:26:15 basically defend ourselves, and we only have 90 days to do
09:26:19 that in the event of a claim, as I understand it. So the
09:26:23 volume of what we have to maintain, the types of
09:26:26 communications that we have to maintain because we want to
09:26:29 maintain them to protect us going forward.
09:26:34 But, of course, misrepresentation is

09:26:36 misrepresentation.
09:26:38 Q. Mr. Dreyfus, you reviewed the full rule before your
09:26:44 testimony today, correct?
09:26:45 A. Yes.
09:26:46 Q. And I know it's long. Are you aware that the
09:26:50 department states in the rule that it will not pursue
09:26:54 recoupment based on the new borrower defense standards
09:26:57 except for loans that are disbursed after the effective
09:26:59 date, meaning after July 1st?
09:27:01 A. Yes.
09:27:04 Q. So would you agree that when Mr. Arthur's declaration
09:27:08 states, quote, recoupment proceedings could be instituted
09:27:11 for ECPI university graduates whose enrollment ended
09:27:15 several years ago, that that's a -- that that statement is
09:27:18 mistaken?
09:27:20 A. I guess so. Yeah.
09:27:23 Q. During your tenure with ECPI, has any branch or
09:27:31 campus ever closed?
09:27:33 A. Yes.
09:27:35 Q. And in those circumstances, were students who wanted
09:27:41 to continue with their program unable to access
09:27:45 educational opportunities at the remaining branches?
09:27:48 A. Every student was, you know, taken care of.
09:27:54 Q. Has any closed ECPI institution ever been subject to
09:27:57 recoupment before?

09:27:58 A. No.
09:28:02 Q. Whenever Mr. Arthur describes upgrades to programs,
09:28:14 could you explain a little bit about what an upgrade looks
09:28:17 like?
09:28:17 A. Sure. Let's take cyber security. You may build a
09:28:23 new lab to that program, you may add a specialty of the
09:28:26 program, for example, now you may have artificial
09:28:29 intelligence to cyber security, which means you have to
09:28:32 get new software, you have to have different staff, you'd
09:28:35 have to make sure that, you know, our facilities are
09:28:38 prepared for that. Same thing in nursing. I mean, in
09:28:41 nursing, we will add, you know, hospital settings and we
09:28:46 will put a lot of resources towards simulation labs and
09:28:52 virtualization now, which has come into play.
09:28:55 So as there are advances in techniques to educate
09:29:01 students, particularly skills-based education, we invest
09:29:05 heavily to that to make it a better experience for our
09:29:07 students.
09:29:10 Q. And so, the result of upgrades like that is never
09:29:13 that a student is unable to complete their program of
09:29:17 study.
09:29:19 A. Students are -- it's available for students to
09:29:22 complete the program, but students don't finish their
09:29:25 program for a lot of reasons. I mean, there's a lot of
09:29:28 life issues that come into play with students. Sometimes

09:29:31 they have financial issues, sometimes there's a sickness
09:29:33 in the family, sometimes they need to take a break and,
09:29:37 you know, take a job. So there's a lot of reasons why.
09:29:42 But no, I mean, I think students are always available to
09:29:47 finish if they can, but things get in the way most of the
09:29:50 time.
09:29:51 Q. But you would agree when they don't finish, it's not
09:29:54 because of the upgrade of the program.
09:29:56 A. No.
09:30:05 Q. And again, just to reiterate, you've reviewed the
09:30:08 full rule before your testimony today?
09:30:10 A. Yes, I did.
09:30:11 Q. Sir, are you aware that in the rule the department
09:30:15 states that continuation of the student's program of
09:30:20 study, even at another location of the institution, is
09:30:23 treated as completion of that program for purposes of the
09:30:26 school discharge rule?
09:30:27 A. Yes. However, if the student changes programs or the
09:30:33 program zip code changes, that is not considered the same
09:30:38 program. So a student that may have been in software
09:30:42 development decides to finish in cyber security, that is
09:30:46 now a student that did not finish the program. If a
09:30:49 student's in mechatronics program decides to go into
09:30:53 engineering technology just because the schedule is super
09:30:56 or they now want to do that, that is now considered a

09:30:58 student that didn't finish the program. So they have to
09:31:01 finish -- not only do they have to finish the exact same
09:31:05 program at the new facility and students do change
09:31:09 programs.
09:31:10 Q. But in the circumstance you are describing, would you
09:31:13 agree that that's the choice of the student? It's not
09:31:16 attributable to the opening of a new location or the
09:31:20 upgrading of that program and study?
09:31:22 A. That's the choice except it's still a discharge.
09:31:30 Q. I'm going to ask you a couple of questions about the
09:31:33 second institution in Texas that ECPI had contemplated
09:31:37 opening up. Could you tell me what date you began
09:31:41 considering opening up that second campus?
09:31:44 A. Probably 2019.
09:31:47 Q. And when did you abandon those plans?
09:31:50 A. We abandoned them this spring.
09:31:53 Q. This spring, 2023?
09:31:55 A. Uh-huh.
09:31:56 Q. And you said that that site was in Dallas, Texas,
09:32:03 right?
09:32:04 A. Correct.
09:32:08 Q. What sort of programs were contemplated to be offered
09:32:12 at that campus?
09:32:13 A. Similar to the San Antonio nursing, cyber security,
09:32:17 engineering technology.

09:32:22 Q. Would any students be able to claim from the San
09:32:30 Antonio campus that their program of study had ended if
09:32:34 the new campus in Dallas were opened up?
09:32:37 A. No.
09:32:44 Q. No further questions, your Honor. Thank you, Mr.
09:32:47 Dreyfus.
09:32:47 THE COURT: Any followup?
09:32:49 RE-DIRECT EXAMINATION
09:32:59 BY MS. BAKER:
09:32:59 Q. Mr. Dreyfus, I want to ask you a few followup
09:33:07 questions, if that's okay.
09:33:14 You currently at ECPI retain records associated
09:33:20 with various aspects of the admissions process, right?
09:33:25 A. Yes.
09:33:25 Q. What is your understanding of how the rule that's
09:33:31 expected to take effect on July 1 will change those record
09:33:35 retention obligations?
09:33:37 A. We will have to retain records for 30 or 40 years
09:33:42 because it has to be over the life of the loan. So
09:33:47 currently, you know, we don't retain records for 40 years
09:33:51 on students in that detail.
09:33:59 Q. You just provided a response to Mr. Knapp's question
09:34:04 about recoupment and your understanding of how the new
09:34:10 rule expected to take effect on July 1st will treat
09:34:15 recoupment as it relates to loans that are disbursed

09:34:19 1 before and after July 1. Do you recall that testimony?
09:34:21 2 A. Yes.
09:34:22 3 Q. I wanted to refresh your recollection about what the
09:34:25 4 rule actually says. Your Honor, may I approach the
09:34:27 5 witness?
09:34:27 6 THE COURT: You may.
09:34:28 7 MS. BAKER: And, your Honor, I have a copy, as
09:34:31 8 well, for you. This is the rule if you guys want a copy.
09:34:35 9 MR. KNAPP: I have a copy.
09:34:37 10 MS. BAKER: Okay. Thank you.
09:34:48 11 Q. (BY MS. BAKER) So I have handed to the witness solely
09:34:59 12 for purposes of refreshing his recollection, not for
09:35:01 13 purposes of admitting into evidence, a copy of the Federal
09:35:05 14 Register proposed rulemaking and actual rulemaking, I
09:35:07 15 should say, that's dated November 1, 2022. No
09:35:11 16 expectation, Mr. Dreyfus, that you read this right now,
09:35:13 17 but I wanted, in particular, to direct your attention to
09:35:16 18 one of the last pages of this rule.
09:35:18 19 Specifically, if you go to the second to last
09:35:21 20 page of the -- and I think I've tabbed it for you.
09:35:25 21 A. Yes.
09:35:25 22 Q. For purposes of ease. It's page 66072. And, your
09:35:31 23 Honor, I have provided you with a copy, as well. It's the
09:35:34 24 second to last page, 66072. Thank you.
09:35:41 25 Are you there, Mr. Dreyfus?

09:35:43 A. Yes, I am.
09:35:44 Q. So it says recovery from institution. Do you see
09:35:46 that?
09:35:46 A. Yes, I do.
09:35:47 Q. And you understand that that concerns the recoupment
09:35:49 process that the rule expected to take effect
09:35:53 contemplates?
09:35:54 A. Yes.
09:35:54 Q. Okay. If I can direct your attention, please, to
09:36:01 about halfway down that third column, part B where it says
09:36:05 the secretary will not collect from the school any
09:36:08 liability. Do you see that?
09:36:09 A. I do.
09:36:09 Q. Okay. And it says -- and I'm just going to read it
09:36:13 just to make sure we're following along. The secretary
09:36:15 will not collect from the school any liability to the
09:36:18 secretary for any amounts discharged on -- discharged or
09:36:22 reimbursed to borrowers for an approved claim under and
09:36:26 then, it cites the provision that contemplates
09:36:29 adjudication 685.406 -- for loans first disbursed prior to
09:36:34 July 1, 2023 unless. Do you see the unless?
09:36:38 A. Yes, I do.
09:36:39 Q. And then, it lists certain instances when, indeed,
09:36:42 recoupment will occur. Do you see that, sir?
09:36:44 A. Yes, I do.

09:36:45 Q. So the first being for loans first disbursed before
09:36:48 July 1, the claim would have been approved under the
09:36:50 standard and the standard described this 685.206. We can
09:36:56 describe that standard, but you agree that there's a
09:36:58 standard there that contemplates instances of recoupment
09:37:02 for loans disbursed prior to July 1, 2023?
09:37:05 A. Yes.
09:37:05 Q. Okay. Second part there, so (b)(2), do you see where
09:37:11 I am, Mr. Dreyfus?
09:37:12 A. Yes.
09:37:12 Q. For loans first disbursed on or after July 1, 2017
09:37:16 and before July 1, 2020, the claim would have been
09:37:19 approved under the standard in Section 685.222(b) through
09:37:25 (d). Do you see that?
09:37:26 A. Yes, I do.
09:37:27 Q. So once again, this rule contemplates recoupment in
09:37:32 instances when a loan could have been eligible for a
09:37:35 borrower defense claim as described in the standard here
09:37:39 on part 2. Do you see that from '17 to '20?
09:37:42 A. Yes.
09:37:42 Q. And then, finally, for 3, for loans first disbursed
09:37:47 on or after July 2020 and before July 1, 2023, the claim
09:37:52 would have been approved under the standard in
09:37:57 685.206(e)(2). Do you see that?
09:37:58 A. Yes, I do.

09:37:58 Q. So you agree then that, indeed, recoupment is
09:38:00 possible as to loans that were disbursed prior to July 1,
09:38:05 2023 under this rule?
09:38:05 A. Yes.
09:38:07 Q. I have one final question for you. Is the San
09:38:14 Antonio campus of ECPI a member of Career Colleges &
09:38:18 Schools of Texas, CCST?
09:38:20 A. Yes, it is.
09:38:20 Q. How long has it been a member?
09:38:22 A. Since it was open 2018.
09:38:24 Q. Thank you. No further questions, your Honor. Thank
09:38:26 you.
09:38:27 THE COURT: Any followup?
09:38:29 MR. KNAPP: No, your Honor.
09:38:29 THE COURT: Okay. Thank you. You may step down.
09:38:34 Next witness.
09:38:39 MS. BAKER: Thank you, your Honor. We call to
09:38:40 the stand Ms. Jones, Diane Auer Jones. Thank you.
09:39:06 THE COURT: Good morning. Before you take a
09:39:07 seat, could you raise your right hand, please.
09:39:10 THE CLERK: You do solemnly swear or affirm that
09:39:10 the testimony which you may give in the case now before
09:39:10 the Court shall be the truth, the whole truth, and nothing
09:39:17 but the truth?
09:39:17 THE WITNESS: I do.

TAB 5

11:16:26 1 RE-DIRECT EXAMINATION
11:16:26 2 BY MS. BAKER
11:16:33 3 Q. Mr. Dreyfus, as you note, you're still under oath and
11:16:36 4 I wanted to just ask you some additional questions in
11:16:39 5 connection with the Judge's question about resource
11:16:43 6 allocation.
11:16:44 7 So you've testified about the compliance costs
11:16:47 8 that are associated with the rule that is scheduled to
11:16:49 9 take effect on July 1. Do you recall that testimony?
11:16:52 10 A. Yes.
11:16:52 11 Q. And what I want to understand is, how is the school
11:16:57 12 paying for those compliance costs?
11:17:00 13 A. We have a limited amount of resources as I mentioned
11:17:03 14 earlier. Because of the financial responsibility
11:17:06 15 regulations, you have to have a profit. From that profit,
11:17:11 16 you pay taxes. In addition, you use those resources to
11:17:16 17 reinvest in the institution, whether it's through hiring,
11:17:19 18 new faculty, or adding facilities or, in essence, really
11:17:24 19 upgrading your facilities, which is what we do. I mean,
11:17:27 20 we're not receiving grants from anyone to build buildings.
11:17:31 21 We're not receiving funds from the state. We have to do
11:17:33 22 that internally.
11:17:34 23 So any improvements or any new programs that we
11:17:37 24 offer comes from our profit. And in this particular case,
11:17:43 25 if resources are diverted, it will, in essence, come out

11:17:47 1 of what the Judge says is profits, of course; but at the
11:17:52 2 same time, it reallocates those resources so that we
11:17:55 3 cannot reinvest in things that we believe will help
11:17:58 4 students in the long run. And because of the financial
11:18:01 5 responsibility regulations, once you have a claim, you
11:18:05 6 basically go down this slippery slope and that slippery
11:18:08 7 slope is, it may be announced to the world, which would
11:18:12 8 have a detrimental impact on our reputation, and then,
11:18:15 9 also, you run afoul of some other regulations.
11:18:18 10 So it really becomes this snowball effect that
11:18:22 11 once you have a claim like this and if it's a large claim,
11:18:26 12 it certainly takes a huge amount of resources. It may be
11:18:29 13 more than a particular year's profitability and if that's
11:18:32 14 the case, you cannot have a loss. I mean, basically the
11:18:37 15 financial responsibility regs require you to have a
11:18:42 16 profit, otherwise, you're in jeopardy of closing.
11:18:45 17 So it's kind of a catch-22. If, all of a sudden,
11:18:48 18 now resources are diverted towards these particular
11:18:51 19 actions and then, you have a recoupment claim that you
11:18:54 20 have to pay, you potentially have an existential threat to
11:18:59 21 the institution.
11:19:01 22 Q. Thank you.
11:19:03 23 MS. BAKER: I don't know if your Honor has any
11:19:04 24 questions for the witness.
11:19:04 25 THE COURT: I don't. Thank you. Any questions?

11:19:06 1 MR. KNAPP: Just a couple, your Honor.
11:19:08 2 THE COURT: Okay.
11:19:09 3 RE-CROSS EXAMINATION
11:19:09 4 BY MR. KNAPP:
11:19:16 5 Q. Hello again, Mr. Dreyfus.
11:19:17 6 A. Hello.
11:19:20 7 Q. A school's participation in the Title IV student loan
11:19:23 8 programs is voluntary; is that right?
11:19:25 9 A. Correct.
11:19:27 10 Q. It's possible that a school can profit outside of
11:19:30 11 that context; is that right?
11:19:32 12 A. Yes.
11:19:35 13 Q. How are the profits allocated across your campuses?
11:19:42 14 Are they pooled sort of at the corporate level or is --
11:19:45 15 A. Yes.
11:19:45 16 Q. -- each institution --
11:19:46 17 A. I mean, we are one entity. So yes, it's pooled.
11:19:50 18 It's one entity.
11:19:51 19 Q. And are the compliance costs shared similarly across?
11:19:55 20 A. Yes, they are.
11:20:00 21 Q. No further questions.
11:20:04 22 THE COURT: Anything further?
11:20:05 23 MS. BAKER: If I may follow up. Thank you, your
11:20:05 24 Honor.
11:20:07 25

11:20:07 1 RE-DIRECT EXAMINATION

11:20:09 2 BY MS. BAKER:

11:20:09 3 Q. Mr. Dreyfus, why does ECPI participate in Title IV

11:20:14 4 programs?

11:20:16 5 A. It allows an opportunity for our students to get

11:20:20 6 associate's, bachelor's, master's degrees and, in essence,

11:20:24 7 it's an entitlement to the students to pursue education.

11:20:28 8 We deal with adult learners, we deal with a lot of

11:20:32 9 different students from a lot of different backgrounds,

11:20:35 10 and it really helps them get the education. And we can

11:20:38 11 provide better faculty. Our faculty come from the same

11:20:44 12 institutions that traditional schools come from and, you

11:20:47 13 know, so it does allow them to get a better education.

11:20:51 14 Q. You talked about the regulations that require you to

11:20:55 15 -- school to maintain a profit. What are those

11:20:58 16 regulations as you understand them?

11:21:00 17 A. The financial responsibility regulations?

11:21:02 18 Q. Yes.

11:21:03 19 A. In essence, you have to show -- there's certain

11:21:06 20 ratios that you have to maintain and you have to have

11:21:08 21 financial stability. One of the issues that I believe in

11:21:13 22 the past the department is fearful of -- and I think it's

11:21:15 23 actually noted in this particular regulation that schools

11:21:20 24 that are in financial jeopardy are at risk of closure and

11:21:25 25 the department wants to, you know, know when a school is

11:21:28 in that range of potentially closing.

11:21:31 So you have to maintain certain ratios to
11:21:36 basically be in good standing as an institution and part
11:21:39 of that is you have to show a profit.

11:21:43 Q. And so, if you have to reallocate resources from that
11:21:46 profit, the other option is, what, to raise tuition?

11:21:49 A. Yes.

11:21:51 Q. No further questions. Thank you. Your Honor, do
11:21:54 you?

11:21:54 THE COURT: No. Thank you. You may step down.

11:22:05 MS. BAKER: I wanted to talk about a couple of
11:22:08 other components of irreparable harm that your Honor heard
11:22:11 some testimony about and has read about in the submitted
11:22:15 declarations, as well. And then, I wanted to speak about
11:22:17 the balance of harms, as well, your Honor, if that's okay.

11:22:20 THE COURT: Please.

11:22:22 MS. BAKER: So as your Honor heard, in addition
11:22:24 to the irreparable harm that will absolutely happen on
11:22:30 July 1 as a function of the group claims process and then,
11:22:34 the subsequent need to respond to that process, the costs
11:22:38 associated with responding to that process, the subsequent
11:22:41 recoupment process, which is contemplated by the rule and
11:22:44 expected by the rule, we've talked about the compliance
11:22:48 costs associated with complying with the rule, which, as
11:22:51 your Honor knows, is its own form of irreparable harm.

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on September 5, 2023, I caused the foregoing to be filed via the Court's CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Allyson B. Baker
Allyson B. Baker