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' MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

** Authorities on which we chiefly rely are marked with asterisks.*

CASES **PAGE(S)**

STATUTES AND RULES

ADMINISTRATIVE PUBLICATIONS

MISCELLANEOUS

INTRODUCTION

Defendants ask this court for extraordinary deference. First, they claim that their delay of a rule, done without providing notice and an opportunity for comment and devoid of any consideration of the harms of that delay, is an exercise of completely unreviewable discretion. Second, they adopt in this litigation the new position that a key statute is ambiguous and that their actions reflect a discretionary construction entitled to *Chevron* deference. In making these arguments, Defendants request not just deference, but complete abdication of the role the Administrative Procedure Act contemplates for courts.

After a fourteen-month negotiated rulemaking and notice-and-comment process, the Department of Education (ED) in November 2016 issued a lengthy, extensively-reasoned rule designed to protect students and the public fisc in light of revelations of fraud and misrepresentation regarding educational offerings and student outcomes at numerous institutions participating in federal student loan programs. *See* ED, Final Regulations, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75926 (Nov. 1, 2016) (Borrower Defense Rule or Final Rule).

Six months later, an association of private colleges sued to vacate the Borrower Defense Rule. *See CAPPS v. DeVos*, Civ. No. 17-999 (D.D.C. filed May 24, 2017) (the *CAPPS* litigation). A few weeks later, ED issued a two-page notice indefinitely staying the Borrower Defense Rule pending resolution of the *CAPPS* litigation, purportedly pursuant to section 705 of the APA, 5 U.S.C. § 705, without any consideration of the harm that foregoing the benefits of the Final Rule would cause for student borrowers and the public. *See* ED, Final Rule; Notification of Partial Delay

of Effective Dates, 82 Fed. Reg. 27621 (June 16, 2017) (Delay Rule). Four months later, and only days before ED's response to Plaintiffs' first summary judgment motion in this action was due, ED issued an "Interim Final Rule," providing that the delay of the Borrower Defense Rule's effective date would last at least until July 1, 2018. ED's sole justification was that its issuance of the original Delay Rule *necessarily* meant that, regardless of the outcome of the now-dormant *CAPPS* litigation—and presumably, even if the Delay Rule were *vacated* by this Court—the earliest the Borrower Defense Rule could go into effect was July 1, 2018, based on a novel "interpretation" of a provision of the Higher Education Act known as the "master calendar provision," 20 U.S.C. § 1089. ED, Interim Final Rule; Delay of Effective Date, 82 Fed. Reg. 49114 (Oct. 24, 2017) (Interim Final Rule or IFR).

In opposing Plaintiffs' motion for summary judgment and in support of their own request for summary judgment, Defendants primarily argue that this Court and Plaintiffs must defer to ED's actions to deprive student borrowers of the benefits of a rule promulgated pursuant to notice and comment, and to ED's "interpretation" of the master calendar provision, promulgated without notice and comment. But neither the relevant statutes nor the governing case law grant ED the authority to delay rules *ad infinitum* without any judicial review.

First, with respect to the Delay Rule, Defendants argue that, in enacting section 705 of the Administrative Procedure Act, Congress "committed to agency discretion" the decision whether to suspend the effective date of a validly promulgated regulation as a result of a lawsuit, and thus deprived the courts of any ability to review such action. This radical argument, based on the statutory language permitting a stay on a finding that "justice so requires," runs directly contrary to numerous district court decisions reviewing section 705 delays. It also ignores controlling decisions of the Supreme Court and the D.C. Circuit, which make clear that the government bears

a high burden in overcoming the well-settled presumption of reviewability. Section 705 lacks the "clear and convincing evidence" of congressional intent required to "dislodge the presumption" of judicial review. *Kucana v. Holder*, 558 U.S. 233, 252 (2010).

Under either the four-factor test that courts and agencies have used to evaluate the appropriateness of section 705 stays or a less structured inquiry into "justice," ED's decision to delay the Borrower Defense Rule is arbitrary and capricious. ED does not even bother to contest that, in the Delay Rule, it completely ignored its own conclusions as to the benefits that the Final Rule would provide to student borrowers and the public fisc, and failed to consider the impact of delaying those benefits. As one district court recently held, such failure to consider the forgone benefits of a rule before delaying it merits vacating a section 705 delay rule. *California v. U.S. Bureau of Land Mgmt.*, --- F. Supp. 3d ---, No. 17-CV-03804-EDL, 2017 WL 4416409, at *13 (N.D. Cal. Oct. 4, 2017). Moreover, ED failed to identify any imminent harm to regulated entities that would justify the cost of forgone benefits. Without any such imminent harm, it is inconceivable that justice would "require" a stay. And absent compliance with the standards of section 705, ED's delay of the effective date of a rule requires both negotiated rulemaking under the HEA, 20 U.S.C. § 1098a, and notice-and-comment rulemaking under the APA, 5 U.S.C. § 553. Because these procedural requirements were lacking, the Delay Rule must be vacated.

Second, with respect to the Interim Final Rule, ED is no more deserving of deference. In an argument ED has never previously made, ED now asserts—without pointing to any specific language—that the master calendar provision is ambiguous, and that its interpretation of that ambiguity is entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). But this is not a *Chevron* case: ED did not purport to exercise congressionally delegated discretion to interpret the master calendar requirement. To the contrary, the Interim Final

Rule was explicitly premised on what ED asserted was a nondiscretionary, statutory requirement. As the D.C. Circuit has made clear, where an agency has asserted its interpretation is compelled by Congress, no deference is owed, and judicial review is *de novo*. *See Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002).

ED's defense of its pronouncement in the IFR that rules can only become effective on July 1 conflates two distinct questions. ED focuses on whether it would be reasonable to conclude, as a matter of policy divorced from any particular statutory language, that rules should only take effect on July 1—i.e., the start of the award year. But the relevant 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 because the Interim Final Rule relied solely on the proposition that the statute *compels* such a requirement both for its substantive rationale and to excuse its failure to engage in notice-and-comment and negotiated rulemaking, the IFR is invalid.

Given both the patent invalidity of ED's actions and its thus-far successful tactics designed to "frustrat[e] those aggrieved by the [delays] from obtaining a judicial ruling on the misuse of Section 705," *Becerra v. U.S. Dep't of Interior*, No. 17-CV-02376-EDL, 2017 WL 3891678, at *6 (N.D. Cal. Aug. 30, 2017), vacatur of both the Delay Rule and the Interim Final Rule is the appropriate remedy. Defendants have chosen not to address the issue of remedy, raised in Plaintiffs' motion, but instead close their brief with a footnote requesting further briefing on that subject if the Court rules for Plaintiffs on the merits. Importantly, their decision not to address remedy does not entitle them to even more delay. The serious procedural and substantive deficiencies in both rules and the fact that vacatur would restore a regulation that the agency had

previously intended to go into effect counsel in favor of the presumptive remedy.[1] This remedy, moreover, would redress Plaintiffs' injuries, contrary to Dfendants' standing argument, which relies entirely on its incorrect position on the merits as to the meaning of the master calendar provision.

ARGUMENT

I. The Delay Rule is substantively and procedurally invalid.

A. The Delay Rule is reviewable by this Court.

Several courts have reviewed agency actions taken pursuant to section 705. *See*, *e.g.*, *California v. BLM*, 2017 WL 4416409; *Becerra*, 2017 WL 3891678; *Sierra Club v. Jackson*, 833 F. Supp. 2d 11 (D.D.C. 2012). Defendants nonetheless argue that "[j]udicial review of the Department's Section 705 Notice is unavailable" because "the decision to postpone an effective date" is committed to agency discretion by law. Mem. in Supp. of Defs.' Mot. for Summ. J. & in

[1] Although in a footnote Defendants quibble over the timing of the filing of the summary judgment motion and the administrative record, they do not contest that the case is now appropriately disposed of by summary judgment. Defendants also argue that Plaintiffs' citation to materials in the underlying rulemaking record that demonstrated the scope of the problem that ED was addressing was "improper." Defs.' Mem. at 17, ECF Doc. No. 35-1. These materials were indisputably before the agency at the time of the decision, and the agency cannot disclaim the record underlying the Borrower Defense Rule in delaying the effective date of that rule. In any event, even if these materials are not required to be part of the administrative record in this case, this Court may consider them as "background information"—extra-record evidence "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 American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) ("background information" appropriately considered where necessary determine whether the agency considered all of the relevant factors"). Consideration of such information is appropriate here because Plaintiffs allege that Defendants did not adequately consider all relevant factors, especially the impact of delay on the students whom the rule was designed to protect. However, because Defendants do not argue that they did give any meaningful consideration to the impact of delay on students, and the record they provided shows no such consideration, Defendants' quibble is not dispositive.

Opp'n to Pls.' Renewed Mot. for Summ. J. 17, ECF No. 35-1. Specifically, Defendants invoke section 701(a)(2) of the APA, 5 U.S.C. § 701(a)(2), which excludes "agency action [] committed to agency discretion by law" from the APA's judicial review provisions. Under well-established case law, however, section 705 does not demonstrate that Congress committed stay determinations to the unfettered agency discretion required for agency action to fall into section 701(a)(2)'s narrow exception to the APA's broad presumption favoring judicial review.

To begin with, although the plaintiffs in the cases reviewing section 705 delays challenged the underlying delay rules on a variety of legal grounds, all proceeded under the judicial review provisions of the APA. In those cases, the government does not appear to have argued that section 705 stays are unreviewable: In the recent *California v. BLM* and *Becerra* actions, the Justice Department acknowledged that the district court had authority to review whether section 705's requirements were satisfied. And in *Sierra Club*, 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 court quoted the government's brief as stating, "Although section 705 authorizes the agencies to postpone the effective date of a rule pending judicial review, the statute does not specify which court should review such an action." *Sierra Club v. Jackson*, 813 F. Supp. 2d 149, 160 (D.D.C. 2011). Far from suggesting that *no* court should engage in such review, the government argued that in the circumstances of that case, where the underlying substantive rule was subject to review in the court of appeals, "Congress intended such review to take place in the court of appeals." *Id*. (characterizing agency's argument). The government's merits arguments in *Sierra Club* acknowledged that actions taken under section 705 are reviewable under the APA for abuse of discretion.

Without acknowledging the novelty of its argument here, Defendants cite a number of cases for general principles about agency discretion. They do not discuss, however, the controlling cases that guide this Court's analysis for section 701(a)(2) purposes. These cases make clear that section 701(a)(2) "is a very narrow exception." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *see Am. Petroleum Tankers Parent, LLC v. United States,* 943 F. Supp. 2d 59, 66 (D.D.C. 2013). To successfully invoke this exception, it is not enough for the government to demonstrate that an action involves an exercise of discretion: After all, the APA explicitly provides that discretionary agency actions *are* reviewable by authorizing courts to set aside action for "abuse of discretion." 5 U.S.C. § 706. 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)). In determining "whether a matter has been committed solely to agency discretion, [courts] consider both 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)); *see also Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (noting agency's "heavy burden" to show Congress prohibited judicial review). Neither of these factors suggests a lack of reviewability here.[2]

[2] In those cases where reviewability is a close question (it is not here), the Supreme Court has held "[w]hen a statute is 'reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.'" *Kucana*, 558 U.S. at 251 (quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)).

As to the nature of the action, the delay of a rule's effective date is plainly the sort of agency action that *is* ordinarily subject to judicial review. The D.C. Circuit has explained, 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; it is an action frequently subjected to judicial review. *See*, *e.g.*, *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017); *Nat'l Venture Capital Ass'n v. Duke*, No. CV 17-1912 (JEB), 2017 WL 5990122 (D.D.C. Dec. 1, 2017). 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, such an action does not pose the sort of question that courts are ill-equipped to review. Indeed, courts themselves regularly make such determinations and are authorized to do so by this very statute.

As to the statutory language, Defendants have not met their burden of "show[ing] by clear and convincing evidence that no meaningful standard exists." *Sluss v. U.S. Dep't of Justice*, No. 14-CV-0759 (CRC), 2016 WL 6833923, at *2 (D.D.C. Nov. 18, 2016). 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. This language requires the agency to make a reasoned "finding," and whether "justice so requires" is not so vague as to be "discretionary and devoid of a standard," as Defendants claim. Defs.' Mem. at 19.[3] Whether such language confers standardless discretion is

[3] An example of language that meets the "devoid of a standard" requirement was at issue in *Steenholdt v. FAA*, 314 F.3d 633 (D.C. Cir. 2003), cited by Defendants, Defs.' Mem. at 17. The

not an open question in the D.C. Circuit. In *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995), the court of appeals considered whether section 701(a)(2) applied to decisions of the Army Board for Correction of Military Records pursuant to a statutory provision that allowed the Board 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 contained no judicially manageable standard, noting that "[c]ourts have, in other contexts, found 'in the interest of justice' to be a reviewable standard." 68 F.3d at 1403 (citing *Sims v. Dep't of the Navy*, 711 F.2d 1578, 1581-83 (Fed. Cir. 1983)). Since *Dickson*, the D.C. Circuit has repeatedly cited the case for the proposition 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). Those decisions apply fully to the "if it finds that justice so requires" standard in section 705.[4]

Dickson also resolves Defendants' argument that judicial review is precluded because the standard 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. *See* Defs.' Mem. at 18 (citing *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1513 (D.C. Cir. 1989) ("*Kreis I*"). The statute at issue in

statute there granted the agency authority to "rescind this delegation ... at any time for any reason." *Id.* at 634 (citing 49 U.S.C. § 44702(d) (1997)).

[4] Defendants' contrary suggestion is based on two district court opinions interpreting a patent regulation. Defs.' Mem. at 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)). Neither decision holds that the regulation at issue committed any determination to an agency's unreviewable discretion. If they did, they would no longer be good law in light of the D.C. Circuit's later opinion in *Dickson*.

Dickson was similar, and permitted the Board 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).

The D.C. Circuit has explained that the language on which Defendants rely from *Kreis I* and related cases is limited to cases "involv[ing] a military judgment requiring military expertise." *Kreis v. Sec'y of Air Force*, 406 F.3d 684 (D.C. Cir. 2005) ("*Kreis III*"). Here, this case obviously does not involve such a judgment. But even in *those* cases, courts have not concluded that agency action was completely unreviewable under the APA, or that the arbitrary and capricious standard of section 706(2) did not apply. To the contrary, in *Kreis I*, the court *rejected* the government's invocation of section 701(a)(2), holding that the language at issue "does not entirely foreclose review of the Secretary's action." 866 F.2d at 1514. The court explained: "So long as the Secretary's exercise of that discretion is not to be utterly unreviewable, however, he must give a reason that a court can measure, albeit with all due deference, against the 'arbitrary or capricious' standard of the APA." *Id.* A challenge such as Plaintiffs', based on the argument that the agency failed even to consider obviously relevant factors such as the forgone benefits of the Borrower Defense Rule caused by delay, is not inconsistent with this conclusion.

Addressing *Dickson* only in a footnote, Defendants' sole argument appears to be that *Dickson*'s reasoning does not apply because section 705 is in the APA and because a section 705 stay is not *explicitly* listed as a "type[] of agency action that [is] reviewable," it would be "entirely reasonable to conclude that Congress … intended to make the Section 705 stay itself … unreviewable." Defs.' Mem. at 21 n.3. This argument ignores the relevant legal standard. The presumption is one of reviewability, and the question is not what it would be "reasonable" to conclude—the question is whether there is clear and convincing evidence that Congress intended to preclude review by conferring discretion without supplying a meaningful standard for review.

Even if *Dickson* did not control, the evidence does not support such a conclusion. The "justice so requires" language cannot be examined in a vacuum. Even in the face of broad statutory language, courts may not find an agency action unreviewable "unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985); *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). That several courts and administrative agencies have found the statute 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 strong evidence that the statutory language provides "law to apply," *Heckler v. Chaney*, 470 U.S. 821, 834 (1985).[5] Courts have repeatedly held that where agencies have been able to derive a more specific standard from broad statutory language, that standard can suffice to provide "law to apply" for section 701(a)(2) purposes. *See, e.g.*, *Clifford v. Pena*, 77 F.3d 1414 (D.C. Cir. 1996); *Center for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988). Given that the authority to interpret section 705 has no more been delegated to ED than any of these other agencies, the fact that other agencies have found section 705 to contain limits on agency discretion is more persuasive than ED's novel litigation position.

Within the statutory text, the second sentence of section 705, which grants authority to courts "to postpone the effective date of an agency action," is relevant as well. That sentence parallels the first by broadly empowering courts to stay agency actions pending review "[o]n such

[5] Plaintiffs' opening memorandum provides additional examples. *See* Mem. in Supp. if Pls.' Renewed Mot. for Summ. J. 30, n. 8 ECF No. 29 (Pls.' Mem.). Defendants do not address this history.

conditions as may be required and to the extent necessary to prevent irreparable injury." Defendants concede that courts have held that this provision embodies the quite manageable, four-part injunction standard. *See* Defs.' Mem. at 27-28. Although Defendants suggest the use of different phrasing indicates that Congress intended for courts and agencies to use vastly different frameworks, neither sentence spells out the standard in detail. That the courts have found a manageable standard in the second sentence of section 705 provides a strong indication that the first sentence likewise imposes a similarly discernible and reviewable standard.

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., Abbot Labs. v. Gardner*, 387 U.S. 136 (1967) ("The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation."). 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), Defendants' theory that Congress intended to silently vest agencies with such unreviewable discretion 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 evidence that Congress intended to enable agencies to suspend rules at their discretion, simply because a lawsuit was filed, without any judicial review.

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 Judge Boasberg 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 Ass'n*, 2017 WL 5990122, at *1. An agency may lawfully revisit a rule promulgated by a previous administration, but it cannot take short-cuts to do so and claim unreviewable discretion.[6] Because the Delay 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 provision regarding arbitrary and capricious agency action, 5 U.S.C. § 706(2)(A).[7]

[6] Plaintiffs do not disagree with Defendants 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 on a desire to revisit rules, as it did here. *See* 82 Fed. Reg. at 27622. ED's explicit invocation of its desire to "revise" the Borrower Defense Rule, combined with its failure to meaningfully advance the *CAPPS* litigation for now six months, suggests that the government's other stated reasons were pretextual. The Court need not reach this issue, though, in light of ED's failure to adequately support its "justice" conclusion.

[7] Defendants' argument that the 706(2) arbitrary-and-capricious standard does not apply, Defs.' Mem. at 21 n.4, lacks merit. 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 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). The mere fact that a statute provides a standard for an *agency* to use in taking an action does not mean the statute contains a standard of *judicial review*; such a statute does not deprive a reviewing court of the authority to examine whether the agency acted arbitrarily and capriciously in applying the statutory standard. *See Dickson*, 68 F.3d at 1404 n.12 (holding APA standard of review applicable to agency's "interest of justice" determination). If ED's contrary argument were correct, any statute that satisfied the nondelegation doctrine by setting forth an intelligible principle to govern an agency's action, *see Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30 (D.C. Cir. 2008), would also displace the APA standard of review.

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

Over the past sixty years, 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 flexible balancing test has consistently focused 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.*, *Virginia 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 *Virginia Petroleum Jobbers*).[8] ED not only

[8] *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, 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 District 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). In addition, without explicitly saying so, the Department of Interior's Office of Natural Resources Revenue functionally applied this test earlier this year. *See* Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, 82 Fed. Reg. 11823, 11823-24 (Feb. 27, 2017) (addressing merits of underlying case, risk of irreparable harm, harm to the United States, and public interest).

failed to reference the four-factor analysis, but, as a matter of substance, in both the Delay Rule and its opening brief, failed to demonstrate consideration of the principles of equity and justice that the factors represent.

Defendants' argument that they were 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.[9] 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 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:

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[9] *See supra* fn 8; *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 Delaware & 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 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 District No. 1*, *supra* fn. 8.

> This section permits either agencies or courts, if the proper showing be made, to maintain the status quo. While it would not permit a court to grant an initial license, it provides intermediate judicial relief for every other situation in order to make judicial review effec- tive. 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*, 833 F. Supp. 2d at 31, this language discusses agency and judicial authority to grant stays in the same breath, and invokes traditional equitable principles to guide that authority. At the same time, *none* of the legislative history suggests that different standards apply for section 705 stays issued by agencies and those issued by courts.

In 1947, the Attorney General reaffirmed the understanding that this section confers equitable authority on agencies and courts. *See* Attorney General's Manual on the Administrative Procedure Act 106 (1947). Acknowledging 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," 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.* at 107. The Attorney General did not suggest a different or lesser standard applied when agencies consider imposing a stay.[10]

[10]"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. Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1175 n.15 (D.C. Cir. 1979) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978)). *See also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (noting manual is "the Government's own most authoritative interpretation of the APA" to which the Supreme Court has "repeatedly given great weight").

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"—*i.e.*, the power that the legislative history makes clear Congress sought to codify in section 705—requires an analysis of the four factors. *Virginia 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); *Eastern Air Lines, Inc v. Civ. Aeronautics Bd.,* 261 F.2d 830, 830 (2d Cir. 1958).

Agencies likewise acknowledged that the four factors appropriately guided them in determining whether justice required stays of their own actions pending judicial review, including stays of effective dates of regulations. In 1969, for example, the Federal Communications Commission denied a stay of regulations relating to subscription television service, invoking the failure of the challengers 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 8 and 9, at least a dozen other agencies have followed this same standard in a range of scenarios.

Application of the same standard to both agencies and courts is fully consistent with the plain statutory text, which supports the reading that Congress wanted both courts and agencies to follow well-accepted equitable principles, just as courts were doing at the time with respect to injunctions. By using the term "justice so requires" with respect to agencies, and by providing courts authority to "issue all necessary and appropriate process" "on such conditions as may be required and to the extent necessary to prevent irreparable injury," Congress was utilizing language that courts regularly used to reflect equitable considerations. 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) (stating that an injunction should not be issued "whenever it would operate oppressively or inequitably, or contrary to the real justice of the case, is the well-established doctrine"); *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"); *Schermerhorn v. L'Espenasse*, 2 U.S. 360, 363 (C.C.D. Pa. 1796) (discussing whether "justice" required dissolving an injunction under equitable authority). In this context, the phrase "justice so requires" expresses congressional intent that agencies exercise the same equitable authority as courts in issuing stays. The presumption that Congress "legislate[s] against a background of common-law adjudicatory principles," including "equitable" ones, *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1226 (2014), likewise bolsters this reading of the statute.

Defendants' suggestion that requiring agencies to apply the four-part test would "produce absurd results," Defs.' Mem. at 29, 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. 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 is no more convincing than would be the suggestion that a district court's grant of a stay pending appeal under the four-factor test is a confession that its judgment should be reversed.

It follows directly from the overarching purposes of the APA that agencies cannot act on mere whims, and that they must consider the harms of granting or not granting a stay, the public interest, and whether the underlying litigation has any merit before taking action. 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. And, as explained in detail in Plaintiffs' opening memorandum, Pls.' Mem. at 30-43, those factors are not met here. Accordingly, the Court should vacate the Delay Rule as arbitrary and capricious.[11]

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

"Justice" is defined as:

> 1. The fair treatment of people. 2. The quality of being fair or reasonable. 3. The legal system by which people and their causes are judged; esp., the system used to punish people who have committed crimes. 4. The fair and proper administration of laws.

[11] 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 the mere failure to invoke the four-part standard makes ED's action invalid. *Cf. Sierra Club*, 833 F. Supp. 2d at 29 (invalidating section 705 delay for failure to invoke four-part test).

Black's Law Dictionary (10th ed. 2014).

Under any accepted principles of justice, ED's conclusion that "justice required" staying the Borrower Defense Rule was arbitrary and capricious, regardless of whether ED was required to apply the four-factor test. Any reasonable determination of whether "justice requires" a stay of a rule would consider the impact of delay on those the rule was designed to protect—here, the fairness of delaying a rule designed to protect vulnerable populations from predatory institutions. By failing to do so except in one sentence about one of the four main provisions of the Borrower Defense Rule, ED "entirely failed to consider an important aspect of the problem." *Nat. Res. Def. Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 100 (D.D.C. 2017) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). As another court recently concluded, regardless of whether the four-factor test applies, an agency's "complete failure to consider the foregone benefits of compliance" with the delayed rule is a *de facto* failure "to meet the 'justice so requires' requirement of Section 705." *California v. BLM*, 2017 WL 4416409, at *13. By the same token, determining what justice requires necessitates a consideration of what, if any, harm would occur if the rule *were not* stayed. But ED does not claim it had any evidence of such harm. Indeed, ED does not argue that it considered the merits of the *CAPPS* litigation beyond invoking unspecified "serious legal questions" raised by it. Defs.' Mem. at 25. Finally, ED's failure to mention its new (and incorrect) "interpretation" of the Master Calendar Rule or the consequences thereof in promulgating the Delay Rule also merits vacatur of the Delay Rule.

1. Determining whether justice requires a stay necessarily requires consideration of forgone benefits.

An agency may not completely ignore the relevant facts before it. *See*, *e.g.*, *Bayer HealthCare, LLC v. U.S. Food & Drug Admin.*, 942 F. Supp. 2d 17, 24 (D.D.C. 2013). Considering

such facts is a basic requirement of reasoned decisionmaking. *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.").

Here, ED had previously made numerous findings as to the expected benefits of the Borrower Defense Rule in issuing a final rule, which ED explicitly maintains remain "the official policy of the Department." Defs.' Mem. at 32. If the agency's position as to the benefits of the Borrower Defense Rule has changed, it is required to say so and provide reasons for this change. *See*, *e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *United Student Aid Funds, Inc. v. King*, 200 F. Supp. 3d 163, 171 (D.D.C. 2016). As one district court recently held, not considering benefits lost by delay is a *per se* failure "to meet the 'justice so requires' requirement of Section 705." *California v. BLM*, 2017 WL 4416409, at *13. Yet in issuing the Delay Rule, ED completely failed to consider the forgone benefits of the Borrower Defense Rule; the Delay Rule contains only one sentence about the impact of the delay of the Borrower Defense Rule on student borrowers:

> [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 agree that this passage in the Delay Rule is the only one that reflects any consideration of the impact delaying the Rule would have on borrowers. *See* Defs.' Mem. at 23-24.

This single 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 does not mean that student borrowers are not worse off than they would be had the stay not been issued. In issuing the Borrower Defense 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 Delay Rule represent financial harms to student borrowers. *See* Pls.' Mem. at 37-38.

Glaringly, the Delay Rule (and Defendants' memorandum) does not purport to address how a delay of the *other* three provisions of the Borrower Defense 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 Borrower Defense 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 42.

The Delay Rule also makes no reference to the financial responsibility provisions contained in the Borrower Defense 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 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 result in the 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 final major part of the Borrower Defense Rule, the 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. An agency cannot determine justice requires a stay without identifying a risk of serious, imminent harm.

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 possible "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 Borrower Defense Rule—two of the provisions as to which ED *completely* failed to consider the benefits to borrowers. 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 also previously considered (and rejected) this argument in the Final Rule that ED continues to insist "remains the official policy of the Department," Defs.' Mem. at 32. *See* 81 Fed. Reg. at 76007-08. As explained in Plaintiffs' opening memorandum, whether any costs would be incurred *at all* is inherently speculative, as an institution would *only* be required to 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 35-36; 81 Fed. Reg. at 76073-74. If requiring institutions in such precarious states to incur whatever costs are required to demonstrate financial responsibility before giving them more federal student loan dollars is contrary to the interests of justice, ED at least needed to say so and explain why, particularly in

light of its lengthy explanation in promulgating the Borrower Defense Rule that these provisions provide important protections to the public fisc, to taxpayers, and to student borrowers.[12]

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 master calendar rule means that the effective date of an ED rule can *only* be July 1, and thus that, because the Delay Rule prevented the Borrower Defense Rule from going into effect on July 1, 2017, the earliest that Rule can go into effect is July 1, 2018. If the now-dormant *CAPPS* litigation were still pending on that date (including appeals, presumably), under this "interpretation" of the master calendar requirement, the Borrower Defense 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 rule 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.

[12] Any other harm identified by the for-profit schools that have filed briefs as *amici* in support of Defendants is irrelevant, in light of the well-established principle that a court only considers the rationale provided by the agency itself in determining whether it 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"). CAPPS, an association of regulated entities that benefit from being allowed to continue engaging in the practices that ED previously determined were detrimental to the public interest, cannot save the Department from its failure to adequately support its agency action. Nor can any evidentiary declarations from for-profit schools be considered.

D. Because ED's stay of the effective date was not authorized by section 705, the stay is invalid for lack of negotiated rulemaking and notice and comment.

Defendants misunderstand Plaintiffs' argument as to the applicability of the procedural requirements of the Higher Education Act (HEA) and section 553 of the APA. 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 46. Defendants' argument that negotiated rulemaking and notice and comment are not required for a *valid* exercise of section 705 authority, Defs.' Mem. at 33-36, is thus a *non sequitur*.

Defendants suggest that their motivation of "freezing the status quo" somehow makes a "stay" of the effective date of a rule different than other delays of the effective date of a rule, and somehow makes the delay of the effective date not a "substantive rule." Defs.' Mem. at 35. This argument is foreclosed by D.C. Circuit precedent that was cited by Plaintiffs and not even acknowledged by Defendants. In *Clean Air Council v. Pruitt*, 862 F.3d 1, 8-9 (D.C. Cir. 2017), the Court of Appeals recently 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 if not authorized by a statute permitting 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 Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 194, 203 (2d Cir. 2004); *Natural Resources Defense Council, Inc. v. U.S. EPA*, 683 F.2d 752, 761-64 (3d Cir. 1982).

Defendants also suggest that ED is only required to utilize the negotiated rulemaking requirements of 20 U.S.C § 1098a when it "proposes" rules, and because it skipped the notice-and-comment procedure of section 553 and proceeded straight to a final rule, it was allowed to evade the statutory requirement. Defs.' Mem. at 36-37 n. 13. As noted above, though, the Delay Rule should have proceeded through notice and comment, and thus, even under Defendants' interpretation, negotiated rulemaking was required. Moreover, ED's argument omits a key sentence of section 1098a, which states that "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). Absent a valid agency invocation of its section 705 stay authority, the Delay Rule was a regulation pertaining to Title IV of the HEA, and it was promulgated after October 7, 1998. The Rule was therefore subject to the negotiated rulemaking requirement.

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

More than four months after the Delay Rule, and days before its opposition to Plaintiffs' summary judgment motion was due, ED issued the Interim Final Rule without providing notice and an opportunity for comment. The Interim Final Rule's premise is that, as a matter of law, no rule issued pursuant to Title IV may take effect on any date other than July 1 of a given year under a provision of the HEA referred to as the master calendar requirement. 82 Fed. Reg. at 49115-16 (citing 20 U.S.C. § 1089(c)(1)). Because the Delay Rule had prevented the Borrower Defense Rule from taking effect on July 1, 2017, the Interim Final Rule advanced the effective date of the Borrower Defense Rule to July 1, 2018. *Id.* Without pointing to any ambiguous language in the statute, Defendants argue that their newly asserted "interpretation" of the master calendar provision is entitled to deference under *Chevron*. Although Defendants go on to spill much ink arguing why, for policy reasons, it would be good for rules to go into effect only on July 1, policy

preference is not the issue before the Court. The question is whether the law *prohibits* rules from going into effect on any other date. Because it does not, both ED's justifications for the substance of the Interim Final Rule and its excuses for failing to comply with the APA's and HEA's procedural rulemaking requirements fail.

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

The IFR was purportedly based on one and only one justification: that the master calendar rule purportedly prohibits rules promulgated under Title IV from taking effect on any day other than July 1. Because the statute contains no such prohibition, the IFR cannot stand. Even if the statute were ambiguous on this issue, as ED now claims, ED would be required to consider the impact on borrowers in exercising any discretion it had as to how best to construe it, and ED does not claim to have done so.

1. The agency's view of what the master calendar provision requires merits neither *Chevron* nor any other form of deference.

Nowhere in the IFR did ED claim to be interpreting an ambiguous statute, and ED points to no agency publication in which it did so before submitting its memorandum in this case. Nonetheless, ED claims here that its "interpretation" of the HEA's master calendar provision is entitled to deference under *Chevron*. But under the Supreme Court's case law, deference is premised on the assumptions that an ambiguity in the statute at issue reflects a gap within which Congress intended to delegate lawmaking discretion to the agency, and that the agency's interpretation reflects a lawful exercise of that implicitly delegated discretion. *United States v. Mead Corp*., 533 U.S. 218, 227, 229 (2001); *Chevron*, 467 U.S. at 843-44. Here, ED fails to point to any ambiguity in the statute. And in issuing the IFR, it did not purport to be interpreting it. To the contrary, in explaining why it was proceeding without notice and comment, ED contended that it *had no* discretion. *See* 82 Fed. Reg. at 49116 ("The master calendar requirement provides that

regulatory changes affecting the title IV programs must become effective at the beginning of an award year.); *id.* at 49117 (stating that "the Department did not have any discretion to set an effective date earlier than July 1, 2018").This circumstance alone precludes *Chevron* deference under D.C. Circuit precedent.

As the D.C. Circuit has explained, "[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). In *Arizona v. Thompson*, where the agency action under review had been premised on the view that the statute precluded the agency from allowing certain grant funds to be used for the common costs of administering a variety of social-welfare programs, the court refused to accept the agency's litigation position that the action could be upheld as an exercise of the agency's interpretive discretion under *Chevron*. *See also* Defs.' Mem. at 39 n. 14 (stating *Arizona v. Thompson* held that "where an agency does not even purport to exercise discretion in offering its interpretation of a statute (*i.e.*, states that there is only one possible interpretation of the statute), that interpretation is not entitled to deference").

ED's action here is indistinguishable. The Interim Final Rule did not purport to be an exercise of discretion. While 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. 402, 419 (1971). "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. Fdn. v. Glickman*, 949 F. Supp. 882, 895 (D.D.C. 1996) (quoting *State Farm*, 463 U.S. at 50).

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 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," and that "is a question of law, which [courts] review de novo." *Arizona*, 281 F.3d at 254.

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

Nowhere in either the IFR or in Defendants' brief does ED identify language in the statute that prohibits rules from becoming effective on days of the year other than July 1. Only one section in the master calendar provision of the HEA addresses the effective date of regulations. That section, in its entirety, states:

> **(c) Delay of effective date of late publications**
>
> **(1)** 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.
>
> **(2)(A)** The Secretary may designate any regulatory provision that affects the programs under this subchapter and is published in final form after November 1 as one that an entity subject to the provision may, in the entity's discretion, choose to implement prior to the effective date described in paragraph (1). The Secretary may specify in the designation when, and under what conditions, an entity may

> implement the provision prior to that effective date. The Secretary shall publish any designation under this subparagraph in the Federal Register.
>
> **(B)** If an entity chooses to implement a regulatory provision prior to the effective date described in paragraph (1), as permitted by subparagraph (A), the provision shall be effective with respect to that entity in accordance with the terms of the Secretary's designation.

20 U.S.C. § 1089(c). Paragraph 2 is plainly not implicated here. The only question is what paragraph 1 requires.

In their opening brief, Plaintiffs explained that, consistent with ED's position in prior litigation and case law, *Career College Ass'n v. Riley*, 74 F.3d 1265 (D.C. Cir. 1996), the Borrower Defense Rule was published "in final form" on November 1, 2016, and the section 705 stay did not alter that fact. *See* Pls.' Mem. at 49-52. ED now agrees, stating that it "does not contest" that the Borrower Defense Rule was published in final form on November 1, 2016. Defs.' Mem. at 46. Thus, there is no question as to the limits imposed by 20 U.S.C. § 1089(c)(1). Because the Borrower Defense Rule was not published in final form by November 1, 2015, it could not become effective until July 1, 2017—the start of the second award year after that date. Section 1089(c)(1) says nothing else. Because the Rule *was* published in final form by November 1, 2016, nothing in the statute imposes any limit on its becoming effective on July 1, 2017, or any date thereafter.

That Congress created one explicit limitation on an HEA rule's effective date does not indicate that Congress *sub silentio* imposed *other* limitations. Yet ED makes a series of arguments as to why the statute imposes a "rules can only be effective on July 1" requirement. None is persuasive.

a. The text of the statute does not impose a "July 1 only" rule.

The closest thing to a textual argument Defendants make relies on the text of a statutory subheading. They state: "That the relevant sub-section [§ 1089(c)] is titled 'delay of effective date of late publications,' reflects the notion that there is only one 'effective date' during the year."

Defs.' Mem. at 39. Although legislative headings can be used to assist the court in determining the meaning of an ambiguous term, they do not have independent force. *Murphy Expl. & Prod. Co. v. U.S. Dep't of the Interior*, 252 F.3d 473, 481 (D.C. Cir. 2001), *modified on other grounds by* 270 F.3d 957. More fundamentally, there is no reason to think that the phrase "delay of effective date" means "there is only one 'effective date' during the year." Read more sensibly, the phrase reflects only that every rule has an effective date, without suggesting that the date may fall on only one day of the year.

Defendants also ignore the plain meaning of the word "until" in the statutory text. When Congress states that an event cannot occur "until" a given occurrence, it does not mean that the event must occur *at* that time—it means that the occurrence marks the *earliest* time the action can occur. The Prison Litigation Reform Act, for example, prohibits prisoners from bringing lawsuits "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). No one would think this phrasing means prisoners must bring a lawsuit at the exact moment their administrative remedies are exhausted—just that they cannot do so *before* then. As one court has explained, the word "until" has an "almost identical meaning" to the phrase "prior to," and there are no "common usages of the word 'until' that are synonymous with the word 'on,' meaning, among other things, 'indicating the day of an occurrence.'" *Claude E. Atkins Enters., Inc. v. United States*, 27 Fed. Cl. 142, 144, 144 n.4 (1992) (citing Oxford English Dictionary (2d ed. 1989)). Thus, when Congress says a rule cannot become effective until the start of the second award year, it is not saying the rule can only become effective *on* or *at* the start of the second award year.

b. The objectives of the statute do not impose a "July 1 only" rule.

As to ED's arguments about the "notice-giving and certainty-promoting objectives of the master calendar," such generic objectives, untied to any specific language of the statute, could

support any number of requirements. But that Congress desired to give notice and certainty in enacting the November 1 cut-off date in section 1089(c)(1) does not mean Congress imposed additional (but unstated) requirements that would serve the same objectives.[13] As set forth in Plaintiffs' opening memorandum, the objectives of notice-giving 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 48-52. From November 1, 2016, through June 2017, student borrowers across the country were relying on the fact 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 year is not consistent with the "notice-giving and certainty-promoting objectives" it touts.

That ED has chosen to create more uncertainty by promulgating the Delay Rule weeks before the Borrower Defense Rule was to go into effect is irrelevant to what the statute requires. The statute requires regulated entities and students have *at least* seven months' notice of the final form of the Rule. If the section 705 stay were terminated today, regulated entities and students would have had more than a year to prepare for implementation of the Borrower Defense Rule—significantly more notice than the statute requires.

[13] The cited legislative history does not advance Defendants' argument, *see* Defs.' Mem. at 40-41, but only shows that Congress was *generally* concerned about notice and the simplification of the federal student financial aid application process. It does not suggest that the master calendar rule contains the restriction that ED now claims. To argue otherwise runs contrary to the "well recognized principle of statutory construction [] that legislative history should be used to resolve ambiguities, and not to create them." *Nat'l Ass'n of Regulatory Util. Comm'rs v. United States*, 397 F. Supp. 591, 595 (D.D.C. 1975); *see also Am. Fed'n of Gov't Employees, AFL-CIO, Local 3669 v. Shinseki*, 709 F.3d 29, 35 (D.C. Cir. 2013) ("Legislative history cannot create ambiguity in a clear statutory text.")

c. ED's historical practices do not demonstrate the existence of a "July 1 only" rule.

ED maintains that its "longstanding policy and practice of implementing Title IV regulations only at the beginning of an award year" deserves weight. Defs.' Mem. at 42.[14] It does not. Even if ED has traditionally implemented rules at the start of an award year, that 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.

Defendants' suggestion that ED's October 30, 2015, Program Integrity and Improvement rule did so, Defs.' Mem. at 43, is false. There, ED explained that it could not lengthen the comment period, because if it had, it would not have been 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 master calendar requirement, which prohibits a rule not *published* by November 1 from going into effect earlier than the beginning of the second award year thereafter. Thus, if ED wanted the rule to go into effect at *any time* in the following award year, it could not extend the comment period to an extent that would prevent it from publishing the rule by November 1. 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 agency interpretation."

[14] Defendants cite *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978) for this proposition. That decision does not reflect current law regarding judicial deference to agency practices.

3. If ED were exercising its discretion to interpret an ambiguous statute, it was required to consider the impacts of its actions.

After spending pages of briefing asserting that its interpretation of the master calendar provision was an exercise of agency discretion meriting deference, ED reverses course and states that a "lack of discretion" meant it was not required to consider the impact of that interpretation and resulting delay of the Borrower Defense Rule in the IFR. Defs.' Mem. at 47-48. ED cannot have it both ways. Even if an agency is owed deference in interpreting an ambiguous statute, it must comply with the basic principles of reasoned decisionmaking, including at least considering the consequences of its interpretation. *See*, *e.g.*, *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"). Because ED did not engage in any reasoning as to the impacts of its actions, the IFR is arbitrary and capricious.

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

Whether the Court agrees with Plaintiffs' or Defendants' arguments as to the merits of the master calendar provision, 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 49.[15] But if, as ED argues, the statute were ambiguous and ED had discretion to determine whether the master calendar requirement should be construed to require delay of the Borrower Defense Rule until at least July 1, 2018, ED cannot simultaneously argue that it "lacked discretion" to reach a different conclusion. On the

[15] Defendants have abandoned the IFR's invocation of the "impracticability" prong of the good cause exception. 82 Fed. Reg. at 49117. As Plaintiffs have explained, Pls.' Mem. at 66, the timing of events demonstrates that the claim of impracticability was unsupportable.

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 excuse Defendants' improper invocation of the good cause exception. "[P]ost hoc comment was not contemplated by the APA and is generally not consonant with it." *N.J. Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1050 (D.C. Cir. 1980); *see also Nat'l Treasury Employees Union v. Newman*, 768 F. Supp. 8, 12 (D.D.C. 1991) ("it is clear that post-hoc publication and opportunity for comment does not pass APA muster"). The one case cited by Defendants, *Coalition for Parity, Inc. v. Sebelius*, 709 F. Supp.2d 10, 24 (D.D.C. 2010), is distinguishable, because the court there *agreed* with the agency that it had good cause to proceed without notice and comment. Moreover, while Defendants claim "the Department is open to feedback about the IFR," Defs.' Mem. at 52, 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").

III. Both the Delay Rule and the Interim Final Rule should be vacated and such relief would redress the harms to Plaintiffs.

Defendants make two arguments about remedies. First, they argue that, although this delay case will have been pending more than six months by the time briefing has been completed and they were granted fifty-five pages to brief the instant motions, the Court should not consider the appropriate remedy without *further* briefing. Second, they argue that Plaintiffs' harms are unredressable by the remedy they request, because the master calendar provision now prevents the Borrower Defense Rule from going into effect before July 1, 2018. Neither argument has merit.

A. Vacatur, not further briefing, is the appropriate remedy.

In a footnote at the end of their brief, Defendants request further briefing as to remedy should the Court hold that the Delay Rule and/or the IFR is invalid. Defs.' Mem. at 52 n. 23. This request is audacious in light of the history of delays and scheduling accommodations in this case—as well as the absence of any activity in the *CAPPS* case, which has the effect of prolonging the section 705 stay indefinitely. In addition, Defendants' approach would needlessly hinder Plaintiffs' access to meaningful judicial review of ED's delay of the Borrower Defense Rule's effective date. *See also* Aug. 30, 2017 Docket Entry (granting Defendants' request for six-week extension to respond to complaint, over Plaintiffs' partial objection); ECF No. 21 (motion for extension of time to respond to summary judgment motion without any indication of agency action in the interim); Interim Final Rule (promulgation of rule requiring amendment of complaint and revision of summary judgment motion seven days before Defendants' extended deadline to respond); *CAPPS* Docket, No. 17-cv-999 (no action by government since October 6 filing of administrative record).

The APA specifies that a court "shall … set aside" agency action that it finds unlawful under section 706. 5 U.S.C. § 706. Thus, "[w]hen a court concludes that agency action is unlawful, 'the practice of the court is ordinarily to vacate the rule.'" *Nat'l Venture Capital Ass'n*, 2017 WL 5990122, at *11 (quoting *Ill. Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997)); *see also Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). A court may depart from that presumption after weighing the "seriousness of the [rule]'s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change." *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Although, in a footnote, Defendants cite the relevant standard, they offer no argument as to why that standard would merit such a departure here. By forgoing

argument despite ample opportunity to do so, Defendants have waived any objection to vacatur should the Court find the challenged actions unlawful. *See*, *e.g.*, *New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv.*, 208 F. Supp. 3d 142, 175 n. 18 (D.D.C. 2016) ("perfunctory and undeveloped arguments are deemed waived"); *Johnson v. Panetta*, 953 F. Supp. 2d 244, 250 (D.D.C. 2013) (same).

In any event, each of the relevant factors weighs strongly in favor of the presumptive remedy. As to the seriousness of the rules' deficiencies, both the procedural and substantive flaws here were quite serious. As Judge Boasberg recently noted in vacating another agency's invalid delay rule in *National Venture Capital Ass'n*, the absence of notice and comment is a "fundamental flaw that almost always requires a vacatur." 2017 WL 5990122, at *11 (quoting *Allina Health v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014)). Here, there has been no notice and comment on either rule. There is the additional, serious deficiency of the agency's complete failure to consider the harm to student borrowers *at all* before taking its delay actions, although student borrowers are the people ED is statutorily obligated to protect. As Plaintiffs have discussed, Pls.' Mem. at 37-43, every day of delay causes continued harm to student borrowers. ED acknowledged this fact when it published the Borrower Defense Rule, and it has not rebutted it here.

Vacatur also would not be particularly disruptive. A challenge to a delay rule "is not a case in which 'the egg has been scrambled and there is no apparent way to restore the status quo ante.'" *National Venture Cap. Ass'n*, 2017 WL 5990122, at *11 (quoting *Sugar Cane Growers Co-op of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002)). Rather, vacating the two unlawful rules "would simply allow the [] Final Rule to take effect, as the agency originally intended." *Id.* Whereas the agency anticipated providing the regulated community seven months to prepare for what ED insists "remains the official policy of the Department," Defs.' Mem. at 32, that community now has had

fourteen. *Cf. id.* Since the Delay Rule was issued only weeks before the scheduled effective date, the regulated community would have obviously commenced—if not completed—its preparation to comply. And there is little doubt that regulated schools have been aware that ED's delays have been challenged in court and could be set aside at any time.

Defendants' reliance on the fact that ED *may* change the Borrower Defense Rule in the future is irrelevant. No rule is set in stone. An agency could argue in any case that a court should not allow a rule to go into effect because the agency might change it in the future. This argument is particularly weak here where the agency insists it has not changed its policy position. *See* Defs.' Mem. at 32. Any new rule that ED might issue could not go into effect until July 2019, at the earliest, because of the master calendar provision's publication requirement, and perhaps even later, given that no new rule has reached the notice stage, and publication by November 1, 2018, is hardly certain. As one court recently explained in vacating a section 705 delay rule even though a new rule was under consideration by the agency, "[g]iven 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*, 2017 WL 4416409, at *14.

B. Plaintiffs' injuries are redressable by vacatur.

Defendants challenge Plaintiffs' standing to sue on only one ground: redressability. Specifically, they maintain that vacatur of the Delay Rule and IFR would be ineffective in addressing Plaintiffs' injuries because the master calendar rule would not allow this Court to order the Borrower Defense Rule to take effect until July 1, 2018. This argument both confuses the

redressability analysis with the merits, and ignores the relationship between the two challenged agency actions.

In analyzing redressability, courts presume that the plaintiffs are correct on the merits. *See*, *e.g.*, *Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976, 985 (D.C. Cir. 2017) (rejecting redressability argument that would "impermissibly 'decid[e] the merits under the guise of determining the plaintiff[s'] standing"); *Sierra Club v. EPA,* 699 F.3d 530, 533 (D.C. Cir. 2012) (stating that "if correct on the merits, as we must assume for standing purposes, such a challenge presents a clearly redressable injury"). The central argument in Plaintiffs' challenge to the IFR is that the master calendar rule does *not* require what Defendants now refer to as their "interpretation" of the statute. If Plaintiffs are correct on the merits, the Borrower Defense Rule could go into effect the day the court vacates the agency's actions. Defendants' argument is not that that relief would not redress the claimed injury, but that it would be improper on the merits. That is not a standing argument.

As to Plaintiffs' standing to challenge the Delay Rule, *even if* ED were correct that rules can only become effective on July 1 of a given year, the Delay Rule would still have to be vacated for the Borrower Defense Rule to go into effect on the July 1, 2018, effective date established by the IFR.[16] Thus, vacating the Delay Rule by itself would provide Plaintiffs with a significant measure of relief by eliminating the *indefinite* stay that exists independent of the IFR.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiffs' opening memorandum, Plaintiffs' renewed motion for summary judgment should be granted, Defendants' motion for

[16] Given the lack of any movement in the *CAPPS* litigation, there is no reason to believe the litigation that serves as the purported basis for the section 705 delay will conclude before July 1, 2018.

summary judgment should be denied, and the Delay Rule and Interim Final Rule should be vacated.

Respectfully submitted,

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