**No. 20-1832**

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

DIANA VARA; AMANDA WILSON; NOEMY SANTIAGO;
INDRANI MANOO; KENNYA CABRERA,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

ELISABETH P. DEVOS, in her official capacity as Secretary
of the United States Department of Education;
THE UNITED STATES DEPARTMENT OF EDUCATION,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts

# BRIEF FOR APPELLANTS

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## REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

The government respectfully requests that the Court hear oral argument in this appeal, which challenges a district court ruling ordering the U.S. Department of Education to grant complete student loan relief to each member of the plaintiff class. The district court's ruling implicates approximately $47 million in loan disbursements and presents an important question of administrative law in the context of a class action.

## STATEMENT OF JURISDICTION

Plaintiffs-appellees brought this class action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the Higher Education Act of 1965, 20 U.S.C. § 1001 *et seq.*, invoking the district court's jurisdiction under 28 U.S.C. § 1331. *See* App. 14.[1] The district court granted class certification and entered final judgment on June 25, 2020. *See* Add. 72-73. Defendants-appellants, the Secretary of Education and U.S. Department of Education, filed a timely notice of appeal on August 24, 2020. App. 90. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUE

Under certain circumstances of misconduct by an academic institution, the U.S. Department of Education (Department or Education) is authorized to relieve affected borrowers, in full or in part, of their obligation to repay certain federal student loans. 20 U.S.C. § 1087e(h); *see* 34 C.F.R. § 685.206. This is known as "borrower defense relief." In 2015, the Massachusetts Attorney General (AG) asked Education for the "immediate discharge of all federal loans taken out by student borrowers who attended Corinthian Colleges, Inc.'s Everest Institute campuses in Brighton and Chelsea, Massachusetts, between 2007 and 2015, when the final programs closed," App. 147, and submitted, *inter alia*, an exhibit identifying all the students (not limited to federal loan borrowers) who had attended those campuses, App. 148. The Department did not

[1] Citations to "App. X" reference the separately filed appendix. Citations to "Add. X" reference the addendum attached to this brief.

regard the AG's submission as triggering borrower defense adjudications for all persons listed in that exhibit and issued no decision on the merits.

In 2019, the named plaintiffs, several borrowers who were listed in the AG's exhibit, commenced this class action against the defendants, the Department and the Secretary of Education. The district court concluded that Education was "free to either adjudicate [the AG's] group application in one fell swoop or adjudicate constituent individual applications one at a time," but was "not free to simply ignore such an application." Add. 54. The government does not seek review of that holding.

The court did not, however, remand to permit Education to adjudicate plaintiffs' claims. Instead, the court held that every class member had established a valid borrower defense claim and is entitled to full loan relief. Add. 71-72. The issue on appeal is whether the court erred in ordering that relief rather than remanding to Education to resolve plaintiffs' claims in the first instance.

## STATEMENT OF THE CASE

### A. Legal Framework

**1.** The Higher Education Act of 1965, 20 U.S.C. § 1070 *et seq.*, authorizes federal student loan programs, including the William D. Ford Direct Loan (Direct Loan) program, 20 U.S.C. §§ 1087a-1087j. Under the Direct Loan program, Education serves as the lender for several types of loans, including loans to students and to eligible parents of dependent students, as well as consolidation loans. *See* 20 U.S.C. § 1087a; 34 C.F.R. § 685.220; *see also* App. 47.

Until July 2010, the Higher Education Act also authorized the Federal Family Education Loan (FFEL) program, which similarly included loans for eligible students and eligible parents. 20 U.S.C. § 1071(d). These loans, however, are generally owned by commercial lenders, and the federal government provides re-insurance. *See* 20 U.S.C. § 1080; *see also* App. 47-48.

**2.** Generally, borrowers are obligated to repay federal student loans, and Education is obligated to try to collect student loan debts. *See, e.g.*, 20 U.S.C. § 1087e(d); 31 U.S.C. § 3711(a)(1). Under certain circumstances, however, the Secretary of Education (Secretary) may administratively discharge loan obligations. *See, e.g.*, App. 146-47. The Higher Education Act requires the Secretary to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment" of a Direct Loan. 20 U.S.C. § 1087e(h).

**a.** Beginning in 1995, Education's regulations provided that "[i]n 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." 34 C.F.R. § 685.206(c)(1) (1995). The Department explained that, under this provision, a Direct Loan borrower can obtain relief if she would have a valid state law claim against the school that is "directly related to the loan or the educational services." 60 Fed. Reg. 37,768, 37,769 (July 21, 1995). The regulations also provided that "[i]f the borrower's defense against repayment is successful, the Secretary notifies the borrower that the

borrower is relieved of the obligation to repay all or part of the loan," and "affords the borrower such further relief as the Secretary determines is appropriate under the circumstances." 34 C.F.R. § 685.206(c)(1) (1995).

For the next two decades, this borrower defense provision was "rarely used." 81 Fed. Reg. 39,330, 39,330 (June 16, 2016). That changed when Corinthian Colleges, Inc. (Corinthian or CCI), a large for-profit college chain, "collapsed" in 2015, prompting "a flood of borrower defense claims submitted by Corinthian students stemming from the school's misconduct." *Id.* at 39,330-31. At the time, Education lacked any "established infrastructure for accepting, processing, and reviewing large numbers of such claims from borrowers." U.S. Dep't of Educ., *First Report of the Special Master for Borrower Defense to the Under Secretary* 5 (Sept. 3, 2015), https://go.usa.gov/xfHkj. The Department worked to address this problem by, among other things, creating a streamlined application process for qualifying Corinthian borrowers. *See infra* pp. 11-12.

The Department also promulgated legislative rules in 2016 and 2019 that amended the borrower defense regulations. *See* 81 Fed. Reg. 75,926 (Nov. 1, 2016) (effective Oct. 16, 2018); 84 Fed. Reg. 49,926 (Sept. 23, 2019) (effective July 1, 2020); *see also* 84 Fed. Reg. 9965, 9965 (Mar. 19, 2019) (regarding effective dates). There are now separate provisions for Direct Loans first disbursed before July 2017, from July 2017 to July 2020, and after July 1, 2020. *See* 34 C.F.R. § 685.206(c), (d), (e).

For loans issued prior to July 2017, the regulations do not alter the substantive standard to be applied in reviewing borrower defense claims. *See* 81 Fed. Reg. at 75,936,

75,945 (explaining that changes in the regulation's language do not represent a substantive change in the standard and describing the Department's "long-standing interpretation").[2]

The 2016 regulations did, however, establish detailed procedures for the assertion and review of borrower defense claims, which apply to these pre-2017 loans. *See* 34 C.F.R. § 685.206(c)(2) (explaining that "borrower defense claim[s] under this section must be asserted, and will be resolved, under the procedures in § 685.222(e) to (k)"). These regulations establish that an individual wishing to assert a borrower defense must submit an application "on a form approved by the Secretary," which indicates, *inter alia*, "whether the borrower has made a claim with respect to the information underlying the borrower defense with any third party … and, if so, the amount of any payment received by the borrower or credited to the borrower's loan obligation." 34 C.F.R § 685.222(e). The regulations also lay out a fact-finding process for reviewing applications and provide that the Secretary, in her discretion, "may initiate a process to

[2] The regulation, 34 C.F.R. § 685.206(c)(1), provides:

> A 'borrower defense' refers to any act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational services for which the loan was provided that would give rise to a cause of action against the school under applicable State law, and includes one or both of the following:
>
> (i) A defense to repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part.
>
> (ii) A claim to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

determine whether a group of borrowers, identified by the Secretary, has a borrower defense." *Id.* § 685.222(f). The amended regulations require the reasonable cooperation of the borrower and continue to recognize the Secretary's discretion to decide the amount of relief to award to a successful claimant. *See id.* § 685.222(i)(1), (j).

For loans first disbursed between July 2017 and July 2020, a borrower defense claim exists where a borrower identifies a favorable non-default and contested judgment against the school under state or federal law, 34 C.F.R. § 685.222(b), or satisfies the federal standards for claiming a breach of contract or a substantial misrepresentation by the school, *id.* § 685.222(c)-(d). As with the pre-2017 loans, the detailed procedures and requirements found in 34 C.F.R. § 685.222 apply. *See id.* §§ 685.206(d), 685.222(a)(2).[3]

**b.** As relevant here to the borrowers in this litigation, those with FFEL loans may generally avail themselves of the Direct Loan's borrower defense provisions by consolidating into a Direct Loan. *See* 34 C.F.R. §§ 685.206, 685.212, 685.220, 685.222.[4]

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[3] For loans first disbursed after July 1, 2020, the borrower defense regulations impose a single federal standard: To establish a claim, a borrower must satisfy the elements of a misrepresentation claim under 34 C.F.R. § 685.206(e)(2). The applicable procedures are found in 34 C.F.R. § 685.206(e). For reasons addressed below, these regulations are not implicated in this litigation.

[4] FFEL borrowers may also assert defenses to repayment against their commercial lenders, provided that they can show that a sufficiently close relationship existed between their school and lender. *See* 34 C.F.R. § 682.209(g). That heightened showing is not at issue in this litigation, which concerns borrower defense claims presented directly to Education under 34 C.F.R. § 685.206 and § 685.222.

FFEL borrowers who have not yet consolidated may ask Education "whether they would be eligible for relief on their borrower defense claims under the Direct Loan regulations, were they to consolidate." 81 Fed. Reg. at 75,961; *see* 34 C.F.R. § 685.212(k). That is, FFEL borrowers may obtain a pre-determination from the Department and then choose to proceed with the consolidation if found to be eligible for relief. *See* U.S. Dep't of Educ., *Fourth Report of the Special Master for Borrower Defense to the Under Secretary* 4-5 (June 29, 2016), https://go.usa.gov/x7uXN (*Fourth Report*).[5]

**c.** In addition to issuing regulations, Education has developed interpretive policies to guide its relief determinations for approved borrower defense claims. In December 2017, the Department established a detailed methodology for calculating the relief presumptively available to a given borrower with a successful misrepresentation claim. Use of that methodology was preliminarily enjoined, however, on the ground that the data it relied upon were likely gathered in violation of the Privacy Act. *See Calvillo Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018), *appeal pending*, No. 18-16375 (9th Cir.). Education has since published a revised methodology, which relies entirely upon on public data. *See* U.S. Dep't of Educ., *Tiered Relief Methodology Policy*

[5] Generally, the date on which the Direct Consolidation Loan was disbursed, or is expected to be disbursed, determines which regulations apply. However, for those who currently have FFEL loans (*i.e.*, not yet consolidated into a Direct Loan), if they applied for borrower defense relief prior to July 2020, then they will be adjudicated under the standard for loans disbursed from July 2017 to July 2020. *See* 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020).

*Statement* (Dec. 10, 2019, as revised Aug. 20, 2020), https://go.usa.gov/xfHUM (*Tiered Methodology*) (incorporated at App. 59). The methodology operates to quantify "harm"—specifically, the "lack of value conveyed by a borrower defense applicant's education"—and provide "proportionate relief." *Id.* at 4, 11-12.[6]

**B. Factual Background**

**1.** Corinthian Colleges, Inc. operated two Everest Institute campuses in Brighton and Chelsea, Massachusetts, from 2007 until they closed in October 2014 and May 2015, respectively. Corinthian ended its operations nationwide and declared bankruptcy in May 2015, in the wake of state and federal investigations into misconduct, which resulted in lawsuits and large fines. *See* Add. 12.

**2.** On November 30, 2015, the Massachusetts AG wrote to Education to request the "swift, automatic, and complete discharge" of the federal student loans of all those who enrolled in programs at Corinthian's two Massachusetts campuses (collectively, Corinthian Massachusetts). App. 148. She urged that Corinthian had engaged in various unfair and deceptive practices in violation of Massachusetts law. *See* Add. 15. "Exhibit 4 of [the] submission" was a list that appeared to identify 7241 former Corinthian Massachusetts students. App. 148. The exhibit offered the students' names,

[6] The current methodology is the subject of a pending challenge. *See Pratt v. DeVos*, No. 20-1501 (D.D.C.).

contact information that they had provided to Corinthian, the specific programs[7] in which they had enrolled, and their dates of enrollment. *See id.*; App. 160. It did not include social security numbers or birthdates, nor did it specify which of the students listed (or parents thereof) had taken federal student loans to attend. *See* App. 595.[8]

The AG explained that individual borrowers would likely struggle with "[n]avigating defense to repayment applications," and that her submission was intended to furnish evidence of misconduct that would be impossible for individual borrowers to gather. App. 154 n.5; *see* Add. 15 (summarizing evidence). She further noted that "[i]f the Department cannot create an automatic discharge process, we urge the Department to put measures in place to assist borrowers in asserting their individual defense[s] to repayment, as part of the debt collection process." App. 154 n.5.

The AG's submission also included, at Exhibit 3, individual borrower defense applications from thirty borrowers. In these applications, the borrowers provided the Department with personal information (including social security numbers) and signed attestations identifying the misleading information that each had received (*e.g.*, "I received information about job placement rates related to my program of study through emails…from [Corinthian].") and that had influenced their decisions to enroll and to

[7] The campuses offered non-degree programs for dental assistants, medical administrative assistants, medical assistants, medical insurance billing and coding, and massage therapy. *See* App. 151.

[8] Following the district court's judgment, Education determined that a number of people are included in the exhibit more than once, and there are, in fact, only 6760 unique former Corinthian students listed. *See* App. 595.

take out loans. *See, e.g.*, App. 211. The applications also each included a signed form authorizing the AG as a representative to access information regarding the status of each student's federal loans. *See, e.g.*, App. 214. The AG requested "that the Department of Education review these individual proffers, as supplemented by this submission, and promptly discharge the applicants' federal student loans." App. 154.[9]

**3.** In January 2016, the Department responded to the AG's letter by requesting additional data or materials to support certain claims. *See* App. 404-05. The Department also stated it would work to "provid[e] a fair, transparent, and efficient process for debt relief for all students" and characterized the AG's submission as "a valuable first step in what we hope will be a productive joint endeavor." App. 405.

The Department forwarded the thirty individual borrower defense applications included in the AG's submission to the "personnel responsible for Borrower Defense intake, for adjudication in the regular course." App. 402. The Department did not attempt to derive individual borrower defense application files from the AG's submission, which broadly requested the "complete discharge of all federal loans for every Corinthian student in Massachusetts" but did not identify the particular borrowers or loans at issue. App. 148. As described below, the Department ultimately used the AG's submission as a source of evidentiary material for findings of

[9] The thirty applications submitted by the AG represent a fraction of the total number of individual applications submitted by Corinthian Massachusetts students, some number of which have been adjudicated. *Cf.* App. 36.

misconduct, but did not regard it as a cognizable application triggering any adjudication process for Corinthian Massachusetts students who had not individually asserted borrower defense claims. *See* Add. 18.

**4.** Beginning in 2015, Education, working in coordination with state Attorneys General, affirmatively investigated claims against Corinthian across the United States. The agency made a series of findings that, with regard to specific programs (*e.g.*, the diploma program for Medical Assistants on a specific campus), Corinthian had widely disseminated misleading job-placement-rate data during specified time periods (*e.g.*, July 2011 through September 2013).[10] To reduce the burden on individual borrowers and streamline adjudications, the Department announced that any borrower who first enrolled in one of these programs within the relevant date range and who had done so, at least in part, in reliance on misleading job-placement rates could assert a presumptively valid defense to loan repayment by completing an attestation form developed by the Department for this purpose. *See* App. 58. The attestation form askes the borrower to provide necessary personal information and to certify the following: the program attended, the dates of enrollment, and that the student had relied in substantial part on Corinthian's misleading job-placement rates when enrolling. *See id.*

[10] *See, e.g.*, U.S. Dep't of Educ., *Third Report of the Special Master for Borrower Defense to the Under Secretary* 3-5 (Mar. 25, 2016), https://go.usa.gov/xAx3G; U.S. Dep't of Educ., *Fact Sheet: Protecting Students from Abusive Career Colleges* (June 8, 2015), https://go.usa.gov/xA3cM.

As relevant here, in 2016, Education, working in conjunction with the Massachusetts AG's office, announced job-placement-data findings for programs at Corinthian's Massachusetts campuses during specified time periods between 2010 and 2014.[11] The Secretary stressed that the AG's submission, and the evidence it presented, had been taken into account in developing these findings. *See* U.S. Dep't of Educ., *U.S. Department of Education Announces Path for Debt Relief for Students at 91 Additional Corinthian Campuses* (Mar. 25, 2016), https://go.usa.gov/xf6b5 (announcing findings at joint press conference with the Massachusetts AG) (cited at App. 58); *see also* U.S. Dep't of Educ., *Everest Attestation Form*, https://go.usa.gov/xAxfz (discussed at App. 58).

The Department subsequently found that Corinthian also made certain misrepresentations about guaranteed employment and the transferability of Corinthian credits. *See* Manning Decl. at 3-4, *Calvillo Manriquez v. DeVos*, No. 17-7210 (N.D. Cal. Apr. 12, 2018) (ECF No. 41-1). In light of these findings, a Corinthian Massachusetts student who attests that she received misleading information about guarantees of work

[11] For four of the diploma programs at the Brighton campus (dental assistant, massage therapy, medical administrative assistant, and medical assistant), the Department's findings about misleading job-placement-rate data extend from July 2010 through September 2014. *See* U.S. Dep't of Educ., *List of Programs and Enrollment Dates* (updated June 15, 2016), https://go.usa.gov/xfzFP (cited in Gov't Mot. & Opp'n at 5-6, 14, *Williams v. DeVos*, No. 16-11949 (D. Mass. Apr. 11, 2018) (ECF No. 81)). For three of the diploma programs at the Chelsea campus (medical administrative assistant, medical assistant, and medical insurance and billing code program), the Department's findings cover July 2011 through September 2014. *Id.* For Chelsea's massage therapy, the findings cover the same dates, but extend to "all credential levels." *Id.* And for one additional Chelsea diploma program (dental assistant), the findings extend from July 2012 through September 2013. *Id.*

following graduation or about the ability to transfer Corinthian credits to other schools, may be successful in asserting a borrower defense to repayment. *See id.*

### C. Prior Proceedings

**1.** The named plaintiffs are several former Corinthian students who incurred Direct Loans or FFEL loans to cover their educational expenses and are thus subject to the borrower defense regulations. Their names were included on Exhibit 4—the AG's list of all former Corinthian Massachusetts students. *See* Add. 26-29. They sought certification of a class of all persons who (a) borrowed federal student loans to cover the costs of attending Corinthian Massachusetts for any student identified in Exhibit 4 and (b) have not yet received complete borrower defense relief. *See* App. 38 (explaining that this class definition includes both student borrowers and parent borrowers).

Plaintiffs contended that defendants violated the APA by failing to issue a reasoned decision resolving the AG's request for borrower defense relief on behalf of all Corinthian students in Massachusetts. *See* App. 13. Relatedly, they urged class-wide relief under Federal Rule of Civil Procedure 23(b)(2) on the ground that "Defendants' action in constructively denying the loan cancellation application submitted by the AG[] on behalf of the class, without rendering a reasoned decision, applies generally to the class, such that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole." App. 38. Plaintiffs asked the district court to hold that all proposed class members have established valid defenses to repayment and that

the "only non-arbitrary action that Defendants may take" is to grant complete loan discharges and refunds on the "loans of all members of the proposed class." App. 14.

**2.** On June 25, 2020, the district court ruled for the plaintiffs. First, the court certified the proposed class under Federal Rule of Civil Procedure 23(b)(2). In doing so, the court stressed that the question of whether Education was required to issue a decision in response to the AG's submission is a central question common to all members of the class and that the named plaintiffs' claims with respect to that question were typical. *See* Add. 34-35.

Second, the district court held that Education's decision whether to address the AG's submission was subject to judicial review, and that the Department had violated the APA by failing to issue any reasoned decision granting or denying the submission. *See* Add. 45-62. The court observed that the Department could choose to adjudicate the AG's submission on a group basis or to adjudicate individually those listed in Exhibit 4, but held that it could not refuse to do either. Add. 54. The court also rejected any suggestion that Education's inaction was justified by the fact that the AG sought to act on behalf of individual borrowers without obtaining their consent or without providing Education with certain identifying information, such as social security numbers or birthdates. Add. 56-59.[12]

[12] The court acknowledged that the Department might "require additional information about borrowers who took out loans for those listed in Exhibit 4" in order to be able to provide any relief, and regarded that as a "matter of implementation" for the Department to address. Add. 72 n.29.

Third, the district court addressed relief. The court acknowledged that ordinarily the remedy for this type of APA violation would be limited to a remand to the agency for further consideration. Instead, however, the court invoked a rarely cited exception applicable when "'a remand would be futile.'" Add. 63 (quoting *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992)). The court concluded that "'only one disposition'" of plaintiffs' borrower defense claims "'is possible as a matter of law'": each and every class member must receive a full loan discharge. *Id.* (quoting *Brooks*, 963 F.2d at 1539); *see* Add. 65 (stressing that it would be "inappropriate" to remand for the Department to decide whether class members are entitled to relief, and, if so, to determine the amount of relief).

Taking as a given that all class members' loans were issued prior to July 2017, a period for which "[s]tate law governs the right to relief," the court held that the only possible conclusion is that every class member—regardless of the dates they attended Corinthian, the programs they completed, or the specific misconduct to which they might claim to have been subjected—has proven a valid claim under Massachusetts' consumer protection law. Add. 62-65 (alteration in original).[13]

The district court further concluded that each borrower would necessarily be entitled to "full loan discharges." Add. 65-69. The court acknowledged that two other

[13] Post-judgment identification of the loans at issue reveals that, while the vast majority of the loans at issue were disbursed prior to July 2017, some former-FFEL borrowers consolidated into Direct Loans after July 1, 2017. And those who currently have FFEL loans will necessarily be consolidating after July 1, 2017. *See* App. 596.

courts had held that the governing regulation "gives the Secretary discretion to determine the amount of relief, not tethered to state law." Add. 65 (quoting *California v. U.S. Dep't of Educ.*, No. 17-7106, 2018 WL 10345668, at *10 (N.D. Cal. June 27, 2018) and *Calvillo Manriquez*, 345 F. Supp. 3d at 1100 ("[T]he regulations do not provide a mandatory right to a full discharge.")). Nevertheless, the district court concluded that the record before it showed a "'settled course of adjudication'" in which "the *measure* of relief" for a successful borrower defense claim was "determined by reference to the state law that gave rise to the right to relief." Add. 66 (quoting *INS v. Yueh–Shaio Yang*, 519 U.S. 26, 32 (1996)). The district court rejected the suggestion that any reasoned departure from that practice might be possible and held that the only lawful remedy here would be the full discharge that the court inferred Massachusetts state law would provide. Add. 67.

Based on these views, the court declared that "a valid borrower defense to repayment application [was] submitted on behalf of all individuals who took out federal student loans to pay for the cost of attendance for students listed in [the AG's] Exhibit 4," "that plaintiffs have established a right to borrower defense relief for all [these] individuals," and that they are "entitled to full loan discharges." Add. 71-72. The district court directed the Secretary "to render a reasoned decision not inconsistent with [the court's] Order." Add. 72.

**3.** On August 20, 2020, the district court partially stayed its order to ensure that the government would not be required to discharge loans or issue refunds during

the pendency of an appeal. *See* App. 588. The court noted that the June 25 order "remains in effect" insofar as it, *inter alia*, declares that class members "have established a complete borrower defense to repayment" and "require[s] a decision by September 7, 2020," and therefore defendants may not "take any action to collect on class members' federal student loans at issue" while the appeal is ongoing. App. 589. On August 24, 2020, the government filed a timely notice of appeal. App. 590.

**4.** On September 4, 2020, Education published a decision on its website concerning the borrower defense applications of all class members in this litigation. *See* App. 594; *see also* App. 599. The agency explained that, under the district court's ruling, "all individuals who borrowed federal student loans to pay the cost of attendance for any of the 7,241 persons named in the Massachusetts Attorney General's exhibit" are entitled to borrower defense relief amounting to "full loan discharges." App. 592. The agency also explained that the government is appealing, and while the appeals process is ongoing, Education is not required to discharge or refund these loans. *Id.* Finally, the agency described the ways in which the agency is implementing the June 25 ruling. *Id.* (*e.g.*, identifying the loans at issue, maintaining government-held loans in forbearance or stopped collection, asking commercial lenders to do the same). Finally, Education noted that, in addition to making the notice of decision publicly available, it would be sending it directly to affected borrowers, and they would also be updated after the conclusion of the appeals process. *Id.*

**5.** Because the AG's Exhibit 4 identified Corinthian students but did not indicate whom among them (or their parents) were federal borrowers, the Department's first step to effectuate the court's orders was to identify the borrowers who comprise the class. App. 595. After identifying 481 duplicative listings among the 7241 names in Exhibit 4, Education worked to identify any federal loans associated with the 6760 unique students. App. 595-96. Education ultimately identified 6024 unique borrowers, who had taken out loans for the benefit of 5639 students and had not yet received complete borrower defense relief. *Id.* These 6024 borrowers include more than 5300 borrowers whose federal loans are held exclusively by Education and approximately 700 borrowers whose loans are exclusively or partially held by non-federal loan holders. *Id.* Education oversaw the creation of electronic borrower defense application records in its Borrower Defense case management platform for each borrower. App. 596 n.2.[14] Education then sent decision letters to the borrowers. App. 596-97; App. 599 (modifying the posting to address class members directly).[15] The agency also took the necessary steps to ensure that loans are held in forbearance or stop-collection status. App. 597-98 (explaining that all vendors servicing defaulted and non-defaulted federally held and commercially held loans confirmed that such relief would be provided).

[14] At the time of the declaration, there were four borrowers for whom the agency had not been able to create files. While the agency still lacks any e-mail or mailing address for two of them, it has been able to create application files for everyone.

[15] As of November 4, 2020, the letter had been sent to all but 59 borrowers—primarily parent borrowers with commercially held FFEL loans whose contact information was not in the Department's databases or in Exhibit 4. *See* App. 597 & n.3.

**6.** On October 21, 2020, plaintiffs filed a motion under Federal Rule of Civil Procedure 70, asking the district court to enforce the judgment's requirement that the Department issue a "reasoned decision." Pls' Mot. to Enforce at 1 (ECF No. 74). Plaintiffs claimed that the Department had failed to do so, taking issue—for example—with the heading under which agency posted its decision on its website ("Notice of Decision About The *Vara v. DeVos* Case") because it "suggest[s] a litigation update, not a substantive agency decision." *Id.* at 11. In response, the Department explained that it sought to implement the district court's instructions by making clear that "(1) as a matter of law, under [the] Court's June 25 decision, all class members are entitled to complete borrower defense relief; (2) in light of the August 20 [stay] order, loans are not being discharged or refunded at this time, but specified relief is being provided during the pendency of the appeal (such as keeping loans in forbearance and stop-collection status); and (3) based on the outcome of appellate proceedings, Defendants will provide further information to class members." Gov't Resp. at 2, 9-12 (ECF No. 75). A hearing on the motion was held on November 19, 2020 (ECF No. 79), and it remains pending.

## SUMMARY OF ARGUMENT

Plaintiffs are former Corinthian students who seek loan relief under Education's borrower defense regulations. This dispute has its genesis in the submission made by the Massachusetts Attorney General in November 2015, which provided the Department with a list of all Corinthian Massachusetts students from the start of the programs in 2007 through the end of their operations in 2015. The Department regarded the submission as serving two purposes: (1) providing evidence of a number of forms of misconduct by Corinthian Massachusetts that informed the Department's affirmative findings and adjudications, and (2) filing borrower defense applications for thirty students who each completed, *inter alia*, a basic form where they identified the particular misconduct that they asserted was the basis for their individual defenses to repayment. Education did not, however, regard the submission as automatically triggering adjudicatory processes for all those who attended Corinthian's Massachusetts campuses.

The district court concluded that Education erred in failing to provide reasoned decisionmaking in response to the AG's submission insofar as it requested relief for all Corinthian Massachusetts students. After certifying the proposed class of Corinthian Massachusetts federal student loan borrowers, the court held that Education "was not required to adjudicate the [AG's application for relief] in a single group adjudication," but was at least "required to adjudicate the individual claim advanced on behalf of each Exhibit 4 borrower." Add. 59. The Department does not appeal that determination.

Had the district court correctly applied principles of administrative law, this would have been the end of the analysis: The court would have ordered Education to promptly provide all class members with reasoned decisions—leaving it to the Department to resolve the merits of their claims as a single group, sets of similarly situated subgroups, or as individual applicants. *See, e.g.*, *INS v. Ventura*, 537 U.S. 12, 16-17 (2002); *Bolieiro v. Holder*, 731 F.3d 32, 38 (1st Cir. 2013). And had the court done so, there would be no appeal by the government at this time.

The district court's opinion did not stop there, however. The court acknowledged that "'the proper way to handle an agency error in the ordinary circumstance is to remand to the agency for additional investigation or explanation.'" Add. 62-63 (quoting *Bolieiro*, 731 F.3d at 38). But the court declared that this matter falls within a narrow exception for cases where remand would be "'futile,'" because—in the court's view—the "'only…possible'" outcome of further proceedings would be for the Department to award 100% relief on every federal student loan borrowed in connection with Corinthian's Massachusetts schools. Add. 63 (quoting *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992)). Accordingly, the court issued its own adjudication of class members' claims, precluding Education from doing so.

The district court erred in directing the grant of relief. First, with regard to the validity of class members' borrower defenses, the court's ruling was premised on what it characterized as "overwhelming, uncontradicted" evidence of misconduct by Corinthian. Add. 64. The question, however, is not whether there is evidence that

Corinthian engaged in misconduct, but whether and to what extent that misconduct is relevant to the case of a particular borrower. Corinthian's misconduct doubtless forms a valid defense for many borrowers, but that is not necessarily the case for every single member of the plaintiff class. Claims may vary depending, among other things, on the dates of enrollment, the program in which the student was enrolled, and the substance of any representations the school made to the borrower.

Second, with regard to the quantum of relief available to those with valid claims, the district court mistakenly concluded that it "need not remand this matter to the agency" because Education would have no choice but to base relief on the remedies available under Massachusetts state law and therefore grant complete loan forgiveness to every class member. Add. 68. No regulation requires Education to grant the remedy that would be available in a state law action, and the district court did not suggest otherwise. Instead, it declared that Education had followed this "settled course" when deciding claims in the past and predicted that the agency would now be unable to reasonably justify taking any different approach. Add. 66-68 (quotation marks omitted).

That conclusion cannot be reconciled with fundamental principles of administrative law. Even assuming that there was—as the district court asserted (Add. 66)—a "settled course of adjudication" based on state law prior to December 2017, that does not preclude the Department from altering its approach; it may do so, as long as it supplies a "reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Education has, in fact, done just that. In 2017 and again

in 2019, the Department explained the rationale for its approaches to calculating partial or complete loan forgiveness for former Corinthian students with successful borrower defenses. And, critically, Education may do so again in the future; it is possible plaintiffs' claims will be adjudicated under a further amended methodology. The point is simply that it was improper for the district court to prejudge how relief might be addressed on remand, and thereby deny the Secretary the opportunity to exercise her statutorily delegated discretion.

This Court has previously declined to find futility and has remanded for further analysis where there are "complicated legal and factual issues" that have not yet been addressed by an agency. *Bolieiro*, 731 F.3d at 41. It should do the same here. Furthermore, vacating the portions of the district court decision that compel the Department to discharge class members' individual federal loans ensures that the ruling is compatible with the certification of the class under Rule 23(b)(2), and avoids any conflict with the Higher Education Act, which includes a provision prohibiting injunctions, attachments, or other similar relief issued against the Secretary with respect to her role in administering federal student loan programs, including her role in deciding requests for borrower defense relief. 20 U.S.C. § 1082(a)(2).

## STANDARD OF REVIEW

The district court granted plaintiffs' motion for judgment, concluding that class members are entitled to specified relief. Factual errors are reviewed for clear error, while errors of law are subject to *de novo* review. *See Massachusetts v. U.S. Nuclear Regulatory*

*Comm'n*, 708 F.3d 63, 73 (1st Cir. 2013); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 426 (1st Cir. 1983).

## ARGUMENT

### THE DISTRICT COURT ERRONEOUSLY FORECLOSED AGENCY ANALYSIS OF PLAINTIFFS' BORROWER DEFENSE CLAIMS.

This lawsuit is an outgrowth of the November 2015 submission of the Massachusetts Attorney General that described misconduct by Corinthian and attached a list of all students who had attended its Massachusetts campuses between 2007 and 2015, urging that they should be given full loan forgiveness. The plaintiff class filed suit when Education did not treat the submission as commencing application determinations for all former students listed. The district court concluded that Education should have done so, and Education now does not appeal that ruling.

As the district court acknowledged, when an agency fails to provide an adequately reasoned decision, "'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" Add. 63 (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). The court mistakenly regarded this case as one of those "rare" instances where "there is no need to remand" because doing so "'would be an idle and useless formality.'" *Id.* (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969)). In the court's view, each of the 6,024 class members—borrowers who took different types of loans at different times to finance different programs and who may claim to have experienced different aspects of Corinthian's

misconduct or to have suffered different harms—necessarily have identical borrower defense claims, and the only non-arbitrary option is for Education to award them each 100% loan forgiveness. *See* App. 62-69.

In fact, as discussed below, adjudication of class members' claims presents a host of "complicated legal and factual issues," which this Court has recognized is cause for remanding to the agency. *Bolieiro v. Holder*, 731 F.3d 32, 41 (1st Cir. 2013). Indeed, "every consideration that classically supports the law's ordinary remand requirement does so here": "The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *INS v. Ventura*, 537 U.S. 12, 16-17 (2002) (explaining that a case should be remanded "to an agency for decision of a matter that statutes place primarily in agency hands"). Accordingly, the government urges this Court to vacate the portion of the district court's decision that adjudicates class members' borrower defense applications, allowing Education to issue reasoned decisions resolving their claims in the first instance under applicable policies and regulations.

### 1. The District Court Improperly Barred The Agency From Determining The Validity Of Class Members' Claims.

After concluding that Education was required to adjudicate plaintiffs' claims, the district court refused to allow Education to address "whether plaintiffs have established their right to borrower defense relief." Add. 63. The court maintained that a remand

would be "'futile'" because "'only one disposition" would be "possible.'" Add. 63 (quoting *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992)). But that conclusion overlooked the composition of the plaintiff class and variations among the 6024 members potentially affecting the strength of their individual claims. *See* App. 62-69. The district court had no authority to insist that entitlement to loan forgiveness be dispensed en masse without regard to potentially significant differences among borrowers and their claims.

**a.** The court declared that its conclusion followed "directly and unequivocally" from the "record evidence," App 63, which it said demonstrated that plaintiffs would have claims against Corinthian under Massachusetts consumer protection law, satisfying the borrower defense standard for pre-2017 loans. Add. 64; *see* 34 C.F.R. § 685.206(c) (requiring applicants to assert relevant causes of action against their schools under state law). The court based its assumption that there was "overwhelming, uncontradicted" evidence of misconduct on the fact that, in 2016, the AG obtained a state court judgment against Corinthian in a consumer protection suit. *See* Add. 64-65. That judgment does not, however, resolve the availability of a borrower defense to every Corinthian student. Moreover, although the district court suggested that the state superior court judge "scrutinized" the AG's factual submissions, Add. 64 n.25, the judge imposed liability in a two-sentence docket entry based on an uncontested motion for summary judgment. *See* App. 141. (Corinthian had, by then, declared bankruptcy, and therefore did not appear to oppose the motion.) The state court's

findings concerned the restitution amount and acknowledged that the AG's "unopposed summary judgment motion" had already been "allowed." App. 142.[16]

The district court also noted the "copious factual findings" included in the AG's submission to the Department. Add. 65. The problem, again, is not a shortage of evidence that Corinthian engaged in misconduct that undoubtedly provides a basis for a borrower defense for many students. But the court did not engage in any analysis of the findings or examination of the underlying evidence as it relates to particular cohorts of students or particular Corinthian programs. The court's approach (noting and describing the evidence) stands in contrast with the Department's approach (analyzing and evaluating the evidence), and it offers a poor basis for precluding the Department from carrying out its statutorily delegated fact-finding role. 20 U.S.C. § 1087e(h); *see Ventura*, 537 U.S. at 16-17 (explaining that a case should be remanded "to an agency for decision of a matter that statutes place primarily in agency hands").

In fact, the Department examined the AG's submission carefully when the agency considered what findings it could issue based on common evidence—ultimately determining, for example, that there was sufficient evidence of Corinthian using misleading job-placement rates in specific programs on certain campuses during certain

[16] Under the borrower defense regulations for loans disbursed before July 2017, the Department is responsible for determining whether the state law standard is satisfied. 34 C.F.R. § 685.206(c). For July 2017 to July 2020 loans, the Department is required to recognize valid borrower defense claims where the plaintiff has secured a state court judgment, but only if it was "a nondefault, favorable *contested* judgment." 34 C.F.R. § 685.222(b) (emphasis added).

time periods that affected students who assert borrower defenses on this basis do not need to produce individual evidence of the misconduct. *See supra* pp. 11-12. The Department did not, however, find that the evidence was sufficient to support issuing such findings for every form of misconduct raised by the AG. For borrowers who request relief based on other claims (*e.g.*, alleging misrepresentations about learning environments or instructor qualifications), eligibility for relief generally turns on the individual evidence that may be adduced. *See, e.g.*, *Fourth Report* 3. The district court's ruling simply swept too broadly when it concluded that it would be impossible for the Department to reasonably conclude, with respect to any class member (that is, any Corinthian Massachusetts borrower or any cohort of borrowers), that the AG's submission was insufficient to establish a valid borrower defense. *Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (establishing that, under APA review, "a court is not to substitute its judgment for that of the agency").

Relatedly, the court's characterization of the evidence of Corinthian's misconduct as "uncontradicted" is inapt, misunderstanding the nature and the posture of this litigation. Add. 64. This is not a suit against Corinthian, but an action against Education. And as an adjudicator, Education has no interest in, or basis for, "contradicting" the evidence placed before it; its role is to give full consideration to that evidence, and to determine whether it is sufficient to support eligibility for borrower defense relief. As we have explained, for at least certain claims, the Department has not found the AG's evidence alone to suffice. But a given class member may still be able to

demonstrate a right to relief based on individual circumstances. Alternatively, where relief is denied, Education would be required to provide a reasoned explanation, which would then be subject to review. *See, e.g.*, 34 C.F.R. § 685.222(e)(5); 5 U.S.C. § 706.

**b.** The district court's ruling failed to appreciate the variety of factual and legal questions that Education's administrative processes would ensure are addressed. In the normal course, applicants for borrower defense relief (whether represented by counsel or not) identify themselves, as well as the grounds on which they believe they are entitled to relief, to the agency. Here, the application process did not follow the normal course; it began with a submission from the AG that identified students who had attended Corinthian Massachusetts, and sought to shift the burden to the Department to identify, using the limited information provided, those among the student body with federal loans, and, in turn, to identify the borrowers, and in some cases lenders, associated with those loans. The district court adjudicated the claims of the plaintiff class before the borrowers who compose the class had been identified. *See supra* pp. 18-19 (describing Education's post-judgment work to identify the individual borrowers).

More significantly, the AG's submission presents a host of potential misconduct claims, which—as the Department's affirmative findings reflect—are not all equally supported and do not apply equally to all students. *See supra* pp. 11-12 (explaining, for example, that the viability of claims based on misleading job-placement rates may depend on the academic program and dates of enrollment). The AG's submission does

not purport to connect students to particular allegations or claims, presumably because the only borrowers who specifically consented to the AG's submission are the thirty borrowers whose individual applications were attached at Exhibit 3. *See supra* pp. 9-10. The result is that, without additional administrative steps to gather relevant information,[17] it is unknown which claims a given borrower wishes to assert (presumably, but not necessarily, a subset of claim presented by the AG).

The government accepts the district court's determination that this missing information did not relieve Education of its obligation to provide reasoned decisionmaking in response to the AG's request for relief. *See* Add. 55-59. But, likewise, that obligation does not diminish Education's authority to address these shortcomings during the course of adjudication. *See, e.g.*, *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 534-44 (1978) (recognizing as "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure" and "to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties"); *see also* Add. 72 n.29 (acknowledging the agency's authority to seek further information from borrowers, or their representative, for sake of implementing relief). Linking applicants to their claims is important because, as we have discussed, the strength of claims varies, and indeed, the strength of certain claims

[17] For a subset of the class, one approach to obtaining this information would simply be to link the application initiated on the borrower's behalf by the AG with the individual's own separately filed application. While there are just thirty such applications included in the AG's submission, the actual number is far higher.

(namely, misleading job-placement-rates) varies depending on the program and time period at issue. The Department's findings provide for relief to be presumptively granted for claims based on misrepresentations about job-placement rates, while for other claims—particularly where the Department has not made any findings—more will be required to establish a right to relief. *See supra* pp. 11-12.[18] The Department has no obligation to provide the federal benefit of borrower defense relief without an understanding of what it is that an applicant claims a school has done that has caused him some harm.

The district court stressed that Massachusetts consumer protection law does not require a showing of detrimental reliance. *See* Add. 65 n.26. Massachusetts law does, however, impose basic standing requirements, including causation, which, at a minimum, support the agency asking applicants to identify the basis for their borrower defense claims. *See, e.g.*, *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. 500, 503 (2011) (explaining that, while "proof of actual reliance on a misrepresentation" is not required, "there must be a causal connection between the seller's deceptive act and the buyer's injury or loss"). In any event, as we have discussed, Education has authority to impose

[18] There can be no doubt that class members are not uniform in their claims. The individual applications included in the AG's submission confirm this. While many indicate that they received misleading information about job-placement rates, others say they were misled or deceived in other ways. *See, e.g.*, App. 326 (asserting claim based on other practices). Among those who assert claims based on misleading job-placement rates, some fall under the Department's findings, while others are outside the recognized time period. *See, e.g.*, App. 384.

procedural rules, and asking applicants (whether directly or through counsel[19]) to confirm the nature of their claims is an eminently reasonable requirement. *See* 34 C.F.R. §§ 685.206(c), 685.222(e).

In sum, the district court's adjudication of plaintiffs' claims precluded an agency process that may well have gathered additional information that would have informed its decisionmaking. Under these circumstances, the court was wrong to suggest that it could foresee that only one disposition of this matter would be possible as a matter of law.

**c.** Finally, Education—unlike the district court—would have the information necessary to ensure that plaintiffs' applications are evaluated under the applicable

[19] Agency's procedural rules generally may impose requirements on applicants and their counsel, including state Attorneys General. The district court nonetheless suggested that the AG has "plenary authority to advance claims on behalf of individuals" and may do so "without their specific written consent." Add. 57, 59. At this stage of this litigation, this is of little consequence—in compliance with the district court's ruling, the agency has recognized the AG's submission as having commenced an application for borrower defense for each class member in November 2015. But it bears noting that the court's assertion of plenary authority to proceed in federal agency proceedings is not well supported. The district court cited its earlier ruling in *Williams v. DeVos*, which, in turn, pointed to an inapposite Fifth Circuit decision holding that a state AG could represent the interests of governmental entities without their express consent in a federal antitrust suit against those allegedly harming the government's interests. *See* Add. 57, 59 (citing *Williams v. DeVos*, No. 16-11949, 2018 WL 5281741, at *11 (D. Mass. Oct. 24, 2018) (citing *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 270 (5th Cir. 1976)). Whatever authority the AG may have to represent citizens or the public interest in state court or even in federal court (at least where the limitations on *parens patriae* suits against the United States are not implicated), this does not automatically extend to the present context—where the AG requests an administrative benefit from a federal agency on behalf of specific individual applicants who may or may not be citizens of the state.

regulations. It is undisputed that class members with Direct Loans that were first disbursed before July 2017 must satisfy the state-law standard under 34 C.F.R. § 685.206(c) to establish a right to borrower defense relief. Because Corinthian ended all operations by 2015, this accounts for the vast majority of class members.

However, having now identified all borrowers who comprise the class, it is clear that there is a sub-group that is differently situated and subject to the standards set out in 34 C.F.R. § 685.206(d). This is because the class includes borrowers with non-Direct Loans—namely, commercially held FFEL loans. As discussed, these borrowers may be able to avail themselves of borrower defense relief by consolidating their FFEL loans into Direct Loans. But if consolidation occurred or will occur (*i.e.*, the Direct Consolidation Loan is first disbursed) after July 1, 2017, as is the case for some class members, they are then subject to the borrower defense standard under 34 C.F.R. § 685.206(d) and § 685.222(b)-(d)—not the state-law standard under 34 C.F.R. § 685.206(c). *See supra* pp. 7 n.5, 15 n.13; *see also* Nevin Decl., Ex. 16 (ECF No. 56-4), *Sweet v. DeVos*, No. 19-3674 (N.D. Cal.).[20]

[20] Some class members with FFEL loans have already completed consolidation into a Direct Loan, and a number of them did so after July 2017. In addition, there are nearly 700 class members who presently have at least one non-Direct Loan, which would be subject to consolidation in the future into a Direct Loan to obtain relief through this channel. *See* App. 595-96. In either case, because the AG's 2015 submission initiated borrower defense applications for all class members (per the unchallenged portion of the district court's ruling), each had an application pending before July 1, 2020. And Education has established that, in such circumstances, even those individuals who consolidate after July 1, 2020, will be resolved under 34 C.F.R. § 685.206(d) and § 685.222(b)-(d). *See* 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020).

As this Court has recognized, such complexity supports a remand. *See Bolieiro*, 731 F.3d at 38. Indeed, "every consideration that classically supports the law's ordinary remand requirement does so here," *Ventura*, 537 U.S. at 16-17, while none offers grounds for the district court's class-wide adjudication of plaintiffs' claims.

### 2. The District Court Improperly Precluded The Agency From Determining The Relief Available To Class Members With Valid Claims.

In addition to holding that the Massachusetts AG's application entitles every class member to borrower defense relief, the court specified the quantum of relief each person is to receive, declaring that "plaintiffs are entitled to full loan discharges pursuant to the agency's settled course of adjudication." Add. 72. As we explain below, however, the court's contention that a remand is unnecessary because of "the agency's course of adjudication" is both factually and legally incorrect. Add. 66.

**a.** Education's regulations leave it to the Secretary's discretion to fashion relief for applicants with valid borrower defense claims. *See, e.g.*, 34 C.F.R. §§ 685.206(c)(1) (relief may be "in whole or in part"), 685.222(i)(1) (providing that the Department "determines the appropriate amount of relief to award the borrower"). For Direct Loans first disbursed before July 2017, state law furnishes the substantive standard that the Department uses to determine whether an applicant has a valid borrower defense, but there is no corresponding requirement that the Department provide whatever remedies might be available under state law.

The district court did not find otherwise. *See* Add. 66. And as the court acknowledged, Add. 65, other district courts have agreed that the federal statute and regulations "give[] the Secretary discretion to determine the amount of relief, not tethered to state law," *California v. U.S. Dep't of Educ.*, No. 17-7106, 2018 WL 10345668, at *10 (N.D. Cal. June 27, 2018); *see Calvillo Manriquez v. DeVos*, 345 F. Supp. 3d 1077, 1103 (N.D. Cal. 2018) ("[T]here is no question that the Secretary has the power to determine the amount of relief a borrower [who has asserted a successful borrower defense] can obtain.").

The district court insisted, however, that the analysis here differs from those cases because a "more robust record depict[s] a 'settled course of adjudication'" by the agency. Add. 66. The court asserted that, "[i]rrespective of whether the agency was required by statute or regulation" to proceed in this manner, the Department's borrower defense decisions prior to December 2017 looked to "the state law that gave rise to the right to relief" to "determine[] the *measure* of relief for a successful borrower defense." Add. 66-67. The court did not believe that any deviation from this past "adjudicatory practice" of state-law reliance could be justified, Add. 67-68, and therefore—instead of remanding for agency consideration—declared, with reference to Massachusetts law, that all class members are entitled to full relief. Add. 68.

**b.** This analysis fails at each step. The court's claim that its decision reflects a "more robust record" regarding the agency's "course of adjudication" than was available in prior cases is mistaken. Add. 66 (quotation marks omitted). The internal

Department memoranda cited here were part of the records in earlier cases—which nevertheless recognized the Secretary's lawful authority to create new policies to determine how relief is calculated. *See* Add. 66-67 (citing a memo on the docket at ECF 35-8 in *Calvillo Manriquez v. DeVos*, No. 17-7210 (N.D. Cal. Mar. 17, 2018), and a memo found on the docket at ECF 66-3 in *California v. U.S. Dep't of Educ.*, No. 17-07106 (N.D. Cal. July 31, 2019)). And those materials do not establish the existence of any binding Department interpretation of the borrower defense regulations.

It is undisputed that from 2015 through 2017, the Department provided full relief to Corinthian borrowers with successful borrower defense claims. Education has explained that this approach was "based on assumptions about the value of the education received by those claimants." *Tiered Methodology* 12 (incorporated at App. 59). But it is hardly clear that this reflected any kind of "settled" view on the part of the Secretary about the role of state law or reasons for looking to state law. *See id.* at 10 (explaining that "[at] times the Department has taken the position internally that the amount of relief is subject to the Secretary's discretion," and "[a]t other times in the past, however, the Department has taken the position internally that the amount of relief due to [borrower defense] applicants is dictated by state law").[21]

[21] The district court quotes selectively from this passage in Education's 2019 policy statement—emphasizing the government's acknowledgment that "at … times" it focused on state law and omitting the "other times" when it did not. *See* Add. 66; *Tiered Methodology* 10.

In any event, whatever Education's views or practices may have been from 2015 through 2017, there have been significant policy developments since then, which make clear that the district court was wrong to suggest that reliance on state law is a "settled" approach to determining relief that would apply on remand. In December 2017, the Department adopted a new methodology for calculating relief for Corinthian borrowers with valid borrower defense claims—one that attempted to replace earlier assumptions about the value of a Corinthian education with a more data-driven assessment of the harm to borrowers. *See Tiered Methodology* 4, 12. The Department's new method relied on average earnings data (some of which was obtained from the Social Security Administration) to quantify the relative value of specific Corinthian programs, and the methodology yielded tiered awards ranging from 10% to 100% loan forgiveness. *See Calvillo Manriquez*, 345 F. Supp. 3d at 1092, 1103 (describing the methodology and concluding that this was "a legitimate exercise of the Secretary's discretion under the [Higher Education Act]").

Because of concerns about the Social Security Administration data that informed the methodology, the application of the 2017 policy to those with claims against Corinthian based on job-placement-rate misrepresentations was preliminarily enjoined on Privacy Act grounds. *Calvillo Manriquez*, 345 F. Supp. 3d at 1110. Subsequently, in 2019, Education announced a revised methodology based on similar principles but relying only on public data. Like the 2017 methodology, this current methodology relies on the comparison of earnings data between a borrower's academic program and similar

programs elsewhere to measure the harm caused by a school's misconduct and to offer proportionate relief (ranging from partial to complete). *See Tiered Methodology* 4. In a policy statement, Education has explained why this approach is a reasonable choice over the approach taken before December 2017. *See id.* at 12-15 (explaining "[d]eparture from previous approaches").

The application of this, or any other methodology, to class members' claims would be subject to judicial review following reasoned determination. For present purposes, it is sufficient to observe that, if awarding 100% relief ever constituted a "settled course of adjudication," that was not true by the time of the district court's ruling, and there were no grounds for concluding that a policy of relying on state law would apply on remand. In fact, the district court's ruling—by requiring that the remedy be based on state law—would establish a different rule for members of this class than for other borrowers (including other Corinthian borrowers) with similar loans whose claims are being decided at this time by the Department.

Moreover, even assuming the Department had a "settled course" as the district court found, it would not render a remand to the agency futile or unnecessary. Agency policies are subject to change. The district court's decision does not come to grips with this bedrock principle of administrative law—that a "course of adjudication" is not a permanent bar to alterations in an agency's policies or practices. At most, it creates a requirement that an agency provide a reasoned explanation for the changes. *See, e.g.*, *Encino Motorcars*, 136 S. Ct. at 2125 (recognizing that agencies "are free to change their

existing policies as long as they provide a reasoned explanation for the change"); *International Junior Coll. of Bus. & Tech., Inc. v. Duncan*, 802 F.3d 99, 113 (1st Cir. 2015) (explaining that Education's departure from prior precedent need only be "supported by a rational basis" (quotation marks omitted)); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947) (requiring the agency to explain its reasoning "with such clarity as to be understandable").[22]

As described above, Education has offered ample explanation for its current methodology for calculating relief. The district court did not review the reasonableness of that explanation nor would it have been proper to do so. The 2019 methodology's current status as a "settled" policy does not mean that it will necessarily be applied on remand, as the Department remains free to take a different approach in the future, provided it offers a reasonable explanation for doing so. *See Encino Motorcars*, 136 S. Ct. at 2125. The point is simply that an ordinary remand is necessary to permit the Department to offer such an explanation for whatever approach is ultimately taken to determining the relief available to class members with valid borrower defenses.[23]

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[22] In *INS v. Yueh–Shaio Yang*, 519 U.S. 26 (1996)—the case quoted by the district court (Add. 66)—the Supreme Court expressly distinguished "an avowed alteration" of a "rule or settled course of adjudication" from an "irrational departure" from agency policy—making clear that it is the latter that "could constitute action that must be overturned." 519 U.S. at 32.

[23] As previously noted, for at least one subgroup of class members, the district court's analysis cannot resolve their claims: For former or present FFEL borrowers who consolidate into Direct Loans after July 1, 2017, the state-law standard that applies to Direct Loans "first disbursed prior to July 1, 2017" is inapplicable. 34

### 3. Remanding To The Agency To Adjudicate Plaintiffs' Claims Is The Only Judgment Compatible With Both Rule 23(b)(2) Class Certification And The Higher Education Act's Anti-Injunction Provision.

Two additional considerations confirm that the district court should have remanded to the agency for adjudication of class members' claims: the limitations of class certification under Rule 23(b)(2) and the restrictions on coercive relief under the Higher Education Act, 20 U.S.C. § 1082(a)(2).

**a.** The district court certified the plaintiff class under Federal Rule of Civil Procedure 23(b)(2). *See* Add. 43-44. This required the court to find that plaintiffs satisfied Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy, as well as Rule 23(b)(2)'s requirement that defendants "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Under subsection (b)(2), unnamed class members may not opt out of the litigation and only receive notice if a court so directs. Fed. R. Civ. P. 23(c)(2)(A).

The district court acknowledged that "[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (internal

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C.F.R. §§ 685.206(c), 685.212(k)(2)(i)(A). At a minimum, for those class members, the district court's analysis cannot properly preclude additional analysis consistent with 34 C.F.R. § 685.206(d) and § 685.222. *See supra* pp. 32-33.

quotations and citations omitted). The Supreme Court has explained that subsection (b)(2) "applies only when a single injunction or declaratory judgment would provide relief to each member of the class," and is inapplicable when class members would be entitled to "individualized determinations." *Id.* at 360, 366.

If the district court had followed the ordinary remand rule, this litigation would have resolved a question (whether Education was required to provide reasoned adjudication of the AG's request on behalf of class members) amenable to uniform resolution in a single declaration (requiring that Education issue reasoned decisionmaking). But the district court's adjudication of the merits of class members' individual claims is a different matter—one that is at odds with the class's certification under Rule 23(b)(2).

While the district court acknowledged the Department's authority to decide plaintiffs' claims "one at a time," Add. 54, it foreclosed any individualized determinations by ordering Education to grant full loan discharges to all class members. The fact that the court declared all plaintiffs entitled to complete loan relief does not render the relief "indivisible": The court's declaration remains the functional equivalent of money judgments entered in each of the class members' borrower defense cases. And such relief is problematic where, as here, there are substantial differences between class members' claims, which the government should be free to consider on remand. As discussed, multiple factors (including, but not limited to, the nature of the misrepresentations a student alleges he encountered, the particular program in which

he was enrolled, his dates of enrollment, and the issuance date and type of his loan) may affect how a student's borrower defense claim is evaluated (including, but not limited to, the applicable rules or standards, and the relevant evidence or Department findings). Determining the proper amount of loan relief is likewise not the kind of analysis that "appl[ies] generally to the class," Fed. R. Civ. P. 23(b)(2), as it turns on quantifying the "lack of [educational] value conveyed" by a specific academic program to enrolled students, *Tiered Methodology* 4.

In sum, while the court's determination that Education was obligated to decide the borrower defenses of all Corinthian Massachusetts students may accord with the court's Rule 23(b)(2) certification, that certification provides no basis for the parts of the court's order that effectively compel the entry of judgment on thousands of individual claims for debt relief.

**b.** Even assuming the court's class-wide substantive relief is permitted under Rule 23(b)(2), the judgment presents another difficulty: It contravenes the Higher Education Act, which commands that "no attachment, injunction, garnishment, or other similar process … shall be issued against the Secretary" in the "performance of, and with respect to, the functions, powers, and duties, vested in [her] by" the statutory provisions governing the student loan programs under the Act. 20 U.S.C. § 1082(a)(2). Courts have recognized that this anti-injunction provision bars declaratory relief where, as here, it would "produce the same effect as an injunction." *American Ass'n of Cosmetology Sch. v. Riley*, 170 F.3d 1250, 1253-54 (9th Cir. 1999) (holding in an APA suit that the

Higher Education Act's anti-injunction prohibition applies to "coercive" relief, "no matter what name it's given"). *Cf. Expedient Servs. Inc. v. Weaver*, 614 F.2d 56, 58 (5th Cir. 1980) (recognizing that a similar provision in another statute barred a request for declaratory relief that was "essentially no different than a request for an injunction").

While this type of provision generally does not deprive courts of the power to restrain an agency "acting clearly outside its statutory powers," it bars courts from ordering coercive relief where an agency is "colorably acting within its enumerated powers." *Gross v. Bell Sav. Bank PA SA*, 974 F.2d 403, 407-08 (3d Cir. 1992). That is the case here: by ordering full loan discharges, the district court's order prevents Education from exercising its statutory authority to resolve class members' borrower defense claims in accordance with agency regulations and policies.[24] This kind of order—which "interfere[s] with internal agency operations" by foreclosing the usual deliberative process and requires the release of tens of millions of dollars in disbursed federal funds—is precisely the kind of order that this Court has recognized is barred by "no-injunction" language. *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1057 (1st Cir. 1987) (explaining that, while "no-injunction language" "does not provide blanket

[24] *See, e.g.*, *Calvillo Manriquez*, 345 F. Supp. 3d at 1103 (explaining that "there is no question that the Secretary has the power to determine the amount of relief a borrower can obtain" and that "creat[ing] a policy to determine whether students obtained value and if so, how much, is … a legitimate exercise of the Secretary's discretion under the [Higher Education Act]").

immunity from every type of injunction," it "protects [an] agency from interference with its internal workings by judicial orders attaching agency funds, etc.").

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated insofar as it foreclosed agency adjudication of plaintiffs' borrower defense claims, including the determination of the proper measure of relief available.

Respectfully submitted,

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December 2020

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,605 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

*s/ Samantha L. Chaifetz*
Samantha L. Chaifetz

**CERTIFICATE OF SERVICE**

I hereby certify that on December 31, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

*s/ Samantha L. Chaifetz*
Samantha L. Chaifetz

# ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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|---|---|---|
| DIANA VARA, AMANDA WILSON, NOEMY SANTIAGO, KENNYA CABRERA, and INDRANI MANOO, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>ELISABETH P. DEVOS, in her official capacity as Secretary of the United States Department of Education, and THE UNITED STATES DEPARTMENT OF EDUCATION,<br><br>Defendants. | ) | Civil No. 19-12175-LTS |

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (DOC. NO. 11) AND PLAINTIFFS' MOTION FOR JUDGMENT (DOC. NO. 38)
June 25, 2020

SOROKIN, J.

In this putative class action arising under the Higher Education Act ("HEA"), 20 U.S.C. § 1070 et seq., the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., and the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, plaintiffs challenge action taken by the Department of Education ("Education") and its secretary, Elisabeth P. DeVos, concerning thousands of federal student loans taken out to pay for the cost of attendance at Everest Institute ("Everest"), a for-profit postsecondary school that was operated by Corinthian Colleges, Inc. ("Corinthian"). Plaintiffs are former Everest students who seek to set aside what they characterize as Education's constructive denial of an application for student loan discharge that

the Massachusetts Attorney General's Office ("AGO") submitted on their behalf in 2015. Plaintiffs contend that Education's failure to render a reasoned decision on the merits of the AGO's application was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "without observance of procedure required by law" in violation of the APA, 5 U.S.C. § 706(2). Further, plaintiffs argue that the AGO's application, which included extensive factual and legal findings and invoked Education's borrower defense regulation, 34 C.F.R. § 685.206(c) (eff. until Oct. 16, 2018), entitled plaintiffs to full relief from their federal student loan obligations.

On November 13, 2019, Named Plaintiffs Diana Vara and Amanda Wilson moved to certify this lawsuit as a class action, Doc. No. 11, a motion that was later supplemented after Named Plaintiffs Noemy Santiago, Kennya Cabrera, and Indrani Manoo entered the case, Doc. No. 29. On January 22, 2020, the parties stipulated to a factual record to govern this dispute. Doc. No. 33. Subsequently, plaintiffs moved for judgment on the record, Doc. No. 38, and defendants opposed both plaintiffs' motion for class certification, Doc. No. 39, as well as their motion for judgment, Doc. No. 49. The two pending motions are now ripe for resolution.

## I. BACKGROUND

Before turning to the resolution of the pending motions, the Court reviews the text, application, and recent revision of the governing regulatory regime, the procedural history of this case and its prior related case, as well as the factual record as it concerns both Corinthian and the AGO's application seeking borrower defense relief on behalf of borrowers who took out loans to pay for the cost of attendance at Everest Massachusetts locations. The Court first reviews the governing law.

A. Federal Student Loans and the Borrower Defense Regulatory Scheme

Under Title IV of the HEA, the Secretary of Education is authorized "to assist in making available the benefits of postsecondary education to eligible students" through financial-assistance programs. 20 U.S.C. §§ 1070(a), 1071(a)(1). To that end, the HEA directs the Secretary of Education to "carry out programs to achieve [this] purpose[]," id. § 1070(b), including the William D. Ford Federal Direct Loan Program ("Direct Loan Program"), through which borrowers secure direct loans from the federal government, id. § 1087a, as well as the Federal Family Education Loan Program ("FFEL Program"), which allows Education to reinsure guaranteed loans made to students by financial institutions, id. § 1078.

1. The 1995 Borrower Defense Regulatory Scheme

Education's regulations, promulgated pursuant to its statutory authority under the HEA, establish that "a borrower is obligated to repay the full amount of a Direct Loan . . . unless the borrower is relieved of the obligation to repay as provided [by the HEA or Education's regulations]." 34 C.F.R. § 685.207. In the HEA, Congress mandated:

> 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). Pursuant to this statutory command, Education promulgated its borrower defense regulation, codifying the mechanism by which "[a] Direct Loan borrower may request that the Secretary exercise [her] long-standing authority to relieve the borrower of his or her obligation to repay a loan on the basis of an act or omission of the borrower's school." Federal Direct Student Loan Program, Notice of Proposed Rulemaking, 59 Fed. Reg. 42,646, 42,649 (Aug. 18, 1994). In its original iteration—which was effective from June 28, 1995 until October

16, 2018 and governs the federal student loans at issue in this case—the regulation read in pertinent part:

> (c) Borrower defenses.
>
> (1) In any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law. These proceedings include, but are not limited to, the following:
>
> (i) Tax refund offset proceedings under 34 CFR 30.33.
> (ii) Wage garnishment proceedings under section 488A of the Act.
> (iii) Salary offset proceedings for Federal employees under 34 CFR part 31.
> (iv) Credit bureau reporting proceedings under 31 U.S.C. 3711(f).
>
> (2) If the borrower's defense against repayment is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances.

34 C.F.R. § 685.206(c) (eff. until Oct. 16, 2018).

a. The Secretary is Required to Adjudicate Borrower Defenses to Repayment

As a threshold matter, the HEA and the 1995 borrower defense regulation require the Secretary to adjudicate borrower defense claims. This duty to adjudicate emanates from the text of the HEA, which establishes that borrowers have the right to raise "defense[s] to repayment" of their federal student loans and unequivocally directs the Secretary to define the contours of such defenses—that is, to clarify which "acts or omissions of an institution of higher education" will give rise to a defense that Education must recognize. 20 U.S.C. § 1070e(h). In passing this provision, Congress ensured that a defense to repayment would be available to borrowers, irrespective of how Education ultimately defined the scope and nature of such a defense. And by selecting the word "defense," Congress chose a word associated with adjudication, a significant

textual consideration. See Black's Law Dictionary 511 (10th ed. 2014) (defining "defense" as "a basis for avoiding liability on a negotiable instrument").

At the same time, Congress delegated to the Secretary—along with other duties necessary to administer the federal student loan programs that Congress created in the HEA—the task of identifying the specific "acts or omissions" which would constitute a defense. Courts have recognized that where, as here, Congress has delegated to an agency the task of administrating federal programs, that agency undertakes a non-discretionary duty to adjudicate claims or applications that are essential to the administration of those programs. Cf. Nigmadzhanov v. Mueller, 550 F. Supp. 2d 540, 546 (S.D.N.Y. 2008) ("The secretary cannot be charged with immigration administration and simultaneously have no duty to administrate. Such a result is irrational."); Rodriguez v. Nielsen, No. 16-CV-7092 (MKB), 2018 WL 4783977, at *10 (E.D.N.Y. Sept. 30, 2018) (collecting cases in which courts have held that "immigration authorities have a non-discretionary duty to adjudicate applications"). So too here.

Moreover, Education and courts have confirmed that the agency is bound to adjudicate borrower defenses to repayment. Indeed, when Education issued its first interpretation of the 1995 borrower defense regulation, the agency explained circumstances in which "[t]he Secretary will acknowledge a Direct Loan borrower's cause of action under State law as a defense to repayment of a loan" during the course of an adjudication. 60 Fed. Reg. 37,768, 37,769 (July 21, 1995) (emphasis added). Since then, courts have confirmed that an adjudication necessarily follows a borrower's assertion of the defense. See Commonwealth v. United States Dep't of Educ., 340 F. Supp. 3d 7, 10 (D.D.C. 2018) (observing that, under the regulatory scheme, the agency will continue collection on a student's debt "until this defense is asserted and the Department adjudicates the borrower's application"). Moreover, the agency has confirmed in

this litigation that borrower defense applications are "adjudicat[ed] in the regular course." Doc. No. 33 ¶ 16. Thus, under the HEA, the 1995 borrower defense regulation, and the agency's interpretations, the Secretary has a duty to adjudicate applications or claims for borrower defense relief.

b. The Secretary Must Adjudicate Affirmative Borrower Defense Applications

The borrower defense regulatory scheme also provides that the Secretary must adjudicate affirmative borrower defense applications—that is, requests for borrower defense relief that are asserted before a borrower has defaulted on their federal student loan and is a party to a related post-default collection proceeding.

The text of the borrower defense regulation makes clear that additional regulations more specifically govern some, but not all, of the "proceedings" in which a borrower may assert a defense to repayment. For example, before the Secretary may collect debt owed to Education through a tax refund offset proceeding, she is required to notify the debtor of her intent to collect and must allow the debtor sixty-five days to request a review by Education of "the existence, amount, enforceability, or past-due status of the debt." 34 C.F.R. § 30.33. As a part of that review, a borrower must include an "explanation of the reasons the debtor believes that the notice the debtor received . . . inaccurately states any facts or conclusions relating to the debt," and, in this explanation, may assert a defense to repayment pursuant to the borrower defense regulation. 34 C.F.R. § 30.24(b)(2).

However, the plain text of the borrower defense regulation also explains that the "proceedings" in which a borrower may assert a defense to repayment "are not limited to" those that are specifically enumerated in subsections (i) through (iv). 34 C.F.R. § 685.206(c)(1) (providing that a borrower may assert a defense to repayment in tax refund proceedings, wage

garnishment proceedings, federal employee salary offset proceedings, and credit bureau reporting proceedings). In fact, numerous sources—in addition to the regulation's clear indication that the listed "proceedings" are not exhaustive—confirm that borrowers who are not facing such proceedings and, indeed, not in default at all may nonetheless assert and obtain an adjudication of their borrower defense. From 1995 on, the agency's interpretations, contracts, and adjudications confirmed that the rights conferred by the borrower defense regulatory scheme had two critical features: (1) a borrower's ability to assert a defense to repayment was not limited to post-default collection proceedings such as those specifically enumerated in 34 C.F.R. § 685.206(c)(1); and (2) Education was bound to adjudicate affirmative, pre-default applications for borrower defense relief by issuing reasoned decisions that discussed the merits of such applications.

The agency's published interpretations, as well as its contractual agreements, confirm that the borrower defense regulation encompassed the right to assert a defense to repayment at any time during repayment of a loan. Education's 1995 interpretation—published "to ensure that program participants and the public generally understand the Secretary's intent in issuing" the borrower defense regulation—provides that Direct Loan borrowers "may present [their] arguments to . . . the Department during the collection process," not just during debt collection proceedings. 60 Fed. Reg. 37,768, 37,770 (July 21, 1995). Since then, Education has repeatedly "explained [that] the Direct Loan borrower defense regulations were intended to . . . allow[] borrowers to assert both claims and defenses to repayment, without regard as to whether such claims or defenses could only be brought in the context of debt collection proceedings." 81 Fed. Reg. 75,926, 75,956 (Nov. 1, 2016) (noting that this interpretation was first "explained by the Department in 1995" shortly after the borrower defense regulation was initially promulgated).

Just last year, the agency reiterated this interpretation, acknowledging that "throughout the history of the existing borrower defense repayment regulation, [Education] has approved . . . affirmative borrower defense to repayment requests." 84 Fed. Reg. 49,788, 49,796 (Sept. 23, 2019). Moreover, the promissory notes governing both the Direct Loan Program and the FFEL Program have long included the following statement under the heading "Discharge (having your loan forgiven)":

> In some cases, you may assert, as a defense against collection of your loan, that the school did something wrong or failed to do something that it should have done. You can make such a defense against repayment only if the school's act or omission directly relates to your loan or to the educational services that the loan was intended to pay for, and if what the school did or did not do would give rise to a legal cause of action against the school under applicable state law.

Williams v. DeVos, Civil Case No. 16-11949-LTS, Doc. No. 43-13 at 7 (reproducing a Direct Loan Master Promissory Note dated October 6, 2010).[1] Education has confirmed that "[l]oans made before July 1, 2017 are governed by the contractual rights expressed in the existing Direct Loan promissory notes." 81 Fed. Reg. 75,926, 75,936 (Nov. 1, 2016). The "defense against collection" described in the master promissory note is not reserved for those borrowers in debt collection proceedings; by its plain terms, a borrower is empowered to assert such a defense as an affirmative claim to preclude "collection" of the loan.

Education's long-standing practice conforms to the regulatory guidance and contract documents. The agency adjudicated applications that affirmatively invoked borrower defenses to repayment, including those submitted on behalf of groups of borrowers. For example, in 2001 and 2003, Education's Office of the General Counsel wrote detailed memoranda in response to two "requests that [Education] recognize [a group of borrowers'] defense to repayment of their

[1] The parties agree that the Court may take judicial notice of any documents filed in the Williams case. Doc. No. 33 at 2 n.1.

Direct Loans pursuant to 34 C.F.R. § 685.206(c)." Calvillo Manriquez v. Devos, Civil Case No. 3:17-cv-07210-SK, Doc. No. 35-8 at 73-82, 86-99.[2] In response to one of these requests—which was made on behalf of 58 borrowers[3] who "claim[ed] that they should not have to pay any remaining balance on their Direct student loan accounts," id. at 87—Education's Office of the General Counsel wrote that "Direct Loan regulations provide that a borrower may avoid repayment on a Direct Loan to the extent that he or she 'asserts [] a [valid] defense against repayment,'" id. at 86 (quoting 34 C.F.R. 685.206(c)). The memorandum then explicated a "three-part test" that the agency used to determine whether it "will . . . recognize such claims":

> [I]n order to establish a defense to repayment, these 58 students must prove three elements: (1) that [the school] engaged in wrongful conduct that gives rise to a legal cause of action under State law (in this case North Dakota law); (2) that [the school]'s actions were directly related to the receipt or distribution of their Direct Loans or the provision of educational services paid for with those loans; and (3) that they were in fact injured as a result of [the school]'s action, and that those injuries can be measured as a specific damage amount.

Id. at 86-87 (emphasis added); see also id. at 74. In its legal analysis, the memorandum used mandatory language to describe its consideration of the borrowers' claim. See, e.g., id. at 89 (concluding that Education "must evaluate these 58 students' claims under North Dakota law")

[2] The Court takes judicial notice of these memoranda pursuant to Fed. R. Evid. 201(b). See Cardoso v. City of Brockton, No. CIV.A. 12-10892-DJC, 2014 WL 6698618, at *3 (D. Mass. Aug. 11, 2014) ("'Federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'" (quoting E.I. Du Pont de Nemours & Co. v. Cullen, 791 F.2d 5, 7 (1st Cir. 1986)); Torrens v. Lockheed Martin Servs. Grp., Inc., 396 F.3d 468, 473 (1st Cir. 2005) (taking judicial notice of a letter sent by the Acting Navy Secretary to the Governor of Puerto Rico because the letter was relevant "as a legally significant event"); Cty. of Tooele v. U.S. Dep't of Agric., 210 F.3d 382 n.3 (9th Cir. 2000); Opoka v. I.N.S., 94 F.3d 392, 394 (7th Cir. 1996). Here, the Secretary directed the Court to Calvillo Manriquez, which has direct relation to the claims and arguments presently before the Court. See Doc. No. 49 at 15.

[3] This group included both students and "parents who obtained PLUS loans for their children." Id. at 86 n.2.

(emphasis added).[4] Ultimately, after analyzing the three decisive factors and acknowledging that the memorandum's "conclusions rest[ed] in large part on inferences drawn from other cases involving [the same college] but not these individuals," Education's Office of the General Counsel "conclude[d] that all 58 students" had "adequately established" that their "claims should be recognized as a defense to collection of their Direct loans." Id. at 93. Education also explained that in order "[t]o quantify the students' damages, [the agency] ha[d] to determine the amount of damages they could recover from [the school] under state law." Id. at 92. After looking to North Dakota state law, which "permits a person defrauded by any advertisement or circular issued by a postsecondary educational institution to recover three times the amount of the actual damages," the agency determined that the students' "loan obligations are fully offset by their damages against [the school]." Id. at 92-93 (citing North Dakota Century Code §15-20.4-09). Finally, in addition to both memoranda, Education furnished the borrowers' representative with responses that provided notice of Education's determination. See id. at 83.

Education's practice of adjudicating affirmative applications continued well after 2003. For example, in 2016, the AGO "sent an application to the Department requesting that all Massachusetts borrowers who attended [American Career Institute ("ACI")] receive a full discharge of their federal loans under the borrower defense regulation without individual application." Doc. No. 33-11 at 1; Commonwealth, Civil Case No. 12-12777-LTS, Doc. No. 16-

[4] This mandatory language was mirrored over a decade later in Education's First Report of the Special Master for Borrower Defense to the Under Secretary, which noted that, under Education's 1995 Notice of Interpretation, 60 Fed. Reg. 37768 (July 21, 1995), "the Department will acknowledge a Direct Loan borrower's cause of action under state law as a defense to repayment of a loan only if the cause of action directly relates to the loan or to the school's provision of educational services for which the loan was provided." U.S. Dep't of Educ., First Report of the Special Master for Borrower Defense to the Under Secretary 4 (Sept. 3, 2015), https://perma.cc/8RMB-5VBJ ("First Special Master Report") (emphasis added).

2 at 9 ("Pursuant to 34 C.F.R. 685.206, the Commonwealth requests and applies for Borrower Defense Discharges, including refunds for all amounts paid to date, for [all] students who attended ACI in Massachusetts between 2010 and the School's closure on January 9, 2013."). On January 4, 2017, Education adjudicated the AGO's application, determining that the agency should "provid[e] full borrower defense relief to all borrowers who attended ACI's Massachusetts campuses." Id. According to its recommendation, which was authored by Under Secretary of Education Ted Mitchell and approved by the General Counsel of the agency, Education came to this conclusion by applying "the current borrower defense regulation."[5]

Notably, Education's adjudication of the AGO's ACI application mirrored the agency's earlier memoranda considering defense to repayment applications submitted on behalf of multiple borrowers. First, Education concluded that "borrowers who attended ACI campuses in Massachusetts ha[d] a valid claim under the Massachusetts Consumer Protection Act (MCPA)[6] and [were] therefore eligible for a borrower defense." Id. at 7. Second, Education canvassed ACI's "numerous," "egregious, [and] widely-disseminated misrepresentations" that related to its provision of educational services that were paid for with federal student loans. Id. at 2-6. Then, Education concluded that "the loss to ACI borrowers was clearly connected to ACI's misrepresentations and omissions." Id. at 8. Given these conclusions, Education "direct[ed] the granting of borrower defense relief" as to "approximately 3,850" eligible borrowers. Id. at 7, 11. Then, Education applied Massachusetts state law to determine the appropriate amount of relief:

[5] As indicated above, the 1995 version of the borrower defense regulation was effective until October 16, 2018.

[6] The agency applied Massachusetts courts' explicit statements "that a showing of individual reliance on a representation is not required under the MCPA." Id. at 8 (emphasis in original). Thus, the agency concluded that "providing relief to students without individual applications is consistent with state law." Id. at 9.

full loan discharges. Id. at 10 (noting that "actual damages under Massachusetts law would include, at a minimum, the amount paid by the student to attend the school").

In sum, the texts of the HEA and the 1995 borrower defense regulation, as well as Education's contemporaneous interpretations, contracts, and adjudicatory practices, demonstrate that the agency must adjudicate affirmative applications for borrower defense relief through the issuance of reasoned decisions applying established legal frameworks.

2. Corinthian's Collapse and the New Borrower Defense Regulatory Scheme

In 2015, Corinthian, a publicly traded company that operated postsecondary schools across the country, closed its schools and filed for bankruptcy. Doc. No. 33 ¶¶ 1, 5. Corinthian's demise followed "numerous investigations for misconduct," id. ¶ 5, including a multi-year investigation led by Education that resulted in a $26,665,000 fine for falsification of job placement rates at Corinthian campuses in California, see Letter from Robin Minor, U.S. Dep't of Educ., to Jack Massimino, Corinthian Colleges, Inc., (Apr. 14, 2015), https://perma.cc/J6AQ-38PY.

After Corinthian's collapse, Education received a "flood of borrower defense claims submitted by Corinthian students stemming from the school's misconduct." 81 Fed. Reg. 39,330, 39,330 (June 16, 2016); see also Doc. No. 33 ¶ 6 ("Immediately after Corinthian collapsed, Education received about a thousand borrower defense claims."). In 2015, Education announced the appointment of a Special Master for Borrower Defense, a position that was designed "to provide students who attended Corinthian Colleges the debt relief they are entitled to." Press Release, U.S. Dep't of Educ., Education Department Appoints Special Master to Inform Debt Relief Process (June 25, 2015), https://perma.cc/RP5Q-9F9S. In September 2015, Special Master Joseph A. Smith, Jr., issued his first report, pledging to

> [f]urther engage State Attorneys General and other enforcement agencies to discuss pending or past investigations they may have pursued against career colleges; evidence of wrongdoing emerging from those investigations that may be relevant to the Department's borrower defense process; and their own state statutes and case law as it relates to wrongdoing relevant for borrower defense claims.

First Special Master Report at 10-11. He also stated his intent to "create processes by which the State Attorneys General can submit evidence developed through their investigatory findings, so that wherever possible, like claims can be treated together and alike." Id. at 11.

Shortly thereafter, in 2016, Education also promulgated a new borrower defense regulation in order to "clarify and streamline the borrower defense process to protect borrowers and improve the Department's ability to hold schools accountable for actions and omissions that result in loan discharges." 81 Fed. Reg. 75,926, 75,926 (Nov. 1, 2016). The new regulation, which ultimately took effect in October 2018, enumerated procedures for individual and group borrower defense applications. 34 C.F.R. §§ 685.222(e), 685.222(f). As to group borrower defense applications, the new regulation provides that "the Secretary may initiate a process to determine whether a group of borrowers, identified by the Secretary, has a borrower defense." Id. §685.222(f)(1). The new regulation also specifies the procedures that govern such group applications, providing that "[a] hearing official resolves [a] borrower defense [group application] through a fact-finding process," which then results in a "written decision," regardless of whether the application is approved or denied. Id. § 685.222(g)(1).

B. The AGO's Litigation Against Corinthian and its Defense to Repayment Application

In 2011, the AGO initiated an investigation of Corinthian after receiving numerous consumer complaints of misconduct at its two Everest campuses in Massachusetts, Doc. No. 33-5 at 4, locations which offered "courses in medical administration, medical insurance billing and coding, dentistry, and massage therapy," Williams, 2018 WL 5281741, at *1. Pursuant to this

investigation, the AGO reviewed hundreds of surveys from former students, conducted extensive employment verifications, interviewed more than one hundred former Everest employees and students, evidence which, in the AGO's view, "demonstrat[ed] widespread and systemic illegal behavior." Id. Ultimately, on April 3, 2014, the AGO sued Corinthian on behalf of the Commonwealth in Massachusetts Superior Court, alleging that since at least 2009, Corinthian had "deceived and misled the public and prospective students in order to aggressively enroll students at its Massachusetts campuses with the goal of increasing tuition and fee revenues, and consequently profits, for the company and its shareholders." Doc. No. 33-1 ¶ 2 (reproducing Complaint, Massachusetts v. Corinthian Colls., Inc., No. 14-1093 (Mass. Super. Ct. Apr. 3, 2014)). The AGO, though suing in the name of the Commonwealth of Massachusetts, sought full restitution for current and former students of Corinthian in Massachusetts. Doc. No. 33-1 at 47 (praying that the Court "[o]rder Corinthian to make full and complete restitution to current and former students at Everest MA schools, including but not limited to the repayment to students of all tuition monies acquired by Corinthian as a result of its unfair or deceptive acts or practice"). The AGO eventually prevailed on a summary judgment motion against Corinthian and, in August 2016, the Massachusetts Superior Court ordered restitution to the Commonwealth for the benefit of the borrowers in the amount of $67,333,091. Doc. No. 33-3 ¶ 15.

While its litigation was ongoing in Massachusetts Superior Court, on November 30, 2015, the AGO submitted to Education a document entitled "Group Discharge of Federal Loans to Corinthian Students" in which the AGO explained that it sought "the immediate discharge of all federal loans taken out by student borrowers who attended Corinthian Colleges, Inc.'s Everest

Institute campuses in Brighton and Chelsea, Massachusetts, between 2007 and 2015." Doc. No. 33-4 at 1.[7]

The DTR Application, which was over 2,700 pages long, contained three particularly notable sections. First, the DTR Application included a 60-page memorandum detailing the evidence it had "compiled in the course of [its] investigation." Doc. No. 33-5 at 5. This evidence, according to the AGO, demonstrated that Corinthian had "engaged in patterns and practices of unfair and deceptive conduct in violation of Massachusetts law," thus "providing Everest MA students with defenses to repayment of their student loans." Id. As the Court noted in Williams, this memorandum canvassed evidence that

> Corinthian [had] misrepresented its in-field placement rates at Everest, which Corinthian advertised as "often in excess of 70%," when actual in-field placement rates were as low as 20 to 40 percent depending on the program. The document also described Corinthian's misrepresentation of the quality of career services and quality and type of classroom instruction at Everest. For example, in promotional material, Corinthian promised "programs specifically designed to provide hands-on training" but, in reality, most training at Everest was "self-taught instruction from workbooks." And, although Corinthian promised "experienced instructors" with "industry-specific expertise," instructors were "unqualified, uninformed, and unconcerned with teaching." "Many instructors were from temp agencies and some never taught in a classroom before." In addition, Corinthian advertised its "professional-level standards for conduct and behavior" and "inspirational classroom discussions," but students instead found the school environment to be "a free-for-all," "unprofessional," and "neglectful." Students reported "serious problems of drug use and violence" at Everest. The document cited these

[7] In Williams, the Court referred to this document as a "Defense to Repayment ("DTR") Submission," explaining that the Court "refer[red] to Attorney General Healey's writing using the name she gave the document in her amicus brief before the Court." See Williams, 2018 WL 5281741, at *4 n.7. In fact, Attorney General Healey's amicus brief in Williams referred to her writing as a "DTR Application." See generally Williams, Civil Case No. 16-11949-LTS, Doc. No. 29. In addition, the first sentence of the cover letter to the AGO's writing makes clear that the writing is "an application to the U.S. Department of Education . . . seeking the immediate discharge of all federal loans taken out by student borrowers who attended Corinthian Colleges, Inc.'s Everest Institute campuses in Brighton and Chelsea, Massachusetts, between 2007 and 2015[.]" Doc. No. 33-4 at 1 (emphasis added); accord id. ("We have compiled our findings here as an application for group loan discharge.") (emphasis added). Accordingly, the Court will henceforth refer to the AGO's writing as a "DTR Application."

> practices and others as establishing violations of the Massachusetts Consumer Protection Act.

Williams, 2018 WL 5281741, at *5 (internal citations omitted).

Second, the DTR Application included an exhibit that "contained documents, totaling 189 pages, concerning over 30 individual former Corinthian students in Massachusetts." Doc. No. 33 ¶ 12. Labeled Exhibit 3 to the DTR Application, these forms included, "as to each student, dates of enrollment, contact and identifying information (including Social Security numbers), a list of deceptive practices of Everest with checkmarks next to those practices that influenced the specific student's decision to attend, and the student's signature," as well as "signed authorization[s] for Attorney General Healey to access information regarding the status of the student's loan(s) and to act on the student's behalf." Williams, 2018 WL 5281741, at *4. The DTR Application additionally "requested that Education review the individual proffers in Exhibit 3 . . . and promptly discharge the applicants' federal student loans." Id. (internal alterations omitted).

Third, the DTR Application included an exhibit that "contained the name, addresses, phone numbers, e-mail addresses, enrollment status, date of enrollment, date of graduation, campus and program(s) attended of 7,241 students." Doc. No. 33 ¶ 13. In the DTR Application's introductory memorandum, the AGO requested "that the Department provide a swift, wholesale, and automatic discharge (including providing refunds on loan payments previously made and removal of any negative credit report entries) for each of Corinthian's Everest MA students, including the [approximately] 7,200 students shown on Exhibit 4." Doc. No. 33-5 at 6 (emphasis added). The AGO clarified that its application on behalf of all 7,241 students was motivated by its view that individual borrowers would struggle to "investigate cohort placement rates or aggregate witness statements," as well as its fear that "[n]avigating

defense to repayment applications and gathering associated required documentation can also present significant hurdles, particularly in the case of a closed school like Corinthian." Id. at 6 n.5. To that end, the AGO's request sought to initiate a process that would "assist borrowers in asserting their individual defense to repayment." Id. (emphasis added).

On January 8, 2016, Education provided its only response to the DTR Application. Doc. No. 33 ¶ 14; Williams, 2018 WL 5281741, at *6 ("The Court ordered the Secretary to file 'any responses to [Attorney General Healey's] letter by Defendant.' She filed only the January 8, 2016 letter.") (citations omitted). In its response, entitled "Re: Everest-Massachusetts Borrower Defense Claims," Education acknowledged receipt of "the summary of evidence and applicable law included with [the DTR Application]," as well as "all appendices and exhibits" that the AGO attached to its Application. Doc. No. 33-7 at 4. Additionally, Education explained that it had "reviewed the documents sent to [the agency] by [the AGO] with care and believe[d] that some evidence referred to in those documents was not included in the submission." Id. Accordingly, Education requested "additional evidence [that] may be critical to [the agency's] assessment of student claims for debt relief," including additional data to support the AGO's conclusions about Corinthian's recalculation of job placement rates, as well as corroborating documentation regarding Corinthian's alleged misrepresentations about the transferability of credits and the expected salary of graduates. Id. at 4-5. In its response, Education did not seek individual attestation forms, social security numbers, or dates of birth for the 7,241 students listed on Exhibit 4, nor did it convey to the AGO that the absence of such information would be a barrier to those students successfully asserting borrower defenses to repayment. Williams, 2018 WL

5281741, at *14 (noting that "Education never identified the lack of [this] information as a deficiency requiring cure").

On January 29, 2016, the AGO submitted to Education supplemental materials in support of the DTR Application. See Williams, Civil Case No. 16-11949-LTS, Doc. No. 29-1 ¶ 4 (Declaration of Assistant Attorney General Jennifer Snow). Education did not respond further to the DTR Application. Williams, 2018 WL 5281741, at *6 n.11. According to David Michael Page, an attorney advisor in Education's Borrower Defense Unit, the forms contained in Exhibit 3 to the AGO's DTR Application, which concerned 30 individual students, were, at some point thereafter, "forwarded to the [Federal Student Aid] personnel responsible for Borrower Defense Intake, for adjudication in the regular course." Doc. No. 33 ¶ 16. However, on December 15, 2017, "a duly authorized representative of Education testified that 'Education did not consider the list of 7,200 names provided in Exhibit 4 to constitute individualized applications for Borrower Defense discharge and did not consider students listed in Exhibit 4 as having applied for Borrower Defense discharge.'" Id. ¶ 17 (quoting Williams, Civil Case No. 16-11949-LTS, ECF No. 50-1 (Second Decl. of Chad Keller)). Education has since confirmed that "the collection procedures on unpaid federal student loans continue for former Massachusetts Everest students who have not personally applied for Borrower Defenses or other types of student loan discharges." Id. ¶ 19.

C. The *Williams* Lawsuit

In September 2016, Darnell Williams and Yessenia Taveras, two former students at Corinthian schools in Massachusetts, filed a lawsuit in this Court alleging that Education had improperly certified their student loan debts as legally enforceable for purposes of referral to the U.S. Department of the Treasury's Treasury Offset Program ("TOP"). Williams, 2018 WL

5281741, at *1. Williams and Taveras, who each obtained nearly $10,000 in federal student loans to attend Corinthian schools, defaulted on their student loans in the fall of 2014. Id. at *1-*2. Subsequently, in 2015, Education sent both Williams plaintiffs notices of its intent to refer their debts to TOP for collection by offset. Id. at *2. Ultimately, in 2016, Education seized both Williams plaintiffs' tax refunds. Id. at *6.

The Williams plaintiffs argued that the certification of their debts to TOP, and the subsequent seizure of their tax refunds, violated the APA because, "at the time the Secretary certified their debts, she had in her possession an application for the discharge of [their] loans" which the Secretary was required to consider before reaching her certification decision. Williams, Civil Case No. 16-11949-LTS, Doc. No. 68 at 2. Critically, both of the Williams plaintiffs were listed in Exhibit 4 of the DTR Application, which Education received on November 30, 2015, over a week before the Secretary certified the Williams plaintiffs' debt for collection by offset on December 9, 2015. Id. at *4, *6.

In January 2017, the Secretary moved to dismiss the Williams case for lack of jurisdiction, a motion that the Court allowed only insofar as the Williams plaintiffs sought injunctive relief or relief on behalf of other non-parties. Id. at *1. After the Massachusetts Attorney General filed an amicus brief and the Secretary filed a complete administrative record, the parties cross-moved for judgment on the record. Id.

1. The Court's Order on Motions for Judgment in *Williams*

On October 24, 2018, the Court resolved the parties' cross-motions, primarily considering two central questions: (1) whether the Williams plaintiffs were required to exhaust available administrative remedies as a prerequisite to bringing suit, id. at *9-*12, and (2) whether the Secretary's decision to certify the Williams plaintiffs' loans without first considering the

DTR Application was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA, id. at *13 (quoting 5 U.S.C. § 706(2)).

First, as to exhaustion, the Court held that the Williams plaintiffs were "entitled to advance their APA action to have the agency's decision reviewed on the basis of the administrative record without first exhausting available administrative remedies." Id. at *10. Alternatively, the Court determined that, even if the plaintiffs had been required to exhaust administrative remedies, that exhaustion requirement was satisfied by (1) the DTR Application, "which invoked the administrative remedy of Education's review process such that Education was required to adjudicate the request," id. (referencing the Secretary's regulations that govern debtor "request[s] for review" that must be adjudicated before the Secretary refers tax refund offsets to Treasury, see 34 C.F.R. §§ 30.24, 30.33); and (2) the Secretary's "decision to certify the plaintiffs' debts for collection through offset," as the Secretary's decision necessarily "'squarely addressed' . . . the plaintiffs' borrower defense," which was the precise issue that would have been adjudicated in any request for review filed by the plaintiffs, id. (quoting Mazariegos-Paiz v. Holder, 734 F.3d 57, 63 (1st Cir. 2013)).

Second, as to the merits of the Williams plaintiffs' APA claim, the Court held that

> the Secretary acted arbitrarily and capriciously by (1) ignoring or refusing to consider the DTR [Application] prior to certifying the plaintiffs' loans for tax refund offsets; (2) failing to determine whether Williams and Taveras, in light of the administrative record and the DTR [Application], had established valid borrower defenses as defined in Education's regulations; and (3) failing to issue a reasoned decision on either of these points.

Id. at *14. In reaching this holding, the Court rejected several arguments that the Secretary raised in support of her contention that "the DTR [Application] was not a borrower defense

application on behalf of Williams and Taveras and therefore was insufficient to stop certification of their debts." Id. at *13.

First, the Court rejected the Secretary's argument that the AGO could not have submitted a valid borrower defense application because the applicable regulation, 34 C.F.R. § 685.206(c), "makes no provision for a *third party* to assert the borrower defense or for defenses to be submitted on behalf of a group of borrowers." Williams, Civil Case No. 16-11949-LTS, Doc. No. 81 at 13 (emphasis in original). In fact, the Court noted, the Secretary "cited no statute or regulation that explicitly prohibits an attorney general from asserting a borrower defense request on behalf of her citizens." Williams, 2018 WL 5281741, at *11. Moreover, the Court observed that the AGO is charged with a "common law duty to represent the public interest," id. (quoting Sec'y of Admin. & Fin. v. Attorney Gen., 326 N.E.2d 334, 338 (Mass. 1975)), a duty the AGO had previously exercised by filing an earlier group application for discharge that Education had adjudicated and approved, id. at *12 (referencing the AGO's 2016 application submitted on behalf of former ACI students, see generally supra section I.A.1). The Court also noted that, in its January 8, 2016 response to the DTR Application, "Education did not advance the position that the law (or anything else) required an individual request from each borrower." Id.

Second, the Court rejected the Secretary's claim that Education could withhold consideration of the DTR Application because it did not "establish[] that the plaintiffs relied upon or were personally harmed by Corinthian's illegal conduct." Id. at *13. Indeed, the Court emphasized that "no language in the borrower defense regulation or any related regulation requires detrimental reliance in order for a borrower to state a claim sufficient for administrative consideration." Id. Further, the Court noted that irrespective of the evidence required to make out a "successful borrower defense claim, the Secretary [is] required to review," and, if

necessary, "deny [such a] claim," because "the Secretary's own regulations allow a borrower to assert a state law claim against the borrower's school as a borrower defense in a tax refund offset proceeding." Id. (citing 34 C.F.R. § 685.206(c)(1)(i)). Thus, the Court reasoned, the Secretary could not refuse to review the DTR Application and certify the plaintiffs' debt for offset without first considering the merits of the borrower defense claim that had been submitted on their behalf. Id.

Finally, the Court rejected the Secretary's argument that the DTR Application "was not a borrower defense application on the plaintiffs' behalf because it did not provide certain information required for consideration," such as the plaintiffs' social security numbers. Id. at *14; cf. Williams, Civil Case No. 16-11949-LTS, Doc. No. 81 at 16-17 (Education's memorandum in support of its motion for judgment relying on a screenshot of the Federal Student Aid website—not Education's regulations, interpretations, or past adjudications—as evidence of the "minimum" requirements for a borrower defense claim). Rather, the Court held that, "where, as here, the DTR [Application] contained ample identifying and contact information for the plaintiffs, and Education never identified the lack of certain information as a deficiency requiring cure, Education's failure to provide notice and an explanation of its decision [to certify the plaintiffs' debt for offset] is the very definition of arbitrary and capricious agency action." Id. at *14.

Ultimately, the Court "determine[d] that the DTR [Application] invoked a borrower defense proceeding on behalf of the people listed on Exhibit 4, including Williams and Taveras," and, given the rights afforded by the borrower defense regulation, 34 C.F.R. § 685.206(c)(1)(i), and the agency's duty to "consider[] any evidence presented by [a] debtor" and "determine[] that the debt is past-due and legally enforceable" before certifying the debt for offset, 31 C.F.R. §

285.2(d)(ii)(C), held that "the Secretary's certification [of the plaintiffs' debt for offset], without consideration of Attorney General Healey's DTR [Application], was arbitrary and capricious." Id. at *15. The Court then granted the Williams plaintiffs relief by, inter alia, (1) vacating the Secretary's "certifications for offset as to Williams and Taveras," (2) declaring that the DTR Application "required the Secretary to render a decision on the merits of [the Williams plaintiffs'] borrower defenses," (3) remanding the "matter to the Secretary for redetermination of her certification decision, including consideration of the borrower defense asserted by [the DTR Application] on behalf of Williams and Taveras," and (4) ordering "the Secretary to report on the status and timing of her decision in 60 days." Id.

2. Subsequent Litigation in *Williams*

Education and the Secretary did not appeal the Court's judgment on the parties' cross-motions for judgment. See Williams, 2019 WL 7592345, at *2 ("Defendants did not appeal from the judgment"). Rather, on December 12, 2018, Education sent letters to the two Williams plaintiffs notifying them that, pursuant to the Court's October 24, 2018 Order, the DTR Application "will be considered to initiate a borrower defense application submitted on your behalf." Williams, Civil Case No. 16-11949-LTS, Doc. No. 101-1. However, Education also informed the plaintiffs of its view that it would not "be able to process [their] borrower defense application" until Education received "additional documentation," including a separate individual application form for a borrower defense to loan repayment from each plaintiff. Id. Thereafter, on February 5, 2018, the Court convened a status conference at which

> counsel for the Secretary informed the Court that she had no information about the expected timing of the Secretary's decision on the plaintiffs' applications for borrower defense . . . In-house counsel for the Department of Education, who appeared by phone, stated that the Department has begun its review of the plaintiffs' borrower defense applications and expects that, without further submissions in response to the December 12, 2018, letters to the plaintiffs, the

> applications will be denied. However, counsel further informed the Court the Secretary might exercise her discretion to discharge the plaintiffs' debts without considering the merits of the applications for borrower defense, provided that such a discharge would moot this case.

Williams, Civil Case No. 16-11949-LTS, Doc. No. 108 at 2. The Williams plaintiffs, who were "unmoved by the Secretary's willingness to discharge the debts on a discretionary basis," informed the Court that "they did not intend to submit additional information, such as the information requested by the Secretary's [December 12, 2018] letter," and further requested that the Court order the Secretary to render a decision on the merits of their borrower defense application. Id. at 2-3. After further discussion, the Court ordered the Secretary to render a decision on the merits of the plaintiffs' applications for borrower defense, including the claims asserted by the DTR Application, within 30 days. Id. at 3. The Court's Order left to the Secretary how she might resolve the applications, but she was required to resolve them.

However, Education ultimately did not render a decision on the merits of the borrower defense application submitted on the Williams plaintiffs' behalf. Instead, on February 26, 2019, the parties reported to the Court that they had reached a settlement in principle and jointly requested that the Court stay its February 6, 2018 Order requiring Education to render a merits decision within 30 days. Williams, Civil Case No. 16-11949-LTS, Doc. No. 112. That same day, the Court entered the stay requested by the parties. The Court also received a motion by the Commonwealth of Massachusetts to compel the Secretary's compliance with the Court's October 24, 2018 Order, or, in the alternative, to intervene in the Williams case. Williams, Civil Case No. 16-11949-LTS, Doc. No. 115. On May 7, 2018, the Williams parties stipulated to dismissal of the action with prejudice, and the following day, the Court vacated its February 6,

2018 Order.[8] Williams, Civil Case No. 16-11949-LTS, Doc. No. 134. At that time, the Commonwealth's motion to compel compliance or intervene remained under advisement. Id.

On August 8, 2019, the Court denied the Commonwealth's motion. Williams, Civil Case No. 16-11949-LTS, Doc. No. 144. The Commonwealth's motion principally alleged that the Court's October 24, 2018 Order "require[ed] the Secretary to treat [the DTR Application] as having invoked a borrower defense proceeding as to all of the [approximately] 7,200 students listed on its Exhibit 4." Id. at 2. The Commonwealth also alleged that "the Secretary has adopted a different interpretation of the [October 24, 2018 Order], which it argue[d] is incorrect: that [the Order] required her to treat the DTR [Application] as having invoked a borrower defense proceeding only as the two plaintiffs in this action." Id. In denying the Commonwealth's motion, the Court noted that "[t]he express terms of the [October 24, 2018 Order] did not grant express relief to anyone other than the named plaintiffs, and the Court had previously dismissed the plaintiffs' claim for non-class declaratory relief benefiting a larger group of persons." Id. at 3. The Court also observed that permissive intervention was not warranted because, amongst other reasons: (1) Education had not appealed the October 24, 2018 Order; and (2) the Commonwealth was free to file a new lawsuit that could squarely address the relief sought by its motion to intervene and would permit the Secretary, if she wished, to appeal the merits of the Court's decision, rather than (possibly) just the Commonwealth's motion to intervene. Id. at 3-4. Finally, the Court remarked that "a prospective plaintiff could 'notify the clerk by notation on the local civil category sheet' that the new pleading is related to [the Williams] case." Id. at 4 (quoting L.R. 40.1(g)).

[8] As the Court noted at a status conference in the instant matter, the Court did not vacate or otherwise disturb its October 24, 2018 Order. See Doc. No. 20 at 6.

D. The Instant Lawsuit

On October 22, 2018, plaintiffs filed this lawsuit and, on the civil cover sheet accompanying their pleadings, indicated its relation to the Williams case.[9] Doc. No. 1-1. In this putative class action, plaintiffs "ask the Court to rule that the Secretary is violating the [APA] by failing to render a reasoned decision on the Borrower Defense that the Attorney General submitted on behalf of 7,241 students in 2015." Doc. No. 24 ¶ 7. Further, they seek an order setting aside the Secretary's "determin[ation] that [the DTR Application] is insufficient, in and of itself or in combination with all other information available to the Department, to establish a borrower defense for any and all individuals who took out a federal student loan in connection with Everest Massachusetts." Id. ¶ 8. Finally, they urge the Court to declare that "[t]he only non-arbitrary action that Defendants may take, in light of all the evidence in front of them, is to cancel the loans of all members of the proposed class, and return any money already collected towards these invalid loans." Id. ¶ 9.

The named plaintiffs, who bring suit on behalf of themselves and "all individuals who borrowed a federal student loan to pay the cost of attendance for the 7,241 students identified in Exhibit 4 to the [DTR Application] who have not yet had their federal student loans completely cancelled and/or have not yet received a refund of sums already collected," Doc. No. 11 at 1, are all former Everest students who were specifically named in Exhibit 4 to the DTR Application. Doc. No. 24 ¶¶ 13-17.

Named Plaintiff Kennya Cabrera took out a $3,500 FFELP loan to attend Everest's Chelsea, Massachusetts location and has since made $3,034.70 in payments on the loan. Doc.

[9] On the same day, the Commonwealth filed a parallel "related" lawsuit. See Commonwealth v. U.S. Dep't of Educ., Civil Case No. 19-12177, Doc. No. 1-1. No party has suggested or contended that the cases are not related under the Local Rule.

No. 35 ¶ 18 (Declaration of Education Loan Analyst Cristin Bulman). Cabrera's loans are not in default and the remaining principal on her loan is $626.31. Id. ¶ 20. Additionally, on May 10, 2016, Cabrera filed an individual borrower defense application and Education has "ceased all collection activity on her loans." Id. ¶ 19.

Named Plaintiff Indrani Manoo took out $9,500 in federal student loans to attend Everest. Doc. No. 36 ¶¶ 15-17. Manoo has made $1,698.56 in payments on the loans but, as of January 23, 2020, still owes Education $13,540.11 ($11,044.39 in principal and $2,495.72 in interest). Id. ¶ 20. Manoo has also filed, in various formats, three individual borrower defense applications, Doc. No. 36-4, and Education has "ceased all collection activity on [Manoo's] loans," Doc. No. 36 ¶ 19.

Named Plaintiff Noemy Santiago took out two federal student loans to attend Everest's Brighton, Massachusetts location. Doc. No. 34 ¶ 15. As of January 16, 2020, the total amount owed on Santiago's FFELP Loans balance is $13,715.97 ($8,969.91 in principal and $4,746.06 in interest). Id. ¶ 19. On January 22, 2020, Education sent Santiago the following communication:

> On or about November 30, 2015, the U.S. Department of Education's (ED) Federal Student Aid received a submission from Massachusetts Attorney General regarding the actions of Corinthian College, which it has previously investigated. Pursuant to a decision by the U.S. District Court rendered in Williams v. DeVos, Case No. 16-11949 (D. Mass.), issued on October 24, 2018, this submission will be considered to initiate a borrower defense application submitted on your behalf. As a result of this submission your student loan account has been put into stopped collection status and decertified from Treasury Offset program on January 21, 2020. This will continue while the U.S. Department of Education's review of your borrower defense application is completed.

Doc. No. 38-1 at 1.[10] In this communication, Education also stated in a footnote that "[t]he Secretary of Education reserves all legal rights to challenge the Court's decision." Id. And, just as it did in its pre-settlement letters to the Williams plaintiffs, Williams, Civil Case No. 16-11949-LTS, Doc. No. 101-1, Education communicated to Santiago that it would not "be able to process [her] borrower defense application" until Education received "additional documentation," including a separate individual application form for a borrower defense to loan repayment, Doc. No. 38-1 at 1. Nothing in the record indicates that Santiago has since submitted such "additional documentation."

Named Plaintiff Diana Vara took out $9,500 in federal student loans to pay for the cost of attendance at Everest's Chelsea location. Doc. No. 31 ¶ 17. On July 2, 2016, Vara's loans entered default, at which point her loan balances totaled $10,279.96 ($9,839.06 in principal and $440.90 in interest). Id. ¶¶ 18-19. Beginning on June 1, 2017 through June 11, 2019, Education collected $8,790.03 in administrative wage garnishment payments toward Vara's federal student loans and, on April 25, 2019, collected $1,111.00 through the TOP. Id. ¶¶ 21-22. On May 7, 2019, Vara filed an individual borrower defense application, at which point "Education ceased all collection activity on her loans." Id. ¶ 23. After the instant litigation commenced, on January 7, 2020, Education "refunded to Vara all the payments she has ever made on her student loans" and, on January 8, 2020 "wrote off the balance of all of Vara's student loans." Id. ¶¶ 25-26. However, Education did not render any decision on either Vara's individual borrower defense application or the DTR Application. Doc. No. 24 ¶ 16.[11]

[10] At oral argument, counsel for Education represented that the filing of the Amended Complaint including Santiago as a Named Plaintiff triggered the sending of this letter.

[11] Nowhere in Education's affidavit describing Vara's federal student loan history does Education state that Vara's loans were ultimately "discharged" pursuant to the borrower defense process; rather, Education's loan analyst merely states that Vara "is no longer indebted to the

Named Plaintiff Amanda Wilson likewise borrowed thousands of dollars of federal student loans to attend Everest's Chelsea location. Doc. No. 32 ¶ 17. Wilson's loans entered default on October 20, 2018, and, six days later, when her loans were assigned for collection, her outstanding balance was $9,448.78 ($8,589.95 in principal and $585.83 in interest). Id. ¶ 18. On March 6, 2019, Education collected $3,101.00 through the TOP; however, when Wilson filed an individual borrower defense application on May 24, 2019, "Education ceased all collection activity and initiated a refund of the $3,101.00 TOP payment." Id. ¶¶ 21-22. Just as it did with Vara, in January 2020, Education "initiated a refund of all payments Wilson made during the life of [her] loan" and "wrote off the balance of all of Wilson's student loans." Id. ¶¶ 23-24. And just like Vara, Education did not render any decision on either Wilson's individual borrower defense application or the DTR Application. Doc. No. 24 ¶ 17.

## II. MOTION FOR CLASS CERTIFICATION

The Court now turns to plaintiffs' motion for class certification, Doc. No. 11, which was supplemented after additional named plaintiffs entered the case, Doc. No. 29. Plaintiffs seek certification of the following class:

> [A]ll individuals who borrowed a federal student loan to pay the cost of attendance for the 7,241 students identified in Exhibit 4 to the Massachusetts Attorney General's Office borrower defense submission who have not yet had

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United States for any student loans," suggesting that Education's decision to "refund" Vara's loan payments and "write off the balance" of her loans was made pursuant to a grant of authority unrelated to the borrower discharge process. See, e.g., 20 U.S.C. § 1082(a)(6) (providing that, in the performance of her duties with respect to FFELP loans, the Secretary may "compromise, waive, or release any right, title, claim, lien, or demand, however acquired"); 20 U.S.C. § 1087a(b)(2) (explaining that Direct loans have "the same terms, conditions, and benefits as [FFELP loans]"); 34 C.F.R. § 30.70(e) (providing that "the Secretary may compromise a debt in any amount, or suspend or terminate collection of a debt in any amount, if the debt arises under" FFELP or the Direct loan program); 81 Fed. Reg. 39330, 39368 (June 16, 2016) (explaining that "[t]he HEA has, since 1965, authorized the Secretary to compromise—without dollar limitation—debts arising from title IV, HEA student loans.").

> their federal student loans completely cancelled and/or have not yet received a refund of sums already collected.

Doc. No. 11 at 1. The Court now considers the motion to certify this class, as well as defendants' opposition, Doc. No. 39, and plaintiffs' reply, Doc. No. 42.

A. Legal Standard

"To obtain class certification, the plaintiff must establish the four elements of Rule 23(a) and one of several elements of Rule 23(b)." Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003) (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997)). Rule 23(a) permits class certification only if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Here, plaintiffs rely on Rule 23(b)(2), Doc. No. 11 at 15, which permits class certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

B. Discussion

Defendants raise two sets of arguments in opposition to class certification. First, defendants argue that plaintiffs' motion fails to meet the commonality and typicality requirements of Rule 23(a).[12] Second, defendants argue that plaintiffs' requested relief would

[12] Defendants do not contend that the other two prerequisites of Rule 23(a) are unmet. Thus, the Court focuses its inquiry on commonality and typicality.

not be "appropriate respecting the class as a whole" and that "final injunctive relief" is unavailable to them. Fed. R. Civ. P. 23(b). The Court now addresses these arguments in turn.

1. Rule 23(a): Commonality and Typicality

Under Rule 23(a), "commonality" necessitates "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "A question is common if it is 'capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" Parent/Prof'l Advocacy League v. City of Springfield, Massachusetts, 934 F.3d 13, 28 (1st Cir. 2019) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)). "In other words, the commonality requirement is met where the questions that go to the heart of the elements of the cause of action will each be answered either 'yes' or 'no' for the entire class and the answers will not vary by individual class member." Raposo v. Garelick Farms, LLC, 293 F.R.D. 52, 55 (D. Mass. 2013) (internal quotations and citation omitted). Under Rule 23(a), what really "matters to class certification . . . is not the raising of common 'questions'" as much as "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Wal-Mart, 564 U.S. at 350 (alteration in original) (emphasis in original) (quoting Richard A. Nagarenda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009)). "Those common answers," the First Circuit recently explained, "typically come in the form of 'a particular and sufficiently well-defined set of allegedly illegal policies [or] practices" that work

similar harm on the class plaintiffs." Parent/Prof'l Advocacy League, 934 F.3d at 28 (quoting Parsons v. Ryan, 754 F.3d 657, 679 (9th Cir. 2014)).

"To establish commonality under Rule 23(a)(2), one common question is enough." Savino v. Souza, No. CV 20-10617-WGY, 2020 WL 1703844, at *6 (D. Mass. Apr. 8, 2020). Here, plaintiffs propose several common questions of law and fact, including:

> (1) whether the AGO's submission represents a valid borrower defense application on behalf of all former Everest Massachusetts students named therein; (2) whether the Secretary constructively denied that application without making a reasoned decision, in violation of the Administrative Procedure Act; and (3) given Everest's numerous, undisputed violations of state law, whether any decision that fails to grant full relief to Plaintiffs and proposed class members is arbitrary and capricious.

Doc. No. 42 at 2; Doc. No. 28 ¶ 155(b).

The typicality requirement of Rule 23(a), on the other hand, "requires that the claims of the representative plaintiff be typical of the claims of the class." Vargas v. Spirit Delivery & Distribution Servs., Inc., 245 F. Supp. 3d 268, 287 (D. Mass. 2017). "The typicality requirement is met 'when the representative plaintiffs' injuries arise from the same events or course of conduct as do the injuries of the class and when plaintiffs' claims and those of the class are based on the same legal theory.'" Id. (quoting In re Credit Suisse–AOL Sec. Litig, 253 F.R.D. 17, 23 (D. Mass. 2008)). Critically, courts note that the typicality requirement "does not mean that the representative plaintiffs' claims must be identical to those of proposed class members, rather the question is whether the putative class representatives can fairly and adequately pursue the

interests of the proposed class members without being sidetracked by their own particular concerns." Id. (internal alterations and quotation marks omitted).

a. Dissimilarities Amongst Proposed Class Members Are Immaterial

"Though commonality and typicality are distinct elements under Rule 23(a), the Supreme Court has repeatedly recognized that they 'tend to merge.'" Savino, 2020 WL 1703844, at *6 (quoting Wal-Mart, 564 U.S. at 349 n.5). In this case, defendants marshal the same argument to attack both requirements: that "there are material dissimilarities between the claims of the five individual Plaintiffs and between each individual Plaintiff and the proposed class as a whole." Doc. No. 39 at 11.

Defendants point to two sets of "material dissimilarities" that, in their view, prevent class-wide consideration of plaintiffs' claims. First, they observe that some proposed class members—including some of the named plaintiffs—have "filed individual Borrower Defense applications . . . while others [in the proposed class] have never filed an [individual] application," Doc. No. 39 at 11. Further, they note that "the [proposed] class is composed not only of borrowers who are not in default on their loans and have filed Borrower Defense applications . . . but also borrowers who are not in default and have never filed Borrower Defense applications, borrowers who are in default and have filed Borrower Defense applications, and borrowers who are in default and have never filed Borrower Defense applications." Id. at 13. Second, and relatedly, defendants argue that some of the relief that plaintiffs seek—full discharge of their student loan obligations—cannot be considered as a class because, in their telling, "entitlement to relief under the borrower discharge regulation hinges on individualized facts" such that borrower defense discharges "cannot be determined en masse." Id.

In fact, these dissimilarities have no bearing on class certification. First, the question whether a given class member filed an individual borrower defense application in addition to the DTR Application is entirely unrelated to whether the DTR Application, in and of itself, constituted a valid borrower defense application on behalf of all class members that must be adjudicated and entitles all class members to relief. Even if some proposed class members have pending individual applications that separately entitle them to relief, this additional entitlement in no way vitiates any entitlement that they may enjoy with respect to the DTR Application. If, by raising this objection, the Secretary means to say that the existence of one pending application submitted on an individual's behalf precludes relief emanating from a separate application also filed on that individual's behalf, nothing in the borrower defense regulatory scheme suggests this limitation on a borrower's ability to seek and receive discharge of their loan obligations.[13] And the Secretary submits no authority or reasoned argument in support of such a limitation.[14]

In any event, though Education claims that those proposed class members who submitted individual applications are differently situated because their "applications [are] in the process of being adjudicated by [Education]," id., nothing in the affidavits supporting its motions establish that Education is, in fact, adjudicating such individual borrower defense applications, see, e.g.,

[13] This reasoning applies with equal force to Education's attempt to distinguish proposed class members "who have filed [an individual] Borrower Defense application and been denied discharge." Id. Even if such proposed class members exist, the mere fact that one application was insufficient to establish an individual's entitlement to relief in no way answers the question whether the DTR Application—which may include more robust evidence—entitles that same individual to relief. Cf. Doc. No. 33-6 at 6 n.5 (explaining that the DTR Application seeks discharge on behalf of all 7,241 students because individuals may struggle to "investigate cohort placement rates or aggregate witness statements" and acknowledging that "[n]avigating defense to repayment applications and gathering associated required documentation can also present significant hurdles").

[14] Whether a ruling on one application, favorable or unfavorable, might have significance to other pending applications on behalf of a borrower has not been argued by the Secretary and is not presented by the facts before the Court.

Doc. No. 36 ¶ 19 (stating that Manoo filed three individual applications with Education in 2016, 2017, and 2019, respectively, but not providing any information about whether they are "being adjudicated"); Doc. No. 35 ¶ 19 (stating that Cabrera filed an individual application with Education in 2016, but not similarly providing no information about whether that application is "being adjudicated"); cf. L.R. 7.1 ("Affidavits and other documents setting forth or evidencing facts on which the motion is based shall be filed with the motion.") (emphasis added).

That some proposed class members are in default on their loans while others are not is also immaterial to class-wide resolution of plaintiffs' claims. As explained above, see supra section I.A.1 (collecting numerous sources), since its promulgation, the borrower defense regulation has encompassed the right to assert a defense to repayment at any time during repayment of a loan, including before a borrower is in default. Indeed, Named Plaintiffs Manoo and Santiago are not in default on their loans, yet Education deems them to have valid borrower defense applications pending before the agency, undoubtedly for this very reason. See Doc. No. 36 ¶ 19; Doc. No. 34 ¶ 20. Clearly, then, default is unrelated to the submission and consideration of borrower defense applications; thus, it is immaterial to the resolution of whether the DTR Application was a valid borrower defense application, whether that application has been denied in violation of the APA, and whether that application entitles all proposed class members to relief. Of course, if the law were otherwise—that only persons in default could obtain a borrower defense discharge of their entire loan obligation—Education's regulatory scheme would stand for an incongruous and perverse proposition: A student who is defrauded by a predatory for-profit college but who nonetheless, through grit and sacrifice, manages to avoid default enjoys no legal right to a borrower defense, while an otherwise similarly-situated student

who forgoes the difficult sacrifice of the first student and defaults on their loan nonetheless enjoys a right to a borrower defense.

Finally, Education's assertion that entitlement to borrower defense relief "hinges on individualized facts," like an individual's "reliance" on a "school's actions," such that relief "cannot be determined en masse" is simply inaccurate as a matter of law. Doc. No. 39 at 13. Defendants concede that the 1995 borrower defense regulation "appl[ies] to this case," Commonwealth, Civil Case No. 19-12177-LTS, Doc. No. 18 at 15; see Doc. No. 49 at 11 n.2 (incorporating this argument by reference), and, in its Answer to plaintiffs' Second Amended Complaint, Doc. No. 37 ¶ 33, admit that "[s]tate law provides the standard for borrower defense for all federal student loans at issue in this lawsuit," Doc. No. 28 ¶ 33 (citing "34 C.F.R. § 685.206(c) (eff. until Oct. 16, 2018)"). Reliance is not an element under the relevant Massachusetts law. Aspinall v. Philip Morris Cos., 813 N.E.2d 476, 492 (Mass. 2004) (finding "deceptive advertising . . . a per se injury on consumers"). Thus, the individual's "reliance" is not relevant to whether a borrower is entitled to relief.

Moreover, defendants have, throughout the history of the 1995 borrower defense regulation, adjudicated affirmative group borrower defense to repayment applications, recognizing this very point. See, e.g., Calvillo Manriquez, Civil Case No. 3:17-cv-07210-SK, Doc. No. 35-8 at 93 (granting an application for group discharge submitted on behalf of 58 borrowers based on "inferences drawn from other cases involving [the same college] but not these individuals"). And, when Education previously adjudicated a group application involving a Massachusetts institution, the agency specifically noted that "a showing of individual reliance on a representation is not required under" Massachusetts law. Doc. No. 33-11 at 8 (emphasis in original). Of course, Massachusetts law imposes no such requirement. Given this backdrop, the

individual circumstances of class members plainly cannot preclude review of plaintiffs' common claim that the DTR Application, in and of itself, entitled all proposed class members to relief from their loan obligations.

Ultimately, then, plaintiffs' common questions are "resolvable irrespective of the distinctions identified by Defendants" and "no possibility exists that an individual claim or factual difference will 'consume the merits' of this class action." Reid v. Donelan, 297 F.R.D. 185, 191 (D. Mass.), enforcement granted, 64 F. Supp. 3d 271 (D. Mass. 2014) (quoting Durmic v. J.P. Morgan Chase Bank, 10–cv–10380–RGS, 2010 WL 5141359, at *4 (D. Mass. Dec. 10, 2010)).

2. Vara's and Wilson's Claims Are Not Moot

Defendants level an additional attack on plaintiffs' fitness to maintain this class action: They argue that Vara and Wilson "cannot as individuals meet the jurisdictional requirement of Article III of the Constitution" because their claims are now moot. Doc. No. 39 at 12. This is so, according to defendants, because Education "has discharged their loans, refunded all payments made on the student loans, and they are no longer indebted to the United States." Id. at 11. Vara and Wilson, for their part, argue that their claims are not moot because Education's failure to adjudicate the merits of their individual borrower defense applications or the DTR Application renders them ineligible for relief from the IRS, which, as of January 15, 2020, "will not assert that taxpayers who receive a . . . borrower defense discharge must recognize gross income resulting from the discharge of [their] federal loans." I.R.S. Rev. Proc. 2020-11, § 2.05(1). Given their ineligibility for IRS relief, Vara and Wilson say, their loan discharges may

be treated as gross income, thus impacting their tax liabilities and giving them a stake in the outcome of this case. Doc. No. 42 at 4-5.[15]

Defendants are correct that Article III, §2 of the U.S. Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies," thus preventing federal courts from "decid[ing] questions that cannot affect the rights of litigants in the case before them." Chafin v. Chafin, 568 U.S. 165, 172 (2013) (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)). However, the

[15] Nearly four months after Vara and Wilson raised this argument in their reply brief, Doc. No. 42, defendants countered in a post-argument letter that "Vara and Wilson will [not] face adverse tax consequences because . . . [s]uch write-offs are not taxable." No. 56 at 3. This is so, defendants say, because such write-offs "are not identifiable events under the Internal Revenue Service regulations." Doc. No. 56 at 3 (citing 26 C.F.R. § 1.6050P-1(b)(2)(i)). Defendants' argument misunderstands the cited regulation, which sets out requirements, "[s]olely for purposes of the reporting," for when certain applicable entities—including federal agencies like Education and certain financial entities—must file a Form 1099-C upon the discharge of an indebtedness. 26 C.F.R. § 1.6050P-1(a)(1). That a "write-off" is not an "identifiable event" under the regulation—and thus does not trigger a duty on the part of federal agencies and financial entities to file a Form 1099-C—has no bearing on whether the "write-off" must be reported as gross income. Indeed, as a 2019 IRS Guidance for individuals makes clear, "[e]ven if [an individual] didn't receive a Form 1099-C, [they] must report canceled debt as gross income on [their] tax return unless [certain] exceptions or exclusions . . . appl[y]." U.S. Dep't of Treasury, Pub. No. 4681, Canceled Debts, Foreclosures, Repossessions, and Abandonments (for Individuals) 3 (Feb. 7, 2020), https://www.irs.gov/pub/irs-pdf/p4681.pdf. In the section of the Guidance that specifically explains the tax consequences of student loan debt cancellations, the IRS further states:

> Generally, if [an individual is] responsible for making loan payments, and the loan is canceled or repaid by someone else, [the individual] must include the amount that was canceled or paid on [their] behalf in [their] gross income for tax purposes. However, in certain circumstances, [an individual] may be able to exclude amounts from gross income as a result of: (1) Student loan cancellation due to meeting certain work requirements, (2) Student loan cancellation due to death or permanent and total disability, or (3) Student loan repayment assistance.

Id. at 4. The January 15, 2020 IRS Guidance cited by Vara and Wilson provides for additional new exceptions to the general rule, including when student loans are discharged "based on the Closed School or Defense to Repayment discharge process." I.R.S. Rev. Proc. 2020-11. The "write off" of Vara and Wilson's loans does not fall into any of the specific "exceptions or exclusions" identified in IRS guidance documents.

Supreme Court has cautioned against reflexive findings of mootness, holding that a case is moot only if "it is impossible for a court to grant any effectual relief whatever," id., a "demanding standard" that courts must apply critically, Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1660 (2019). Indeed, "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." Chafin, 568 U.S. at 172 (quoting Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 307 (2012)).

Here, that "demanding standard" is not met. Vara and Wilson undoubtedly have an interest in minimizing their tax liabilities and, due to Education's failure to render a decision on their borrower defense applications, may not avail themselves of a benefit now provided by the IRS. I.R.S. Rev. Proc. 2020-11 (explaining that the IRS will extend relief only "where the Federal loans are discharged by [Education] under the Closed School or Defense to Repayment discharge process, or where the private loans are discharged based on a settlement of a legal cause of action against nonprofit or other for-profit schools and certain private lenders."). While the Secretary may have refunded Vara and Wilson's payments and discharged their loans, the plain text of the January 15, 2020 IRS Guidance limits relief to borrowers whose loans were discharged pursuant to the enumerated discharge processes. As such, the relief that the proposed class seeks—including a "declar[ation] that the Defendants' failure to issue a decision on the merits of the [DTR Application] is unlawful" and an order compelling Education to issue such a decision—would redress ongoing harm to Vara and Wilson. Accordingly, neither Vara's nor Wilson's claims are moot.[16]

[16] One additional matter bears discussion. On January 6, 2020, the Court convened a status conference to discuss a schedule for fair and expeditious resolution of the instant dispute. Doc. No. 23. At that conference, defendants' counsel indicated that this dispute "may be moot before [the Court has] to decide it." Id. at 30. On that very same day, Education wrote off the balance of all of Vara and Wilson's student loans (without issuing a decision as to their borrower defense

3. Rule 23(b)

Defendants also raise two objections to class certification under Rule 23(b). First, they argue that plaintiffs are not entitled to "final injunctive relief or corresponding declaratory relief," Fed. R. Civ. P. 23(b)(2), because the HEA's so-called "anti-injunction provision," 20 U.S.C. § 1082(a)(2), forecloses such relief. Second, defendants argue that, even if plaintiffs are entitled to such relief, the proposed class is not amenable to a uniform remedy, thus rendering class certification inappropriate. See Fed. R. Civ. P. 23(b)(2) (dictating that relief must be "appropriate with respect to the class as a whole").

a. The HEA Does Not Preclude Class Certification

Defendants argue that they are immune from suit seeking injunctive relief because the HEA provides that "no attachment, injunction, garnishment, or other similar process, . . . shall be issued against the Secretary or property under the Secretary's control." 20 U.S.C. § 1082(a)(2). Given this so-called "anti-injunction provision," defendants argue that plaintiffs are categorically

claims), see Doc. No. 31 ¶ 26; Doc. No. 32 ¶ 24; and, one day earlier, it refunded to Vara and Wilson all the payments they had ever made on their student loans, Doc. No. 31 ¶ 25; Doc. No. 32 ¶ 23. At this point, Vara and Wilson were the only named plaintiffs in this putative class action. See Doc. No. 24 (adding Santiago as a named plaintiff on January 13, 2020); Doc. No. 28 (adding Manoo and Cabrera as named plaintiffs on January 16, 2020). On January 29, 2020, nearly three weeks after the Court's status conference, defendants filed their opposition to this motion for class certification, arguing, in part, that Vara's and Wilson's claims were moot in light of the refunds and discharges that Education issued. Because Vara's and Wilson's claims are not moot, the Court need not consider whether Education engaged in the "nefarious" practice of "pick[ing] off plaintiffs to evade judicial review." Kaplan v. Fulton St. Brewery, LLC, No. CV 17-10227-JGD, 2018 WL 2187369, at *9 (D. Mass. May 11, 2018) (quotation marks omitted); see also Bais Yaakov of Spring Valley v. ACT, Inc., 798 F.3d 46, 48 (1st Cir. 2015) (rejecting defendant's "nifty stratagem for defeating motions for class certification: offer only the named plaintiff full payment for its individual claims, and then move to dismiss the suit as moot before the court has a chance to consider whether the plaintiff should be allowed to represent the putative class").

barred from seeking "final injunctive relief or corresponding declaratory relief" and thus cannot maintain this class action against the Secretary. Fed. R. Civ. P. 23(b)(2).

This is not so. As to plaintiffs' APA claim, "[s]ection 702 of the APA waives sovereign immunity when a plaintiff," as here, "seeks non-monetary relief from a decision of a federal agency." Tortorella v. United States, 486 F. Supp. 2d 159, 163 (D. Mass. 2007). The HEA's "anti-injunction provision" does not, as defendants argue, categorically disturb the APA's general waiver of sovereign immunity. As the First Circuit has held, "no-injunction language" like the HEA's "anti-injunction provision" merely

> protects [Education] from interference with its internal workings by judicial orders attaching agency funds, etc., but does not provide blanket immunity from every type of injunction. In particular, it should not be interpreted as a bar to judicial review of agency actions that exceed agency authority where the remedies would not interfere with internal agency operations.

Ulstein Mar., Ltd. v. United States, 833 F.2d 1052, 1057 (1st Cir. 1987). Moreover, federal district and circuit courts across the country have "concluded the APA grants federal courts subject matter jurisdiction over cases seeking declaratory and injunctive relief for injuries caused by the Secretary's decisions made under the HEA." Adams v. Duncan, 179 F. Supp. 3d 632, 640 (S.D.W. Va. 2016) (collecting numerous cases).[17] Indeed, the HEA posed no impediment at all to recent class actions that challenged the Secretary's actions with respect to borrower defense

[17] In their merits briefing, defendants point to one out-of-circuit case that recently determined that the HEA's "limited waiver of sovereign immunity does not allow declaratory relief that functions as injunctive relief by another name." Carr v. DeVos, 369 F. Supp. 3d 554, 560 (S.D.N.Y. 2019). The Court is unpersuaded, at the very least, that the Carr Court's reasoning prevents review of plaintiffs' APA claim. The Carr Court specifically "stresse[d] that [the HEA's anti-injunction provision] will not, on its own, bar Plaintiffs (or other student borrowers) from raising a similar challenge to a final [Education] decision under the APA." Carr, 369 F. Supp. 3d at 562; see also Student Loan Mktg. Ass'n v. Riley, 907 F. Supp. 464, 474 (D.D.C. 1995), aff'd and remanded, 104 F.3d 397 (D.C. Cir. 1997), on reh'g (Mar. 11, 1997) (noting that many courts "have held that the anti-injunction clause of § 1082(a)(2) does not preclude relief for APA claims.").

claims and sought injunctive and declaratory relief. See, e.g., Sweet v. DeVos, No. C 19-03674 WHA, 2019 WL 5595171, at *3 (N.D. Cal. Oct. 30, 2019) (certifying a class under Rule 23(b)(2) that sought "injunctive relief compelling the Department to begin deciding borrower defense claims again"); Calvillo Manriquez v. DeVos, No. 17-CV-07210-SK, 2018 WL 5316175, at *1 (N.D. Cal. Oct. 15, 2018) (certifying a class under Rule 23(b)(2) that "sought, among other forms of relief, full relief for all students who had attended the Corinthian schools during the designated time period").

Plaintiffs' claim under the DJA, which seeks a declaration that plaintiffs "have successfully established a defense to the repayment of all federal student loans associated with Everest Massachusetts," Doc. No. 28 ¶ 172, is similarly unaffected by the HEA's "anti-injunction provision." Multiple circuit courts have held that the HEA does not prevent the issuance of declarations concerning the Secretary's prospective compliance with and application of statutes and regulations. See, e.g., Thomas v. Bennett, 856 F.2d 1165, 1168 (8th Cir. 1988) (holding that the HEA did not thwart the court's consideration of plaintiff's prayer for a declaration that a proposed tax refund offset would be improper because the applicable statute of limitations had run); Bartels v. Riley, No. 98-8885 (11th Cir. June 29, 1999) (holding that the HEA did not thwart a class from seeking a declaration that certain of the Secretary's wage garnishment procedures violated due process). Accordingly, the HEA cannot prevent class-wide review of plaintiffs' claim for declaratory relief.[18]

[18] Defendants urge the Court to adopt the rule of American Ass'n of Cosmetology Sch. v. Riley, 170 F.3d 1250 (9th Cir. 1999), which held that the HEA's anti-injunction provision bars declaratory relief that "would have the same coercive effect as an injunction." Id. at 1255. The Court is unpersuaded. Such a categorical rule would bar "judicial review of agency actions that exceed agency authority" and would thus directly conflict with First Circuit precedent regarding the scope of anti-injunction provisions. Ulstein, 833 F.2d at 1057.

b. The Proposed Class is Amenable to a Uniform Remedy

Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). As the Supreme Court has held, "[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Wal-Mart, 564 U.S. at 360 (internal quotations and citations omitted). In their opposition, defendants contend that "[t]here is no uniform remedy that would address the needs of all 7,241 members of the proposed class." Doc. No. 39 at 17.

Not so. In fact, this is a "quintessential Rule 23(b)(2) case," Nat'l Ass'n of Deaf v. Massachusetts Inst. of Tech., No. 3:15-CV-30024-KAR, 2020 WL 1495903, at *2 (D. Mass. Mar. 27, 2020); here, "a party charges that another has engaged in unlawful behavior toward a defined group," Reid, 297 F.R.D. at 193—that is, all borrowers who took out loans on behalf of individuals listed in Exhibit 4. Moreover, the remedies sought by plaintiffs—including a declaration that the all such borrowers have established a defense to repayment of their federal student loans, as well as an order compelling Education to issue a reasoned decision as to the DTR Application, Doc. No. 28 at 30—would benefit all proposed class members by ameliorating a common harm inflicted by the agency's action with respect to the DTR Application. See McDonald v. Heckler, 612 F. Supp. 293, 300 (D. Mass. 1985) (concluding that a "class action is properly brought pursuant to Rule 23(b)(2)" where plaintiffs seek "declaratory and injunctive relief with respect to the entire class concerning the policies of the Secretary which have been applied to each class member"). Thus, plaintiffs have satisfied the strictures of Rule 23(b)(2).

C. Conclusion

For the foregoing reasons, plaintiffs' motion for class certification is ALLOWED. The following class is CERTIFIED:

> All individuals who borrowed a federal student loan to pay the cost of attendance for the 7,241 students identified in Exhibit 4 to the DTR Application who have not yet had their federal student loans completely discharged due to a successful borrower defense claim, have not yet received a refund of sums already collected, and have not yet received a favorable decision as to a borrower defense application.[19]

Named Plaintiffs Kennya Cabrera, Indrani Manoo, Noemy Santiago, Diana Vara, and Amanda Wilson are hereby APPOINTED as class representatives. Plaintiffs' counsel from the Harvard Legal Services Center's Project on Predatory Student Lending are hereby APPOINTED as class counsel.

III. MOTION FOR JUDGMENT

Now before the Court is plaintiffs' motion for judgment. Doc. No. 38. First, plaintiffs argue that the DTR Application "is a valid borrower defense application" on behalf of all borrowers who took out loans for students on Exhibit 4. Id. at 2. Second, plaintiffs submit that Education "must render a reasoned decision" with respect to the borrower defenses invoked by the DTR Application. Id. Finally, plaintiffs argue that any decision failing to grant full relief to

[19] The Court certifies this slightly redefined class, cf. Doc. No. 11 at 1, in order to overtly recognize an additional grievance that plaintiffs raise throughout their Second Amended Complaint and motion for class certification: that they have been harmed, in multiple ways, by defendants' failure to render a decision as to their borrower defenses. See Doc. No. 28 ¶ 7 ("Named Plaintiffs, on behalf of themselves and all of their classmates, ask the Court to rule that the Secretary is violating the Administrative Procedure Act by failing to render a reasoned decision on the Borrower Defense that the Attorney General submitted on behalf of 7,241 students in 2015."); see also Manning v. Bos. Med. Ctr. Corp., 725 F.3d 34, 60 (1st Cir. 2013) (holding that "the district court has many tools at its disposal to address concerns regarding the appropriate contours of the putative class, including redefining the class during the certification process").

the class—that is, complete loan cancellations, the return of any money paid on relevant loans, and a favorable borrower defense determination for all borrowers in the class—would be arbitrary, capricious, and contrary to law. Id. Defendants have opposed the motion on multiple grounds. First, defendants argue that "judicial review under the [APA] is unavailable because the Secretary's decision to not initiate a process to determine whether a particular group of borrowers has a borrower defense is committed to her discretion as a matter of law." Doc. No. 49 at 2. Second, defendants argue that "the APA did not require a formal, reasoned decision here." Id. Third, defendants contend that the Court is not authorized to grant plaintiffs the relief that that they seek. Id. The motion for judgment is now ripe for resolution.

A. Legal Standard

In the administrative law context, "a motion for summary judgment is simply a vehicle to tee up a case for judicial review and, thus, an inquiring court must review an agency action not to determine whether a dispute of fact remains but, rather, to determine whether the agency action was arbitrary and capricious." Boston Redevelopment Auth. v. Nat'l Park Serv., 838 F.3d 42, 47 (1st Cir. 2016). An agency has acted arbitrarily and capriciously if it has "relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise." Associated Fisheries of Maine, Inc. v. Daley, 127 F.3d 104, 109 (1st Cir. 1997). An agency action may only be upheld "on the basis articulated by the agency itself." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) (internal citations omitted). Courts considering a claim under the APA's arbitrary and capricious standard must "carefully review[]" the record to "satisfy[] themselves that the agency has made a reasoned decision[.]" Marsh v. Oregon Nat.

Res. Council, 490 U.S. 360, 378 (1989). "While this is a highly deferential standard of review, it is not a rubber stamp." Penobscot Air Servs., Ltd. v. F.A.A., 164 F.3d 713, 720 (1st Cir. 1999) (quoting Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n, 59 F.3d 284, 290 (1st Cir.1995)). Although "the ultimate standard of review is a narrow one," the court must undertake "a thorough, probing, in-depth review," necessitating a "searching and careful" inquiry into the record. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–16 (1971).

B. The Court May Review the Challenged Action

As a threshold matter, defendants argue that this Court may not review plaintiffs' "claim that Defendants erred by not initiating a process to determine whether the seven thousand borrowers listed in the DTR [Application] had a borrower defense claim." Doc. No. 49 at 11. This is so, defendants argue, because "[s]uch action is committed to Defendants' discretion as a matter of law, and there is no law for the Court to apply in evaluating Defendants' action." Id. Plaintiffs, for their part, contend that "[t]his Court is empowered to review the Department's denial of the DTR [Application]." Commonwealth, Civil Case No. 19-12177-LTS, Doc. No. 27 at 38; Doc. No. 50 at 2 (incorporating this argument by reference).

The Court first notes that there is a "strong presumption" favoring judicial review of administrative action. Mach Mining, LLC v. EEOC, 575 U.S. 480, 486 (2015); accord Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984). The APA "generally provides a vehicle for reviewing agency decisions that are alleged to violate federal law." Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 17 (1st Cir. 2020). Supreme Court cases have repeatedly "established that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Bowen

v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986) (internal alteration and quotation marks omitted).

"Notwithstanding that strong presumption, agency actions can evade judicial review under the APA if they are 'committed to agency discretion by law.'" Union of Concerned Scientists, 954 F.3d at 17 (quoting 5 U.S.C. § 701(a)(2)).[20] This exception applies only in the "rare circumstances" where the relevant law "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Lincoln v. Grover Vigil, 508 U.S. 182, 191 (1993) (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)). Recently, the Supreme Court emphasized that the § 701(a)(2) exception to the presumption of reviewability is "quite narrow[]." Dep't of Commerce v. New York, 139 S. Ct. 2551, 2568 (2019).[21]

Ultimately, the Court's inquiry into whether this "narrow" exception applies turns on whether there is "law to apply," Citizens to Preserve Overton Park, 401 U.S. at 410, that provides "judicially manageable standards" for judging the agency's exercise of discretion, Chaney, 470 U.S. at 830. The First Circuit "ha[s] not clearly defined the outer limits of the types of 'law' that may furnish meaningful standards for deciding claims under § 706(2)(A)." Union of Concerned Scientists, 954 F.3d at 21; see also Cowels v. Fed. Bureau of Investigation, 936 F.3d 62, 67 (1st Cir. 2019), cert. denied, 140 S. Ct. 1118 (2020) (declining to decide whether an FBI manual was sufficient to provide law to apply). However, the First Circuit has echoed other

[20] Defendants do not rely on the APA's other exception to judicial review, 5 U.S.C. § 701(a)(1), which provides that review of an agency action is unavailable where "statutes preclude judicial review."

[21] The Supreme Court also stressed that it has "generally limited [this] exception to certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion, such as a decision not to institute enforcement proceedings or a decision by an intelligence agency to terminate an employee in the interest of national security." Id. (internal citations and quotation marks omitted).

courts in holding that "[a]gencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures." Distrigas of Massachusetts Corp. v. F.E.R.C., 737 F.2d 1208, 1219 (1st Cir. 1984). Indeed, the First Circuit recently reiterated the longstanding principle that "an agency is expected to apply the same basic rules to all similarly situated supplicants,'" Thompson v. Barr, No. 18-1823, 2020 WL 2570167, at *6 (1st Cir. May 21, 2020) (quotation marks omitted), echoing its earlier observation that "[a]n agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along," Henry v. I.N.S., 74 F.3d 1, 6 (1st Cir. 1996).

These legal principles necessarily inform the proper scope of judicial review. As a unanimous Supreme Court held:

> Though [an] agency's discretion [may be] unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy . . . could constitute action that must be overturned as arbitrary, capricious, or an abuse of discretion.

I.N.S. v. Yueh–Shaio Yang, 519 U.S. 26, 32 (1996) (internal alteration omitted); see also Morton v. Ruiz, 415 U.S. 199, 235 (1974) (holding that "where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required."); Serv. v. Dulles, 354 U.S. 363, 388 (1957) (explaining that an agency is bound to adhere to the more "rigorous substantive and procedural standards" enumerated in its own regulations). Given these teachings, federal circuit courts throughout the country look not only "to the statutory text" when determining whether there is "law to apply," but also consider "the agency's regulations, and informal agency guidance that govern the agency's challenged action," Salazar v. King, 822 F.3d 61, 76 (2d Cir. 2016), as well as agency's practice when applying the relevant regulatory scheme, see ASSE

Int'l, Inc. v. Kerry, 803 F.3d 1059, 1069 (9th Cir. 2015) ("Even where statutory language grants an agency unfettered discretion, its decision may nonetheless be reviewed if regulations or agency practice provide a meaningful standard by which this court may review its exercise of discretion."); Doe v. United States, 100 F.3d 1576, 1583 (Fed. Cir. 1996) (holding that Treasury regulations and an agency handbook offered "guidance or constraint" sufficient to guide judicial review of federal agency's discretionary determination); Padula v. Webster, 822 F.2d 97, 100 (D.C. Cir. 1987) ("Judicially manageable standards may be found in formal and informal policy statements and regulations as well as in statutes . . .").

In this case, upon review of the HEA, the 1995 borrower defense regulations, Education's published interpretations of that regulation in the Federal Register, and Education's practice of adjudicating borrower defenses, the Court concludes that there is sufficient law to apply to permit judicial review of plaintiffs' claims. As noted above, see supra section I.A.1, the HEA itself ensures that a defense to repayment is available to federal student loan borrowers. As defendants concede, in enacting the HEA, "Congress required the Secretary to promulgate borrower defense regulations." Commonwealth, Civil Case No. 19-12177-LTS, Doc. No. 18 at 15. Pursuant to the HEA's command, 20 U.S.C. § 1087e(h), Education promulgated a regulation that established borrowers' right 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." 34 C.F.R. § 685.206(c)(1) (eff. until Oct. 16, 2018). This regulatory scheme established Education's duty to adjudicate borrower defense claims, including those affirmatively asserted before a borrower was in default.

Moreover, throughout the existence of that regulation, the agency used mandatory language to indicate the circumstances under which it "will acknowledge" a "right to relief."

First Special Master Report at 3-4 (quoting 60 Fed. Reg. 37768, 37769 (July 21, 1995)); see also Hewitt v. Helms, 459 U.S. 460, 471 (1983) (describing the use of words like "will" and "must" in administrative guidelines as "language of an unmistakably mandatory character"); Salazar, 822 F.3d at 77 (holding that "mandatory, non-discretionary language creates boundaries and requirements for agency action"). The agency consistently interpreted its regulation to encompass borrower defense claims asserted at any time during the loan collection process, an interpretation that was codified in the master promissory note governing all federal student loans. See supra section I.A.1. Additionally, Education's practice—memorialized in multiple memoranda authored by the agency's Office of the General Counsel—demonstrates that the agency was bound to adjudicate affirmative borrower defense applications by analyzing relevant state law to determine whether applicants had established a right to relief, as well as to determine the appropriate remedy. See, e.g., Calvillo Manriquez v. Devos, Civil Case No. 3:17-cv-07210-SK, Doc. No. 35-8 at 89 (concluding that Education "must evaluate these 58 students' claims under North Dakota law") (emphasis added); id. at 92 ("To quantify [these borrowers'] damages, we have to determine the amount of damages they could recover from [the fraudulent for-profit college] under state law.") (emphasis added); Doc. No. 33-11 at 6-10 (applying Massachusetts state law to determine whether borrowers had established a right to relief and to determine the appropriate remedy).

Notwithstanding these numerous sources of law, defendants now argue that the borrower defense regulation "does not contain any criteria or guidelines to apply in making the determination that a borrower successfully asserted a defense to repayment." Commonwealth, Civil Case No. 19-12177-LTS, Doc. No. 18 at 15; Doc. No. 49 at 11 (incorporating this argument by reference). Remarkably, this position is directly rebutted by defendants' own

admissions in this litigation. In their Answer to plaintiffs' Second Amended Complaint, Doc. No. 37 ¶ 33 defendants "admitted" that "[s]tate law provides the standard for borrower defense for all federal student loans at issue in this lawsuit," Doc. No. 28 ¶ 33 (citing "34 C.F.R. § 685.206(c) (eff. until Oct. 16, 2018)") (emphasis added)). Defendants reiterated this position in their brief in the Commonwealth's related case. Commonwealth, Civil Case No. 19-12177-LTS, Doc. No. 32 at 4 (stating that "state law provides the basis upon which Defendants evaluate a borrower defense claim").

These admissions establish the law to apply to the decision under review. Nothing more is required, but there is more. Back in 2015, Education's own Special Master stated in his First Report: "Under [the borrower defense] regulations, the Department looks to the law of the state where the action took place to determine whether to accept the borrower defense," and further explained that a "cause of action under state law against the school [] establishes an equivalent right to relief from the obligation to repay a Direct Loan." First Special Master Report at 3-4. Thus, defendants have consistently recognized that a specific legal standard—that is, one supplied by state law—governs the agency's consideration of borrower defense applications.

In these circumstances, where the Court may look to the statutory and regulatory text, the agency's published interpretations, contractual language drafted by and binding the agency, as well as its "settled course of adjudication," Yueh–Shaio Yang, 519 U.S. at 32, the Court concludes that there is "law to apply," Citizens to Preserve Overton Park, 401 U.S. at 410, that provides "judicially manageable standards" for judging the agency's actions with respect to the DTR Application, Chaney, 470 U.S. at 830. Accordingly, the Court now turns to plaintiffs' claims under the APA and the DJA.

C. Defendants Must Render Reasoned Decisions on Borrower Defense Applications

The Court must now consider plaintiffs' argument that defendants are generally obligated to render reasoned decisions in response to applications for borrower defense relief, irrespective of whether those applications are ultimately successful. Doc. No. 38 at 15-17. Defendants contend that an application for borrower defense relief creates no such obligation, arguing instead that "text of the [borrower defense] regulation itself does not require the Secretary to issue a statement of reasons" if an application is denied or is otherwise unsuccessful. Doc. No. 32 at 12.

Courts have repeatedly held that "[a] fundamental requirement of administrative law is that an agency set forth its reasons for decision[s]," maintaining that "an agency's failure to do so constitutes arbitrary and capricious agency action." Tourus Records, Inc. v. Drug Enf't Admin., 259 F.3d 731, 737 (D.C. Cir. 2001) (internal quotation marks omitted). This fundamental requirement is codified in section 6(d) of the APA, 5 U.S.C. § 555, which requires that "[p]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding . . . accompanied by a brief statement of the grounds for denial." 5 U.S.C. § 555(e). "This requirement not only ensures the agency's careful consideration of such requests, but also gives parties the opportunity to apprise the agency of any errors it may have made and, if the agency persists in its decision, facilitates judicial review." Tourus Records, Inc., 259 F.3d at 737. As Judge Henry Friendly observed in a seminal work on the subject, "the core requirement is that the agency explain 'why it chose to do what it did.'" Id. (quoting Henry J. Friendly, *Chenery* Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L.J. 199, 222). Ultimately, "conclusory statements will not do; an 'agency's statement must be one of

reasoning.'" Amerijet Int'l, Inc. v. Pistole, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (quoting Butte Cnty., Cal. v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010)) (emphasis in original).

By its plain terms, section 6(d) applies to "any agency proceeding." 5 U.S.C. § 555(e). The APA provides that "agency proceedings" include rule makings, adjudications, and licensing proceedings. 5 U.S.C. §§ 551(5), (7), (9), (12). As the Court has already observed, see supra section I.A.1, the governing regulatory scheme creates a duty to adjudicate borrower defense applications, and both the agency and reviewing courts treat Education's consideration of borrower defense applications—including those submitted on behalf of borrowers who have not yet defaulted on their loans—as "adjudications." Indeed, throughout the briefs submitted in the instant case, defendants repeatedly refer to the agency's consideration of borrower defense claims as "adjudications." See Commonwealth, Civil Case No. 19-12177, Doc. No. 18 at 12 (stating that it placed certain borrowers' applications submitted by the AGO "in the queue for adjudication") (emphasis added); Doc. No. 32 at 15 (same). Thus, there can be no doubt that Education, upon receipt of borrower defense applications, undertakes the obligation to "articulate [] satisfactory explanation[s]" for the agency's actions. State Farm, 463 U.S. at 43. Such explanations must be fashioned in order to "facilitate judicial review" under the APA's familiar arbitrary and capricious standard. Tourus Records, Inc., 259 F.3d at 737.

D. The AGO Validly Sought Individual Relief for All Exhibit 4 Borrowers

In light of the APA's demands detailed above, plaintiffs argue that the DTR Application validly sought relief on behalf of all Exhibit 4 borrowers, and, as such, obligated the agency to render a reasoned, non-arbitrary decision as to whether each borrower was entitled to borrower defense relief. Defendants, however, contend that the DTR Application did not trigger any of the APA's constraints on agency adjudications. See Doc. No. 49 at 12 (arguing that "the AGO did

not have the authority to create such obligation[s] for the Defendants simply by asking for something."). In defendants' view, the DTR Application only requested that the agency initiate a "group discharge process," a request that could not have precipitated the agency's ordinary duties because "such [a] process did not exist for group submissions" under the governing regulation. Id. at 13.

The parties do not dispute that the AGO presented its DTR Application, at least in part, as "an application for group loan discharge." Doc. No. 33-4 at 1. The Court rejects defendants' claim that a group discharge process did not exist and thus could not be requested by the AGO. In fact, this claim is contradicted by overwhelming record evidence, which demonstrates that the agency repeatedly exercised its discretion to initiate group discharge processes upon receipt of group applications. See, e.g., Doc. No. 33-11 (granting a request for group discharge submitted by the AGO); Calvillo Manriquez v. Devos, Civil Case No. 3:17-cv-07210-SK, Doc. No. 35-8 at 89 (considering and granting a borrower defense application submitted on behalf of 58 borrowers). However, defendants are correct insofar as they argue that nothing in the 1995 borrower defense regulation nor the agency's adjudicatory practice required the agency to adjudicate en masse or in group form an application submitted on behalf of multiple borrowers. Put another way, while the agency's practice clearly indicates that it engaged in group discharge adjudications, nothing in the text of the HEA, the 1995 borrower defense regulation, nor in the agency's interpretations or memoranda indicate that the agency considered itself bound to adjudicate as a group an application requesting borrower defense relief on behalf of multiple similarly situated persons. Rather, the agency was free to either adjudicate such a group application in one fell swoop or adjudicate constituent individual applications one at a time. As noted above, though, the agency was not free to simply ignore such an application.

In any event, the DTR Application sought more than the initiation of a group discharge process, a point this Court resolved in Williams. See 2018 WL 5281741, at *14. There, the Court held that "the language of the DTR submission itself requested the application of the borrower defense on behalf of all persons listed on Exhibit 4." Id. at *12 (emphasis added). Indeed, the AGO requested "that the Department provide a swift, wholesale, and automatic discharge (including providing refunds on loan payments previously made and removal of any negative credit report entries) for each of Corinthian's Everest MA students, including the [approximately] 7,200 students shown on Exhibit 4." Doc. No. 33-5 at 6 (emphasis added). The AGO specifically requested that Education view the DTR Application as initiating a process that would "assist borrowers in asserting their individual defense to repayment." Doc. No. 33-5 at 6 n.5 (emphasis added). Moreover, the AGO provided each "student's name, dates of enrollment, contact information, and programs attended" to facilitate the provision of such individual relief. Williams, 2018 WL 5281741, at *4.

Defendants, as they did throughout the Williams litigation, maintain that the DTR Application did not validly seek individual relief on behalf of all Exhibit 4 borrowers.[22] Once again, defendants' arguments fail.

[22] Much ink has been spilled discussing the import of the Court's decision in Williams. To the extent that defendants contend that the Court in Williams (1) only ordered relief as to the two plaintiffs in the lawsuit, id. at *15; and (2) only resolved whether the Secretary's decision to certify the two plaintiffs' debts to TOP without first considering the DTR Application was arbitrary and capricious, id., those observations are plainly correct. Necessarily, then, plaintiffs' contention that defendants have "refused to comply with the [Court's] judgment," Doc. No. 38 at 3, is inaccurate. However, to the extent defendants wish to characterize the Court's reasoning in Williams as to whether the DTR Application "invoked a borrower defense proceeding on behalf of the people listed on Exhibit 4," id., as "dicta," Doc. No. 49 at 13, such nomenclature in no way disproves the Court's logic. Cf. Traglio v. Harris, 104 F.2d 439, 441 (9th Cir. 1939) ("The force of these statements, when so deliberately made on the precise point, may not be destroyed by calling it 'dicta.'").

First, defendants' contention that only individual borrowers themselves may present borrower defense claims to Education, Williams, Civil Case No. 16-11949, Doc. 81 at 14, is plainly incorrect. Lawyers routinely represent clients before administrative agencies and present claims on their clients' behalf. See George M. Cohen, The Laws of Agency Lawyering, 84 Fordham L. Rev. 1963, 1963 (2016) ("A significant part of lawyering in the regulatory state involves lawyers appearing and practicing before federal administrative agencies on behalf of clients."); see also Calvillo Manriquez v. Devos, Civil Case No. 3:17-cv-07210-SK, Doc. No. 35-8 at 98 (reproducing a letter from a private lawyer indicating his representation of a number of students who attended a for-profit college and seeking borrower defense relief on their behalf). As the Court noted in Williams, "[t]he Attorney General is a lawyer, licensed to 'seek the lawful objectives of [those whom she represents] through reasonably available means permitted by law,' including through recourse to administrative proceedings." Williams, 2018 WL 5281741, at *11 (quoting Mass. R. Prof'l Conduct 1.2). Defendants offer no source of law that vitiates the AGO's competence to appear as a lawyer in proceedings before Education, including adjudications of borrower defense claims. They offer no law, regulation, or practice either precluding lawyers from representing borrowers in asserting a borrower defense or requiring the borrowers to proceed pro se before the agency. In fact, the notice that Education sends to borrowers whose debts the agency intends to refer to TOP, unsurprisingly, states otherwise. See id. at *2 (observing that Education's notices informed the Williams plaintiffs that they may "have a lawyer represent them in exercising their rights" during debt collection proceedings).

Next, defendants protest that, even if the AGO may generally represent Massachusetts citizens in federal administrative proceedings—a point that defendants tacitly conceded when

they adjudicated applications submitted by the AGO on behalf of borrowers included in Exhibit 3 of the DTR Application, id. at *11 n.19—the Attorney General's representation of Exhibit 4 borrowers is defective because her submission lacked signed attestation forms indicating that all of the persons listed on Exhibit 4 consented to her representation or authorized the request for relief. Williams, Civil Case No. 16-11949, Doc. 81 at 15. This argument fundamentally misunderstands that the scope of the AGO's authority and its capacious role in protecting the public interest. Numerous sources of statutory and common law support the AGO's "routine[] and presumptive[] represent[ation]" of Massachusetts citizens in legal proceedings without their specific written consent. Williams, 2018 WL 5281741, at *11 (collecting authorities and noting that "Attorney General Healey stands in very different shoes than a private lawyer seeking relief on behalf of a class of individuals"). Given the AGO's additional statutory charge to enforce Massachusetts' consumer protection laws, Mass. Gen. Laws ch. 93A, §§ 2, 4, the AGO was authorized to assert borrower defense claims on behalf of Massachusetts citizens and is not at all akin to a private lawyer who seeks to represent a class or group of borrowers. Indeed, in the DTR Application, the AGO sought specific relief for individual borrowers, just as the AGO did in its lawsuit against Corinthian in Massachusetts Superior Court. See Doc. No. 33-1 at 47 (seeking, amongst other relief, "full and complete restitution to current and former students at Everest MA schools").

Finally, defendants continue to argue that the DTR Application did not validly seek individual relief on behalf of all Exhibit 4 borrowers because the Application lacked certain personally identifying information, like social security numbers and birth dates, for each student listed on Exhibit 4. Williams, Civil Case No. 16-11949-LTS, Doc. No. 81 at 16-17. However, contrary to Education's representations, nothing in the HEA, the 1995 borrower defense

regulation, or the agency's adjudicatory practice suggests that the inclusion of such information was required for a borrower defense application to validly seek relief. Indeed, even the 2015 Federal Student Aid website cited by defendants did not, as they claim, state that "student[s] must include, 'at a minimum,'" such information; rather, it merely stated that "submission materials . . . should include" certain listed information, id. at 17 (emphasis added), much of which was, in fact, appended to the DTR Application in Exhibit 4, Williams, 2018 WL 5281741, at *4 (noting that Exhibit 4 included each "student's name, dates of enrollment, contact information, and programs attended," in addition to the AGO's 60-page memorandum chronicling Corinthian's fraudulent practices). Cf. Lambert v. Austin Ind., 544 F.3d 1192, 1196 (11th Cir. 2008) (noting that the word "should" indicates "permissive, rather than mandatory language") (citing Black's Law Dictionary 1379 (6th ed. 1990) (noting that "should" means "usually no more than an obligation of propriety or expediency . . . it does not ordinarily express certainty as 'will' sometimes does."); Atla–Medine v. Crompton Corp., No. 00 CIV 5901(HB), 2001 WL 1382592, at *5 (S.D.N.Y. Nov. 7, 2001) (finding that a statement that parties "should negotiate the terms and conditions" was not a promise because "'should' is permissive, not mandatory.")). Moreover, as the Court noted in Williams, "Education never identified the [DTR Application's] lack of [social security numbers and birth dates] as a deficiency requiring cure." 2018 WL 5281741, at *14. To the extent that social security numbers or birth dates are necessary at any stage of borrower defense process—a proposition that is not supported by any evidence presently before the Court—such information most certainly is not required for a

borrower defense application to validly seek relief on behalf of an individual borrower or for the agency to adjudicate that application in the ordinary course.[23]

Thus, as this Court determined in Williams, the DTR Application "invoked a borrower defense proceeding on behalf of the people listed on Exhibit 4," Williams, 2018 WL 5281741, at *15, an invocation that triggered Education's duty to render reasoned, non-arbitrary decisions as to each borrower who took out loans on behalf of students listed in Exhibit 4.[24] While Education was not required to adjudicate the DTR Application in a single group adjudication, it was required to adjudicate the individual claim advanced on behalf of each Exhibit 4 borrower.

E. Defendants Constructively Denied the DTR Application

Next, plaintiffs aver that the Secretary constructively denied the DTR Application's request for individual borrower defense relief. Doc. No. 38 at 11. Specifically, plaintiffs note that, notwithstanding the events of the Williams litigation, defendants have continued "to collect on the loans of former students of Everest Massachusetts, including by seizing the tax refunds

[23] The Court does not understand defendants to contend that the DTR Application could not constitute an application on behalf of borrowers associated with Exhibit 4 students merely because none of those borrowers signed a piece of paper requesting the relief. This is, of course, a different contention than the argument defendants did advance: that borrowers who took out loans on behalf of Exhibit 4 students are not entitled to relief because each borrower has not made a showing of individual reliance. That contention has been addressed in the text. See supra section II.B. In any event, the contention that an application does not validly seek borrower defense relief without a signed statement from the borrower saying they want the relief is without merit. Neither the HEA nor the 1995 borrower defense regulation impose such a requirement. And, at least in the context of an application made by the Commonwealth's Attorney General with her plenary authority to advance claims on behalf of individuals, see Williams, 2018 WL 5281741, at *11, defendants have identified no reason or purpose supporting such a requirement. If this was the basis for denial, that is arbitrary and capricious.

[24] Previously, defendants also argued that the DTR Application could not constitute a valid invocation of the borrower defense on behalf of all class members because the AGO's submission did not include individualized evidence of detrimental reliance as to each borrower. Williams, Civil Case No. 16-11949, Doc. 81 at 18. Now, defendants concede that the absence of such evidence "would not justify a failure to consider a discharge request." Commonwealth, Civil Case No. 19-12177, Doc. No. 32 at 4 n.2 (quoting Williams, 2018 WL 5281741, at *12).

and garnishing the wages of individuals specifically named by the Attorney General as qualifying for loan cancellation." Doc. No. 28 ¶ 5.

In the administrative law context, it is black letter law that "inaction may represent effectively final agency action that the agency has not frankly acknowledged." Sierra Club v. Thomas, 828 F.2d 783, 793 (D.C. Cir. 1987). As the D.C. Circuit has held, "when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." Id. (quoting Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir. 1970)); see also Her Majesty the Queen in Right of Ontario v. U.S. E.P.A., 912 F.2d 1525, 1531 (D.C. Cir. 1990) (holding that "the absence of a formal statement of the agency's position . . . is not dispositive" as to whether a final agency action is subject to review); All. To Save Mattaponi v. U.S. Army Corps of Engineers, 515 F. Supp. 2d 1, 10 (D.D.C. 2007) (reviewing under section 706(2) an agency's failure to exercise its discretion to veto a permit where "the agency 'did' nothing").

Here, the agency's inaction amounts to a constructive denial of the DTR Application's request for relief on behalf of all Exhibit 4 borrowers. After the Court's October 24, 2018 Order in Williams, Education notified the Williams plaintiffs that the DTR Application would "be considered to initiate a borrower defense application submitted on [their] behalf" and informed the plaintiffs that Education would not "be able to process [their] borrower defense application" until Education received "additional documentation," including a separate application form for borrower defense relief issued by Education. Williams, Civil Case No. 16-11949-LTS, Doc. No. 101-1. After Named Plaintiff Santiago entered this case, Education similarly notified her that the DTR Application "will be considered to initiate a borrower defense application submitted on

[her] behalf" and that she will not receive borrower defense relief unless she submits an additional application form. Doc. No. 38-1 at 1. Education's apparent, but unstated, position in these communications—that the DTR Application, in and of itself, is insufficient to establish a right to borrower defense relief for all borrowers who took out loans for students listed in Exhibit 4—comports with the position taken by the agency's in-house counsel during the Williams litigation. See Williams, Civil Case No. 16-11949-LTS, Doc. No. 108 at 2 (noting that, on February 5, 2018, Education's counsel informed the Court that, while the agency was contemplating providing relief to the Williams plaintiffs on a discretionary basis, it would deny the relief sought by the DTR Application unless it was supplemented with individual application forms). Now, more than a year since the agency made that representation in open court, "the collection procedures on unpaid federal student loans continue for former Massachusetts Everest students who have not personally applied for Borrower Defenses or other types of student loan discharges." Doc. No. 33 ¶ 18. Moreover, in a post-argument letter, defendants contend that "[m]ere presence on the Exhibit 4 list does not preclude certification or collection activity because . . . the list lacks birthdates and social security numbers." Doc. No. 56 at 2. While the agency has not "frankly acknowledged" its denial of the DTR Application for individual borrower defense relief, in these circumstances, defendants' continued refusal to grant the plaintiffs individual relief based on the DTR Application "has precisely the same impact on the rights of the parties as denial of relief." Sierra Club, 828 F.2d at 793.

Plaintiffs argue that this constructive denial was arbitrary, capricious, and contrary to law, in violation of the APA. Doc. No. 38 at 10. This is so, plaintiffs say, because defendants have not—as they are obligated to do—rendered a reasoned decision on the merits of the DTR Application's request for relief for all Exhibit 4 borrowers. Id. at 15-17. Defendants, for their

part, argue that the APA's strictures do not apply because the DTR Application was not a part of an "agency proceeding." Doc. No. 49 at 11.

Not so. As the Court explained above, the agency's consideration of the DTR Application, like its consideration of other affirmative borrower defense claims, was an "adjudication" within the meaning of the APA. See supra section III.C. Nonetheless, Education attempts to evade the APA's procedural requirements by recasting a familiar form of agency action as an alien proceeding, suggesting that the DTR Application—which, on its face, is a written application that invokes an adjudicatory process on behalf of certain borrowers—may disappear undetected. Cf. Doc. No. 49 at 12 (arguing that the DTR Application "does not squarely fit in the APA definition of 'adjudication'"). This runs counter to the letter and spirit of the APA. State Farm, 463 U.S. at 48 (holding that the Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner"). Accordingly, the Court concludes that defendants' failure to render a reasoned decision justifying its denial of the DTR Application is arbitrary, capricious, and contrary to law.

F. All Class Members Have Established a Right to Full Relief

In light of the above conclusion—that the agency's constructive denial of the DTR Application's request on behalf of all Exhibit 4 borrowers violated the APA, at least due to the agency's failure to render a reasoned decision—the Court is now tasked with determining the appropriate remedy. On this front, defendants contend that, even if their actions violated the APA, the only acceptable path forward is an order remanding this matter back to the agency for reconsideration. Doc. No. 49 at 13-14.

There can be no dispute that "the proper way to handle an agency error in the ordinary circumstance is to remand to the agency for additional investigation or explanation." Boliero v.

Holder, 731 F.3d 32, 38 (1st Cir. 2013) (describing the "ordinary remand rule"). The Supreme Court has long held that, in the ordinary course, "if the record before the agency does not support the [challenged] agency action, [or] if the agency has not considered all relevant factors . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). However, it is also well established that courts are "not strictly bound to [the] ordinary remand rule when it is clear that remand would be futile." Singh v. Holder, 558 F. App'x 76, 81 (2d Cir. 2014); accord Watson v. Geren, 569 F.3d 115, 134–35 (2d Cir. 2009) (holding that where "the record contains no basis in fact for denial of [an] application," remand to the agency is futile). The Supreme Court has noted that its precedents do not "require that [courts] convert judicial review of agency action into a ping-pong game" and has further held that there is no need to remand a matter to an agency when such a procedure "would be an idle and useless formality." N. L. R. B. v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969). The D.C. Circuit has reiterated this principle, repeatedly holding that a remand is unnecessary where "only one conclusion would be supportable." Donovan ex rel. Anderson v. Stafford Const. Co., 732 F.2d 954, 961 (D.C. Cir. 1984); George Hyman Const. Co. v. Brooks, 963 F.2d 1532, 1539 (D.C. Cir. 1992) (holding "that a remand would be futile on certain matters as only one disposition is possible as a matter of law").

In this case, the precise legal questions at issue—whether plaintiffs have established their right to borrower defense relief and whether plaintiffs are entitled as a matter of law to full loan discharges—are directly and unequivocally answered by the record evidence. As to the first legal question, the parties do not—and cannot—dispute that "[s]tate law governs the right to relief under the [1995] borrower defense rule." California v. U.S. Dep't of Educ., No. 17-CV-

07106-SK, 2018 WL 10345668, at *10 (N.D. Cal. June 27, 2018). Indeed, the Secretary has admitted as much in her Answer to which she is bound. Doc. No. 37 ¶ 33.

Here, the overwhelming, uncontradicted evidence demonstrates that plaintiffs have satisfied the 1995 borrower regulation's requirement to establish a cause of action under Massachusetts state law. In 2016, the AGO secured a judgment against Corinthian in Massachusetts Superior Court. Doc. No. 33 ¶ 3. In that judgment, the Massachusetts Superior Court wrote that it had allowed the AGO's "summary judgment motion as to [Corinthian's] liability for [the AGO's] claims," Doc. No. 33-3 at 1, including the AGO's allegation that Corinthian "violated M.G.L. c. 93A by misleading prospective students about the school's job placement rates, transferability of credits, and other issues," Doc. No. 33-2.[25] The Superior Court then made findings as to damages, noting that "[r]estitution is authorized in cases where defendants are found to have liability for unfair or deceptive acts or practices in violation of c. 93A, section 4." Doc. No. 33-3 ¶ 5. Additionally, the Superior Court wrote that its restitution calculation was based on a "complete list of all students enrolled at Corinthian during the relevant time period," which was July 1, 2007 through June 30, 2014. Id. ¶¶ 9-10. The Superior Court also noted that its "restitution calculation makes no distinction between graduates as to whom the record on summary judgment contains statements that such students relied on defendants' misrepresentations and graduates as to whom the record contains no such

[25] The Massachusetts Superior Court's judgment made clear that it had scrutinized the AGO's submissions and findings of fact. Compare Calvillo Manriquez, Doc. No. 35-8 at 91 (observing that Education could not rely solely on a default judgment because "there [was] no way to determine whether the court in fact scrutinized the complaint, or simply relied on [the college's] failure to answer"), with Doc. No. 33-3 (acknowledging in its Entry of Judgment that the Superior Court had "considered the Commonwealth's . . . statement of undisputed facts, together with the affidavits and exhibits submitted by the Commonwealth in support of [its summary judgment] motion," and had held a hearing to consider the Commonwealth's request for damages).

statements."[26] Id. ¶ 12. Given this conclusive state court judgment, as well as the copious factual findings included in the DTR Application, see Williams, 2018 WL 5281741, at *5, the Court concludes that plaintiffs have established their right to borrower defense relief. Accordingly, remand is inappropriate as to this legal question—that is, whether the borrowers are entitled to relief. Other courts have reached similar conclusions about the mandatory nature of this entitlement. See Calvillo Manriquez, 345 F. Supp. 3d at 1100; California, 2018 WL 10345668, at *10.

This does not end the matter. There remains a second legal question: whether plaintiffs are entitled to full loan discharges under the 1995 borrower defense regulation as a matter of law. Urging the Court to answer this question in the negative, defendants point to two recent decisions issued by district courts in the Northern District of California. There, the courts determined that, while a successful borrower defense claim necessarily triggers a "mandatory right to some relief," as well as a "mandatory right to be notified about the amount of the relief," the borrower defense regulation "do[es] not provide a mandatory right to a full discharge." Calvillo Manriquez, 345 F. Supp. 3d at 1100; California, 2018 WL 10345668, at *10 (holding that "the regulation at issue gives the Secretary discretion to determine the amount of relief, not tethered to state law").

Calvillo Manriquez and California rendered rulings based only on the governing statutes and regulations. See Calvillo Manriquez, 345 F. Supp. 3d at 1101 (determining that there is a "mandatory right to some relief but not a full discharge[] under the [relevant] section of the Higher Education Act and its [implementing] regulations"); California, 2018 WL 10345668, at

[26] As previously noted, Massachusetts law does not require a showing of individual reliance. See supra section II.B; Doc. No. 33-11 at 8.

*10 (looking only to the text of the 1995 borrower defense regulation in determining that states did not have standing to pursue their claim based on Education's alleged failure to enforce state unfair competition law). This Court, on the other hand, has before it a more robust record depicting a "settled course of adjudication" under the 1995 borrower defense regulatory scheme. Yueh–Shaio Yang, 519 U.S. at 32.

Here, the agency's course of adjudication—that state law determines the measure of relief for a successful borrower defense—is settled. In the pre-2017 cases in which the agency applied the 1995 borrower defense regulation, the measure of relief was uniformly determined by reference to the state law that gave rise to the right to relief. See, e.g., Calvillo Marquez, Doc. No. 35-8 at 91 ("To quantify [these borrowers'] damages, we have to determine the amount of damages they could recover from IBC under state law."); id. at 82 (same); Doc. No. 33-11 (framing its inquiry into the appropriate amount of relief by applying Massachusetts law).[27] Critically, even the agency now admits that, in the years before 2017, "the Department [took] the position internally that the amount of relief due to [borrower defense] applicants [was] dictated by state law." Policy Statement, U.S. Dep't of Educ., Tiered Relief Methodology to Adjudicate Certain Borrower Defense Claims 9 (December 10, 2019), http://ed.gov/sites/default/files/documents/borrower-defense-relief.pdf. According to the agency, "[t]his position was based on an extension of the application of state law in the adjudication of [borrower defense] claims under the 1995 regulation to the determination of relief and reliance,"

[27] Remarkably, in its ACI memorandum, Doc. No. 33-11, the agency makes this observation when determining the appropriate amount of relief: "The facts described above with respect to ACI's practices and product resemble those for Corinthian Colleges, where the Department determined that borrowers should receive full relief. This determination was based in substantial part on the lack of value attendant to a Corinthian education." Id. at 10. The agency then applied Massachusetts case law to determine that full relief was appropriate.

which adopted the interpretive method endorsed by "courts in consumer protection cases." Id. Education has pointed to no contemporaneous adjudications under the governing 1995 borrower defense regulation in which the agency determined the measure of relief for a borrower defense claim arising from a state law cause of action on a basis other than by reference to state law.[28]

Irrespective of whether the agency was required by statute or regulation to apply the 1995 borrower defense regulation in this manner, it may not irrationally shift the legal framework that, in practice, governed like applications for relief. As the First Circuit recently reiterated, "an agency is expected to 'apply the same basic rules to all similarly situated supplicants.'" Thompson, 2020 WL 2570167, at *6 (quoting Henry, 74 F.3d at 6). Indeed, a "zigzag course is not open to an agency when . . . the agency has failed to explain why it is changing direction." Id. (quoting Davila-Bardales v. I.N.S., 27 F.3d 1, 5 (1st Cir. 1994)).

Here, defendants offer one post-hoc attempt to distinguish its contemporaneous adjudication of the ACI matter: They note that ACI, unlike Corinthian, "actually required its students to sign an acknowledgment that they had received the information containing the misrepresentations." Williams, Civil Case No. 16-11949, Doc. No. 81 at 18. This attempt fails for two reasons. First, as the agency itself noted in the ACI memorandum, "individual reliance on a representation is not required" for Massachusetts borrowers to either state a claim or receive full relief under the 1995 borrower defense regulation. Doc. No. 33-11 at 8 (emphasis in original). Second, this factual difference in no way explains or supports a departure in this case from the settled legal rule that uniformly governed the measure of relief in borrower defense adjudications. As the First Circuit has long held, the law "prohibit[s] an agency from adopting

[28] The Court notes that Education was enjoined from utilizing a post-2017 methodology for determining the measure of borrower defense relief. Calvillo Manriquez, 345 F. Supp. at 1107.

significantly inconsistent policies that result in the creation of 'conflicting lines of precedent governing the identical situation.'" Davila-Bardales, 27 F.3d at 5 (quoting Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 37 (1st Cir. 1989)). Given this prohibition, as well as the clarity of the agency's pre-2017 adjudicatory practice, the Court need not remand this matter to the agency for redetermination.

Notwithstanding this undisputed evidence as to plaintiffs' entitlement to relief and their entitlement to full loan discharges, defendants argue that the Court may not issue declaratory relief in this case because doing so would "circumvent the ordinary remand rule." Doc. No. 49 at 14. However, the DJA allows "any court of the United States" to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought," so long as the declaration is made "[i]n a case of actual controversy within [that court's] jurisdiction." 28 U.S.C. § 2201(a). "Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995); Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 534 (1st Cir. 1995) (noting that the DJA is "designed to enable litigants to clarify legal rights and obligations"). Ultimately, the Supreme Court has held that "the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." Pub. Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 243 (1952).

The parties do not dispute that the Secretary may, pursuant to the HEA, "sue . . . in any district court of the United States," including to "enforce" any "claim" arising from her administration of the federal student loan programs. 20 U.S.C. § 1082(a); see also United States

v. Mance, 2020 WL 1080438, at *1 (E.D.N.Y. Mar. 6, 2020) ("The United States of America . . . commenced the instant action to recover the amounts owed by Defendant Shondell Mance on Mance's defaulted student loan"). In their Answer to plaintiffs' Second Amended Complaint, defendants also admit that "[i]n such a lawsuit, the individual borrower, as defendant, could raise a borrower defense to [Education's] claim, based on school misconduct." Doc. No. 37 ¶ 174; Doc. No. 28 ¶ 174. Further, defendants admit that "[t]his Court may exercise jurisdiction over the affirmative defense to putative collection actions raised by the AGO in her borrower defense submission and reiterated by the Plaintiff Class in this action." Doc. No. 37 ¶ 175; Doc. No. 28 ¶ 175.

In these circumstances, the Court concludes that declaratory relief is appropriate. The parties dispute whether the DTR Application "in and of itself or in combination with all other information available to [Education] . . . establish[es] a borrower defense for any and all individuals who took out a federal student loan in connection with Everest Massachusetts." Doc. No. 28 ¶ 8. The resolution of this dispute depends on whether plaintiffs can "assert," as the 1995 borrower defense regulation demands, "any act or omission of the school attended by the student[s] that would give rise to a cause of action against the school under applicable State law." 34 C.F.R. § 685.206(c)(1) (eff. until Oct. 16, 2018). If plaintiffs have asserted such acts or omissions, then they have necessarily "established an equivalent right to relief from the obligation to repay a Direct Loan." First Special Master Report at 4 (emphasis added and alteration omitted). As noted above, the parties also dispute whether they are entitled to full relief as a matter of law. Where, as here, the Court is faced with purely legal questions and benefits from a robust evidentiary record, the Court is well-suited to declare the litigants' rights.

G. Certifications of Legal Enforceability and Wage Garnishment Orders

In their Second Amended Complaint, plaintiffs also seek a declaration that "every certification of legal enforceability and every wage garnishment order issued by the Department, since November 26, 2015, against any individual listed on Exhibit 4 is unlawful." Doc. No. 28 at 30. The Court has not made such a declaration for two reasons. First, in light of the declarations made by the Court, a declaration with respect to the certifications or wage garnishments might be moot. Second, not all of the borrowers who took out loans associated with Exhibit 4 students have been subject to certifications or wage garnishments, thus raising significant class certification concerns. See Fed. R. Civ. P. 23(b)(2) (dictating that relief must be "appropriate with respect to the class as a whole").

The Court does note, however, that Education has admitted in a binding Answer that "[s]tate law provides the standard for borrower defense for all federal student loans at issue in this lawsuit." Doc. No. 37 ¶ 33. Further, Education has admitted in a binding stipulation that a Massachusetts Superior Court entered judgment against Corinthian for violations of Massachusetts state law in a lawsuit that sought "full and complete restitution to current and former students at Everest MA schools." Doc. No. 33 ¶ 4, Doc. No. 33-1 at 47. Despite these unequivocal concessions, Education has acknowledged that "collection procedures on unpaid federal student loans," including certifications to TOP and wage garnishments, "continue for former Massachusetts Everest students who have not personally applied for Borrower Defenses or other types of student loan discharges." Doc. No. 33 ¶ 19. The agency has also argued that "[m]ere presence on the Exhibit 4 list does not preclude certification or collection activity." Doc. No. 56 at 2. Of course, a complete borrower defense to repayment vitiates Education's ability to certify a loan for tax refund offset or seek wage garnishment. See 34 C.F.R. §

685.206(c) (eff. until Oct. 16, 2018). And, as this Court has previously held, the agency is bound by statute and regulation to consider such a defense before a certification or wage garnishment decision is made. See 31 U.S.C. § 3720A(b); 31 C.F.R. § 285.2(b)–(d).

## IV. ORDER

For the foregoing reasons, the Court concludes that: (1) the DTR Application was a valid borrower defense application on behalf of all individuals who took out federal student loans to pay for the cost of attendance for students listed in Exhibit 4, including those who took out Parent PLUS loans; (2) defendants constructively denied the DTR Application without rendering a reasoned decision, thus violating the APA's prohibition on arbitrary and capricious agency action; and (3) plaintiffs have established that they are entitled full loan discharges and a favorable borrower defense decision pursuant to 34 C.F.R. § 685.206(c)(1) (eff. until Oct. 16, 2018). Accordingly, the Court hereby:

(1) ALLOWS the plaintiffs' Motion for Judgment, Doc. No. 38;

(2) DECLARES that the DTR Application was a valid borrower defense to repayment application submitted on behalf of all individuals who took out federal student loans to pay for the cost of attendance for students listed in Exhibit 4;

(3) SETS ASIDE the defendants' constructive denial of the DTR Application for borrower defense relief submitted on behalf of all individuals who took out federal student loans to pay for the cost of attendance for students listed in Exhibit 4;

(4) DECLARES that plaintiffs have established a right to borrower defense relief for all individuals who took out federal student loans to pay for the cost of attendance for students listed in Exhibit 4;

(5) DECLARES that plaintiffs are entitled to full loan discharges pursuant to the agency's settled course of adjudication;[29]

(6) REMANDS this matter to the Secretary to render a reasoned decision not inconsistent with this Order;

(7) ORDERS the Secretary to issue her reasoned decision within 60 days of the issuance of this Order or such further time allowed by the Court;[30]

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[29] In a post-argument letter, defendants claim, without evidentiary support, that Education is unable to search its database for borrowers who took out loans for individuals in Exhibit 4 because the DTR Application does not contain birth dates and social security numbers for all such individuals. Doc. No. 56 at 2. The Court notes that within three days of Named Plaintiff Noemy Santiago entering this case—at which point the Amended Complaint and Santiago's Affidavit in support of class certification merely contained her name, dates of attendance at Everest Brighton, and information about which program she attended at Everest Brighton, see Doc. No. 24 ¶¶ 67-80, Doc. No. 29-3—an Education loan analyst produced Santiago's entire loan history, Doc. No. 34. The loan analyst's declaration states that her search of Education's various databases was based on "documents submitted by [Santiago] in this lawsuit." Id. ¶ 8. There is no indication in the loan analyst's declaration that birth dates or social security numbers are necessary to search loan records maintained by or available to the agency, nor is there any support for defendants' claim that Education's "database . . . is not organized by school." Doc. No. 56 at 2. (It is unclear which "database" defendants mean to reference in their post-argument letter. Indeed, as Education's loan analyst confirms in her declaration, electronic records are maintained in several databases, including the Common Origination and Disbursement (COD) system, the National Student Loan Database System, and the Debt Management Collection System. Doc. No. 34 ¶¶ 4-6.). To the extent that defendants require additional information about borrowers who took out loans for those listed in Exhibit 4 in order to effectuate the relief to which borrowers are entitled, that is a matter of implementation that the agency shall consider upon remand.

[30] The Court has carefully considered the time required for the Secretary to render a decision. Among other factors, the Court notes: (1) the AGO filed the DTR Application almost five years ago; (2) the Court rendered its decision in Williams well over a year and a half ago; and (3) defendants have demonstrated their ability to expeditiously compile relevant loan documents for individuals listed in Exhibit 4. See supra note 29. Defendants complain that plaintiffs' case is a plea for favoritism, a request to "jump ahead of all existing claimants without having followed the rules." Doc. No 49 at 2. The Court respectfully disagrees. The DTR Application was filed in 2015. Education never issued a reasoned decision in response to the DTR Application. The Court found in Williams that the DTR Application was a valid borrower defense application as to two borrowers listed in Exhibit 4 and ordered Education to adjudicate the individual borrower defense that the DTR Application presented on their behalf. Education did not appeal this judgment; instead, it persisted in its view that the law did not require it to render a reasoned

(8) RETAINS jurisdiction of this matter in the event of an appeal from or challenge to the administrative decision ordered by paragraph 6.

The clerk shall issue a final judgment.

SO ORDERED.

/s/ Leo T. Sorokin
Leo T. Sorokin
United States District Judge

decision or frankly acknowledge its constructive denial of the borrower defense that the DTR Application raised on behalf of all borrowers connected to Exhibit 4 students. Another suit predictably followed. The Court has now ruled. With the five-year anniversary of the AGO's submission of the DTR Application approaching, the Court concludes that plaintiffs are not "jumping ahead" of anyone at all.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| DIANA VARA, AMANDA WILSON, NOEMY SANTIAGO, KENNYA CABRERA, and INDRANI MANOO, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>ELISABETH P. DEVOS, in her official capacity as Secretary of the United States Department of Education, and THE UNITED STATES DEPARTMENT OF EDUCATION,<br><br>Defendants. | ) | Civil No. 19-12175-LTS |

FINAL JUDGMENT

June 25, 2020

For the reasons stated in the Court's Memorandum and Order dated June 25, 2020, Doc. No. 58, the Court hereby:

(1) DECLARES that the DTR Application, Doc. No. 33-4; Doc. No. 33-5, was a valid borrower defense to repayment application submitted on behalf of all individuals who took out federal student loans to pay for the cost of attendance for students listed in Exhibit 4;

(2) SETS ASIDE the defendants' constructive denial of the DTR Application for borrower defense relief submitted on behalf of all individuals who took out federal student loans to pay for the cost of attendance for students listed in Exhibit 4;

(3) DECLARES that plaintiffs have established a right to borrower defense relief for all individuals who took out federal student loans to pay for the cost of attendance for students listed in Exhibit 4;

(4) DECLARES that plaintiffs are entitled to full loan discharges pursuant to the agency's settled course of adjudication;

(5) REMANDS this matter to the Secretary to render a reasoned decision not inconsistent with this Order;

(6) ORDERS the Secretary to issue her reasoned decision within 60 days of the issuance of this Order or such further time allowed by the Court;

(7) RETAINS jurisdiction of this matter in the event of an appeal from or challenge to the administrative decision ordered by paragraph 6.

SO ORDERED.

/s/ Leo T. Sorokin
Leo T. Sorokin
United States District Judge

**20 U.S.C. § 1087e(h)**

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.

**34 C.F.R. § 685.206(c) (1995)**

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

(i) Tax refund offset proceedings under 34 CFR 30.33.
(ii) Wage garnishment proceedings under section 488A of the Act.
(iii) Salary offset proceedings for Federal employees under 34 CFR part 31.
(iv) Consumer reporting agency reporting proceedings under 31 U.S.C. 3711(f).

(2) If the borrower's defense against repayment is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances.

Further relief may include, but is not limited to, the following:
(i) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection.
(ii) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.
(iii) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

**34 C.F.R. § 685.206(c)-(e)**

(c) Borrower defense to repayment for loans first disbursed prior to July 1, 2017.

(1) For loans first disbursed prior to July 1, 2017, the borrower may assert a borrower defense under this paragraph. A "borrower defense" refers to any act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational services for which the loan was provided that would give rise to a cause of action against the school under applicable State law, and includes one or both of the following:

(i) A defense to repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part.

(ii) A claim to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(2) The order of objections for defaulted Direct Loans are as described in § 685.222(a)(6). A borrower defense claim under this section must be asserted, and will be resolved, under the procedures in § 685.222(e) to (k).

(3) For an approved borrower defense under this section, except as provided in paragraph (c)(4) of this section, the Secretary may initiate an appropriate proceeding to collect from the school whose act or omission resulted in the borrower defense the amount of relief arising from the borrower defense, within the later of –

(i) Three years from the end of the last award year in which the student attended the institution; or

(ii) The limitation period that State law would apply to an action by the borrower to recover on the cause of action on which the borrower defense is based.

(4) The Secretary may initiate a proceeding to collect at any time if the institution received notice of the claim before the end of the later of the periods described in paragraph (c)(3) of this section. For purposes of this paragraph, notice includes receipt of –

(i) Actual notice from the borrower, from a representative of the borrower, or from the Department;

(ii) A class action complaint asserting relief for a class that may include the borrower; and

(iii) Written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower.

(d) Borrower defense to repayment for loans first disbursed on or after July 1, 2017, and before July 1, 2020. For borrower defense to repayment for loans first disbursed on or after July 1, 2017, and before July 1, 2020, a borrower asserts and the Secretary considers a borrower defense in accordance with § 685.222.

(e) Borrower defense to repayment for loans first disbursed on or after July 1, 2020. This paragraph (e) applies to borrower defense to repayment for loans first disbursed on or after July 1, 2020. [Remainder of subsection (e) omitted.]

**34 C.F.R. § 685.222**

(a) General.

(1) For loans first disbursed prior to July 1, 2017, a borrower asserts and the Secretary considers a borrower defense in accordance with the provisions of § 685.206(c), unless otherwise noted in § 685.206(c).

(2) For loans first disbursed on or after July 1, 2017, and before July 1, 2020, a borrower asserts and the Secretary considers a borrower defense in accordance with this section. To establish a borrower defense under this section, a preponderance of the evidence must show that the borrower has a borrower defense that meets the requirements of this section.

(3) A violation by the school of an eligibility or compliance requirement in the Act or its implementing regulations is not a basis for a borrower defense under either this section or § 685.206(c) unless the violation would otherwise constitute a basis for a borrower defense under this section or § 685.206(c), as applicable.

(4) For the purposes of this section and § 685.206(c), "borrower" means -

(i) The borrower; and

(ii) In the case of a Direct PLUS Loan, any endorsers, and for a Direct PLUS Loan made to a parent, the student on whose behalf the parent borrowed.

(5) For the purposes of this section and § 685.206(c), a "borrower defense" refers to an act or omission of the school attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided, and includes one or both of the following:

(i) A defense to repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part; and

(ii) A right to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(6) If the borrower asserts both a borrower defense and any other objection to an action of the Secretary with regard to that Direct Loan, the order in which the Secretary will consider objections, including a borrower defense, will be determined as appropriate under the circumstances.

(b) Judgment against the school. The borrower has a borrower defense under this section if the borrower, whether as an individual or as a member of a class, or a governmental agency, has obtained against the school a nondefault, favorable contested judgment based on State or Federal law in a court or administrative tribunal of competent jurisdiction. A borrower may assert a borrower defense under this paragraph at any time.

(c) Breach of contract by the school. The borrower has a borrower defense under this section if the school the borrower received the Direct Loan to attend failed to perform its obligations under the terms of a contract with the student. A borrower may assert a defense to repayment of amounts owed to the Secretary under this paragraph at any time after the breach by the school of its contract with the student. A borrower may assert a right to recover amounts previously collected by the Secretary under this paragraph not later than six years after the breach by the school of its contract with the student.

(d) Substantial misrepresentation by the school.

(1) A borrower has a borrower defense under this section if the school or any of its representatives, or any institution, organization, or person with whom the school has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services, made a substantial misrepresentation in accordance with 34 CFR part 668, subpart F, that the borrower reasonably relied on to the borrower's detriment when the borrower decided to attend, or to continue attending, the school or decided to take out a Direct Loan. A borrower may assert, at any time, a defense to repayment under this paragraph (d) of amounts owed to the Secretary. A borrower may assert a claim under this paragraph (d) to recover funds previously collected by the Secretary not later than six years after the borrower discovers, or reasonably could have discovered, the information constituting the substantial misrepresentation.

(2) For the purposes of this section, a designated Department official pursuant to paragraph (e) of this section or a hearing official pursuant to paragraph (f), (g), or (h) of this section may consider, as evidence

supporting the reasonableness of a borrower's reliance on a misrepresentation, whether the school or any of the other parties described in paragraph (d)(1) engaged in conduct such as, but not limited to:

(i) Demanding that the borrower make enrollment or loan-related decisions immediately;

(ii) Placing an unreasonable emphasis on unfavorable consequences of delay;

(iii) Discouraging the borrower from consulting an adviser, a family member, or other resource;

(iv) Failing to respond to the borrower's requests for more information including about the cost of the program and the nature of any financial aid; or

(v) Otherwise unreasonably pressuring the borrower or taking advantage of the borrower's distress or lack of knowledge or sophistication.

(e) Procedure for an individual borrower.

(1) To assert a borrower defense under this section, an individual borrower must -

(i) Submit an application to the Secretary, on a form approved by the Secretary -

(A) Certifying that the borrower received the proceeds of a loan, in whole or in part, to attend the named school;

(B) Providing evidence that supports the borrower defense; and

(C) Indicating whether the borrower has made a claim with respect to the information underlying the borrower defense with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount

of any payment received by the borrower or credited to the borrower's loan obligation; and

(ii) Provide any other information or supporting documentation reasonably requested by the Secretary.

(2) Upon receipt of a borrower's application submitted under this section, the Secretary -

(i) If the borrower is not in default on the loan for which a borrower defense has been asserted, grants forbearance and -

(A) Notifies the borrower of the option to decline the forbearance and to continue making payments on the loan; and

(B) Provides the borrower with information about the availability of the income-contingent repayment plans under § 685.209 and the income-based repayment plan under § 685.221; or

(ii) If the borrower is in default on the loan for which a borrower defense has been asserted -

(A) Suspends collection activity on the loan until the Secretary issues a decision on the borrower's claim;

(B) Notifies the borrower of the suspension of collection activity and explains that collection activity will resume if the Secretary determines that the borrower does not qualify for a full discharge; and

(C) Notifies the borrower of the option to continue making payments under a rehabilitation agreement or other repayment agreement on the defaulted loan.

(3) The Secretary designates a Department official to review the borrower's application under this section to determine whether the application states a basis for a borrower defense, and resolves the claim through a fact-finding process conducted by the Department official.

(i) As part of the fact-finding process, the Department official notifies the school of the borrower defense application and considers any evidence or argument presented by the borrower and also any additional information, including -

(A) Department records;

(B) Any response or submissions from the school; and

(C) Any additional information or argument that may be obtained by the Department official.

(ii) For borrower defense applications under this section, upon the borrower's request, the Department official identifies to the borrower the records the Department official considers relevant to the borrower defense. The Secretary provides to the borrower any of the identified records upon reasonable request of the borrower.

(4) At the conclusion of the fact-finding process under this section, the Department official issues a written decision as follows:

(i) If the Department official approves the borrower defense in full or in part, the Department official notifies the borrower in writing of that determination and of the relief provided as described in paragraph (i) of this section.

(ii) If the Department official denies the borrower defense in full or in part, the Department official notifies the borrower of the reasons for the denial, the evidence that was relied upon, any portion of the loan that is due and payable to the Secretary, and whether the Secretary will reimburse any amounts previously collected, and informs the borrower that if any balance remains on the loan, the loan will return to its status prior to the borrower's submission of the application. The Department official also informs the borrower of the opportunity to request reconsideration of the claim based on new evidence pursuant to paragraph (e)(5)(i) of this section.

(5) The decision of the Department official under this section is final as to the merits of the claim and any relief that may be granted on the claim. Notwithstanding the foregoing -

(i) If the borrower defense is denied in full or in part, the borrower may request that the Secretary reconsider the borrower defense upon the identification of new evidence in support of the borrower's claim. "New evidence" is relevant evidence that the borrower did not previously provide and that was not identified in the final decision as evidence that was relied upon for the final decision. If accepted for reconsideration by the Secretary, the Secretary follows the procedure in paragraph (e)(2) of this section for granting forbearance and for defaulted loans; and

(ii) The Secretary may reopen a borrower defense application at any time to consider evidence that was not considered in making the previous decision. If a borrower defense application is reopened by the Secretary, the Secretary follows the procedure paragraph (e)(2) of this section for granting forbearance and for defaulted loans.

(6) The Secretary may consolidate applications filed under this paragraph (e) that have common facts and claims, and resolve the borrowers' borrower defense claims as provided in paragraphs (f), (g), and (h) of this section.

(7) The Secretary may initiate a proceeding to collect from the school the amount of relief resulting from a borrower defense under this section -

(i) Within the six-year period applicable to the borrower defense under paragraph (c) or (d) of this section;

(ii) At any time, for a borrower defense under paragraph (b) of this section; or

(iii) At any time if during the period described in paragraph (e)(7)(i) of this section, the institution received notice of the claim. For purposes of this paragraph, notice includes receipt of -

(A) Actual notice from the borrower, a representative of the borrower, or the Department of a claim, including notice of an application filed pursuant to this section or § 685.206(c);

(B) A class action complaint asserting relief for a class that may include the borrower for underlying facts that may form the basis of a claim under this section or § 685.206(c);

(C) Written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower, for underlying facts that may form the basis of a claim under this section or § 685.206(c).

(f) Group process for borrower defense, generally.

(1) Upon consideration of factors including, but not limited to, common facts and claims, fiscal impact, and the promotion of compliance by the school or other title IV, HEA program participant, the Secretary may initiate a process to determine whether a group of borrowers, identified by the Secretary, has a borrower defense under this section.

(i) The members of the group may be identified by the Secretary from individually filed applications pursuant to paragraph (e)(6) of this section or from any other source.

(ii) If the Secretary determines that there are common facts and claims that apply to borrowers who have not filed an application under paragraph (e) of this section, the Secretary may identify such borrowers as members of a group.

(2) Upon the identification of a group of borrowers under paragraph (f)(1) of this section, the Secretary -

(i) Designates a Department official to present the group's claim in the fact-finding process described in paragraph (g) or (h) of this section, as applicable;

(ii) Provides each identified member of the group with notice that allows the borrower to opt out of the proceeding;

(iii) If identified members of the group are borrowers who have not filed an application under paragraph (f)(1)(ii) of this section, follows the procedures in paragraph (e)(2) of this section for granting forbearance and for defaulted loans for such identified members of the group, unless an opt-out by such a member of the group is received; and

(iv) Notifies the school of the basis of the group's borrower defense, the initiation of the fact-finding process described in paragraph (g) or (h) of this section, and of any procedure by which the school may request records and respond. No notice will be provided if notice is impossible or irrelevant due to a school's closure.

(3) For a group of borrowers identified by the Secretary, for which the Secretary determines that there may be a borrower defense under paragraph (d) of this section based upon a substantial misrepresentation that has been widely disseminated, there is a rebuttable presumption that each member reasonably relied on the misrepresentation.

(g) Procedures for group process for borrower defenses with respect to loans made to attend a closed school. For groups identified by the Secretary under paragraph (f) of this section, for which the borrower defense is asserted with respect to a Direct Loan to attend a school that has closed and has provided no financial protection currently available to the Secretary from which to recover any losses arising from borrower defenses, and for which there is no appropriate entity from which the Secretary can otherwise practicably recover such losses -

(1) A hearing official resolves the borrower defense under this section through a fact-finding process. As part of the fact-finding process, the hearing official considers any evidence and argument presented by the Department official on behalf of the group and, as necessary to determine any claims at issue, on behalf of individual members of the group. The hearing official also considers any additional information the Department official considers necessary, including any Department records or response from the school or a person affiliated with the school as described in § 668.174(b), if practicable. The hearing official issues a written decision as follows:

(i) If the hearing official approves the borrower defense in full or in part, the written decision states that determination and the relief provided on the basis of that claim as determined under paragraph (i) of this section.

(ii) If the hearing official denies the borrower defense in full or in part, the written decision states the reasons for the denial, the evidence that was relied upon, the portion of the loans that are due and payable to the Secretary, and whether reimbursement of amounts previously collected is granted, and informs the borrowers that if any balance remains on the loan, the loan will return to its status prior to the group claim process.

(iii) The Secretary provides copies of the written decision to the members of the group and, as practicable, to the school.

(2) The decision of the hearing official is final as to the merits of the group borrower defense and any relief that may be granted on the group claim.

(3) After a final decision has been issued, if relief for the group has been denied in full or in part pursuant to paragraph (g)(1)(ii) of this section, an individual borrower may file a claim for relief pursuant to paragraph (e)(5)(i) of this section.

(4) The Secretary may reopen a borrower defense application at any time to consider evidence that was not considered in making the previous decision. If a borrower defense application is reopened by the Secretary, the Secretary follows the procedure in paragraph (e)(2) of this section for granting forbearance and for defaulted loans.

(h) Procedures for group process for borrower defenses with respect to loans made to attend an open school. For groups identified by the Secretary under paragraph (f) of this section, for which the borrower defense under this section is asserted with respect to Direct Loans to attend a school that is not covered by paragraph (g) of this section, the claim is resolved in accordance with the procedures in this paragraph (h).

(1) A hearing official resolves the borrower defense and determines any liability of the school through a fact-finding process. As part of the fact-finding process, the hearing official considers any evidence and argument presented by the school and the Department official on behalf of the group and, as necessary to determine any claims at issue, on behalf of individual members of the group. The hearing official issues a written decision as follows:

(i) If the hearing official approves the borrower defense in full or in part, the written decision establishes the basis for the determination, notifies the members of the group of the relief as described in paragraph (i) of this section, and notifies the school of any liability to the Secretary for the amounts discharged and reimbursed.

(ii) If the hearing official denies the borrower defense for the group in full or in part, the written decision states the reasons for the denial, the evidence that was relied upon, the portion of the loans that are due and

payable to the Secretary, and whether reimbursement of amounts previously collected is granted, and informs the borrowers that their loans will return to their statuses prior to the group borrower defense process. The decision notifies the school of any liability to the Secretary for any amounts discharged or reimbursed.

(iii) The Secretary provides copies of the written decision to the members of the group, the Department official, and the school.

(2) The decision of the hearing official becomes final as to the merits of the group borrower defense and any relief that may be granted on the group borrower defense within 30 days after the decision is issued and received by the Department official and the school unless, within that 30-day period, the school or the Department official appeals the decision to the Secretary. In the case of an appeal -

(i) The decision of the hearing official does not take effect pending the appeal; and

(ii) The Secretary renders a final decision.

(3) After a final decision has been issued, if relief for the group has been denied in full or in part pursuant to paragraph (h)(1)(ii) of this section, an individual borrower may file a claim for relief pursuant to paragraph (e)(5)(i) of this section.

(4) The Secretary may reopen a borrower defense application at any time to consider evidence that was not considered in making the previous decision. If a borrower defense application is reopened by the Secretary, the Secretary follows the procedure in paragraph (e)(2) of this section for granting forbearance and for defaulted loans.

(5)

(i) The Secretary collects from the school any liability to the Secretary for any amounts discharged or reimbursed to borrowers under this paragraph (h).

(ii) For a borrower defense under paragraph (b) of this section, the Secretary may initiate a proceeding to collect at any time.

(iii) For a borrower defense under paragraph (c) or (d) of this section, the Secretary may initiate a proceeding to collect within the limitation period that would apply to the borrower defense, provided that the Secretary may bring an action to collect at any time if, within the limitation period, the school received notice of the borrower's borrower defense claim. For purposes of this paragraph, the school receives notice of the borrower's claim by receipt of -

(A) Actual notice of the claim from the borrower, a representative of the borrower, or the Department, including notice of an application filed pursuant to this section or § 685.206(c);

(B) A class action complaint asserting relief for a class that may include the borrower for underlying facts that may form the basis of a claim under this section or § 685.206(c); or

(C) Written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower, of underlying facts that may form the basis of a claim under this section or § 685.206(c).

(i) Relief. If a borrower defense is approved under the procedures in paragraph (e), (g), or (h) of this section, the following procedures apply:

(1) The Department official or the hearing official deciding the claim determines the appropriate amount of relief to award the borrower, which may be a discharge of all amounts owed to the Secretary on the loan at issue and may include the recovery of amounts previously collected by the Secretary on the loan, or some lesser amount.

(2) For a borrower defense brought on the basis of -

(i) A substantial misrepresentation, the Department official or the hearing official will factor the borrower's cost of attendance to attend the school, as well as the value of the education the borrower received, the value of the education that a reasonable borrower in the borrower's circumstances would have received, and/or the value of the education the borrower should have expected given the information provided by the institution, into the determination of appropriate relief. A borrower

may be granted full, partial, or no relief. Value will be assessed in a manner that is reasonable and practicable. In addition, the Department official or the hearing official deciding the claim may consider any other relevant factors;

(ii) A judgment against the school -

(A) Where the judgment awards specific financial relief, relief will be the amount of the judgment that remains unsatisfied, subject to the limitation provided for in § 685.222(i)(8) and any other reasonable considerations; and

(B) Where the judgment does not award specific financial relief, the Department will rely on the holding of the case and applicable law to monetize the judgment; and

(iii) A breach of contract, relief will be determined according to the common law of contracts, subject to the limitation provided for in § 685.222(i)(8) and any other reasonable considerations.

(3) In a fact-finding process brought against an open school under paragraph (h) of this section on the basis of a substantial misrepresentation, the school has the burden of proof as to any value of the education.

(4) In determining the relief, the Department official or the hearing official deciding the claim may consider -

(i) Information derived from a sample of borrowers from the group when calculating relief for a group of borrowers; and

(ii) The examples in Appendix A to this subpart.

(5) In the written decision described in paragraphs (e), (g), and (h) of this section, the designated Department official or hearing official deciding the claim notifies the borrower of the relief provided and -

(i) Specifies the relief determination;

(ii) Advises that there may be tax implications; and

(iii) Advises the borrower of the requirements to file a request for reconsideration upon the identification of new evidence.

(6) Consistent with the determination of relief under paragraph (i)(1) of this section, the Secretary discharges the borrower's obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay and, if applicable, reimburses the borrower for amounts paid toward the loan voluntarily or through enforced collection.

(7) The Department official or the hearing official deciding the case, or the Secretary as applicable, affords the borrower such further relief as appropriate under the circumstances. Such further relief includes, but is not limited to, one or both of the following:

(i) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(ii) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(8) The total amount of relief granted with respect to a borrower defense cannot exceed the amount of the loan and any associated costs and fees and will be reduced by the amount of any refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, compromise, or any other financial benefit received by, or on behalf of, the borrower that was related to the borrower defense. The relief to the borrower may not include non-pecuniary damages such as inconvenience, aggravation, emotional distress, or punitive damages.

(j) Cooperation by the borrower. To obtain relief under this section, a borrower must reasonably cooperate with the Secretary in any proceeding under paragraph (e), (g), or (h) of this section. The Secretary may revoke any relief granted to a borrower who fails to satisfy his or her obligations under this paragraph (j).

(k) Transfer to the Secretary of the borrower's right of recovery against third parties.

(1) Upon the granting of any relief under this section, the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary

any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the contract for educational services for which the loan was received, against the school, its principals, its affiliates, and their successors, its sureties, and any private fund. If the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense and for the same loan for which the discharge was granted under this section.

(2) The provisions of this paragraph (k) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(3) Nothing in this paragraph (k) limits or forecloses the borrower's right to pursue legal and equitable relief against a party described in this paragraph (k) for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

# United States Court of Appeals
## For the First Circuit

No. 20-1832

DIANA VARA; AMANDA WILSON; NOEMY SANTIAGO; INDRANI MANOO; KENNYA CABRERA, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellees,

v.

ELISABETH P. DEVOS, in her official capacity as Secretary of the United States Department of Education; THE UNITED STATES DEPARTMENT OF EDUCATION,

Defendants - Appellants.

**APPELLEE'S BRIEFING NOTICE**

Issued: January 4, 2021

Appellee's brief must be filed by **February 1, 2021**.

The deadline for filing appellant's reply brief will run from service of appellee's brief in accordance with Fed. R. App. P. 31 and 1st Cir. R. 31.0. Parties are advised that extensions of time are not normally allowed without timely motion for good cause shown.

Presently, it appears that this case may be ready for argument or submission at the coming **May, 2021** session.

The First Circuit Rulebook, which contains the Federal Rules of Appellate Procedure, First Circuit Local Rules and First Circuit Internal Operating Procedures, is available on the court's website at www.ca1.uscourts.gov. Please note that the court's website also contains tips on filing briefs, including a checklist of what your brief must contain.

**Failure to file a brief in compliance with the federal and local rules will result in the issuance of an order directing the party to file a conforming brief and could result in the appellee not being heard at oral argument. See 1st Cir. R. 3 and 45.**

Maria R. Hamilton, Clerk

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