IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES,

Plaintiff,

v.

ARNE DUNCAN, in his official capacity as Secretary of the Department of Education,

and

UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.

Civil Action No. 1:11-cv-01314 (JEB)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

AND

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case is about the Department's regulatory excess. The Department has seized on a single phrase—"gainful employment"—to justify lengthy and complex regulations. The Department's improper effort to expand its regulatory reach beyond its statutory authority is based on significant—and now, admitted—mistakes by the Department; after-the-fact hypothetical reasoning; a tainted rulemaking process; and a set of arbitrary decisions.

APSCU's motion for summary judgment identified a fundamental mistake in the rulemaking: the omission of African American students from the Department's analysis of the relationship between race and repayment rates. The Department now concedes that its analysis was incorrect and understated the impact of race on repayment. The error is striking. Commenters noted that the Department's approach measured student demographics rather than program quality. This underscored widespread concerns that the Department's regulations would encourage schools to shift their focus away from under-served students. Yet, the Department nonetheless presses forward and asserts it would have reached the same result, regardless of the data. The Department's attempt to salvage the flawed regulations with a *post hoc* rationalization is inconsistent with both the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, and common sense.

Congress has required that schools prepare students for "gainful employment" for nearly a half century in the Higher Education Act of 1965, as amended ("HEA"), 20 U.S.C. § 1070 *et seq.*, but only very recently did the Department seize on those two words to open a world of detailed debt regulations. Significantly, Congress has enacted a separate, specific regime to address student debt and program quality; the Department's abuse of "gainful employment" to second-guess Congress and create its own, very different regime is unlawful. In any event, the Department has failed to provide rational explanations for its regulatory choices and adopted

regulations that are impermissibly retroactive because they punish schools based on conduct completed before their adoption.

The Gainful Employment regulations also impose severe sanctions based on secret data that schools can *never* review or challenge. Further, the regulations purport to require schools to promote the Department's ideological messages. For these reasons, the regulations violate both the Due Process Clause and the First Amendment to the Constitution.

The Reporting and Disclosure and Program Approval regulations, which are inextricably intertwined with the Gainful Employment regulations, also are not authorized by the HEA, conflict with other statutory provisions, and violate the APA.

ARGUMENT

I. The Gainful Employment Regulations Should Be Vacated.

A. The Gainful Employment Regulations Are Based On A Significant Error.

The Department admits in a declaration by an Assistant Secretary, Eduardo M. Ochoa, and submitted with its legal brief, that it erred in calculating the effect of student demographics on repayment rates in the final rule. Specifically, it used "the wrong variable" and "understat[ed] minority enrollment" by failing to count African American students. Ochoa Decl. ¶ 8. Although this was an issue of significant contention in the rulemaking, the Department—relying exclusively on the Ochoa Declaration—remarkably asks the Court to believe that its error is of no consequence and that the final rule nonetheless reflects its considered, lawful judgment. Dep't Mem. 29. This effort must be rejected for several reasons.

First, the Department's error is substantial and validates concerns raised by commenters in the rulemaking process. Many commenters objected that the Department's tests would be significantly affected by student demographics, including race, and would therefore have a negative impact on access to higher education for certain categories of students, specifically

African American students. *See, e.g.*, A.R. 37,200-01 (comments from members of Congress), 34,831 (comments from Chicagoland Ministerial Alliance), 43,713, 45,234-35, 155,877 (comments from National Black Chamber of Commerce); *see also* A.R. 45,126-27 (noting low repayment rates of students attending historically black colleges), 45,171-75 (citing studies exploring the relationship between non-institutional factors, including race, and repayment rates).

In the adopting release, the Department purportedly took these concerns seriously and acknowledged that some "commenters described very high correlations between student body demographics and repayment rates." 76 Fed. Reg. 34,386, 34,459 (June 13, 2011) (to be codified at 34 C.F.R. pt. 668). "To examine" the relationship between race and repayment rates "more carefully," the Department performed a regression analysis. *Id.* at 34,460. The Department used this analysis to *reject* commenters' concerns. Specifically, the Department explained that in four out of nine models, race was a statistically significant predictor, but that "in no case did it explain more than approximately 13 percent of variance in repayment rates." *Id.* at 34,461. The Department then considered the results of its regression analysis for each type of institution, declaring, for example, with regard to 4-year private nonprofit institutions, "the racial/ethnic composition of an institution's student body was predictive of repayment rates . . . but as a sole predictor it explained less than 2 percent of variance in repayment rates." *Id.* The Department further concluded that the "percentage of the students that are members of a minority group explains 1 percent of the total variance in repayment rates." *Id.* at 34,462. Now, the Department admits its calculations were flawed; the actual variance explained for 4-year private nonprofit institutions is *more than 15 times larger*, at 31 percent, and the total variance explained

for all institutions is *20 times larger*. The chart below, comparing the calculations in the final rule to the revised calculations in the Ochoa Declaration plainly demonstrates the error:

	Race/Ethnicity Only Analyses Contained In The Final Rule		"Corrected" Race/Ethnicity Only Analyses Submitted With The Department's Cross-Motion		Percentage Point Difference In Percent Of Total Variance Explained	Predictive "No" Changed To "Yes"
	Predictive?	Percent Of Total Variance Explained	Predictive?	Percent Of Total Variance Explained		
4-Year Institutions						
Public	No		Yes	29	29	✓
Private Nonprofit	Yes	1	Yes	31	30	
Private For-profit	No		Yes	7	7	✓
2-Year Institutions						
Public	Yes	1	Yes	8	7	
Private Nonprofit	Yes	13	Yes	38	25	
Private For-profit	No		Yes	19	19	✓
Less-Than-2-Year Institutions						
Public	Yes	4	No		-4	
Private Nonprofit	No		Yes	11	11	✓
Private For-profit	No		Yes	14	14	✓
All Institutions	Yes	1	Yes	20	19	

The Department's error demolishes its decision to reject commenters' concerns about the relationship between its regulations and race and educational opportunity. This error, by itself, requires that the regulations be vacated. *See Comcast Corp. v. FCC*, 579 F.3d 1, 8-9 (D.C. Cir. 2009); *see also Lloyd Noland Hosp. & Clinic v. Heckler*, 762 F.2d 1561, 1568 (11th Cir. 1985) ("It is . . . an abuse of discretion to base a regulation on faulty data."). The Department's admitted error also reveals that the Gainful Employment regulations are arbitrary and capricious

because the Department failed to "provide a reasoned response" to comments. *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 205 (D.C. Cir. 2011).[1]

Second, the Department's assertion that the error was not prejudicial and that its decision would have been the same if it had the accurate data before it is unsupportable. Dep't Mem. 29. As noted above, commenters asserted that the regulations would harm under-served students, including African Americans; the Department rejected those concerns with an analysis that did not include African Americans. Commenters also demonstrated that repayment rates are largely related to student demographics including race; the Department rejected those concerns relying on its flawed analysis that dramatically undercounted the significance of race. The Department's errors were not harmless and courts have rejected similar arguments. *See Gerber v. Norton*, 294 F.3d 173, 183-84 (D.C. Cir. 2002) (rejecting agency claim that its error was harmless when "the agency nonetheless concluded that it would not have changed its decision had it known of [plaintiffs'] concerns"); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1030 (D.C. Cir. 1978) (rejecting argument where an agency "conceded some errors . . . but urged that by remaking its computations from scratch, it could justify the figures used in the" final regulations); *see also Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984) (explaining that a rule "cannot stand" where "data anywhere . . . in the rulemaking record[] demonstrates that the rule constitutes such

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[1] Notably, the recalculated results attached to the declaration reveal *another* error. Ochoa Decl. Ex. A ("Table 4 . . . indicated that Pell Only was not predictive among 2-year private nonprofit institutions, when it should have indicated that it was predictive."). The Department made a similar error in the text of the final rule analyzing the data in its chart, stating that for 4-year public institutions the percentage of students receiving Pell Grants explained 49 percent of the variance in repayment rates, but dismissing this finding by noting that it was not a "statistically significant predictor." 76 Fed. Reg. at 34,461. To the contrary, both the original and corrected charts state that it is predictive.

The Department concedes that its miscalculation was only revealed because of this lawsuit. *See* Ochoa Decl. ¶ 8. Because the Department did not make all the data available to the public, the Court cannot be confident that there are not other significant, hidden errors.

an unreasonable assessment of social costs and benefits as to be arbitrary and capricious"). Indeed, if the Department's decision really were the same in light of the corrected data, it would violate the reasoned decision making requirements of the APA. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Department mischaracterizes case law to argue that "a statistic of 'dubious' credibility does not bring down a rulemaking." Dep't Mem. 29 (quoting *Gen. Med. Co. v. FDA*, 770 F.2d 214, 219 n.2 (D.C. Cir. 1985)). *General Medical* did not involve a rulemaking; rather, the petitioner—a medical device manufacturer—was challenging a decision of the FDA that its device was not safe. 770 F.2d at 216. Among the reasons the FDA offered for its conclusion were problems with the *company's* scientific evidence. *See id.* at 219-21. The court affirmed the FDA's decision in part because the company's "statistic" was "dubious." *Id.* at 219 n.2. The result was that the proponent of the "dubious" data lost. So too here the Department must lose.[2]

Third, the APA does not permit the Department to save the regulations with extra-record *post hoc* analysis. The Department cannot for the first time in litigation supplement the record to include new data, and then imagine what its analysis would have been. *See Alvarado Cmty. Hosp. v. Shalala*, 155 F.3d 1115, 1124 (9th Cir. 1998) (holding that a court's consideration of extra-record material submitted by the Government was improper), *amended by*, 166 F.3d 950 (9th Cir. 1999); *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990) ("[W]e cannot accept *post-hoc* rationalizations that the agency did not offer in the [rule] itself." (internal quotation omitted)); *see also Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 698

[2] The Department's further reliance on *General Medical* is also misplaced. Dep't Mem. 29. The court noted that "blatant" errors justify an assumption that an agency's decision may be different upon review of accurate data. That is precisely the case here, where the Department's error *is* so "blatant"—and the issue was so important to the rulemaking—that the Department's decision presumably would have turned out differently had it properly considered the correct data.

(D.C. Cir. 1991). Moreover, the Department's attempt to use the declaration to introduce a new defense of the regulations is impermissible under the APA. *Gerber*, 294 F.3d at 184 (courts "do not generally give credence to such post hoc rationalizations, but rather consider only the regulatory rationale actually offered by the agency during the development of the regulation" (internal quotation omitted)); *Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1144 (D.C. Cir. 1989) (rejecting an agency affidavit because it was "a prohibited post-hoc rationalization" that did not "represent an articulated basis for the agency's decision").

In any event, the analysis in the Department's declaration is conclusory and legally flawed. The declaration asserts that "the disparity in the percent of variance explained across the institutional sectors indicates that factors other than student demographics account for the success or failure of institutional repayment rates." Ochoa Decl. ¶ 11. It further states that the error is of no consequence because the "percent of total variance explained by minority enrollment remains less than the variance explained by the rate of Pell recipients," and the relationship does not show that results are "predetermined by student demographics." *Id.*

These arguments do not mitigate the Department's error. That "factors other than" race may account for *some* of the differences in repayment rates does not absolve the Department of the need to consider the *reality* that its own figures show race is a significant predictor of repayment rates and that, to a large degree, its regulations measure the percentage of minorities attending a program—not program quality. *See, e.g.*, A.R. 45,175 ("The totality of the evidence indicates that student characteristics swamp institutional variables in terms of predictive power [on default rates].").[3] The public policy consequences of the Department's error are clear—

[3] Indeed, the analysis in the Ochoa Declaration is inconsistent with the well-established framework for evaluating the relationship between race and employment policies in, for example, Title VII disparate impact discrimination cases. In those cases, courts hold that a

schools that enroll a higher percentage of minority students are more likely to fail the Department's repayment test—yet nowhere does the Department directly confront this reality. The Ochoa Declaration does not do the job and in any event cannot belatedly satisfy the Department's APA obligations.[4]

B. The Gainful Employment Regulations Are Not Entitled To *Chevron* Deference Because The Higher Education Act Forecloses The Department's Interpretation.

The Gainful Employment regulations must also be invalidated because they are not authorized by the HEA. Under the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts "must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9. In applying that framework, courts must utilize all tools of statutory construction and evaluate whether "in light of its text, legislative history, structure, and purpose" a statute forecloses an agency's interpretation. *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000). Here, the tools of statutory construction demonstrate that Congress did not intend the "gainful

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facially neutral policy can run afoul of the anti-discrimination laws if there is a "causal relationship" between the policy and the disparity in outcomes between groups—plaintiffs are not forced to prove that the policy is the sole cause of the disparity. *See, e.g.*, *Malave v. Potter*, 320 F.3d 321, 325-26 (2d Cir. 2003) (internal quotation omitted).

[4] In response to evidence that repayment rates are also highly correlated with the percentage of students receiving Pell grants, APSCU Mem. 21, the Department claims there is only a "modest relationship," Dep't Mem. 29. But the relationship is not modest—the percentage of institutions' students receiving Pell grants is almost always predictive of repayment rates and for some institutions it explains nearly half of the variance in repayment rates. *See* 76 Fed. Reg. at 34,460-61. The Department's further response—that enrolling students from disadvantaged backgrounds does not legitimize leaving students with unaffordable debt and poor employment prospects, Dep't Mem. 29—is both inflammatory and mistaken. Schools recruit under-served students to provide them with educational opportunities—consistent with the HEA's objectives—even though other students may predictably have greater likelihood of success in repayment.

employment" phrase to authorize the complex, debt-related regime the Department has adopted. APSCU Mem. 9-15, 18-19. The Department has failed to show otherwise.

1. The Department's Interpretation Is Not Supported By The Text, Structure, Or Purpose Of The Higher Education Act.

APSCU explained that the text, structure, and purpose of the HEA establish that Congress used the phrase "gainful employment" to mean a job that pays. APSCU Mem. 9-15. The Department's misguided efforts to paint the "gainful employment" language as ambiguous, and as a grant of broad authority to the Department, Dep't Mem. 11-12, must be rejected.

a) The Text Of The Higher Education Act Forecloses The Department's Interpretation.

1. The Department asserts that the HEA is ambiguous because Congress did not provide a definition of "gainful employment." Dep't Mem. 11. But the lack of a statutory definition does not, on its own, create ambiguity. *See Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1373 (D.C. Cir. 2007). Moreover, the Department errs in contending that there is "no common meaning of the phrase." Dep't Mem. 11. The Department's citation to a definition of "gainful" to mean "profitable," *id.*, does not demonstrate that the phrase "gainful employment" is not commonly understood to mean a job that pays. Indeed, the multiple definitions cited by APSCU reflect that common meaning. APSCU Mem. 10.

The Department goes a step further and asserts that "profitable" means "the excess of returns over expenditures, or having something left over after one's expenses are paid." Dep't Mem. 11. Based on this extrapolation, the Department suggests yet another step: that the HEA requires that programs prepare students not just for jobs that pay, but that programs lead to jobs that pay enough to cover "major expenses." *Id.* There is nothing to support the conclusion that Congress in 1965—the year it adopted the "gainful employment" requirement—intended to

authorize the debt-centered regulations or the Department's definition of what it means for former students to be able to cover "major expenses."

The Department next tries to argue that APSCU's understanding of the phrase "gainful employment" is redundant because "employment" alone connotes a job that pays. Dep't Mem. 11. But that effort fails for at least two reasons. First, "employment" does not always mean paying work. *See, e.g.*, *Webster's Third New International Dictionary* 743 (1965) (defining "employment" as "activity in which one engages and employs his time and energies"). That Congress used the phrase "gainful employment" demonstrates an effort to ensure that certain programs prepare students for paying work, not volunteer work, for example. Second, the Department cites no definition of the whole phrase "gainful employment" that demonstrates it means something besides paying work. *See* APSCU Mem. 10 (quoting *Black's Law Dictionary* 605 (9th ed. 2009) as defining the phrase "gainful employment" as "[w]ork that a person can pursue and perform for money"). In short, that one element of the phrase—"employment"—*sometimes* means paying work, does not create redundancy.

2. The Department does not dispute that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (internal quotation omitted); *see also Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). Yet the Department's interpretation violates that rule of statutory construction, because numerous other provisions of Title 20 use the phrase "gainful employment" in a way that is consistent with its ordinary meaning of a job that pays, and inconsistent with the Department's debt tests. APSCU Mem. 11.

The Department seeks to distinguish other provisions that use the term "gainful employment" in Title 20 by claiming that the operative phrase at issue here is not "gainful employment," but instead "gainful employment in a recognized occupation," and that this somehow provides authority for the convoluted debt tests. Dep't Mem. 11-12. Once again, this is a wholly new argument that appeared nowhere in the rulemaking. Further, the Department does not and cannot explain how the phrase "in a recognized occupation" alters the ordinary meaning of "gainful employment" so as to justify its complex debt metrics, so the argument adds nothing.

The Department's assertion that "gainful employment" has different meanings when used throughout Title 20 fares no better. Dep't Mem. 12. In each example cited by the Department, the phrase "gainful employment" could be replaced with its ordinary meaning—a job that pays. *E.g.*, 20 U.S.C. § 1036(e)(1)(B)(ii) (an institution may not provide a fellowship to an individual "engaged in gainful employment, other than [certain] part-time employment"). In contrast, reading the phrase across the HEA to include complex debt tests would lead to untenable results. That the regulations depend on the phrase having different meanings in different parts of the HEA shows that they are impermissible.[5]

3. As APSCU explained, the Gainful Employment regulations read the word "prepare" out of the requirement that programs "*prepare* students for gainful employment." APSCU Mem. 10 (quoting 20 U.S.C. § 1002(b)(1)(A)). As construed by the Department, the regulations go

[5] The Department's interpretation also violates the principle that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); APSCU Mem. 12. Here, the regulations produce absurd results: to give just one example, two schools in different states that offer identical programs and that place the same number of graduates into the same jobs, might not both satisfy the Department's tests because of factors such as regional wage differences. Although APSCU offered that example in its memorandum, APSCU Mem. 12, the Department has no response.

beyond the statute, and decree that programs must "*lead*[] to gainful employment." 34 C.F.R. § 668.7(a)(1) (emphasis added); APSCU Mem. 10.

The Department's response that the regulations require "that a certain percentage of" students get jobs that allow them to pay back their loans, Dep't Mem. 12, confirms APSCU's point. The statutory "gainful employment" language does not require that schools guarantee "successful" employment outcomes relative to debt for *any* of their students. APSCU Mem. 10. Moreover, schools cannot reasonably be expected to admit a student body and then oversee students' individual career and financial decisions to create a mass outcome that satisfies the Department's "percentage" requirements.

4. It is also the case that the Department improperly seized upon an *institutional* requirement in the HEA to impose a *program* requirement. APSCU Mem. 11. In the provisions relied upon by the Department as authority for the Gainful Employment regulations—20 U.S.C. §§ 1001(b), 1002(b), 1002(c)—Congress used "gainful employment" to impose a requirement on institutions, not on individual programs. APSCU Mem. 11. The Department responds by citing 20 U.S.C. § 1088(b)(1)(A)(i), which defines "eligible program" in some cases to also include a gainful employment requirement. Dep't Mem. 15. Evidently, the Department believes that the inclusion of a gainful employment requirement in *one* of the definitions of "eligible program" transforms the *institutional* eligibility requirements of the HEA into *program* eligibility requirements.

But § 1088 does not inform the meaning of § 1001 and § 1002. Under § 1088, programs can be "eligible" even if they do not prepare students for gainful employment. *See* 20 U.S.C. § 1088(b)(1)(B). Further, one of the three gainful employment provisions in § 1001 and § 1002 does not require schools to offer an "eligible program," making that statutory definition

irrelevant to the gainful employment provisions the Department has purportedly interpreted. *Compare* 20 U.S.C. § 1002(b)(1)(A)(i) (requiring an "eligible program"), *with* 20 U.S.C. § 1001(b)(1) (no "eligible program" requirement). Moreover, that Congress enacted an express provision defining an eligible *program* undermines the Department's contention that § 1001 and § 1002, which discuss eligible *institutions*, are also directed at program eligibility.

5. The Department's interpretation of the HEA also violates the principle that Congress "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); APSCU Mem. 9, 15. The Department attempts to avoid this commonsense principle by attacking straw men. Dep't Mem. 16-19. In particular, the Department attempts to distinguish several cases—not cited by APSCU—to show that the "gainful employment" phrase is no mousehole. But this Court need look no further than *Whitman*, which the Department seems to distinguish only by noting that the case involved a "highly significant policy issue." *Id.* at 16. In *Whitman*, the Supreme Court held that it was implausible that Congress would, through "modest words," give the EPA the power to determine whether implementation costs should moderate national air quality standards. 531 U.S. at 468. The Department's attempt to read broad authority to impose a debt-related regime—a significant new policy—based on the modest words "gainful employment," must similarly be rejected.

The Department's attempt to distinguish *American Bar Ass'n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), is also unavailing. The Department fails to acknowledge that the court rejected the FTC's interpretation after explaining that the "length, detail, and intricacy" of the scheme enacted by Congress made "it difficult to believe that Congress, by any remaining ambiguity," intended to grant the expanded authority the FTC assumed. *Am. Bar Ass'n*, 430 F.3d at 469; *see also* APSCU Mem. 15. The length, detail, and intricacy of the provisions Congress enacted to

address concerns regarding program quality and student debt dictate the same result here. *See infra* 14-15; APSCU Mem. 13-14.

b) The Structure And Purpose Of The Higher Education Act Do Not Support The Department's Interpretation.

APSCU explained that the structure and purpose of the HEA foreclose the Department's interpretation of "gainful employment." APSCU Mem. 12-15. In particular, APSCU demonstrated that Congress has expressly, and in detail, addressed concerns associated with student debt in a regulatory scheme focused on default rates, known as "Cohort Default Rates" or "CDRs." *See id.* at 13-15. In response, the Department attempts to claim that the structure of the HEA supports the regulations. *See* Dep't Mem. 14-16. The Department is mistaken.

1. The Department fails to rebut the Gainful Employment regulations' inconsistency with the central purpose of the HEA—expanding educational opportunities for qualified students. *See* APSCU Mem. 15. The Department has no response to APSCU's argument that the regulations impermissibly shun that expansive purpose in favor of ensuring that students are prepared for "high-paying jobs." 75 Fed. Reg. 43,616, 43,667 (July 26, 2010); *see also* APSCU Mem. 15. Because the regulations frustrate Congressional intent, they must be rejected. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).[6]

2. As APSCU explained, Congress's enactment of a detailed debt-related regime in the CDR provisions renders it highly implausible Congress would smuggle a parallel debt regime into the simple term "gainful employment." APSCU Mem. 15. Additionally, by emphasizing in 2007 that the CDR has "served as a relatively reliable indicator of the quality of programs and resulting success of the students in the job market," H.R. Rep. No. 110-500, pt. 1, at 261 (2007);

[6] Indeed, the expansive purpose of the HEA underscores the importance of the Department's admitted error in evaluating the relationship between repayment rates and race—an error that prevented the Department from recognizing that its approach will limit educational opportunities for under-served students. *See supra* 2-3.

APSCU Mem. 13, the House Committee on Education and Labor explained that Congress has addressed issues of program quality through CDRs. The Department's disagreement with Congress's approach to debt and program quality does not authorize it to adopt its own, very different regime. APSCU Mem. 14.[7]

The Department responds by suggesting that its construction of "gainful employment" is permissible because it purportedly complements the CDR regime. *See* Dep't Mem. 14. The Department evidently believes that because Congress enacted one specific default regime to measure program quality, Congress must have intended the phrase "gainful employment" in a separate provision to authorize the Department to impose another regime directed to the same end. Not surprisingly, the Department cites no case law to support this novel theory of statutory interpretation.

Further, the Department claims that Congress enacted the CDR provision as only "one" mechanism for dealing with its concerns regarding federal student aid. Dep't Mem. 14. Even granting the Department's premise, Congress gave *no* indication that it intended "gainful employment" to authorize a separate regulatory regime addressing student debt. In fact, the additional provisions the Department cites further demonstrate that when Congress wants to address perceived problems with the federal student aid program, it does so in express and detailed terms. *Id.* at 15-16. The history of the CDR provisions that the Department rehashes confirms that point as well. *See id.* at 3-4. Congress does not hide its financial aid regulatory regimes in simple phrases. *See Whitman*, 531 U.S. at 467 ("We have therefore refused to find

[7] As APSCU explained, the Gainful Employment regulations are not consistent with the CDR regime and instead represent the Department's second-guessing of the system Congress enacted. APSCU Mem. 13-14. The Department's belief that the statutory CDR provisions are inadequate is evident in both the regulations, 76 Fed. Reg. at 34,386-87 (listing purported shortcomings in the CDR regime), and its memorandum, Dep't Mem. 5 (same).

implicit in ambiguous sections of the [statute] an authorization to consider costs that has elsewhere, and so often, been expressly granted.").[8]

3. Throughout its motion, the Department seems to justify the regulations on the theory that Congress was especially concerned about issues related to student debt at private sector schools. *See, e.g.*, Dep't Mem. 4 ("Congress documented several abuses at [private sector trade schools] . . . ."); *id.* at 14 ("As discussed above, Congress was especially concerned in this regard about private for-profit institutions."); *id.* at 15. The Department claims that Congress did not preclude it from "effectuating the gainful employment requirement by relying on other debt measures at the programmatic level for a *subset of institutions* whose students are having particular trouble repaying their loans." *Id.* at 15 (emphasis added).

The Department's focus on a "subset of institutions" undermines its own interpretation of the HEA. First, the Department's argument is belied by the fact that Congress enacted a CDR regime that applies to *all* institutions, not just to a subset of institutions. *See* APSCU Mem. 14 n.4. Second, the Department concedes that "institutions of higher education in all sectors—public, private nonprofit, and private for-profit—offer programs" that are covered by "gainful employment." Dep't Mem. 5. Thus, it is irrational for the Department to assert that any

[8] The Department contends that it is *authorized* to impose a complex debt-related regime because Congress did not expressly *foreclose* the Department's authority. Dep't Mem. 14-15. That "extreme position" has been rejected. *Nat'l Mining Ass'n v. Dep't of the Interior*, 105 F.3d 691, 695 (D.C. Cir. 1997) ("'To suggest . . . that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not written in 'thou shalt not' terms), is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent.'" (alterations in original) (quoting *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc))). Moreover, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," and the ordinary meaning of "gainful employment" does not authorize the Department's interpretation. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation omitted).

Congressional concern about private sector institutions justifies its interpretation of a statutory term that applies to *all* types of institutions. The results of a recent Government Accountability Office ("GAO") report, which found that private sector school students had higher graduation rates for certificate programs, similar graduation rates for associate degree programs, and similar earnings as students at nonprofit and public schools, confirms the irrationality of the Department's focus on private sector schools. *See* U.S. Gov't Accountability Office, GAO-12-143, *Student Outcomes Vary at For-Profit, Nonprofit, and Public Schools* (2011).[9]

4. The Department has no response to APSCU's observation that the Department's longstanding and uniform interpretation of "gainful employment" casts light on Congress's intent. APSCU Mem. 17. The Department never before interpreted the phrase "gainful employment" to include complex considerations of student debt, and for nearly fifty years Congress did not enact a different regime to alter that interpretation. Congress's failure to step in is evidence that it did not intend "gainful employment" to authorize the complex tests the Department has adopted. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986). This is especially true in light of the Department's contention that when Congress "found that the Department had done an inadequate job in managing and overseeing" the federal

[9] The Department spends pages disparaging private sector schools as background for its flawed regulations. *See* Dep't Mem. 5-7. The Department's commentary is irrelevant in this case to the legal analysis and does not reflect the reality of private sector education. Private sector schools enroll a higher proportion of low-income, minority, and nontraditional students than institutions in other sectors, and these students tend to have less positive educational outcomes for reasons unrelated to program quality. *See* GAO, *supra* at 56. And one study has found that there are no statistically significant differences in default rates when comparing private sector schools' students to nonprofit schools' students. *See id.* at 78 (citing Guryan, J., M. Thompson, and Charles River Associates, Report on Gainful Employment, Prepared for Harris N. Miller, Career College Association (Apr. 2010)). Career College Association is APSCU's predecessor.

financial aid program, it enacted detailed legislation targeted at default rates. Dep't Mem. 4. Here, Congress has not taken any similar action.[10]

Moreover, the Department does not explain how the Gainful Employment regulations are consistent with its existing regulations, which provide that schools can demonstrate that students have "obtained *gainful employment* in [a] recognized occupation" *without* submitting detailed data regarding student income or debt. 34 C.F.R. § 668.8(g)(1)(ii) (emphasis added); APSCU Mem. 16. Those regulations thus further confirm that the Department previously adopted a limited interpretation of "gainful employment"; that it has now departed from that interpretation; and that it has adopted inconsistent definitions of the same term within its own regulations, all without the reasoned decision making required by the APA. *See Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009); APSCU Mem. 17 n.6.

2. Legislative History Does Not Support The Department's Interpretation.

The Department's far-reaching search for legislative history in support of its interpretation of the HEA demonstrates how far it has strayed from what Congress intended. The

[10] The Department claims, remarkably, that it has *not* changed its prior interpretation of the gainful employment requirement. Dep't Mem. 18-19 n.3. The Department asserts that its administrative enforcement actions discussed only a "minimum, threshold requirement," and that in those decisions there was no need for the Department to state what else the gainful employment provision might (silently) require. *Id.* But that reasoning is inconsistent with cases like *In re Beth Jacob Hebrew Teachers Coll.*, Nos. 94-43-ST, 94-80-ST, 1996 WL 1056644, at *3 (Dep't of Educ. Aug. 12, 1996), in which the Department determined that an institution's religious education program satisfied the HEA's gainful employment requirement in part because it was "designed for an occupational objective." The Department's litigation position here strongly implies that it has acted arbitrarily in abandoning its past interpretation. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). In any event, the Department's calculations demonstrate that many programs are currently, and have been, failing the Department's tests, but the Department has not previously taken any action against those programs, showing that this allegedly longstanding interpretation of the gainful employment requirement is in fact of very recent vintage.

Department looks to the legislative history of a statute other than the HEA and fails even to mention the contrary history set forth by APSCU. APSCU Mem. 18-19.

The Department relies heavily on the legislative history of the National Vocational Student Loan Insurance Act of 1965 ("NVSLIA"), Pub. L. No. 89-287, 79 Stat. 1037. Dep't Mem. 12-14. Congress merged the requirements of the NVSLIA into the HEA in the Higher Education Amendments of 1968, Pub. L. No. 90-575, § 293, 82 Stat. 1014, 1050-51. Nothing in that statutory merger supports the Department's strained construction of the pre-existing phrase "gainful employment." In passing the 1968 amendments, Congress explained that the use of the phrase "gainful employment" in another provision of the HEA was meant only to *expand* the definition of "institution of higher education" beyond business or technical schools. *See* APSCU Mem. 18-19; *see also* S. Rep. No. 90-1387, at 79 (1968). Nowhere did Congress suggest that it was using the phrase to authorize complex debt-related requirements aimed at disqualifying programs from Title IV.

The Education Amendments of 1972, Pub. L. No. 92-318, § 202(b), 86 Stat. 235, also confirm that Congress intended "gainful employment" to mean a job that pays. In that legislation, Congress amended a similar gainful employment requirement to expressly deem that training for volunteer firemen constituted training for gainful employment. APSCU Mem. 19. A Senate Report explained the need for this amendment: because volunteer firemen are uncompensated, their training could not be considered training for gainful employment under then-existing law. *See* S. Rep. No. 92-346, at 75 (1971). The 1972 amendment thus demonstrates that Congress understood "gainful employment" to mean only a job that pays. The Department has no answer to this history.

The Department's reliance on legislative history of the now-displaced NVSLIA, a statute that did not include the phrase "gainful employment," is misplaced. Dep't Mem. 12-14. Under the NVSLIA, an eligible institution was required to provide a program of postsecondary vocational or technical education "designed to fit individuals for useful employment in recognized occupations." NVSLIA § 17(a). The operative phrase in the NVSLIA is not "gainful employment"—the phrase Congress adopted and retained in the HEA—and thus the history of the NVSLIA provides little insight into the meaning of "gainful employment."

The Department cites snippets of *testimony* by private individuals, quoted in Senate and House Reports on the NVSLIA. Dep't Mem. 12-14. These culled excerpts provide no support for the Department. In particular, the Department cites testimony from Dr. Kenneth B. Hoyt regarding graduates of vocational programs. *Id.* at 12-13. That testimony does not demonstrate that Congress was concerned about graduates receiving certain incomes, or that Congress intended to authorize the Department to adopt debt tests. Indeed, both the House and Senate Reports preface the testimony of Dr. Hoyt by noting that he testified regarding the "need for such legislation and about the caliber of student attending a vocational institution." H.R. Rep. No. 89-308, at 3 (1965); *see also* S. Rep. No. 89-758, at 3 (1965). Thus, Congress quoted the testimony for what it said about student quality—not program quality. Those are very distinct concerns, which are reflected in the text of Title IV. *See, e.g.*, 20 U.S.C. § 1091 (student eligibility provisions).[11]

[11] Indeed, the Senate Report the Department cites notes that other provisions of the NVSLIA were directed at program quality. Thus, to address expressed concerns that "fly by night" institutions be explicitly eliminated from eligibility, Congress "add[ed] an eligibility feature which requires an institution to have been in existence for 2 years." S. Rep. No. 89-758, at 12. But with respect to the definition of "eligible institution," the Act aimed to establish a definition "as liberal as possible by including varieties of institutions authorized to provide, and providing, 'a program of postsecondary vocational or technical education designed to fit

The additional legislative history of the NVSLIA cited by the Department is also irrelevant. The Department cites testimony from two individuals, but Congress did not state why it included this testimony in the reports; and the testimony, which touches upon numerous topics including the need to increase access to education, does not purport to give meaning to the "gainful employment" phrase. *See* S. Rep. No. 89-758, at 9-11. Congress's consideration of data regarding the default rate of one program that offered guaranteed loans for students attending vocational institutions does not establish that Congress authorized the Department to impose a debt-related regime by using the phrase "gainful employment" or even that that phrase was targeted at program quality. Dep't Mem. 13-14.

The Department's attempt to drag the NVSLIA into this case is an obvious reach, given the HEA's text and the legislative history of the HEA itself. APSCU Mem 9-15, 18-19. And, of course, it remains incredible that the Department has discovered in this forty-plus year old legislative history support for its new regulatory regime.

C. The Gainful Employment Regulations Violate The Administrative Procedure Act.

In its motion for summary judgment, APSCU demonstrated that the Gainful Employment regulations are the product of a tainted process, lack a reasoned basis, are fraught with irrational distinctions and inconsistencies, and fail to further their purported purpose—measuring program quality. APSCU Mem. 19-30; *see also* 76 Fed. Reg. at 34,387. Additionally, APSCU explained that the regulations are impermissibly retroactive and were promulgated in violation of the notice and comment requirements of the APA. APSCU Mem. 30-33. The Department has no adequate response to these numerous deficiencies.

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individuals for useful employment in recognized occupations.'" *Id.*; *see also* H.R. Rep. No. 89-308, at 9. Thus, Congress made clear that the "useful employment" phrase was meant to describe types of institutions *generally* eligible and that program quality would be addressed by other provisions. The Department ignores these statements.

1. More Exacting Review Is Necessary Because The Regulations Are The Result Of A Tainted Process.

The Department's attempt to expand its regulatory turf was marked by well-substantiated allegations of misconduct, meriting "more exacting scrutiny." *See Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979); *see also* APSCU Mem. 19-20. The history of the Department's rulemaking is both unusual and troubling. *See* Complaint ¶¶ 47-56; APSCU Mem. 19-20 & n.7; *see also* Answer ¶¶ 3, 35, 49. And the Department's newly admitted error in evaluating repayment rates is just another reason to doubt the care given to the rulemaking process.

The Department attempts to minimize the serious concerns about the rulemaking's fairness. Dep't Mem. 32-33. It repeatedly states that APSCU participated in the process—but that does not give the Department license for misconduct. The Department also contends that any suggestion that "the Department compromised the integrity of this rulemaking by meeting with organizations that disagree with plaintiff, or organizations that have a different financial position from plaintiff, is fatuous." *Id.* at 33 (citation omitted). It is remarkable that the Department would take this position, considering that it *admits* that these same concerns have led to an inquiry by its Inspector General; requests for Congressional investigations; and referrals to the U.S. Attorney for the Southern District of New York and the Securities and Exchange Commission. APSCU Mem. 19. Surely not all of these are "fatuous." Moreover, press reports disclose that the Department has conceded that at least one person should have been banned from meeting with Department officials because of his financial ties. *Id.* at 20 n.7. Put simply, this was not a rulemaking that respected ordinary procedures; based on the troubling allegations and admitted errors, which continue to come to light, this Court should exercise more exacting review. *See Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006).

2. The Gainful Employment Regulations Are Arbitrary And Capricious.

In its opening brief, APSCU demonstrated that the Gainful Employment regulations are arbitrary and capricious for numerous reasons. APSCU Mem. 19-30. In particular, APSCU identified significant flaws in the Department's tests and additional flaws, including the Department's substantial miscalculation of student body repayment rates, that prevent the tests from measuring program quality. *Id.*

In response, the Department largely ignores those flaws and instead emphasizes that it has devised multiple tests to determine if a program should be eligible for federal loans. Dep't Mem. 20. The Department claims that the tests are "designed to work together," evidently on the theory that failures with one test are mitigated because another test exists. *Id.* But the Department's approach fails to account for the fact that *each* of its tests is flawed and is not consistent with the requirements of reasoned decision making; an agency cannot throw together flawed tests and argue one rational, workable test will emerge from the wreckage.

The Department also asserts that, "[i]n essence, plaintiff is fighting for the right of its member institutions, in three out of four years, to fail all three tests and still remain eligible to accept federal student aid." Dep't Mem. 20. This flight of rhetoric does not improve the Department's legal position: it is untrue; it cannot excuse the Department's failure to follow the law; and it does not even accurately describe the regulations. APSCU is fighting for the right of its members to be free of unlawful and unconstitutional regulations; these regulations impose serious sanctions on its members after just *one* year, not after "three out of four years"; and the regulations could force many private sector schools to stop educating students who are under-served by traditional institutions of higher education.

a) The Gainful Employment Regulations Fail To Further The Department's Stated Purpose.

The Department argues that the Gainful Employment regulations were adopted in an effort to "[p]rovide better program information to students" and "identify the worst performing programs." 76 Fed. Reg. at 34,387. But the regulations do not measure program quality. *See* APSCU Mem. 20-29; *infra* 25-26.

1. The Department cites extensively to *Association of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859 (D.C. Cir. 1992). In *Alexander*, the Department followed a clear Congressional mandate to "reduc[e] the cost to the federal government of reinsuring defaulted student loans." *Id.* at 866. Affected schools claimed, among other things, that the statute and implementing regulations violated the Due Process Clause by punishing schools irrationally. *Id.* The court relied on Congress's "comprehensive evaluation" of the student loan program to conclude that the statute and regulations were rational for purposes of due process. *Id.*

This case is vastly different. APSCU is not challenging the rationality of the HEA; rather, it urges that the HEA's plain terms control. Moreover, in *Alexander*, Congress determined that *defaults* were a serious problem and the Department adopted a rule that directly measured *defaults*. Here, the Department can point to no Congressional directive that the HEA's "gainful employment" language be used to solve any perceived problems with loan repayment or student debt-to-earnings ratios; and, as APSCU has demonstrated, the regulations, which purport to address concerns about program quality, measure a host of factors unrelated to that consideration. APSCU Mem. 20-25. *Alexander* simply does not hold that it is always rational to punish schools for students' choices, especially where the Department has failed to provide a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 52 (internal quotation omitted).

2. The lack of connection between the Department's tests and its stated goal of measuring program quality is evident in the Department's failure to account for general economic conditions. APSCU Mem. 23. The Department claims that because the debt-to-earnings ratio is based on either the mean or median annual earnings—whichever is higher—it has sufficiently accounted for market conditions. Dep't Mem. 27 & n.6. Even accepting the Department's premise, its approach ignores that *both* average and median earnings may be depressed in difficult economic times and that the regulations require measuring earnings against debt, a number that does not fluctuate with market conditions. The flaws in the Department's approach are demonstrated by today's economic downturn, where unemployment rates are high, jobs are difficult to find across the country, and salaries are frozen in many industries. *See* Gary Burtless, *Another Year of Modest Labor Market Gains*, Brookings Inst. (Dec. 15, 2011), http://www.brookings.edu/opinions/2011/1215_labor_gains_burtless.aspx. These conditions create an economic environment where well-educated people find it difficult, and sometimes impossible, to repay their student loans or maintain what the Department has deemed to be appropriate debt-to-earnings ratios. Yet the regulations punish APSCU's members for these economic realities.

The Department misleadingly claims that programs are "shielded" from economic downturns because they will only lose eligibility after failing in three out of four years. Dep't Mem. 28. The regulations, however, subject programs to sanctions after just one year and, as history shows, economic downturns can last longer than three years.

Finally, the Department asserts that "plaintiff never explains why the APA requires the Department to subsidize the programs preparing students for jobs the market cannot bear." Dep't Mem. 28. But this burden-shifting fails. *Congress* has decided to grant students access to

Title IV funds. *Congress* has enacted other express measures—the CDR provisions—to safeguard the public fisc from excessive student defaults. And *Congress* intended that students be the market—taking Title IV funds to those schools that, in their perspective, best serve their interests. Thus, *the Department* must explain how the HEA allows it to restrict programs—and potentially deprive students attending those programs of federal funding—based on debt tests that measure a host of factors other than program quality.

3. The Department argues that "good" institutions are able to "influence student choices." Dep't Mem. 25. Even if schools were effective debt counselors, that would not eliminate the inherent irrationality of basing tests that are meant to measure program quality on external factors such as economic conditions, or on a program's ability to persuade autonomous students to take on debt levels lower than those permitted by Title IV. Moreover, schools are barred from directly limiting or controlling student borrowing. 76 Fed. Reg. at 34,416; *see also* 20 U.S.C. § 1087tt(c); 34 C.F.R. § 685.301(a)(8). The regulations arbitrarily punish schools when students independently decide to take on excessive debt. *See also* APSCU Mem. 25.[12]

4. Similarly, the Department fails to acknowledge that a student's independent choice to use a repayment plan, deferment, or forbearance does not speak to program quality. APSCU Mem. 28 & n.12. Indeed, a student taking advantage of a Congressionally authorized repayment plan is likely doing so for any number of reasons unrelated to program quality.[13] Yet, the

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[12] The Department also claims that it was "generous" in only including debt incurred to cover tuition and fees in the debt-to-earnings calculations. Dep't Mem. 25. Yet the Department's "generosity" highlights its irrationality. As APSCU pointed out, the Department has no valid reason for not including a similar limitation in the repayment test. APSCU Mem. 25 n.10.

[13] The Department states that deferment and forbearance are important protections for borrowers because there is no guarantee "that higher education will bring[] higher earnings." Dep't Mem. 26 (alteration in original) (internal quotation omitted). The Department thus acknowledges that higher education will not necessarily bring higher earnings, revealing that its attempt to measure program quality based on repayment and earnings is irrational.

Department does allow *some* payments under authorized repayment plans to qualify as being in repayment and excludes *some* deferred loans from its calculations. *Id.* Thus, the Department recognized economic realities and accounted for Congressionally authorized options for some students, but decided to ignore those same realities for others. That is arbitrary. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153 (D.C. Cir. 2011).[14]

5. The Department tries to circumvent Congress's express prohibition on interfering with school administration, APSCU Mem. 25 (citing 20 U.S.C. § 1232a), and Congress's recognition that the federal government does not currently have the authority to manipulate institutions' tuition rates, *id.* (quoting H.R. Rep. No. 109-231, at 159 (2005)). APSCU does not argue that any regulation with a financial impact on schools would violate § 1232a's prohibition on exercising "any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution," *see* Dep't Mem. 27; rather, the regulations are invalid because the Department has proceeded with the *expectation* that schools will adjust their pricing to comply—in other words, the Department is attempting to control tuition, just as a national school board might. *See* 75 Fed. Reg. at 43,668. The Department cannot overcome this Congressional prohibition by citing general statutory provisions that authorize the Department to make rules.

Contrary to Congressional intent, the regulations will also put some schools at risk of violating the "90/10" rule, which forbids private sector schools from deriving more than 90

[14] The Department also irrationally counts students who do not complete programs in the loan repayment rate calculation. The Department claims that it is "obvious" that a program with a high number of "drop outs" cannot be preparing students for gainful employment. Dep't Mem. 26. But that is far from obvious and ignores that the debt-to-earnings analysis focuses on only program graduates. Indeed, students could choose not to complete a program for many reasons that have nothing to do with program quality. APSCU Mem. 29. The Department cannot make the rational connection required by the APA by mischaracterizing something as "obvious."

percent of their revenues from certain forms of federal financial aid. *See* 20 U.S.C. § 1094(a)(24). The Department claims that it is "entirely possible" for schools to comply with both the 90/10 rule and the Gainful Employment regulations. Dep't Mem. 27. Perhaps; but it is indisputable that many schools are at or near the 90/10 rule's threshold, 76 Fed. Reg. at 34,414-15, and those schools will be caught between conflicting requirements. *See* APSCU Mem. 26.

b) The Department's Debt Tests Lack A Reasoned Basis.

The Department has failed to demonstrate that its tests are supported by a reasoned explanation. *See* APSCU Mem. 26-30; *see also State Farm*, 463 U.S. at 52; *Cnty. of L.A. v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999).

1. APSCU explained that the Department's choice of threshold levels for its debt tests was unsupported. APSCU Mem. 26-28. In particular, the Department selected the 35 percent repayment rate threshold to reach predetermined outcomes: specifically, to target the "lowest-performing quarter of programs," as circularly defined by the Department. 76 Fed. Reg. at 34,397; *see also* Dep't Mem. 21. But some quarter of programs will always be the "lowest-performing," and the Department did not explain why those—or any other percentile of programs—are deemed not to prepare students for gainful employment. APSCU Mem. 26-27. And the Department's reliance on the permissibility of bright line rules does not save the regulations because, as the Department acknowledges, those bright lines must be reasonably explained. Dep't Mem. 21.

The Department also arbitrarily chose the threshold for its debt-to-earnings test. In the Notice of Proposed Rulemaking ("NPRM") the Department proposed an 8 percent threshold for its test. APSCU Mem. 27. When commenters explained that this threshold had been criticized by Sandy Baum and Saul Schwartz—the two economists the Department otherwise relied upon to support its regulations—the Department simply repeated that the threshold is a commonly

used standard and accepted it as a useful measure. *Id.* The Department makes the same fundamental error in defending its regulations: it reiterates that the administrative record evinces support for the 8 percent threshold, quoting repeatedly from the Baum and Schwartz paper that in fact *criticizes* the threshold. Dep't Mem. 21-23 (quoting A.R. 4007); *see also* A.R. 45,238. Baum and Schwartz state that "any benchmark needs stronger justification than has thus far been forthcoming" for the 8 percent standard. A.R. 4008. The Department fails to grapple with this conclusion and does not provide the "stronger justification" its own authorities deem necessary.[15]

2. APSCU also demonstrated that the Department's reliance on flawed data from Missouri, which the Department acknowledged was not broadly representative with respect to race and ethnicity, was arbitrary and capricious. APSCU Mem. 27-28. The Department's only defense is that the APA permits it to "consult an 'imperfect database' when better data is unavailable." Dep't Mem. 24 n.5 (quoting *Mt. Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1233 (9th Cir. 1993)). But in *Mt. Diablo*, the court concluded that the agency's use of imperfect data was not arbitrary and capricious because the agency had asserted that it was "the most reliable data available at the time." *See* 3 F.3d at 1233 (internal quotation omitted). Here, the Department has not asserted that the Missouri data was the most reliable available, nor has it adequately accounted for the data's shortcomings. The usefulness of the unrepresentative Missouri data is further undermined by the Department's admitted error in substantially underestimating the relationship between race and repayment rates. At a minimum, the Department must be required

[15] The Department also stresses that it applied a multiplier to the 8 percent threshold, thereby increasing the threshold to 12 percent, to "'establish thresholds above which it becomes unambiguous that a program's debt levels are excessive.'" Dep't Mem. 23 (quoting 75 Fed. Reg. at 43,620). But as APSCU explained, "*arbitrarily* inflating an *arbitrary* threshold does not create a reasoned threshold." APSCU Mem. 27. Similarly, it adds nothing for the Department to assert that it has explained "how the debt-to-income measures came to be." Dep't Mem. 24. The tests are still fundamentally flawed.

to consider whether reliance on the Missouri data is still proper in light of its other errors. It does not even pretend to have done so. *See* Ochoa Decl. (no mention of Missouri data).

3. Even if Congress intended the phrase "gainful employment" to mean "profitable employment," Dep't Mem. 11, the Department's tests are unreasonable because they do not measure profitability, *i.e.*, whether the total returns on education exceed expenditures.

The Department's tests do not actually measure whether the monetary returns from education exceed the costs. For example, in the debt-to-earnings analysis, the Department purports to evaluate whether the average loan debt of former students is greater than a certain percentage of either average income or average discretionary income measured shortly after program completion, APSCU Mem. 29-30; it does not consider whether education increased projected *lifetime* student earnings more than the cost.[16] The repayment test fares no better. It generally measures whether former students paid down the principal balance on their student loans over the course of a year. But whether former students failed to make payments does not necessarily reflect whether they could have made payments; or whether their ability to pay down the loan in future years has been enhanced by their education. Thus, even under the Department's strained reading of the HEA, the regulations miss the mark.

4. The Department asserts that its interpretation of "gainful employment" "makes sense" from the perspective of the student and thus is reasonable. Dep't Mem. 19. The Department

[16] The Department states that it measures income in "years three and four to provide some time for former students to obtain employment and experience while recognizing that as more years pass, it grows harder and harder to link income to education." Dep't Mem. 28. But the fact that the Department believes the link between education and income is harder to measure over time does not justify the Department's attempt to evaluate program quality based on an incomplete picture of the income of former students. As APSCU explained, the Department previously acknowledged that "incomes increase by as much as 43 percent between the first few years out of postsecondary education and the sixth to tenth years out." 75 Fed. Reg. at 43,666. The Department's tests fail to account for this important fact.

concludes that a student would evaluate an educational program to determine whether borrowing the necessary funds is "worth it" and not just whether graduating from the program would result in a paying job. *See id.* But the decision making process that students attending postsecondary schools might engage in says nothing about what *Congress intended* by imposing the "gainful employment" requirement on institutions.

In addition, students should be the ones determining whether a program is "worth it" based on their evaluation of *all* the costs and benefits of education—both monetary and non-monetary, subjective and objective, convenience- and time-driven, and otherwise; but the Gainful Employment regulations preclude that student choice. The Department decrees that students should answer that question based only on monetary benefits accruing a short time after graduation and assessed against the Department's arbitrary notion of how much money they should have left after servicing their educational loans. In the Department's view, if a student needs to borrow money to obtain postsecondary education, generally it is only "worth it" for that student if he will obtain a *high-paying* job that produces a certain income within *three to four years*. That the Department's tests fail to account at all for longer-term financial benefits from the educational experience—or non-monetary benefits such as a consistent work schedule, the ability to pursue a career in the nonprofit sector, or the opportunity to secure a job that permits work from home or with safer work conditions—does not mean that a program is not "worth it," and it certainly does not demonstrate anything about programs' quality or whether they are "profitable" for students.

3. The Gainful Employment Regulations Are Impermissibly Retroactive.

The Department acknowledges, as it must, that the Gainful Employment regulations impose sanctions based "on the debt of students who left a program before the regulations were promulgated." Dep't Mem. 35. Nonetheless, the Department argues that the regulations are not

impermissibly retroactive because "they have only future effect." *Id.* at 34. The Department is wrong about what the regulatory text says; and the Department's selective reading of the retroactivity jurisprudence does not save the regulations.

The Department notes that under the final rule, programs will first be subject to ineligibility based on the debt measures calculated in fiscal year ("FY") 2014. Dep't Mem. 36. The Department argues that the FY 2014 debt measures will consider the debt of students who completed the program in FY 2010 and FY 2011, "a time during which schools at least had notice of the Department's intent to promulgate the regulations." *Id.* Of course, proposed regulations are not legally binding. Moreover, under the regulations' plain text and the Department's own admission, programs will be subject to sanctions based on the debt measures calculated in *FY 2012*, which take into account students who completed programs in FY 2008 and FY 2009, well before the Department initiated this rulemaking. 34 C.F.R. § 668.7(h), (i); 76 Fed. Reg. at 34,412 ("Based on the effective date of these regulations, the first final repayment rates will be calculated for FY 2012 and will examine borrowers who first entered repayment in FY 2008 and FY 2009."). Therefore, even though the Department suggests otherwise, the regulations will impose sanctions on schools based on conduct that was completed *years before* the Department set this rulemaking in motion.[17]

Given these consequences, the Department's regulatory approach is impermissibly retroactive because it "attaches new legal consequences to events completed before its enactment." *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 860 (D.C. Cir. 2002) (per

[17] The alternative method for calculating repayment rates available to some programs does not alter the regulations' retroactive effect. Even under the alternative method, each of the tests will still be based on debt incurred before the adoption—to say nothing of the effective date—of the final regulations. *See* 76 Fed. Reg. at 34,422.

curiam) (internal quotation omitted); *see* APSCU Mem. 31. The Department ignores this rule of law, and instead relies on a number of inapposite cases.

For example, the Gainful Employment regulations find no shelter in *National Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009), or *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585 (D.C. Cir. 2001). In the former case, the court held that a rule that "impaired the future value of past bargains" was not retroactive because it did "not render[] past actions illegal or otherwise sanctionable." *Nat'l Cable*, 567 F.3d at 670. By contrast, the Gainful Employment regulations punish schools for the debt load of students who have already left the program, and thus do "render past actions" "otherwise sanctionable." *Celtronix Telemetry* is not on point because it did not examine whether the challenged rule imposed new liabilities on completed conduct, *see* 272 F.3d at 585-88, which is at issue in this case.

The Department also cites *Alexander* but, as with its other cases, *Alexander* did not examine whether regulations attached new legal consequences to events completed before promulgation. At the outset, the court stated that "[a] law is 'retroactive' if it takes away or impairs vested rights acquired under existing law, *or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past*." *Alexander*, 979 F.2d at 864 (emphasis added) (internal quotation omitted). The court's reasoning and analysis focused entirely on the "vested right" issue and did not address whether the regulations impermissibly imposed new sanctions based on completed conduct. *Id.* at 864-66; *see also Bergerco Can. v. Iraqi State Co. for Food Stuff Trading*, 924 F. Supp. 252, 268 (D.D.C. 1996) (recognizing *Alexander*'s limited holding), *rev'd on other grounds*, 129 F.3d 189 (D.C.

Cir. 1997). Thus, *Alexander* does not render these regulations permissible, and none of the cases cited by the Department suggests that retroactive regulations like these are lawful.[18]

4. The Gainful Employment Regulations Violate The Notice Requirement Of The Administrative Procedure Act.

The regulations must also be set aside because they are substantially different from the ones the Department proposed in the NPRM. APSCU Mem. 31-33. In particular, although the Department initially proposed a system where some limited debt warnings would be required, the final regulations mandate increasingly severe debt warnings after each year a program is deemed failing. *Id.* at 32; *see also* 34 C.F.R. § 668.7(j)(1), (2). The Department asserts that some of the warnings required by the final regulations are similar to those in the NPRM and notes that it received some comments on the propriety of the proposed warnings. Dep't Mem. 31. But the limited warnings the Department proposed did not put APSCU's members on notice that the Department would adopt a regime that imposed increasingly severe sanctions, including unconstitutionally compelled speech. *See infra* 35-40.

The final regulations also impose harsh wait-out periods on programs deemed "ineligible" that are nowhere found in the NPRM. 34 C.F.R. § 668.7(*l*)(2)(ii); APSCU Mem. 32-33. The Department can point to *nothing* that previewed the new wait-out periods in the final rule; thus, the regulations violate the logical outgrowth doctrine. *See Int'l Union, United Mine*

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[18] The Department also cites *Career College Ass'n v. Riley*, No. 94-1214, 1994 WL 396294 (D.D.C. July 19, 1994), *aff'd*, 70 F.3d 637 (D.C. Cir. 1995). *See* Dep't Mem. 34. That case addressed only the "secondary retroactive[e]" effects of the Department's rule, not whether the rule was retroactive. *Career Coll. Ass'n*, 1994 WL 396294, at *3-5.

With regard to secondary retroactivity, this Court applies a "reasonableness" analysis to rules "affecting the desirability of past transactions." *Celtronix Telemetry*, 272 F.3d at 589. Here, the regulations also have a secondary retroactive effect because, as commenters pointed out, the regulations will affect schools' Title IV eligibility based on past transactions. *E.g.*, A.R. 37,349-50, 45,133-35, 45,231-33. Schools have little control over these metrics (especially for former students), making these sanctions unreasonable. *See* APSCU Mem. 20-26.

Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259-60 (D.C. Cir. 2005) (the logical outgrowth doctrine does not "extend to a final rule that is a brand new rule," because something "is not a logical outgrowth of nothing" (internal quotation omitted)).[19]

The Department also violated the APA by failing to release the data underlying its regulations. APSCU Mem. 33; *see Chamber of Commerce*, 443 F.3d at 899; *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237(D.C. Cir. 2008). The Department released some data on its website, Dep't Mem. 32, but it explicitly told schools they would not be able to access all of the data necessary to replicate its analysis. A.R. 45,147. The Department does not deny this statement, which contradicts its claim that it released data sufficient to allow "commenters to examine in detail the doings of the Department." Dep't Mem. 32. Indeed, until this litigation, the Department failed to release the data it relied upon to reject commenters' concerns about the relationship between student demographics and repayment rates. If the Department had released this important data during the rulemaking, its substantial errors could have been avoided.

D. The Gainful Employment Regulations Violate The First Amendment And The Due Process Clause.

1. The Regulations Cannot Survive Strict Scrutiny.

The Department acknowledges that the compelled speech sanctions are "not intended to prevent consumer confusion or deception *per se*," and claims that the regulations are intended instead to provide factual information to students. Dep't Mem. 38 n.10. Given that purpose, under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Department must establish that the compelled speech is "purely factual and uncontroversial." *Id.* at 651. The

[19] The Department contends that the wait-out provisions are permissible to close a "loophole." Dep't Mem. 32 (quoting *AT&T Corp. v. FCC*, 113 F.3d 225, 230 (D.C. Cir. 1997)). But *AT&T* does not address whether an agency violated the APA's notice and comment requirements by closing a loophole, and thus does not support the Department. *See AT&T*, 113 F.3d at 230. Moreover, the Department's "loophole" argument would encourage agency game-playing in rulemakings.

Department agrees that *Zauderer* applies, Dep't Mem. 38, but fails to meet the *Zauderer* test, and the regulations therefore must satisfy strict scrutiny.

As an initial matter, the Department states that its regulations must be upheld if there is any "'conceivabl[e] manner in which [they] can be enforced consistent with the First Amendment.'" *Id.* (alterations in original) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 456 (2008)). In *Washington State Grange*, the Court concluded that it would uphold a law that allowed candidates some control over how their names appeared on the State's ballot so long as "the ballot could conceivably be printed in such a way as to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment." 552 U.S. at 456. Unlike the speculative question of whether ballots could ever be printed so as to avoid confusing voters, APSCU's challenge is premised on the set text of the compelled speech requirements. APSCU Mem. 34. The speech compelled by the regulations is always unconstitutional and thus fails under any standard, facial or otherwise. *See also Fry v. Bd. of Regents of Univ. of Wis. Sys.*, 132 F. Supp. 2d 740, 743 (W.D. Wis. 2000) ("[F]ederal case law is devoid of precedent applying the 'facial versus applied' dichotomy to compelled speech cases.").

Turning to the merits, the Department's argument that the speech is "factual" reveals its inherently nonfactual nature. According to the Department, "[b]ecause two-thirds or more of its borrowers are having *difficulty* paying down their loans, it is reasonable, and factually accurate, to say that students in such a program 'should expect' to have *difficulty* paying back their loans, too." Dep't Mem. 39 (emphases added). The Department's contention improperly assumes that its tests actually measure program quality instead of student demographics and general economic conditions. *See supra* 24-26. Moreover, the statement is not factual because the Department's

tests do not measure whether students will have "difficulty" paying back their loans. As discussed, the repayment test counts certain borrowers who are in deferment or certain Congressionally authorized repayment plans—but who could pay if they chose—as *not* being in repayment. APSCU Mem. 28-29. Many of the students that the Department does not consider in repayment may be having no "difficulty" at all; rather, they could be managing debt in a way Congress authorized, they may be in deferment, or they simply may have chosen to pay off other debt before paying off their student loans. And of course, even if some past students have had "difficulty" does not mean that any particular student "should expect" to have similar difficulties.

The regulations thus require schools to make a statement that contains the Department's highly imprecise assumptions about "expectations" and "difficulty," not statements of fact. The compelled speech is also controversial, as shown by numerous comments contesting whether the Department's tests actually measure the "difficulty" of repaying student loans. *See, e.g.*, APSCU Mem. 21 (collecting comments). Under *Zauderer*, compelled speech must be both factual *and* noncontroversial to avoid strict scrutiny. 471 U.S. at 651. Here, the regulations fail both aspects of the test and strict scrutiny applies.

Similarly, requiring schools to endorse the Government's "resource" for researching educational options—www.collegenavigator.gov—is neither purely factual nor uncontroversial. By requiring schools to advocate the Government's website—instead of allowing them to select their own research resources—the Department has imposed its value judgment on schools. The regulations also require a statement that the Government's website can be used by students to "research *other educational options*." 34 C.F.R. § 668.7(j)(2)(C) (emphasis added). The regulations thus force schools to suggest to students that other institutions will provide them with a comparable education or at least appropriate alternative options.

These First Amendment objections do not rest on schools' desire to "not emphasize this information," Dep't Mem. 39; rather, they rest on the right of private entities to be free from compelled speech that is either nonfactual or controversial, absent a compelling government interest and narrow tailoring. The Department relies on *New York State Restaurant Ass'n v. New York City Board of Health*, 556 F.3d 114 (2d Cir. 2009); but in that case, as the Department acknowledges, the restaurants required to post calorie information did not dispute that the information was purely factual. *Id.* at 134. By contrast, the compelled speech in this case is akin to the "opinion-based" requirement that video game manufacturers attach an "18" sticker to "sexually explicit" video games. *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006). There, the court explained that even "if one assumes that the State's definition of 'sexually explicit' is precise, it is the State's definition—the video game manufacturer or retailer may have an entirely different definition of this term." *Id.* The court in *Blagojevich* applied strict scrutiny to the mandated "18" sticker because it "communicate[d] a subjective and highly controversial message," striking down the requirement as insufficiently tailored. *Id*. By that same reasoning, the compelled statements that students should expect to have "difficulty" paying back their loans or that www.collegenavigator.gov is an appropriate "resource" for students, are based impermissibly on the Department's tendentious views.[20]

Because the compelled speech is not purely factual and uncontroversial, strict scrutiny applies, and the Department bears the burden of demonstrating a "compelling" government interest and narrow tailoring. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000); *R.J. Reynolds Tobacco Co. v. FDA*, No. 11-cv-01482, 2011 WL 5307391, at *5-6 (D.D.C. Nov.

[20] Even if the regulations involved only factual and noncontroversial speech, they are still impermissible under *Zauderer* because they are unjustified and unduly burdensome. *See* APSCU Mem. 36 n.15.

7, 2011). The Department's assertion that it has a "substantial"—but not compelling—interest, Dep't Mem. 41, is fatal to the regulations.

Moreover, the Government's interest is invalid. APSCU cited numerous cases for the proposition that the Government does not have a valid interest in dissuading adults from engaging in legal though disfavored behavior. APSCU Mem. 36. The Department contends that this is not its asserted interest, and that the regulations seek to "provide students with more information, not less." Dep't Mem. 41-42 n.12. The Department could have required schools to make a statement that they did not pass the Department's debt-related tests for the last two years. Regardless of the validity of those tests, such a statement could at least be factual. Instead, schools must adopt the Department's assumption-laden words. This suggests that the goal is not merely to provide information, but to influence student choices. The Department slips, and admits as much. *Id.* (noting desire to guide students to make what the Department considers "the *best*, most informed decisions" (emphasis added)).

Further, the compelled speech sanctions are not the least restrictive means of achieving the Department's interests. The Department claims that schools "remain free to express their own views about the Department's debt measures," Dep't Mem. 40, but that does not satisfy the Constitution. Compelled speech violates the First Amendment when a speaker's message is affected by the speech that the speaker is forced to accommodate. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 576 (1995) ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."). This case is thus unlike *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir.

2003), where the court upheld the EPA's requirement that municipalities engage in purely factual, uncontroversial speech. Here, it would make no sense for schools to tell students on the one hand that they should expect to have "difficulty" repaying their loans, and on the other hand to express their own views (*e.g.*, that students who have enhanced job and compensation opportunities can make decisions in order to manage debt loads without "difficulty").

The Department errs in cavalierly suggesting that schools "can avoid the disclosure requirements by opting out of the federal Title IV program." Dep't Mem. 40. In the context of the First Amendment, that is not a choice that the Department can force schools to make. The Government "may not deny a benefit to a person on a basis that infringes his Constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also Rumsfeld*, 547 U.S. at 59-60. Further, the Department knows that many institutions are able to offer educational programs only because Title IV funding is available. In light of the pervasiveness of Title IV funds in postsecondary education—a policy outcome fostered by Congress—the Department cannot credibly assert that the Constitutional problem in its regulations can be ignored because schools might abandon the Title IV program.

2. The Regulations Fail To Provide Due Process.

The regulations violate schools' rights under the Due Process Clause because they impose harsh sanctions, including ineligibility to receive Title IV funds, based on Social Security Administration ("SSA") information available *only* to the Government that schools can never review or challenge. APSCU Mem. 37.

APSCU has standing to bring this claim. The Department cites *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), for the proposition that a challenge to a regulation is not "ripe" until the regulation has been applied. Dep't Mem. 42. But the Department omits the critical next sentences from the Court's decision: "The major exception, of course, is a

substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is 'ripe' for review *at once* . . . ." 497 U.S. at 891 (emphasis added). The regulations require APSCU's members to adjust their conduct immediately, *see* Complaint ¶ 14; Answer ¶ 14, and its members will continue to operate under the threat of imminent sanctions absent judicial relief. Indeed, when a plaintiff is subject to a rulemaking, standing is "self-evident." *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002).

The Department responds that APSCU lacks standing because "[a] program is not even potentially subject to sanctions under the regulations unless it fails all three debt measures, only two of which . . . turn on SSA data." Dep't Mem. 42. It is alarming that the Department defends any use of secret data. But that argument cannot prevail, given the Department's repeated assertions that the "debt measures are designed to complement each other." *Id.* at 1-2. If the tests are indeed designed to work together to compensate for each other's shortcomings—as the Department argues—then the Department cannot simultaneously claim that the reliance on secret SSA data is irrelevant because it only arises in some cases.

On the merits, schools have a property interest in Title IV eligibility that cannot be deprived without meaningful notice and an opportunity to be heard. APSCU Mem. 37-38; *see Career Coll. Ass'n v. Dep't of Educ.*, No. 92-1345, 1992 WL 233837, at *5 (D.D.C. Aug. 31, 1992) (schools' participation in federal loan programs is a "property" interest). The cases cited by the Department—*Alexander*, 979 F.2d 859 and *Dumas v. Kipps*, 90 F.3d 386 (9th Cir. 1996)—are not to the contrary. In *Alexander*, the court held that schools did not have a "vested right" to participate in federal student loan programs. 979 F.2d at 864. But the court did not equate "vested right" with "property interest," and did not reject plaintiff's due process claim on that ground. *See id.* at 867. *Dumas* involved a school in bankruptcy proceedings seeking to

bring a suit under Section 1983 against a State's student aid commission. 90 F.3d at 388. In that unique circumstance, the Ninth Circuit—expressly recognizing the conflict with *Continental Training Services, Inc. v. Cavazos*, 893 F.2d 877, 893 (7th Cir. 1990) (holding that a school had a property interest in its eligibility to receive federal funds under the HEA; *cited in* APSCU Mem. 37 n.16)—held that as an indirect beneficiary of the HEA, the debtor school did not have an interest to support its Section 1983 claim. *Dumas*, 90 F.3d at 392.[21]

Further, the Department's skewed application of the balancing test developed in *Mathews v. Eldridge*, 424 U.S. 319 (1976), only emphasizes the regulations' serious procedural shortcomings. *See* Dep't Mem. 44-45.

First, a school that offers multiple programs has an interest in maintaining Title IV eligibility for each of its programs that cannot be characterized as "relatively modest." Dep't Mem. 44. For example, schools that offer a limited number of programs and schools with programs that attract a large number of students could face dire consequences if even one program is deemed ineligible. Indeed, the 90/10 rule is a Congressional acknowledgment of schools' substantial interest in maintaining access to federal funds. 20 U.S.C. § 1094(a)(24). The fact that schools may be able to obtain revenue from other sources cannot justify the Department's steamrolling of their due process rights, especially considering that an erroneous determination of ineligibility could have a devastating impact on a school. *See Mathews*, 424 U.S. at 341 (requiring consideration of "the degree of potential deprivation"); *Gray Panthers v.*

[21] Whether APSCU is a direct beneficiary of the HEA is irrelevant, contrary to the Department's implication. Dep't Mem. 43 n.13. That inquiry pertains to whether a school may bring a private right of action under the HEA. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995) (applying four-factor test for implying private right of action). Here, APSCU challenges the regulations under the Constitution and the APA.

Schweiker, 652 F.2d 146, 166-67 (D.C. Cir. 1980) (cautioning against minimization of private interest in balancing test).

Second, the Department's concession that it can "neither provide the detailed SSA earnings data to the school nor adjudicate any dispute about the accuracy of that data," Dep't Mem. 44, conclusively demonstrates that an erroneous determination of ineligibility would be essentially unreviewable. The Due Process Clause safeguards schools against such unreviewable sanctions, *see* APSCU Mem. 37-38, and the Department's assertion that schools may request a recalculation based on alternative data does nothing to solve this problem. *Id.* at 38 n.17.[22]

Third, the Department argues that APSCU has not identified additional procedural protections, apart from access to the SSA data, that would ameliorate these due process violations. Dep't Mem. 45. Nothing dictates defining gainful employment by reference to social security earnings data; it is the Department that seeks to impose sanctions without due process, and it is the Department that must satisfy the *Mathews* balancing test. If there is no way for the Department to impose these sanctions without trampling the due process rights of schools, then the Department must pursue a different course.

II. The Reporting And Disclosure Regulations Violate The Higher Education Act And The Administrative Procedure Act.

A. The Reporting And Disclosure Regulations Exceed The Department's Authority Under The Higher Education Act.

The Department defends the Reporting and Disclosure regulations largely by distorting the administrative record and ignoring adverse, controlling precedent.

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[22] The Department asserts that "the risk of an erroneous deprivation is low," Dep't Mem. 45, but now, in addition to the recent miscalculation of CDRs admitted in its Answer, *see* Answer ¶ 115, the Department has admitted a substantial error in its calculation of the relationship between race and repayment rates, and disclosed a further error as well. *See supra* 5 n.1. This string of miscalculations only underscores the importance of allowing regulated entities an opportunity to examine and contest the data used to sanction them. *Id.*

First, the Department insists that the regulations are "independently authorized" by 20 U.S.C. § 1221e-3 and § 3474 and are not contingent upon the statute's gainful employment language. Dep't Mem. 10, 46 & n.17. The APA and judicial precedent foreclose that argument. The APA requires that the Department "reference . . . the legal authority under which [a] rule is proposed." 5 U.S.C. § 553(b)(2). And the D.C. Circuit has confirmed that this reference must be found in the notice of the proposed rulemaking. *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 900 (D.C. Cir. 1978). The Department did not cite 20 U.S.C. § 1221e-3 or § 3474 as authority for the Reporting and Disclosure regulations in the NPRM—or, indeed, the final rule. *See* 75 Fed. Reg. 66,832, 66,949 (Oct. 29, 2010); 75 Fed. Reg. 34,806, 34,873 (June 18, 2010). Those sections cannot be belatedly invoked as authority for the regulations.

Second, the regulations violate the HEA's prohibition on "the development, implementation, or maintenance of a Federal database of personally identifiable information on individuals receiving assistance under this chapter." 20 U.S.C. § 1015c(a). The Department asserts that its regulations do not run afoul of the prohibition "because the reported information will not be used to monitor individual students over time" and will instead be "aggregated to evaluate programs." Dep't Mem. 47. That, however, evades the crucial fact that the regulations call for schools to provide the Department with "[i]nformation *needed to identify the student.*" 34 C.F.R. § 668.6(a)(1)(i) (emphasis added). Even if the Department later aggregates the data it collects, it will still have "develop[ed] . . . a Federal database of personally identifiable information" in violation of the HEA.[23]

[23] Because the regulations violate the statute's plain text, the legislative history of 20 U.S.C. § 1015c(a) cannot salvage the regulations. *Burlington N. R.R. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987). Moreover, the legislative history demonstrates that Congress was concerned about the Department collecting data to track students; the Reporting and

The regulations also do not satisfy the exception to 20 U.S.C. § 1015c(a) for systems necessary for the operation of Title IV programs that were in use by the Department as of 2008. *See* 20 U.S.C. § 1015c(b). The Department argues that "the information reported by schools is necessary to calculate a program's debt measures and will be incorporated into an existing database . . . the National Student Loan Data System." Dep't Mem. 47. But the collected information is "necessary" only because the Department has adopted the unlawful Gainful Employment regulations.[24] Further, if the Department is concerned only with aggregate data, as it claims, it is not "necessary" to collect personally identifiable information. Finally, the notion that the Department may collect any personally identifiable information whatsoever, so long as it eventually incorporates that data into an existing system, eviscerates the prohibition in 20 U.S.C. § 1015c(a). Under the Department's interpretation, the exception swallows the rule, allowing the Department infinitely to expand its existing systems as it discovers new personally identifiable information it would like to obtain.

B. The Reporting And Disclosure Regulations Are Arbitrary And Capricious.

The Department concedes that the Reporting and Disclosure regulations require schools to disclose graduation rates calculated using a methodology that differs from the methodology enacted by Congress. Dep't Mem. 47-48. The Department's efforts to overcome that concession are inadequate.

First, the Department argues that it is reasonable to require disclosure of two different graduation rates because there "is no reason to suspect that an individual who is thinking about pursuing postsecondary education will not be able to understand" the difference between the two

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Disclosure regulations authorize the Department to collect precisely the type of data that would enable it to do what Congress prohibited.

[24] This is also fatal to the Department's assertion that the Reporting and Disclosure regulations are independent of the Gainful Employment regulations. *See* Dep't Mem. 46 n.17.

rates. Dep't Mem. 48. The Department offers no further explanation beyond this *ipse dixit*. Moreover, the Department's claim defies logic: an advertisement setting forth two different, government-calculated and government-blessed graduation rates for the same program may well be confusing. Second, a hope that students will not be confused is not an affirmative reason for measuring the same thing in two different ways; the Department cannot persuasively explain how publishing two different graduation rates "promote[s] the goal of facilitating informed choice." 75 Fed. Reg. at 66,836. Third, the Department's assertion that prospective students will be able to understand the two types of graduation rates was made for the first time in its brief. Dep't Mem. 47-48. Such *post hoc*, lawyer-driven explanations cannot salvage deficient regulations. *Clark Cnty., Nevada v. FAA*, 522 F.3d 437, 443 n.1 (D.C. Cir. 2008) (holding agency action arbitrary and capricious where court found "nothing in the agency's determinations that support[ed] counsel's post hoc explanations").

The regulations are also arbitrary and capricious because nothing in either the proposed or final regulations explains why it is reasonable to require schools to treat students who transfer from a program at another institution differently from students who transfer from a program at their own institution. The Department argues that transfers should be treated differently because "schools could manipulate the on-time completion rates of their programs by encouraging students to switch between similar programs." Dep't Mem. 48. But there is no evidence that institutions attempt to manipulate their graduation rates in that way. And this is yet another *post hoc* rationalization offered by the Department's lawyers that finds no support in the rulemaking. *Clark Cnty.*, 522 F.3d at 443 n.1.[25]

[25] The Department's assertion that APSCU's argument has been waived is mistaken. Dep't Mem. 48 n.18. The proposed regulations did not set forth any methodology for calculating graduation rates; accordingly, commenters had no reason to suspect the Department would

III. The Program Approval Regulations Violate The Higher Education Act And The Administrative Procedure Act.

The Department's effort to save the Program Approval regulations fails. The regulations are not an attempt to effectuate policy declared by Congress; instead, they are an attempt to buttress the Department's own unlawful Gainful Employment regulations.[26] In addition, the Program Approval regulations put the Department in a role Congress did not intend, by permitting it to exercise curriculum control over institutions participating in Title IV programs. The Program Approval regulations also violate the APA in several ways.

A. The Program Approval Regulations Exceed The Department's Authority Under The Higher Education Act.

The Department's argument that the Program Approval regulations are necessary to prevent schools from "recycl[ing]" ineligible programs, Dep't Mem. 48, must be rejected. The regulations do not target "recycled" programs; rather, they broadly empower the Department to disapprove of disfavored programs based on vague and malleable standards, including whether "the process and determination" by which an institution decided to offer an additional program was "sufficient," whether the program was designed to meet "local market needs," and "how the program was reviewed or approved by, or developed in conjunction" with potential employers. 34 C.F.R. § 600.20(d)(2); APSCU Mem. 42-43.

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make an irrational distinction between transfer students and other students. In any event, the Department bears the burden of proving any affirmative waiver defense. Its half-hearted suggestion that it "does not *appear* that this argument was raised in comments," *id.* (emphasis added), is insufficient to carry that burden. Finally, this internal inconsistency between treatment of transfer students and other students is the "kind of clear point[] that an agency must consider *sua sponte*." *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1150 (D.C. Cir. 2005).

[26] The Department did not dispute that the Program Approval regulations facilitate the Gainful Employment regulations. APSCU Mem. 43 n.20. Accordingly, these regulations need not be considered separately if the Court vacates the Gainful Employment regulations.

As APSCU explained, the Department has unlawfully conferred upon itself authority to exercise "'direction, supervision, or control over curriculum, program of instruction, administration, or personnel of any educational institution.'" APSCU Mem. 42-43 (quoting 20 U.S.C. § 1232a). If the Department believes a school has made a poor curriculum decision, the regulations empower it to prevent that school from accepting Title IV funds for the proposed program. That is a clear violation of 20 U.S.C. § 1232a.

The Department's claim that the Program Approval regulations do not contradict § 1232a because they are "closing a massive loophole whose existence would prevent the effectuation of the policy declared by Congress" is wrong and simply an attempt to use the Department's own regulations to bootstrap itself into greater power. *See* Dep't Mem. 49 (internal quotation omitted). The alleged "loophole" is a product not of the statute, but of the Department's own unlawful regulations. Accordingly, *Pierce County, Washington v. Guillen*, 537 U.S. 129, 145 (2003) and *United States v. Miami University*, 294 F.3d 797, 818 (6th Cir. 2002), both of which address agency efforts to give teeth to an underlying statute, are inapplicable. The Department cannot create a loophole through improper regulations, then purport to close that loophole through additional regulations that are contrary to Congressional intent embodied in § 1232a and the HEA generally.

B. The Program Approval Regulations Are Arbitrary And Capricious And Not A Logical Outgrowth Of The Proposed Regulations.

The Program Approval regulations empower the Department to provide an institution only 30-days' notice before the first day of class that a new program must obtain approval to receive Title IV funds. 34 C.F.R. § 600.20(d)(1)(ii)(B). The Department makes the confounding assertion that this is a "benefit" to institutions "by allowing them to add new programs relatively quickly." Dep't Mem. 49. This mis-presents the 30 day regulation. Regardless of when schools

notify the Secretary of their intention to offer a new program, the Secretary does not need to inform schools that the program must be authorized before disbursing Title IV funds until 30 days before the start of classes. If an institution is required to obtain approval, it would need to know more than 30 days prior to the first day of class, so that students who have enrolled in the program can make plans for alternative arrangements if approval is not granted. Moreover, an institution would have already engaged and scheduled instructors for the program and notifying these instructors 30 days before the first day of class that their services will not be utilized, puts both the institution and the instructors in untenable positions. The Department's failure to consider the regulations' undue burden on schools, students, and school employees is arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

The Program Approval regulations are not a logical outgrowth of the regulations proposed. *See Int'l Union*, 407 F.3d at 1259; *Shell Oil Co. v. EPA*, 950 F.2d 741, 750-51 (D.C. Cir. 1991) (per curiam). There was no indication in the NPRM that institutions would be subject to the many new requirements in the final Program Approval regulations. *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009) (explaining that the initial proposed regulations must "ma[k]e clear that the agency was contemplating" the requirements found in the final regulations). For example, the 30 day notice-of-approval provision described above is entirely new; commenters had no opportunity to explain to the Department how that provision would be harmful to students and schools. Similarly, commenters had no notice that the Department planned to eliminate the exception listed in 34 C.F.R. § 600.10(c) (2010), which excluded from the prior, limited approval process certain new programs that prepared students for gainful employment "in the same or related recognized occupation as an educational program that" had been previously "designated as an eligible program at that institution." Because the

proposed regulations failed to identify these dramatic changes—and others, APSCU Mem. 44—the public lost the opportunity to draw attention to the many flaws in the regime.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, and as supported by the record, the Court should deny the Department's motion for summary judgment and grant summary judgment in APSCU's favor, declaring the Gainful Employment, Reporting and Disclosure, and Program Approval regulations to be unlawful, vacating them, and enjoining their enforcement.

Dated: January 12, 2012

Respectfully submitted,

/s/ Douglas R. Cox

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2012, a true and correct copy of the attached **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**, and the accompanying **PROPOSED ORDER**, were filed and served pursuant to the Court's electronic filing procedures using the Court's CM/ECF System.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES,

Plaintiff,

v.

ARNE DUNCAN, in his official capacity as Secretary of the Department of Education,

and

UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.

Civil Action No. 1:11-cv-01314 (JEB)

[PROPOSED] ORDER DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

WHEREFORE, having considered the Complaint, the Answer, the Parties' Cross-Motions for Summary Judgment, the arguments of counsel, and the evidence in this matter, the Court is of the opinion that Plaintiff has demonstrated that no disputed issue of material fact exists between the Parties, and that Plaintiff is entitled to judgment as a matter of law on its claims that the Gainful Employment regulations, 76 Fed. Reg. 34,386, 34,448 (June 13, 2011) (to be codified at 34 C.F.R. § 668.7), the Reporting and Disclosure regulations, 75 Fed. Reg. 66,832, 66,948 (Oct. 29, 2010) (codified at 34 C.F.R. § 668.6), and the Program Approval regulations, 75 Fed. Reg. 66,665, 66,676 (Oct. 29, 2010) (codified at 34 C.F.R. §§ 600.10, 600.20), are invalid and in violation of law.

IT IS THEREFORE ORDERED that Defendants' Cross-Motion for Summary Judgment is **DENIED**;

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is **GRANTED**;

IT IS FURTHER ORDERED that the Gainful Employment, Reporting and Disclosure, and Program Approval regulations are **VACATED** and **SET ASIDE**;

IT IS FURTHER ORDERED that Defendants and their officers, employees, and agents shall not implement, apply, or take any action whatsoever pursuant to the Gainful Employment, Reporting and Disclosure, and Program Approval regulations.

SO ORDERED.

DATE: _____

_____
James E. Boasberg
United States District Judge

LOCAL RULE 7(k) LIST OF PERSONS TO BE SERVED WITH PROPOSED ORDER

Pursuant to LCvR 7(k), the following persons are entitled to be notified of entry of the foregoing Proposed Order:

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