21-888

In the United States Court of Appeals
for the Second Circuit

New York Legal Assistance Group,

Plaintiff-Appellant,

v.

Miguel A. Cardona, in His Official Capacity as Secretary of Education, and United States Department of Education,

Defendants-Appellees.

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

BRIEF OF MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAII, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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INTRODUCTION AND STATEMENT OF INTEREST

The Commonwealth of Massachusetts, by and through Attorney General Maura Healey; the State of California, by and through Attorney General Rob Bonta; the State of Connecticut, by and through Attorney General William Tong; the State of Delaware, by and through Attorney General Kathy Jennings; the District of Columbia, by and through Attorney General Karl Racine; the State of Hawaii, by and through Attorney General Clare Connors; the People of the State of Illinois, by and through Attorney General Kwame Raoul; the State of Maine, by and through Attorney General Aaron Frey; the State of Maryland, by and through Attorney General Brian Frosh; the State of Michigan, by and through Attorney General Dana Nessel; the State of Minnesota, by and through Attorney General Keith Ellison; the State of New Jersey, by and through Acting Attorney General Andrew J. Bruck; the State of New Mexico, by and through Attorney General Hector Balderas; the State of New York, by and through Attorney General Letitia James; the State of North Carolina, by and through Attorney General Josh Stein; the State of Oregon, by and through Attorney General Ellen Rosenblum; the Commonwealth of Pennsylvania, by and through Attorney General Josh Shapiro; the State of Rhode Island, by and through Attorney General Peter Neronha; the State of Vermont, by and through Attorney General Thomas J. Donovan Jr.; the Commonwealth of Virginia, by and through Attorney General Mark

Herring; the State of Washington, by and through Attorney General Bob Ferguson; the State of Wisconsin, by and through Attorney General Joshua Kaul (collectively, "Amici States") submit this brief under Federal Rule of Appellate Procedure 29(a) to assist the Court in determining whether the final agency action at issue in this litigation is arbitrary and capricious in violation of the Administrative Procedure Act. The information presented in this brief is informed by the considerable experience that Amici States have accumulated in protecting students from predatory conduct by for-profit schools and assisting students in obtaining relief.

Amici States have taken a leading role in addressing misconduct perpetrated by for-profit schools, which often target unsophisticated, low-income students. Amici States have initiated numerous investigations and enforcement actions under state consumer protection laws, uncovering pervasive abuses of students and their families by these private companies. To ensure that victimized students are not unfairly saddled with federal student loans, Congress created a statutory entitlement to loan relief for borrowers who are defrauded by their school—a process known as "borrower defense." *See* 20 U.S.C. § 1087e(h). Amici States have helped tens of thousands of students secure borrower defense relief and have submitted aggregated or "group" borrower defense claims on behalf of similarly situated students subjected to systematic institutional misconduct.

In September 2019, the U.S. Department of Education (ED) issued final borrower defense regulations making it all but impossible for defrauded borrowers to successfully obtain loan relief ("2019 Rule"), while at the same time rejecting longstanding agency practice and positions going back 25 years to the first borrower defense rule. *See* 59 Fed. Reg. 61,671 (1994). The 2019 Rule also rescinded and replaced ED's prior extensive regulations ("2016 Rule"). The previous rule provided a clear, fair, and transparent process for borrowers to seek relief and, at the same, established important deterrents to school misconduct. Notably, under the 2016 Rule, a borrower could assert a successful borrower defense based on a state-law judgment obtained by a state attorney general against a school.

By contrast, the 2019 Rule irrationally rescinded key borrower protections and eliminated most of the grounds for borrower defense relief established by the 2016 Rule, including judgments obtained by state attorneys general. The 2019 Rule also completely rejected violations of state law as a basis to assert a claim, which has been a key part of borrower defense since 1994. *See* 59 Fed. Reg. 61,671. Even after drastically limiting available defenses, the 2019 Rule imposes additional, onerous requirements on borrowers seeking loan relief, creating what is at best an illusory process—as confirmed by ED's own projections that as few as 3.5% of borrowers who were *actually* defrauded by their school would obtain relief under

the new rule. *See* 84 Fed. Reg. 49,895. Rather than protecting students, the 2019 Rule repeatedly expresses solicitude for for-profit schools, seeking to shield their reputations and spare them accountability for their violations of state and federal law. *See,* e.g., 84 Fed. Reg. 49,843 (public hearings could have "serious negative impact on an institution's reputation"); 49,876 (financial protection disclosures "could tarnish the reputation" of for-profit schools).

In gutting critical student-borrower protections going back decades and replacing the comprehensive 2016 Rule with a futile borrower defense process, ED relied on unsupported assumptions, failed to explain its fundamental changes of position, and ignored considerable record evidence. These deficiencies render the 2019 Rule arbitrary and capricious in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). Amici States respectfully request reversal of the district court's order holding otherwise.[1]

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[1] Amici States are co-plaintiffs in a pending APA action against ED and its Secretary in the U.S. District Court in the Northern District of California, also challenging the lawfulness of the 2019 Rule. *Massachusetts, et al. v. Cardona, et al.* (N.D. Cal. No. 20-0477, filed July 15, 2020). There, the court *sua sponte* stayed the case through at least August 14, 2021, following the change in presidential administrations.

ARGUMENT

THE 2019 BORROWER DEFENSE RULE IS NOT THE PRODUCT OF LAWFUL AGENCY DECISIONMAKING

ED premised the 2019 Rule on inaccurate, unsupported, and inconsistent claims. In particular, ED relied heavily on the wholly unsubstantiated assertion that—absent regulatory impediments—borrowers are likely to submit frivolous borrower defense claims. *See, e.g.*, 84 Fed. Reg. 49,800-01, 49,861, and 49,888. ED also relied on entirely illogical and unsupported contentions regarding the best interests of taxpayers, including the implausible assertion that taxpayers will benefit from the elimination of a group claims process that streamlines ED's review of borrower defense claims. *See, e.g.*, 84 Fed. Reg. 49,879. In promulgating the 2019 Rule, ED also failed to consider relevant factors and record evidence, and further failed to adequately explain—and in some cases even acknowledge—its dramatic reversal from its prior positions. Critically, ED failed to consider the significant harm to borrowers caused by its change of position and imposition of insurmountable obstacles to borrower relief. The logical errors, unfounded assumptions, omissions, and inconsistencies that undergird the 2019 Rule render the entire rule arbitrary and capricious under the APA.

While judicial review under the APA's "arbitrary and capricious" standard may be narrow, it is not "merely perfunctory." *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 151 (2d Cir. 2008). Rather, "judicial inquiry must be

searching and careful." *Id*. (citations omitted). The court should not "substitute [its] judgment for that of the agency" but must still carefully examine the agency's contemporaneous explanation for the action as reflected in the administrative record. *XY Planning Network v. S.E.C.*, 963 F.3d 244, 255 (2d Cir. 2020); *see also, e.g.*, *U.S. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) ("Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply convenient litigating positions.") (citation, internal quotation marks, and alteration omitted). The standard of review is not "a rubber stamp." *Penobscot Air Servs. v. F.A.A*., 164 F.3d 713, 720 (1st Cir. 1999).

Here, the district court's review was so deferential to the agency that it failed to ensure ED's compliance with the APA. The district court accepted ED's justifications without undertaking the requisite review of the administrative record supporting the 2019 Rule. Instead, the district court credited ED for merely providing justifications for its decisions even where those justifications were unsubstantiated and contrary to record evidence. In so doing, the court failed to ensure that "the agency [gave] adequate reasons for its decisions, in the form of a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Nat. Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency*, 961 F.3d 160, 170 (2d Cir. 2020) (internal quotation marks and alterations

omitted).

In this brief, Amici States highlight three glaring deficiencies in the 2019 Rule, each of which concerns an area with which Amici States have firsthand experience and expertise through their work prosecuting for-profit schools and assisting tens of thousands of defrauded borrowers secure borrower defense relief: (1) the 2019 Rule's irrational adoption of provisions establishing insurmountable evidentiary requirements for victimized borrowers; (2) the 2019 Rule's illogical elimination of avenues for group relief; and (3) the 2019 Rule's unsubstantiated, repeated assertions that borrowers widely submit frivolous claims. These rulemaking infirmities are merely illustrative of the inescapable conclusion that the entire 2019 Rule was not "the product of reasoned decision-making" as is required by the APA. *See Vargas v. I.N.S.*, 938 F.2d 358, 361 (2d Cir. 1991).

A. ED Irrationally Adopted an Insurmountable Standard of Proof that Functions as an Effective Bar to Relief for Victimized Borrowers

In promulgating the 2019 Rule, ED established insurmountable burdens for defrauded borrowers to obtain relief by, *inter alia*, requiring that they prove that an institution engaged in intentionally misleading conduct or acted with reckless disregard for the truth, 34 C.F.R. § 685.206(e)(3), and making clear that only claims supported by *written* proof would be likely to succeed. *See* 84 Fed. Reg. 49,807 (encouraging borrowers "to obtain and preserve written documentation"

from their schools, as claims lacking written evidence will be "difficult claims to adjudicate"). As such, although the rule purports to establish a process by which defrauded borrowers can obtain loan forgiveness, it will in fact function as a bar to borrower relief.

Amici States have particular insight into the evidence required to prove institutional misconduct. Amici States' considerable experience investigating misconduct by for-profit schools has time and again demonstrated that proving institutional fraud typically requires a lengthy investigation, access to school records via subpoena, thorough legal analysis, and often the use of experts to audit school data. For example, ED's determination that Corinthian Colleges, Inc. ("Corinthian") systematically lied to students during the enrollment process about job-placement rates was based on a multi-year investigation by the California Attorney General's Office, supported by subpoenas, which included a review of every placement file with the assistance of thousands of hours from forensic accountants.[2]

Amici States know firsthand that students simply do not have the ability—legal or otherwise—to access and assemble the evidence necessary to establish the

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[2] *See, e.g.*, Attorney General Kamala D. Harris, Incoming U.S. Education Secretary John King Announce Expanded Debt Relief Options for Corinthian College Students (Nov. 2015), https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-incoming-us-education-secretary-john-king.

falsity of a school's representations, much less the school's intent. Contrary to ED's unsubstantiated claims that students should be able to "obtain and preserve written documentation" from schools, 84 Fed. Reg. 49,807, students lack the bargaining power to obtain such evidence. Information imbalances heavily favor predatory schools over deceived borrowers because the documentary evidence needed to meet the intent requirement of the 2019 Rule is in the possession of the school. Indeed, as Amici States have learned from assisting thousands of borrowers, former students often face significant challenges obtaining *any* records from their schools. As a result, without compulsory access to a school's internal records, and without the assistance of lawyers and experts, students cannot make the requisite showing of deception and intent, and the 2019 Rule effectively precludes relief.

Amici States, along with other state attorneys general, raised these concerns during the rulemaking process as did many other commenters.[3] However, ED ignored these submissions and relevant evidence, justifying the 2019 Rule's burden

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[3] *See* State Attorneys General, Comment Letter Re: Docket ID ED-2018-OPE-0027 (Aug. 30, 2018), https://oag.ca.gov/system/files/attachments/press-docs/docket-id-ed-2018-ope-0027-final-letter.pdf; *see also, e.g.*, Legal Aid Community, Comment Letter on the Proposed Regulations on Borrower Defenses and Use of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations (Aug. 30, 2018), https://www.regulations.gov/document?D=ED-2018-OPE-0027-29073

on borrowers with the implausible assertion that borrowers could simply demand "written representations and documentation" from schools during the enrollment process. 84 Fed. Reg. 49,807. ED was well aware of the absurdity of this claim, having previously concluded, based on evidence and experience, that that "[i]nformation asymmetry between borrowers and institutions, which are likely in control of the best evidence of intentionality of misrepresentations, would render borrower defense claims implausible for most borrowers" under heightened evidentiary requirements. 81 Fed. Reg. 75,937.

Furthermore, ED's own "budgetary impact" for the 2019 Rule estimates that only 3.47%–5.25% of loans taken out by students who were *in fact* defrauded by for-profit schools will be discharged under the 2019 Rule. 84 Fed. Reg. 49,895 (and Table 3).[4] In context, this means that for every $1,000,000 in federal student loans taken out to attend a for-profit school, ED expects that approximately $100,000 will be eligible for discharge due to fraud, but because of the 2019 Rule's barriers and impediments, ED estimates that only approximately $4,000 will actually be successfully discharged. In these numbers, ED tacitly acknowledged that the 2019 Rule created only an illusory path to loan forgiveness.

[4] In contrast, under the 2016 Rule, ED estimated that between 54.6% and 65% of loans taken out by defrauded students would be discharged. 84 Fed. Reg. 49,895.

ED's budgetary statistics highlight its awareness that virtually no harmed borrowers will be able to secure relief under the 2019 Rule's heightened evidentiary requirements. Nonetheless, ED failed to expressly consider these grave impacts on borrowers, and thus failed to meet APA requirements. *See, e.g.*, *NRDC v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 144 (S.D.N.Y. 2019) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)) ("[A]gency action is arbitrary and capricious if the agency [has] entirely failed to consider an important aspect of the problem.").

Moreover, the explanation that ED offered for how borrowers could meet its heightened evidentiary standard—that they could simply demand "written representations and documentation" from schools during the enrollment process—is unsupported and divorced from reality. Nonetheless, the district court accepted at face value ED's purported justification for imposing a heightened evidentiary standard and stated—without citation or example—that these justifications were supported by "underlying empirical evidence" in the record. Dist. Ct. Op. at 16. To the contrary, ED's central claim that borrowers would be able to obtain the requisite evidence to establish a successful borrower defense claim under the 2019 Rule's standard was merely conjecture—which is not a valid substitute for analysis supported by record evidence. *See, e.g.*, *Kan. Gas & Elec. Co. v. FERC*, 758 F.2d 713, 721 (D.C. Cir. 1985) ("agency's reasoning [is] deficient" if it is "mere

conjecture"). ED did not support this claim with any empirical evidence, did not provide any reasoned explanation for its change of position from the 2016 Rule, and did not contend with considerable evidence to the contrary. Accordingly, the heightened evidentiary standard in the 2019 Rule is arbitrary and capricious under the APA.

B. ED Ignored Substantial Record Evidence and Failed to Explain Its Change of Position When It Rescinded the Group Discharge Process

The 2019 Rule rescinded the process by which ED could consider borrower defense claims brought on behalf of groups of borrowers. 84 Fed. Reg. 49,798-800. In violation of the APA, ED did so without providing a reasoned explanation for its change of position and without considering record evidence of the harms posed to borrowers and taxpayers by this change. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at, 42 ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

When it issued the 2016 Rule, ED concluded that a group process "will facilitate the efficient and timely adjudication of not only borrower defense claims for large numbers of borrowers with common facts and claims, but will also conserve ED's administrative resources by also adjudicating any contingent claim ED may have for recovery from an institution." 81 Fed. Reg. 75,965. In issuing the

2019 Rule, however, ED adopted a contradictory, unreasoned position, asserting that "[i]nitiating the group discharge process is extremely burdensome on [ED] and results in inefficiency and delays for individual borrowers." 84 Fed. Reg. 49,879.

ED's primary explanation for its elimination of the group discharge process was its conclusion that the 2019 Rule's new evidentiary standard necessitates individual applications and claim adjudications. *See* 84 Fed. Reg. 49,798-800, 49,888. This explanation fails to acknowledge that, as multiple commenters explained, ED could have retained a group discharge process for the purpose of determining institutional misconduct even under its new heightened standard. Such a process could address systemic misconduct widely perpetrated against cohorts of borrowers, and could do so based on documentary evidence of institution-wide policies and practices. ED's stated rationale does not justify its total abandonment of a group discharge process. *See, e.g.*, 84 Fed. Reg. 49,799.

In seeking to justify this change of policy, ED relied on two other assertions not supported in the record: that group discharges place an undue burden on taxpayers, *see* 84 Fed. Reg. 49,879, and that there is "evidence of[] outside actors attempting to personally gain from the bad acts of institutions as well as unfounded allegations" by submitting group claims. 84 Fed. Reg. 49,798. ED failed, however, to identify any such "actors" or "evidence."

Under ED's new policy, even in the case of widespread evidence of

institutional misrepresentations, ED will grant relief only where "each borrower" has the "ability to demonstrate that institutions made misrepresentations with knowledge of [their] false, misleading, or deceptive nature or with reckless disregard." 84 Fed. Reg. 49,799. ED has not offered a reasonable explanation for denying relief to a borrower merely because the borrower is unable to marshal *their own* evidence under ED's new strict standard, even where ED is already in possession of such evidence—nor could it. *See Williams v. DeVos*, No. 16-11949, 2018 WL 5281741, at *13 (D. Mass. Oct. 24, 2018). To deny borrower relief in such circumstances is patently irrational and serves only to deprive defrauded borrowers of relief to which they are entitled.

Numerous investigations and enforcement actions undertaken by Amici States have revealed that predatory schools typically engage in systemic misconduct, subjecting large numbers of prospective and enrolled students to the same egregious abuse and deception. A group discharge process can efficiently address these harms, and without a group process many eligible borrowers will be deprived of relief to which they are statutorily entitled. Amici States' significant experience conducting outreach to student borrowers has revealed that most borrowers who have been defrauded by their schools are unaware of the borrower defense process or their entitlement to relief.

In 2017, for example, ED's sustained efforts to reach out to borrowers

defrauded by the for-profit chain of schools operated by Corinthian failed to reach even a substantial fraction of students eligible for relief. As a result, a bipartisan group of 47 state attorneys general engaged in massive outreach efforts to contact these students and inform them of their eligibility. This experience made clear that, even when borrowers are aware of borrower defense relief, they often find the application process overwhelming and confusing. Thus, absent a group discharge process, those schools that have committed the most egregious and systemic misconduct will benefit from their wrongdoing at the expense of borrowers with meritorious claims who are unaware of or unable to access relief.

ED's stated rationale for reversing its position on a group discharge process is also illogical. First, the claim that evidence of reasonable reliance on a misrepresentation must be considered on an individualized basis was squarely and rightfully rejected by ED during its 2016 rulemaking. As ED previously explained, "if a representation that is reasonably likely to induce a recipient to act is made to a broad audience, it is logical to presume that those audience members did in fact rely on that representation." 81 Fed. Reg. 75,971. ED correctly concluded in 2016 that "there is a rational nexus between the wide dissemination of the misrepresentation and the likelihood of reliance by the audience, which justifie[s] the rebuttable presumption of reasonable reliance upon the misrepresentation." *Id.* As ED previously acknowledged, such a presumption is consistent with federal

consumer protection law. *Id.* In the 2019 Rule, ED failed to provide a reasoned explanation for its departure from this position so fully articulated in 2016.

Second, the contention that a group discharge process would place an "extraordinary burden" on ED is unsupported and unrealistic. 83 Fed. Reg. 37,244. ED's proposed alternative to group discharge is a process whereby ED is required to review and individually adjudicate numerous individual borrower defense claims. Unless ED is expecting that eligible borrowers will fail to apply for relief or that it will be able to quickly dispose of most applications without considering their merits, applying a group discharge to an entire cohort of similarly affected borrowers would undoubtedly be more cost-effective and efficient than the proposed individualized alternative—just as class actions under Federal Rule of Civil Procedure 23 permit the efficient resolution of numerous claims by aggregating them into a single adjudication and eliminating repetitious litigation. *See, e.g.*, *Rodolico v. Unisys Corp.*, 199 F.R.D. 468, 479-80 (E.D.N.Y. 2001). In addition, undertaking a tedious individualized process is unnecessary where a school's widespread misconduct has already been established.

Finally, ED's repeated assertion that borrowers may be harmed by inclusion in a group discharge because the school may then refuse to release their transcripts (or other credentials) reflects a profound misunderstanding of the challenges facing defrauded borrowers. Withholding credentials to induce payment of a debt is

precisely the sort of predatory and unfair conduct that state consumer protection laws make unlawful.[5] It is profoundly improper for ED to rely on the possibility of school retaliation against group members to justify a rule that *reduces* protections for defrauded student borrowers. Moreover, ED is empowered to prevent such retaliation by forbidding a school from withholding such credentials. *See* 20 U.S.C. § 1221e-3. ED's own regulatory choice to abide such retaliation by predatory schools does not constitute a compelling reason for depriving victimized borrowers of critical relief.

Amici States raised these concerns to ED during the rulemaking process, as did other commenters.[6] Nonetheless, ED eliminated the group discharge process on the basis of these irrational justifications. In reviewing this rescission, the district court merely recited ED's justifications and found them to be sufficient without identifying any support in the record for ED's views. Dist. Ct. Op. at 16-17. The Court did not undertake the required "searching and careful" review of the record when concluding that these justifications were sufficient to satisfy the APA. *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 415–16.

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[5] *See, e.g.*, California's Educational Debt Collection Practices Act, Cal. Civ. Code §§ 1788.90-1788.93 (prohibiting schools from, among other things, withholding transcripts as a debt-collection tool).

[6] *See* State Attorneys General, Comment Letter Re: Docket ID ED-2018-OPE-0027, at 12 (Aug. 30, 2018), https://oag.ca.gov/system/files/attachments/press-docs/docket-id-ed-2018-ope-0027-final-letter.pdf

Critically, it is not the case that ED's position is merely at odds with the opinions of the Plaintiff or Amici States. For all the above-stated reasons, ED's justifications for elimination of the group discharge process are irrational, and thus arbitrary and capricious. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (agency must "articulate a satisfactory explanation for its action including a *rational* connection between the facts found and the choice made").

C. ED Improperly Premised the 2019 Rule on the Baseless Assertion that Borrowers Widely Submit "Frivolous" Claims

In addition to ignoring considerable record evidence, ED premised the 2019 Rule on the overarching view that, without the imposition of impediments to relief, borrowers would submit a massive number of "frivolous" and "unsubstantiated" claims. *See, e.g.*, 84 Fed. Reg. 49,800-01, 49,861, and 49,888. Throughout the 2019 Rule, ED portrays students who seek relief as irresponsible and acting in bad faith, and asserts without basis that the regulations must be designed to prevent "giving students an opportunity to complete their education and [then] raise alleged misrepresentations to avoid paying for that education." 84 Fed. Reg. 49,793. ED provides no record evidence to support its new belief of supposed widespread borrower malfeasance, which runs counter to ED's prior position going back 25 years. *See, e.g.*, 59 Fed. Reg. 61,671 (1994) ("The Secretary does not believe that [borrower defense] proceedings will be used by borrowers to raise frivolous appeals.").

Regardless, ED's core concern about the specter of frivolous claims is divorced from reality and runs contrary to the vast experience of Amici States assisting defrauded borrowers. Indeed, ED's assertion that borrowers have submitted a large number of frivolous claims is completely unfounded. There is no record evidence that students have used—much less used on a large scale—the borrower defense process to complete their education and then inappropriately raise alleged misrepresentations to avoid paying for that education.

Additionally, ED's contention that the 2016 Rule in particular would be insufficient to prevent potential frivolous claims is based on clear factual errors. Throughout the 2019 Rule, ED repeatedly cited to its past experience processing borrower defense claims, creating the misimpression that it had experience reviewing a large number of claims under the 2016 Rule. *See, e.g.*, 84 Fed. Reg. 49,800-801, 49,884. In reality, ED had not yet approved or denied a single claim under the 2016 Rule at the time the 2019 Rule was published.[7]

ED's pervasive reliance on the prospect of widespread frivolous claims and borrower misconduct in justifying its rescission of the 2016 Rule and imposition of limitations to relief is an unexplained and unsupported reversal of agency position.

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[7] *See, e.g.*, Testimony of Sec. DeVos Responding to Questions Submitted by Senator Patty Murray, at 20-21 (June 13, 2019), https://www.help.senate.gov/imo/media/doc/SenMurrayQFRresponses32819LHHS hearing.pdf.

See, e.g., *New York Pub. Int. Rsch. Grp., Inc. v. Johnson*, 427 F.3d 172, 182 (2d Cir. 2005) ("[A]gency action is arbitrary and capricious if it departs from agency precedent without explanation."). It is also unreasonable in the absence of any record evidence to support ED's claims. "Reliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking." *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017). ED's persistent reliance even "*in part* on the basis of" unsubstantiated claims of borrower misconduct and frivolous claims "is enough to render the Rule arbitrary and capricious." *See New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 546 (S.D.N.Y. 2019) (citing *Animal Legal Def. Fund, Inc.*, 872 F.3d at 619). Accordingly, the 2019 Rule is arbitrary and capricious.

CONCLUSION

Amici States respectfully request that the Court hold that the 2019 Rule is arbitrary and capricious in violation of the APA and reverse the district court's decision holding otherwise.

Dated: July 28, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,493 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word for Office Professional Plus 2016 (the same program used to calculate the word count).

/s/ Nicklas A. Akers