UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK LEGAL ASSISTANCE GROUP, Plaintiff, v. MIGUEL A. CARDONA, in his official capacity as Secretary of Education, and UNITED STATES DEPARTMENT OF EDUCATION, Defendants.	No. 20 Civ. 1414 (LGS)

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S MOTION TO AMEND JUDGMENT TO SEVER AND VACATE AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION TO AMEND JUDGMENT AND FOR PARTIAL CERTIFICATION UNDER FED. R. CIV. P. 54(B)

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INTRODUCTION

This long-running challenge to a 2019 Rule issued by defendants Secretary Miguel A. Cardona and the Department of Education (collectively, ED) has returned to this Court on a limited remand from the Second Circuit, which directed this Court to resolve two specific questions and gave guidance as to how those questions should be answered. After holding that this Court erred by failing to consider, "in its discretion," "the potential remedy of severing and vacating" the portion of the 2019 Rule this Court has held unlawful, the Second Circuit instructed this Court to consider two things: (1) that potential remedy under a familiar two-factor framework, and (2) whether any "vacatur should be with or without a remand," in the hopes that the answers to those questions would eliminate the need for the Circuit to resolve a question of appellate jurisdiction. *N.Y. Legal Assistance Grp. v. Cardona*, No. 21-888-cv, 2024 WL 64220, at *3, *4 (2d Cir. Jan. 5, 2024) (Second Circuit Order). Plaintiff New York Legal Assistance Group (NYLAG) has asked this Court to answer those questions by severing and vacating an unlawful statute of limitations provision that remains in effect nearly five years after it was promulgated, without remand.

ED's response is to make a new argument that is incompatible with the Second Circuit's mandate: ED argues that this Court is not authorized to vacate the unlawful provision and, thus, that the Court must leave the unlawful provision in effect indefinitely, to the harm of NYLAG, its clients, and student borrowers nationwide. This argument runs afoul of the mandate rule in two ways. First, it is inconsistent with the Second Circuit's order in this case, which held that this Court erred by not considering whether to exercise its discretion to sever and vacate the unlawful provision. That this Court had the authority to exercise its discretion in that way is implicit in the Second Circuit's holding, and thus cannot be revisited on this limited remand. Second, the mandate rule also bars consideration of ED's new argument in light of ED's failure to raise it before the

Second Circuit, where the parties briefed the appropriateness of partial vacatur in those proceedings. On the merits, ED's argument as to the authority to vacate is incorrect and inconsistent with numerous Supreme Court and Second Circuit decisions.

Rather, as this Court, the Second Circuit, and the parties previously acknowledged, this Court's decision whether to vacate the unlawful provision is governed by two factors: "the (1) seriousness of the action's deficiencies and (2) the likely disruptive consequences of vacatur." *NYLAG v. DeVos*, 527 F. Supp. 3d 593, 609 (S.D.N.Y. 2021) (*NYLAG I*) (cleaned up); *see also* Second Circuit Order, 2024 WL 64220, at *3. Here, both factors point to vacatur: Courts have consistently held that logical outgrowth violations like that found by this Court are sufficiently serious to warrant vacatur, and ED has not identified any disruptive consequences that would flow from vacatur. Moreover, ED's statement that, if the Court severs and remands without vacatur, it "expects" that it would commence a years-long negotiated rulemaking to address the statute of limitations issue in a way that is consistent with the 2018 NPRM (ED Mem. (ECF 103) at 18)—that is, to repeal the unlawful provision—is not a rational basis for this Court to allow the unlawful provision to remain in effect. Moreover, because ED has offered no explanation why vacatur should be accompanied by a remand and disclaims any intention to reimpose the provision this Court held unlawful three years ago, vacatur should be without remand.

In addition, ED also asks the Court to go beyond the specific questions contained in the Second Circuit's mandate and instead certify as final its judgment as to the claims on which ED prevailed pursuant to Rule 54(b). This suggestion is likewise outside the scope of the limited remand. In any event, Rule 54(b) is unavailable here, where the Court has already entered judgment on all claims of all parties.

ARGUMENT

I. The Court should address the Second Circuit's questions by severing and vacating without remand.

The Second Circuit asked this Court to answer two questions: whether "the statute of limitations provision for defensive claims[] should be severed from the 2019 Rule and vacated and, if so, whether such a vacatur should be with or without a remand." Second Circuit Order, 2024 WL 64220, at *4. The parties agree that the unlawful provision is severable. *See* NYLAG Mem. (ECF 94) at 7; ED Mem. at 9. Under the relevant precedent, the Second Circuit's mandate, and the facts and circumstances of this case, the Court, after severing the provision, should vacate without remand.

A. This court has the authority to vacate the unlawful provision.

The parties and the Court previously agreed that a court's decision whether to, in its discretion, vacate an unlawful rule, should be guided by an assessment of "the [1] seriousness of the action's deficiencies and [2] the likely disruptive consequences of vacatur." *NYLAG I*, 527 F. Supp. 3d at 609 (citing *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014)). ED now argues, however, that courts lack the authority to vacate unlawful rules *ever*. *See* ED Mem. 10–16. This new argument is both precluded and wrong.

1. ED's new argument is precluded by the mandate rule.

"Under the mandate rule, 'where a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate as was established by the appellate court.'" *Callahan v. Cnty. of Suffolk*, 96 F.4th 362, 367 (2d Cir. 2024) (quoting *Kerman v. City of N.Y.*, 374 F.3d 93, 109 (2d Cir. 2004)) (cleaned up). "[T]he mandate rule generally forecloses re-litigation of issues previously waived by the parties or decided by the appellate court," as well as the "'re-litigation of issues impliedly resolved by the appellate court's

mandate.'" *United States v. Malki*, 718 F.3d 178, 182 (2d Cir. 2013) (quoting *Yick Man Mui v. United States*, 614 F.3d 50, 53 (2d Cir. 2010)). The mandate rule is not limited to issues "squarely presented" on appeal. *In re Coudert Bros. LLP*, 809 F.3d 94, 101 (2d Cir. 2015). "To determine whether an issue remains open for reconsideration on remand, the trial court should look to both the specific dictates of the remand order as well as the broader 'spirit of the mandate.'" *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (quoting *United States v. Kikumura*, 947 F.2d 72, 76 (3d Cir. 1991)).

Here, the Court of Appeals held that this Court erred by "fail[ing] to … consider, in its discretion, the potential remedy of severing and vacating only the statute of limitations provision for defensive claims." Second Circuit Order, 2024 WL 64220, at *3. And because this Court's "sever[ing] and vacat[ing] only the procedurally defective statute of limitations provision and amend[ing] its judgment accordingly, with no remand," would eliminate any doubts as to the Second Circuit's jurisdiction over NYLAG's appeal, the Court of Appeals found it appropriate to "remand partial jurisdiction" so that this Court could consider severing and vacating "in the first instance." *Id.* at *3–*4.

ED's new argument cannot be reconciled with either the holding or the "spirit of the mandate." *Ben Zvi*, 242 F.3d at 95. If, as ED suggests, district courts lack the authority to vacate rules held unlawful, this Court could not have possibly erred in failing to consider, "in its discretion," severance and partial vacatur—as the Second Circuit held it did. *See* Second Circuit Order, 2024 WL 64220, at *3. The Second Circuit's order remanding to this Court to determine whether to sever and vacate would therefore have been an empty exercise, with no possibility of eliminating questions regarding appellate jurisdiction. As an appellate court's "mandate impliedly decides at least enough issues to allow it to be effective," *Coudert Bros.*, 809 F.3d at 101–02, this

Court's authority to sever and vacate the unlawful provision was implied in the Second Circuit's directive that it exercise its discretion to consider doing so.

Beyond the Second Circuit's recognition that this Court has the authority to vacate unlawful rules, the mandate rule precludes consideration of ED's new argument as an "issue that w[as] 'ripe for review at the time of an initial appeal but ... nonetheless foregone' by a party." *United States v. Aquart*, 92 F.4th 77, 87 (2d Cir. 2024) (quoting *United States v. Quintieri*, 306 F.3d 1217, 1229 (2d Cir. 2002)). In its summary judgment decision, this Court noted that vacatur was a potential remedy within its discretion. *See NYLAG I*, 527 F. Supp. 3d 593, 609 (citing *Guertin v. United States*, 743 F.3d 382, 388 (2d Cir. 2014)). And in its opening brief on appeal, NYLAG argued that this Court should have severed and partially vacated the unlawful provision. *See* Appellant Br. at 62–66, No. 21-888 (2d Cir. July 21, 2021), Dkt. No. 36. ED's only response was that ED could have argued in response that this Court and NYLAG had it wrong, and that vacatur was not statutorily authorized. Had ED done so, the Second Circuit could have taken that argument into consideration in adjudicating the appeal. But ED did not do so. Rather, as it had in this Court, ED argued only that vacatur was not warranted under the two-factor standard previously invoked by the parties and this Court. *See* Appellees Br. at 49–51, No. 21-888 (2d Cir. Oct. 20, 2021), Dkt. No. 114; *see also* Def. Summ. J. Mem. (ECF 67) at 41. This argument against the exercise of equitable discretion is an entirely different from the argument ED now seeks to make—that no such discretion exists at all.

To allow ED to make this new argument now—one that undercuts the very purpose of the Second Circuit's remand—would "effectively eviscerate [the mandate rule] by creating an incentive for parties to hold ripe arguments in reserve." *Aquart*, 92 F.4th at 87–88; *see also Quintieri*, 306 F.3d at 1229 ("[I]t would be absurd that a party who has chosen not to argue a point

on a first appeal should stand better as regards the law of the case than one who had argued and lost."). As the Second Circuit held in a similar situation, it is "not reasonable to construe the mandate as allowing alternative, dispositive bases for denying [the relief sought] to be raised for the first time on remand, particularly when [a] case[] ha[s] been pending for years and ha[s] already been the subject of an appeal." *Parmalat Cap. Fin. Ltd. v. Bank of Am. Corp.*, 671 F.3d 261, 271 (2d Cir. 2012).

ED's argument that this Court has "discretion" to excuse its failure to raise its new argument, ED Mem. at 23, "mistakes the requirements of the mandate rule with waiver." *Coudert Bros.*, 809 F.3d at 101. Unlike the waiver doctrine, the mandate rule "rigidly binds the district court," "subject to only narrow exception for compelling circumstances, consisting principally of (1) an intervening change in controlling law, (2) new evidence, or (3) the need to correct a clear error of law or to prevent manifest injustice." *Aquart*, 92 F.4th at 87 (quotations omitted). None of these exceptions applies here. That ED's new argument is "purely legal," ED Mem. at 23, is irrelevant, as reflected by numerous Second Circuit decisions holding consideration of belatedly invoked "purely legal" questions barred by the mandate rule. *See, e.g.*, *Aquart*, 92 F.4th at 89 (holding district court correctly declined to assess new legal argument not raised in prior appeal); *Stegemann v. Price*, No. 22-205-cv, 2023 WL 218577, at *2 (2d Cir. Jan. 18, 2023) (holding legal argument not raised in prior appeal precluded by mandate rule); *Parmalat*, 671 F.3d at 270–71 (holding district court erred in considering alternative legal argument not raised on first appeal).

2. ED's new argument is inconsistent with Second Circuit and Supreme Court precedent.

Should the Court consider ED's new argument that the Administrative Procedure Act (APA), 5 U.S.C. § 706(2), does not authorize vacatur of unlawful rules on the merits, it should reject it. ED cites no court decision that adopts its reading, which runs counter to decisions from

courts at all levels of the federal judicial system. To begin with, as this Court has recognized, the Second Circuit has adopted "the general rule that vacatur is the appropriate remedy when 'an agency violates its obligations under the APA.'" *City Club of N.Y. v. U.S. Army Corps of Eng'rs*, 246 F. Supp. 3d 860, 872 (S.D.N.Y. 2017) (quoting *Guertin v. United States,* 743 F.3d 382, 388 (2d Cir. 2014)); *see also, e.g.*, *NYLAG I*, 527 F. Supp. 3d at 609; *NRDC v. U.S. Dep't of Interior*, 478 F. Supp. 3d 469, 488 (S.D.N.Y. 2020); *New York v. HHS*, 414 F. Supp. 3d 475, 575–77 (S.D.N.Y. 2019). The Second Circuit has recognized the district courts' authority to invalidate unlawful agency action under the APA for decades. *See, e.g.*, *Nat'l Nutritional Foods Ass'n v. Mathews*, 557 F.2d 325, 338 (2d Cir. 1977) (directing district court to declare rules "invalid as arbitrary and capricious and not in accordance with law"); *Citizens Comm. for Hudson Valley v. Volpe*, 425 F.2d 97, 102 (2d Cir. 1970) (affirming the voiding of an agency action as authorized by the "power under [5 U.S.C. §] 706 to set aside agency action"). And in cases brought under statutes that provide for direct review of agency action in the courts of appeals, the Second Circuit has itself exercised the authority to vacate unlawful rules under section 706(2). *See, e.g.*, *NRDC v. EPA*, 961 F.3d 160 (2d Cir. 2020); *New York v. NHTSA*, 974 F.3d 87, 20 (2d Cir. 2020); *NRDC v. NHTSA*, 894 F.3d 95, 115–16 (2d Cir. 2018); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013).

The Supreme Court has also repeatedly held that actions that violate the APA may be vacated under section 706(2). *See Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020) (holding that agency action that violated the APA "must be vacated"); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2564, 2567, 2568 (2019) (affirming district court's decision that "vacated" the challenged agency action and using "set aside" interchangeably with "vacate"); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 471 n.4 (2001) (stating that if

allegations that the EPA violated rulemaking requirements "could be proved, it would be grounds for vacating the [agency action], because the Administrator had not followed the law"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 41 (1983) (clarifying that it is an "agency's action" itself which must be set aside if it is contrary to or in excess of agency authority); *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (holding that, "if [an agency's] finding is not sustainable on the administrative record made, then the [agency]'s decision must be vacated"); *see also Griffin v. HM Florida-ORL, LLC*, 144 S. Ct. 1, 1 n.1 (2023) (Kavanaugh, J., respecting denial of application) (stating that the APA "expressly authorizes" vacatur).

ED asserts that the Second Circuit has not explicitly rejected its argument. The Court of Appeals has plainly stated, however, that vacatur is the general rule "when an agency violates its obligations under the APA." *Guertin*, 743 F.3d at 388. And "[a] lower court must follow precedent that is on point, however, even if it thinks the precedential decision was wrongly decided." *Dodge v. Cnty. Of Orange*, 282 F. Supp. 2d 41, 80 (S.D.N.Y. 2003). "[V]ertical stare decisis provides little, if any, leeway for a district court judge to stray from Court of Appeals precedent." *Id.*

3. ED's new argument is wrong.

ED's new argument is also inconsistent with the text and structure of the APA, which gives district courts the power to "set aside" agency action found unlawful. 5 U.S.C. § 706(2). ED's assertion that section 706 "does not govern remedies," ED Mem. at 10, is incorrect. Section 706 has two parts that speak to two different types of actions that "[t]he reviewing court shall" take: It shall (1) "compel agency action unlawfully withheld or unreasonably delayed, and" (2) "hold unlawful and set aside agency actions, findings, and conclusions found to be" problematic on one of the specified bases. Section 706(1) plainly states the judicial *remedy* for unlawfully withheld or delayed agency action: an order compelling the action. Given the "usual rule of statutory

interpretation that a law's terms are best understood by 'the company [they] kee[p],'" *United States v. Taylor*, 142 S. Ct. 2015, 2023 (2022), it is logical to read section 706(2) to address remedy as well. Indeed, ED's argument seems to read "hold unlawful and set aside" out of the statute.

Although ED argues that "set aside" does not authorize vacatur (contrary to decades of court decisions), use of that same term in another agency review statute confirms ED's error. The Hobbs Act, 28 U.S.C. § 2342(1), gives courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend … or to determine the validity of" certain orders. Including the term "set aside" between "enjoin" and "suspend" indicates that the term is similarly a remedy. Accordingly, the Second Circuit has held that the term "set aside" in that statute confers the power to vacate agency orders. *Gorss Motels, Inc. v. FCC*, 20 F.4th 87, 98 (2d Cir. 2021).

ED's contrary assertion that only section 703, titled "Form and venue of proceeding," addresses remedy, ED Mem. at 13, is untethered to both the APA's text and its structure. "Form of proceeding" is not a term used to refer to remedy. *Compare* Fed. R. Civ. P. 2 (addressing "form of action"), *with id*. Rules 64–71 (addressing "remedies"). Furthermore, the APA's judicial review provisions follow a clear structure: Section 702 addresses the parties (who can sue and be sued); section 703 addresses the form and venue of the suit; section 704 describes the types of agency action over which one can sue; section 705 addresses interim remedies; and section 706 addresses the scope of judicial review and final remedies. Reading the "form of proceeding" in section 703 to address remedy destroys that logical progression.

ED contends that the legislative history shows Congress that "expected APA litigants to obtain traditional remedies under Section 703 that were known at that time." ED Mem. 13–14 (citing, among other things, Administrative Procedure Act, Legislative History, S. Doc. No. 79-248 at 36–37 (1946)). That legislative history shows otherwise, though, discussing the "Form and

Venue of Action" provision (i.e., section 703) in terms of the "methods of review," S. Doc. 79-248 at 36–37, while explaining that the "Scope of Review" (i.e., section 706) provision authorizes courts to "compel" and to "invalidat[e]" agency action, while rejecting the notion that "invalidation of agency action 'short of statutory right' is something new," *id*. at 40. This history supports the view that section 706 intended to codify the authority of courts to vacate agency action, as does the 1941 Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 77-8 (1941) (1941 Report)—a report described at the time as "the most thorough and comprehensive study ever made of Federal administrative procedure," James Hart, *Final Report of the Attorney General's Comm. on Admin. Pro.*, 35 Am. Pol. Sci. Rev. 501, 501 (1941). As the 1941 Report makes clear, courts have long considered challenges to *both* the "legality of applying a regulation to a particular objector" *and* "the validity of the entire regulation." 1941 Report at 116. In the latter instance, "[a] judgment adverse to a regulation results in setting it aside." *Id.* at 117.

Finally, ED's suggestion that section 706(2) may authorize vacatur but only as to the parties to the particular case, ED Mem. 15–16, "is nowhere in the statute," as then-Judge Jackson has explained. *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1, 67 (D.D.C. 2019), *rev'd on other grounds*, 962 F.3d 612 (D.C. Cir. 2020); *see also New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 674–75 (S.D.N.Y. 2019), *aff'd in part, rev'd in part, and remanded by Commerce v. New York*, 139 S. Ct. 2551 (rejecting same argument); Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1140–86 (2020) (explaining why, in light of legislative history, text, and structure, "the best reading of the APA is that it authorizes universal vacatur of rules"). The statute's language "bespeaks an authority to set aside an entire rule, not merely to preclude its enforcement in a particular case." *Kinkead v. Humana, Inc.*, 206 F. Supp. 3d 751, 754 (D. Conn.

2016). That the relief may benefit persons other than the plaintiff does not mean that it is barred by Article III: Article III does not authorize, let alone require, courts to deny a statutorily authorized form of relief that redresses a plaintiff's injury merely because the relief will also benefit others who suffer a comparable injury. *See Massachusetts v. EPA*, 549 U.S. 497, 522 (2007); *FEC v. Akins*, 524 U.S. 11, 23–25 (1998); *Pub. Citizen v. DOJ*, 491 U.S. 440, 449–50 (1989). As then-Judge Jackson explained in another case,

> the mere fact that a vacatur order may happen to confer a possible benefit upon other individuals who are not before the Court—indeed, conceivably, any and every person who might have otherwise been subjected to the government's unlawful conduct benefits from its vacatur—is not a reason to conclude that the Court lacks the power to nullify the unlawful government practice.

Kiakombua v. Wolf, 498 F. Supp. 3d 1, 53 (D.D.C. 2020)

The suggestion that section 706(2) may authorize vacatur, but only as to the parties to the particular case, is also wholly unworkable. As Judge Engelmayer has explained, this "audacious argument," "taken to its logical extreme, would ultimately require a profusion of actions to assure that [an unlawful] Rule was never applied." *New York v. HHS*, 414 F. Supp. 3d at 579. The resulting practical problems would be many:

> for example, how could this Court vacate the Rule with respect to the organizational plaintiffs in this case without vacating the Rule writ large? What would it mean to "vacate" a rule as to some but not other members of the public? What would appear in the Code of Federal Regulations?

O.A. v. Trump, 404 F. Supp. 3d 109, 153 (D.D.C. 2019). *See also D.C. v. USDA*, 444 F. Supp. 3d 1, 52 (D.D.C. 2020) ("Limiting final relief to the plaintiffs in APA cases would be absurd, making a patchwork out of federal law."); *N.M. Health Connections v. HHS*, 340 F. Supp. 3d 1112, 1183 (D.N.M. 2018) ("The Court does not know how a court vacates a rule only as to one state, one district, or one party."), *rev'd on other grounds*, 946 F.3d 1138 (10th Cir. 2019). Like the *O.A.*

court, "the Court need not engage in such logical gymnastics" in light of the statutory text and controlling precedent. 404 F. Supp. 3d 109.

B. Vacatur without remand is appropriate.

1. The relevant equitable considerations weigh in favor of vacatur.

As NYLAG explained in its opening memorandum, the two factors that guide this Court's discretion—the seriousness of the violation and the degree of disruption—both point to vacatur. *See* NYLAG Mem. 10–11 (applying *Allina Health* factors). As to the seriousness of the violation, ED does not dispute either the general rule that "deficient notice is a fundamental flaw that almost always requires vacatur," *Allina Health*, 746 F.3d at 1110, or the fact that courts, including the D.C. Circuit and the Second Circuit, have held that logical outgrowth problems like the one the Court found here are properly remedied by vacatur, *see* NYLAG Mem. at 10 (*Time Warner Cable*, 729 F.3d at 170–71; *Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 103 (D.C. Cir. 2013); *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 258 (3d Cir. 2010); *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1083 (D.C. Cir. 2009); *Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 9090 (D.C. Cir. 2006)).

To the extent that ED's discussion of the equitable considerations relate to the first factor at all, it simply states that "ED expects to use appropriate rulemaking procedures to issue a new rule regarding a statute of limitations on defensive claims that is consistent with the agency's statements in the 2018 NPRM and the public comments received." ED Mem. at 18. Thus, ED seems to be saying that, if the case is remanded without vacatur, it "expects" to commence a multi-year long negotiated rulemaking process to *rescind* the regulatory provision at issue. *See* 20 U.S.C. § 1098a (setting out requirements for rulemaking pursuant to Title IV of the Higher Education Act). If so, ED's opposition to vacatur appears to be wholly academic. Regardless, its expectation that it would rescind the unlawful rule does not alter the equitable calculus, particularly because

ED cannot commit to the outcome of any future rulemaking processing. *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (recognizing that, to satisfy notice-and-comment rulemaking requirements, "an agency must … remain sufficiently open-minded"). Moreover, the mere possibility that an agency will rescind an unlawful rule on its own exists in nearly every case in which the vacatur inquiry is applied. But as the D.C. Circuit has explained, where a court finds a rule unlawful due to a failure to undertake a procedural requirement, the relevant question is "whether the agency could, with further explanation, justify its decision to skip that procedural step." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021), *quoted in* NYLAG Mem. 10–11. ED cannot give a further explanation that would justify its decision in 2019 not to give the public a meaningful opportunity to comment on the statute of limitations provision at issue. Moreover, as a matter of equity, the possibility that ED might rescind an unlawful rule in several years is not a reason to leave that rule in effect in the interim. The unlawful statute of limitations is running as to NYLAG's clients *now* and has been for years. Equity does not require this situation to continue.

As to the second factor, the degree of disruption, ED offers no argument that vacatur would be disruptive—and with good reason. As the Second Circuit stated, vacatur of the unlawful provision "would have no degree of disruption to students asserting borrower defenses, as it would simply eliminate an obstacle to the assertion of such defenses." 2024 WL 64220, at *3.

In its discussion of "equitable considerations," ED repeats the aphorism that relief "should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs," without any explanation as to how that point is relevant here. ED Mem. 18–19 (*quoting Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)). To the extent ED is retreading its argument that the APA does not authorize "universal" vacatur, that argument is wrong for the

reasons discussed above. *See* pp. 10–11 *supra*. Moreover, a vacatur limited to NYLAG and its clients and prospective clients would be entirely unworkable, and a "universal" vacatur here does not implicate any risk of competing judgments because the lawfulness of the 2019 limitations provision is not at issue in any other case. Here, "[b]ecause the Secretary's decision was universal," the relief directed at that decision should be universal too. *New York v. Commerce*, 351 F. Supp. 3d at 677.

2. Vacatur should not be accompanied by remand.

As NYLAG explained in its opening memorandum, "'[v]acatur without remand is justified where 'a remand would be pointless.'" NYLAG Mem. at 12 (quoting *NLRB v. Maine Coast Reg'l Health Facilities*, 999 F.3d 1, 17–18 (1st Cir. 2021), and citing *Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1268 (D.C. Cir. 1994); *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 1142 (D.C. Cir. 1994)). ED does not dispute this proposition, or otherwise address whether vacatur, if ordered by this Court, should be accompanied by a remand.

In its discussion of the equitable considerations going to whether vacatur is appropriate, though, ED states that "a remand is necessary and appropriate because of the Fifth Circuit's stay of [the 2022] rule, which went into effect after the Second Circuit's summary order was issued."[1]

[1] ED also states: "As the Second Circuit noted, ED complied with this Court's March 2021 Order remanding the statute of limitations to the agency for further proceedings" by undertaking the 2022 rulemaking. ED Mem. 18. This assertion is irrelevant but also misleading. While the Second Circuit "noted" that the 2022 rulemaking occurred, nowhere did it suggest that that rulemaking resulted from this Court's order. Rather, as NYLAG explained in briefing before the Second Circuit:

> The May 26, 2021 notice initiating that rulemaking does not reference the district court decision or remand, and most of the 14 topics it lists are unrelated to the issues addressed in this case. See ED, Notice of intent to establish negotiated

This assertion is factually incorrect. The Fifth Circuit issued a stay of portions of ED's 2022 Rule, which, among dozens of other things, addressed the statute of limitations for borrower defense claims, on August 7, 2023—five months *before* the Second Circuit's order in this case. *See* Order, *Career Colls. & Schs. of Tex. v. U.S. Dep't of Educ.*, No. 23-50491 (5th Cir. Aug. 7, 2023). In April 2024, the Fifth Circuit issued an order directing that its August 2023 stay "remain[] in effect" pending the issuance of a preliminary injunction. *Career Colls. & Schs. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 256 (5th Cir. 2024).

More importantly, the status of the 2022 Rule is irrelevant to the question of remand. ED argues that remand is necessary because the unlawful statute of limitations provision remains in effect. ED Mem. 18. But the Second Circuit asked this Court to decide whether "*a vacatur* should be with or without a remand," i.e., assuming the Court vacates the unlawful provision, is there any reason for the Court to *also* remand to the agency. Second Circuit Order, 2024 WL 64220, at *4 (emphasis added). If the Court vacates the unlawful provision, it would, of course, no longer be in effect. ED would therefore not need to do anything to eliminate the provision. Furthermore, even if ED wanted to re-promulgate the unlawful provision by undertaking required procedures, there is no "limitation on [ED's] rulemaking authority (or any other negative consequences to the rulemaking process) that would result from the absence of any remand language in this case," as the Second Circuit has pointed out. *Id.* at *3 n.3.

> rulemaking committees, 86 Fed. Reg. 28,299. The list does not even include the one issue on which the court ruled against ED—the defensive statute of limitations.

Appellant Reply Br. at 8, No. 21-888 (2d Cir. July 21, 2021), Dkt. No. 125. The agency's first suggestion that it was removing any limitations periods in that rulemaking came months *after* NYLAG filed its opening brief in the Second Circuit in an "issue paper." *See id.* at 8–9. Neither that issue paper, the proposed rule, or the final rule suggested that ED viewed the 2022 rulemaking as a response to this Court's decision. ED's suggestion (without citation) that the Second Circuit stated otherwise has no basis.

As the only function of including the word "remand" in any judgment would be to leave open the question of appellate jurisdiction that the Second Circuit's limited remand sought to eliminate, vacatur of the unlawful provision should be without remand.

II. Certification pursuant to Rule 54(b) is not proper.

The Court should address the questions remanded it to by the Second Circuit, amend its judgment accordingly, and go no further. ED, however, requests that the Court decline to sever and vacate the unlawful statute of limitations provision, and then certify under Federal Rule of Civil Procedure 54(b) "the portion of the amended judgment that relates to *other* provisions of the 2019 Rule." That request should be rejected both because it is beyond the scope of the limited remand and because the Court's final adjudication of all claims precludes a partial judgment.

A. ED's request is beyond the scope of the Second Circuit's limited remand.

"[W]here the mandate limits the issues open for consideration on remand, the district court ordinarily may not deviate from the specific dictates or spirit of the mandate by considering additional issues on remand." *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 175 (2d Cir. 2014); *see also Lozano v. United States*, 436 F. Supp. 3d 772, 77 (S.D.N.Y. 2020) (holding that, where "the mandate of the Court of Appeals directed this Court to resolve two narrow preliminary questions" on remand, it was improper to address additional questions). Similarly, a district court may not come up with an alternative "solution to a problem for which [the Second Circuit] ha[s] already prescribed a specific response." *Puricelli v. Argentina*, 797 F.3d 213, 218 (2d Cir. 2015). But that is what ED asks the Court to do here: Rather than resolve any concerns about the finality of its order by answering the specific questions that the Second Circuit directed to the Court, ED asks the Court to take a different approach, via Rule 54(b). As in *Puricelli*, that is not allowed.

The Second Circuit "partially remand[ed] [this action] to the district court to consider the severability issue"—i.e., the appropriate remedy as to the claim on which NYLAG prevailed on the merits—"while retaining the appeal in accordance with the procedure set out in *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994)." Second Circuit Order, 2024 WL 64220, at *2. The Circuit's instructions were clear, directing this Court "to determine whether the portion of the 2019 Rule that it found procedurally invalid, namely, the statute of limitations provision for defensive claims, should be severed from the 2019 Rule and vacated and, if so, whether such a vacatur should be with or without a remand," and further specifying that, "[i]f [this Court] determines that a new remedy is warranted, it may amend the judgment accordingly"—i.e., to reflect that "new remedy." *Id.* at *4. These questions relating to the remedy for NYLAG's logical outgrowth claim are the only questions now before this Court.

ED's request for a Rule 54(b) certification not only goes beyond the specific, limited dictates of the Second Circuit's mandate, but is also contrary to the spirit of that mandate and the limited remand. ED asks this Court to certify "the portion of the amended judgment that relates to *other provisions of the 2019 Rule*." ED Mem. at 19 (emphasis added). But the Second Circuit's limited remand did not return jurisdiction to this Court as to NYLAG's challenges to "other provisions of the 2019 Rule," and this Court thus lacks jurisdiction as to *those* claims. *See MacDermid Printing Sols., LLC v. Cortron Corp.*, No. 08-cv-1649 (MPS), 2017 WL 1404310, at *3–5 (D. Conn. Apr. 18, 2017) (holding that, where the Second Circuit directed the district court to recalculate damages as to one claim, the mandate rule precluded alteration of the judgment as to other claims). Although ED is correct that the Court may consider "the full range of remedial options available to it," ED Mem. 25 (quoting Second Circuit Order, 2024 WL 64220, at *4), a Rule 54(b) certification of a judgment already entered in favor of Defendants is not a "remedial

option" because Rule 54(b) certification is not a "remedy," and even less so a remedy with respect to a claim on which NYLAG prevailed.

That ED's request is beyond the scope of the mandate is further made clear by ED's arguments in favor of partial certification, which rely on the assertion that this Court's existing judgment "is an order that lacks finality under 28 U.S.C. § 1291." ED Mem. at 19. That disputed assertion is a question raised before the Second Circuit. *See* Second Circuit Order, 2024 WL 64220, at *2 (summarizing parties' competing positions). The Second Circuit decided to delay resolving that question, though, because "the district court's consideration of the severability remedy could impact the jurisdictional issue presented on this appeal." *Id.* at *3. The order delaying analysis of "the jurisdictional implications of … various scenarios until the district court has considered on remand the full range of remedial options potentially available to it and explains its decision for the particular option it chooses" does not direct this Court itself to address the issue of appellate jurisdiction facing the Second Circuit. *Id.* at *3–4.

B. A Rule 54(b) judgment is unavailable where the Court has adjudicated all claims of all parties.

Rule 54(b) provides that, "[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." The Rule thus allows a district court to "enter a final judgment before an entire case is concluded," *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 16 (2d Cir. 1997), to allow parties to appeal such adverse final judgments "even though some piece of the case remains pending in the district court," *Jays Foods, L.L.C. v. Chem. & Allied Prod. Workers Union, Loc. 20, AFL-CIO*, 208 F.3d 610, 614 (7th Cir. 2000); *see also Williams v. Seidenbach*, 958 F.3d 341,

370 (5th Cir. 2020) ("Congress and the Supreme Court promulgated Rule 54(b) to allow for appeals from some final judgments—even as litigation continues in district court."). But where no unresolved claims requiring further district court proceedings remain, Rule 54(b) "is not applicable." *Doe v. Hesketh*, 828 F.3d 159, 166 n.7 (3d Cir. 2016); *see also SEC v. Premier Links, Inc.,* No. 14-CV-7375 (CBA)(ST), 2022 WL 4118519, at *2 (E.D.N.Y. Sept. 9, 2022) (similar). Here, regardless of how the Court resolves the questions remanded to it, no piece of the case will remain pending in the district court. Accordingly, Rule 54(b) is unavailable.

In determining finality, appellate courts "eschew formalism in favor of a pragmatic approach" and instead ask whether the district court "anticipate[d] additional proceedings" before it and whether "it intended for its ruling to resolve all pending merits issues." *Bey v. City of New York*, 999 F.3d 157, 163 (2d Cir. 2021). Generally, "when a court remands a case based on agency error without retaining jurisdiction, the case is terminated." *SecurityPoint Holdings, Inc. v. TSA*, 836 F.3d 32, 38 (D.C. Cir. 2016). And several courts of appeals have held that, in APA litigation, where a district court rules against a plaintiff as to some of its challenges to an agency action, and in favor of the plaintiff as to others—"remanding" with or without vacatur—the ensuing judgment is final as to all claims.

For instance, in *Limnia, Inc. v. United States Department of Energy*, 857 F.3d 379 (D.C. Cir. 2017) (Kavanaugh, J.), the D.C. Circuit held that a district court's order resolving a case and "remanding" the dispute to the agency was final as to all claims, where the remand did not obligate the agency to take any particular action and the district court closed the case. *Id*. at 386. The D.C. Circuit explained that, despite being labeled a "remand," the court's order "did not return the 'core dispute' … back for further proceedings by the agency" and "effectively terminated [the plaintiff]'s APA action." *Id.* In such a circumstance, "denying review … on the ground that it 'is

a 'remand' would strain common sense." *Id.* (quoting *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 699 (10th Cir. 2009)).

The D.C. Circuit reached a similar conclusion in *American Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510 (D.C. Cir. 2020). There, the plaintiffs challenged a rule that set pilot compensation rates for a specific year. The district court had rejected most of the plaintiffs' APA challenges but found that some parts of the rule were not supported by the record. It declined to vacate those parts of the rule and remanded to the agency "to evaluate and justify an appropriate adjustment to benchmark compensation for its ratemaking methodology going forward." 962 F.3d at 515 (quoting district court opinion). On appeal, the D.C. Circuit held that the judgment was final as to all claims. Although the district court had directed the agency to develop a new methodology "going forward," the D.C. Circuit explained that these further proceedings were immaterial to finality because such proceedings would have no impact on plaintiffs' claims. 962 F.3d at 515. Like the remand order in *Limnia*, the order "finally disposed of" the plaintiffs' challenges to the rule. *Id.*

Other courts have likewise held that a remand does not render an order non-final where the district court has fully resolved the case and has not required the agency to revisit the core dispute giving rise to the action. *See, e.g.*, *N.M. Health Connections v. HHS*, 946 F.3d 1138, 1158 (10th Cir. 2019); *Sisseton-Wahpeton Oyate of Lake Traverse Reserv. v. U.S. Corps of Eng'rs*, 888 F.3d 906, 920 (8th Cir. 2018); *Am. Wild Horse Preservation Campaign v. Jewell*, 847 F.3d 1174, 1184–85 (10th Cir. 2016); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1175–76 (9th Cir. 2011); *Richardson*, 565 F.3d at 697.

Thus here, if the Court decides that an amended judgment should include a remand to the agency, that judgment would still be final. Such a judgment would not return the "core dispute"

surrounding the 2019 Rule to the agency for reconsideration. *See Limnia*, 857 F.3d at 386. To the contrary, the Court's summary judgment order "placed a judicial imprimatur on the vast majority of the challenged [action]." *Sierra Forest*, 646 F.3d at 1175; *see also Bitterroot Ridge Runners Snowmobile Club v. U.S. Forest Serv.*, 833 F. App'x 89, 90 (9th Cir. 2020) ("Because the lower court upheld the 'vast majority' of the agency's challenged decision, we may exercise jurisdiction."). And such a judgment would "not require [ED] to recommence a proceeding, or indeed to take any action at all." *Richardson*, 565 F.3d at 698. Even if ED does undertake a new rulemaking, any judicial proceedings arising out of that rulemaking will not be part of *this* case—a fact made clear by the fact that no party argued that the pending litigation challenging the 2022 Rule proceeding before a Texas district court should have actually been heard by this Court.

CONCLUSION

For the reasons stated above and in NYLAG's opening memorandum, the Court should (1) grant NYLAG's motion to amend judgment and sever and vacate the 2019 Rule's application of a statute of limitations to defensive claims, without remand, and (2) deny ED's cross-motion.

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Respectfully submitted,

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