UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MEAGHAN BAUER and STEPHANO DEL ROSE, *Plaintiffs*, v. ELISABETH DEVOS, Secretary, U.S. Department of Education, *et al*., *Defendants*.	)	Civil Action No. 17-1330 (RDM)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SECOND RENEWED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case concerns three rules the Department of Education (ED) has issued, each delaying the effective date of the 2016 Borrower Defense Rule—a comprehensive rule designed to protect student borrowers and the public fisc. In issuing these three rules (together, the Delay Rules), ED ignores that the 2016 Rule was explicitly premised on findings that the pre-existing regime was a failure, allowing proprietary institutions to defraud students and lure them into taking on federal student debt, without providing high-quality education in return. ED's unexplained abandonment of that position, as well as other procedural and substantive flaws of each rule, makes its actions arbitrary and capricious.

The first of the three rules at issue is ED's indefinite stay, purportedly issued pursuant to section 705 of the APA, 5 U.S.C. § 705. *See* 82 Fed. Reg. 27621 (the Section 705 Rule). In response to plaintiffs' challenge, ED claims that it may unilaterally and indefinitely stay a rule without notice and opportunity for public comment, and that such action is unreviewable. Binding precedent, however, dictates that the Section 705 Rule is reviewable. *See Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 (D.C. Cir. 1995). Moreover, the Section 705 Rule cannot survive review. Whether examined under the four-factor test that courts have held governs section 705 stays, or under any reading of the "as justice requires" statutory standard, ED's cursory and irrational explanation, devoid of any consideration of the harms a stay inflicts, is insufficient.

Second, with respect to the 2018 Delay Rule, 83 Fed. Reg. 6458, ED continues to argue that it may suspend the 2016 Rule without any reason beyond its plan to engage in rulemaking to undo the rule. But the APA requires more: An agency's presupposition that a rule will change *after* it engages in notice-and-comment rulemaking does not allow it to make a substantive change—such as a new effective date—in advance of that rulemaking. *See California v. Bureau of Land*

Mgmt., 286 F. Supp. 3d 1054, 1064 (N.D. Cal. 2018) (*California v. BLM II*). At a bare minimum, the agency must provide some reasoning to explain why a change is necessary. No authority supports the proposition that an agency may repeatedly delay the effective date of a rule solely because it may in the future come up with a good reason to change it. ED's mantra that it is only "temporarily" "delaying" the initial rule does not suffice, nor does it entitle ED to the broader deference it seeks. Under the law of this Circuit, a delay of a rule—whether "permanent or impermanent"—is fully subject to the requirements of the APA, including those of reasoned decisionmaking. *See Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984). Thus, ED was required to explain its abandonment of prior positions, *see Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016), and its analysis of the effects of delay and the costs of proceeding without delay must be rational and supported by the record, *see Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). Additionally, ED needed "good cause" to evade the Higher Education Act (HEA)'s negotiated rulemaking requirement, 20 U.S.C. § 1098a, and its claimed inability to achieve its desired policy goal if it complied with the law does not suffice to provide it.

Third, with respect to the Interim Final Rule (IFR), 82 Fed. Reg. 49114, ED asks this Court to ignore the plain language of the HEA and defer to its preferred meaning of the statute, which it concedes has no support in the statutory text. For the first time, in litigation, ED asserts—without pointing to any specific statutory language—that its newly announced view of the meaning of the HEA's master calendar requirement represents an interpretation of an ambiguous statute and thus is entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). But this case does not implicate *Chevron*: In issuing the IFR, ED did not purport to exercise congressionally delegated discretion to interpret the statute, and it did not bring to bear any

specialized expertise in choosing among competing interpretations. To the contrary, the IFR was explicitly premised on what ED asserted was a nondiscretionary statutory requirement. As the D.C. Circuit has made clear, in such circumstances no deference is owed, and judicial review is *de novo*. *See Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002). Moreover, the plain text of the statute unambiguously forecloses ED's position; ED's attempts to create ambiguity fail for various reasons, most notably ED's concession that the plain text cannot be read to impose the "July 1 Only" rule it insists the statute contains. ED's arguments that it would be reasonable to conclude, as a matter of policy and divorced from any statutory language, that rules should only take effect on July 1 are irrelevant. The question is whether the master calendar provision *mandates* that rules may only become effective on July 1 of a given year. It does not, and the IFR (as well as the 2018 Final Rule explicitly relying on this same interpretation) therefore cannot stand.

Given both the invalidity of ED's actions and its thus-far successful delay tactics designed to frustrate plaintiffs' ability to obtain judicial review of its unlawful actions, vacatur of all three rules is the appropriate remedy. Although plaintiffs fully briefed the appropriate remedy in their motion for summary judgment, defendants have chosen not to address that issue and instead request further briefing (and thus even further delay) on that subject if the Court rules for plaintiffs on the merits. ED's tactical decision not to address remedy does not entitle it to even more delay in a case challenging the lawfulness of ED's delays. The serious procedural and substantive deficiencies in all three rules and the fact that vacatur would only restore a regulation that the agency previously intended to go into effect—a regulation that the agency insists remains its policy—counsel in favor of the presumptive remedy.

ARGUMENT

I. The Section 705 Rule is substantively and procedurally invalid.

A. The Section 705 Rule is reviewable by this Court.

Several courts have reviewed agency stays purportedly implemented pursuant to section 705. *See, e.g.*, *California v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (*California v. BLM I*); *Becerra v. U.S. Dep't of Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11 (D.D.C. 2012). Defendants nonetheless argue that judicial review of the Department's Section 705 Rule is unavailable because "the decision to postpone an effective date" is committed to agency discretion by law. Mem. in Supp. of Defs.' Renewed Mot. for Summ. J. & in Opp'n to Pls.' Second Renewed Mot. for Summ. J., ECF No. 58-1 (Defs.' Mem.) at 16. But section 705 lacks the indicia required under well-established case law to fall under the APA's narrow exception to the broad presumption favoring judicial review.[1]

The APA's exception to judicial review for actions committed to agency discretion by law, 5 U.S.C. § 701(a)(2), "is a very narrow exception" that applies only in "rare instances." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *see also Accrediting Council for Indep. Colls. & Sch. v. DeVos*, --- F. Supp. 3d ---, No. CV 16-2448 (RBW), 2018 WL 1461958, at

[1] This case appears to be the first challenge to a section 705 delay in which the government has made this argument. In the recent *California v. BLM I* and *Becerra* actions, the Justice Department acknowledged that the district court had authority to review whether section 705's requirements were satisfied. And in the *Sierra Club* litigation, in the context of a dispute over whether the D.C. Circuit or the district court had jurisdiction to review a section 705 delay action, the government acknowledged that a court could review the action and argued, in the circumstances of that case, that "Congress intended such review to take place in the court of appeals." *Sierra Club v. Jackson*, 813 F. Supp. 2d 149, 160 (D.D.C. 2011) (characterizing agency's argument); *see also NRDC v. U.S. Dep't of Energy*, No. 17 Civ. 6989, 2018 WL 1229733, at *3-*4 (RWS) (S.D.N.Y. Mar. 6, 2018) (addressing government's argument that court of appeals should review section 705 rule). The government's merits arguments in *Sierra Club* acknowledged that actions taken under section 705 are reviewable under the APA for abuse of discretion.

*8 (D.D.C. Mar. 23, 2018) (*ACICS v. DeVos*). To successfully invoke this exception, it is not enough for the government to demonstrate that a statute allows for agency discretion. After all, the APA explicitly provides that a reviewing court can set aside agency actions found to be an "abuse of discretion." 5 U.S.C. § 706(2)(A); *see also Heckler v. Chaney* 470 U.S. 821, 829-30 (1985) (explaining relationship of two provisions). Rather, the government must "rebut the presumption that agency action is judicially reviewable by showing 'the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007) (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); *see also Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (noting agency's "heavy burden" to show Congress prohibited judicial review); *Sluss v. U.S. Dep't of Justice*, No. 14-CV-0759 (CRC), 2016 WL 6833923, at *2 (D.D.C. Nov. 18, 2016) (noting government bears burden of "show[ing] by clear and convincing evidence that no meaningful standard exists").

In determining whether a matter has been committed solely to agency discretion, courts in this Circuit consider two factors: "the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action." *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006) (quoting *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002)).[2] As explained below, both factors support plaintiffs here.

[2] Some courts in this circuit have identified a third factor: "Congress's intent to commit the matter fully to agency discretion as evidenced by, among other things, the statutory scheme." *See, e.g., ACICS v. DeVos*, 2018 WL 1461958, at *8. Others have collapsed this consideration with the second factor, as we do here. *See, e.g.*, *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 257, 266 (D.D.C. 2018); *see also Sierra Club v. Jackson*, 648 F.3d 848 (D.C. Cir. 2011) (applying two factors).

1. The delay of an effective date is an action ordinarily subject to judicial review.

The delay of a rule's effective date is an agency action ordinarily subject to judicial review. The D.C. Circuit has explained that there are "narrow categories that usually satisf[y] the strictures of subsection 701(a)(2)." *Cody*, 509 F.3d at 610. Agency actions in these categories are "executive branch decision[s] involving complicated foreign policy matters," actions that "relate to an agency's refusal to undertake an enforcement action," and agency "determination[s] about how to spend a lump-sum appropriation." *Id.* (citations omitted). The delay of a regulation's effective date does not fall into any of these categories.

Rather, agency action delaying the effective date of a final rule has often been subjected to judicial review. *See, e.g.*, *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017); *NRDC v. Reilly*, 976 F.2d 36 (D.C. Cir. 1992); *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, No. 17-CV-03434-JSW, 2018 WL 1626499, at *3 (N.D. Cal. Mar. 21, 2018); *Open Communities All. v. Carson*, 286 F. Supp. 3d 148 (D.D.C. 2017); *Nat'l Venture Capital Ass'n v. Duke*, --- F. Supp. 3d ----, No. CV 17-1912 (JEB), 2017 WL 5990122 (D.D.C. Dec. 1, 2017); *Delta Air Lines, Inc. v. Exp.-Imp. Bank of U.S.*, 85 F. Supp. 3d 387 (D.D.C. 2015). Even if the "nature of the action" is characterized more specifically as a determination whether to stay a rule's effective date pending a judicial challenge, courts have likewise reviewed such agency action. *California v. BLM I*, 277 F. Supp. 3d at 1122; *Becerra v. Dep't of Interior*, 276 F. Supp. 3d 953; *Sierra Club v. Jackson*, 833 F. Supp. 2d 11.

2. The language and structure of the statute support judicial review.

The second factor in the section 701(a)(2) analysis "involves applying typical canons of statutory construction to determine whether the statute provides standards for the agency to apply and for the courts to review." *ACICS v. DeVos*, 2018 WL 1461958, at *9 (citing *Watervale Marine*

Co., Ltd. v. U.S. Dep't of Homeland Sec., 55 F. Supp. 3d 124, 138 (D.D.C. 2014)). This analysis entails looking at both the language of the text and the "statutory scheme." *See, e.g.*, *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985).

a. Section 705's "justice so requires" language provides a meaningful standard.

The text of section 705 allows an agency to delay the effective date of a regulation only when "it finds that justice so requires." 5 U.S.C. § 705. The "justice so requires" standard is sufficient to allow courts to undertake review, as the D.C. Circuit has held. In *Dickson v. Secretary of Defense*, 68 F.3d at 1404, the court of appeals considered whether section 701(a)(2) applied to decisions made by an agency pursuant to a statutory provision that allowed it to excuse a failure to timely file a request for a correction "if it finds it to be in the interest of justice," under 10 U.S.C. § 1552(b). The court rejected the government's argument that this language lacked a judicially manageable standard, noting that "[c]ourts have, in other contexts, found 'in the interest of justice' to be a reviewable standard." *Id.* at 1403 (citing *Sims v. Dep't of the Navy*, 711 F.2d 1578, 1581-83 (Fed. Cir. 1983)). In *Cody*, the D.C. Circuit again stated that statutory language providing that an agency "'may' take an action if it 'finds it to be in the interest of justice'" provides a "meaningful standard against which to judge the agency's exercise of discretion." *Cody*, 509 F.3d at 611; *see also Menkes v. Dep't of Homeland Sec.*, 486 F.3d 1307, 1313 (D.C. Cir. 2007) (favorably citing *Dickson* and finding reviewability). Those decisions apply fully to the "justice so requires" standard in section 705.[3]

[3] Defendants' contrary suggestion is based on two district court opinions interpreting a patent regulation. Defs.' Mem. at 18-19 (citing *Mobil Oil Corp. v. Dann*, 448 F. Supp. 487, 489 n.3 (D.D.C. 1978), and *Nitto Chem. Indus. Co. v. Comer*, Civ. A. No. 93-1378 (JHG), 1994 WL 872610, at *2 n.4 (D.D.C. Mar. 7, 1994)). The decisions do not hold that the regulation at issue committed a determination to an agency's unreviewable discretion. Even if they did, they could not prevail over the D.C. Circuit's later opinion in *Dickson*.

Defendants' argument that judicial review is precluded here because action under section 705 is based on the "agency's finding" that justice requires a stay, as opposed to "the objective existence" of the circumstance that justice requires a stay, relies on a misreading of precedent and is inconsistent with *Dickson*. *See* Defs.' Mem. at 17 (citing *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1513 (D.C. Cir. 1989) ("*Kreis I*")). Similar to section 705, the statute at issue in *Dickson* permitted the agency to act "if *it finds* it to be in the interest of justice." 10 U.S.C. § 1552(b), *quoted in* 68 F.3d at 1399 (emphasis added). And in *Kreis I*, while the court of appeals acknowledged the "agency finding"/"objective existence" distinction, it *rejected* the government's invocation of section 701(a)(2), holding that the statute at issue "d[id] not entirely foreclose review of the Secretary's action." 866 F.2d at 1514. The court explicitly held that the agency determination was to be measured "against the 'arbitrary or capricious' standard of the APA." *Id.* at 1515; *see also Kreis v. Sec'y of Air Force*, 406 F.3d 684 (D.C. Cir. 2005) ("*Kreis III*") (applying *State Farm* and other cases to conclude that agency's action was arbitrary and capricious). *Kreis I* thus provides no support for ED's argument that plaintiffs' invocation of the arbitrary and capricious standard is "improper." Defs.' Mem. at 20 n.4.[4]

[4] *Kreis I* and *Kreis III* also resolve defendants' argument that section 705 provides a standard of judicial review other than that set out in section 706(2) of the APA, 5 U.S.C. § 706(2), Defs.' Mem. at 20 n.4. This argument erroneously conflates the standard that guides an agency's action, with the standard of judicial review applied by courts to determine whether the agency abided by the statutory standard. Section 705 does not "provide a standard of judicial review" of an agency's stay that displaces the default standard of review for action that is arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law. *Cf. Al-Fayed v. CIA*, 254 F.3d 300, 305 (D.C. Cir. 2001) (noting that arbitrary and capricious standard is displaced by FOIA provision that explicitly directs court to conduct *de novo* review). That the statute provides a standard for the *agency* to use does not deprive this Court of authority to examine whether the agency acted arbitrarily and capriciously in applying that standard. *See Dickson*, 68 F.3d at 1404 n.12 (holding APA standard of review applicable to agency's "interest of justice").

Defendants' sole attempt to address *Dickson*, contained in a footnote, is to argue that it does not apply because section 705 is in the APA and that it would be "entirely reasonable to conclude that Congress … intended" for section 705 stays to be unreviewable, because a section 705 stay is not *explicitly* listed as a type of agency action that is reviewable. Defs.' Mem. at 20 n.3. This argument, however, does not answer the point that the D.C. Circuit in *Dickson* held that an interest of justice standard is sufficient to establish reviewability. *See Cody*, 509 F.3d at 611. It is also based on an overstatement of what section 704 of the APA actually says; the statute does not "delineate[] the types of agency actions that are reviewable." Defs.' Mem. at 20 n. 3. It simply provides that both "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704; *see also Heckler*, 470 U.S. at 828 (explaining provision). A section 705 rule is plainly a final agency action without any other mechanism for judicial review. Moreover, ED's argument ignores that, given the presumption of reviewability of agency action, the question is not what it would be "reasonable" to conclude, but whether there is clear and convincing evidence that Congress intended to preclude review. *See Overton Park*, 401 U.S. at 410; *Sluss*, 2016 WL 6833923, at *2. As to this question, the answer is plainly no.

b. The statutory scheme provides sufficient guidance to allow judicial review.

The court of appeals has instructed courts that agency action is reviewable "unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." *Robbins*, 780 F.2d at 45; *see also Beverly Health & Rehab. Servs., Inc. v. Thompson*, 223 F. Supp. 2d 73, 90 (D.D.C. 2002); *Lee v. Kemp*, 731 F. Supp. 1101, 1108 (D.D.C. 1989).

Looking at the statutory scheme as a whole, the APA imposes a basic requirement of reasoned decisionmaking on a broad range of administrative actions and contains a strong presumption of judicial review. *See, e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967). Given the legislative history of the APA, which states that to preclude APA review, a statute "must upon its face give clear and convincing evidence of an intent to withhold it," H.R. Rep. No. 79-1980, at 41 (1946), ED's theory that Congress intended to silently vest agencies with unreviewable discretion to issue a section 705 stay in passing the APA itself is implausible. *See also Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670-72 (1986) (discussing legislative history of APA). There is no "clear and convincing evidence" that Congress intended to enable agencies to suspend final legislative rules at their discretion, simply because a lawsuit was filed, without the possibility of judicial review.

Courts have also repeatedly held that, even where a statute contains broad language, a more specific standard adopted by the agency based on that broad language can demonstrate there is sufficient "law to apply" for purposes of review. *See, e.g.*, *Clifford v. Pena*, 77 F.3d 1414, 1417 (D.C. Cir. 1996); *Ctr. for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988). That several courts and administrative agencies have found section 705 to provide manageable standards, *see, e.g.*, *Sierra Club*, 833 F. Supp. 2d 11; *McCafferty v. Centerior Energy*, No. 96-ERA-6, 1996 WL 897658 (Dep't of Labor Admin. Rev. Bd. Oct. 16, 1996) (collecting cases); *Special Counsel v. Campbell*, No. CB1216920001S1, 1993 WL 301629 (M.S.P.B. Aug. 3, 1993), is thus telling.

Defendants' view of section 705 would open the door to collusive lawsuits between an agency that has soured on a rule it previously promulgated and a regulated entity that does not like the rule. The agency could "stay" the rule while slow-walking the litigation, and in the interim engage at its leisure in the notice-and-comment rulemaking required if an agency wants to "revisit"

a rule (as seems to be happening here). As this Court recently opined in vacating another attempt to delay a rule issued by the previous administration, "Elections have consequences. But when it comes to federal agencies, the Administrative Procedure Act shapes the contours of those consequences." *Nat'l Venture Capital*, 2017 WL 5990122, at *1. Because the Section 705 Rule does not fall under the narrow exception of section 701(a)(2) of the APA, it is subject to the APA's judicial review provisions, including its direction that arbitrary and capricious agency action shall be vacated, 5 U.S.C. § 706(2)(A).

B. ED was obligated to consider the four factors that courts and agencies have widely concluded embody the interests of justice.

Over the past sixty years, both courts and federal agencies have consistently relied on four factors in determining whether equity warrants a stay, both under section 705 and in other contexts. This balancing test focuses on the likelihood of success of the judicial challenge, the likelihood of irreparable injury if a stay is not granted, a balancing of harm to others that a stay would cause, and the public interest. *See, e.g.*, *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *In re Pub. Serv. Co. of N.H.*, 1 E.A.D. 389, 1977 WL 45581 at *2 (EPA Aug. 12, 1977) (citing *Va. Petroleum Jobbers* and stating, "These tests are also used by agencies in deciding whether to issue stays of their own orders."); *In re Clement*, SEC Release No. 17815, 1981 WL 38210 at *2 (May 22, 1981) (applying four factors under "justice so requires" standard for stays under Securities Exchange Act); *In re Amendment of Subpart L, Part 91*, 3 F.C.C.2d 816 (1966) (applying *Va. Petroleum Jobbers*).[5] In issuing the Section 705 Rule, ED not only failed to

[5] *See also McCafferty*, 1996 WL 897658 (collecting cases); *Campbell*, 1993 WL 301629; *In re Certain Semiconductor Chips with Minimized Chip Package Size & Prod. Containing Same*, USITC Inv. No. 337-TA-605, 2011 WL 7575646, at *24 (Nov. 2011); EPA, National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 76 Fed. Reg. 28318, 28326 (May 17, 2011); *Vulcan Power Co.*, 178 IBLA 210, 214 (Dep't of Interior, Interior Board of Land Appeals Nov. 5,

reference the four-factor analysis, but failed to demonstrate consideration of the principles of equity and justice that the factors represent.

ED's argument that it was not obliged to consider the four factors runs directly contrary to another decision of this Court, *Sierra Club v. Jackson*, 833 F. Supp. 2d at 30, and the practices of at least a dozen administrative agencies.[6] Defendants argue that the plain text of the statute does not explicitly direct agencies to utilize the four-part test, and that it requires agencies to use a *different* test from that used by courts in evaluating section 705 stay requests. This argument fundamentally misapprehends the nature of plaintiffs' arguments, the *Sierra Club* court's ruling, and the reasoning of the dozen administrative agencies that have reached the conclusion that agencies should consider the four factors.

To be sure, the statute does not explicitly direct agencies to utilize the four-part test—just as it does not direct courts to do so. Rather, as has been understood since the time of its enactment, section 705 requires both courts and agencies to conduct an analysis of the equities implicated by

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2009); FERC, Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 74 Fed. Reg. 30924, 30931 (June 29, 2009); *In re Cumulus Licensing Corp*., 16 F.C.C. Rcd. 1052, 1054 (2001); *In re Ozark Airlines, Inc.*, Order 2000-1-18, 2000 WL 38240, at *6 (Dep't of Transp. Jan. 20, 2000); *In re Dist. No. 1*, Dkt. No. MARAD-1999-6171-598, 1999 WL 33738388, at *2 (Maritime Admin. Dec. 23, 1999); *Harrison v. Stone & Webster Eng'g Grp.*, Case No. 93-ERA-44, 1995 WL 848109, at *1 (Dep't of Labor Off. Admin. App. Dec. 13, 1995); *In re Rapaport*, OTS Order No. AP 94-08, 1994 WL 169641 (Feb. 18, 1994).

[6] *See supra* note 5; *see also United States v. Frimmel Mgmt.*, 12 OCAHO 1271D, 2017 WL 413181, at *6 (Dep't of Justice, Exec. Office of Immigration Rev., Jan. 18, 2017) (noting the "law is clear" that it should apply the four factors); *In re Del. & Hudson Co.*, Dkt. No. 30965, 1995 WL 641120, at *1 (I.C.C. Oct. 30, 1995) (agencies are required to engage in four-factor analysis). We have identified one agency that has explicitly held that the four-part test does not apply to it, the Federal Aviation Administration. *See* FAA Commercial Air Tour Limitations in the Grand Canyon National Park, 65 Fed. Reg. 60352, 60355 (Oct. 11, 2000). This conclusion conflicts with the position of other Department of Transportation components. *See In re Ozark Airlines* and *In re Dist. No. 1*, *supra* note 8.

a potential stay. And courts and agencies have repeatedly found that to do so properly, they must consider the four factors.

When Congress was considering the APA, the Senate Judiciary Committee Report explained the provision that would become section 705 as follows:

> This section permits either agencies or courts, if the proper showing be made, to maintain the status quo. … The authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy.

S. Rep. No. 79-752, at 213 (1945). Similar language appears in the House Report, which also emphasizes the traditional equitable principle that relief is ordinarily "withheld in the absence of a substantial question for review." H.R. Rep. No. 79-1980 at 277. As noted in *Sierra Club*, this language discusses agency and judicial authority to grant stays in the same breath, and invokes traditional equitable principles to guide that authority. *See* 833 F. Supp. 2d at 31. At the same time, *none* of the legislative history suggests that different standards apply to section 705 stays issued by agencies and those issued by courts.

In 1947, the Attorney General affirmed the understanding that this section confers equitable authority on agencies and courts. *See* Attorney General's Manual on the Administrative Procedure Act 106 (1947). "The Attorney General's Manual on The Administrative Procedure Act is a contemporaneous interpretation of the Administrative Procedure Act. Because of 'the role played by the Department of Justice in drafting the legislation,' it deserves some deference." *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1175 n.15 (D.C. Cir. 1979) (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 546 (1978)). In that document, the Attorney General acknowledged that the section "prescribes no procedure for the exercise of the power which it confers upon reviewing courts to postpone the effective date of agency action." Attorney General's Manual at 107. The Attorney General concluded that the standards for issuing preliminary

injunctions and restraining orders "appear to be applicable to the exercise of the power conferred by" now-section 705. *Id.* The Attorney General did not suggest a different or lesser standard applied when agencies consider imposing a stay.

Thus, it was hardly controversial when courts soon began to apply what defendants refer to as the "preliminary injunction test" to requests for stays of administrative action pending judicial review. In 1958, the D.C. Circuit recognized that the courts' "customary power to stay orders under review"— the power that Congress sought to codify in section 705—requires an analysis of the four factors. *Va. Petroleum Jobbers*, 259 F.2d at 924-25. Other courts soon adopted this reasoning. *See, e.g.*, *Associated Sec. Corp. v. SEC*, 283 F.2d 773, 774 (10th Cir. 1960); *E. Air Lines, Inc v. Civ. Aeronautics Bd.*, 261 F.2d 830, 830 (2d Cir. 1958). And within years, agencies acknowledged that the four factors appropriately guided their decisions as to whether to stay the effective date of their actions pending judicial review. In 1969, for example, the FCC denied a stay of regulations relating to subscription television service, invoking the challengers' failure to meet the four factors. *See In re Amendment of Part 73 of the Commission's Rules and Regulations*, 17 F.C.C.2d 1001, 1001-02 (1969). As noted above, *see supra* notes 5 and 6, at least a dozen other agencies have followed this same standard in a range of scenarios.

Requiring both courts and agencies to utilize the same equitable standard is fully consistent with Congress's choice of words in the statutory text. Congress "legislate[s] against a background of common-law adjudicatory principles," including "equitable" ones. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1226 (2014). At the time of the APA's enactment, it was well-understood that "[u]nder the general rules of equity jurisprudence, an interlocutory injunction will not issue unless a reasonably clear case of necessity and otherwise irreparable injury is made out." *Luckenbach S. S. Co. v. Norton*, 21 F. Supp. 707, 708 (E.D. Pa. 1937); *see also Vaughan v. John C. Winston Co.*,

83 F.2d 370, 374 (10th Cir. 1936) (equity confers the power to do all "things necessary to accomplish complete justice"); *Mountain Copper Co. v. United States*, 142 F. 625, 640 (9th Cir. 1906) (noting the then "well-established doctrine" that an injunction should not be issued "whenever it would operate oppressively or inequitably, or contrary to the real justice of the case"); *Mfrs' Fin. Corp. v. Vye-Neill Co.*, 46 F.2d 146, 148 (D. Mass. 1930) (noting court's power to grant stay "to such extent as justice may require"). Thus, by using the phrase "justice so requires," Congress demonstrated an intent for agencies to exercise the same equitable authority as courts in issuing stays.

Defendants' suggestion that requiring agencies to apply the four-part test would "produce absurd results," Defs.' Mem. at 27, and impose an unworkable constraint on agencies is itself absurd. EPA, the Department of Labor, the Department of Justice, the Department of Interior, the Merit Systems Protection Board, the Securities and Exchange Commission, the Federal Energy Regulatory Commission, the International Trade Commission, the Federal Communications Commission, the Department of Transportation, the Interstate Commerce Commission, and the Office of Thrift Supervision have repeatedly applied the four factors to determine whether justice requires a stay of effective date. *See supra* notes 5-6. Each agency has managed to function properly, and parties have been able to seek a section 705 stay in the court in which they are challenging an agency rule if the agency concludes the standard has not been met. Defendants' argument that an agency that applied the equitable factors to grant a stay would effectively be conceding that its action should be set aside by the reviewing court, Defs.' Mem. at 27, is no more convincing than the suggestion that a district court's grant of a stay pending appeal under the four-factor test is a concession that its judgment should be reversed.

The Court should thus follow the *Sierra Club* decision and conclude that defendants were required to consider the four factors in evaluating whether a stay was appropriate. ED makes no effort to argue that it *did* consider these four factors, particularly the likelihood of success of CAPPS's suit on the merits, the harm to student borrowers and the public fisc caused by the delay of the four major provisions of the Borrower Defense Rule, or whether there was evidence of imminent, serious harm to regulated entities. Because the agency has not argued that its action could be sustained if these factors were considered, the Court can vacate the Delay Rule without addressing whether an agency's mere failure to invoke the four-factor standard explicitly would make ED's action invalid. *Cf. Sierra Club*, 833 F. Supp. 2d at 29 (invalidating section 705 delay for failure to invoke four-factor test). In any event, as explained in detail in plaintiffs' opening memorandum, Mem. of Points & Authorities in Supp. of Pls.' Second Renewed Mot. for Summ. J., ECF No. 56 (Pls.' Mem.) at 28-39, those factors are not met here. Accordingly, the Court should vacate the Delay Rule as arbitrary and capricious.

C. ED's conclusion that justice required a delay was arbitrary and capricious.

Even if the four-factor test does not apply to an agency's section 705 stay, an agency must engage in reasoned decisionmaking in concluding that "justice" requires a stay. Defendants' attempt to convert a "justice so requires" standard into a "when an agency thinks it would be good policy" standard ignores that "justice" has a real meaning—one inherently tied to principles of fairness. *See* "Justice," Black's Law Dictionary (10th ed. 2014). As one court recently explained:

> If the words "justice so requires" are to mean anything, they must satisfy the fundamental understanding of justice: that it requires an impartial look at the balance struck between the two sides of the scale, as the iconic statue of the blindfolded goddess of justice holding the scales aloft depicts. Merely to look at only one side of the scales, whether solely the costs or solely the benefits, flunks this basic requirement.

California v. BLM I, 277 F. Supp. 3d at 1122.

ED's only response to plaintiffs' identification of the agency's failure to demonstrate that justice requires a stay is to assert this argument is a mere "rehash" of the four factors, while refusing to defend its flawed reasoning substantively and instead claiming deference. Defs.' Mem. at 29-30.[7] But as the court recently held in *ACICS v. DeVos*, even if the Secretary's "determination is entitled to a good deal of deference, that does not mean the Secretary can make such decisions unreasonably." 2018 WL 1461958, at *11 (citing *Menkes*, 486 F.3d at 1313); *see also ASG Indus., Inc. v. Consumer Prod. Safety Comm'n*, 593 F.2d 1323, 1335 (D.C. Cir. 1979) ("In an appropriate case, an agency may defer the effective date of a regulation just as a court may defer the effective date of a decree enjoining a nuisance, provided there is justification. However, the requirement of reasoned decisionmaking has vitality as to such deferral measures."). As explained below, ED's actions were unreasonable.

1. ED failed to consider forgone benefits.

In promulgating the 2016 Rule, ED made numerous findings as to the rule's expected benefits. ED admits that these findings remain "the official policy of the Department." Defs.' Mem. at 32. Thus, ED cannot ignore them. Ignoring the benefits lost by delay is a *per se* failure "to meet the 'justice so requires' requirement of Section 705." *California v. BLM I*, 277 F. Supp. 3d at 1122. Moreover, ignoring such benefits violates the basic principle of reasoned decisionmaking that an agency is not free to ignore the relevant facts before it. *See, e.g.*, *Bayer*

[7] Plaintiffs do not disagree with ED that, as a general matter, an agency may have numerous reasons for acting. But section 705, unlike the general rulemaking provisions of the APA, allows a stay of effective date for only one reason: to avoid injustice while a challenge to a rule is being litigated. Thus, the agency cannot justify its invocation of section 705 based on a desire to revisit rules, as it explicitly did here. *See* 82 Fed. Reg. at 27622. Moreover, the equitable principles that underlie section 705, as discussed below, are inconsistent with the notion that a rule can be stayed pending the result of litigation when the government takes no action to advance that litigation, and/or when that litigation is itself stayed. The Court need not reach this issue, though, in light of ED's failure to adequately support its "justice" conclusion.

HealthCare, LLC v. U.S. FDA, 942 F. Supp. 2d 17, 24 (D.D.C. 2013); *see also Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626 (1986) ("It is an axiom of administrative law that an agency's explanation of the basis for its decision must include a rational connection between the facts found and the choice made.").

Yet in issuing the Section 705 Rule, ED completely failed to consider the forgone benefits of the 2016 Rule. The Section 705 Rule contains only one sentence about the impact of the delay on student borrowers, which relates only to the portion of the rule that changed the process by which students obtain borrower defense cancellation:

> [T]he postponement of the final regulations 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 27621. Notably, defendants point to no other passage in the Section 705 Rule that reflects consideration of the impact delay would have on borrowers. *See* Defs.' Mem. at 22-23.

ED's brief mention of the interests of borrowers does not show that the agency meaningfully considered the forgone benefits of the Rule. At best, it only restates the obvious: The old rules remain in effect. But that observation does not mean that student borrowers are not worse off than they would have been had the stay not been issued. In issuing the 2016 Rule, ED concluded that the "existing regulations" were insufficient and that the new regulations would "give students access to consistent, clear, fair, and transparent processes to seek debt relief," and reduce obstacles to pursuing borrower defense claims. 81 Fed. Reg. at 76047. And ED does not dispute the point that the cost savings identified in the Section 705 Rule represent financial harms to student borrowers. *See* Pls.' Mem. at 32-33.[8]

[8] In a footnote, defendants argue that plaintiffs' citation to materials in the underlying 2016 rulemaking for background purpose is "improper." Defs.' Mem. at 14 n.2. But a court may consider

Glaringly, the Section 705 Rule (and defendants' brief) does not address how a delay of the other provisions of the 2016 Rule would impact student borrowers—including the provision relating to class action waivers and forced arbitration, which was the only provision CAPPS sought to preliminarily enjoin. As to that provision, ED had previously stated that "prohibiting predispute arbitration clauses will enable more borrowers to seek redress in court" through individual or class actions. 81 Fed. Reg. at 75939. ED had concluded that limiting the use of arbitration clauses and class action waivers by Title IV-eligible institutions would benefit both borrowers and federal taxpayers, given the Department's findings of "widespread and aggressive use of class action waivers and predispute arbitration agreements [that] coincided with widespread abuse by schools over recent years, and effects of that abuse on the Direct Loan Program." *Id.* at 76025. In issuing the Delay Rule, ED did not acknowledge that an indefinite stay of the 2016 Rule would result in a loss of these benefits for an indefinite period of time. It also failed to acknowledge that individual borrowers' statutes of limitations periods would continue to run during any delay, meaning that harm to those borrowers caused by delay would be irreparable. *See also* Pls.' Mem. at 36.

The Section 705 Rule also makes no reference to the financial responsibility provisions contained in the 2016 Rule, much less consider how delaying them would forestall what the agency had concluded would be "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

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background information outside the administrative record where "necessary to help the court understand the reasons for the agency's action, or to ensure that the agency considered all relevant factors." *Tindal v. McHugh*, 945 F. Supp. 2d 111, 127 (D.D.C. 2013) (citing *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996), and *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285-86 (D.C. Cir. 1981)); *see also Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). The one case defendants cite does not establish otherwise, and indeed ruled that it *was* proper to consider certain relevant materials outside the Administrative Record. *Stand Up for California! v. U.S. Dep't of Interior*, 71 F. Supp. 3d 109, 119-22 (D.D.C. 2014).

76049. ED did not acknowledge that delaying these provisions would deprive borrowers of what the agency had called "early warning signs about an institution's risk for students," which it expected would allow borrowers "to select a different college, or withdraw or transfer to an institution in better standing in lieu of continuing to work towards earning credentials that may have limited value." *Id.* at 76051. It did not address the fact that delay of the Rule would cause a loss of what it deemed "protection for taxpayers as well as potential direction for the Department and other Federal and State investigatory agencies to focus their enforcement efforts." *Id.* at 76055.

As to the 2016 Borrower Defense Rule's loan repayment disclosure provision, ED failed to acknowledge the irreparable harm of depriving students and families of what it called "critical" information "they need to make well-informed decisions about where to go to college." 81 Fed. Reg. at 76018.

In short, ED did not simply fail to consider *one* of the benefits of the Borrower Defense Rule that would be forgone by delay. It failed to consider *any* of them. As a result, any conclusion that justice required a stay was not a product of reasoned decisionmaking.

2. ED failed to identify significant harm that would occur absent a stay.

A necessary precondition to a finding that justice requires a stay is the conclusion that some serious harm would occur absent a stay. The principle that an action in the interest of justice must be aimed at redressing or avoiding harm is reflected in courts' applications of other "when justice requires" standards. For example, under Federal Rule of Civil Procedure 15(a)(2), courts should freely grant leave to amend a complaint "when justice so requires." But justice does not require such leave when amendment would be futile or unnecessary—that is, where no meaningful harm would otherwise occur. *See, e.g.*, *Sai v. Dep't of Homeland Sec.*, 149 F. Supp. 3d 99, 126 (D.D.C. 2015). Likewise, Federal Rule of Criminal Procedure 33 provides that courts may vacate a

judgment and grant a new trial "if the interest of justice so requires." Although this determination is in the trial court's discretion, a new trial should not be granted without a showing of substantial, not harmless, error. *See, e.g.*, *United States v. Safavian*, 644 F. Supp. 2d 1, 8 (D.D.C. 2009).

Here, the only harms that ED cited as likely to occur if it did not issue a stay were the costs of modifying contracts to eliminate forced arbitration and class action waiver clauses, and potentially substantial costs related to the financial responsibility trigger provisions. 82 Fed. Reg. at 27621. Notably, these purported harms relate only to two of the four major provisions of the delayed 2016 Rule. Even so, ED had previously concluded that modifying contracts would take ten minutes per student, 81 Fed. Reg. at 76067, which can hardly be deemed a serious harm. As to the unspecified "substantial costs" associated with the financial responsibility triggers, ED had previously considered (and rejected) this argument when it issued the 2016 Rule. 81 Fed. Reg. at 76007-08. ED failed to acknowledge this reversal of position, contrary to the requirements of reasoned decisionmaking, and thus acted arbitrarily and capriciously. *See Encino Motorcars*, 136 S. Ct. at 2125-26; *United Student Aid Funds, Inc. v. King*, 200 F. Supp. 3d 163, 171 (D.D.C. 2016). Even if ED had acknowledged this reversal, the reversal would be irrational; As explained in plaintiffs' opening memorandum, whether any costs would be incurred *at all* is inherently speculative, as the financial responsibility provision would require only that an institution obtain a letter of credit upon the occurrence of a specified event, such as a court judgment, the imposition of a teach-out plan, or the de-listing of its stock on an exchange. *See* Pls.' Mem. at 31; 81 Fed. Reg. at 76073-74. It is far from obvious why requiring financially precarious institutions to incur whatever costs are required to demonstrate financial responsibility before receiving more federal student loan dollars is contrary to the interests of justice, yet ED failed to offer any reason for its contrary conclusion—a particularly egregious omission in light of ED's lengthy explanation, in

promulgating the 2016 Rule, that these provisions provide important protections to the public fisc, taxpayers, and student borrowers.[9]

3. ED's failure to disclose its position on the length of the delay was arbitrary and capricious.

As discussed in further detail below, ED now claims that, as a matter of law, the HEA's master calendar requirement means that the effective date of an ED rule can *only* be July 1, and thus that, because the Section 705 Rule prevented the 2016 Rule from going into effect on July 1, 2017, the earliest that Rule can go into effect is July 1, 2018. If the now-stayed *CAPPS* litigation were still pending on that date (including appeals, presumably), under this "interpretation" of the master calendar requirement, the 2016 Rule would not go into effect until July 1, 2019, at the earliest. As explained below, plaintiffs dispute that such an interpretation has any basis in the text of the statute. But if ED is to be taken at its word that this "interpretation" of the master calendar requirement is "longstanding" (although it never before appeared in any public document), ED's failure to mention it in discussing the impact of issuing a section 705 stay was arbitrary and capricious. That a stay pending judicial review would, under ED's interpretation, last a minimum of one year, even if the underlying litigation were dismissed in three weeks, would obviously be germane to the inquiry whether justice required such a lengthy stay.

[9] Any other harm identified by amicus in support of defendants is irrelevant, in light of the well-established principle that a court only considers the rationale provided by the agency at the relevant time in determining whether the agency engaged in reasoned decisionmaking. *See Vermont Yankee*, 435 U.S. at 549 ("when there is a contemporaneous explanation of the agency decision, the validity of that action must stand or fall on the propriety of that finding").

D. Because ED's stay of the effective date was not authorized by section 705, the stay is procedurally invalid.

Defendants misunderstand plaintiffs' argument as to the applicability of the procedural requirements of the HEA and section 553 of the APA, 5 U.S.C. § 553. As plaintiffs' opening brief states: "Because ED's action cannot be justified as a rational application of section 705, its delay of the Rule's effective date could be sustained only if it had followed the notice-and-comment procedures set forth in the APA, as well as the negotiated rule-making precursors required by the HEA, 20 U.S.C. § 1098a. It indisputably failed to do so." Pls.' Mem. at 41. Defendants' argument that negotiated rulemaking and notice and comment are not required for a valid exercise of section 705 authority, Defs.' Mem. at 32-35, is thus a non sequitur.

ED's argument that its "notice" is not a "rule" under the APA because it is merely "temporarily postponing the effective date of agency action," Defs.' Mem. at 33, is foreclosed by D.C. Circuit precedent, cited in plaintiffs' opening brief and unacknowledged by defendants. In *Clean Air Council v. Pruitt*, 862 F.3d 1, 8-9 (D.C. Cir. 2017), the court of appeals held that a stay of the effective date of a rule is a substantive rule subject to the notice-and-comment requirements of the APA, unless another statute permits it to be issued in some other manner. This holding is consistent with decades of case law establishing that a change in a rule's effective date is a substantive revision. *See Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983); *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 815-16 (D.C. Cir. 1983); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981); *see also NRDC v. Abraham*, 355 F.3d 179, 194, 203 (2d Cir. 2004); *NRDC v. U.S. EPA*, 683 F.2d 752, 761-64 (3d Cir. 1982). ED's claim that the stay of the 2016 Rule did not "produce significant effects on any private interests," Defs.' Mem. at 34, is contrary to *Clean Air Council*, *see* 862 F.3d at 7 (explaining that a stay "also affects regulated parties' 'rights or obligations'"). It is also wrong. The stay benefited the regulated industry and

harmed student borrowers, as explained above. Notably, when ED issued the Section 705 Rule, it called it a "final rule." *See* 82 Fed. Reg. at 27621.

Defendants also suggest that ED is required to utilize the negotiated rulemaking requirements of 20 U.S.C § 1098a only when it "proposes" rules, and that it here proceeded straight to a final rule. Defs.' Mem. at 36-37 n.13. But if ED could evade the negotiated rulemaking requirement by skipping the notice-and-comment requirement, it could choose to forgo both requirements on its whim, notwithstanding the HEA and APA. Moreover, as noted above, the Section 705 Rule should have proceeded through notice and comment, and thus, even under Defendants' circular argument, negotiated rulemaking was required. In addition, ED's argument fails to address a key sentence of section 1098a: "All regulations pertaining to this subchapter that are promulgated after October 7, 1998, shall be subject to a negotiated rulemaking." 20 U.S.C. § 1098a(b)(2). This statutory provision is not limited to those regulations that are proposed via notice and comment. Thus, because the Section 705 Rule was a regulation pertaining to Title IV of the HEA and was promulgated after October 7, 1998, it was subject to the negotiated rulemaking requirement, absent good cause.

II. The 2018 Delay Rule is substantively and procedurally invalid.

Defendants do not dispute that the primary stated purpose and effect of the 2018 Delay Rule, which changes the 2016 Borrower Defense Rule's effective date to July 1, 2019, is to block that rule from ever going into effect. Each of the three justifications for the 2018 Delay Rule ED cites in its brief —"the 'timing of the negotiated rulemaking,' 'the effect of the master calendar requirement,' and the desire to mitigate regulatory confusion"— reflects that purpose. Defs.' Mem. at 36 (quoting AR at 7). But defendants do not cite a *single* case where a court has upheld the delay of an effective date based solely on a generic intent to "revisit" a rule, and they cannot

meaningfully distinguish cases to the contrary. Moreover, the 2018 Delay Rule relied on an illogical discussion of the consequences of delay, unsupported by the record. Further, ED's argument that it had good cause to evade the specific HEA requirements that contemplate a lengthy process for revising rules, simply because Congress' prescribed procedures stand in the way of its policy goals, expands the narrow good cause exception beyond recognition.

A. ED's reasoning was arbitrary, capricious, and contrary to law.

"[D]elaying [a] rule's effective date" is "tantamount to amending or revoking a rule." *Clean Air Council*, 862 F.3d at 6. Accordingly, as discussed above, the delay of an effective date of a rule is subject to the same requirements of reasoned decisionmaking as any other substantive rule, and courts frequently review such rules for compliance with those requirements. *See, e.g.*, *California v. BLM II*, 286 F. Supp. 3d at 1063-70 (applying *State Farm* to delay rule); *see also Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal*, 662 F.2d 1, 14 (D.C. Cir. 1981) (examining whether delay of effective date was arbitrary and capricious); *Open Communities All.*, 286 F. Supp. 3d at 173 (concluding agency delay of implementation of rule was arbitrary and capricious). Indeed, for decades, courts have held that agencies cannot escape the requirements of the APA by simply "delaying" rules instead of revoking them. *See* Pls.' Mem. at 43-44 (collecting cases); *see also Pub. Citizen v. Steed*, 733 F.2d at 98 ("Although the agency's characterization may provide some guidance in determining the nature of the challenged action, it is the substance of what the agency has purported to do and has done which is decisive."). Here, however, ED has failed to comply with the APA's requirement of reasoned decisionmaking.

1. The desire to revise a rule is not a sufficient basis for delay.

The mere fact that ED wants to change the 2016 Rule is not a sufficient basis for delaying its effective date. *See, e.g.*, *California v. BLM II*, 286 F. Supp. 3d at 1064 (agency "cannot use the

purported proposed future revision, which has yet to be passed, as a justification for the [delay rule]"). ED's claim that it did not need to provide good reasons for the 2018 Delay Rule, or explain the inconsistencies with the agency's prior stated positions, because the delay of the effective date is only "limited and temporary," must fail. Even a "temporary suspension" must be supported by "good reasons," and, "[t]o the extent that [an agency's] reasoning contradicts the reasoning underlying the [initial rule], [the agency] must be prepared to provide the requisite good reasons and detailed justification." *California v. BLM II*, 286 F. Supp. 3d at 1064.

ED argues that *California v. BLM II* is "materially different" because, there, the court found the "agency's concerns appeared to rest on factual findings that contradicted those underlying the [initial rule] but did not provide any contrary facts to support those concerns." Defs.' Mem. at 38. But ED's discussion of the benefits of delay suffers from precisely that same flaw, as further explained below. Moreover, ED cannot evade the reasoned decisionmaking requirement by providing no reason at all. *See Encino Motorcars*, 136 S. Ct. at 2125 (noting basic requirement "than an agency must give adequate reasons for its decisions"); *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001) ("A fundamental requirement of administrative law is that an agency set forth its reasons for decision.").

Public Citizen v. Steed compels the same result. There, the D.C. Circuit examined a "suspension" rule premised on the notion that the delayed regulations needed to be revisited, and found that the agency failed to sufficiently explain this reversal from its previous position. 733 F.2d at 99-100. ED suggests that *Steed* is distinguishable because the 2018 Delay Rule is "expressly limited to one year," but it fails to explain why that distinction is meaningful. Even if ED had not made clear that it intends to delay the rule indefinitely, *see, e.g.*, 83 Fed. Reg. at 6464 (explaining rule is designed to prevent 2016 Rule from becoming effective before new,

hypothetical rules take effect), the facts in *Steed* are analogous to those here. There, the delay of the rule at issue was a "complete reversal of [the agency]'s prior position," "[h]owever permanent *or impermanent* the suspension" was. 733 F.2d at 98 (emphasis added).

While ED strains to distinguish the cases cited by plaintiffs in their opening brief, it cannot point to a single decision where a court has deferred to an agency's delay of a rule based on bare invocation of potential revision. The two unrelated cases it cites have nothing to do with this case. *McKinney v. McDonald*, 796 F.3d 1377 (Fed. Cir. 2015), *cited in* Defs.' Mem. at 39, concerned an agency's decision to set a delayed effective date as part of the *initial* rulemaking. It did not involve an agency reversal of position, and the agency action there was fully explained. *Mid-Tex Electric Cooperative, Inc. v. FERC*, 822 F.3d 1123, 1132-34 (D.C. Cir. 1987), *cited in* Defs.' Mem. at 39-40, concerned whether an agency was justified in proceeding without notice and comment in issuing an interim rule after vacatur and remand by a court—an issue not presented here. The rule at issue in *Mid-Tex* is, in any event, easily distinguishable. As this Court recently explained in rejecting the government's argument that *Mid-Tex* was relevant to a challenged delay rule, the *Mid-Tex* court only "allowed FERC to fill the void [left by the earlier vacatur] rather than leave the agency without *any* rule or guidance in place." *Nat'l Venture Capital*, 2017 WL 5990122, at *11. As in *National Venture Capital*, "[t]here is no such risk in this case." *Id.* Absent the 2018 Delay Rule, the 2016 Rule would go into effect.

This distinction between *Mid-Tex* and this case highlights another arbitrary aspect of ED's decisionmaking: ED insists that the 2016 Rule that would go into place absent delay remains "the official policy of the Department." Defs.' Mem. at 32. It is irrational for an agency to (1) assert a rule remains the official policy of the Department; (2) refuse to identify reasons why the rule should not be the official policy of the Department; and (3) insist that it would be calamitous for

the official policy of the Department to go into effect because it might not remain the official policy of the Department in the future.

ED's claimed need for "clarity and consistency" is not an independent rationale for the 2018 Delay Rule, as it is premised on the assumption that the agency will revoke the 2016 Rule in the future. *See* Defs.' Mem. at 40 (citing agency's desire to avoid "three separate sets of standards" though no third set of standards has even been proposed). Not only is a potential rule change always possible, defendants have no response to the argument that the interest in "clarity and consistency" is sufficiently served by the properly-applied master calendar requirement and the HEA, not a series of delay rules that evade the rulemaking requirements of that statute. *See* Pls.' Mem. at 46. Clarity and consistency would be served by allowing the detailed, considered 2016 Rule go into effect. Nor do defendants explain —in either the 2018 Delay Rule or their opposition brief—why it is appropriate to disrupt the plans of student borrowers who relied on the 2016 Rule going into effect *See* Pls.' Mem. at 46 (citing *Nat'l Venture Capital*, 2017 WL 5990122, at *11). The Court should thus vacate the 2018 Delay Rule in light of ED's failure to provide a sufficient, legitimate, and reasoned explanation for its action.

2. ED acted arbitrarily and capriciously by relying on a poorly-reasoned analysis of the effects of delay and costs of inaction.

In their complaint and opening brief, plaintiffs argued that ED's reliance on its analysis of the impacts of further delay, and the costs associated with not issuing a delay, was arbitrary and capricious, both because the analysis was illogical and because it rested on findings that contradicted the agency's prior stated position, without explanation. Thus, the agency failed to "examine[] the relevant data and articulate[] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 611 (D.C. Cir. 2017) (quoting *State Farm*, 463 U.S. at 43).

Defendants try to deflect the review by arguing, erroneously, that plaintiffs are seeking to challenge a cost-benefit analysis or to require compliance with an executive order. But the cases cited by defendants concerning the reviewability of cost-benefit analyses are inapposite. It is well-settled that when an agency chooses to rely on costs and benefits as the reason for an action, those costs and benefits are subject to review, just as any other reason put forth by the agency is. *See, e.g.*, *Nat'l Ass'n of Home Builders v. EPA*, 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."); *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984) (stating "if data in the regulatory flexibility analysis—or data anywhere else in the rulemaking record—demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, 5 U.S.C. § 706(2)(A), the rule cannot stand"). Here, in promulgating the 2018 Delay Rule, ED explicitly concluded that the benefits of delay to regulated entities outweighed the harms to students, and relied on this conclusion to justify the delay. *See, e.g.*, 83 Fed. Reg. at 6461, 6462, 6464, 6467. Indeed, in their brief, defendants argue that this Court should rely on ED's "extensive discussion of the effects of the delay, as well as an accounting statement," to uphold the 2018 Delay Rule. Defs.' Mem. at 37. Accordingly, Plaintiffs properly may rely on shortcomings in the "extensive discussion" to demonstrate why the 2018 Delay Rule fails to meet the requirements of reasoned decisionmaking under the APA.

Air Transport Ass'n of America v. FAA, 169 F.3d 1 (D.C. Cir. 1999), discussed in defendants' brief (at 41), concerned an entirely different issue. There, the court of appeals expressly did *not* reject the petitioner's argument that the action was arbitrary and capricious on the grounds "that the FAA did not adequately weigh the costs of this project against the benefits." *Id.* at 8. Its only holding was that the petitioner could not bring a claim that the agency was required

to abide by Executive Order 12893 and failed to do so. *Id*. Defendants point to *Air Transport Association* to argue that a plaintiff cannot claim that the failure to abide by a non-reviewable executive order constitutes arbitrary and capricious action under the APA, but plaintiffs make no such claim here. Indeed, whether defendants' analysis complied with the executive order is completely irrelevant to plaintiffs' argument. Instead, as in several cases cited by defendants, plaintiffs ask the Court to consider whether the analysis the agency relied on in issuing the rule was supported by the record. *See, e.g.*, *Fla. Bankers Ass'n v. U.S. Dep't of Treasury*, 19 F. Supp. 3d 111, 122-23 (D.D.C. 2014) (examining whether IRS's estimates as to impact of rule complied with *State Farm*), *vacated on other grounds*, 799 F.3d 1065 (D.C. Cir. 2015).

On the merits, ED's rebuttal to the identified flaws in the agency's reasoning fails as well. First, as plaintiffs have explained, it was inconsistent for ED to dismiss the forgone benefits of the 2016 Rule as merely temporary, while basing its estimate of savings to the regulated industry on the presumption that the 2016 Rule will be revoked. *See* Pls.' Mem. at 47. ED cannot label the delay temporary and disclaim preordaining results of future rulemaking on the one hand, and then presume the 2016 Rule's permanent revocation on the other. ED's only response is that it was appropriate to "factor in the *likelihood* that the rule might be altered or amended." Defs.' Mem. at 44 (emphasis in original). But ED does not point to anything in the administrative record that evaluates that likelihood: It does not identify flaws in the 2016 Rule or provide any reason why the agency is acting contrary to its "official position" that the 2016 Rule represents a lawful and appropriate policy. The 2018 Delay Rule is thus impermissibly based on "inconsistent assumptions to inflate [ED's] calculation of the net benefits." *California v. BLM II*, 286 F. Supp. 3d at 1069.

Second, as plaintiffs have explained, ED's claim that the pre-existing regime and "other existing protections for borrowers" like oversight by state regulators provided students with

adequate protections from predatory practices, 83 Fed. Reg. at 6461, is inconsistent with the position taken in the 2016 Rule (and indeed with the entire factual predicate for the 2016 Rule), and ED's failure to acknowledge and explain this change of position is arbitrary and capricious. *See, e.g.*, *Encino Motorcars*, 136 S. Ct. at 2125-26; *see also* Pls.' Mem. at 48-49. Defendants' response is simply to point to other parts of the 2018 Delay Rule that acknowledge that the 2016 Rule had "some" benefits. But those statements do not change the fact that ED's 2018 action expressly relied on a conclusion—"that borrowers will [not] be significantly harmed" by delay because the pre-existing regime sufficiently protected them, 83 Fed. Reg. at 6460-61—that is contrary to the factual findings in the 2016 Rule. *See* Pls.' Mem. at 48-49. It also fails to respond to the contrary comments submitted in the 2018 rulemaking record. *See id.* at 49.

Finally, plaintiffs challenged ED's cursory consideration of the permanent harms to individual borrowers that result from the expiration of statutes of limitations during the period of delay. *See* Pls.' Mem. at 49-50. ED's defense of the delay of the forced arbitration and class action waiver provisions of the 2016 Rules rests on its speculation that this Court would find those provisions unlawful in the *CAPPS* case—what it now refers to as its "assessment of the litigation risk." Defs.' Mem. at 47. But ED's cursory assertion of "litigation risk" is insufficient, as it is entirely unreasoned. *See, e.g.*, *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 430 (E.D.N.Y. 2018). In *NAACP v. Trump*, --- F. Supp. 3d ---, No. 17-1907(JDB), 2018 WL 1920079 (D.D.C. Apr. 24, 2018), this Court held that "the agency's prediction regarding the outcome of threatened litigation over DACA's validity" was insufficient to justify the agency's action. *Id.* at *22-23. Here, ED did not even provide an explanation for the Court to review. ED's bald prediction that its rule might be set aside is not sufficient to meet the requirements of reasoned decisionmaking.

Additionally, ED's assertion that this Court was "likely" to strike down the forced arbitration and class action waiver provisions of the 2016 Rule is inconsistent with its reasoning in the 2016 Rule, which discussed case law at length and concluded that the provisions were lawful. *See* 81 Fed. Reg. at 76022-24. At a minimum, ED was required to acknowledge its previous conclusion and explain its about-face. *See Encino Motorcars*, 136 S. Ct. at 2125-26; *Batalla Vidal*, 279 F. Supp. 3d at 431. ED's argument that its conclusion as to "litigation risk" is not a reversal of the position set forth in the 2016 Rule because it is only promulgating a "limited delay," *id.* at 47-48, is a non sequitur and, as discussed above, is inconsistent with precedent, *see, e.g.*, *Pub. Citizen*, 733 F.2d at 98; *California v. BLM II*, 286 F. Supp. 3d at 1064, as well as with the agency's expressed determination to prevent the provisions from *ever* going into effect (notwithstanding that they continue to reflect its official policy).

3. A rule premised on two unlawful rules is arbitrary and capricious.

Plaintiffs have also argued that the 2018 Delay Rule must be vacated to the extent it incorporates each of the other two unlawful rules. ED responds only in a footnote, suggesting that the issue should be the subject of yet more briefing. *See* Defs.' Mem. at 48 n.20. ED's failure to respond to the point reveals the weakness of its position, and the Court should deem plaintiffs' point conceded by defendants.[10] *See Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) ("It is well understood in this Circuit that when a [party] files an opposition to a dispositive motion and addresses only certain arguments raised by the [other party], a court may treat those arguments that the [party] failed to address as conceded."); *see also Lockhart v. Coastal Int'l Sec., Inc.*, 5 F. Supp. 3d 101, 108 n.4 (D.D.C. 2013) (collecting cases).

[10] Defendants' suggestion of further briefing is a blatant attempt to further delay a case about delay that has already been pending for nearly a year.

In any event, ED's suggestion that the 2018 Delay Rule is not based on the Section 705 Rule and the IFR is inconsistent with ED's position in other sections of its brief, and with the point of the 2018 Rule itself. As ED states, ED based the 2018 Delay Rule, in part, on "the effect of the master calendar requirement." Defs.' Mem. at 36. Thus, if ED's interpretation of the master calendar requirement is contrary to law, as plaintiffs argue below, *infra* at part III.A, a rule based on that interpretation cannot stand. The 2018 Delay Rule also presumed the lawfulness of the Section 705 Delay Rule and incorporated its flawed reasoning. *See, e.g.*, 83 Fed. Reg. at 6462. If that rule had not been issued, the factual predicate for the 2018 Delay Rule—that first coming into compliance with the 2016 Rule in 2018 would be "burdensome" on the regulated community—would not exist.

B. ED lacked good cause to evade the HEA's negotiated rulemaking requirement.

ED does not dispute that, absent good cause, it could not issue the 2018 Delay Rule without completing negotiated rulemaking required by the HEA, 20 U.S.C. § 1098a. ED's argument for good cause continues to be that it would not be able to achieve its desired policy outcome if it were required to follow the procedures required by law, because those procedures would take a long time. That is not good cause. As one district court recently explained, "[a] new administration's simple desire to have time to review, and possibly revise or repeal, its predecessor's regulations falls short of th[e] exacting [good cause] standard." *Pineros y Campesinos Unidos del Noroeste v* 2018 WL 1626499, at *3 (citing *Clean Air Council*, 862 F.3d at 9); *see also NRDC v. U.S. EPA*, 683 F.2d at 765 (finding agency lacked good cause where only "reason for failing to comply with the APA" in delaying rule was the approach of its effective date). Under well-established D.C. Circuit precedent, an impending deadline (here, the effective date of the rule) does not provide an agency with good cause to dispense with required procedure. *See Union of Concerned Scientists*

v. NRC, 711 F.2d 370, 382 (D.C. Cir. 1983); *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d at 920; *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981).

ED concedes that the HEA expressly incorporates the narrow "good cause" exception contained in the APA, 20 U.S.C. § 1098a(b)(2). Yet, without citation, ED argues that the "good cause" exception should be more forgiving under the HEA, because of the "particular administrative burdens associated with negotiated rulemaking." Defs.' Mem. at 49. But if Congress wanted to provide broader exceptions to the negotiated rulemaking requirement in light of its "administrative burdens," it would have done so; instead, it expressly directed that the only exceptions to the negotiated rulemaking requirement were those contained in the APA.

None of the impracticability cases cited by ED are relevant, and none have found an agency has good cause to delay a validly-promulgated rule without complying with procedural requirements. To the contrary, case after case has found otherwise. *See, e.g.*, *Nat'l Venture Capital*, 2017 WL 5990122, at *8-11; *NRDC v. U.S. EPA*, 683 F.2d at 765. ED's claim that the "limited" nature of the 2018 Delay Rule somehow alters the good cause analysis is precluded by D.C. Circuit precedent. *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012). Indeed, if ED were correct that a rule of limited effect was somehow exempt from the standard good cause analysis, "the good cause exception would soon swallow" the statutory procedural requirements. *Id.* (quoting *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145 (D.C. Cir. 1992)).

ED cites the correct standard for impracticability—a basis for not undertaking required procedures where "due and required execution of the agency functions would be (unavoidably) prevented" by doing so. *N.J., Dep't of Envtl. Prot. v. U.S. EPA*, 626 F.2d 1038, 1043 (D.C. Cir. 1980), *cited in* Defs.' Mem. at 51. But ED would not have been prevented from engaging in "the due and required execution" of its functions by the 2016 Rule going into effect, and, perhaps for

that reason, it did not argue that position in its notice of waiver of negotiated rulemaking. *See* 82 Fed. Reg. at 49157.

ED points to *Clean Air Council* for the proposition that an agency has "broad discretion to reconsider a regulation at any time." Defs.' Mem. at 51 (citing 862 F.3d at 8). But this argument misunderstands the point of *Clean Air Council* and, in particular, the paragraph containing the quoted language, which makes clear that an agency's "broad discretion" is constrained by statutory procedural requirements. 862 F.3d at 8. Here, the negotiated rulemaking requirement of the HEA is one such requirement. Congress has decided that ED cannot change regulations quickly. ED may not disregard that congressional mandate because it prefers otherwise. *See, e.g.*, *City of Arlington v. FCC,* 569 U.S. 290, 297 (2013) (agencies' "power to act and how they are to act is authoritatively prescribed by Congress"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (agency rulemaking "must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes").

III. The Interim Final Rule is substantively and procedurally invalid.

ED's October 2017 Interim Final Rule announced that the 2016 Rule could not take effect until July 1, 2018, based on the HEA's master calendar requirement. 82 Fed. Reg. at 49115-16 (citing 20 U.S.C. § 1089(c)(1)). At the time, ED did not purport to be exercising discretion in interpreting the HEA, nor did it suggest the statute was ambiguous. It simply stated, as a matter of law, that the master calendar requirement compelled a "July 1 Only" rule for the effective date of Title IV rules. Thus, the only way the IFR can be upheld is if the HEA actually contains such a requirement. Because it does not, both ED's justifications for the substance of the IFR and its excuses for failing to comply with the APA's and HEA's procedural rulemaking requirements in adopting the IFR fail.

A. The Interim Final Rule is arbitrary, capricious, and otherwise contrary to law.

The IFR was purportedly based on one and only one justification: that the HEA unambiguously prohibits rules promulgated under Title IV from taking effect on any day other than the first date of an award year (i.e., July 1). As ED concedes, the plain text does not contain any such requirement. Even if the Court were to conclude the statute was ambiguous on this issue, as ED now claims for the first time in litigation, ED's failure to ever grapple with this ambiguity, or the impacts of its chosen interpretation in this case, is arbitrary and capricious.

1. The agency's view of what the master calendar provision requires merits no deference.

ED claims that its pronouncement in the IFR that the statute imposes a "July 1 Only" rule is entitled to *Chevron* deference. As explained in plaintiffs' opening brief, however, this case does not implicate *Chevron*. Pls.' Mem. at 55-56. As the D.C. Circuit has explained in numerous cases, "[d]eference to an agency's statutory interpretation 'is only appropriate when the agency has exercised its own judgment,' not when it believes that interpretation is compelled by Congress." *Arizona v. Thompson*, 281 F.3d at 254 (quoting *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169 (D.C. Cir. 1986)); *see also Sec'y of Labor v. Nat'l Cement Co. of Cal.,* 494 F.3d 1066, 1073 (D.C. Cir. 2007) (declining to accord agency's litigating position *Chevron* deference where the agency had treated the statute as unambiguous and interpreted it accordingly); *Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5 (D.D.C. 2013) (same); *cf. PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 794 (D.C. Cir. 2004) (noting agency cannot invoke *Chevron* nor any other canon of deference where agency concluded statute "plainly meant what [it] assumed").

Attempting to distinguish this line of cases, ED accuses plaintiffs of "confus[ing] discretion in interpreting a statute with discretion to act in light of the agency's interpretation." Defs.' Mem. at 54. *Nowhere* in the IFR, however, did ED purport to be exercising "discretion in interpreting a

statute." Even if ED *now* contends that it was opining on the meaning of an ambiguous statute, an agency is not entitled to deference based on *post hoc* rationalizations for action, raised for the first time in litigation, which appear nowhere in the administrative record. *See, e.g.*, *Overton Park*, 401 U.S. at 419. "An agency's action must be upheld, if at all, on the bases articulated by the agency itself, not those articulated after the fact by its lawyers." *Milk Indus. Found. v. Glickman*, 949 F. Supp. 882, 895 (D.D.C. 1996) (quoting *State Farm*, 463 U.S. at 50).

The scenario here is exactly the same as the ones presented in *Arizona v. Thompson*, *National Cement*, and *American Petroleum Institute*. In each, the agency took an action based on a statement of what a statute required, without acknowledging any ambiguity or suggesting it was engaging in congressionally delegated gap-filling. Then, when its view of the statutory requirement was challenged in court, the agency invoked *Chevron* and claimed ambiguity. The court in each case declined to defer to the agency's interpretation. In short, *Chevron* deference is limited to "those instances when an agency recognizes that the Congress's intent is not plain from the statute's face." *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006). The agency did not do so here.

In addition, nowhere in the plethora of legislative history cited by defendants is there any indication that Congress intended to delegate to ED the question of whether the statute allows rules to go into effect on days of the year other than July 1. Defendants' citation to ED's "broad power to implement Department programs, including federal student aid programs," Defs.' Mem. at 38, is inapposite. The question is not whether ED has broad authority in promulgating regulations to set effective dates; it is whether ED has broad authority to decide what the plain language of 20 U.S.C. § 1089 mandates. It does not.

Because the conditions for *Chevron* deference are absent, the only question before the Court is whether a "July 1 only" policy for effective dates "is actually compelled by statute." *Arizona*, 281 F.3d at 254. That question "is a question of law, which [courts] review de novo." *Id.*

2. ED's reading of the master calendar provision is incorrect.

a. The plain text does not impose a "July 1 Only" Requirement.

The plain language of the master calendar provision does not support ED's reading. The relevant language is:

> Except as provided in paragraph (2), any regulatory changes initiated by the Secretary affecting the programs under this subchapter that have not been published in final form by November 1 prior to the start of the award year shall not become effective until the beginning of the second award year after such November 1 date.

20 U.S.C. § 1089(c)(1). As plaintiffs have explained, the phrase "until the beginning of the second award year" can only mean the "the beginning of the second award year" is the *earliest* possible date on which a rule could take effect. To read that phrase otherwise would change the word "until" to "only at." Pls.' Mem. at 53-54. Defendants do not explain how the statutory language could mean anything else. Indeed, they concede that the word "until" "shows that the statute does not *explicitly* provide that regulations can be implemented only at the beginning of the award year." Defs.' Mem. at 56. This concession should end the inquiry, because the IFR is premised on ED's claim that the statute did exactly that.

Nonetheless, defendants argue that the plain reading of the text is "strained" because it makes "superfluous" the phrase "beginning of the." Defs.' Mem. at 56. But "[t]he canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 106 (2011) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Defendants offer no such competing interpretation, acknowledging that the plain text cannot be read to create a "July 1 only" requirement. Their preferred "interpretation"

relies solely on "other statutory language and objectives," untethered to the text, and would require the Court to *disregard* the meaning of the word "until." But under no level of deference would the Court be free to interpret a statutory provision contrary to its plain text on the basis that somewhere in the penumbras of the HEA, Congress meant something other than what it said. Where the text of the statute is clear, "the canon against surplusage cannot dictate a different interpretation." *Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998, 1003 (D.C. Cir. 2016).

Even if the canon were relevant, specificity does not equal surplusage. Stating that the earliest an event can occur is "the beginning of the next year" as opposed to "the next year," provides precision and eliminates ambiguity. Moreover, the clause at issue follows one that refers to a nonoccurrence by "November 1 prior to *the start of the award year*" (emphasis added). Only if publication does not occur by this time does the next clause come into play. Thus, syntactically, it would have been strange *not* to say "the start of" or "the beginning of the second award year" in the clause that immediately followed.

b. The agency's attempts to create ambiguity where there is none fail.

Unable to point to any textual provision that could create a "July 1 only" requirement, defendants rely heavily on a variety of sources beyond the text to suggest that the statute means something other than what it says. But as defendants acknowledge in another section of their brief, courts do not "read[] a phrase into the statute when Congress has left it out." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993), *quoted in* Defs.' Mem. at 26. Defendants agree that the only requirement set out in the plain text of the statute is that "regulations cannot be implemented before" the beginning of the second award year. Defs.' Mem. at 56. That Congress created one explicit limitation on an HEA rule's effective date does not indicate that Congress *sub silentio* imposed *other* limitations—indeed, the canon of *expressio unius est exclusio alterius* suggests the

contrary; "[W]hen Congress enacts specific limitations in a general statute it is presumed to allow other circumstances not included in those limitations," *Sierra Club*, 833 F. Supp. 2d at 25 (quoting *Alegria v. District of Columbia*, 391 F.3d 262, 266 (D.C. Cir. 2004)); *cf. Detweiler v. Pena*, 38 F.3d 591, 594 (D.C. Cir. 1994) ("Where a statute contains explicit exceptions, the courts are reluctant to find other implicit exceptions.").

A statute is not ambiguous simply because it would have been reasonable for the statute to have been drafted to say something else. "[P]olicy considerations cannot create an ambiguity when the words on the page are clear." *SAS Inst. Inc. v. Iancu*, --- S. Ct. ---, No. 16-969, 2018 WL 1914661, at *8 (Apr. 24, 2018). Thus, none of the explanations defendants advance for why it might be good to have a "July 1 only" rule bear on whether the statute is ambiguous. Courts "do not read legislative history to *create* otherwise non-existent ambiguities." *Air Transp. Ass'n of Canada v. FAA*, 323 F.3d 1093, 1096 (D.C. Cir. 2003); *see also Am. Fed'n of Gov't Employees, AFL-CIO, Local 3669 v. Shinseki*, 709 F.3d 29, 35 (D.C. Cir. 2013); *Goldring v. District of Columbia*, 416 F.3d 70, 74 (D.C. Cir. 2005). Thus, the legislative history to which defendants point, Defs.' Mem. at 57-58, to show that Congress was *generally* concerned about notice and the simplification of the federal student financial aid application process is irrelevant. *See U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004) ("resort to legislative history is not appropriate in construing plain statutory language"); *see also SAS Inst.*, 2018 WL 1914661, at *9 (court may not "defer to an agency official's preferences because [it] imagine[s] some 'hypothetical reasonable legislator' would have favored that approach").

Defendants' argument that it would be disruptive for this Court to vacate their unlawful stays in the middle of the year is relevant only with respect to the appropriate remedy. *Cf.* Pls.' Mem. at 60-62 (addressing relief). It has no bearing on what the statute requires; there is no

evidence the statute was designed with the goal of limiting judicial remedies when courts conclude ED acted unlawfully. As set forth in plaintiffs' opening memorandum, the objectives of notice and certainty are served by the plain-language construction of the master calendar rule, and a contrary construction would allow the agency to irreversibly *deprive* interested parties of notice—as it did here by issuing a defective section 705 rule. *See* Pls.' Mem. at 56.[11] From November 1, 2016, through June 2017, student borrowers across the country relied on the legal requirement that new rules would go into effect on July 1, 2017—rules that would make their lives better. A conclusion that ED can suddenly, without notice and comment and at the last minute, announce a stay that automatically delays those benefits for a full year is not consistent with the "notice-giving and certainty-promoting objectives" ED touts. Defs.' Mem. at 56.

Finally, ED's reliance on its "longstanding policy and practice of implementing Title IV regulations only at the beginning of an award year," *id.* at 59, is also irrelevant to determining what the statute *mandates*. ED's citation to *Esquire, Inc. v. Ringer,* 591 F.2d 796 (D.C. Cir. 1978) is inapposite, since that case involved an agency's interpretation of a regulation, not a statute. ED's practice does not demonstrate that the *statute* requires that practice. Indeed, none of the rules cited by defendants includes a statement that ED interprets the master calendar provision to prohibit an effective date other than the day an award year starts. The suggestion that ED's October 30, 2015 Program Integrity and Improvement rule did so, Defs.' Mem. at 60-61, is false. There, ED explained that it could not lengthen the comment period, because if it had, it would not have been

[11] Defendants' policy arguments presume the validity of the Section 705 Rule. Defs.' Mem. at 61. But a discussion as to what would happen if the Section 705 Rule were vacated immediately necessarily must assume the invalidity of the Section 705 Rule. *See*, *e.g.,* Defs.' Mem. at 59 ("if the Court invalidates the 705 Notice, the 2016 Rule would go into effect immediately"). Indeed, if the Court were to conclude the section 705 stay is valid, the validity of the IFR (though not the 2018 Rule nor ED's newfound statutory "interpretation") would likely be a moot issue.

able to publish the Rule in final form by November 1, 2015. *See* ED, Program Integrity and Improvement, 80 Fed. Reg. 67126, 67131 (Oct. 30, 2015). That statement, however, comports fully with plaintiffs' reading of the plain language of the statute, which plaintiffs acknowledge prohibits a rule not *published* by November 1 from going into effect earlier than the beginning of the second award year thereafter. In the Program Integrity and Improvement Rule, ED did not opine on what effective date it could select if the rule *was* published in final form by November 1. Even if it had, a single reference in responding to a comment two years ago would not evidence a "long-standing" interpretation as defendants claim. *See* Defs.' Mem. at 2, 52.

3. If ED were exercising its discretion to interpret an ambiguous statute, it would have been required to consider the impacts of its decision.

Even where a statute is ambiguous and does not foreclose an agency's interpretation, the agency's "exercise of its authority must be 'reasonable and reasonably explained' in order to survive arbitrary and capricious review under the Administrative Procedure Act." *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740, 750 (D.C. Cir. 2015) (quoting *Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012)); *see also Fox v. Clinton*, 684 F.3d 67, 77 (D.C. Cir. 2012) (even if agency action warranted *Chevron* deference, it "would still fail for want of reasoned decisionmaking"). ED's bare conclusion that the master calendar requirement "required" a delay of the rule, without identifying competing interpretations of the statute or identifying the costs to borrowers associated with adopting its chosen interpretation, failed to comply with reasoned decisionmaking requirements of the APA.

ED suggests, without citation, that the Court's review of its action here "is less demanding than if it were reviewing an agency's substantive policy decision within a complex regulatory scheme." Defs.' Mem. at 63. But this miscomprehends the nature of plaintiffs' challenge. Plaintiffs are not challenging an interpretative rule that ED issued; they are challenging the delay

rule—a substantive policy decision within a complex regulatory scheme. That ED relies on its interpretation of a statute to support that substantive policy decision does not differentiate this case from any other case where an agency's action is based on an incorrect reading of a statute. *See, e.g.*, *Transitional Hosps. Corp. of La. v. Shalala*, 222 F.3d 1019, 1024 (D.C. Cir. 2000); *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 464 (D.C. Cir. 1989). ED's bare conclusion that the master calendar provision "required" a delay of the rule, without identifying competing interpretations of the statute or identifying the costs to borrowers associated with adopting its chosen interpretation, failed to comply with reasoned decisionmaking requirements of the APA.

B. ED's delay of the effective date required negotiated rulemaking and notice and comment.

Whether or not ED's interpretation of the master calendar provision is correct, ED's failure to comply with the procedural requirements of the APA and HEA invalidates the IFR. ED's only excuse for these failures is that a "lack of discretion to reach a different conclusion" made it "unnecessary" to use the required procedures, as that term is used in the relevant statutory provisions. Defs.' Mem. at 65.[12] But if, as ED argues, the statute is ambiguous and ED had discretion to determine whether the master calendar provision should be construed to require delay of the 2016 Rule until at least July 1, 2018, ED cannot simultaneously argue that it "lacked discretion" to reach a different conclusion. On the other hand, if the Court agrees with plaintiffs that the statute unambiguously did *not* require ED to delay the Borrower Defense Rule to July 1, 2018, ED's necessity argument fails as well.

The opportunity for post-promulgation comment does not remedy ED's failure to undertake required procedures. "[P]ost hoc comment was not contemplated by the APA and is

[12] Defendants have abandoned the IFR's invocation of the "impracticability" prong of the good cause exception. 82 Fed. Reg. at 49117.

generally not consonant with it." *N.J.*, *Dep't of Envtl. Prot. v. EPA*, 626 F.2d at 1050; *see also Nat'l Treasury Employees Union v. Newman*, 768 F. Supp. 8, 12 (D.D.C. 1991) (stating "it is clear that post-hoc publication and opportunity for comment does not pass APA muster"). The one case ED cites, *Coalition for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 24 (D.D.C. 2010), is distinguishable. There, Congress had specifically authorized the agency to issue interim final rules, and, thus, the court *agreed* that the agency was allowed to proceed without notice and comment. No such congressional authorization is present here. Moreover, the *Coalition for Parity* court explicitly relied on the need for "immediate guidance." *Id.* at 20-21. Here, ED waited more than four months after the Section 705 Rule to act. It certainly could have issued a notice with a thirty-day comment period earlier in those four months. And while Defendants claim "the Department is open to feedback about the IFR," Defs.' Mem. at 67, their insistence that any reasonable interpretation of the master calendar rule requires the delay demonstrates that the post hoc opportunity for comment would be meaningless. *See California v. Health & Human Servs.*, No. 17-cv-05783-HSG, 2017 WL 6524627, at *14 (N.D. Cal. Dec. 21, 2017) (enjoining interim final rule issued without notice and comment despite agency's claimed willingness "to consider post-promulgation comments"); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 575 (E.D. Pa. 2017) ("Post-issuance commentary does not ameliorate the need for notice and comment because by the time agencies issue interim rules, they are less likely to heed public input.").

IV. All three rules should be vacated promptly.

Plaintiffs' opening memorandum sets out in detail why the Court should immediately vacate the challenged rules. *See* Pls.' Mem. at 60-62. Rather than respond, defendants argue that, although this delay case will have been pending for nearly a year by the time briefing has been completed, the Court should not consider the appropriate remedy without *further* briefing. Defs.'

Mem. at 67 n.28. This request is audacious in light of the history of delays and scheduling accommodations in this case—as well as ED's failure to advance the *CAPPS* case, which has the effect of prolonging the section 705 stay indefinitely. Defendants' approach would needlessly hinder plaintiffs' access to meaningful judicial review of ED's delay of the 2016 Rule's effective date. ED's failure to respond on the merits should be deemed a concession to plaintiffs' position. *See Hopkins*, 284 F. Supp. 2d at 25; *Lockhart*, 5 F. Supp. 3d at 108 n.4.

Plaintiffs' unrebutted position is correct. That ED intends to replace the 2016 Rule does not change what the APA requires. As one court recently explained in vacating a delay rule even though the agency was considering a new rule:

> Given the time-intensive steps required to move a draft rule forward to final publication and the additional period of 30 days before it comes effective, any such rule revising or rescinding the Rule is unlikely to go into effect for a number of months. In the end, there is no certainty that either proposed rulemaking will survive potential legal challenge, given the litigation history of this Rule. Thus, application of the general rule in favor of vacatur is appropriate here.

California v. BLM I, 277 F. Supp. 3d at 1127.

CONCLUSION

For the foregoing reasons and those set forth in plaintiffs' opening memorandum, plaintiffs' second renewed motion for summary judgment should be granted, defendants' renewed motion for summary judgment should be denied, and the Section 705 Rule, the 2018 Delay Rule, and the Interim Final Rule should be vacated.

Respectfully submitted,

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