21-888

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK LEGAL ASSISTANCE GROUP,
Plaintiff-Appellant,

v.

MIGUEL A. CARDONA, in his official capacity as Secretary of Education, and UNITED STATES DEPARTMENT OF EDUCATION,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF OF APPELLANT NEW YORK LEGAL ASSISTANCE GROUP

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November 19, 2021

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INTRODUCTION

The brief of appellees Miguel A. Cardona and the United States Department of Education (collectively, ED) ignores three cardinal principles of administrative law. First, even where agencies have a wide degree of policy discretion, they must exercise that discretion reasonably. Accordingly, agencies cannot base their actions on "unsupported speculation." *New York v. DHS*, 969 F.3d 42, 83 (2d Cir. 2020). Second, agencies must actually consider and respond to substantive comments and evidence submitted in the rulemaking process; summarily rejecting contrary comments without addressing the issues raised is not enough. *See, e.g.*, *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 344–48 (D.C. Cir. 2019). Finally, when an agency adopts a rule that "rests upon factual findings that contradict those which underlay" its previous rule, the agency must do more than acknowledge that the rule itself is a reversal of position. *FCC v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 515 (2009). The agency must also provide a well-reasoned explanation for disregarding its earlier factual findings. *Id.*

In addition to ignoring these principles in defending its 2019 Rule, 84 Fed. Reg. 49788, ED mischaracterizes some of NYLAG's challenges

as "policy disagreements" and fails entirely to address others. ED also repeatedly asks for deference to speculative conclusions without identifying support in the record and without addressing those conclusions' inconsistency with its 2016 findings. And ED asserts that it did consider various important aspects of the problem raised by commenters and/or identified by the agency in 2016, but points to nothing in the record that demonstrates as much. Given this Court's obligation to conduct a "searching and careful" inquiry into ED's justification for the rule, such assertions are insufficient. *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 151 (2d Cir. 2008) (cleaned up).

ED argues this Court should not reach these arguments, or otherwise address the district court's final judgment on each of NYLAG's claims, because the district court used the word "remand" in its judgment. But the presence of that word does not change that the district court finally resolved the claims before it both on the merits and as to remedy, and terminated all judicial proceedings without retaining jurisdiction. As recognized by multiple courts of appeals, such an action is final under 28 U.S.C. § 1291. Thus, this Court may review both the district court's merits determinations on the claims on which NYLAG

did not prevail, and its failure to consider vacating the portion of the 2019 Rule that it found invalid. This appeal represents NYLAG's only opportunity for review of the court's order—particularly since the rulemaking ED is currently undertaking in its discretion would only apply to loans issued on or after July 2023, at the earliest.

ARGUMENT

I. This Court has jurisdiction to review the district court's final judgment.

Upon resolving each of NYLAG's claims, the district court entered judgment and closed the case. SPA-23. It granted summary judgment to NYLAG on its claim that the 2019 Rule's statute of limitations on defensive claims was not a logical outgrowth of the proposed rule and granted summary judgment to ED on all other claims. *Id.* Nothing in the district court's discussion of remedy in its opinion and order, or in the judgment, directed ED to reconsider or revisit any aspect of the Rule. *See* SPA-21–22, 23. The parties and the district court thus each stand in the same position as if the district court had entered a final judgment *against* NYLAG on all its claims. As the district court's involvement has come to an end, its judgment is reviewable as final under 28 U.S.C. § 1291 and this Court's "practical" approach to that

provision. *Leftridge v. Conn. State Trooper Officer No. 1283*, 640 F.3d 62, 66 (2d Cir. 2011) (citations omitted).

ED argues that, because the district court stated that, "This matter is remanded to ED for further proceedings consistent with this Opinion and Order," SPA-22, the order and final judgment are not final. ED Br. 16. But while ED correctly notes that remand orders are *generally* not appealable, *id.* at 17, this Court and other courts of appeals have recognized that this is not a bright-line rule. *See, e.g.*, *Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991). To the contrary, as with all questions of finality, 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); *see also Bender v. Clark*, 744 F.2d 1424, 1427 (10th Cir. 1984) (noting that the general rule against appeals of remand orders "is not to be applied if it would violate basic judicial principles"). Here, the answer to both questions indicates finality.

Other courts of appeals have recognized that, where a district court's order does not require the agency to reconsider the action giving rise to the plaintiff's claims and demonstrates that the court considers the case finally resolved, the district court's judgment is appealable. For instance, in *Limnia, Inc. v. United States Department of Energy*, the D.C. Circuit held that it had jurisdiction to review a district court's order resolving a case and "remanding" the dispute to the agency, where the "remand" did not obligate the agency to take any particular action as to the order being challenged and the district court closed the case. 857 F.3d 379, 386 (D.C. Cir. 2017) (Kavanaugh, J.). 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 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, but 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 and appealable. Contrary to ED's description, the court's holding was not based on the fact that the remand order "did not instruct the agency to 'conduct further proceedings,'" ED Br. 19 (quoting *Am. Great Lakes,* 962 F.3d at 515)—in fact, the district court had directed the agency to develop a new methodology "going forward." Rather, 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.

The considerations that led the courts in all of these cases to find orders that nominally "remanded" APA actions appealable are all present here: (1) the district court did not direct the agency to reconsider the dispute that gave rise to NYLAG's claims; (2) the district court did not contemplate further proceedings before it; and (3) the current appeal is the only opportunity to appeal the district court's order.

First, the district court did not return the "core dispute" surrounding the 2019 Rule to the agency for reconsideration. *See Limnia*, 857 F.3d at 386. To the contrary, it "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 the district court "did not require [ED] to recommence a proceeding, or indeed to take any action at all." *Richardson*, 565 F.3d at 698.

ED's attempt to evade appellate review by recharacterizing an ongoing rulemaking—never previously connected to this case—as action taken "in accordance with the district court's direction," ED Br. 19, should be rejected. That rulemaking is not a response to, much less compelled by, the court's order. 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 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. That the agency stated in an "Issue Paper" authored months after NYLAG submitted its opening brief on appeal that it "is considering 'removing any limitations periods,'" ED Br. 20 n.1 (quoting

Issue Paper #6, https://go.usa.gov/xM6UX), does not transform the current rulemaking into "proceedings on remand."

Even if the rulemaking were directly responsive to the district court proceedings, though, it would not be a bar to finality given that that rulemaking cannot redress the claims NYLAG brought in this action. *See Sierra Forest Legacy*, 646 F.3d at 1175 (citing *Skagit Cty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir. 1996) ("[A] remand order may be final when the broad relief sought could not be achieved through the action the district court directed the agency to undertake.")). As reflected in *Limnia* and *American Great Lakes*, a remand that cannot resolve a plaintiff's APA claims is not a basis to delay review of the district court's final resolution of those claims. Here, even if ED's discretionary rulemaking does address the provisions NYLAG challenged, those provisions would remain in effect for loans disbursed between July 2020 and July 2023, at the earliest, as reflected in ED's own proposed regulations. *See* ED, Proposed Regulatory Text for Issue Papers #6, 7, and 8 at 2, https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/borrower-defense-repayment.pdf (proposed amended § 685.206(e)). *See also* 81 Fed. Reg. at 75,936 (taking position

that ED cannot change borrower defense provisions retroactively); 84 Fed. Reg. at 49,824 (declining to alter limitations periods for previously issued loans "due to retroactivity concerns").

Second, the district court did not contemplate continued jurisdiction over this action. This case is not one in which the court "postpone[d] adjudication until after additional evidence has been analyzed." *Perlman v. Swiss Bank Corp. Comp. Disability Plan*, 195 F.3d 975, 979 (7th Cir. 1999). To the contrary, the court resolved the merits questions and denied NYLAG the relief it sought. It entered final judgment and closed the case, without retaining jurisdiction. *Cf. Sisseton-Wahpeton,* 888 F.3d at 920 (where district court granted summary judgment in favor of agency on most issues and remanded as to one issue, order was appealable because "the District Court denied all relief requested by" the plaintiff and "did not retain jurisdiction"). "[W]hen 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).

Although ED suggests that the entry of final judgment and closure of the case are irrelevant, ED Br. 18–19, this Court has held otherwise:

"The intent of the district court judge is relevant for purposes of § 1291 when the court's rulings reveal that the action could be final and it therefore matters whether the trial judge contemplated further proceedings." *Henrietta D. v. Giuliani*, 246 F.3d 176, 181 (2d Cir. 2001); *see Leftridge*, 640 F.3d at 62 (examining district court's intent for purposes of finality); *Somoza v. N.Y. City Dep't of Ed.*, 538 F.3d 106, 113 n.5 (2d Cir. 2008) (considering "indications that the District Court's intent was to end the litigation on the merits in the District Court"). Here, "the district court's use of the term judgment suggests … that it did not anticipate additional proceedings and that it intended for its ruling to resolve all pending merits issues," thus demonstrating finality. *Bey*, 999 F.3d at 163.

Finally, "[w]ithout appellate review by this Court, there would be no avenue—administrative or judicial—by which" NYLAG could obtain review of the district court's order and ED's 2019 Rule. *Limnia*, 857 F.3d at 386. This fact weighs strongly in favor of a finding of finality. *See id.*; *Davies v. Johanns*, 477 F.3d 968, 971 (8th Cir. 2007) ("If, for example, an order remanding a case for further administrative proceedings will likely escape appellate review unless subject to

immediate appeal, the order may be considered final for purposes of 28 U.S.C. § 1291."). The general rule against appealability of remand orders is aimed at "avoid[ing] the prospect of entertaining two appeals, one from the order of remand and one from entry of a district court order reviewing the remanded proceedings." *In re St. Charles Pres. Invs., Ltd.*, 916 F.2d 727, 729 (D.C. Cir. 1990); *see also Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 35 (1st Cir. 2020) (noting that, where "the government agency may resolve the underlying issue on remand," "efficiency concerns" warrant avoiding "piecemeal appeals"). Here, there is no such risk of piecemeal appeals because none of the issues on appeal have been remanded to ED.

ED states that NYLAG "may seek judicial review after the agency has completed proceedings on remand," ED Br. 20. NYLAG does not dispute that, should ED issue a new regulation that causes NYLAG injury, it can obtain judicial review of that regulation in a new case. But that case would challenge a different rule and would not enable NYLAG to challenge the matters that the district court here conclusively decided. The district court's decision in this case, as to the 2019 Rule, would escape appellate review—with significant consequences, since, as

discussed above, any new rule will *not* replace the 2019 Rule with respect to loans issued from 2020 through the hypothetical new rule's effective date. The resulting regulations will co-exist alongside those created by the 2019 Rule—just as the 2019 Rule's regulations co-exist alongside those created by the 2016 Rule, which remain in effect for loans issued between 2017 and 2020. *See* 34 C.F.R. §§ 685.206(c)–(e), 685.222. NYLAG's clients with loans issued in that window would continue to be bound by the challenged rule, with no opportunity for this Court to address it.

Under ED's theory of finality, because NYLAG won on the merits of one claim, NYLAG cannot appeal the district court's final judgment until and unless ED completes a new rulemaking with prospective effect. Yet ED does not contest that, had the same final judgment reflected that NYLAG lost all of its claims, NYLAG would be free to pursue this appeal while ED was undertaking that new rulemaking. "Had Congress wished to allow appeal under the APA only when an agency prevails on all claims in the district court, it could have done so explicitly." *Richardson*, 565 F.3d at 699.

In sum, this Court has jurisdiction under section 1291.

II. The 2019 Rule reflects arbitrary and capricious decision-making.

In its opening brief, NYLAG explained that four aspects of the 2019 Rule were the product of arbitrary and capricious decisionmaking. ED has failed to demonstrate otherwise.

A. Borrower-defense claims process and standard for relief

The process by which students can seek borrower-defense relief and the substantive standard imposed by the 2019 Rule did not comply with principles of reasoned decisionmaking. *See* NYLAG Br. 27–45. ED does not respond to NYLAG's argument that ED's changes were premised on a "problem" that had no support in the record, and thus the Court should reverse based on that argument alone. Moreover, although ED addresses the three specific changes NYLAG raised in its opening brief, it does not point to any evidence that supports ED's conclusory, speculative justifications for those changes.

1. Unsupported premises underlying ED's changes

ED's two justifications for changing the borrower-defense process created by the 2016 Rule lack logical or evidentiary support. NYLAG Br. 28–31. ED largely ignores NYLAG's discussion of these flaws.

First, ED claimed that the 2016 process failed to adequately deter "frivolous" claims, resulting in increased costs to the agency. But the record does not support ED's claim that the 2016 Rule required it to process and deny a rash of "frivolous" claims, and ED has conceded that it did not process *any* claims under the 2016 Rule prior to its publication of the 2019 Rule. *See* NYLAG Br. 29. ED does not address this argument in its brief, and thus the Court may treat it as uncontested.

Additionally, NYLAG and other commenters pointed out that, while imposing additional barriers to relief might decrease the number of claims ultimately *approved*, there is no logical reason why doing so would decrease the number of claims *denied* as frivolous, under ED's own definition of the term. *Id.* at 29–30. ED did not address this point in the 2019 Rule, and the only response in its brief is a footnote speculating, without any citation to the record, that the "financial harm" requirement "may discourage those who lack any proof of financial harm from submitting claims." ED Br. 34 n.5. But a court "may not uphold agency action based on speculation, or on the post hoc rationalization of the agency's appellate counsel." *Nat'l Shooting Sports*

Fdn., Inc. v. Jones, 716 F.3d 200, 214 (D.C. Cir. 2013) (cleaned up). ED's footnote is both. It also is nonresponsive to NYLAG's argument: By adding requirements, ED actually *increases* the likely number of "frivolous" claims, defined by ED as those which plainly do not meet well-stated requirements for relief. In the 2019 Rule, ED acknowledges that the 2016 Rule did not deter "frivolous claims," which it defined as those that "seek discharge from private rather than Federal loans, or that seek relief from a school not associated with any of the borrower's current underlying loans," 84 Fed. Reg. at 49,800, even though the 2016 Rule barred relief in all those scenarios. There is no reason to believe that any of the requirements added in 2019 would somehow have a different effect. They are just as likely to increase the number of claims that ED would dismiss as "frivolous"—a point that ED did not even consider.

Second, while ED considered savings to the federal government from making it harder for defrauded students to obtain relief, ED did not consider the countervailing economic benefits of loan discharges, which ED had previously recognized as an important factor in implementing the HEA's borrower defense provision, 20 U.S.C.

§ 1087e(h). *See* NYLAG Br. 30–31. ED did not respond to this argument, which the Court may take as a concession that ED did not consider, or explain its refusal to consider, an "important aspect of the problem." *Alzokari v. Pompeo*, 973 F.3d 65, 70 (2d Cir. 2020).

2. New standard for relief

ED justified both the more stringent definition of misrepresentation the 2019 Rule imposed and the heightened evidentiary requirement for establishing such a misrepresentation on the ground that such changes would lead students to "take personal responsibility" in selecting amongst schools. *See* 84 Fed. Reg. at 49,817; *see also* NYLAG Br. 33. As NYLAG has explained, this notion has no support in the record; indeed, it is contradicted by evidence submitted by commenters and by ED's own prior factual conclusions that borrower-defense claims are not the result of irresponsible students, and that information asymmetry, discrepancies in bargaining power, and high-pressure sales tactics mean that students cannot obtain the kind of evidence that the 2019 Rule would require. *See* NYLAG Br. 35 (citing 2016 Rule and numerous comments). There is no support for the notion that changes to the evidentiary standard for borrower-defense

claims that students may file years in the future will shape how students approach interactions with schools at the enrollment stage. *Id.* at 35–36.

In response, ED argues that the 2019 Rule does not contain an "intent requirement." ED Br. 27. The rule, however, contains a heightened scienter requirement, requiring borrowers to establish that a school made a statement, act, or omission "with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth." 34 C.F.R. § 685.206(e)(3). ED concedes that it adopted this requirement based on its conclusion that it is not "difficult [for a borrower] to prove that a statement [by a school] was made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth." ED Br. 28 (quoting 84 Fed. Reg. at 49,803). This assertion is untethered to reality, as demonstrated by numerous commenters, *see* ED Br. 27, whom ED ignored. *See, e.g.*, JA367; JA428–29; As a coalition of attorneys general explained:

> In practice, expecting borrowers to possess evidence of either intent *or* recklessness is simply unrealistic. Information imbalances favor predatory schools over deceived borrowers, compounded by the fact that former students often face significant challenges obtaining *any* records from their schools. Making the requisite showing of intentionality or

> recklessness without the assistance of a lawyer or access to discovery would be impossible. In our experience as law enforcers, proving systematic and egregious fraud concerning placement rates and other issues can require a lengthy investigation, access to records via subpoena, and thorough analysis.

JA343. ED gave examples of ways in which students could meet this standard in hypothetical scenarios. 84 Fed. Reg. at 49,803. Those scenarios, however, as commenters who work directly with defrauded borrowers explained, are not consistent with the situations actually experienced by students; ED never addressed this.

Next, ED states in its brief that it did not actually adopt a new evidentiary requirement. But it repeatedly stated otherwise when issuing the Rule, explaining that a "borrower's affidavit or sworn testimony, alone," would not be sufficient evidence to establish a misrepresentation under the new rule. 84 Fed. Reg. at 49,817, 49,818.

Asking the Court to ignore its repeated statements that these provisions would change student behavior, ED states that it "relied on a variety of reasonable explanations." ED Br. 31. But where an agency has invoked multiple reasons for a rule, a court "may only sustain the decision where one is valid and the agency would clearly have acted on that ground even if the other were unavailable." *Williams Gas*

Processing – Gulf Coast Co. v. FERC, 475 F.3d 319, 330 (D.C. Cir. 2006) (internal quotation marks omitted). Given the pervasiveness of ED's insistence that the changes to the standard would change student behavior, this standard has not been met. ED also generally requests that this Court defer to its unsupported speculation as "properly within the scope of its policymaking authority." ED Br. 31. An agency's "policymaking authority" does not include the authority to ignore commenters and base a rule on speculation unsupported by the record.

3. Financial harm requirement

To obtain relief from student loan debt under the 2019 Rule, borrowers must establish that misrepresentations that induced them to take out student loans caused them financial harm *beyond* the debt itself and the opportunity cost associated with enrollment in a valueless program. 34 C.F.R. § 685.206(e)(4), (8)(v)). That requirement is unreasonable. *See* NYLAG Br. 36–40.

In the 2019 Rule, ED's sole justification for imposing this requirement was that it was a "necessary deterrent to unsubstantiated claims," such as claims predicated upon students' "disappointments through their college experience and career, such as believing that they

would have been better served by a different institution or major." 84 Fed. Reg. at 49,819.

NYLAG has identified four reasons why this change was arbitrary and capricious: (1) ED failed to consider the role of collateral consequences of student debt and opportunity costs, which were recognized in comments and by ED itself in the 2016 Rule; (2) ED failed to address its own previous position as to why harm beyond that inherent in a material misrepresentation about an educational program was *not* necessary; (3) there was no rational support for ED's claim that such a requirement was necessary to prevent students from obtaining borrower defense relief based solely on being "disappointed" by their college experience; and (4) it is illogical to require students to show "financial harm" beyond their student loan debt, when the only relief ED could provide was elimination of that student loan debt. NYLAG Br. 37–39.

ED largely ignores these arguments. It neither defends its illogical claim that the requirement is necessary to weed out claims of students dissatisfied with their dorm rooms, 84 Fed. Reg. at 49,819, nor offers any explanation why it makes sense to require borrowers to establish

financial harm that ED cannot remedy through the borrower-defense process. *Cf.* ED Br. 35 (arguing that it was appropriate to refuse to consider collateral consequences of debt because ED could not remedy those consequences through the borrower-defense process). And while ED's brief states that the agency "expressly acknowledged" the harms caused by the specific collateral consequences and opportunity costs raised by commenters, *id.* at 35 (citing 84 Fed. Reg. at 49,818), nothing in the cited page indicates that the agency actually considered this important aspect of the problem identified by Congress.

ED curiously suggests that it did not reverse its position from the 2016 Rule as to what kinds of harm would allow borrowers to qualify for relief, because "in the 2016 rulemaking, ED did not refuse to consider financial harm." ED Br. 34 n.6; *see also id.* 35 (suggesting 2016 and 2019 Rules contained "similar limitations"). In 2016, however, ED did not *require* claimants to establish any specific quantum of harm. Rather, in 2016, ED stated: "There is no quantum or minimum amount of detriment required to have a borrower defense claim, and the denial of any identifiable element or quality of a program that is promised but not delivered due to a misrepresentation can constitute such a

detriment." 81 Fed. Reg. at 75,951. ED's 2019 position is that being denied an identifiable element or quality of a program that is promised but not delivered is nothing but "disappointment" and not a basis for a borrower defense claim—a position fundamentally incompatible with its 2016 position.

ED primarily advances the alternative theory that the new financial harm requirement was "a reasonable policy choice" because it would result in savings to taxpayers. ED Br. 35. That a change to the borrower-defense process saves taxpayers money, however, cannot alone justify the new provision. Such an argument could be made for *any* change that makes it harder to obtain borrower-defense relief. ED was required to explain why particular changes it made were reasonable given Congress's requirement that ED create a system to relieve borrowers of their obligations to repay loans.

4. Elimination of the group claims process

In eliminating the process by which ED could, in its discretion, resolve borrower-defense claims on a group-wide basis, ED did not address concerns that it overstated the ease of the borrower-defense process and focused on the fictitious "problem" of "evidence of outside

actors attempting to personally gain from the bad acts of institutions." NYLAG Br. 41–46 (quoting 84 Fed. Reg. at 49,798). While ED characterizes its rejection of evidence as to how difficult it is for borrowers to complete the borrower-defense process as "prioritization of competing policy objectives," ED Br. 39, an agency's policy choices must demonstrate meaningful consideration of the evidence before it. The assertion that ED "expressly and carefully considered comments," *id.* at 38, is wholly unsupported by the Rule. And "[s]tating that a factor was considered ... is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *see also Texas v. Biden*, 10 F.4th 538, 556 (5th Cir. 2021) (rejecting the argument that an agency's "statement that it considered this or that factor is enough to avoid any arbitrary-and-capricious problems"). ED's conclusory dismissal of the concerns raised by commenters did not meet its burden to show "what major issues of policy were ventilated, and why the agency reacted to them as it did." *Del. Dep't of Nat. Res. & Enviro. Control v. EPA*, 785 F.3d 1, 15 (D.C. Cir. 2015) (cleaned up). And ED's assertion, contrary to evidence before it, that establishing that a school years earlier made a misrepresentation with at least a reckless

disregard is no harder than "appl[ying] for financial aid," ED Br. 38 (discussing 84 Fed. Reg. at 49,799), does not meet this standard.

Instead of providing support for its assertion that the group claims process was being manipulated by bad outside actors, ED states that it "did not base its decision regarding group claims *solely*" on this myth. ED Br. 39 (emphasis added). But even if ED based its decision *partially* on an invented problem that lacked support in the record, that would render the action arbitrary and capricious. *See Williams Gas Processing*, 475 F.3d at 330.

B. Elimination of automatic closed-school discharges and related disclosures

As NYLAG has explained, NYLAG Br. 46–47, in 2016, ED identified a problem: Nearly half of all students who were eligible for closed-school discharges under statute never applied for, and thus never received, such a discharge. *See* 81 Fed. Reg. at 76,039. To address this problem, ED's 2016 Rule provided that ED would automatically discharge loans for eligible students three years after the school's closure, 34 C.F.R. § 685.214(c)(2)(ii) (2016), and required closing schools to notify borrowers of the closed-school discharge option, 34 C.F.R. § 668.14(b)(32) (2016). In 2019, ED removed both provisions, without

explaining why it no longer thought the underutilization of the closed-school discharge process was a problem. This failure to acknowledge or address the impact of these changes on the problem the agency had identified only three years earlier is arbitrary and capricious. ED fails to respond to this argument. ED also fails to respond to the argument that the agency failed to consider the cumulative impact of these changes. *See* NYLAG Br. 51.

Instead, as to automatic closed-school discharges, ED simply restates the reasons why the agency thought such discharges were bad, pointing to its conclusory assertion that it "considered all of the relevant factors." ED Br. 48 (quoting 84 Fed. Reg. at 49,848). But addressing only the negatives of a policy, and not the positives of the policy as previously expressed by the agency and commenters, is arbitrary and capricious. Moreover, as NYLAG has explained, there is no factual (or rational) support for the notion that the availability of closed-school discharges discourages students from furthering their education. Although ED quotes language from the 2019 Rule speculating that it does, ED points to no record evidence that supports this conclusion. *See* ED Br. 47. Finally, even if there were such evidence, it is up to

Congress to reconsider the closed-school discharge requirement it enacted, 20 U.S.C. § 1087(c)(1). ED cannot use its disagreement with the statute as a basis for depriving students of the relief they are entitled to under law.

As to eliminating the disclosure requirement, ED in 2019 took the position that schools that receive federal funding should not have to inform students of their rights. ED does not address its failure to harmonize that position with the fact that ED has consistently done just that. *See* NYLAG Br. 49–51. Instead, ED simply restates its position as a "reasonable policy choice." ED Br. 48. That characterization does not satisfy ED's duty to provide a reasoned explanation for disregarding the facts and circumstances that underlay the prior policy. *See Fox*, 556 U.S. at 516.

C. Rescission of conditions on the use of pre-dispute arbitration agreements and class-action waivers

ED's conclusion in 2019 that individual arbitrations are better for students than having the option to proceed in court, either individually or as a class, was not supported by record evidence and did not adequately express ED's departure from its 2016 factual findings—including its findings that there is no such thing as "informed choice" in

the context of pre-dispute agreements and that no disclosure requirements could remedy that. *See, e.g.*, NYLAG Br. 61 (quoting 81 Fed. Reg. at 76028). Framing this issue as a "policy disagreement," ED suggests that the agency was required only to "acknowledge[] that it had changed course based on its 'reweighing of the issue and subsequent legal developments.'" ED Br. 43 (quoting 83 Fed. Reg. at 37265).[1] But ED was required to do more because "its new policy rests upon factual findings that contradict those which underlay its prior policy," *Fox*, 556 U.S. at 515—namely, its factual conclusions about the benefits of mandatory arbitration agreements and class action waivers to student borrowers. ED was required to explain why it was disregarding those facts and making new, contrary factual findings. It did not. *See* NYLAG Br. 53–54, 59–61.

ED does not dispute that it ignored multiple studies and analyses specific to the student loan context. And it does not dispute that its conclusions about the benefits of arbitration to student borrowers were

[1] As the Eighth Circuit recently explained, upholding a similar condition on the use of mandatory arbitration agreements by recipients of federal funds, no "legal developments" since 2016 called into question ED's authority to adopt the provisions it replaced. *See Northport Health Servs. of Ark. v. HHS*, 14 F.4th 856, 867–69 (8th Cir. 2021).

based on a pamphlet promoting commercial arbitration and that its conclusions about the negatives of student-borrower class actions were based on an article about securities and mass tort class actions. Instead, it characterizes its reliance on these documents as a "reasonable" attempt "for the agency to seek information from experts in the field," and states that "NYLAG does not challenge the substance of the information ED relied upon." ED Br. 43. These assertions mistake NYLAG's argument. NYLAG has no reason to challenge an ABA pamphlet on the benefits of commercial arbitration or an opinion piece on the downsides of securities class actions, because the 2019 Rule has nothing to do with commercial arbitration or securities class actions. And it was unreasonable for ED to extrapolate factual findings from those two sources to the student loan context in light of evidence in the record, NYLAG Br. 54–56, 59–60, particularly given ED's failure to acknowledge it was making an extrapolation, *see Mo. Public Serv. Comm'n v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003) (noting agency "must fully explain the assumptions" underlying such extrapolations), and its concurrent refusal to consider a sister agency's report on the negative impact of mandatory arbitration agreements in the consumer

lending context on relevance grounds, 84 Fed. Reg. at 49842. ED makes *no* argument about the reasonableness of its unacknowledged extrapolation.

III. The district court's refusal to consider severance and partial vacatur was an abuse of discretion.

Where a district court finds a portion of a rule unlawful, the default remedy is severance and vacatur of the flawed portion, "absent evidence that the agency would not have enacted those provisions which are within its power, independently of that which is not.'" *New York v. U.S. Dep't of Lab.*, 477 F. Supp. 3d 1, 18 (S.D.N.Y. 2020) (cleaned up). Here, though, the district court did not engage in any severability analysis. Instead, it concluded that vacatur of the *entire* Rule would be inappropriate under *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146 (D.C. Cir. 1993), without considering whether to vacate only the unlawful portion of the Rule. *See* SPA-22. This was an abuse of discretion.

ED does not meaningfully respond to this argument.[2] ED does not argue that the unlawful provision was not severable from the rest of the

[2] ED states in a footnote that "the district court never said" that it was not considering the possibility of severance and partial vacatur. ED

2019 Rule. To the contrary, it properly directs its own arguments about the application of the *Allied-Signal* factors to the question whether the unlawful provision should have been severed and vacated. In so doing, ED attributes to the district court conclusions that it never made, and that, therefore, cannot support its argument that the court did not abuse its discretion.

To the extent ED seeks *de novo* analysis of the *Allied-Signal* factors, its arguments do not pass muster. First, ED claims "'a serious possibility' that the agency could, if it chooses, reimplement the limitations period for such claims," and that "the limitations period was not 'so deficient as to raise serious doubts whether the agency can adequately justify its decision at all.'" ED Br. 51 (quoting *Allied-Signal*, 998 F.2d at 151, and *N. Air Cargo*, 674 F.3d 852, 860–61 (D.C. Cir. 2012)). The district court made no such findings, SPA-22, nor could it have as what made the limitations period unlawful was not the agency's failure to "adequately justify its decision" but its failure to comply with the requirement to provide notice and an opportunity for comment.

Br. 51 n.11. But the district court never said that it *was* considering the possibility, and its brief discussion of remedy shows that it did not.

Courts of appeals have repeatedly found such failures to warrant vacatur of offending provisions. *See* NYLAG Br. 65 (collecting cases)).

As to the second *Allied-Signal* factor, ED asserts that vacating the stringent statute of limitations "could lead to disruption for students" — without explaining what such disruption could possibly be. ED Br. 51. The only risk to students is that ED will subject their claims to an unlawful limitations period and find their defensive claims extinguished as soon as July 2023. This risk weighs in favor of vacatur, not against it.

The court should thus reverse the district court's remedial finding and order the court to vacate the unlawful statute of limitations provision.

CONCLUSION

For the foregoing reasons, this Court should (1) reverse the district court's entry of judgment on NYLAG's fourth cause of action, (2) reverse the district court's order as to remedy for the unlawful defensive statute of limitations provision, and (3) remand to the district court with instructions to order entry of judgment in NYLAG's favor and to vacate all unlawful provisions of the 2019 Rule.

Respectfully submitted,

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November 19, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief complies with the typeface and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(5), (a)(6), and (a)(7)(B) and Local Rule 32.1(a)(4) as follows: The proportionally spaced typeface is 14-point Century Schoolbook and, as calculated by my word processing software (Microsoft Word for Office 365), the brief contains 6,492 words, exclusive of those parts of the brief not required to be included in the calculation by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

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