UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA ASSOCIATION OF PRIVATE POSTSECONDARY SCHOOLS,

Plaintiff,

v.

ELISABETH DEVOS, in her official capacity as Secretary of the U.S. Department of Education, *et al.*,

Defendants,

MEAGHAN BAUER and STEPHANO DEL ROSE,

Defendant-Intervenors.

Civil Action No. 17-999 (RDM)

DEFENDANT-INTERVENORS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

In November 2016, the Department of Education (ED) finalized its Borrower Defense Rule, which aimed to protect student loan borrowers from predatory practices of institutions participating in federal student aid programs. ED, Borrower Defense Final Rule, 81 Fed. Reg. 75,926, 75,926 (Nov. 1, 2016). Seven months later, and just weeks before the rule's July 1, 2017, effective date, plaintiff California Association of Private Postsecondary Schools (CAPPS) filed suit to invalidate the rule and moved to preliminarily enjoin a portion of the rule dealing with schools' use of forced arbitration and class-action waiver provisions in agreements with students. After ED subsequently took several actions to delay the rule's effective date, CAPPS withdrew its motion and did nothing to press its claims on the merits. This Court formally stayed the litigation in March 2018. Meanwhile, Meaghan Bauer and Stefano Del Rose, the borrower defendant-intervenors in this case, sued ED over its delay of the Borrower Defense Rule. Last month, in *Bauer v. DeVos*, No. 17-1330, this Court held unlawful two of ED's delay actions and stayed vacatur of one delay action until October 12, 2018.

CAPPS has now renewed its motion for a preliminary injunction, but expanded its scope to include portions of the four key parts of the Borrower Defense Rule. CAPPS asks this Court to resolve on an expedited basis 24 arguments with respect to its likelihood of success on the merits. And it does so on the basis of declarations from its members that collectively do not even mention some of the provisions against which CAPPS is seeking a preliminary injunction.

CAPPS is not entitled to the requested relief. First, as to the pre-dispute arbitration and class-action waiver provisions, 34 C.F.R. § 685.300(e) and (f) (new), CAPPS is not likely to prevail on the merits of its claims. Those provisions do not render forced arbitration and class-action waiver agreements invalid, revocable, or unenforceable by a court, and therefore do not

conflict with the Federal Arbitration Act (FAA), 9 U.S.C. § 2. Moreover, ED did not violate the Administrative Procedure Act (APA) in adopting these provisions: It acknowledged opposing arguments and evidence but reasonably concluded that the weight of evidence supported its rule, and it rightly focused on its experience and data specific to the higher education context. In addition, the rule's arbitration and class-waiver provisions do not violate the Due Process Clause or raise Spending Clause concerns. There is nothing unconstitutional about putting a private school to the choice between enforcing existing contractual rights or entering into new agreements with students so as to be eligible for money from a third party—in this case, ED. Finally, CAPPS has failed to satisfy the other preliminary injunction factors. Most notably, it could easily begin enforcing and entering into forced-arbitration and class-waiver provisions again if the rule were ultimately invalidated, and its discussion of the public interest ignores the interests of students and borrowers, thousands of whom have viable yet aging claims and effectively no recourse.

This Court can easily dispense with two of CAPPS's other claims—those involving the loan repayment rate disclosure requirement, *see* 81 Fed. Reg. at 76,070-71 (new 34 C.F.R. § 668.41(h)), and the borrower defense provisions, *id.* at 76,083-86 (new § 685.222)—by holding that CAPPS has not demonstrated a likelihood of establishing Article III standing to challenge those provisions, and necessarily has not demonstrated irreparable harm. CAPPS has had nearly fifteen months to pull together satisfactory evidence of injury, and it has not done so. In any event, these provisions are lawful, and the balance of equities and the public interest weigh in favor of their immediate implementation. The loan repayment rate disclosure requirement mandates that commercial actors make a purely factual statement about their services, and it is like thousands of other such legal requirements. CAPPS's argument that the provision is unconstitutional ignores binding and directly contrary Circuit precedent that ED cited in the rule. The borrower defense

provisions are likewise lawful. CAPPS's slew of arguments to the contrary boil down to disagreement with ED's rationale, which is not sufficient to show a violation of the APA.

Finally, CAPPS has not demonstrated that it is entitled to a preliminary injunction against the financial responsibility provision. *See* 2016 Rule, 81 Fed. Reg. at 76,073-76. It has not made a convincing showing that its members will suffer the fate of closure that it predicts, and the posting of collateral to obtain a letter of credit is not an irreparable injury. Moreover, the interests of other parties and the public support immediate implementation of these provisions to protect the federal fisc and provide a disincentive to poor behavior by predatory, financially at-risk schools that leaves both taxpayers and students in the lurch when those schools suddenly close.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Title IV Aid Program and Predatory Schools

The federal government spends more than $120 billion annually on student aid distributed under Title IV of the Higher Education Act, 20 U.S.C. § 1070 *et seq*. *See* ED, Federal Student Aid Office, 2017 Annual Report, https://www2.ed.gov/about/reports/annual/2017report/fsa-report.pdf. Students use Title IV, the largest stream of federal postsecondary education funding, to attend colleges, career training programs, and graduate schools. To receive Title IV funds, participating schools must enter into contracts called Program Participation Agreements (PPAs) with ED and agree to comply with the HEA and all applicable regulations. *See* 20 U.S.C. §§ 1087c(a), 1094; 34 C.F.R. §§ 668.14, 685.300(b).

In recent years, there have been numerous revelations regarding schools that participate in Title IV programs while engaging in fraud and misrepresentation with respect to their educational offerings and student outcomes. *See*, *e.g.*, ED, Notice of Proposed Rulemaking, 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. 39,330, 39,335 (2016) (NPRM) (discussing fraudulent practices of Corinthian College). These predatory schools, generally concentrated in the for-profit college industry, heavily recruit vulnerable populations of students, including students of color, first-generation immigrants, and single parents. *See*, *e.g.*, Senate HELP Committee, For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success 4 (2012) (hereinafter HELP Report). They lure students with representations, some untrue, about students' repayment obligations, completion rates, and accreditation. *See*, *e.g.*, *id.*

Once enrolled, students often find substandard materials and instructors and poor to non-existent job placement services. *See*, *e.g.*, *id.* at 6-7; *see also* Bauer Decl. ¶ 10, ECF No. 22-1; Del Rose Decl. ¶ 11, ECF No. 22-2. Many students drop out of such predatory schools because of the low quality of the programs, or realize that they were admitted to programs from which the school should have known they could not benefit. *See* NPRM, 81 Fed. Reg. at 39,366. Students often find themselves in *worse* positions than they were in before attending—having wasted time and accrued massive debts that they cannot possibly repay given the low-paying jobs for which they qualify. *See* HELP Report 7-8; *see also* NPRM, 81 Fed. Reg. at 39,373.

Unfortunately, students who have been injured by their school's wrongdoing often have little recourse. Predatory schools have been remarkably successful at insulating themselves from liability through pre-dispute arbitration and class-action waiver provisions buried in their enrollment contracts. *See generally* Comments of Public Citizen (Aug. 1, 2016), ED-2015-OPE-0103-10723 (hereinafter Public Citizen Comments), & App'x C. Based on a sample of enrollment contracts at for-profit colleges, one 2016 investigation found that roughly 98 percent of students

who attended such colleges were subject to forced arbitration provisions. Tariq Habash & Robert Shireman, *How College Enrollment Contracts Limit Students' Rights* 7 (2016), ED-2015-OPE-0103-9861. Moreover, recent experience demonstrates that as allegations of wrongdoing pile up, some predatory schools simply shut down, to the detriment of thousands of current students who have already invested money there. *See*, *e.g.*, NPRM, 81 Fed. Reg. at 39,335 (2016).

By statute, regulation, and the terms of their loan contracts, students who are harmed by a Title IV school's violation of certain laws, including prohibitions on fraud, may be entitled to cancellation of their federal Direct Loans through a process known as "borrower defense" to repayment. *See* 20 U.S.C. § 1087e(h); 34 C.F.R. § 685.206(c). Through regulations adopted in 1995, ED concluded that a "borrower defense" would be available for an "act or omission of [a] school … that would give rise to a cause of action against the school under applicable State law." 34 C.F.R. § 685.206(c). The regulation was "silent on the process a borrower follows to assert a borrower defense claim." NPRM, 81 Fed. Reg. at 39,335. Separately, federal law provides a basis for loan relief—called a closed-school discharge—for students whose schools close while they are attending and who do not reenroll in a related program. 20 U.S.C. § 1087(c)(1).

In the absence of recourse against their schools, many defrauded borrowers have turned to the borrower defense process for relief, despite its inability to make them whole. As of May 1, 2018, nearly 100,000 borrower defense claims were pending. *See* Press Release, Durbin Releases Shocking New Data on Department of Education's Borrower Defense Application Backlog, July 24, 2018, https://bit.ly/2Lpi8Eb. Other students attending predatory schools that suddenly close seek relief through the closed-school discharge process. *See*, *e.g.*, 2016 Rule, 81 Fed. Reg. 75,985 (noting that Corinthian closed-school discharges exceeded $ 103 million in November 2016).

To date, ED has been hamstrung in recouping the federal investment in predatory schools that engage in conduct that could form the basis for borrower defense applications or lead to school closure. The existing process for recovery of federal funds spent cancelling loans under the borrower defense process or through closed-school discharges is limited. Moreover, although ED may require schools at financial risk to post letters of credit that might protect taxpayers if the schools go under, these discretionary triggers have been largely ineffective. *Id.* at 75,983, 75,987.

The 2015 closure of Corinthian Colleges provides a case in point. Corinthian went bankrupt after numerous state attorneys general investigations and federal investigations. For years students attempted to sue the school for alleged misrepresentations and other wrongdoing. *See*, *e.g.*, Public Citizen Comments 25. Their cases were generally forced out of court and into individual arbitrations, where during the peak years of Corinthian's wrongdoing, only one student obtained a favorable arbitrator's award, among the thousands of students who had enrolled in the school. *Id.* at 26. ED ultimately determined that Corinthian "had misrepresented its job placement rates," 2016 Rule, 81 Fed. Reg. at 75,946, and it fined the institution. Unable to pay its bills, Corinthian shut down its campuses and filed for bankruptcy, setting off a wave of borrower defense and closed-school discharge applications, *id.*, "with no other party from which the Federal government may recover any losses," *id.* at 76,022. That process made clear that ED's then-existing regulations governing the borrower-defense process were insufficient. *See id.*

B. The 2016 Borrower Defense Rule

In 2015, ED announced that it intended to amend its Title IV regulations to address the borrower defense process, including its consequences for borrowers, schools, and the agency. *See* NPRM, 81 Fed. Reg. at 39,332-33. On November 1, 2016, ED published its final Borrower Defense Rule, "effective July 1, 2017." 81 Fed. Reg. at 75,926. The 2016 Rule has four key parts.

1. *The borrower defense process.* The 2016 Rule amends the standards and procedures applicable to the borrower defense process. *Id.* at 75,961-64. Three portions of these amendments, which are to be set forth at 34 C.F.R. § 685.222, are relevant to CAPPS's preliminary injunction motion. First, the rule codifies what had been ED's longstanding policy about how such defenses could be asserted. It provides that borrowers seeking to raise a defense to repayment may do so while their loans are in good standing and need not first default on their loans and be named in collection proceedings. *See id.*

Second, the rule changes the standard for what constitutes a defense to repayment for new loans. Instead of pegging the borrower defense process exclusively to violations of state law for new loans, the 2016 rule provides that a borrower has a defense to repayment if (1) her school "made a substantial misrepresentation … that the borrower reasonably relied on to the borrower's detriment when the borrower" attended or took out a Direct Loan, (2) her school "failed to perform its obligations under the terms of a contract with" her, or (3) the borrower obtained a "nondefault, favorable contested judgment [against her school] based on State or Federal law." 2016 Rule, 81 Fed. Reg. at 76,083 (new 34 C.F.R. § 685.222(b)-(d)).

Third, ED confirmed the availability of a group process for adjudicating borrower defense applications. Specifically, it states that, "[u]pon consideration of factors including, but not limited to, common facts and claims, fiscal impact, and the promotion of compliance by the school or other" Title IV participants, the Secretary "may" initiate a process to determine whether a group of borrowers, identified by the Secretary, has a borrower defense." *See id.* at 76,084 (new 34 C.F.R. § 685.222(f)); *see also id.* at 75,964-73. It provides two different sets of procedures for group processes: one for borrowers who attended closed schools and another for borrowers who attended schools that remain open. *Id.* at 76,085 (new 34 C.F.R. § 685.222(g), (h)).

A portion of the 2016 Rule that ED did not delay provides that "[i]f any provision of" § 685.222 "or its application to any person, act, or practice is held invalid, the remainder of" § 685.222 "or the application of its provisions to any person, act, or practice shall not be affected thereby." 34 C.F.R. § 668.223.

ED explained that these new provisions "give students access to consistent, clear, fair, and transparent processes to seek debt relief," and reduce obstacles to borrower defense claims. 2016 Rule, 81 Fed. Reg. at 76,047. The new borrower defense process also aids institutions: "[T]hrough clarification of circumstances that could lead to a valid claim, institutions may better avoid behavior that could result in a valid claim and future borrowers may be less likely to face such behavior," which would also benefit both borrowers and the federal government. *Id.* at 76,049. ED also noted the extensive benefits to "borrowers who ultimately have their loans discharged," explaining that discharge would ameliorate the well-documented hardships associated with high student debt, while also providing "spillover economic benefits." *Id.* at 76,051. By allowing more students to return to school, discharge would benefit both students and the public. *Id.*

2. *Arbitration and other contractual barriers to justice.* The 2016 Rule amends 34 C.F.R. § 685.300 to address the use of predispute arbitration agreements and class-action waivers by schools choosing to participate in the Direct Loan Program. *See* 2016 Rule, 81 Fed. Reg. at 76,021-31. The rule provides that a participating school may not "enter into a predispute agreement [with a student] to arbitrate a borrower defense claim, or rely in any way on a predispute arbitration agreement with respect to any aspect of a borrower defense claim." *Id.* at 76,088 (new 34 C.F.R. § 685.300(f)(i)). It similarly amends § 685.300 to require a participating school to forgo reliance on any predispute agreement with a student that waives the student's right to participate in a class action against the school related to a borrower defense claim. *Id.* (new 34 C.F.R. § 685.300(e)).

The 2016 Rule requires schools participating in the Direct Loan Program to include language incorporating the policy into any new contracts with students. *Id.* at 76,087, 76,088 (new § 685.300(e)(3)(i), (f)(3)(i)). Schools may either amend contracts predating the rule's effective date or notify affected students or former students that the schools will no longer rely on predispute arbitration or class action waiver provisions. *Id.* at 76,087-88 (new 34 C.F.R. § 685.300(e)(3)(ii)-(iii), (f)(3)(ii)-(iii)). The rule defines "[b]orrower defense claim" as used in these provisions to mean "a claim that is or could be asserted as a borrower defense as defined in § 685.222(a)(5), including a claim other than one based on § 685.222(c) or (d) that may be asserted under § 685.222(b) if reduced to judgment." *Id.* at 76,089 (new 34 C.F.R. § 685.300(i)).

Like the borrower defense provisions, the arbitration provisions are subject to a severability clause currently in effect. The clause states that "[i]f any provision of" the subpart in which the arbitration and class-action waiver provisions are contained "or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be effected thereby." 34 C.F.R. § 685.310.

ED explained that "prohibiting predispute arbitration clauses will enable more borrowers to seek redress in court" through individual or class actions. 2016 Rule, 81 Fed. Reg. at 75,939. ED found that forced arbitration clauses "jeopardize the taxpayer investment in Direct Loans," by allowing institutions to "insulat[e] themselves from direct and effective accountability for their misconduct, … deter[] publicity that would prompt government oversight agencies to react, and … shift[] the risk of loss for that misconduct to the taxpayer." *Id.* at 76,022. ED also concluded that class action waivers "effectively removed any deterrent effect that the risk of … lawsuits would have provided," and shifted the risk to taxpayers by foreclosing meaningful options for redress other than the borrower defense process. *Id.* ED found that "class action waivers for these

claims substantially harm the financial interest of the United States and thwart achievement of the purpose of the Direct Loan Program." *Id.* Limiting the use of arbitration clauses and class action waivers by Title IV-eligible institutions would thus benefit both borrowers and federal taxpayers, given ED'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 76,025.

3. *Disclosure of loan repayment rates.* The 2016 Rule creates an additional disclosure requirement for for-profit institutions, 81 Fed. Reg. at 76,070-72 (new 34 C.F.R. § 668.41(h)), based on a "wide body of evidence" demonstrating "that student debt and loan repayment outcomes are worse for students in the proprietary sector than students in other sectors," *id.* at 76,017. Under this provision, ED will calculate a final loan repayment rate for each institution over a two-year cohort period. *Id.* at 76,070-71 (new 34 C.F.R. § 668.41(h)(1)). If that calculation shows that the median borrower has neither fully repaid his or her Title IV loans, nor made payments sufficient to reduce the balance on each such loan by at least one dollar over the third year of repayment, the institution must include a disclosure in its promotional materials. *Id.* at 76,071 (new 34 C.F.R. § 668.41(h)(3)); *see also id.* at 75,926.

The rule establishes presumptive language for the disclosure: "U.S. Department of Education Warning: A majority of recent student loan borrowers at this school are not paying down their loans." *Id.* at 76,071 (new 34 C.F.R. § 668.41(h)(3)). However, it also states that ED will publish more information about the "form, place, and manner" of the disclosure, and gives ED the authority to change the language of the disclosure or to provide flexibility to institutions with respect to the disclosure's wording. *Id.* The rule also permits ED to "conduct consumer testing to help ensure that the warning is meaningful and helpful to students." *Id.*

4. ***Financial responsibility triggers.*** A fourth key aspect of the Rule amends the standards by which ED determines whether an institution is "financially responsible." Institutions must meet these standards to be eligible for Title IV aid unless they obtain a letter of credit or provide another form of financial protection. *See id.* at 76,075-76 (new 34 C.F.R. § 668.175).

The prior regulations focused solely on an institution's equity, reserve, and net income ratios and calculated a "composite score" on that basis. The new regulations also consider six "triggering" events indicating an institution is at significant risk of financial instability, including litigation-related events and actions by accreditors or regulators. *Id*. at 76,073 (new § 668.171(c)). If any of the six events occurs, the Rule requires recalculation of the institution's "composite score," accounting for potential losses that could result. *Id.* The Rule also includes two automatic triggers for a finding of financial irresponsibility: (1) violating the HEA's "90/10" rule, which provides that for-profit schools can receive no more than 90 percent of their revenue from Title IV funds, *id*. at 76,074 (new 34 C.F.R. § 668.171(d)); and (2) having two "cohort default" rates, which gauge the extent to which a school's borrowers default on federal loans, of 30 percent or more, *id.* (new § 668.171(f)). For publicly traded institutions, certain actions by the SEC or the exchange on which the institution is traded are also automatic triggers. *Id.* (new § 668.171(e)). The Rule also provides that an institution may be deemed not financially responsible if the Secretary determines that an event or condition is "reasonably likely to have a material adverse effect on the financial condition, business, or results of operations of the institution." *Id.* (new § 668.171(g)). The Rule lists eight examples of possible "discretionary triggers." *Id.* (new § 668.171(g)(1)-(8)).

ED determined that these financial responsibility provisions "introduce far stronger incentives for schools to avoid committing acts or making omissions that could lead to a valid borrower defense claim than currently exist." *Id.* at 76,049. Associated disclosure provisions allow

"borrowers to receive early warning signs about an institution's risk for students, and therefore borrowers may be able 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 76,051. ED found that, together, these provisions "provide some 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 76,055.

II. Litigation Over the Borrower Defense Rule and a New Rulemaking

In May 2017, just weeks before the Rule was to take effect, CAPPS filed suit, challenging parts of the four major provisions and seeking to enjoin ED "from implementing, applying, or taking any action whatsoever pursuant to the final regulations" and vacatur of the final rule. Compl. ¶ 242, ECF No. 1. CAPPS moved for a preliminary injunction solely against the Rule's provisions regarding predispute arbitration clauses and class action waivers. *See* Pls.' Mot. for Prelim. Inj. (withdrawn), ECF No. 6, 6-1. Meaghan Bauer and Stephano Del Rose, two borrowers who were defrauded by a for-profit school that used forced arbitration clauses and class-action waivers and who have submitted borrower defense applications, moved to intervene as defendants.

On June 16, 2017, two weeks before the 2016 Rule was to take effect, ED invoked section 705 of APA, 5 U.S.C. § 705, to issue an indefinite "stay" of the 2016 Rule pending resolution of this litigation. *See* ED, Final Rule; Notification of Partial Delay of Effective Dates, 82 Fed. Reg. 27,621 (June 16, 2017). In a separate notice that same day, ED initiated a new negotiated rulemaking to revise the Borrower Defense Rule. *See* ED, Negotiated Rulemaking Committee, 82 Fed. Reg. 27,640 (June 16, 2017). CAPPS then withdrew its motion for a preliminary injunction.

Seeking immediate implementation of the 2016 Rule, Ms. Bauer and Mr. Del Rose filed a separate lawsuit in July 2017 challenging the legality of ED's section 705 delay. *See Bauer v.*

DeVos, No. 17-1330 (D.D.C.). ED subsequently issued two further delay rules, which had the effect of delaying the main portions of the 2016 Rule until July 1, 2019. Bauer and Del Rose amended their complaint to challenge those rules and participated in three successive rounds of summary judgment briefing necessitated by ED's new actions. Meanwhile, in this litigation, ED filed an answer (ECF No. 52) and the Administrative Record (ECF No. 54), at which point CAPPS did nothing to advance the case further. Eventually, this Court *sua sponte* stayed this litigation pending resolution of *Bauer*. *See* Minute Order of Mar. 1, 2018.

In July 2018, after a negotiated rulemaking failed to reach consensus, ED issued a notice of proposed rulemaking to amend the Borrower Defense Rule. That proposed rule has been widely panned by consumer, civil rights, student, and veterans' advocates and many state attorneys general. Some have called for ED to withdraw the notice altogether based on fundamental inaccuracies. Comments of the Legal Aid Bureau of Harvard Law School (Aug. 2, 2018), ED-2018-OPE-0027-0011. Many others have described critical flaws in the proposal and indicated that they do not believe ED will be able to overcome its burden to justify a change in position from the 2016 Rule. *See* Comments of Public Citizen (Aug. 30, 2018), ED-2018-OPE-0027-27568; Comments of the Legal Aid Community (Aug. 30, 2018), ED-2018-OPE-0027-29073.

In September 2018, this Court held in *Bauer* that the two of ED's delay rules that were still in effect were unlawful under the APA and found the interpretation of the HEA contained in a third, interim rule, to be contrary to law. This Court held that the standard necessary for ED to justify the section 705 stay—that is, that "justice so requires," 5 U.S.C. § 705—was "the same type of determination that courts make when they decide whether to grant preliminary injunctive relief," *Bauer v. DeVos*, __ F. Supp. 3d __, 2018 WL 4353656, at *21 (D.D.C. Sept. 12, 2018). The Court faulted ED for ignoring the harm of a stay to student borrowers, and gave as "just one

example" the possibility that "statutes of limitations may run on student borrowers' claims before they are able to take advantage of the new regulations' prohibition on predispute arbitration agreements and class action waivers." *Id.* at *23 n.13. It also noted the attention that ED had given to the arbitration and class-action waiver provisions in the rule, "devot[ing] nine columns of the Federal Register to describing the legal objections and to responding to them." *Id.* at *24. This Court ordered that the most recent delay rule and the section 705 stay be vacated but stayed vacatur of the section 705 stay until October 12, 2018, to permit ED "to attempt to remedy the [stay's] deficiencies." *Bauer v. DeVos*, _ F. Supp. 3d __, 2018 WL 4483783, at *2 (D.D.C. Sept. 17, 2018).

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the movant is entitled to such relief." *John Doe Co. v. CFPB*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (alteration and quotation marks omitted). "'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Id.* (quoting *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

ARGUMENT

I. CAPPS IS NOT ENTITLED TO A PRELIMINARY INJUNCTION ON THE PREDISPUTE ARBITRATION AND CLASS-WAIVER PROVISIONS.

A. The Predispute Arbitration and Class-Waiver Provisions Are Lawful.

CAPPS contends that the arbitration and class-waiver provisions to be set forth at 34 C.F.R. § 685.300(e) and (f) are at odds with the Federal Arbitration Act (FAA), exceed the Department's

statutory authority under the HEA, were adopted in violation of the APA, and violate the Due Process Clause. None of CAPPS's arguments has merit.[1]

1. Federal Arbitration Act. The FAA provides that arbitration agreements are "valid, irrevocable, and enforceable," except where grounds "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. CAPPS argues that §§ 685.300(e) and (f) of the Rule "retroactively invalidat[e] arbitration clauses in existing and prospective contracts" and, therefore, violate the FAA. Although CAPPS does not make its theory clear, it presumably challenges the provision addressing class waivers on the ground that the FAA protects a party's right to insist on *bilateral* arbitration. *See* Pl.'s Mot. for Prelim. Injunction 12, ECF No. 65 (hereinafter, P.I. Memo.) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)).

CAPPS's portrayal of the 2016 Rule, which it never actually quotes, is inaccurate. The Rule provides only that, as a condition of Title IV funding, a participating school may not "enter into a predispute agreement [with a student] to arbitrate a borrower defense claim, or rely in any way on a predispute arbitration agreement with respect to any aspect of a borrower defense claim." 2016 Rule, 81 Fed. Reg. at 76,088 (new 34 C.F.R. § 685.300(f)(i)). It similarly requires, as a condition of funding eligibility, that a Title IV school agree to forgo reliance "in any way on a predispute arbitration agreement or on any other predispute agreement … with respect to any aspect of a class action that is related to a borrower defense claim." *Id.* at 76,087 (new 34 C.F.R. § 685.300(e)(1)). Going forward, schools must include language in new enrollment contracts

[1] CAPPS has not challenged or moved to enjoin other portions of § 685.300 amended by the 2016 Rule but not yet effective due to ED's unlawful delay, including subsection (d), which will restrict Title IV schools' ability to compel students to use an internal dispute resolution process, and subsections (g) and (h), which will require Title IV schools to submit to ED various arbitral and judicial records. *See* Compl. ¶¶ 96-98, ECF No. 1.

providing that they will not stop borrowers from being part of a class action lawsuit for covered claims. *Id.* (new 34 C.F.R. § 685.300(e)(3)).

The rule thus gives schools and students a choice. Schools remain free to use and enforce predispute arbitration and class-waiver agreements with their students, but they may not at the same time—through Direct Loan program funding—receive financial support from U.S. taxpayers. Conversely, schools may opt to receive Title IV money, but they must agree as a reasonable condition on that funding not to enter into predispute arbitration and class-waiver agreements or to rely on existing ones. Should institutions fail to comply with the terms of § 685.300, the consequence is loss of Title IV money or a fine, not invalidation of the offending arbitration or class-waiver agreements. 34 C.F.R. § 668.11(b) (new). Similarly, students maintain their rights under existing predispute arbitration agreements to resolve disputes through individual arbitration. They may also "enter into a voluntary *post-dispute* arbitration agreement with a school to arbitrate" any claim, including a borrower defense claim. *Id.* § 685.300(f)(1)(ii) (new). Accordingly, contrary to CAPPS's assertion (at 11), the Final Rule does not "invalidate[]," "retroactively" or otherwise, predispute arbitration or class-waiver provisions in student contracts.

Properly understood, the Rule's arbitration and class-waiver provisions are permissible. Arbitration is fundamentally "a matter of contract," *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013), and "the FAA does not require parties to arbitrate when they have not agreed to do so," *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). Rather, the "preeminent concern of Congress in passing" the FAA was the "enforce[ment]" of "private agreements into which parties had entered." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Nothing in the FAA prevents anyone, including an educational institution, from agreeing *not* to arbitrate, or from agreeing, in exchange for money,

to forgo contractual rights to enforce an arbitration clause under an existing agreement. And in the absence of an agreement to arbitrate, the FAA plainly has no application to class waivers.

CAPPS cites a string of Supreme Court decisions to bolster its argument, but none deals with a law or regulation conditioning federal spending on a company's decision not to use forced arbitration or class-waiver provisions. It contends, for example, that a principle of equal treatment for arbitration agreements and other contracts prohibits ED's rule. But in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), the Court explained that this "equal-treatment principle" prohibits a court from "*invalidat[ing]* an arbitration agreement based on … legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* at 1426 (quoting *Concepcion*, 563 U.S. at 339) (emphasis added); *see also DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466, 469 (2015) (a state court may not "refus[e] to *enforce* an arbitration provision" if the court's approach to interpreting the ambiguous provision is unique to arbitration clauses (emphasis added)). Because the rule does not permit a court to invalidate or refuse to enforce an arbitration agreement, these cases are irrelevant.

Likewise, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018), casts no doubt on the 2016 Rule. *Epic Systems* involved the question whether private employment contracts requiring individualized arbitration proceedings violated the National Labor Relations Act (NLRA), which guarantees employees' right to engage in concerted activities for collective bargaining or "other mutual aid or protection." 29 U.S.C. § 157. The Court held that the prohibition on class proceedings in the agreements was enforceable under the FAA because the NLRA's mutual-aid-or-protection provision did not "speak[] to the procedures judges or arbitrators must apply." 138 S. Ct. at 1625. Accordingly, the Court held that it could reconcile the NLRA with the FAA's

mandate that courts must "rigorously … enforce arbitration agreements according to their terms." *Id.* at 1621 (internal quotation marks omitted). The 2016 Rule does not interfere with this mandate.

CAPPS also misreads precedent in contending that ED—as the "party opposing arbitration"—must "show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue" in arbitration agreements. P.I. Memo. 13 (quoting *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 227 (1987)). That rule applies where a party in litigation argues that an arbitration agreement is *invalid* because it waives the party's right to a judicial forum for the party's claims. The 2016 Rule, however, does not invalidate an arbitration agreement that ED has with schools or any arbitration agreement at all.

Nor does CAPPS's invocation (at 11) of a "liberal federal policy favoring arbitration" help it. No federal policy favors arbitration in all circumstances. In particular, the FAA does not favor arbitration where a party has *not* agreed to it. *See*, *e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (describing the proposition that "arbitration is strictly a matter of consent" as "the first principle that underscores all of [the Supreme Court's] arbitration decisions" (internal quotation marks omitted)). And Congress has sharply limited companies' ability to use forced arbitration in some contexts by, for example, prohibiting forced arbitration in consumer credit contracts with some servicemembers or their dependents, 10 U.S.C. § 987(e)(3); forbidding commodities merchants from conditioning access to their products on a consumer's agreement to an arbitration clause, 11 U.S.C. § 21(b)(10)(A); and barring forced arbitration provisions in residential mortgage agreements, 15 U.S.C. § 1639c(e). Moreover, CAPPS ignores the fact that agencies have, in some cases for decades, regulated the use of forced arbitration provisions in various settings, even absent express statutory authorization. For example, the Financial Industry Regulatory Authority (FINRA), the self-regulatory organization that oversees broker dealers, has

long prohibited—with the Securities and Exchange Commission's approval—arbitration agreements that apply to class action litigation. FINRA Rule 2268(f) (governing contents of arbitration agreements); FINRA Rule 12204 (governing arbitration procedure).

CAPPS focuses on *American Health Care Ass'n v. Burwell*, 217 F. Supp. 3d 921 (N.D. Miss. 2016), in which a district court held that plaintiffs were likely to prevail in challenging a Centers for Medicare & Medicaid Services (CMS) rule that barred nursing homes receiving federal funds from entering into pre-dispute arbitration agreements with their residents or conditioning residents' admission on such agreements. CMS appealed the entry of a preliminary injunction in that case but then voluntarily dismissed its appeal, thus precluding review of the decision's many errors. In any event, the district court's determination in *Burwell* had "as much to do with the state of the administrative record" as it did with the legal authorities regarding the FAA. *Id.* at 933. The court faulted CMS for not creating "a strong factual record in enacting the Rule, even though, in the court's view, it potentially could have." *Id.* Regardless of whether that court's conclusions were correct as applied to the CMS rule, the same criticism cannot conceivably apply to ED's rulemaking, which—as described below—was based on an extensive factual record regarding the use of forced arbitration provisions and class-action waivers in student enrollment contracts and the impact of those provisions on the federal fisc.

CAPPS next argues that, even viewed as a spending condition on schools' use of pre-dispute arbitration clauses and class-action waivers, the rule is unlawful. It contends that schools have "no real option but to acquiesce" because they rely so heavily on federal dollars. P.I. Memo. 14 (internal quotation marks omitted). However, even for those schools with unusually large shares of Direct Loan funding, CAPPS's Spending Clause analogy falls flat. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), a case on which CAPPS relies, dealt with

a federal spending program vis-à-vis the states. In striking down the Affordable Care Act's provisions authorizing the Secretary of Health and Human Services to penalize states that did not expand their Medicaid programs, the Supreme Court acknowledged the danger that Spending Clause legislation might "undermin[e] the status of the States as independent sovereigns in our federal system" by coercing states to adopt federal regulatory programs. *Id.* at 577 (emphasis omitted). It emphasized that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* (internal quotation marks omitted). But CAPPS does not point to, and the Borrowers are not aware of, any state school that uses forced arbitration agreements with students. At a minimum, CAPPS does not represent any such schools.

2. Higher Education Act. The predispute arbitration and class-action waiver provisions in the 2016 Rule easily fall within the scope of ED's broad statutory authority. Section 1087d(a)(6) of the HEA authorizes ED to adopt stand-alone conditions on funding as part of its Program Participation Agreements with institutions, stating that ED may add "such other provisions" that it "determines are necessary to protect the interests of the United States and to promote the purposes of" the Direct Loan Program. ED reasonably determined that barring Title IV participants from relying on pre-dispute arbitration clauses and class-action waiver provisions that hamper students' access to justice meets this standard because it forces schools to internalize the costs of their misconduct and thereby reduces the United States' exposure to financial liability in the form of student loans that cannot or will not be repaid. 2016 Rule, 81 Fed. Reg. 76,022-23, 76,026.

CAPPS advances two contentions to the contrary. First, it says (at 16) that the "text and structure of the HEA establish" that § 1087d(a)(6) is a "catch-all clause at the end of a series of ministerial requirements for loan administration under program participation agreements," and

cannot be the basis for any substantive PPA provision. CAPPS is incorrect: The various obligations expressly enumerated in § 1087d cannot fairly be characterized as ministerial in nature. For example, that provision requires a school to "accept[] responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement" and to agree not to "charge any fees of any kind … to student or parent borrowers for [loan] origination activities or the provision of any information necessary for a student or parent to receive a [covered] loan." 20 U.S.C. § 1087d(a)(3), (5). Like the arbitration and class-waiver provisions, those provisions bear on a schools' substantive obligations and a student's substantive rights.

Second, CAPPS (at 15) contends that "in the rare circumstances when Congress grants an agency the authority to abrogate arbitration provisions, it does so clearly and unambiguously." It points as an example to 12 U.S.C. § 5518, which authorizes the Consumer Financial Protection Bureau (CFPB) to "prohibit or impose conditions or limitations on the use" of certain agreements in the consumer financial sector "providing for arbitration of any future dispute between … parties." P.I. Memo. 15. As described above, however, the Rule does not abrogate arbitration provisions or prohibit their use. It attaches conditions on a school's receipt of federal funding to deny continued eligibility to schools that (1) enter into new agreements prohibited by the funding condition, and (2) enforce or otherwise rely on such agreements already in existence. Accordingly, even under CAPPS's statement of the legal standard, its assertion that the arbitration and class-waiver provisions exceed ED's authority under § 1087d(a)(6) fails.

Moreover, that Congress has, in some circumstances, expressly permitted agencies to regulate on matters involving arbitration does not mean that Congress must do so in every instance. For example, long before Congress expressly authorized the SEC to regulate the use of forced arbitration provisions in broker contracts, the Supreme Court had recognized that the SEC "had

expansive power to ensure the adequacy of the arbitration procedures employed by" self-regulatory organizations (SROs) overseen by the agency. *Shearson*, 482 U.S. at 233. The Court's conclusion in this regard was based not on 15 U.S.C. § 78o, which directly addresses arbitration and post-dates *Shearson*, but on § 78s(c), which broadly permits the SEC, "on its own initiative, to 'abrogate, add to, and delete from' any SRO rule if it finds such changes necessary or appropriate to further the objectives of the [Exchange] Act." *Shearson*, 482 U.S. at 233 (quoting § 78s(c)). The SEC has, in turn, relied on this general grant of authority to approve a FINRA rule that prohibits broker-dealers from using arbitration agreements that apply to class action litigation. *See* FINRA Rules 2268(f); 12204. Because of the SEC's oversight, these rules "have the force and effect of a federal regulation." *Charles Schwab & Co. Inc. v. FINRA*, 861 F. Supp. 2d 1063, 1065 (N.D. Cal. 2012). Just as the general grant of authority on which the Supreme Court relied in *Shearson* was "sufficient statutory authority to ensure that arbitration" was adequate to protect customers' rights, 482 U.S. at 238, the HEA's grant of authority to ED provides a sufficient basis for the adoption of the Final Rule's arbitration and class-waiver provisions to protect the integrity of the Title IV program.

3. Administrative Procedure Act. CAPPS has established no basis to set aside the forced arbitration and class-waiver provisions in the 2016 Rule as arbitrary and capricious under the APA. First, ED did not, as CAPPS contends (at 17), inadequately consider arguments regarding the purported "benefits of arbitration" or the "drawbacks of class actions for students." As this Court has observed, the 2016 Rule in fact "devoted nine columns of the Federal Register to describing … legal objections" to the forced arbitration and class waiver provisions and responses to them. *Bauer*, 2018 WL 4353656, at *24. ED also acknowledged what it termed "conflicting evidence," but ultimately had no need to "deny the merits of arbitration" because the rule "do[es] not ban

arbitration." 2016 Rule, 81 Fed. Reg. at 76,025. It emphasized that the rule expressly *permits* post-dispute arbitration agreements, 34 C.F.R. § 685.300(f)(1)(ii), and therefore does not "deny students the benefits that … commenters ascribe to arbitration." 2016 Rule, 81 Fed. Reg. at 76,029.

Moreover, although CAPPS points (at 17-18) to documents discussing forced arbitration and class waivers, ED was not required to respond to each of them, particularly those that did not deal directly with the higher education context. *See Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) (stating that an agency need not respond "to every comment made"). ED was instead correct to focus most heavily on evidence specific to colleges and universities, including its own experience overseeing schools notorious for using forced arbitration agreements and class waivers. For example, ED found that "little evidence" supported the "unfounded" contention that class actions had resulted in only "modest returns" in the "postsecondary education industry." 2016 Rule, 81 Fed. Reg. at 76,026 n.85. It emphasized that "in one of the few class actions to proceed to trial" in the higher education context, "a class of students obtained two million dollars in relief from a for-profit school." *Id.* It also stressed "that class actions have significant effects beyond financial recovery for the particular class members, including deterring misconduct by the institution, deterring misconduct by other industry members, and publicizing claims of misconduct that law enforcement authorities might otherwise have never been aware of, or may have discovered only much later." *Id.* at 76,026.

In addition, ED explained in the context of Corinthian Colleges that *arbitration* had "provided minimal relief for students" injured by what ED itself had determined was widespread institutional wrongdoing. *Id.* at 76,022 n.75. It recognized that between 2011 and 2015, "very few Corinthian students pursued arbitration, according to records maintained by the American Arbitration Association," the arbitration firm selected by Corinthian in its arbitration agreements,

and that "even fewer received any award." *Id.* (citing Public Citizen Comments 26). ED was correct in determining that "[t]his data support[ed]" its "conclusion that widespread use of mandatory arbitration agreements effectively masked serious misconduct later uncovered in government enforcement actions, while providing minimal relief for students." *Id.*

Second, CAPPS contends that ED violated the APA in adopting the arbitration and class-waiver provisions because it relied in part on a CFPB study on these types of agreements. However, ED did not, as CAPPS contends (at 19), "simply cut and paste findings" from the CFPB, or fail "to undertake its own consideration of relevant data." In addition to the CFPB study, ED cited court cases, including against for-profit colleges; data from the American Arbitration Association; declarations from students; government investigations; and social science literature. *Id.* at 76,021-30; NPRM, 81 Fed. Reg. at 39,380-85. It also persuasively explained why the CFPB study was relevant. Specifically, it stated that the study "analyze[d] the prevalence of arbitration agreements for private student loans as well as disputes concerning those loans"; that "[s]chools participating in the Direct Loan Program not infrequently provide or arrange private student loans to their students"; and that "private loan borrowers … can be expected often to share characteristics with Direct Loan borrowers." 2016 Rule, 81 Fed. Reg. 76,025. CAPPS's assertion (at 19) that Direct Loans have different terms for repayment than private student loans is beside the point.

CAPPS is also incorrect in asserting (at 19) that Congress "rejected" the CFPB's study. By statute, CFPB was required to conduct a study concerning "the use of agreements providing for arbitration of any future dispute" between covered companies and consumers for the provision of financial products or services. 12 U.S.C. § 5518(a). After conducting its study, it relied on express statutory authority to prohibit pre-dispute arbitration agreements that precluded class actions, determining that regulation was "in the public interest and for the protection of consumers," and

"consistent with its study." *Id.* § 5518(b). Pursuant to the Congressional Review Act, Congress subsequently "disapprove[d]" the CFPB's rule, but its joint resolution doing so stated only that the rule would "have no force or effect." Pub. L. No. 115-74 (2017). The resolution does not explain why Congress disapproved the rule, or refer in any way to CFPB's earlier study. Indeed, the clearest signal Congress sent with respect to ED's 2016 Rule and the sufficiency of its rationale is that it did *not* disapprove it under the Congressional Review Act, as it did the CFPB's rule.

Third, CAPPS contends (at 20) that ED "failed to consider the extent to which institutions have relied on the pre-existing regulatory framework." However, CAPPS does not cite a single comment in the record urging ED to consider such reliance interests or explaining how it should do so. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), the case on which CAPPS relies to contend that ED failed to consider regulated entities' reliance interests, dealt with a situation in which an agency had consciously jettisoned a previously adopted policy. Here, the agency was writing on a blank slate as to forced arbitration and class-waiver provisions, so there was no basis for reliance. In any event, *Encino Motorcars* recognizes that even if parties have relied on a pre-existing policy, an agency can change its mind about that policy so long as it provides a "reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 2126 (internal quotation marks omitted). ED did so in this rulemaking.

4. Due process. Finally, CAPPS contends (at 20) in two sentences that § 685.300(e) and (f) violate the Due Process Clause because they have a retroactive effect on existing contracts. Even if that drive-by contention were sufficient to preserve an argument, it must fail. The rule neither imposes retroactive liability that might implicate due process concerns, nor requires "retroactive changes" to schools' contracts. Rather, it requires that schools agree as a condition of future funding not to enforce or enter into certain contractual provisions going forward.

B. Allowing the Predispute Arbitration and Class-Waiver Provisions to Take Effect Will Not Cause Irreparable Harm to Schools.

CAPPS has failed to demonstrate that its members would suffer irreparable harm during this litigation if the 2016 Rule were to go into effect. It relies most heavily on a number of compliance costs, such as sending notices to borrowers who have existing arbitration provisions in their enrollment agreements, amending new enrollment agreements, retraining admissions staff, and litigating cases in federal and state court. *See* P.I. Memo. 21-22. It also emphasizes that it may not be able to recover "improperly denied funds" from ED due to sovereign immunity. *Id.* at 23.

CAPPS's focus on sovereign immunity (at 23) is misplaced. No institution is entitled to participate in (and thereby receive funds under) federal student aid programs. If a school chooses *not* to comply with the 2016 Rule, the Department acts to sanction that noncompliance, and the Court later vacates the 2016 Rule, the institution would not have any legally cognizable claim for compensation as result of the period of nonparticipation, irrespective of sovereign immunity. It is speculative that the institution would have suffered any loss of revenue or student enrollment.

Although CAPPS urges this Court to follow a Fifth Circuit decision and some district court opinions, these cases do not address CAPPS's theory of irreparable injury from *non-compliance* with a later-invalidated rule. With respect to the cost of compliance, these cases are against the weight of appellate authority, which holds that "injury resulting from attempted compliance with government regulation ordinarily is not irreparable harm." *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980); *accord Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *A. O. Smith Corp. v. FTC*, 530 F.2d 515, 527-28 (3d Cir. 1976). The fact that economic losses may be nonrecoverable does not automatically render them irreparable, and "does not absolve the movant from its considerable burden of proving that those losses are certain, great, and actual." *Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 242 (D.D.C. 2014) (quotations

omitted) (considering discontinuation of non-profit's programs). Not one of CAPPS's declarants makes any attempt to quantify those costs, particularly in relation to schools' overall size. Nor do they explain why these costs have not already been borne by its members, given that it sued shortly before the Rule would have taken effect and ED stayed the litigation just days before the initial effective date.

CAPPS also points (at 22) to "uncertainty" for schools that have ongoing arbitration proceedings, but the declarations on which CAPPS relies simply state: "We currently have disputes in arbitration and are not certain how we could proceed with those disputes if the Final Rule goes into effect." Decl. of D. Scott Casanover, Am. Career Coll., ¶ 11, ECF No. 65-4; *accord* Decl. of D. Scott Casanover, W. Coast Univ., ¶ 11, ECF No. 65-7. The declarations do not describe the claims at issue in those arbitrations, whether the students are Direct Loan borrowers, and whether the borrowers would seek to litigate their claims in court but for the arbitration agreements. Those facts are relevant to determining whether the Rule would have any effect on CAPPS members. 2016 Rule, 81 Fed. Reg. at 76,087-88 (citing new 34 C.F.R. § 685.300(e) and (f)).

CAPPS also argues (at 21) that "[o]nce students have signed … [an enrollment] agreement, it will be virtually impossible to retroactively adopt pre-dispute arbitration and class-action-waiver provisions." The problem for CAPPS is that its declarants do not say that. Each one concedes in identical language that it may be only "difficult" to "amend" the "enrollment agreements," *see, e.g.*, Decl. of Rick Wood, Institute of Tech., ¶ 11, ECF No. 65-6, and none of them discusses whether a predispute arbitration agreement could be entered into at a later time through some other contract if the 2016 Rule were ultimately invalidated. Nor do any of the declarants discuss the possibility that a school could nevertheless continue to arbitrate claims by seeking post-dispute arbitration agreements with aggrieved students; such agreements, of course, are expressly

permitted by the 2016 Rule. 2016 Rule, 81 Fed. Reg. at 76,088 (new 34 C.F.R. § 685.300(f)(1)(ii)). A plaintiff seeking preliminary relief must "demonstrate that irreparable injury is *likely* in the absence of an injunction," not just possible. *Winter*, 555 U.S. at 22. CAPPS has not done so.

This Court should also reject CAPPS's attempt to portray the loss of Title IV funding—and consequent bankruptcy—as an irreparable injury caused by the arbitration and class-waiver provisions. A school will lose its Title IV funding only if it refuses to forgo using forced arbitration and class-waiver provisions covered by the 2016 Rule. Not one of CAPPS's declarants suggests that a CAPPS member school will make this decision. In any event, "[t]he case law is well-settled that a preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted." *Lee v. Christian Coal. of Am., Inc.*, 160 F. Supp. 2d 14, 33 (D.D.C. 2001) (internal quotation marks and alteration omitted).

Finally, because CAPPS's constitutional challenge to the arbitration and class-waiver provisions fails on the merits, *see supra*, p. 25, its members necessarily do not suffer irreparable injury from a constitutional violation. *Davis v. Dist. of Col.*, 158 F.3d 1342, 1346 (D.C. Cir. 1998).

C. The Balance of Equities and Public Interest Favor Immediate Implementation.

CAPPS wrongly contends (at 24) that the equities favor an injunction because it would preserve the status quo in which schools may use forced arbitration agreements and class-action waivers, and that ED would only be harmed in the abstract by the delayed implementation of its regulation. First, CAPPS does not even acknowledge harm to the borrowers around the country if the rule does *not* go into effect. Second, it ignores obvious options available to schools if the rule goes into effect, such as that a school could seek to enter into post-dispute arbitration agreements. Third, although CAPPS predicts (at 25) that "massive litigation costs will be imposed on schools," causing "tuition to rise or services to decline" and harm to underserved populations, its declarations

do not say that. They instead state in bland terms that when the rule goes into effect, "the resulting litigation will divert school resources from education, to the detriment of our schools and its students." *E.g.*, Decl. of Rick Wood, Inst. of Tech., ¶ 12, ECF No. 65-6. These allegations fall far short of the "certain and great" injury required to demonstrate irreparable harm; rather, they constitute a "theoretical" injury insufficient to justify relief. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

CAPPS also relies on the NPRM issued in the current rulemaking to amend the 2016 Rule. This Court should not rely on a statement of views expressed in a different NPRM—a document that is, by definition, not final—to weigh the interests at stake here. *See*, *e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478-79 (2001) (recognizing that a proposed rule marks the beginning of an agency's decisionmaking process). Moreover, if the 2018 NPRM were relevant, the Court would also have to consider the very strong objections to that NPRM and the possibility, if not likelihood, that a resulting rule resembling the 2018 NPRM would be challenged in court and itself enjoined. *See supra*, p. 13.

II. CAPPS IS NOT ENTITLED TO A PRELIMINARY INJUNCTION ON THE BORROWER DEFENSE PROVISIONS.

CAPPS seeks a preliminary injunction against only three aspects of the broader borrower defense provisions it challenged in its complaint: (1) the rule's confirmation that applicants may apply affirmatively, rather than waiting for their loans to go into default, 34 C.F.R. § 685.222 (new), (2) the federal standard for breach of contract and substantial misrepresentation grounds that may be used as a defense to repayment on new, as opposed to existing, Direct Loans, *id.* § 685.222(c)-(d) (new), and (3) the establishment of a discretionary group-based process for adjudicating borrower defense applications, *id.* § 685.222(f) (new). This Court can easily dispense with CAPPS's preliminary injunction request for these provisions by finding that it has not

demonstrated a likelihood of establishing Article III standing or, in the alternative, that it has made *no* showing of harm, irreparable or otherwise. In any event, the borrower defense provisions for which CAPPS seeks an injunction are lawful and, in light of other factors, should become effective immediately.

A. CAPPS Has Not Demonstrated a Likelihood of Establishing Article III Standing to Challenge These Provisions and Cannot Show Irreparable Harm.

"[A] party who seeks a preliminary injunction must show a substantial likelihood of standing." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). Without such a showing, the party "is not entitled to a preliminary injunction." *Id.* Moreover, one factor in the preliminary injunction analysis is whether the movant has demonstrated irreparable harm. Because CAPPS has not shown that it or its members will suffer *any* harm at all from the provisions for which it seeks an injunction, its request for preliminary relief should be denied.

Specifically, not one of CAPPS's declarants demonstrates how the implementation of the borrower defense provisions would cause the schools harm, much less irreparable harm. Indeed, the declarants do not even mention the borrower defense provisions. That omission explains why CAPPS's brief (at 43-44) cites no evidence to support claims of harm. As a result, CAPPS has not demonstrated a likelihood of establishing standing to challenge the borrower defense provisions. As to the request for preliminary relief, even if CAPPS is correct (at 9 n.8, 44) that a sliding-scale approach to balancing the four preliminary injunction factors remains viable after *Winter*, 555 U.S. at 22, that approach just allows "a weak showing on one factor to be overcome by a strong showing on another." *Hedgeye Risk Mgmt., LLC v. Heldman*, 196 F. Supp. 3d 40, 46 (D.D.C. 2016). It does not suggest that a party could make *no* showing of harm and still be entitled to preliminary relief as to a challenged law. To hold otherwise with respect to the irreparable harm factor would directly conflict with *Winter*, which held that a plaintiff is "require[d]" to "demonstrate that irreparable

injury is likely in the absence of a[] [preliminary] injunction." 555 U.S. at 22. CAPPS has not done so, and no amount of balancing can fix that problem.

CAPPS's brief points without evidence to compliance costs and the possibility of schools' participation in borrower defense administrative proceedings, contending that these burdens constitute irreparable harm. As discussed above, CAPPS's theory regarding compliance costs is does not satisfy the irreparable harm standard. And although CAPPS refers (at 43) to "countless" proceedings in which its schools may become embroiled, it fails to point to a single one.[2] "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent" with the "characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

B. The Borrower Defense Provisions Are Lawful.

Even aside from the inadequacies of CAPPS's evidence, CAPPS is not entitled to a preliminary injunction of the borrower defense provisions because those provisions are lawful.

1. Statutory Authority. CAPPS contends (at 38) that the borrower defense provisions exceed ED's statutory authority. However, CAPPS is wrong that 20 U.S.C. § 1087e(h) cannot be read to permit ED to grant loan relief except in collection proceedings. That section does not specify the type of proceeding in which a defense to repayment can be raised. Rather, it provides that "the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part." *Id.* It

[2] Although CAPPS speaks of the group-based discharge process as though it were a single regulatory provision, the 2016 Rule addressed the group-based process in two separate subsections: one for borrowers who attended now-closed schools, 34 C.F.R. § 685.222(g) (new), and the other for borrowers whose schools remain open, *id.* § 685.222(h) (new). CAPPS's members necessarily cannot demonstrate any harm from the group-based process for borrowers who attended now closed institutions.

is also telling that the statute includes a limitation, forbidding "a borrower [to] recover from the Secretary, in any action *arising from or relating to* a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan." *Id.* (emphasis added). Because a collection proceeding would always "aris[e] from" a loan, CAPPS's reading of this provision would render superfluous the "relating to" language of the statute.

Moreover, ED convincingly explained why, "from the inception of the Direct Loan Program," it has "considered its administrative authority under the HEA for the Direct Loan Program to authorize [it] to hold schools liable for losses incurred through borrower defenses, and to adopt administrative procedures to determine and liquidate those claims." 2016 Rule, 81 Fed. Reg. at 75,931. It also explained that it had a common-law right to recoup those costs from schools—a point that CAPPS ignores entirely. *Id.* Moreover, CAPPS's contention that 20 U.S.C. § 1087d(a)(6) is a "catch-all" that permits ED to add to PPAs only "ministerial" requirements fails for the same reason as it did with the arbitration and class-waiver provisions. *See supra*, p. 20-21. Section 1087d(a)'s requirements are not merely ministerial, and § 1087d(a)(6) broadly permits ED to add "such other provisions" to PPAs as it "determines are necessary to protect [U.S.] interests … and to promote" the Direct Loan program's purposes.

2. Administrative Procedure Act. CAPPS incorrectly contends that the borrower defense provisions identified in its motion for preliminary relief violate the APA for several reasons. First, CAPPS claims (at 40) that it was arbitrary for ED to "remove[] 'borrower defenses' as a defense in collection proceedings and instead initiate[] a novel administrative process for affirmative debt relief." CAPPS's argument here rests on a false premise that until this rule "borrower defenses" were not a basis for affirmative relief. In reality, although the 1995 version of the borrower defense regulations did not specify how the defenses could be raised, ED's longstanding practice has been

to allow loan relief where borrowers seek it affirmatively. 2016 Rule, 81 Fed. Reg. at 75,956 (stating that since 1995, regulations have "allowed borrowers to assert both claims and defenses to repayment, without regard" to whether the claim was "brought in the context of debt collection proceedings" or affirmatively); *see also* Comment of Legal Services Center of Harvard Law School (Aug. 2, 2018), ED-2018-OPE-0027-0011 (providing examples). The 2016 Rule simply codifies that practice in regulation.

Second, CAPPS argues (at 41) that ED "did not adequately explain why it decided to abandon a more certain and predictable [state-law] standard" for what constitutes a "borrower defense" to repayment of Direct Loans, and instead adopted a uniform federal definition based on breaches of contract and substantial misrepresentations. As an initial matter, CAPPS misstates the grounds on which a borrower defense may be made. The federal standard to which it refers applies only to new loans (that is, those disbursed on or after July 1, 2017), and although it would permit a borrower defense based on a federal standard for substantial misrepresentation and breach of contract, it would also do so based on "nondefault, favorable contested judgment" based on federal *or* state law. *See* 2016 Rule, 81 Fed. Reg. 76,083 (new 34 C.F.R. § 685.222(b)-(d)). Moreover, contrary to CAPPS's suggestion, ED did not refer only to distance learning (and the complications it creates in identifying applicable state laws) as the ground on which ED adopted a federal standard of substantial misrepresentation and breach of contract. ED also explained "that potential disparities may exist as students in one State may receive different relief than students in another State, despite having common facts and claims." *Id.* at 75,938. And it identified and explained why it was rejecting key alternatives, such as a suggestion that it use a federal standard "as a floor," while still permitting state-law unfair and deceptive practices claims to be grounds for defenses. *Id.* at 75,939. In the end, it was not unreasonable for ED to want a federal standard for use in

adjudicating federal borrower defense rights. Nor was it unreasonable for ED to state that the contours of the federal breach-of-contract standard would be shaped on a "case-by-case basis." *Id.* at 75,943. It is well-established that an agency can "make legal-policy through rulemaking or by adjudication."' *Kidd Commc'ns v. FCC*, 427 F.3d 1, 5 (D.C. Cir. 2005) (citing *SEC v. Chenery Corp.,* 332 U.S. 194, 202-03 (1947)). And ED made clear that its federal standard would begin with the common law recognized across all states for breach of contract, whose "elements are … uniform." 2016 Rule, 81 Fed. Reg. at 75,943.

Third, CAPPS contends that ED acted arbitrarily in establishing the elements of a federal standard for substantial misrepresentation and breach of contract. Not so. ED offered a robust explanation for not requiring intent to show a substantial misrepresentation. It explained that (1) it would be "nearly impossible" for a borrower to gather evidence of an institution's intent to mislead in support of a borrower defense application, (2) its view adhered to a "longstanding position that a misrepresentation does not require knowledge or intent on the part of the institution" and was consistent with consumer protection laws in many states, and (3) requiring an institution to be responsible for injuries due to misrepresentations would be "more reasonable and fair than having the borrower (or taxpayers) bear the cost of such injuries." *Id.* at 75,937. ED also explained adequately why it adopted a rebuttable presumption of reasonable reliance in the group-based relief process. *See id.* at 75,971. Although it declined to impose a "materiality" element for breach-of-contract claims, it made clear that it would "consider whether any alleged breach of contract by an institution is material in its assessment of whether the borrower would be entitled to relief, as well as whether such relief would be full or partial." *Id.* at 75,944.

3. ***Constitutionality.*** CAPPS dedicates a single sentence to a due process challenge related to the borrower defense provisions and two sentences to a combined Article III and Seventh

Amendment argument, and it nowhere identifies the specific parts of the rule to which these arguments supposedly apply. Even assuming CAPPS has properly pressed these arguments, they are unavailing. As ED has explained, [t]he rights at issue in the proposed borrower defense proceedings have the character of public rights, which may be consigned by Congress to the Department for adjudication." *Id.* at 75,966. They do not require a jury trial. Moreover, ED was on solid ground in declining to require that the group-based borrower defense fact-finding process be overseen by administrative law judges. As ED explained, it will use hearing officials who are "independent of the employees performing investigative and prosecutorial functions for the Department" and ensure "substantive and procedural due process protections." *Id.* Should this Court find otherwise, it would not only hamper the borrower defense process, but also call into question other ED regulations—not cited by CAPPS—that rely on similar hearings. *See id.*

C. Other Preliminary Injunction Factors Weigh Heavily Against Relief.

A balancing of the equities and the public interest tilt strongly against a preliminary injunction of the borrower defense provisions. CAPPS again ignores the interests of anyone but its members and ED. However, as the Borrowers' updated declarations make clear, *see* 2d Del Rose Decl. ¶¶ 7-8, 11; 2d Bauer Decl. ¶¶ 6-8, they have an interest in a clear, binding statement that borrowers may seek loan relief without first defaulting on their loans and triggering a collection proceeding. Moreover, borrowers have an interest in a group-based relief process, particularly those who do not have legal counsel. To the extent they are otherwise bound by arbitration and class-waiver agreements, many also have an interest in upholding § 685.222, which is expressly incorporated by reference in the definitional section of the 2016 Rule's provisions on arbitration and class waivers. *See* § 685.300(i) (new) (definitional section). Enjoining § 685.222 could leave many defrauded students with aging claims that cannot be brought in court.

III. CAPPS IS NOT ENTITLED TO A PRELIMINARY INJUNCTION ON THE LOAN REPAYMENT RATE DISCLOSURE PROVISION.

CAPPS contends that the loan repayment rate disclosure provision is beyond ED's authority to adopt, violates the APA, and is unconstitutional. It is none of those things. This Court need not reach those issues, however, because CAPPS has not demonstrated it will likely be able to show standing to challenge this provision, nor has it provided evidence of harm to its members.

A. CAPPS Has Not Shown a Likelihood of Establishing Article III Standing to Challenge the Disclosure Provision or of Irreparable Harm.

As stated above, a party who cannot show a likelihood of Article III standing, or any harm at all, is not entitled to a preliminary injunction. *Food & Water Watch*, 808 F.3d at 913. CAPPS submitted seven declarations, yet only one even mentions the disclosure requirement. *See* Decl. of Robert Johnson ¶¶ 29-30, ECF No. 65-2. And that one does not provide any information to suggest that a CAPPS member will have to make the disclosure at issue. Rather, CAPPS's director merely observes that "[u]nder the 2016 Rule, a proprietary institution is required in certain circumstances to include in all promotional materials a loan repayment rate warning." *Id.* ¶ 29. That is an accurate statement of the law: Once the Rule goes into effect, ED will calculate institutional loan repayment rates under a fixed formula described in the rule, and only those institutions with rates below a certain level will be required to make the requisite disclosure, subject to a waiver process that will apply to a subset of institutions. 2016 Rule, 81 Fed. Reg. at 75,926. However, CAPPS does not establish standing, or show a likelihood of irreparable harm, by describing the terms of the rule.

B. The Disclosure Provision Is Lawful.

1. Higher Education Act. CAPPS contends that the repayment-rate disclosure requirement is unlawful because it exceeds ED's authority under the HEA. Specifically, CAPPS points to 20 U.S.C. § 1092(a)(1), which governs certain required disclosures, to contend that ED cannot adopt

additional disclosures beyond those identified in that statutory section. However, as ED explained in the 2016 Rule, 81 Fed. Reg. at 76,014, the repayment-rate disclosure requirement easily falls within other broad grants of regulatory authority to the agency. *See* 20 U.S.C. § 1221e-3 (authorizing ED "to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department"); *id.* § 3474 ("The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of" ED). Nothing in these provisions precludes ED from distinguishing between proprietary and non-profit schools with respect to disclosures under these broad grants of authority; CAPPS is therefore wrong (at 32) that the HEA provides no basis for doing so. In *Ass'n of Private Colleges & Universities v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012), this Court relied on §§ 1221e-3 and 3474 to uphold a requirement that certain institutions make disclosures about their programs, costs, and student outcomes. *Id.* at 156. It should do the same here with respect to loan repayment rates.

2. Administrative Procedure Act. The disclosure requirement also does not violate the APA. As an initial matter, CAPPS cannot ground its APA claim on views stated in the 2018 NPRM to replace the 2016 Rule. *See* P.I. Memo. 32, 34. That notice is by definition not the agency's final view on the matter, *Whitman*, 531 U.S. at 478-79, and the reasonableness of an agency rule is assessed based on the administrative record for that rule, not a later rule. *See* 5 U.S.C. § 706 (directing a court to review "the whole record or those parts of it cited by a party" in an APA suit).

Moreover, contrary to CAPPS's contention (at 33), ED reasonably considered the effect of income-based repayment plans on a student's rate of repayment and an argument that the repayment rate formula would "effectively … punish institutions" that enroll students who use

such plans. It also acknowledged the contention that the formula had an unfair retroactive effect on institutions. As ED explained:

> The [income-driven repayment (IDR)] plans that Congress and the Department provide to borrowers were created to act as a safety net for struggling borrowers…. However, a post-college safety net program for borrowers does not eliminate the responsibility the institution has to provide a high-quality education that ensures borrowers are able to, at a minimum, afford to pay down their loans, even in the first years after entering repayment. … Students considering such programs should be warned if the majority of borrowers do not have sufficient income to pay down their Federal student debt, even if those borrowers are protected from default by enrolling in IDR plans.

2016 Rule, 81 Fed. Reg. at 76,018. CAPPS does not acknowledge this rationale, much less find fault with it. In addition, there is nothing retroactive about requiring schools to disclose after the Rule's effective date loan repayment information for a previous cohort of students. Like statutes, a rule is "not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment." *Ass'n of Proprietary Colls. v. Duncan*, 107 F. Supp. 3d 332, 356 (S.D.N.Y 2015).

CAPPS also argues that the repayment rate provision is arbitrary and capricious because it applies only to proprietary institutions. But ED reasonably drew this line: A "wide body of evidence demonstrates that student debt and loan repayment outcomes are worse for students in the proprietary sector than students in other sectors." 2016 Rule, 81 Fed. Reg. at 76,017. CAPPS contends that ED unreasonably recognized the "risk of excessive and unnecessary burden' to non-proprietary schools," P.I. Memo. 34 (quoting 2016 Rule, 81 Fed. Reg. at 76,017), but ignored it with respect to for-profit schools. It has plucked ED's statement out of context. ED suggested that the burden to non-proprietary schools might be "excessive" or "unnecessary" because those institutions have "a far lower likelihood of poor repayment rates" than for-profit schools. 2016 Rule, 81 Fed. Reg. at 76,017.

In addition, ED's determination to distinguish between proprietary and non-proprietary schools was not based on "inaccurate data," as CAPPS contends (at 33). CAPPS points to an ED document that acknowledged a coding error for data in ED's online College Scorecard, which is available to prospective students and their families and which includes different loan repayment data than the data used by the 2016 Rule. *See* ED, Updated Data for College Scorecard and Financial Aid Shopping Sheet, https://bit.ly/2ixBEzY. That document makes clear that the coding error was "unique to the College Scorecard repayment rate calculation and does not affect any other Department-calculated repayment rates." *Id.* CAPPS does not acknowledge this limitation of the coding problem, which appears on the face of the very same (short) document it cites.

3. First Amendment. CAPPS contends (at 34) that the repayment rate disclosure requirement violates the First Amendment because it "compel[s] proprietary institutions to speak a government-mandated message." Under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), requirements *compelling* speech by commercial actors are subject to a relaxed form of First Amendment scrutiny. CAPPS argues (at 35) that this form of scrutiny cannot apply to the repayment rate provisions because they "will not prevent deception." In so doing, it ignores *American Meat Institute v. USDA*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc), binding Circuit precedent that ED cited in the 2016 Rule, *see* 81 Fed. Reg. 76,014 n.64. That decision expressly disavowed "limiting *Zauderer* to cases in which the government points to an interest in correcting deception." *Am. Meat Inst.*, 760 F.3d at 22.

CAPPS also errs in contending (at 35) that, even if *Zauderer* applies, the disclosure requirement is unconstitutional because it is a "broad prophylactic rule" subject to more "careful scrutiny" and is "both over-inclusive and under-inclusive" in scope. The portion of *Zauderer* on which CAPPS relies did not address the disclosure requirement that was at issue in that case, but

a "blanket ban on the use of illustrations" in lawyer advertising. 471 U.S. at 649. And it is well-settled that restrictions on, as opposed to disclosures of, speech are subject to a more searching, "intermediate" level of scrutiny. *See Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). *Zauderer* rejected applying a "least restrictive means" test to a commercial-disclosure requirement, or holding such a requirement subject to attack if "it is under-inclusive—that is, if it does not get at all facets of the problem it is designed to ameliorate." 471 U.S. at 651 n.14 (internal quotation marks omitted). The repayment rates need only be "reasonably related" to ED's goal of "ensur[ing] students and families have the information they need to make well-informed decisions." 2016 Rule, 81 Fed. Reg. at 76,018. They unquestionably are.

Likewise, the fact that the disclosure requirement applies to proprietary but not non-profit or public schools does not raise a First Amendment concern. The single case on which CAPPS relies (at 35) for this argument stands for the unremarkable proposition that regulations of speech targeting "particular views" are subject to strict First Amendment scrutiny. *See True the Vote, Inc. v. IRS*, 831 F.3d 551, 560 (D.C. Cir. 2016). The repayment rate requirement does not discriminate on the basis of viewpoint; it makes a reasonable distinction involving corporate form and is grounded in evidence unrelated to speech. The fact that the requirement applies to certain schools but not others, and describes the content of the disclosures that schools must provide, is entirely permissible—indeed, nearly unavoidable—in the commercial-speech context.

C. The Balance of Equities and Public Interest Favor Immediate Implementation.

As discussed above, CAPPS has not established the likelihood of any harm at all, much less irreparable harm, as a result of the disclosure provision. In contrast, if the rule is enjoined, students and their families will not have access to this institution-level information, which is necessary to ensure that students and families are well-informed about college options. 2016 Rule,

81 Fed. Reg. at 76,018. CAPPS's contention that students will benefit from enjoining the disclosures because the disclosures are misleading ignores the way that the rule works. As ED explained, the repayment rate disclosure "rests squarely on factual determinations of repayment patterns demonstrated by a recent cohort of student borrowers from [an] institution, derived from data validated through a challenge process in which the institution may contest the accuracy of the data elements." *Id.* at 76,014. It is a factual statement that "ascribes no adverse quality to the institution itself as the cause of this pattern" *Id.* In addition, an institution remains "free to explain, if it wishes, why it believes that pattern exists, or why it believes that the pattern does not indicate that it is unable to deliver a quality education." *Id.* Moreover, "the form, place, and even the actual language of this warning may change based on consumer testing or other factors to help ensure that the warning is meaningful and helpful to students, and if so, the Department will publish those matters in a notice in the Federal Register." *Id.*; *see also* § 668.41(h)(3) (new). Moreover, CAPPS's reliance on ED's statements in an NPRM to replace a different rule should not be credited. That rulemaking is still underway. In contrast, ED *found* in the one rule that *is* final and before this Court that the loan repayment rate would provide useful information to students and their families.

IV. CAPPS IS NOT ENTITLED TO A PRELIMINARY INJUNCTION ON THE FINANCIAL RESPONSIBILITY PROVISIONS.

A. CAPPS Has Not Demonstrated That It Or Its Members Are Likely to Suffer Irreparable Harm.

CAPPS's contention that its members will suffer irreparable harm from the financial responsibility provisions is entirely speculative and, thus, insufficient to warrant preliminary relief. *See Wis. Gas Co.*, 758 F.2d at 674. Not one of CAPPS's declarants predicts that a CAPPS member will likely be forced out of business because of a mandatory trigger that requires a letter of credit, and no declarant has demonstrated that a discretionary trigger would require such an outcome. It

is therefore beside the point that, as CAPPS contends (at 30), economic injury "threaten[ing] the very existence of [a] movant's business" can constitute irreparable harm. Perhaps recognizing that its declarations do not entitle it to a preliminary injunction, CAPPS selectively cites to an administrative record comment from a CAPPS member predicting—in CAPPS's words—that the financial responsibility provisions "could 'forc[e] closure.'" P.I. Memo. 30 (quoting Comments of San Joaquin Valley College – Financial Responsibility, ED-2015-OPE-0103-10085 (Aug. 1, 2016)). But that school noted only that the proposed financial responsibility provision could permit a state investigating a school "to unilaterally strong-arm *a* college with unproven allegations, including to the point of forcing closure." Comments of San Joaquin Valley College (emphasis added). The school did not predict such an outcome for itself. *See also* P.I. Memo. 31 (citing Comments by Success Education Colleges, ED-2015-OPE-0103-9013, which do not predict closure of specific schools). Likewise, CAPPS speculates that the provisions could affect schools' ability to participate in a state grant program. Its assertion (at 30) that the challenged provisions "could lower" a school's composite score needed for state approval to operate and thus "might cause schools" to lose agency approval is far too attenuated to establish irreparable harm.

In addition, although CAPPS contends (at 29) that a lawsuit might trigger a letter of credit, "cost[ing]" a school "millions of dollars," it does not assert that those costs are due to fees associated with the letters that cannot be recaptured (and which are never, in any event, quantified or even estimated by CAPPS), as opposed to the collateral that a school might have to provide to obtain the letter. That collateral, of course, would no longer be encumbered if the 2016 Rule's financial responsibility provisions were invalidated and a school no longer had an obligation to maintain it. Furthermore, CAPPS concedes that the possibility that some schools might have to provide a letter of credit equal to 50 percent of their Title IV funds is three years into the future.

B. CAPPS Has Not Demonstrated That It Is Likely to Prevail on the Merits of Its Challenge to the Financial Responsibility Provisions.

1. *Statutory authority*. CAPPS also errs in contending that the financial responsibility provisions exceed ED's statutory authority under 20 U.S.C. § 1099c(c). First, ED's establishment of financial responsibility triggers, some of which take into account pending litigation against a school or the actions of regulators, *see* 2016 Rule, 81 Fed. Reg. 76,072-73 (mew 34 C.F.R. § 668.171), is consistent with the statutory mandate under 20 U.S.C. § 1099c(c)(1) that the Secretary determine whether an institution is financially responsible. In the 2016 Rule, ED established by rulemaking that these triggering events bear on an institution's ability to meet its financial obligations and explained how the events will be considered. *See* 81 Fed. Reg. at 75,980 (responding to argument raised by CAPPS in litigation that the triggers constitute an unlawful delegation of authority to a third party).

Nor do the triggers adopted in the 2016 Rule conflict with ED's mandate to "take into account an institution's total financial circumstances in making a determination of its ability to meet the [financial responsibility] standards." 20 U.S.C. § 1099c(c)(2). As ED explained, the statute permits the Secretary to "giv[e] controlling weight to a single significant occurrence in making" the financial responsibility determination, and ED has in fact done so in practice since at least 1994. 2016 Rule, 81 Fed. Reg. at 75,980 (citing 20 U.S.C. § 1099c(e)). Moreover, in attempting to discount the financial impact of certain triggers, such as pending litigation or high cohort-default rates, CAPPS ignores the fact that the triggers are intended to capture not only a "new financial obligation already incurred," but also "a new financial risk that is realistically imminent." *Id.* at 75,987; *see also id.* at 75,989-92 (discussing basis for triggers).

Finally, citing 20 U.S.C. § 1099c(c)(5), CAPPS argues (at 26) that by ED must base a financial responsibility determination on a school's audited financial statements. But as ED

explained, it has broad authority to consider an institution's total financial circumstances, some of which accrue after the close of a fiscal year. 2016 Rule, 81 Fed. Reg. at 75,980.

2. ***Administrative Procedure Act.*** CAPPS's APA claim likewise fails. ED provided a reasoned explanation for adopting the financial responsibility provisions and considered significant comments in the record. As it does elsewhere in its motion, CAPPS relies primarily on ED's recent statements in a 2018 NPRM. Those tentative statements cannot render unreasonable ED's earlier position, as explained above. CAPPS's only other argument (at 27) is that the rule does not consider the merits of pending lawsuits against schools and that the suits therefore "bear no relation to an institution's financial responsibility." Without irony, CAPPS complains that schools are "effectively deprive[d] of their day in court" by the 2016 Rule. *Id.* But it ignores that the rule regarding pending litigation incorporates a standard for assessing a case's relative risk, pegged to whether the litigation survives after the opportunity for a school to move to dismiss or for summary judgment. *See* 2016 Rule, 81 Fed. Reg. at 75,989-92; *see also id.* at 76,073 (new § 668.171(c)(1)(i)(B), (c)(1)(ii)). CAPPS does not explain why this standard is insufficient.

CAPPS also argues that ED erred in providing that it would incorporate into an institution's financial responsibility determination new information reported to it. 34 C.F.R. § 668.171(c)(2) (new). Although CAPPS may prefer an annual calculation, it was not unreasonable for ED to determine that, consistent with its obligation to determine whether an institution "is able … to meet all of its financial obligations," 20 U.S.C. § 1099c(c)(1), it should consider up-to-date information, *see* 2016 Rule, 81 Fed. Reg. at 75,980.

3. ***Due process.*** CAPPS contends (at 29) that the financial responsibility provisions violate schools' due process rights because they "impose significant financial consequences"—i.e., they require schools to provide a letter of credit—"automatically based on triggering events." Although

the financial responsibility provisions "may inconvenience or burden the school," they do not "deprive the school of its property right in its funds." 2016 Rule, 81 Fed. Reg. at 75,981. The Due Process Clause does not determine the substantive eligibility criteria for government benefits. *Cf. Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 641 (1993). Moreover, if ED sought to end an institution's funding or place limitations on it as a result of a determination that the institution was not financially responsible, the institution would be entitled to an administrative hearing accompanied by significant procedural protections. *Id.* Due process requires no more. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

C. The Other Preliminary Injunction Factors Tilt Heavily Against Preliminary Relief on the Financial Responsibility Provisions.

CAPPS's largely boilerplate language as to the balance of equities and the public interest is not compelling. It states that ED would not suffer any harm if the provisions are enjoined, but it ignores that the provisions were added precisely to avoid unwarranted risks to the integrity of the Title IV program. *See*, *e.g.*, 2016 Rule, 81 Fed. Reg. at 75,985-86. As discussed above, the interests of CAPPS members in preliminary relief are highly attenuated, if not non-existent. CAPPS also again relies on the fact that ED is undertaking a rulemaking to amend the Borrower Defense Rule, but as discussed above, the possibility that this rule may be finalized and go into effect as planned on July 1, 2019, without associated litigation, is remote and, in any event, does not provide a basis for refusing to enforce a law that should have been in effect for more than 15 months already.

CONCLUSION

For the foregoing reasons, this Court should deny CAPPS's motion for a preliminary injunction.

Respectfully submitted,

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