**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MEAGHAN BAUER and STEPHANO DEL ROSE, *Plaintiffs*, v. BETSY DEVOS, *in her official capacity as Secretary of Education,* and UNITED STATES DEPARTMENT OF EDUCATION, *Defendants*.	Civil Action No. 17-1330 (RDM)

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT

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The Institute for Policy Integrity at New York University School of Law ("Policy Integrity")[1] submits this brief as *amicus curiae* in support of Plaintiffs' renewed motion for summary judgment seeking vacatur of two administrative stays issued by the Department of Education (the "Department") suspending implementation of a rule known as the Borrower Defense Rule, 81 Fed. Reg. 75,926 (Nov. 1, 2016) (the "Rule").[2]

INTEREST OF AMICUS CURIAE

Policy Integrity is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, with a particular focus on environmental and economic issues.

An area of special concern for Policy Integrity is the appropriate use of cost-benefit analysis in the promulgation of federal regulations. Policy Integrity has expertise in the proper scope and estimation of costs and benefits and the application of economic principles to regulatory decisionmaking. Our director, Richard L. Revesz, has published more than eighty articles and books on environmental and administrative law, including several works that address the legal and economic principles that inform rational regulatory decisions.

In furtherance of its mission to promote rational decisionmaking, Policy Integrity has filed several *amicus* briefs and comment letters regarding agencies' failure to follow proper procedures and conduct appropriate cost-benefit analyses when suspending duly promulgated

[1] This brief does not purport to represent the views of New York University School of Law, if any.

[2] Policy Integrity thanks Chelsea Anelli and Allyson Scher, students in New York University School of Law's Regulatory Policy Clinic, for assistance in preparing this brief.

regulations. *See, e.g.,* Br. for Inst. for Policy Integrity as *Amicus Curiae, Air Alliance Houston v. Envtl. Prot. Agency,* No. 17-1155 (D.C. Cir. Nov. 1, 2017); Br. for Inst. for Policy Integrity as *Amicus Curiae*, *Open Cmtys. Alliance v. Carson*, No. 17-cv-2192-BAH (D.D.C. Nov. 13, 2017); Br. for Inst. for Policy Integrity as *Amicus Curiae, California v. U.S. Bureau of Land Mgmt.*, No. 17-cv-3804-EDL (N.D. Cal. Sept. 6, 2017); Br. for Inst. for Policy Integrity as *Amicus Curiae*, *Clean Water Action v. Pruitt,* No. 17-cv-0817-DLF (D.D.C. June 27, 2017).[3] Additionally, this Court previously granted Policy Integrity's motion to file an amicus brief in this case, in support of Plaintiffs' initial motion for summary judgment. *See* Minute Order (Oct. 27, 2017).

Policy Integrity's expertise in cost-benefit analysis and experience with these cases gives it a unique perspective from which to evaluate Plaintiffs' claims that the Department's stays of the Borrower Defense Rule are arbitrary and capricious.[4]

QUESTION PRESENTED

Do the stays of the Borrower Defense Rule violate the Administrative Procedure Act (APA) by (1) failing to consider the Rule's positive consequences for borrowers and (2) failing

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[3] *See also* Policy Integrity Comments on Dep't of Labor's Proposed Extension of Transition Period and Delay of Applicability Dates for the Fiduciary Rule (Sept. 15, 2017), *available at* http://policyintegrity.org/documents/Labor_Fiduciary_Rule_Delay_Comments_9-15-17.pdf; Policy Integrity Comments on Envtl. Prot. Agency's Proposed Postponement of Certain Compliance Dates for the Effluent Rule (July 6, 2017), *available at* http://policyintegrity.org/documents/2017-07-06_Policy_Integrity_Comments_on_the_Second_Stay_of_the_Effluent_Rule.pdf.

[4] No publicly held entity owns an interest of more than ten percent in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public. Additionally, no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

to provide a rational explanation for disregarding the Department's prior finding that a delay of the Rule would not be cost-benefit justified?

BACKGROUND

Section 455(h) of the Higher Education Act of 1965, as amended, authorizes the Department to "specify . . . acts or omissions of an institution of higher education [that] a borrower may assert as a defense to repayment" of federal student loans. 20 U.S.C. § 1087e(h). The Department issued implementing regulations for this provision in 1995, but the regulations were "silent on the process a borrower follows to assert a borrower defense claim." 81 Fed. Reg. 39,330, 39,335 (proposed June 16, 2016). For two decades, such claims were rarely filed. *Id.*

In 2016, after the collapse of the for-profit Corinthian Colleges "generated an unprecedented level of borrower defense claims activity[,]" the Department "realized that the existing regulations made [the borrower defense] process burdensome, both for borrowers and for the Department." 81 Fed. Reg. at 76,047. It decided to develop new regulations that would better "protect borrowers and improve the Department's ability to hold schools accountable for actions and omissions that result in loan discharges." *Id.* at 75,926.

The resulting Borrower Defense Rule established a "more accessible and consistent" standard for evaluating borrower defense claims[5] and straightforward procedures for asserting such claims. *Id.* It also made it easier for the federal government to recover its losses on discharged loans from the institutions whose misconduct gave rise to those claims. *Id.* To this end, the Rule set out certain financial responsibility triggers—that is, "actions and events that

[5] Whereas the Department's prior regulations allowed claims under "applicable [s]tate law," the Borrower Defense Rule allowed claims based on a substantial misrepresentation, breach of contract, or a favorable court judgment related to the making of the borrower's loans or the provision of education for which those loans were made. 81 Fed. Reg. at 75,926.

would trigger a requirement that a school provide financial protection, such as a letter of credit, to insure against future borrower defense claims." *Id.* at 75,927.

In addition to reforming the borrower defense claim process, the Borrower Defense Rule protected borrowers by (1) requiring for-profit higher education institutions to feature warnings in advertising and promotional materials if their typical students experience poor loan repayment outcomes and (2) prohibiting schools participating in federal student loan programs from including mandatory arbitration clauses or class action waivers in their student enrollment agreements. *Id.* at 75,926-27.

Pursuant to Executive Order 12,866, the Department prepared a Regulatory Impact Analysis for the Borrower Defense Rule that thoroughly assessed the transfers, costs, and benefits that would result from the Rule. *See id*. at 76,046-61. In that analysis, the Department projected that, relative to the 1995 regulations, the Rule would increase the proportion of defrauded borrowers bringing successful discharge claims[6] and the proportion of discharged loans for which the federal government recovered funds from the responsible institution.[7]

Specifically, the Department estimated that, under a business-as-usual scenario, the federal government would discharge an annualized $637 million in student loans between 2017 and 2026, with $485 million (76 percent) of that cost ultimately borne by the government and the

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[6] *Compare id*. at 76,058, tbl.3-B (showing a baseline scenario in which 8 percent of loans associated with potentially eligible borrowers are discharged), *with id.* at 76,057, tbl.3-A (showing a "primary estimate" scenario for the Borrower Defense Rule in which 35 to 45 percent of potentially eligible loans are discharged, depending on the institution type).

[7] *Compare id*. at 76,058, tbl.3-B (showing a baseline scenario in which the government recovers 23.8 percent of discharged loan amounts from proprietary—i.e., for-profit—institutions), *with id.* at 76,057, tbl.3-A (showing a "primary estimate" scenario for the Borrower Defense Rule in which the government recovers 75 percent of discharged loan amounts from proprietary institutions).

remaining $152 million (24 percent) recovered from the institutions whose misconduct led to the discharges.[8] Under the Borrower Defense Rule, the Department's "primary estimate" showed total discharges increasing to an annualized $2.465 billion, with $1.471 billion (60 percent) of that paid by the federal government and the remaining $994 million (40 percent) recovered from institutions.[9] In other words, the Department expected the Borrower Defense Rule to quadruple total discharges and to almost double the percentage of discharges recovered from institutions.

As the Department acknowledged in its analysis, from the perspective of society as a whole, the balance of a discharged loan is more appropriately treated as a transfer payment from the government to a borrower than as a true regulatory benefit. *Id*. at 76,051 ("When claims are successful, there will be a transfer between the Federal government and affected student borrowers . . . ."); *see also id.* at 76,052 ("[T]here may be a potentially significant amount of funds transferred between institutions and the Federal government as reimbursement for successful claims."); Office of Mgmt. & Budget, Exec. Office of the President, Circular A-4, at 38 (2003) ("Transfer payments are monetary payments from one group to another that do not affect total resource available to society.").[10]

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[8] *See id.* at 76,059 (showing total annualized discharges of $637 million for the baseline scenario, using a 3 percent discount rate); *id.* at 76,058 tbl.4 (showing discharge costs of $485 million to federal government under baseline scenario, using a 3 percent discount rate).

[9] *See id.* at 76,059 (showing total annualized discharges of $2.465 billion under the "primary estimate" for the Borrower Defense Rule, using a 3% discount rate); *id.* at 76,058 tbl.4 (showing discharge costs of $1.471 billion to federal government under "primary estimate," using a 3 percent discount rate).

[10] Circular A-4 is a guidance document "designed to assist analysts in the regulatory agencies by defining good regulatory analysis . . . and standardizing the way benefits and costs of Federal regulatory actions are measured and reported." *Id.* at 1. *Available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.

But the Department also found that loan discharges would yield benefits to borrowers (and, in turn, society as a whole) separate from the value of the discharged loans themselves. *See* 81 Fed. Reg. at 76,051 ("[W]e expect the benefits associated with the substantial transfers to students from successful borrower defense claims will be significant."). For example, "[b]orrowers who ultimately have their loans discharged will be relieved of debts they may not have been able to repay, and that debt relief can ultimately allow them to become bigger participants in the economy, possibly buying a home, saving for retirement, or paying for other expenses." *Id.* at 76,051; *see also id.* (citing literature suggesting "that high levels of student debt may decrease the long-term probability of marriage, increase the probability of bankruptcy, reduce home ownership rates, and increase credit constraints"). The Department predicted that these "significant positive consequences for affected borrowers" would have "spillover economic benefits" for society at large. *Id.*

Additionally, to the extent that loan discharges caused by the Borrower Defense Rule were recovered from institutions, the Department found that they would have the benefit of "deterring misconduct by other schools." *Id.* at 76,049; *see also id.* at 76,056 (explaining that the Department expects to see a pattern in which, over "a period of several years . . . the worst performers are removed from the system and . . . other institutions adapt to the new requirements and a lower steady state [of misconduct] is established"); *id.* at 76,058 (explaining that, under a business-as-usual scenario, institutional conduct was expected to improve at a "slower rate than occurs under the [Borrower Defense Rule]").

As for regulatory *costs*, the Department found that institutions would incur compliance-related paperwork and training costs, as well as "costs associated with obtaining letters of credit or suitable equivalents" to comply with new financial responsibility trigger provisions. *Id*. at

76,052. The Department also anticipated some administrative costs to the government from processing an increased number of discharge applications. *Id.* at 76,055.

After considering all of these transfers, costs, and benefits, the Department made a "reasoned determination" that the Borrower Defense Rule's benefits justified its costs. *Id.* at 76,046-47. The Department also expressly considered the alternative of delaying the Rule in order to gather more data on its potential effects. *See id.* at 76,049. But the Department found that it was "not clear when a significant amount of [additional] relevant data would become available" and that the benefits of waiting for such information did not outweigh the costs of delaying the "improved clarity and accountability" of the Borrower Defense Rule. *Id*. Accordingly, the Department declined to delay the Rule, which was, in its view, the regulatory approach that "maximize[d] net benefits." *Id.* at 76,047.

On June 16, 2017, only seven months after making this determination, and just two weeks before the Borrower Defense Rule was scheduled to take effect, the Department abruptly reversed course. Without seeking public comment, the Department stayed implementation of the Rule's most significant provisions, purportedly pursuant to Section 705 of the APA, pending resolution of a legal challenge filed by a trade association of private post-secondary schools. *See* 82 Fed. Reg. 27,621, 27,621 (June 16, 2017) ("Delay Rule").

Shortly thereafter, Plaintiffs filed this action seeking to vacate the Delay Rule, Dkt. No. 1, and, on September 26, filed a motion for summary judgment, Dkt. No. 15. But one week before the Department's opposition was due, the Department issued a *second* delay of the Borrower Defense Rule. 82 Fed Reg. 49,114, 49,115 (Oct. 24, 2017) ("Interim Final Rule"). This Interim Final Rule formally changed the Rule's effective date from July 1, 2017, to July 1, 2018—as required, the Department claimed, by Section 482 of the Higher Education Act. *Id.*

Plaintiffs subsequently filed an amended complaint, Dkt. No. 25, and a renewed motion for summary judgment seeking vacatur of both the Delay Rule *and* the Interim Final Rule, Dkt. No. 29.

SUMMARY OF ARGUMENT

As Plaintiffs explain, both the Delay Rule and the Interim Final Rule are procedurally and substantively defective in multiple respects. *See generally* Mem. P. & A. in Supp. Pls. Renewed Mot. Summ. J., Dkt. No. 29 ("Pls. Br."). This amicus brief focuses solely on the Department's failure to provide a reasoned explanation for either action, as required by the APA.

In both the Delay Rule and the Interim Final Rule, the Department arbitrarily disregards its prior findings on the Borrower Defense Rule's positive consequences for borrowers, even as it relies on prior estimates of expenditures that the federal government and institutions would have to make under the Rule. This one-sided treatment of the Borrower Defense Rule's economic impacts renders both the Delay Rule and the Interim Final Rule arbitrary and capricious.

The Department also arbitrarily disregards its prior conclusion that a delay of the Borrower Defense Rule would not be cost-benefit justified. In the Regulatory Impact Analysis for the Borrower Defense Rule, the Department considered not only the costs and benefits of the Rule, but also the costs and benefits of delaying action. *See* 81 Fed. Reg. at 76,049. The Department concluded that the benefits of delaying the Rule to gather more information about its potential impacts would not outweigh the costs of such a delay. *Id.* Neither the Delay Rule nor the Interim Final Rule even acknowledge this prior finding, much less explain why the Department has changed its position on the costs and benefits of delay. As a result of these failures, both actions are arbitrary and capricious and must be set aside.

ARGUMENT

I. THE DEPARTMENT FAILS TO OFFER A REASONED EXPLANATION FOR THE DELAY RULE

As Plaintiffs argue, the Delay Rule is unlawful because the Department neither met the criteria for staying a rule under section 705 of the APA nor followed mandatory procedures for substantive rulemaking under the Higher Education Act and section 553 of the APA. Pls. Br. at 27. This brief focuses on the Department's additional failure to offer a reasoned explanation for suspending the Borrower Defense Rule.

The Delay Rule is a final agency action that is subject to review under the APA's arbitrary and capricious standard, set out in 5 U.S.C. § 706(2). *See Clean Air Council v. Pruitt*, 862 F.3d 1, 6-8 (D.C. Cir. 2017) (stay under section 307 of the Clean Air Act is a final agency action reviewable under the APA); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 18 (D.D.C. 2012) (stay under 5 U.S.C. § 705 is subject to the APA's arbitrary and capricious standard).[11]

Under the arbitrary and capricious standard, 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 v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); *see also Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (stating that agencies must "cogently explain" a suspension ((*quoting State Farm*, 463 U.S. at 48)). Furthermore, when amending, suspending, or repealing a rule, an agency must provide "a reasoned explanation . . . for disregarding facts and

[11] *See also Becerra v. Interior*, No. 17-cv-2376-EDL, 2017 WL 3891678 (N.D. Cal. Aug. 30, 2017) (reviewing 5 U.S.C. § 705 stay under § 706); *California v. U.S. Bureau of Land Mgmt.*, No. 17-cv-3804-EDL, 2017 WL 4416409, at *11 (N.D. Cal. Oct. 4, 2017) (same).

circumstances that underlay or were engendered by the prior policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

In issuing the Delay Rule, the Department failed to provide a reasoned explanation for ignoring its prior findings regarding the Borrower Defense Rule's positive consequences for borrowers and the costs of delaying its implementation. As a result, the Delay Rule is arbitrary and capricious and must be vacated.

A. The Delay Rule Arbitrarily Disregards the Borrower Defense Rule's Positive Consequences for Borrowers

The Department's justifications for the Delay Rule focus on savings that delay will generate for the federal government and institutions, without a corresponding analysis of the losses that delay will impose on borrowers. But as the Supreme Court has made clear, "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699, 2707 (2015). In weighing a possible action, an agency "cannot tip the scales . . . by promoting [the action's] possible benefits while ignoring [its] costs." *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983); *see also California v. U.S. Bureau of Land Mgmt.*, No. 17-cv-3804-EDL, 2017 WL 4416409, at *9 (N.D. Cal. Oct. 4, 2017) (vacating a delay where agency relied "on precisely the same Regulatory Impact Analysis that it had previously relied on" to support its findings regarding the suspended rule's costs, but ignored that analysis's findings regarding the rule's benefits). Here, the Department's failure to conduct an evenhanded analysis renders the Delay Rule arbitrary and capricious. *See Nat'l Ass'n of Home Builders v. Envtl. Prot. Agency*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("When an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.").

When it issued the Borrower Defense Rule, the Department projected that the Rule would generate transfer payments from the government to borrowers in the form of discharged loans and that these transfers would, in turn, yield significant additional benefits for borrower and the broader economy. *See supra* pp. 5-6. In the Delay Rule, however, the Department ignores these prior findings regarding the Borrower Defense Rule's positive consequences for borrowers, even as it relies on prior findings regarding the Rule's negative consequences for the federal government and institutions. Most notably, the Department asserts that postponing the effectiveness of the Borrower Defense Rule will "help to avoid" $16.6 billion in loan discharge expenditures by the federal government. 82 Fed. Reg. at 27,621-22.

As an initial matter, this substantially overstates the value of loan discharges that will result from the Borrower Defense Rule, because it includes $4.9 billion in discharges that the Department estimated would occur even in the Rule's absence.[12] More importantly, the Department fails to acknowledge that any reductions in total loan discharges caused by the Delay Rule will result not just in savings to the government, but also in losses to student borrowers. *See* 81 Fed. Reg. at 76,051 ("When [borrower defense] claims are successful, there will be a transfer between the Federal government and affected student borrowers as balances are forgiven and some past payments are returned.").

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[12] The Department does not explain how it arrived at its $16.6 billion estimate, but it appears to have added the $14.9 billion in discharges that were projected to result from borrower defense claims between 2017 and 2026 to the $1.7 billion in discharges that were expected to result from a new "closed school discharge process." *See* 81 Fed. Reg. at 76,058-59. But the $14.9 billion attributed to borrower defense claims includes $4.9 billion in discharges that the Department expected to occur even in the absence of the Borrower Defense Rule. *Id.* at 76,058 ("The $4.9 billion estimated cost for the baseline scenario . . . is included in the $14.9 billion total estimated cost for the borrower defense provisions.").

The Department instead insists that "postponement of the [Borrower Defense Rule] will not prevent student borrowers from obtaining relief because the Department will continue to process borrower defense claims under existing regulations that will remain in effect during the postponement." 82 Fed. Reg. at 27,621. But this assertion misses the point. Even if *some* borrowers will still get debt relief in the absence of the Borrower Defense Rule, the fact remains that the Department expected *many more* to get relief with the rule in place. As discussed above, the Rule was expected to quadruple total discharges relative to a business-as-usual scenario. *See supra* pp. 4-5.

In the Delay Rule, the Department does not dispute the accuracy of its prior finding that the Borrower Defense Rule would enable more borrowers to successfully discharge their loans. On the contrary, it implicitly endorses that finding when it claims that delaying the Rule will avoid billions of dollar in discharge costs to the federal government. *See* 82 Fed. Reg. at 27,621-22. Those projected savings represent billions of dollars in debt relief that borrowers would have received under the Borrower Defense Rule but will now *not* receive as a result of the Delay Rule. For the Department to characterize avoided loan discharges as government savings without acknowledging that they are also borrower losses is arbitrary and capricious.[13]

The Department similarly considers "only one side of the equation" when discussing the economic impacts of delaying the Borrower Defense Rule's bar on mandatory arbitration and class action waiver clauses and its financial responsibility trigger provisions. *California v. U.S.*

[13] In effect, the Department is attempting to recast a transfer payment as a pure regulatory cost by ignoring the beneficiary of the transfer. Furthermore, it is ignoring its prior findings regarding the benefits that the Borrower Defense Rule would generate for borrowers, separate from the transfer payments associated with loan discharges, such as the freedom to participate more fully in the economy and pursue further education. *See* 81 Fed. Reg. at 76,051.

Bureau of Land Mgmt., 2017 WL 4416409, at *11. With respect to the arbitration and class action waiver ban, the Department claims that the Delay Rule will avoid costs that institutions would otherwise incur "to modify their [student enrollment] contracts," 82 Fed. Reg. at 27,621, but fails to acknowledge its prior findings regarding those contract modifications' positive consequences for borrowers and taxpayers. *See* 81 Fed. Reg. at 39,383 (finding that class action suits "provide a vehicle for addressing a multitude of relatively small claims that would otherwise not be raised"); *id.* (explaining that eliminating barriers to litigation would "lessen . . . financial risk" to taxpayers because allowing "[r]ecoveries through the court system . . . would eliminate any need to seek relief from the Department—and the taxpayers"). And with respect to financial responsibility triggers, the Department cites the provisions' "substantial costs" to institutions, 82 Fed. Reg. at 27,621, but makes no mention of its prior findings regarding the provisions' benefits—namely, the creation of "far stronger incentives for schools to avoid committing acts or making omissions that could lead to a valid borrower defense claim than currently exist," 81 Fed. Reg. at 76,050.

In sum, every avoided governmental or institutional expenditure that the Department cites as a justification for the Delay Rule will be accompanied by forgone gains for borrowers that the Department fails to address. By ignoring these effects on borrowers, the Department impermissibly "put[s] a thumb on the scale" in favor of the Delay Rule. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008).

The Department cannot excuse its failure to consider these effects on borrowers by asserting that the Delay Rule merely "preserve[s] the regulatory status quo." 82 Fed. Reg. at 27,621. The status quo was a world in which the Borrower Defense Rule was scheduled to take effect on July 1, 2017. 81 Fed. Reg. at 75,926. By issuing the Delay Rule, the Department

disrupted that status quo and imposed costs on borrowers and others who would have benefited from the Rule's implementation. *See California v. U.S. Bureau of Land Mgmt.,* 2017 WL 4416409, at *9 ("[a]fter years of developing [a rule] and working with the public and industry stakeholders," an agency's abrupt decision to delay implementation "plainly did not 'maintain the status quo'").

Because the Department has failed to provide a reasoned explanation for forgoing the Borrower Defense Rule's positive consequences for borrowers, the Delay Rule is arbitrary and capricious.

B. The Delay Rule Arbitrarily Disregards the Department's Prior Finding That Delaying the Borrower Defense Rule Would Not Be Cost-Benefit Justified

The Delay Rule also provides no explanation for disregarding the Department's prior finding that a delay of the Borrower Defense Rule would not be cost-benefit justified. As explained above, when amending a regulation, through a suspension or otherwise, an agency must provide an explanation for disregarding the "facts and circumstances that underlay" the original rule. *Fox*, 556 U.S. at 516. In promulgating the Borrower Defense Rule, the Department not only made a "reasoned determination that [the Rule's] benefits justify [its] costs," 81 Fed. Reg. at 76,046, but also expressly concluded that delaying the Rule's finalization to gather more data about its potential effects would not be cost-benefit justified, *id.* at 76,049. Specifically, the Department determined that any informational benefits associated with a delay would not outweigh the costs that delay would impose in the form of forgone benefits from the Borrower Defense Rule's "improved clarity and accountability." *Id.*

In the Delay Rule, by contrast, the Department asserts that suspending implementation of the Borrower Defense Rule will be essentially costless, claiming that "the United States will suffer no significant harm from postponing the effectiveness of the final regulations" and that

"postponement of the final regulations will not prevent student borrowers from obtaining relief" *See* 82 Fed. Reg. at 27,621. But the Department provides no rational explanation for disregarding its prior finding about the costs of delay. It does not, for example, contend that the findings of the Regulatory Impact Analysis for the Borrower Defense Rule were incorrect, or that changed circumstances have rendered those original findings inapplicable. On the contrary, it continues to rely on the findings of the Regulatory Impact Analysis as to the Borrower Defense Rule's impacts on the federal budget. *Id*.

Because the Department fails to provide a reasoned explanation for selectively disregarding the findings of its original Regulatory Impact Analysis, the Delay Rule is arbitrary and capricious.

II. THE DEPARTMENT FAILS TO OFFER A REASONED EXPLANATION FOR THE INTERIM FINAL RULE

Like the Delay Rule, the Interim Final Rule—which formally changes the Borrower Defense Rule's effective date from July 1, 2017 to July 1, 2018—is a final agency action subject to review under the APA's arbitrary and capricious standard. *Clean Air Council*, 862 F.3d at 6 (explaining that orders "delaying [a] rule's effective date" are "tantamount to amending or revoking a rule"). Accordingly, when issuing the Interim Final Rule, the Department was obligated to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by" the Borrower Defense Rule. *Fox*, 556 U.S. at 516; *Pub. Citizen v. Steed*, 733 F.2d at 98 (explaining that agencies must "cogently explain" a suspension (quoting State Farm, 463 U.S. at 48)). As in the Delay Rule, however, the Department offers no justification in the Interim Final Rule for disregarding (1) the Department's prior findings on the Borrower Defense Rule's positive consequences for borrowers and (2) its prior finding that a

delay of the Rule would not be cost-benefit justified. As a result, the Interim Final Rule is arbitrary and capricious.

A. The Interim Final Rule Arbitrarily Disregards the Borrower Defense Rule's Positive Consequences for Borrowers

The Department claims in the Interim Final Rule that delay will have a minimal impact on borrowers, because the "vast majority of claims" that could be brought under the Borrower Defense Rule's new federal standard for discharging loans "could be made under the current, State-law based standard as well." 82 Fed. Reg. at 49,118. But this ignores the fact that the Borrower Defense Rule changed not just the substantive standard for evaluating borrower defense claims, but also the procedures for asserting them. These procedural reforms were expected to have a much greater impact on total loan discharge amounts than the shift to a new substantive standard.

In the Regulatory Impact Analysis for the Borrower Defense Rule, the Department found that, for loans issued in 2017 and 2018, changing the substantive borrower defense standard would modestly increase the percentage of loans affected by institutional conduct that could give rise to a valid borrower defense claim—the share of loans, in other words, that were *eligible* for discharge.[14] But the Department also estimated that the Rule would more than quadruple the percentage of those eligible loans that were successfully discharged.[15] This increase reflected the

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[14] *Compare, e.g.,* 81 Fed. Reg. at 76,058 tbl.3-B (showing 2.7 to 18 percent of 2017 loans eligible for discharge under a baseline scenario, depending on institution type), *with id.* at 76,057 tbl.3-A (showing 3 to 20 percent of 2017 loans eligible under "primary estimate" scenario for the Borrower Defense Rule, depending on institution type); *see also id.* at 76,057 ("We estimate that the final regulations could increase claims beyond those that could be pursued without it by an average of approximately 10 percent for the FY2017 cohort.").

[15] *Compare, e.g.,* 81 Fed. Reg. at 76,058 tbl.3-B (showing 8 percent of eligible 2017 loans discharged under a baseline scenario), *with id.* at 76,057 tbl.3-A (showing 35 to 45 percent of

Department's view that the Borrower Defense Rule's new claim procedures would "enable more borrowers to pursue valid claims and increase their likelihood of discharging their loans." 81 Fed. Reg. at 76,050; *see also id.* (noting that a "better defined process may encourage borrowers who may have been unaware of the process, or intimidated by its complexity in the past, to file claims").

In the Interim Final Rule, however, the Department assumes that delaying the Borrower Defense Rule will have *no* effect on the percentage of eligible loans that are ultimately discharged.[16] It estimates that 35 to 45 percent of eligible 2017 loans will still be discharged under the Interim Final Rule—the same percentage that the Department expected to be discharged with the Borrower Defense Rule in place. 82 Fed Reg. 49,119. The Department attempts to justify this assumption by noting that, although the new substantive standard for evaluating borrower defense claims will apply only to loans made after the Borrower Defense Rule's effective date, the new *procedures* for filing claims will apply to all loans, regardless of when they were issued. *See id.* at 49,118 ("[T]he delay will not result in specific cohorts of borrowers being excluded from the process reflected in the final regulations, *when implemented*." (emphasis added)). In other words, 2017 and 2018 borrowers can still get the benefit of the new claim procedures, so long as they wait to file their claims until *after* the delay of the Rule expires on July 1, 2018.

But this reasoning is flawed for two reasons. First, there is no reason to believe the Borrower Defense Rule will take effect on July 1, 2018. At the same time that it issued the

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eligible 2017 loans discharged under "primary estimate" scenario for Borrower Defense Rule, depending on institution type).

[16] *See* 82 Fed. Reg. at 49,119, tbl.1 (showing 35 to 45 percentage of eligible 2017 loans successfully discharged under both the Borrower Defense Rule and the Interim Final Rule).

Interim Final Rule, the Department proposed a further delay of the Borrower Defense Rule until July 1, 2019. 82 Fed. Reg. 49,155, 49,155 (proposed Oct. 24, 2017). In the Interim Final Rule, the Department acknowledges that the third delay is being proposed "to allow for completion of [a] negotiated rulemaking process before regulatory changes become effective in this area." *Id.* at 49,117. In other words, the Department is simply buying time until it can scrap the Borrower Defense Rule altogether.

Second, even if the Borrower Defense Rule *does* eventually take effect, forcing borrowers to wait a year or more before pursuing relief under the Rule's new procedures imposes a very real cost on those borrowers. As the Department found in its original Regulatory Impact Analysis for the Borrower Defense Rule, borrowers carrying high loan balances face greater credit constraints, a higher likelihood of declaring bankruptcy, and a lower likelihood of home ownership. 81 Fed. Reg. at 76,051. But in the Interim Final Rule, the Department does not even acknowledge the negative impacts the delayed debt relief could have on borrowers, much less attempt to quantify those impacts. *Fox*, 556 U.S. at 537 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.").

Because the Department has not provided a reasoned explanation for disregarding the positive consequences that the Borrower Defense Rule's procedural reforms would have had for borrowers—and the negative consequences that will result from delaying those reforms—the Interim Final Rule is arbitrary and capricious.

B. The Interim Final Rule Arbitrarily Disregards the Department's Prior Finding That Delaying the Borrower Defense Rule Would Not Be Cost-Benefit Justified

The Department claims that it issued the Interim Final Rule "only on a reasoned determination that its benefits justify its costs." 82 Fed. Reg. at 49,118. But this assertion is in

direct conflict with the Department's prior determination, in the Regulatory Impact Analysis for the Borrower Defense Rule, that a delay of the Rule would *not* be cost-benefit justified. 81 Fed. Reg. at 76,049; *see also supra* pp. 14-15. The Interim Final Rule neither acknowledges this previous determination nor makes any effort to explain why the Department's view of the relative costs and benefits of delay has changed.

Because the Department has not provided a reasoned explanation for disregarding its prior finding that the benefits of delaying the Borrower Defense Rule would not justify the attendant costs, the Interim Final Rule is arbitrary and capricious.

CONCLUSION

This Court should grant Plaintiffs' motion for summary judgment and vacate both the Delay Rule and the Interim Final Rule.

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Respectfully submitted,

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