IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES,

Plaintiff,

v.

ARNE DUNCAN, in his official capacity as Secretary of the Department of Education,

UNITED STATES DEPARTMENT OF EDUCATION,

and

UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 1:14-cv-01870 (JDB)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Association of Private Sector Colleges and Universities ("APSCU"), pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 7(h), moves the Court for summary judgment in its favor holding unlawful and setting aside a recently promulgated regulation—the so-called "gainful employment" rule, 79 Fed. Reg. 64,889 (Oct. 31, 2014) (to be codified at 34 C.F.R. Parts 600 and 668). The parties "agree that this case can be resolved on cross-motions for summary judgment," Joint Proposed Briefing Schedule 2 (Nov. 19, 2014) (ECF No. 5), and as set forth in the accompanying Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, Plaintiff is entitled to judgment as a matter of law.

Pursuant to Local Rule 7(f), Plaintiff respectfully requests oral argument on this motion at the hearing previously scheduled by the Court for May 20, 2015.

Dated: February 6, 2015

Respectfully submitted,

/s/ Douglas R. Cox

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FOR THE DISTRICT OF COLUMBIA

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INTRODUCTION

In 2011, Defendant Department of Education adopted an unprecedented regulation that restricted students' access to financial aid for postsecondary education. The 2011 rule exceeded the Department's statutory and constitutional authority, was irrational and arbitrary, and imposed unjustified sanctions on schools based on circumstances outside their control. Plaintiff Association of Private Sector Colleges and Universities ("APSCU")—an association of approximately 1,400 private-sector schools that serve more than 3 million students—filed suit in this Court challenging the 2011 rule. In a pair of rulings, this Court struck down the 2011 rule, holding that a key component lacked any reasoned basis and that the rule violated federal law. *APSCU v. Duncan*, 870 F. Supp. 2d 133, 152–55 (D.D.C. 2012) ("*APSCU I*"); *APSCU v. Duncan*, 930 F. Supp. 2d 210, 214–19 (D.D.C. 2013) ("*APSCU II*").

The Department declined to appeal the Court's rulings, and instead launched a new "major" rulemaking with a conceded economic impact of more than $400 million a year. The Department has not learned its lesson. Far from curing the many defects in its prior rule, the new rule again breaches the limits on the Department's legal authority, is more irrational and arbitrary than the vacated 2011 rule, and imposes even harsher sanctions. If allowed to stand, the new rule will deprive hundreds of thousands of students of educational opportunities and punish schools that ably serve at-risk students who lack other educational options. Indeed, 99% of the programs that will not pass the Department's new standards are offered by private-sector schools that the Department conceded "are more likely" than others "to enroll students who are older, women, Black, Hispanic," or "[s]ingle parents," or who "[have] a certificate of high school equivalency" or "lower family income." 79 Fed. Reg. 64,889, 64,904, 65,064 (Oct. 31, 2014). More than one-third of for-profit programs will not pass the Department's arbitrary test. *Id.* at 65,064. The rule also creates disincentives for schools to enroll at-risk students, who are more likely to cause programs to fail the Department's test. As the *Washington Post* explained, the "likely outcome . . . is that schools will admit only students who pose the least risk."[1]

The new rule purports to implement a provision of the Higher Education Act of 1965 ("HEA") that limits the eligibility of certain programs for federal aid under Title IV of the HEA to those that "prepare students for gainful employment in a recognized occupation." 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A), (c)(1)(A). For nearly 50 years, the Department construed this phrase to mean simply that programs must prepare students for a job that pays. In its vacated 2011 rule, however, the Department sought for the first time to transform that phrase into license for a regulatory regime focused not on program quality, but on students' earnings and debt, over which schools have no control. The Department's new rule follows the same flawed approach, employing a "debt-to-earnings test"—which purportedly compares the mean or median earnings of a group of recent graduates to the group's median debt load—to disqualify many programs. The new rule is even more draconian than the 2011 rule, imposing more irrational thresholds—illogically derived from mortgage-lending practices—and an even shorter path to ineligibility.

The Department's debt-to-earnings test contravenes the HEA. Neither the "gainful employment" provisions nor anything else in the statute authorizes the agency to limit Title IV eligibility based on students' earnings and debt. The statutory structure, purpose, and legislative history confirm that the test is unlawful. The rule must be vacated for that reason alone.

Even if the Department's debt-to-earnings test could somehow be squared with the statute, it still must be vacated because the Department violated the Administrative Procedure Act, 5 U.S.C. §§ 551–706 ("APA"). The Department never offered a reasoned basis for conditioning schools' eligibility for federal student aid on students' circumstances and choices.

[1] Editorial, *Tightening Rules On For-Profit Colleges*, Wash. Post, Apr. 27, 2014, http://tinyurl.com/mwnf8yt (all Internet sites last visited Feb. 6, 2015).

Its test has nothing to do with assessing program quality, and the results largely reflect demographics. The Department also failed to confront the severe adverse consequences of its rule, which will deprive students of access to higher education and will place an even greater strain on public resources. And its rule imposes irrationally overbroad sanctions and violates basic principles of fairness by punishing schools retroactively for past conduct and by preventing schools from meaningfully challenging the agency's eligibility determinations.

In addition to the debt test, the new rule requires schools to disclose various information to current and prospective students, to report student-specific loan data to the Department, and to certify compliance with a wide range of national and local accreditation and licensure standards. These requirements, too, are unlawful. Each exceeds the Department's statutory authority. And the disclosure and certification rules contravene the Constitution by compelling schools to engage in non-factual, controversial speech in violation of the First Amendment, and are irrational and arbitrary. Even if these requirements were rational and within the Department's authority, they would be doomed by the invalidity of the debt-to-earnings test on which they are predicated. By the same token, neither the debt-to-earnings test nor the disclosure rules can operate as intended without the reporting requirements, and therefore the illegality of the reporting rules independently requires vacatur of the debt-to-earnings test and disclosure rules.

For all of these reasons, the Court should hold unlawful the Department's new rule and repudiate the Department's stubborn disregard for controlling law and administrative procedure.

STATEMENT OF FACTS

I. Statutory Background

Each year, millions of students are enabled to pursue postsecondary educational opportunities by federal financial aid administered by the Department of Education under Title IV of the HEA, 20 U.S.C. §§ 1070–1099d. Title IV established a comprehensive framework for determining eligibility for that aid. The HEA's central purpose is "to assist in making available the benefits of postsecondary education to eligible students." *Id.* § 1070(a).

Under the HEA, students may use Title IV funds only at an "institution of higher education." 20 U.S.C. § 1070. "Institutions of higher education" include private-sector "proprietary institution[s] of higher education" and public-sector "postsecondary vocational institution[s]." *Id.* § 1002(a)(1). Such schools generally must "provid[e] an eligible program of training to prepare students for gainful employment in a recognized occupation." *Id.* § 1002(b).[2]

The HEA imposes a host of requirements on schools that receive Title IV funds. Among other things, a school must be authorized in the State in which it operates to provide postsecondary education and ordinarily must be accredited by an accrediting agency recognized by the Secretary. *See* 20 U.S.C. §§ 1001(a)(2), (5), 1002(b)(1)(B), (D), (c)(1)(B). The HEA also imposes limitations on the qualifications of students that the schools may enroll, the types of programs they may offer, how long each program must last, and how a school is managed. *See*, *e.g.*, *id.* §§ 1002(a)(3), 1088(b). Section 1094 of the HEA alone requires schools to comply with 29 separate requirements, including one unique to private-sector schools: The "90/10" rule requires that at least 10% of a school's revenues from tuition, fees, and other institutional charges be attributable to sources *other* than federal Title IV student aid. *See id.* § 1094(a)(24).

A number of HEA provisions specifically address student-loan debt and costs. The HEA specifies that an institution may not participate in certain Title IV programs if its students' federal-loan default rates, known as "cohort default rates" or "CDRs," exceed specified limits. Those rates measure, on an institutional basis, the percentage of a school's borrowers who have defaulted on their federal loans within a certain period after their loans entered repayment.

[2] The "gainful employment" requirement applies to degree *and* non-degree programs at "proprietary [*i.e.*, for-profit] institutions of higher education," 20 U.S.C. § 1002(b)(1)(A), but only to *non*-degree programs at public and non-profit schools, *id.* §§ 1001(b)(1), 1002(c)(1)(B).

Congress has also barred the Department from interfering with school administration. 20 U.S.C. § 1232a. The agency cannot exercise "any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution." *Id*. Congress has never given the Department authority to dictate tuition and fees.[3]

II. The Department's Prior Rule Struck Down By The Court

Nearly a half century after the HEA was enacted, in 2009 the Department initiated a negotiated rulemaking ostensibly to measure whether a program prepared students for "gainful employment" under the HEA. The rulemaking was rife with irregularities, leading to an inquiry by the Department's Inspector General, requests for congressional investigations, and referrals to federal prosecutors and the Securities and Exchange Commission. The flawed negotiated rulemaking failed to reach consensus, but the Department pressed on, issuing two separate Notices of Proposed Rulemaking that collectively proposed three sets of regulations supposedly authorized by the statutory phrase "gainful employment."[4]

The 2011 regulations—which were ultimately vacated by this Court—purported to measure program quality based on two complex debt measures. 76 Fed. Reg. at 34,388, 34,448. One, the debt-to-earnings test, was based on the ratios of (1) the estimated annual loan payment of a program's recent graduates to (2) those graduates' (a) mean (or median) annual earnings and (b) their discretionary income. *See* 34 C.F.R. § 668.7(c)(1) (2011). The other, the loan-repayment-rate test, was based on the percentage of former students who had fully repaid their loans or reduced the outstanding balance. *Id.* § 668.7(b). A program satisfied the 2011 rules if (1) a cohort of students had a loan-repayment rate of at least 35%, or (2) the cohort's median

[3] *See* H.R. Rep. No. 109-231, at 159 (2005) ("[T]he Federal government does not currently have the authority to dictate tuition and fee rates for institutions of higher education.").

[4] 75 Fed. Reg. 66,832 (Oct. 29, 2010); 75 Fed. Reg. 66,665 (Oct. 29, 2010); 76 Fed. Reg. 34,386 (June 13, 2011).

debt was either less than 12% of its mean or median earnings or less than 30% of discretionary income. *Id.* § 668.7(a)(1)(i)–(iii), (d)(2). A program needed only to pass *one* of the two tests to retain eligibility. A program failing both tests faced increasing sanctions; a program that failed in three out of four years would be declared ineligible for Title IV funds. *Id.* § 668.7(h)–(j). The Department explained that it adopted two tests because "there can be no *single* percentage that answers the question of how much students can borrow without risking repayment difficulties."[5]

The prior rule further required schools to report to the Department personally identifiable student information for the Department to calculate the debt metrics, including the amounts of *private* loans students incurred. 34 C.F.R. § 668.6(a)(1)(i)(C)(2) (2011). The rules also required schools to make various disclosures, such as the job for which a program prepares students, its on-time graduation rate, tuition and fees, placement rate, and loan debt. *Id.* § 668.6(b). Programs that failed the debt tests had to issue "warnings" to students. *Id.* § 668.7(j)(2)(i)(D).

In July 2011, APSCU filed suit in this Court challenging the 2011 regulations. *See APSCU I*, 870 F. Supp. 2d 133. The parties filed cross-motions for summary judgment, and on June 30, 2012, this Court vacated almost the entire regulatory regime, including the debt metrics and the reporting requirements. *See id.* The Court held that the loan-repayment-rate test lacked a reasoned basis because it "was not based upon any facts at all," and "[n]o expert study or industry standard suggested that the rate selected by the Department would appropriately measure whether a particular program adequately prepared its students." *Id*. at 154. Because—by the Department's admission—the debt metrics could not stand alone absent the defective loan-repayment-rate test, the Court invalidated the debt regulation in its entirety. *Id*. It also held that the reporting requirements violated 20 U.S.C. § 1015c, which bars the collection of

[5] Dep't Cross-Mot. Summ. J. 20, *APSCU v. Duncan*, No. 11-1314 (D.D.C. Dec. 13, 2011) (ECF No. 16) ("Dep't *APSCU I* Cross-Mot.") (emphasis added) (internal quotation marks omitted).

personally identifiable student information. *See* 870 F. Supp. 2d at 155. And it expressed concern that the "warnings" might violate the First Amendment. *See id.* at 154 n.7.[6]

The Department moved to amend the judgment to reinstate the reporting rules and the procedures for calculating the debt metrics, so that schools could make the required disclosures. The Court denied the motion, clarifying that, under Section 1015c, the Department could not collect the information it required schools to report. *See APSCU II*, 930 F. Supp. 2d at 214–19.

III. The Department's New Rulemaking

Rather than appeal this Court's orders, the Department elected to launch a new rulemaking. Like the prior rulemaking, the Department's new effort was marked by well-substantiated allegations of bias and misconduct. *See* Compl. ¶¶ 5, 52–62, 71–78 (ECF No. 1). The Department repeatedly rebuffed efforts of stakeholders to include appropriate representation of private-sector schools and the business community in the negotiated rulemaking. The agency refused to heed the advice of even its handpicked participants, who questioned its approach of holding schools responsible for students' personal circumstances and choices, and it rejected recommendations to reevaluate its proposal once it obtained additional data.[7] The Department did not try to hide its bias against for-profit schools. The President's Special Assistant for

[6] A final component of the prior rules, the "program approval" regulation, required schools to notify the Secretary before adding new gainful-employment programs and allowed the agency to decide whether to subject a new program to further administrative review. *See* 34 C.F.R. §§ 600.10(c)(1), 600.20(d) (2011). *APSCU I* also struck down this rule. 870 F. Supp. 2d at 158.

[7] *See*, *e.g.*, Michael Stratford & Paul Fain, *Agree to Disagree*, Inside Higher Ed (Sept. 10, 2013), http://tinyurl.com/q98natf; Ben Miller, *Gainful Employment Negotiations Day 1 Liveblog*, Higher Ed Watch (Sept. 9, 2013), http://tinyurl.com/pk56hwt; Ben Miller, *Gainful Employment Liveblog Session 2: Day 3*, EdCentral (Nov. 20, 2013), http://tinyurl.com/kcotjhd. This flawed process prompted 30 Members of Congress, all Democrats, to write to Secretary Duncan expressing serious concerns regarding "the process by which the Department" conducted the negotiated rulemaking. Administrative Record ("AR-") I-000367. These Members were concerned by the fact that the Department had "targeted" private-sector schools and had not provided "data regarding the impact on students by demographic." *Id.*

Education, for example, stated that "the whole premise behind the gainful employment regulation" was the Administration's intent to "cut [for-profits] out . . . of federal aid."[8]

The negotiated rulemaking failed to reach consensus, and in March 2014, the Department proposed a new gainful-employment rule. 79 Fed. Reg. 16,425 (Mar. 25, 2014). The proposal only exacerbated the problems in the vacated rule. It retained the basic debt-to-earnings test but with *more* stringent thresholds and a shorter path to ineligibility. *See id.* at 16,427. In place of the vacated loan-repayment-rate test, the proposal substituted a program cohort default rate ("pCDR") test that calculated graduates' rates of default. *Id.* The agency also proposed various disclosure, reporting, and certification requirements. *Id.* at 16,428.

The proposal elicited 95,000 comments. 79 Fed. Reg. at 64,892. APSCU, Members of Congress, and other stakeholders submitted comments explaining the proposed rule's many problems.[9] Undeterred, the Department issued a final rule on October 31, 2014—the last day to publish rules to take effect in the 2015 award year, *see* 20 U.S.C. § 1089(c)(1)—set to take effect July 1, 2015. 79 Fed. Reg. at 64,890.[10]

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[8] Roberto J. Rodriguez, Special Assistant to the President for Educ., Conference on Student Loans—Opening Plenary Session 1:05:29–1:05:49 (Oct. 24, 2013), http://tinyurl.com/kt5q5e3. The Department's bias was confirmed in its assertions that 72% of private-sector programs have graduated students who make less than high-school dropouts. *See*, *e.g.*, Dep't of Educ., *Obama Administration Takes Action to Protect Americans from Predatory, Poor-Performing Career Colleges* (Mar. 14, 2014), http://tinyurl.com/lxhlvw2. The *Washington Post*'s fact checker showed that this statistic was "bogus" and compared "apples and oranges." Glenn Kessler, *Do 72 Percent of For-Profit Programs Have Graduates Making Less Than High School Dropouts?*, Wash. Post, Apr. 11, 2014, http://tinyurl.com/lnsr3am.

[9] *See*, *e.g.*, AR-H-074147 (APSCU), -000138 (Mark Kantrowitz), -054584 (DeVry Educ. Group), -072823 (U.S. Chamber of Commerce), -072919 (Kaplan, Inc.), -073202 (Sen. Lamar Alexander et al.), -074014 (The Educ. Trust), -075237 (Career Educ. Corp.), -085625 (ITT Educ. Servs.), -086962 (Am. Ass'n of Cosmetology Schools), -087187 (Congressman John Kline et al.), -088554 (Am. Pub. Univ. System), -088803 (The Latino Coalition), -109025 (Ass'n of Proprietary Colls.), -109322 (Gallegos Legal Grp.).

[10] Schools must comply with the new rule's disclosure requirements beginning January 1, 2017. *See* 79 Fed. Reg. at 64,977; 79 Fed. Reg. 71,957, 71,958 (Dec. 4, 2014) (correcting rule).

IV. The Challenged Regulations

A. The Debt-To-Earnings Test

Like the vacated 2011 rule, the new rule imposes arbitrary debt metrics to restrict programs' Title IV eligibility purportedly based on the "gainful employment" phrase in 20 U.S.C. §§ 1001, 1002, and 1088. Unlike the prior rule—and contrary to the Department's prior claim that no single debt test can suffice—its new rule abandons the proposed pCDR test and relies on a single test, the debt-to-earnings test. *See* 34 C.F.R. § 668.403. The debt-to-earnings test claims to compare (i) the estimated annual loan payment owed by recent graduates from a particular program who received Title IV funds to (ii) those graduates' estimated annual earnings and discretionary income. *See id.* §§ 668.402–.404. The agency calculates the loan payment by amortizing graduates' median total student-loan debt over a 10-year repayment period for associate's degrees and 15 years for bachelor's and master's degrees. *See id.* § 668.404(b)(2). That payment is compared to graduates' mean (or median, if higher) earnings and income, based on Social Security Administration ("SSA") data. *Id.* § 668.404(c).[11]

A program "passes" the debt-to-earnings test only if the estimated loan payment is less than either 8% of graduates' mean or median earnings or 20% of their mean or median discretionary income, 34 C.F.R. § 668.403(c)(1)—thresholds more punitive than in the vacated rule, *cf.* 34 C.F.R. § 668.7(a) (2011) (12% and 30%, respectively). If the loan payment exceeds 12% of earnings or 30% of discretionary income, the program fails. 34 C.F.R. § 668.403(c)(2). A program that fails twice in any three consecutive years loses Title IV eligibility, *id.*

[11] The calculations are generally made using data for students who graduated in the two-year period consisting of the third and fourth fiscal years prior to the most recently concluded award year. *See* 34 C.F.R. §§ 668.402, .404(b)–(d). If there are fewer than 30 students who completed a specific program in that period, the calculations are made using data for students who graduated or entered repayment during a four-year period usually consisting of the third, fourth, fifth, and sixth award years prior to the most recently concluded award year. *See id.* § 668.402.

§ 668.403(c)(4)—more quickly than under the prior rule, *cf.* 34 C.F.R. § 668.7(*i*) (2011) (failing three out of four years led to ineligibility). A program that falls below the passing threshold but above the failing threshold is "in the zone." 34 C.F.R. § 668.403(c)(3). A program loses eligibility if in each of four consecutive years it *either* fails or is in the zone. *Id.* § 668.403(c)(4).

The Department admitted that its rule will burden almost exclusively private-sector schools. By its own calculation (using 2012 data), *99%* of non-passing programs under the new rule (1,431 of 1,445) were offered by for-profit private-sector schools. 79 Fed. Reg. at 65,064. That is more than one-third (34.1%) of all for-profit private-sector programs. *Id.*[12]

A program that loses eligibility cannot seek to reestablish it for three years. During that time, the school offering the program may not establish a new program "substantially similar" to the ineligible program even at a different credential level. *See* 34 C.F.R. § 668.410(b)(2)(i), (iv).

B. Disclosure, Reporting, And Certification Requirements

Like the vacated rule, the Department's new regulation imposes an array of disclosure, reporting, and certification requirements on covered programs. The disclosure rules compel programs to calculate and disclose up to 16 metrics to enrolled and prospective students, on their websites and in their promotional materials. *See* 34 C.F.R. § 668.412(a)(1)–(16). Programs facing ineligibility also must provide written "warnings" to "[current] students and prospective students" about their programs, including a warning that students "may not be able to use" federal funding to pay for the program. *Id.* § 668.410(a)(1), (a)(2)(i).

[12] Public and non-profit schools would fare similarly if the Department applied its new debt tests to all programs at such schools. A recent Department study shows that 26% of graduates of public four-year colleges and 39% of graduates of private four-year colleges would not be deemed "gainfully employed" if the test applied to them. *See* Jennie H. Woo, Dep't of Educ., *Degrees of Debt: Student Borrowing and Loan Repayment of Bachelor's Degree Recipients 1994, 2001, and 2009*, at 12 (2013), http://tinyurl.com/owuzhnk. And of 520 programs at public universities in Texas, 28% would be at risk under the Department's test. *See* Mark Schneider, *Are Graduates from Public Universities Gainfully Employed? Analyzing Student Loan Debt and Gainful Employment*, Am. Enter. Inst. (May 14, 2014), http://tinyurl.com/ofpgpwt.

The reporting rules require schools to report to the Department various personally identifiable information about students. Among other things, schools must report the amount of *private* loans each student took on, the total amount of debt the student owes after graduating or withdrawing, the total tuition and fees charged to the student, and the total amount for books, supplies, and equipment included in the student's cost of attendance. 34 C.F.R. § 668.411.

The certification rules require schools to sign a Program Participation Agreement certifying that each of their gainful-employment programs meets applicable school- and program-level accreditation requirements and licensure standards. 34 C.F.R. § 668.414.

STANDARD OF REVIEW

Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "'[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal,'" and "'[t]he "entire case" on review is a question of law.'" *APSCU I*, 870 F. Supp. 2d at 144 (citation omitted). A court must set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations" or "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B), (C). It is an "essential function of the reviewing court . . . to guard against bureaucratic excesses by ensuring that administrative agencies remain within the bounds of their delegated authority." *Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 712 F.2d 650, 655 (D.C. Cir. 1983). Courts "must give effect to the unambiguously expressed intent of Congress" and "reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 & n.9 (1984). The Department is due no deference "when its regulations create 'serious constitutional difficulties.'" *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) (citation omitted).

Agency action must also be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

ARGUMENT

I. The Debt-To-Earnings Test Is Unlawful In Many Ways.

A. The Debt-To-Earnings Test Exceeds The Department's Statutory Authority.

The centerpiece of the Department's rule, its debt-to-earnings test, exceeds the agency's statutory authority. "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (emphasis omitted). The Department's debt test has no basis in the HEA's text, contradicts the statute's structure and purpose, and has no support in the legislative history.

1. No Statutory Provision Authorizes The Department's Test.

"Gainful Employment" Provisions. The Department's rule rests on a reading of the phrase "'prepare students for gainful employment in a recognized occupation,'" 79 Fed. Reg. at 64,890 (quoting 20 U.S.C. § 1001(b)(1)), that contradicts its plain meaning. Where a statute's ordinary meaning is plain, "that is the end of the matter," for the court as well as the agency. *Chevron*, 467 U.S. at 843.[13] The ordinary meaning of "gainful employment," when the HEA was enacted and today, is simply *a job that pays*: A "gainful" job is one that is "productive of

[13] *See also Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) (rule contrary to "traditionally and commonly defined" meaning of statutory term cannot stand); *Cyprus Emerald Res. Corp. v. Fed. Mine Safety & Health Review Comm'n*, 195 F.3d 42, 45 (D.C. Cir. 1999) (rejecting "*Chevron* detour around the statute's plain meaning").

gain" or "provid[es] an income."[14] "Gainful employment" does not mean "a job that pays more than X," or "a job that permits an individual to service debt in the amount of Y." Yet that is how the agency reads it. To be sure, *APSCU I* concluded that "gainful employment" was ambiguous (and deferred to the agency's view). 870 F. Supp. 2d at 149. But that was not necessary to its holding invalidating the rule on other grounds. *See id.* at 154. *APSCU I*'s misreading of "gainful employment" thus does not preclude the Court from reading the phrase to mean a job that pays.[15]

The Department's interpretation also departs from the way Congress has used the phrase "gainful employment" elsewhere, contrary to the "'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (citation omitted). Congress used the phrase "gainful employment" in at least nine other provisions of Title 20: In each, the phrase's usage is consistent with "a job that pays," but *not* with the Department's debt-focused interpretation.[16]

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[14] *Webster's Third New International Dictionary* 928 (1965); *accord Webster's New International Dictionary* 1026 (2d ed. 1949) (same); *The Shorter Oxford English Dictionary* 768 (3d ed. 1964) (defining "[g]ainful" as "[p]roductive of gain or profit," or "[a] [gainful] (= paid) occupation"); *see also*, *e.g.*, *Shorter Oxford English Dictionary* 1066 (6th ed. 2007) (defining "gainful" as "(of employment) paid, useful"); *Black's Law Dictionary* 641 (10th ed. 2014) (defining "gainful employment" as "[w]ork that a person can pursue and perform for money").

[15] *See Bobby v. Bies*, 556 U.S. 825, 834 (2009) (issue preclusion applies only to an issue that was "'essential to the judgment'" (citation omitted)). That conclusion also is not binding because APSCU—having obtained all the relief it sought (vacatur of the regulation)—could not have appealed it. *See Sea-Land Serv., Inc. v. DOT*, 137 F.3d 640, 647 (D.C. Cir. 1998).

[16] *See* 20 U.S.C. §§ 1036(e)(1)(B)(ii), 1134c(a), 1135c(d)(2), 1140(1)(B), 1140g(d)(3)(D), 1161g(d)(5)(B), 2008(a), 4706(a), 5605(a)(2)(B). Several of those statutes use "gainful employment" to describe work that recipients of certain scholarships and fellowships may not pursue. *See*, *e.g.*, *id.* § 1036(e). Congress meant to bar scholarship recipients from engaging in *any* paid employment; it would make no sense to bar such students only from taking jobs that paid enough to service a particular level of debt, but to allow them to accept *less* well-paid work. The "gainful employment" requirement also is part of Section 1001's definition of "institution of higher education," *id.* § 1001(b)(1), which Congress has incorporated into other provisions of Title 20 unrelated to Title IV funding, such as a provision providing for federal loans for schools "impacted by a major disaster or emergency," *id.* 1161*l*-3(b), (g)(4). It is implausible that Congress meant to limit the availability of *disaster-relief* funds to schools based on student *debt*.

The Department's own prior understanding of the phrase "gainful employment" confirms that the phrase is correctly interpreted according to its plain meaning. *See Loving*, 742 F.3d at 1017. In a 1994 ruling applying the "gainful employment" requirement, the Department considered only whether the primary goal of a program was to prepare students for work, without ever addressing student debt. *See In re Acad. for Jewish Educ.*, 1994 WL 1026087, at *3 (Dep't of Educ. Mar. 23, 1994). And a Department rule still in force, 34 C.F.R. § 668.8, makes clear that employment is "gainful" as long as it is paying.[17] In all events, the fact that, for nearly 50 years after the "gainful employment" provisions were enacted, the Department never claimed authority under those provisions to condition Title IV eligibility on students' earnings and debt is strong evidence that such authority was not "actually conferred." *FTC v. Bunte Bros.*, 312 U.S. 349, 352–53 (1941); *see also Bankamerica Corp. v. United States*, 462 U.S. 122, 131–32 (1983).

The Department's reading also ignores the statutory context. The word "gainful" modifies "employment." What must be "gainful" is the *job* for which a program prepares a student—not, as the Department's reading would require, the entire process of completing a program of study and obtaining a job. The HEA, moreover, requires only that a program "*prepare* students for gainful employment," 20 U.S.C. § 1001(b)(1) (emphasis added), not that graduates obtain a job that yields an income that exceeds the student's debt by a certain amount. Yet the new rule turns on what jobs students *secure*. For a program to remain eligible, there must be enough jobs paying a certain amount, *and* a sufficient number of graduates must seek out and choose such jobs—factors over which schools have no control. Nothing in the HEA suggests that Congress intended to make schools guarantors of students' employment outcomes.

[17] Section 668.8(e)(1)(ii) provides that certain programs are eligible for Title IV only if they have "a substantiated placement rate of at least 70 percent," which in turn depends on how many students "obtained gainful employment." 34 C.F.R. § 668.8(g)(1)(ii). A school can show that a graduate "obtained gainful employment" by producing various documents that reflect the student's employment and earnings (*e.g.*, tax returns) but that say nothing about *debt*. *See id.*

Other Statutory Provisions. The Department briefly asserted in the new rule that the test is also authorized by two other statutes, 20 U.S.C. §§ 1221e-3 and 3474. 79 Fed. Reg. at 64,890–91. That is incorrect. Sections 1221e-3 and 3474 do not confer freestanding authority to impose sweeping rules not otherwise authorized. Both are "implementary rather than substantive [in] character," as they merely "'authorize [the] agency to use means of regulation not spelled out in detail'" to achieve an *already*-authorized end. *New Eng. Power Co. v. Fed. Power Comm'n*, 467 F.2d 425, 430–31 (D.C. Cir. 1972) (citation omitted), *aff'd*, 415 U.S. 345 (1974). Section 1221e-3 permits rules to "carry out functions otherwise vested in the Secretary by law," 20 U.S.C. § 1221e-3, and Section 3474 permits rules "to administer and manage the functions of the Secretary or the Department," *id.* § 3474. Neither one "confer[s] independent authority to act" where the agency otherwise lacks authority to do so. *New Eng. Power*, 467 F.2d at 431.

Indeed, construing Sections 1221e-3 and 3474 to confer on the Department rulemaking authority broad enough to support the Department's debt-to-earnings test would render those provisions unconstitutional—which the Court must avoid if possible, *see Clark v. Martinez*, 543 U.S. 371, 381 (2005). Congress cannot cede its lawmaking power to agencies, but must "'lay down . . . an intelligible principle'" to which agencies must "'conform.'" *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (citation omitted). If Sections 1221e-3 and 3474, which do not mention earnings or debt, were broad enough to authorize the debt-to-earnings test, they would contain no intelligible principle, and would unconstitutionally confer virtually unlimited authority on the agency to regulate any aspect of higher education.

In fact, despite relying on Sections 1221e-3 and 3474 to support its rule, the Department conceded elsewhere that these provisions *do not* authorize its test. Addressing arguments that its rule unfairly targets private-sector schools by imposing on them burdens that other schools do not face, the Department claimed that it *could not* expand the rule beyond programs subject to the "gainful employment" statutes. 79 Fed. Reg. at 64,904. Having disclaimed authority under Sections 1221e-3 and 3474, the Department cannot rely on those provisions to support its rule.

2. The Department's Test Contravenes The HEA's Purpose And Structure And Yields Absurd Results That Congress Did Not Intend.

The Department's interpretation of "gainful employment" also cannot be squared with the HEA's structure and purpose. An agency rule must not "effectively gut Congress's carefully articulated existing system," *Loving*, 742 F.3d at 1020, but the Department's rule does just that.

Restricting Educational Opportunities Contrary To HEA's Aim. The inevitable effect of the Department's new rule will be to undermine the HEA's central purpose—a result that "court[s] must avoid" where, as here, an "alternative interpretatio[n] consistent with the legislative purpose [is] available." *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002). Congress enacted the HEA to *expand* access to higher education by "assist[ing] in making available the benefits of postsecondary education to eligible students." 20 U.S.C. § 1070(a). The new rule does just the opposite and is antithetical to Congress's aim.

The Department admitted that its new rule will force programs serving hundreds of thousands of students—including fully one-third of the programs offered by for-profit schools—to close. *See* 79 Fed. Reg. at 65,064. The programs that survive will not have the capacity for many displaced students. The Department estimates that "about 32 percent of students in in-person zone and failing programs will not have nearby transfer options." *Id.* at 65,074.[18]

The rule's disproportionate effect on private-sector schools compounds its conflict with Congress's purpose. Private-sector schools serve a greater proportion of disadvantaged students

[18] *See also* AR-H-060745, -072935, -074244. Even if public schools could otherwise absorb displaced students, doing so would cost States billions of dollars. *See* AR-H-088718–21; *see also* Jorge Klor de Alva & Mark Schneider, Nexus Research & Policy Center, *The Cost To States of the Gainful Employment Rule: State-By-State Estimates* (2014); AR-H-072935.

than other schools, as the Department conceded. *See* 79 Fed. Reg. at 64,904. Private-sector schools also produce graduates at a lower cost, and often have higher graduation rates, than other schools.[19] Yet the new rule openly and irrationally targets private schools. *See* Compl. ¶¶ 71–78, 158–67.[20] The Department's bias eliminates any presumption of regularity for its new rule.[21]

Conflict With Statutory Debt Metrics. Congress has established (and recently updated) one type of debt metric that measures students' default rates at the *institutional* level, and applies to *all* institutions of higher education.[22] Congress's actions would make little sense if the HEA empowered the agency to impose additional, *program*-level debt metrics for Title IV eligibility on only *certain* programs. Yet the new rule does just that. *Cf. Loving*, 742 F.3d at 1020.[23]

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[19] *See*, *e.g.*, Bradford Cornell & Simon M. Cheng, Charles River Assocs., *An Analysis of Taxpayer Funding Provided for Post-Secondary Education: For-profit and Not-for-profit Institutions* 2 (Sept. 8, 2010), http://tinyurl.com/bo7nxtw; Robert J. Shapiro & Nam D. Pham, Sonecon, *Taxpayers' Costs to Support Higher Education: A Comparison of Public, Private Not-for-Profit, and Private For-Profit Institutions* 18–19 (2010), http://tinyurl.com/pzvkrm7.

[20] *See also* Press Release, Sen. Roger Wicker, "Gainful Employment" Rule Discriminates Vocational Schools, Community Colleges (May 6, 2014), http://tinyurl.com/p88gqyz ("[T]he 'gainful employment' rule discriminates against for-profit colleges and universities that provide a gateway to the middle class for minorities, veterans, and underserved demographics."); Press Release, Educ. & Workforce Comm., Members Denounce New Gainful Employment Regulation (Mar. 14, 2014), http://tinyurl.com/knyhjzw (proposed rule "unjustly penaliz[es] institutions that are trying to prepare students and workers for a changing economy"); AR-I-000380–82 (letter of Janet Napolitano to Secretary Duncan, explaining that, instead of gainful-employment rule, Department should adopt a measure that will apply to "*all* participating institutions, including public and private universities, and for-profit and non-profit colleges"); AR-H-087187.

[21] *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979); *see also Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (not only the result, but also "the process by which [the agency] reaches that result must be logical and rational").

[22] *See*, *e.g.*, 20 U.S.C. §§ 1085(m)(1), 1087bb(g)(1); *see also* Higher Education Opportunity Act, Pub. L. No. 110-315, § 436(e), 122 Stat. 3078, 3256–57 (2008).

[23] In *Loving*, the IRS adopted rules governing paid tax-return preparers, based on a statute that granted the IRS authority to regulate "the practice of representatives of persons before the Department of the Treasury." 742 F.3d at 1014 (internal quotation marks omitted). In vacating the rules, *Loving* reasoned that Congress's passage and updating of laws targeting tax-return preparers undermined the IRS's broad reading of the statute: "Under the IRS's view . . . all of [the] amendments would have been unnecessary." *Id.* at 1020. Here, too, Congress's passage and amendment of debt metrics undermine the agency's novel reading of the statute.

Usurping Role Of Accrediting Bodies. The HEA also expressly empowers accrediting bodies, not the Department, to assess "the quality of education or training" provided by gainful-employment programs. 20 U.S.C. § 1099b(a). Section 1099b establishes detailed criteria for entities that may serve as accrediting bodies, and limits the factors those bodies may use to evaluate program quality. *Id.* Congress forbade the Department from usurping the role of either accreditors or administrators by "exercis[ing] any direction, supervision, or control" over "any accrediting agency" or over "the curriculum, program of instruction, administration, or personnel of any educational institution." *Id.* § 3403(b). In the new rule, however, the Department arrogates to itself the role of policing program quality, and it supplants the congressionally mandated accrediting criteria with contrived debt metrics mentioned nowhere in the statute.[24]

Unlawfully Dictating Tuition. The primary means by which the Department expects schools to attempt to comply with the new regulation—"lowering tuition and fees," 79 Fed. Reg. at 64,924—exacerbates the conflict between the rule and the HEA. The Department has never had authority to dictate tuition and fees, *see supra* p. 5 & n.3, and it is implausible that Congress meant the phrase "gainful employment" to upend the status quo by giving the Department broad discretion effectively to regulate tuition.[25] Section 1232a further forbids the Department from interfering with school administration. 20 U.S.C. § 1232a. Yet the new rule attempts to do both by seeking to force schools to charge less for the same offerings, or to offer less for the same price.

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[24] By attempting to dictate indirectly what schools offer, the rule also interferes with standards set by state-level accreditors that have long played a primary role in ensuring quality in higher education, a result that Congress did not intend. Pl.'s Mot. Summ. J. 24–25, 29–30, *Ass'n of Proprietary Colls. v. Duncan*, No. 14-8838 (S.D.N.Y. Jan. 23, 2015) ("*APC*") (ECF No. 23).

[25] *Cf. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements.").

Coercing schools to lower tuition and fees also would increase the percentage of students' tuition paid for with Title IV funds, thus placing schools at risk of violating the "90/10" rule—which requires that at least 10% of a school's revenues from tuition, fees, and other institutional charges come from sources other than federal Title IV aid. *See* 20 U.S.C. § 1094(a)(24). The agency admitted that 21% of schools have ratios "in the very high range of 85 to 90 percent." 79 Fed. Reg. at 64,949. Under the new rule, many schools would face an unworkable choice between failing the new debt metrics and risking violation of the 90/10 rule.

Different Outcomes For Identical Programs. The absurd results that the Department's statutory interpretation would yield further prove that its reading is implausible. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Under the new rule, two schools in different States that offer identical programs and charge the same tuition and fees would fare differently simply because job-market conditions vary from one locale to another. Indeed, two identical programs in the *same* locale may fare differently due to their students' decisions on which jobs to accept. And even if students from two identical, equally priced programs obtain *identical jobs*, one program may fail the debt-to-earnings test, while the other passes, if the median debt of students in one program differs from the median debt of students in the other. Congress could not have intended eligibility for national aid to turn on local idiosyncrasies or on students' circumstances—none of which is related to the quality of an educational program.

3. The Legislative History Does Not Support The Department's Test.

In defending its debt-to-earnings test, the Department leaned heavily on legislative history. *See* 79 Fed. Reg. at 64,891–93. The Court in *APSCU I* also relied on legislative history to conclude in dicta that the statutory "gainful employment" provisions are ambiguous. *See* 870 F. Supp. 2d at 138–40, 149. But courts "do not resort to legislative history to cloud a statutory text that is clear," as it is here. *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994).

In any event, the legislative history only further undermines the Department's reading of "gainful employment." As noted, the agency previously read "gainful employment" to mean that programs must prepare students for work, irrespective of debt. *See supra* p. 14. Congress has amended the HEA numerous times, but has never questioned the Department's earlier interpretation, undercutting the agency's new, contrary interpretation.[26]

The Department relied on (and the Court in *APSCU I* cited) the legislative history of the National Vocational Student Loan Insurance Act of 1965 ("NVSLIA"), Pub. L. No. 89-287, 79 Stat. 1037.[27] That reliance is misplaced. Unlike the HEA, the NVSLIA did not use the phrase "gainful employment," but referred instead to "*useful* employment."[28] The NVSLIA's history thus lends no support to the agency's reading of "gainful employment" in the HEA.[29] Moreover, the NVSLIA's principal author explained that he "d[id] not intend that the Department, by rule or regulation, should, in any way, build barriers that will keep the students from attending the so-called privately owned schools if it is their desire to do so."[30]

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[26] *See Int'l Bhd. of Elec. Workers v. NLRB*, 814 F.2d 697, 710–11 (D.C. Cir. 1987).

[27] *See* 79 Fed. Reg. at 64,893; *APSCU I*, 870 F. Supp. 2d at 138–40.

[28] NVSLIA, Pub. L. No. 89-287, § 17(a)(2), 79 Stat. at 1048 (emphasis added).

[29] Although Congress later merged the NVSLIA's requirements into the HEA in the Higher Education Amendments of 1968, Pub. L. No. 90-575, § 293, 82 Stat. 1014, 1050–51, nothing in the history of that merger supports the Department's strained reading of "gainful employment," a phrase that already appeared in the HEA, *see* HEA, Pub. L. No. 89-329, § 435(a), 79 Stat. 1219, 1248 (1965).

[30] *National Vocational Student Loan Insurance Act of 1965: Hearings Before the Select Subcomm. on Educ. of the Comm. on Educ. & Labor*, 89th Cong. 13 (1965) (statement of Chairman John H. Dent). The Department (and the *APSCU I* Court) cited private persons' testimony quoted in Senate and House Reports. *See* 79 Fed. Reg. at 64,893; 870 F. Supp. 2d at 139. But nothing in that testimony shows that Congress meant to authorize debt tests. The Reports quoted testimony of Dr. Kenneth Hoyt about graduates of vocational programs, but explained that his testimony concerned the "need for such legislation and about the caliber of student attending a vocational institution." H.R. Rep. No. 89-308, at 3 (1965); *see also* S. Rep. No. 89-758, at 3 (1965). They quoted the testimony for what it said about *student* quality, not *program* quality, which are very different concerns, as Title IV reflects. *See*, *e.g.*, 20 U.S.C. § 1091 (student eligibility provisions).

B. The Debt-To-Earnings Test Is Arbitrary And Capricious.

1. The Department's Test Lacks A Reasoned Basis And Turns On Factors Beyond Schools' Control, Not Program Quality.

The APA required the Department to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle*, 463 U.S. at 43 (citation omitted). The agency has never offered a rational explanation of how debt and earnings metrics measure whether programs prepare students for gainful employment.[31]

Whatever the debt-to-earnings test does measure, it does *not*, as the Department claims, "assess whether programs provide quality education and training." 79 Fed. Reg. at 64,890. The Department *rejected* arguments "that programs should be evaluated according to each program's curriculum and other aspects of the program controlled by the institution," including "quality of instruction," and it "believe[d] it is more appropriate to evaluate programs based on the *outcomes* of their students after completion, *rather than* the curricular content or educational practices of the institutions operating the programs." *Id.* at 64,915 (emphases added). Even the "outcomes" that the test purports to measure have nothing to do with a program's effectiveness in preparing students for gainful employment—as even commenters who support the Department's approach

[31] Indeed, the Department's accounts of what its test is designed to do are contradictory, which renders its rule invalid. *See KIRO, Inc. v. FCC*, 545 F.2d 204, 208 (D.C. Cir. 1976). It claimed that its test assesses whether programs "provide training that prepares students for gainful employment," 79 Fed. Reg. at 64,904, relying on an "inference that earnings in the period measured are reasonably considered to be the product of the *quality* of the . . . program," *id.* at 64,953 (emphasis added). But elsewhere it said that the rule is designed to "assess whether a GE program has indeed prepared students to earn enough to repay their loans," *id.* at 64,891, or "to cover . . . major expenses," *id.* at 64,894; whether students are taking on a level of debt the Department subjectively deems "acceptable," *id.* at 64,921; and whether students' debt subjects them to "serious risk of financial or *emotional* harm," *id.* at 64,914 (emphasis added). It also vacillated between claiming that its test measures a "*program's* performance," *id.* at 64,896, 64,899 (emphasis added)—as opposed to the experiences of individual students—and claiming that the rule "evaluate[s] the outcomes of *individuals*," *id.* at 64,900 (emphasis added).

agree.[32] Because the test fails to evaluate a program's quality in any rational way, it must be vacated. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006).

Students' Employment Choices And Earnings. One of the "outcomes" the debt-to-earnings test purports to measure is students' earnings. The jobs and earnings available to graduates obviously depend on economic factors beyond schools' control, including unpredictable macroeconomic trends, such as recessions, and local job-market conditions.[33] The Department also did not dispute that jobs and pay in a given *locale* in a given industry may vary. And job prospects in an industry may change in ways that schools cannot predict or control.

The earnings that a graduate attains also depend on his or her choices and circumstances. Students may elect to pursue jobs in the non-profit sector, for example, or may opt out of the labor force temporarily to raise children or to care for aging family members. A student who obtains a job also may be terminated for reasons entirely unrelated to the preparation the program provided, yet the loss of earnings will adversely affect the program's debt-to-earnings score. The Department denied that its test "holds schools responsible for a student's career decisions" because the test considers the aggregate outcomes of recent graduates, such that "atypical" "outcomes" should not skew its results. 79 Fed. Reg. at 64,895, 64,920–21. But the Department simply assumed without analysis that students who do not pursue high-paying jobs

[32] *See*, *e.g.*, AR-H-074063 (conclusion of Accrediting Council for Independent Colleges and Schools that Department's debt tests are not a "credible proxy for institutional quality").

[33] The Department admitted that "a program should not be determined ineligible . . . due to temporary and unanticipated fluctuations in local labor market conditions." 79 Fed. Reg. at 64,926. Yet it dismissed that risk because recessions by one definition have, on average (since 1945), lasted 11.1 months. *Id*. at 64,920. That reasoning ignores studies showing that recessions have lingering effects for years. *See For Recent Grads, Recessions Equal Underemployment*, Inside Higher Ed (Jan. 7, 2014), http://tinyurl.com/mx9mvqo (unemployment peaked after 2008, remaining at this high level until 2011); Katherine Peralta, *College Grads Taking Low-Wage Jobs Displace Less Educated*, Bloomberg (Mar. 12, 2014), http://tinyurl.com/nyln54f (jobless rate of Americans ages 25-34 with college degrees grew from 2.2% to 3.7%, an increase of 68.18%, from 2007 to 2013). And, by definition, many recessions last longer than "average."

are "atypical." If many students in a program choose to take lower-paying jobs, or choose not to work, the program may be deemed failing. Those choices prove nothing about program quality.

The Department's debt-to-earnings test also illogically focuses on *gross* earnings, rather than the *net gain* in earnings that graduates attain as a result of completing a program. A program may enable a student to achieve relatively *greater* earnings than he or she otherwise could. But the level of earnings that a student could obtain in *absolute* terms may be affected by many factors unrelated to the program's quality—such as individual ability or the local job market. *See* AR-H-088120–21. In assessing the effectiveness of a classroom teacher, one might rationally consider the improvement in students' performance over a given period; but a single, static snapshot of students' test scores proves nothing about the teacher's ability. So, too, the gross earnings graduates attain standing alone shed no light on the quality of the program itself.

Students' Debt. The other "outcome" the test purportedly measures—student debt—is similarly disconnected from program quality and beyond schools' control. The Department assumed that schools "have the ability to affect the debt that their students accumulate by lowering tuition and fees." 79 Fed. Reg. at 64,924. But the Department lacks authority to dictate tuition, and reducing tuition likely will cause schools to violate the 90/10 rule. *Supra* pp. 5, 19.

Moreover, debt levels may not fall even if schools could reduce tuition without sacrificing quality. Debt levels are driven largely by students' financial circumstances—*e.g.*, income, savings, family resources—and lifestyle choices.[34] The Department admitted that "overborrowing may be a significant problem for at least some students," 79 Fed. Reg. at 65,031, and schools themselves lack authority to require their students to borrow less money.[35] Even if

[34] *See*, *e.g.*, AR-H-072870, -074210, -075309, -083850, -085639, -085693.

[35] In fact, Departmental guidance *forbids* schools from limiting borrowing by students on "an across-the-board or categorical basis." Dep't of Educ., *2013-2014 Federal Student Aid Handbook* 3-86, http://tinyurl.com/l9n74kg.

schools could reduce tuition, students may continue to borrow the same amounts of money to finance other purchases. The extent to which students reduce their borrowing will depend largely on their lifestyle choices (*e.g.*, taking the bus versus buying a car, or having a roommate versus living alone), which have nothing to do with program quality. The rule does nothing to encourage students to modify their behavior.

Student Outcomes And Demographics. The Department's debt and earnings metrics thus do not measure program quality. Instead, there is strong evidence that those "outcomes" really measure student demographics. *See*, *e.g.*, AR-H-074065–66, -074278–86, -075262–63, -085644, -088120, -109053–56. The agency itself found that demographics and other factors unrelated to program quality account for 44% of the variance in students' debt-to-earnings rates, *see* 79 Fed. Reg. at 65,053, and another study found that nearly half (47%) of the variance was explained by such factors, *see* AR-H-109059, -109151. The Department admitted that "the background of students has some impact on outcomes and that some groups may face greater obstacles in the labor market than others."[36] These relationships between student attributes and programs' debt-to-earnings ratios confirm that the test does not measure program quality.[37]

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[36] 79 Fed. Reg. at 64,923; *see also id.* at 64,908, 64,910. The Department's own analysis found, for example, that Pell grant recipients have higher debt-to-earnings rates. *Id.* at 65,041. The Department downplayed this correlation, claiming that it explains only a small amount of the variance because it has a low "R-squared" value. *Id.* But a low R-squared value means only that other factors also play a role. *See* AR-H-074278–79.

[37] The Department's exclusive focus on earnings and debt in the new rule contradicts its separate proposal to rate all colleges based on an array of factors including access, affordability, and student outcomes, not merely debt and earnings. *See* Dep't of Educ., *For Public Feedback: A College Ratings Framework* (Dec. 19, 2014), http://tinyurl.com/qe8nkud; Dep't of Educ., *A New System of College Ratings—Invitation to Comment* 1–3, 6–14 (Dec. 19, 2014), http://tinyurl.com/ovvbk7a. The Department has failed to explain why a broad range of factors is relevant for its ratings proposal but not for this rule. Notably, in the college-ratings framework, the Department reportedly has "ruled out" a "debt-to-earnings ratio." Kelly Field, *Obama's College-Ratings Plan Arrives, but Most Specifics Stay Behind*, Chron. Higher Educ. (Dec. 19, 2014), http://tinyurl.com/k39pewv.

2. The Department's Metrics And Data Are Irrational And Unreliable.

Even if debt and earnings metrics could ever validly measure whether programs prepare students for gainful employment, the particular debt-to-earnings test the Department has devised is fatally flawed. The agency's metrics contradict its own prior position and accepted economic methodology, impose arbitrary thresholds, and are based on incomplete, unreliable data.

Reliance On A Single Debt Test. In defending its prior rule in *APSCU I*, the Department conceded that "'there can be no single percentage that answers the question of how much students can borrow without risking repayment difficulties,'" Dep't *APSCU I* Cross-Mot. 20 (citation and alteration omitted), and that it "has no magic mirror through which it can identify programs that are not preparing their students for gainful employment." Dep't Reply 11, *APSCU*, No. 11-1314 (D.D.C. Feb. 2, 2012) (ECF No. 20) ("Dep't *APSCU I* Reply"). The prior rule adopted *two* tests—the debt-to-earnings test and the loan-repayment-rate test—"designed to work together." Dep't *APSCU I* Cross-Mot. 20; Dep't *APSCU I* Reply 12. Unfairness resulting from failing one test could be mitigated, as a program could remain eligible by passing the other.

The Department's new rule contradicts its prior position by relying on just one test—the debt-to-earnings test—to do what the Department told the Court *no* single test can do. The Department has not attempted to explain this contradiction between the finding that "underlay its prior policy" (*FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) that no single test can suffice, and its current view that the debt-to-earnings test alone is so reliable that entire swaths of programs can be destroyed based solely on that test.[38]

Arbitrarily Short Time Period For Measuring Earnings And Debt. The Department's reliance on its debt-to-earnings test as the sole measure of whether programs prepare students for

[38] Although its proposal included a second test—the pCDR test, 79 Fed. Reg. at 16,437–39—the agency abandoned that test (after commenters showed that it was just as unlawful and arbitrary as the vacated loan-repayment-rate test), *id.* at 64,964, and offered nothing in its place.

gainful employment is especially misplaced because the test does not accurately reflect the earnings students achieve or their debt payments. Higher education is a lifelong investment that yields benefits not fully realized within the first few years after graduation.[39] Many graduates, for example, accept lower-paying jobs in the first few years after graduation, often seeking to gain experience that will increase their earnings potential in the future.[40] The "widely-used and methodologically-sound process for evaluating the value of a long-lived asset, such as education," is to calculate the "net present value": the total "benefits *over the useful life of the investment*" minus the cost—for an education, the total "additional wages" the student will earn over his career minus the cost of attendance—discounted to present value. AR-H-109174–76.[41]

Instead of calculating the net additional earnings students would attain over their entire career, the Department's test illogically considers graduates' earnings only in the first few years after graduation—as little as 18 months after a student leaves a program—when students' income is at its lowest. That time horizon is arbitrary; the Department offered no reasoned justification for the particular period it chose. In any event, it is far too short to capture the total net benefits of completing a program or to determine whether a student will be able to repay any debt incurred. AR-H-109176–81. The test will perversely bar many students for whom a program would yield a significant net *lifetime* benefit from enrolling simply because their *short-*

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[39] The Department has observed that education can increase income "by as much as 43 percent between the first few years out of post secondary education and the sixth to tenth years out," 75 Fed. Reg. 43,615, 43,666 (July 26, 2010), and that "gross earnings . . . will increase for program graduates over the course of their lives." 79 Fed. Reg. at 64,922; *see also*, *e.g.*, Sandy Baum, Urban Institute, *Higher Education Earnings Premium: Value, Variation, and Trends* 7 (2014), http://tinyurl.com/pzahamm.

[40] *See*, *e.g.*, AR-H-074204, -074258, 075314–15.

[41] The Department has admitted elsewhere that "long-term earnings outcomes more closely correlate with an individual's lifetime earnings and are thus a better proxy for career success" than are "[s]hort-term labor market outcomes." Dep't of Educ., *A New System of College Ratings*, *supra*, at 12. That admission, of course, contradicts the new rule.

term earnings will be lower than the Department arbitrarily deems sufficient. AR-H-075303, -109181–90.[42]

The Department offered no rational justification for this choice. It claimed that its approach is necessary to help avoid a "serious risk of financial or emotional harm to students and loss to taxpayers." 79 Fed. Reg. at 64,914. But shielding students from "emotional harm" in connection with repaying loans they chose to incur is hardly a task suited to the federal government, and in any case bears no relationship to whether a program prepares students for gainful employment. The Department also claimed that a short horizon was necessary to "ensure [that] program graduates have sustainable debt levels both in the early part of their careers *and* in later years." *Id.* at 64,922 (emphasis added). But that is no justification for disregarding the long-term benefits of education altogether, as the new rule does. *Id.*[43]

The Department's test similarly distorts students' *debt* burden by calculating the median loan payment of a program's graduates based on an irrational repayment timeline. The test calculates the annual loan payment assuming a 10-year repayment term for associate's degrees and a 15-year term for bachelor's degrees. Those arbitrary timelines are divorced from reality. For example, the Department admitted that, "of undergraduate borrowers from two-year institutions who entered repayment in 2002," barely *half*—only "55 percent"—"had fully repaid

[42] By preventing many students from completing education programs, the rule also will adversely impact employers by reducing the pool of workers. *See*, *e.g.*, AR-H-088588, -088805.

[43] The debt-to-earnings test also understates earnings by failing to consider *annualized* earnings for graduates who obtain jobs part-way through a given year. If a student starts on November 1 a new job that pays $60,000 annually, for example, the new rule counts only the $10,000 earned in November and December—skewing the average earnings of a program's graduates. *See* 79 Fed. Reg. at 64,952. The agency claimed that this was necessary to account for "actual outcomes of students," which include "periods of unemployment," *id.*, but a student's temporary unemployment immediately after graduation is not indicative of the likelihood of future unemployment after that student obtains a full-time job. Annualizing earnings would thus better predict the long-term benefits of education and students' ability to service debt.

their loans" within 10 years. 79 Fed. Reg. at 64,939.[44] It is irrational—indeed, indefensible—to determine programs' eligibility based on assumptions that the agency *knows* are unrealistic. The Department also failed to account for programs that allow students to make lower payments in the first few years after graduation—such as graduated and extended repayment plans.[45] And while it noted that "income-based repayment" plans cap many borrowers' payments at 10% or 15% of their discretionary income, the rule ignores those caps in calculating loan payments.[46]

Arbitrary Debt Thresholds. The Department's test evaluates the arbitrary earnings and debt figures that it calculates, against equally arbitrary passing and failing thresholds. To pass the test, the estimated annual loan payment for a program's graduates must be less than 8% of their annual earnings (as calculated by the Department). 79 Fed. Reg. at 64,919. But that 8% metric makes no sense as a measure of student-loan debt: 8% represents the maximum amount of non-mortgage debt that, according to some analysts, borrowers *who have a mortgage* should take on. The vast majority of recent graduates with student-loan debt, however—nearly *80%* by one measure—do *not* have mortgages, making the 8% threshold both irrelevant and misleading.[47] Recent graduates, in fact, routinely have debt-to-earnings ratios well above 8%. A recent Department study found that the average ratio for bachelor's degree graduates at *all* schools was *13%*, and *16%* for such graduates of non-profit schools. *See* Woo, *supra*, at 11.

[44] The Department also conceded that "only 44% of undergraduate borrowers from four-year institutions . . . had fully repaid their loans within 10 years," and simply speculated that most such students will have repaid their loans in 15 years. 79 Fed. Reg. at 64,939. Courts never owe "defer[ence] to the agency's conclusory or unsupported suppositions." *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004).

[45] *See*, *e.g.*, AR-H-074293, -075331. The Department's "Repayment Estimator" (available at http://tinyurl.com/lekxgto) illustrates how some such alternative repayment plans operate.

[46] *See* 79 Fed. Reg. at 64,918, 64,940; *cf.* 20 U.S.C. § 1098e(a)–(b), (e); AR-H-074205–06.

[47] *See* Meta Brown et al., Fed. Reserve Bank of N.Y., *Just Released: Young Student Loan Borrowers Remained on the Sidelines of the Housing Market in 2013*, Liberty Street Economics (May 13, 2014), http://tinyurl.com/khz7qpl (fewer than 22% of persons age 27 to 30 with student loans also had home-secured debt); *see also* 79 Fed. Reg. at 64,914.

The Department offered no rational defense of importing the 8% threshold from the mortgage-lending context to student loans. It claimed that its thresholds were based on "expert recommendations." 79 Fed. Reg. at 65,096. But the Department later conceded that it could not locate any communications with any experts on this issue.[48] In fact, a study on which the agency purported to rely contradicts its position, explaining that importing the 8% mortgage threshold to "student-loan borrowing has no particular merit or justification."[49] If any debt threshold is used, current data "implies that a significantly higher threshold for student debt service, in the range of 18% to 20% would be supportable." AR-H-109227. The Department ignored these criticisms, adhering to thresholds that it knows are arbitrary and will compel programs to fail.

The Department's 8% passing threshold, moreover, is even *harsher* than under the vacated 2011 rule. The vacated 2011 rule set the passing threshold at 12%, 34 C.F.R. § 668.7(a) (2011), which the Department claimed was supported by "industry practice and expert recommendations" and was designed to account for graduates "who may have left the workforce voluntarily or are working part-time."[50] The new rule abandons that threshold. The Department purported to justify making its new rule more stringent by adopting a "zone" between the passing (now 8%) and failing (now 12%) thresholds. 79 Fed. Reg. at 64,921. But the zone itself is arbitrary, created by inflating the made-up passing thresholds by an equally made-up percentage. And the zone does little to lessen the harmful effects of the Department's arbitrary threshold: "[p]rograms in the zone will inevitably lose eligibility . . . because of the retroactive nature of the

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[48] *See* Compl., Ex. 5, *APC*, No. 14-8838 (S.D.N.Y. Nov. 6, 2014) (ECF No. 1-5) (Department's response to Freedom of Information Act request).

[49] Sandy Baum & Saul Schwartz, Project on Student Debt and the College Board, *How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt* 8 (2005), http://tinyurl.com/kbm98hf; *see also*, *e.g.*, AR-H-000148–49, -074291–92, -075346–49.

[50] 76 Fed. Reg. at 34,395, 34,400; *see also* Dept. *APSCU I* Cross-Mot. 24. The passing threshold for the debt-to-discretionary-income metric similarly was lowered from 30% to 20%. *Compare* 34 C.F.R. § 668.403(b)–(c) *with* 34 C.F.R. § 668.7(a) (2011).

rule, making the zone tantamount to failure." AR-H-000139. Indeed, to avoid ineligibility, programs in the zone—which would have passed under the vacated 2011 tests—would be required to lower tuition enough to decrease students' total debt loads by as much as *33%*. Few if any programs can make such drastic cuts while maintaining program quality.[51]

Skewed, Unreliable Data. The Department defaulted on its duty to "use 'the most reliable data available,'" *Baystate Med. Ctr. v. Leavitt*, 545 F. Supp. 2d 20, 41 (D.D.C. 2008) (citation omitted), by applying its unsound metrics to data that are incomplete and inaccurate—even though better, more complete data exist. The debt-to-earnings test cannot accurately measure the performance of a *program* because it calculates scores based only on earnings and debt of students who receive Title IV funding. 34 C.F.R. §§ 668.402–.404. Even if earnings and debt were probative of program quality, the experiences of students who can finance a program without Title IV funding—the majority of students in many programs, *see* AR-H-087958—should be equally relevant. Yet the new rule excludes them. *See* 79 Fed. Reg. at 64,899; 34 C.F.R. § 668.402. Nothing in the HEA supports ignoring students who receive no Title IV funds, and excluding them will distort schools' debt-to-earnings ratios. *See* AR-H-072871.[52]

For students the Department's test does consider, the Department relies on admittedly incomplete earnings data. The Department uses data from the SSA's Master Earnings File ("MEF"), but the MEF provides a severely distorted (and understated) picture of earnings. AR-H-109084–88. For individuals for whom earnings information is missing, the MEF records

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[51] Programs in the zone also face immediate consequences, including having to issue inflammatory "warnings" to current and prospective students. 79 Fed. Reg. at 64,891, 64,924.

[52] Many graduates who receive no Title IV funds likely will have less student debt than Title IV recipients. Excluding such graduates thus will likely skew schools' debt-to-earnings ratios upward, causing more schools to fail. For example, students may not need to incur Title IV loans because the military or their private employer pays part or all of their tuition; excluding them inflates a cohort's median debt. Moreover, such students also are likely to secure jobs upon graduation, so excluding them would further skew a program's debt-to-earnings ratios upward.

earnings of *zero*. AR-H-109269–75, -109325–35. The MEF also records zero earnings when SSA cannot match reported earnings to a person in its database.[53] As commenters explained, assuming that all such persons have zero earnings is unjustified, yields biased results, and is irrational given that statistically sound methods to estimate the missing earnings exist and are widely used by federal and state agencies, including the Department itself. AR-H-109275–81. Despite admitting that such methods exist, and contrary to its own guidelines,[54] the Department refused to employ them, knowingly choosing to rely on data that is incomplete and inaccurate.[55]

The Department defended its use of bad data on the ground that *commenters* had offered "no practicable alternative that would eliminate these issues." 79 Fed. Reg. at 64,955. That is incorrect: As noted, commenters cited sound, established methodologies to address such issues. It is also irrelevant: If an agency lacks adequate data, it must forgo or defer regulation. *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). It cannot adopt a rule based on admittedly inadequate data because commenters did not supply something better.

Irrational Results. The Department's illogical approach and unsound methodologies will produce irrational and absurd results. *See supra* p. 19. A program with a 100% graduation rate that prepares every student for paying jobs, yielding large net benefits to students over their careers, will be deemed failing if a cohort's median debt is, by the Department's lights, too high

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[53] 79 Fed. Reg. at 64,953. As of 2011, SSA had a backlog of 7 million W-2 reports, representing $70 billion in earnings, that it had not matched to an individual in its database. *Id.*

[54] *See* Dep't of Educ., *Information Quality Guidelines* 7 (2005), http://tinyurl.com/pkuvvdg (calling for use of "modern statistical techniques" and "state-of-the-art methodologies").

[55] 79 Fed. Reg. at 64,957–59. The MEF also significantly undercounts many individuals' earnings. It excludes income deducted for medical care, child care, and other elective deductions. AR-H-074204; *see also* 79 Fed. Reg. at 64,951. The MEF also excludes unreported or underreported income—*e.g.*, earnings of graduates who are self-employed or work in jobs that rely heavily on tips—which the IRS estimates exceeds $100 billion per year. *See, e.g.*, IRS, *Tax Gap for Tax Year 2006* 2 (2012), http://tinyurl.com/ldwp8qp. The Department admitted that "misreported and underreported earnings can have some effect on the earnings data." 79 Fed. Reg. at 64,955.

relative to the group's average earnings—even if every graduate who chose to work in a high-paying job found one, and even if all timely repay their loans without difficulty.[56] Yet a program with a 0% job-placement rate apparently could avoid ineligibility if 51% of its graduates receive Title IV *grants* but incur no *debt*; the median debt of its Title IV recipients would be zero, so the program would pass.[57] That is the antithesis of reasoned decisionmaking.

3. The Department Failed To Confront The Harmful Impact That Its Debt-To-Earnings Test Will Have On Students And Schools.

The immense—and immensely harmful—practical consequences of the Department's debt-to-earnings test demonstrate that the rule is not the product of reasoned decisionmaking. The APA requires agencies to confront a rule's effects. *See*, *e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1151–52 (D.C. Cir. 2011); *Timpinaro v. SEC*, 2 F.3d 453, 457–60 (D.C. Cir. 1993). The Department defied that obligation here. It failed to confront the reality that its test will render ineligible programs that serve *hundreds of thousands* of students, will impose tremendous compliance costs that will cause programs to close, and will pressure the programs that survive to curtail enrollment of at-risk students.

Depriving Students Of Opportunities. The Department recognized that programs serving more than 387,000 students would be deemed failing, and programs serving more than 840,000 students would be deemed failing or in the "zone." 79 Fed. Reg. at 65,064. Programs in such fields as healthcare, information technology, communications engineering, and criminal justice are likely to be among the most acutely affected. *See id.* at 65,069. Few (if any) government programs have such a dramatic adverse impact on an identifiable group of citizens.

[56] For example, as several members of Congress commented, Rocky Vista University—a for-profit medical school, and one of only two medical schools in Colorado—has for several years had a 100% residency-placement rate and turned out top-performing students, yet it likely will be in the "zone" or failing under the new rule. AR-H-022815, -022835, -089755.

[57] *Cf.* 79 Fed. Reg. at 64,900 (77% of students who completed certificate programs at 2-year public schools "received only Pell Grants," and "only 23 percent were borrowers").

The new rule also will impose massive administrative and compliance burdens that may make it impracticable for many high-quality programs to continue operation. By one measure, the rule is the "most burdensome" of the Department's rules since at least 2010. The rule will result in more than $400 million of additional regulatory costs *every year* for 10 years and an annual paperwork burden totaling 6.93 million hours.[58] Many schools will find these burdens unbearable.[59] Despite acknowledging these costs, the agency has failed to offer a reasoned explanation for imposing them on schools and students.

Most students whose programs are closed will lose access to postsecondary education altogether. As the Department conceded, many public and non-profit schools are either unable or unwilling to serve many of the students enrolled at private-sector schools.[60] By one estimate, only 25% to 50% of displaced students will find alternative programs, and the other 50% to 75% will not. *See* AR-H-074207. The agency itself projects that "about 32 percent of students in in-person zone and failing programs will not have nearby transfer options." 79 Fed. Reg. at 65,074.

The Department also turned a blind eye to the disproportionate effect that its rule will have on disadvantaged students. The Department admitted that private-sector schools "are more likely to enroll students who are older, women, Black, Hispanic, . . . with low incomes . . . [are] [s]ingle parents, [have] a certificate of high school equivalency, and [have] lower family income." 79 Fed. Reg. at 64,904. But, because 99% of the programs that would fail the Department's rule are private, such traditionally underserved groups are at even greater risk of being displaced. Indeed, the debt metrics could deny as many as 2 million people, including

[58] *See* 79 Fed. Reg. at 65,005, 65,084, 65,103; Dan Goldbeck, *Revised Gainful Employment Final Rule* (Nov. 3, 2014), http://tinyurl.com/q72baqk.

[59] Even the American Association of State Colleges and Universities—which consists of competitors of for-profit schools—agrees that the rule is "intrusive and unworkable for low-risk" programs, imposes "overwhelming compliance burdens," and is an "egregious exampl[e] of how an indiscriminate regulatory approach can overburden legitimate institutions." AR-H-075144.

[60] *See* 79 Fed. Reg. at 64,904; *see also supra* pp. 16–17.

300,000 Hispanics and almost 500,000 African-Americans, access to college through the end of the current decade.[61] As The Latino Coalition explained, the rule "disproportionately affect[s] minority and other under-served constituencies who are seeking life improvement through education" and deprives "those who need it most" of "the opportunity to get the education they choose at the institution of their choice." AR-H-088805. The agency's failure to address the rule's effects on educational opportunities renders its rule arbitrary and capricious.[62]

Perverse Incentives. The Department also ignored the disincentives its rule creates to enroll at-risk students and to keep quality programs in key fields. The only realistic way schools can improve programs' debt-to-earnings scores (and avoid violating the 90/10 rule) is to limit who is admitted. As the *Washington Post* highlighted, "the likely outcome . . . is that schools will admit only students who pose the least risk," which "will make it harder for minorities, poor people and nontraditional students to get the kind of post-secondary education that might help them improve their lives."[63] Schools also will face tremendous pressure to shutter programs that prepare students for socially valuable but lower-paying jobs, such as education and social work. *See*, *e.g.*, AR-H-073203. This could especially affect women, who concentrate in these fields.[64]

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[61] *See* Ben Goad, *Battle Raging At WH Over For-Profit College Rules*, The Hill (Feb. 18, 2014), http://tinyurl.com/nnqroyg.

[62] *See APSCU v. Duncan*, __ F. Supp. 3d __, 2014 WL 4923023, at *7–8 (D.D.C. Oct. 2, 2014) (remanding Department's rule regarding compensation of school personnel because it failed, for the second time, to address concerns about effects on minority students' enrollment).

[63] *Tightening Rules On For-Profit Colleges*, Wash. Post, *supra*; *see also* AR-H-088121–23.

[64] Anthony P. Carnevale, Jeff Strohl, & Michelle Melton, Georgetown Univ. Ctr. on Educ. & the Workforce, *What's It Worth?: The Economic Value of College Majors* 33 (2011), http://tinyurl.com/4x2myuw. Discouraging schools from providing training for such jobs is also irrational in light of the President's recent expansion of the Pay As You Earn ("PAYE") loan-repayment program, which rewards students who enter low-paying government or non-profit jobs with faster loan forgiveness. *See* Peter Jacobs, *Obama Announces Expansion Of Student Loan Relief Plan That Will Help 5 Million With College Debt*, Business Insider (June 9, 2014), http://tinyurl.com/nqxlq8a. The PAYE program provides an incentive for students to seek lower-paying jobs. Yet the new rule punishes programs that prepare students for such jobs.

4. The Rule Imposes Unlawfully Retroactive And Irrationally Overbroad Sanctions And Violates Basic Principles Of Fairness.

The irrationality and arbitrariness of the debt metrics the Department's rule imposes are compounded by the unlawful and overbroad sanctions it imposes on schools deemed "failing" and the grossly unfair procedures by which the Department will determine schools' eligibility.

Impermissible Retroactive Sanctions. Nothing in the HEA expressly authorizes the Department to impose retroactive obligations on programs, and the Department offered no reasoned justification for doing so. Nevertheless, the Department's rule unfairly and unlawfully punishes schools *retroactively* for past outcomes that they cannot possibly affect today. "[A] statutory grant of legislative rulemaking authority" generally does not "encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).[65] Even if the statute permits retroactive effects, an agency must offer a reasoned explanation for imposing new consequences on past conduct. *See U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227, 233 (D.C. Cir. 2000).

For the first several years, the Department's debt-to-earnings test calculates the earnings of students who graduated *before* the regulations were finalized—and who may have entered a program of study as many as 10 years earlier. *See* 34 C.F.R. §§ 668.402, .404; 79 Fed. Reg. at 64,929, 64,961. Schools, however, can do nothing to alter *past* students' earnings.[66] The Department purported to mitigate this retroactive effect by adopting an alternate debt-to-earnings metric during a "transition period" after the rule takes effect. *See* 79 Fed. Reg. at 64,947–48. During this "transition period," the Department will also calculate the debt-to-earnings ratios

[65] *See also Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 859–60 (D.C. Cir. 2002) (per curiam) (whether a rule is retroactive turns on "a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment" (internal quotation marks omitted)).

[66] These concerns are particularly acute because the Department's calculations include data from 2009, 2010, and 2011—a period of severe recession, *supra* p. 22 n.33.

using debt levels of students who graduated in the most recent program year. But this "transition" metric does not eliminate the rule's retroactive effect, as the Department admitted. *See id.* at 64,925. The *earnings* data remain the same; only the debt component will change. *See* 34 C.F.R. § 668.404(g)(2)(ii). Moreover, the debt of students who graduated in the last year depends on decisions made years earlier by students (*e.g.*, how much debt to incur) and schools (concerning whom to admit, how much to charge, and what to offer). AR-H-075275–76.

Overbroad Punishments. The draconian sanctions that the Department's rule imposes on programs that lose eligibility also sweep far beyond the purported problem the Department claimed to target.[67] If a program loses eligibility, not only is the school barred from offering that *particular* program for three years, but it also cannot offer any *other* program—at *any* credential level—that shares the same four-digit Classification of Instructional Programs ("CIP") code.[68] There is no reason why a school whose program in a field is deemed ineligible based on its students' earnings and debt should be barred from offering a program in the same field that leads to a *different* credential, which differs in length, cost, curriculum, and resulting career opportunities. A school whose certificate program in information technology loses eligibility due to a downturn in demand should not be barred from offering a master's degree program in computer science for which demand is strong. Yet the new rule does just that.[69]

The Department speculated that schools might attempt to "avoid accountability by changing program length." 79 Fed. Reg. at 64,973. But that hardly justifies a blanket ban on

[67] *Cf. WHX Corp. v. SEC*, 362 F.3d 854, 859 (D.C. Cir. 2004) (SEC "failed to explain how any reasonable application" of its own stated criteria "could support" imposing chosen sanction).

[68] *See* 34 C.F.R. § 668.410(b)(2)(iv); 79 Fed. Reg. at 64,973. CIP codes are created by the Department's National Center for Educational Statistics ("NCES").

[69] This effect is heightened because many four-digit CIP codes cover broad areas. *See* NCES, Dep't of Educ., CIP 2010, http://tinyurl.com/n2uxs2y (examples include "agriculture, general," "education, general," "communication and media studies," and "computer and information sciences, general").

any program in the same general field regardless of credential level. A school cannot readily transform an associate's degree program into a master's level curriculum, and doing so for purposes of "evasion" makes no sense because such programs would serve different students.[70]

Inability To Challenge Department's Determinations. The Department's rule imposes these irrational, overbroad sanctions without even affording schools the most basic procedural protections. As the Department conceded, "due process" principles inherent in reasoned decisionmaking "warran[t]" permitting schools to challenge those determinations. 79 Fed. Reg. at 16,460.[71] Yet the new rule bars schools from meaningfully doing so. The Secretary will calculate the debt metrics using mean and median earnings of a cohort of students obtained from SSA, 34 C.F.R. § 668.405(d), but the new rule expressly *forecloses* any "objection to the mean or median annual earnings data that SSA provided to the Secretary," *id.* § 668.405(f)(3)(i).[72]

The Department dismissed this deficiency because the rule permits schools to challenge the Department's calculations based on alternative earnings data "from State databases" or their own surveys. 79 Fed. Reg. at 64,957. But, as the Department admitted, *id.*, not every State will have an earnings database.[73] And conducting an independent survey of graduates' earnings likely will be prohibitively costly for many schools, particularly smaller schools. Even if schools

[70] *Cf. APSCU*, 2014 WL 4923023, at *1, *7 (rejecting Department's defense of "total ban" on certain compensation practices as necessary to prevent evasion and "institutional abuse").

[71] *Cf. Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The HEA forbids the Department from limiting a school's participation in a Title IV program without "notice and [an] opportunity for hearing," 20 U.S.C. § 1094(c)(1)(F), which entails "presentation of arguments and evidence," 34 C.F.R. § 668.88(a).

[72] Schools also cannot meaningfully challenge the aggregate statistics that SSA reports to the Department because they cannot access the underlying *individual* wage records from which "the aggregate earnings data" are derived. 79 Fed. Reg. at 64,957; *see also Kapps v. Wing*, 404 F.3d 105, 124 (2d Cir. 2005) (meaningful challenge requires access to underlying evidence).

[73] Databases that do exist also may reflect only average earnings of total workers and may conflate occupation and industry. *See* Jonah Newman, *The Pitfalls of Comparing Colleges Based on Postgraduate Earnings*, Chron. of Higher Educ. (Mar. 5, 2014), http://tinyurl.com/mtag78a; *see also* AR-H-109342 (discussing deficiencies in state databases).

can afford to conduct a survey acceptable to the Department, moreover, there is no guarantee that their graduates will respond.[74] The Department's purported alternatives are thus illusory.

II. The Disclosure, Reporting, And Certification Requirements Are Unlawful.

The new rule exacerbates the intrusion into program administration by imposing an array of further requirements. These rules are independently unlawful and must be set aside even if the debt-to-earnings test stands. If the debt-to-earnings test is vacated, the disclosure and reporting requirements that are premised upon it must be vacated as well. The illegality of the reporting rules also requires vacating the debt-to-earnings test and the disclosure requirements.

A. The Disclosure Rules Contravene The HEA And Impose Duplicative And Confusing Duties In Violation Of The First Amendment And The APA.

1. The Disclosure Rules Exceed The Department's Statutory Authority.

The Department lacks authority to compel the array of additional disclosures in the rule. The rule cites as authority only "20 U.S.C. 1001, 1002, [and] 1088," 79 Fed. Reg. at 65,015—the gainful-employment provisions. But those provisions say nothing about disclosure, and making such disclosures proves nothing about whether a program prepares students for gainful employment. Nor do 20 U.S.C. §§ 1221e-3, 3474, or 1231a(2), which the preamble cites to support the rule generally, *see* 79 Fed. Reg. at 64,892, authorize the disclosures. Sections 1221e-3 and 3474 do not confer independent authority, *supra* pp. 15–16, and Section 1231(a)(2) directs the *Secretary* generally to "inform the public regarding federally supported education programs," 20 U.S.C. § 1231a(2), but does not authorize shifting the burden onto schools.

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[74] Such surveys must adhere to standards that will be (but have not yet been) published by the Department's NCES and use an "Earnings Survey Form" issued by NCES or a "pilot-tested" survey that tracks NCES's form. 79 Fed. Reg. at 64,962; *see also* AR-H-109341.

2. The Disclosure Requirements Violate The First Amendment.

The disclosure requirements also infringe schools' First Amendment rights by compelling the disclosure of non-factual information and granting the Secretary unbridled discretion to dictate the content of schools' speech. The rule requires schools to disclose "the cost that a prospective student would incur to attend and complete a GE program," yet the Department conceded that "institution[s] may not know [this cost] precisely." 79 Fed. Reg. at 64,977; *see* 34 C.F.R § 668.412(a)(7). The Department announced (for the first time) in the preamble to the final rule that schools may treat these calculations as "estimates." 79 Fed. Reg. at 64,978.

Mandating disclosure of uncertain, speculative estimates is unconstitutional. As this Court recognized in *APSCU I*, the First Amendment narrowly limits the government's authority to require market participants to disclose information unless that information is "'purely factual and uncontroversial.'" 870 F. Supp. 2d at 154 n.7 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)). Compelled speech that is non-factual or controversial can be upheld only if the government shows that "(1) a substantial government interest that is; (2) directly and materially advanced by the restriction; and (3) that the restriction is narrowly tailored." *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 372 (D.C. Cir. 2014).[75]

The requirement to disclose cost estimates cannot survive under this standard. Such estimates are not purely factual. *See Chem. Mfrs. Ass'n*, 1980 WL 29285, at *3 (D.D.C. Dec. 21, 1980). The disclosure fails heightened scrutiny because the Department has not shown either a substantial government interest or that the compelled speech is narrowly tailored to serve such an interest. The controversial nature of these estimates undermines their value to students without

[75] The D.C. Circuit overruled *National Association of Manufacturers* "[t]o the extent that [it] may be read as . . . limiting *Zauderer* to cases in which the government points to an interest in correcting deception," *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc), but did not question the holding that heightened scrutiny applies to speech falling outside of *Zauderer*'s standard for "purely factual and uncontroversial" disclosures.

reducing their burden on schools. The disclosure will spur confusion and frivolous lawsuits when schools' estimates inevitably prove "imprecise" in hindsight.

3. The Disclosure Requirements Are Arbitrary And Capricious.

The disclosure requirements are, at a minimum, arbitrary and capricious because they needlessly add to schools' statutory disclosure obligations and risk creating confusion. Schools are already required to disclose a wide range of data, ranging from "the cost of attending the institution" to completion and graduation rates. 20 U.S.C. § 1092(a)(1)(A), (E), (L). The Department cited no evidence that the existing required disclosures are insufficient and no basis for requiring the particular disclosures mandated by its rule. AR-H-075313–14. Piling on another layer of disclosures would burden schools and thrust upon students a bewildering array of statistics.[76] Forty members of Congress, representing both parties, explained that the disclosures "could actually lead to *reduced* transparency" and increase "confusion for prospective students." AR-H-087188 (emphasis added). That is irrational.[77]

[76] *See*, *e.g.*, AR-H-073195 (American Council on Education—consisting of both private schools such as Harvard, Yale, Princeton, and Georgetown Universities and public schools such as the Universities of Maryland, Michigan, and Texas—explaining that rule imposes "excessive layers of reporting and disclosure burdens" that "will not achieve [the Department's] ends" and will not be "offset by commensurate improvements to the Title IV system"); AR-H-072874 (community-college group explaining that rule yields an "overabundance of information that will only confuse potential students"); AR-H-088838 (financial-aid administrators stating that the "disclosures are overwhelming and not particularly helpful"); *see also* AR-H-037100 (rule will burden state regulators by "caus[ing] an immediate storm of complaints").

[77] The new rule's requirements that schools provide non-English language warnings are also arbitrary because they are unduly vague and impossible to obey. *See Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 930 F.2d 936, 940 (D.C. Cir. 1991). Programs in danger of ineligibility must, "[t]o the extent practicable," provide non-English language warnings to "prospective students for whom English is not their first language." 34 C.F.R. § 668.410(a)(4). This vague "practicab[ility]" test unfairly exposes schools to sanction for failing to identify students in need of non-English language warnings using methods that even the Department could not identify at the time of the rulemaking. The rule's preamble suggests one "test" for "determining whether alternatives to non-English warnings are warranted," but it emphasizes that "[o]ther methods . . . might also be practicable," and thus required. 79 Fed. Reg. at 64,970.

The requirement that programs disclose their "most recent" pCDR, 34 C.F.R. § 668.412(a)(12), is also arbitrary and capricious because the pCDR is irrelevant as a measure of program quality. The Department proposed the pCDR as part of its debt tests, 79 Fed. Reg. at 16,445, but, in the face of criticism, the Department abandoned the pCDR as a gainful-employment metric. *Id.* at 64,915. The Department has not justified requiring schools disclose this flawed metric that even the Department no longer defends. Its requirement to disclose pCDRs is merely a back-door effort to gain acceptance of its discredited metric.

B. The Reporting Requirements Exceed The Department's Statutory Authority And Violate 20 U.S.C. § 1015c.

The new rule also unlawfully commands schools to report new types of student data to the Department. Like the disclosure rules, these reporting requirements—which will be "extraordinarily costly" for schools, AR-H-072873—also stray from the Department's statutory authority. No statute authorizes the agency to demand that schools report students' debt data to the Department. The Department claimed that the reporting rules are intended to "facilitate the Department's evaluation of the GE programs" and "support the goa[l]" of "transparency." 79 Fed. Reg. at 64,891. But because the debt-to-earnings test and the disclosure rules are unlawful, the Department cannot rely on them to justify imposing new reporting requirements.[78]

Moreover, compelling programs to report *private* borrowing information also contravenes 20 U.S.C. § 1015c, which protects privacy by forbidding "the development, implementation, or maintenance of a federal database of personally identifiable information on individuals receiving assistance under this chapter" except to the extent that database "is necessary for the operation of

[78] The debt-to-earnings test also cannot provide the anchor for requiring schools to report information that is not relevant to calculating the debt-to-earnings test. For example, the rule requires schools to report data about the amount of the private and institutional debt of students who "withdrew from [a] GE program during [an] award year." 34 C.F.R. § 668.411(a)(2)(ii)–(iii). But that information cannot affect the debt-to-earnings test, which is based on only those "students who completed the program." *Id.* § 668.404(b)(1)(i); *see also id.* § 668.404(c)(1).

programs" authorized by Title IV and was in use by the Department prior to August 14, 2008. In *APSCU II*, this Court held that the addition of new, personally identifiable information to an existing database violates Section 1015c if it effectively creates a "new database." 930 F. Supp. 2d at 221. As the Court explained, there must be "a point at which an existing database could be changed so substantially that it effectively became a new database"; otherwise, Section 1015c would be a dead letter, and "the Department could collect whatever individually identifiable student information it wanted, so long as it incorporated that information into a database that was necessary for some covered purpose." *Id.* at 218. This Court thus struck down the 2011 reporting rule, which sought to expand the National Student Loan Data System ("NSLDS") to include private borrowing data about students who did not receive federal loans. *Id.* at 218–21.

The new reporting requirements suffer the same fatal flaw. They, too, improperly expand the NSLDS to include "personally identifiable information" about private borrowing, requiring programs to report for students who received Title IV funding the "amount the student received from private education loans," 34 C.F.R. § 668.411(a)(2)(ii), and "information needed to identify the student," *id*. § 668.411(a)(1)(i). As in *APSCU II*, the reporting rules must be struck down.[79]

If the Court invalidates the private-loan reporting rules, it must also strike the debt-to-earnings test and disclosure requirements as well *even if* it concludes that those provisions are otherwise lawful. When a court holds one provision of a regulation invalid, it must invalidate the

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[79] Contrary to the Department's claim, 79 Fed. Reg. at 64,975, the fact that schools must report such data only for students who receive federal funds does not rescue its rule. Adding private borrowing data to the NSLDS would effectively create a new database because that data is unrelated to any preexisting purpose of the NSLDS. The NSLDS exists to store "information regarding loans made, insured, or guaranteed under" various *federal* programs, 20 U.S.C. § 1092b(a), not *private* loan data, *see also* 78 Fed. Reg. 38,963, 38,965 (June 28, 2013) (listing categories of data stored in NSLDS). Indeed, the Department has no legitimate need to determine eligibility or to track the status of private loans not administered by the government. The reporting requirement therefore contravenes Section 1015c, and is also arbitrary and capricious.

remainder of the regulation—even if the agency intends the stricken provision to be severable—if "the remainder of the regulation" cannot "function sensibly without the stricken provision." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir.), *reh'g denied*, 253 F.3d 732 (D.C. Cir. 2001). The debt-to-earnings test and disclosure rules cannot "function sensibly" without schools' reporting private borrowing data. The debt-to-earnings ratio is a function of a program's "annual loan payment," 34 C.F.R. § 668.404(a), which cannot be calculated without private-loan data from students, *id.* § 668.404(b)(1)(i), (d)(1)(ii). Programs also cannot publish their "median loan debt" "[a]s calculated by the Secretary," *id.* § 668.412(a)(10), if the data is not reported to the Secretary. The private-loan reporting rules thus are not severable, despite the Department's contrary statements, *see id.* § 668.415, and the entire rule must be vacated.[80]

C. The Certification Requirements Exceed The Department's Statutory Authority, Contravene The First Amendment, And Violate The APA.

The Department's certification rules also overstep the agency's statutory and constitutional authority and are arbitrary and capricious. Those rules compel schools to certify to the federal government that each program meets applicable national and state institutional and program-level accreditation requirements and licensure standards. 34 C.F.R. § 668.414. The HEA defines an eligible "institution" as one accredited by a "nationally recognized accrediting agency or association," 20 U.S.C. § 1001(a)(5), and does not require each program to meet state or other accrediting requirements. That approach adopted by Congress makes perfect sense: Many schools operate in multiple States or online, and requiring programs to meet multiple and potentially conflicting sets of accrediting and other requirements would impose significant

[80] If it were true that the new debt metrics are "designed to operate independently of" the reporting requirements, *see* 79 Fed. Reg. at 16,488; *id.* at 64,993; 34 C.F.R. § 668.415, then the reporting requirements could not be "necessary for the operation of" the debt metrics—or any other Title IV program—further demonstrating that they violate Section 1015c(b)(1).

burdens on schools.[81] Congress avoided those burdens by requiring schools to be accredited only by a nationally recognized accreditor. By conditioning Title IV eligibility on *program*-level, *state-specific* accreditation, the Department has impermissibly "substitute[d] its policy judgment for that of Congress." *Ala. Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994) (internal quotation marks omitted).

The certification requirements are also unconstitutional, and at a minimum arbitrary and capricious, because they fail to define clearly which licensure requirements any given program must satisfy. For example, it is unclear from the text of the rule whether a culinary program must certify that it meets requirements for a butcher's license, or whether a cosmetology program must certify that it meets the licensure requirements for manicurists. Absent clearer guidance from the Department, schools lack notice of what is required to conform their behavior to the law. The vagueness of this requirement will expose compliant schools to frivolous lawsuits based on purported inaccuracies in the Program Participation Agreements that schools must sign. Those risks make compliance with the certification requirements an unduly burdensome form of compelled speech, in violation of the First Amendment. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). For the same reasons, the requirement's vagueness and the lack of notice of what conduct is prohibited renders the requirement arbitrary and capricious. *See Alliance for Cannabis Therapeutics*, 930 F.2d at 940.

The certification requirements also are arbitrary and capricious because they increase the risk that schools will be subject to conflicting requirements of multiple States. The rule requires each school to provide "applicable program certifications" not only in States where the school operates, but "in *any* State where the institution is otherwise required to obtain State approval"

[81] *See*, *e.g.*, AR-H-054475–79 (describing variance in requirements and burdens of overlapping standards on schools that operate in multiple States or online).

under the Department's state-authorization regulations (34 C.F.R. § 600.9). 79 Fed. Reg. at 64,992 (emphasis added). As the Department itself has recognized, "State requirements may conflict in such a way that it would be impossible to concurrently meet the requirements of multiple States." *Id*. By requiring schools to certify that their programs satisfy requirements of a larger number of States, the rule increases the risk that schools will face inconsistent requirements, and may invite additional baseless lawsuits against schools. That result and the burdens on schools are irrational, especially in light of Congress's decision to require schools to be accredited only by a nationally recognized accreditor.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment for APSCU, declare the gainful-employment regulation to be unlawful, vacate it, and enjoin its enforcement.

Dated: February 6, 2015

Respectfully submitted,

/s/ Douglas R. Cox

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2015, a true and correct copy of the attached **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT,** the **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**, and the accompanying **PROPOSED ORDER**, were filed and served pursuant to the Court's electronic filing procedures using the Court's CM/ECF System.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES, Plaintiff, v. ARNE DUNCAN, in his official capacity as Secretary of the Department of Education, UNITED STATES DEPARTMENT OF EDUCATION, and UNITED STATES OF AMERICA, Defendants.	Civil Action No. 1:14-cv-01870 (JDB)

[PROPOSED] ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

WHEREFORE, having considered the Complaint and Motion for Summary Judgment filed by Plaintiff Association of Private Sector Colleges and Universities, the Defendants' opposition thereto, and the record, this Court is of the opinion that Plaintiff has demonstrated that no disputed issue of material fact exists between the Parties, and that Plaintiff is entitled to judgment as a matter of law on its claims that the Gainful Employment regulation, 79 Fed. Reg. 64,889 (Oct. 31, 2014), is invalid and in violation of law. The Court, therefore, finds that Plaintiff's Motion for Summary Judgment should be and hereby is **GRANTED.**

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment be **GRANTED**;

IT IS FURTHER ORDERED that the Gainful Employment regulation, 79 Fed. Reg. 64,889 (Oct. 31, 2014), be **VACATED** and **SET ASIDE**; and

IT IS FURTHER ORDERED that Defendants and their officers, employees, and agents shall not implement, apply, or take any action whatsoever pursuant to the Gainful Employment regulation.

SO ORDERED.

DATE: _________________

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HONORABLE JOHN D. BATES
United States District Judge

LOCAL RULE 7(k) LIST OF PERSONS TO BE SERVED WITH PROPOSED ORDER

Pursuant to LCvR 7(k), the following persons are entitled to be notified of entry of the foregoing Proposed Order:

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