IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF MASSACHUSETTS, et al. *Plaintiffs*, v. UNITED STATES DEPARTMENT OF EDUCATION, and BETSY DEVOS, *in her official capacity as Secretary of Education,* *Defendants*.	Civil Action No. 17-cv-01331

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

Bethany A. Davis Noll
(D.C. District Bar No. 1002512)
Richard L. Revesz
Madison Condon
Jack Lienke
Institute for Policy Integrity
New York University Law School
139 MacDougal, 3rd floor
New York, NY 10012
T: (212) 998-6239
E: bethany.davisnoll@nyu.edu

Counsel for Amicus Curiae
Institute for Policy Integrity

October 25, 2017

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

QUESTION PRESENTED 2

BACKGROUND 3

SUMMARY OF ARGUMENT 7

ARGUMENT 9

The Department Failed to Offer a Reasoned Explanation for the Delay Rule 9

A. The Department Arbitrarily Disregarded Its Prior Findings on the Borrower Defense Rule's Positive Consequences for Borrowers..10

B. The Department Arbitrarily Disregarded Its Prior Finding That Delaying the Borrower Defense Rule Would Not Be Cost-Benefit Justified 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases……………………………………………………………………………………Page(s)

Becerra v. Interior,
No. 17-cv-2376, 2017 WL 3891678 (N.D. Cal. Aug. 30, 2017) 9

California v. BLM,
No. 17-cv-3804-EDL, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017) 9, 10, 12, 13

Clean Air Council v. Pruitt,
862 F.3d 1 (D.C. Cir. 2017) 9

Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.,
538 F.3d 1172 (9th Cir. 2008) 13

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 9, 13

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 9

Nat'l Ass'n of Home Builders,
682 F.3d 1032 (D.C. Cir. 2012) 10

Pub. Citizen v. Steed,
733 F.2d 93 (D.C. Cir. 1984) 9

Sierra Club v. Jackson,
833 F. Supp. 2d 11 (D.D.C. 2012) 9

Sierra Club v. Sigler,
695 F.2d 957 (5th Cir. 1983) 10

Statutes

20 U.S.C. § 1087 3

Other Authorities

Br. for Institute for Policy Integrity as *Amicus Curiae*,
California v. BLM, No. 17-cv-3804-EDL (N.D. Cal. Sept. 25, 2017)...................................... 2

Other Authorities……………………………………………………………………….Page(s)

Br. for Institute for Policy Integrity as *Amicus Curiae*,
Michigan v. EPA, 135 S. Ct. 2699 (2015) 2

Br. for Institute for Policy Integrity as *Amicus Curiae,*
Murray Energy Corp. v. EPA, No. 15-1385 (D.C. Cir. Aug. 4, 2016) 2

Br. for Institute for Policy Integrity as *Amicus Curiae*,
Murray Energy Corp. v. EPA, No. 16-1127 (D.C. Cir. Jan. 25, 2017)...................................... 2

Br. For Policy Integrity as *Amicus Curiae*,
Clean Water Action v. EPA, No. 17-cv-817-KBJ (D.D.C. June 27, 2017) 2

Mem. of Points and Authorities in Supp. of Pls.' Mot. for Summ. J., ECF No. 32 .... 7, 9

Office of Mgmt. & Budget, Exec. Office of the President, Circular A-4 (2003) 6

Regulations

34 C.F.R. § 685.206 3

Federal Register

Borrower Defense Rule, 81 Fed. Reg. 75,926 (Nov. 1, 2016)... passim

Delay Rule, 82 Fed. Reg. 27,621 (June 16, 2017) .... passim

Proposed Borrower Defense Rule, 81 Fed. Reg. 39,329 (June 16, 2016) 3, 12

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' motion for summary judgment seeking vacatur of the Department of Education's (the "Department") Partial Delay of Effective Dates, 82 Fed. Reg. 27,621 (June 16, 2017) (the "Delay Rule"), for 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 proper 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 fifty articles and books on environmental and administrative law, including several works that address the legal and economic principles that inform rational regulatory decisions.

Policy Integrity has filed *amicus curiae* briefs addressing agency analysis of costs and benefits in many cases. For example, Policy Integrity filed briefs in the Supreme Court and U.S. Court of Appeals for the D.C. Circuit addressing the Environmental Protection Agency's

[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.

("EPA") calculation of costs and benefits in its regulation of mercury emissions from power plants. *See* Br. for Institute for Policy Integrity as *Amicus Curiae*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015); Br. for Institute for Policy Integrity as *Amicus Curiae*, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Jan. 25, 2017). Policy Integrity also filed a brief in the D.C. Circuit discussing the cost-benefit analysis that EPA prepared in connection with a revision to national ozone standards. *See* Br. for Institute for Policy Integrity as *Amicus Curiae, Murray Energy Corp. v. EPA*, No. 15-1385 (D.C. Cir. Aug. 4, 2016). Finally, Policy Integrity has submitted briefs regarding the treatment of forgone benefits in rule suspensions similar to the Delay Rule at issue in this case. *See* Br. for Institute for Policy Integrity as *Amicus Curiae, California v. BLM*, No. 17-cv-3804-EDL (N.D. Cal. Sept. 25, 2017); Br. For Policy Integrity as *Amicus Curiae*, *Clean Water Action v. EPA,* No. 17-cv-817-KBJ (D.D.C. June 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' claim that the Delay Rule is arbitrary and capricious.[3]

QUESTION PRESENTED

Did the Department violate the Administrative Procedure Act (APA) by failing to consider the Borrower Defense Rule's positive consequences for borrowers and by failing to provide a rational explanation for disregarding its prior finding that a delay of the Borrower Defense Rule was not cost-benefit justified?

[3] 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.

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 procedures for asserting borrower defense claims on non-defaulted loans. 34 C.F.R. § 685.206(c); *see also* Proposed Borrower Defense Rule, 81 Fed. Reg. 39,329, 39,335 (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 issued the Borrower Defense Rule to "clarify and streamline the borrower defense process." *Id*. at 76,061. Whereas the Department's prior regulations allowed claims under "applicable [s]tate law," the Borrower Defense Rule allows borrower defense 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. *Id.* at 75,926. In addition to establishing this common federal standard, the Rule sets out a clear process for asserting borrower defense claims on non-defaulted loans. *Id.*

The Borrower Defense Rule further aids borrowers by (1) requiring for-profit institutions to including 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.

In addition to protecting borrowers, the Borrower Defense Rule protects taxpayers by making it easier for the federal government to recover losses related to discharged loans from the institutions whose misconduct gave rise to those discharges. *See id*. at 75,926. To this end, the Rule sets out certain "conditions or events upon which an institution is or may be required to provide to the Department financial protection, such as a letter of credit." *Id.*

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[4] and the proportion of discharged loans for which the federal government recovered funds from the responsible institution.[5]

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 remaining $152 million (24 percent) recovered from the institutions whose misconduct led to the

---

[4] *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).

[5] *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).

discharges.[6] 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.[7] 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 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.").[8]

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*

[6] *See id.* at 76,059 (noting 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).

[7] *See id.* at 76,059 (noting 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).

[8] 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.

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 76047.

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 indefinitely stayed implementation of the Rule's most significant provisions and claimed, without citing any evidence, that this delay would be essentially costless. *See* 82 Fed. Reg. at 27,621.

SUMMARY OF ARGUMENT

In the Delay Rule, the Department relies on section 705 of the APA, 5 U.S.C. § 705, to postpone the effective date of the Borrower Defense Rule's key provisions. *See* 82 Fed. Reg. at 27,621. As Plaintiffs explain, the Department has failed to meet the criteria for staying a rule under section 705 and has also failed to follow mandatory procedures for substantive rulemaking under the Higher Education Act and section 553 of the APA. Mem. of Points and Authorities in Supp. of Pls.' Mot. for Summ. J., ECF No. 32 ("Pls. Br.") at 10-11. But even if the Department *had* satisfied the procedural requirements for substantive rulemaking, the Delay Rule would still be arbitrary and capricious because the Department did not provide a reasoned explanation for its action.

First, the Department arbitrarily disregards the Borrower Defense Rule's positive consequences for borrowers, even as it repeatedly cites expenditures that the federal government and institutions would have to make under the Rule. It claims, for instance, that the Delay Rule will "help to avoid" $16.6 billion in loan discharge expenses for the federal government, 82 Fed. Reg. at 27,621-22, but fails to acknowledge that those savings would result in even larger losses to borrowers whose loans will not be discharged in the absence of the Rule. This one-sided treatment of the Borrower Defense Rule's economic impacts renders the Delay Rule arbitrary and capricious.

Second, the Department 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.* In the Delay Rule, by contrast, the Department asserts that postponing implementation of the Borrower Defense Rule will be essentially costless. Because the Department has failed to provide a reasoned explanation for disregarding the facts and circumstances that underlay its prior action, the Delay Rule is arbitrary and capricious.

ARGUMENT

THE DEPARTMENT FAILED 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 10-11. This brief focuses on the Department's additional failure to offer a reasoned explanation for suspending the Borrower Defense Rule, as required the APA.

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).[9]

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

---

[9] *See also Becerra v. Interior*, No. 17-cv-02376, 2017 WL 3891678 (N.D. Cal. Aug. 30, 2017) (reviewing 5 U.S.C. § 705 stay under § 706); *California v. BLM*, No. 17-CV-03804-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 Department Arbitrarily Disregarded Its Prior Findings on 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 an equal treatment of the losses delay will impose on borrowers. This one-sided analysis renders the Delay Rule arbitrary and capricious. *See California v. BLM*, 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); *see also Nat'l Ass'n of Home Builders*, 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."); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (agency "cannot tip the scales . . . by promoting possible benefits while ignoring their costs").

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.[10] 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.").

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,

[10] 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* 82 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 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.[11]

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. BLM,* 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. The Department fails, however, to acknowledge its prior findings regarding the positive consequences of those contract modifications 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

---

[11] 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.

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").

Finally, the Department claims that the Delay Rule will avoid the financial trigger provisions' "substantial costs" to institutions, 82 Fed. Reg. at 27,621, but makes no mention of its prior findings regarding the benefits those provisions would generate. Those benefits include 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 expenditure by the government or institutions 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 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. BLM,* 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 Department Arbitrarily Disregarded Its Prior Finding That Delaying the Borrower Defense Rule Would Not Be Cost-Benefit Justified

The Delay Rule also fails to provide a reasoned 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 enactment of the Rule 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 asserted that suspending implementation of the Borrower Defense Rule would be essentially costless. *See* 82 Fed. Reg. at 27,621 (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"). But the Department provided no rational explanation for disregarding its prior finding about the costs of delay. It did not, for example, assert 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 continued 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 failed to provide a reasoned explanation for selectively disregarding the findings of its original Regulatory Impact Analysis, the Delay Rule is arbitrary and capricious.

CONCLUSION

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

Dated: New York, NY
October 25, 2017

Respectfully submitted,

/s/ Bethany A. Davis Noll

Bethany A. Davis Noll
(D.C. District Bar No. 1002512)
Richard L. Revesz
Madison Condon
Jack Lienke
Institute for Policy Integrity
New York University Law School
139 MacDougal, 3rd floor
New York, NY 10012
T: (212) 998-6239
E: bethany.davisnoll@nyu.edu

Counsel for Amicus Curiae
Institute for Policy Integrity