INITIAL VERSION

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 15-5190

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES,

Plaintiff-Appellant,

v.

ARNE DUNCAN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF EDUCATION; UNITED STATES DEPARTMENT OF EDUCATION; AND UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal From The United States District Court
For The District Of Columbia
(No. 1:14-cv-01870-JDB)

OPENING BRIEF FOR APPELLANT

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

(A) Parties, Intervenors, and *Amici*

The Association of Private Sector Colleges and Universities ("APSCU") was the plaintiff in the district court and is the appellant in this Court. APSCU is a voluntary association of private-sector educational institutions, incorporated in the District of Columbia. APSCU represents hundreds of accredited, private postsecondary schools, institutes, colleges, and universities. APSCU has no parent company, and no publicly held company has a 10% or greater ownership interest in APSCU.

The defendants in the district court, who are appellees in this Court, were Arne Duncan, in his official capacity as Secretary of the Department of Education; the United States Department of Education; and the United States of America.

The Chamber of Commerce of the United States participated in the district court as an *amicus* in support of plaintiff APSCU.

The following entities participated in the district court as *amici* in support of the defendants: Air Force Sergeants Association; American Federation of Teachers, AFL-CIO; Center for Public Interest Law; Center for Responsible Lending; Children's Advocacy Institute; Consumer Action; Consumer Federation of California; Demos; The Institute for College Access & Success; League of United Latin American Citizens; Military Officers Association of America;

Mississippi Center for Justice; National Council of La Raza; New Economy Project; Public Advocates Inc.; Public Citizen, Inc.; Public Counsel; Public Good Law Center; Public Law Center; Service Employees International Union; United States Student Association; University of San Diego School of Law Veterans Legal Clinic; Veterans Education Success; Veterans' Student Loan Relief Fund; VetJobs; Vietnam Veterans of America; Woodstock Institute; and Young Invincibles.

Public Citizen, Inc. and Young Invincibles have filed a notice of intent to participate as *amici* in this Court in support of defendants-appellees.

There currently are no other *amici* and no intervenors.

(B) Rulings Under Review

APSCU seeks review of the Order entered on June 23, 2015, by the United States District Court for the District of Columbia (Bates, J.) (District Court Docket Entry ("D.E.") 32), denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment. The district court also issued a Memorandum Opinion accompanying its Order on June 23, 2015 (D.E.31), ___ F. Supp. 3d ___, 2015 WL 3866659 (D.D.C. June 23, 2015).

(C) Related Cases

The same agency action was challenged in the Southern District of New York by the Association of Private Colleges. *Association of Private Colleges v. Duncan*, 14-cv-08838 (S.D.N.Y.). The district court in the *Association of Private*

Colleges case entered judgment for the defendants on May 28, 2015. No notice of appeal was filed.

Counsel is not aware of any other related cases.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Association of Private Sector Colleges and Universities ("APSCU") is a 501(c)(6) voluntary membership organization whose members include accredited, private postsecondary schools, institutes, colleges, and universities that provide educational opportunities to prepare millions of students for employment in many occupational fields. APSCU does not have any parent companies, and no publicly held company has a 10% or greater ownership interest in APSCU. APSCU qualifies as a "trade association" under Circuit Rule 26.1(b) because it is "a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership."

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http://tinyurl.com/o3w6e25 60

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Legislative History **Page(s)**

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Other Authorities

Black's Law Dictionary (10th ed. 2014)....................21

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IRS, *Tax Gap for Tax Year 2006* (2012), http://tinyurl.com/ldwp8qp....................49

Roberto J. Rodriguez, Special Assistant to the President for Educ., Conference on Student Loans—Opening Plenary Session (Oct. 24, 2013), http://tinyurl.com/kt5q5e3....................11

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* *Webster's New International Dictionary* (2d ed. 1949).................... 21, 26

* *Webster's Third New International Dictionary* (2002).................... 21, 26

GLOSSARY

2011 regulations	Prior "gainful employment" regulations, 34 C.F.R. §§ 668.6-.7 (2011), vacated in principal part
2014 regulations	"Gainful employment" regulations under review in this case, 79 Fed. Reg. 64,889 (Oct. 31, 2014)
APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
APSCU	Association of Private Sector Colleges and Universities (Plaintiff-Appellant)
APSCU I	*Ass'n of Private Sector Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012)
APSCU II	*Ass'n of Private Sector Colls. & Univs. v. Duncan*, 930 F. Supp. 2d 210 (D.D.C. 2013)
Data System	National Student Loan Data System
Debt metrics (or "metrics")	The "discretionary income rate" and "annual earnings rate," 34 C.F.R. §§ 668.403-.404
Department	United States Department of Education
File	Social Security Administration Master Earnings File
HEA	Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 20 U.S.C. § 1001 *et seq.*
NVSLIA	National Vocational Student Loan Insurance Act of 1965, Pub. L. No. 89-287, 79 Stat. 1037
Reporting requirements	Reporting requirements established in the 2014 regulations, *see* 34 C.F.R. § 668.411
Title IV	Title IV of the Higher Education Act of 1965, 20 U.S.C. §§ 1070-1099d

INTRODUCTION

In one of the most consequential higher-education rulemakings in decades, the U.S. Department of Education adopted sweeping regulations of federal student financial aid that will unlawfully deprive hundreds of thousands of students of educational opportunities. The Department's "gainful employment" regulations, 79 Fed. Reg. 64,889 (Oct. 31, 2014)—adopted to replace a similar, failed attempt to regulate that a federal court struck down—impose severe new restrictions on higher-education institutions' ability to participate in financial-aid programs under Title IV of the Higher Education Act of 1965 ("HEA"), 20 U.S.C. § 1001 *et seq*. The regulations will render more than one thousand educational programs ineligible for Title IV aid, based on students' choices and circumstances beyond the schools' control. The regulations far exceed the Department's statutory authority and violate principles of administrative law embodied in the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*.

Congress never authorized the Department's attempt to overhaul federal higher-education policy through "gainful employment" regulations. The rule's putative basis is a short, straightforward statutory phrase: Certain programs are eligible for Title IV funds only if they "prepare students for gainful employment in a recognized occupation." *E.g.*, 20 U.S.C. § 1002(b)(1)(A)(i). That language merely limits the *type* of training programs must provide: training that prepares

students for paying jobs. The regulations distort that text into a license to condition eligibility based on whether (in the Department's view) programs enable students to earn enough to repay their student loans—which the Department determines using complex metrics of debt and earnings. No plausible reading of the HEA's text supports that construction. The statutory context, structure, and purpose—and the Department's own prior, longstanding position—confirm that Congress had nothing like that in mind. Indeed, Congress forbade the Department from *collecting* certain data used to calculate the metrics.

Even if Congress had authorized conditioning Title IV eligibility on students' debt and earnings, the metrics are arbitrary and irrational. They do not rationally measure what schools *enable* students to earn, but instead purport to measure how much graduates *actually* earn—which does not reliably reflect program quality, but students' circumstances and choices and the economy. The Department disavowed an intent to hold schools responsible for—indeed, to shutter high-quality programs based upon—students' choices or economic conditions. Yet its metrics do just that.

The metrics also do not rationally assess whether graduates earn enough to repay their debt, but instead judge earnings against an arbitrary threshold reflecting the proportion of income the Department thinks students should devote to servicing debt. That threshold has no basis in empirical evidence; the Department's own

data show it is unrealistic. And the metrics will senselessly bar many thousands of students from higher education, an irrational consequence the Department failed to justify. Far from a common-sense response to a perceived student-debt problem, the metrics illogically harm the students that the Department purports to help.

The district court sustained the metrics based on multiple errors of law. It gave short shrift to the controlling statutory text—jumping from the facts that Congress did not define certain words and that dictionaries supply slightly different definitions, to the conclusion that Congress delegated the entire domain to the Department. That is not how *Chevron* works. Absence of statutory definitions simply means courts must consult terms' ordinary meaning. And the existence of multiple dictionary definitions makes no difference where, as here, every plausible definition in contention yields the *same answer* to the "precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The district court's contrary view would transform nearly every statute into an inkblot, drastically expand agency discretion, and curtail court review.

The district court also failed to scrutinize numerous other irrational aspects of the rule. Instead, it broadly accepted the Department's policy justifications at face value, sidestepping the pivotal *legal* questions of whether the record contains substantial evidence to support the Department's premises and whether the agency's reasoning is rational. The APA does not allow a court to rubber-stamp

agency action based on the agency's assurance that it thought about the issues. The district court was required, but failed, to assess whether the agency's putative evidence and explanations add up.

This case is far from the ordinary APA rulemaking challenge, where deference often means agencies get the benefit of the doubt at the margin. The Department's position here is not entitled to *any* deference, and no degree of deference could rescue its unlawful gainful-employment regulations from their illegality, or their irrationality. The district court's decision should be reversed and the regulations vacated.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. This action arose under (inter alia) the HEA, 20 U.S.C. § 1001 *et seq.*, and the APA, 5 U.S.C. § 551 *et seq*. Joint Appendix ("J.A.") __[D.E.1:¶¶1-23, 198-211].

This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered its order granting summary judgment for defendants and denying summary judgment for plaintiff-appellant Association of Private Sector Colleges and Universities ("APSCU")—disposing of all claims—on June 23, 2015. J.A.__[D.E.32]. APSCU filed a timely notice of appeal on July 2, 2015. J.A.__[D.E.33].

APSCU, which participated in the rulemaking, J.A.__[AR-H-074147-365], has standing because many of its member schools are subject to the regulations and will face substantial additional regulatory burdens as a result. J.A.__[D.E.1:¶19].

STATEMENT OF ISSUES

1. The HEA conditions certain higher-education programs' eligibility for Title IV aid on whether they "prepare students for gainful employment in a recognized occupation." 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A), (c)(1)(B), 1088(b)(1)(A)(i). The regulations restrict Title IV eligibility based on complex debt metrics that purport to measure students' ability to repay their loans. Do the Department's metrics exceed its statutory authority?

2. The metrics purport to measure whether programs enable graduates to repay their loans by comparing skewed estimates of graduates' earnings and debt—which depend on factors unrelated to program quality and beyond schools' control—using an arbitrary passing threshold. Are the metrics arbitrary and capricious?

3. Section 1015c of Title 20 prohibits the Department from developing new databases containing personally identifiable student information. The regulations require programs to report personally identifiable data regarding students' private, non-federal student loans. Do the reporting requirements violate Section 1015c, and further require vacatur of the metrics, which depend on them?

STATUTES AND REGULATIONS

All pertinent statutes and regulations are reproduced in the separately bound Addendum.

STATEMENT OF THE CASE

A. The Statutory Framework

Each year, millions of students are enabled to pursue postsecondary education by federal aid under Title IV of the HEA, 20 U.S.C. §§ 1070-1099d. Congress enacted the HEA in 1965 to "assist in making available the benefits of postsecondary education to eligible students." *Id.* § 1070(a). Title IV establishes a comprehensive framework governing eligibility for that aid.

The HEA extends Title IV funds only to students attending an "institutio[n] of higher education," 20 U.S.C. § 1070, which includes public and non-profit postsecondary schools as well as "proprietary" (*i.e.*, for-profit) institutions, *id.* §§ 1001(a)(4), (b), 1002(a)(1), (b)-(c). As the Secretary has noted, "'for-profit institutions play a vital role in training young people and adults for jobs'" and help to "'meet the explosive demand for skills'" that other schools cannot. J.A.__[AR-H-055068] (citation omitted).

An "institution of higher education" must satisfy numerous statutory criteria. Among others, the school must be authorized in the State where it operates, and ordinarily must be accredited by a Department-approved accrediting agency.

20 U.S.C. §§ 1001(a)(2), (5), 1002(b)(1)(B), (D), (c)(1)(B). The HEA also specifies the qualifications of students schools may enroll, the types and duration of programs they may offer, and how schools are managed. *E.g.*, *id.* §§ 1002(a)(3), 1088(b). And for most for-profit (degree and non-degree) programs—and non-degree programs at public and non-profit schools—the HEA requires that programs "prepare students for gainful employment in a recognized occupation." *Id.* §§ 1001(b)(1), 1002(b)(1)(A), (c)(1)(B), 1088(b)(1)(A)(i).

Beyond these threshold criteria, Congress established a host of specific requirements schools must satisfy. *E.g.*, 20 U.S.C. §§ 1085, 1087bb, 1088, 1094. Section 1094 alone imposes 29 separate requirements. *Id.* § 1094(a). Many HEA provisions specifically address student-loan debt and costs. For example, an institution is ineligible for certain Title IV assistance if its "cohort default rate" exceeds specified limits. *Id.* § 1085(a)(2), (m)(1). That rate measures, on an institutional basis, the percentage of students who default on federal loans.

While the HEA permits the Department to administer these statutory requirements, 20 U.S.C. §§ 1070(b), 1221e-3, 3474, and allows the Department to develop standards on certain specific issues, *e.g.*, *id.* § 1088(b)(2)(A)(i)-(ii) (calculation of placement rates); *id.* § 1094(c)(1)(B) ("institutional capability" and "financial responsibility" standards for administering financial aid), Congress limited the Department's authority to superimpose additional requirements. The

statute forbids the Department—or any federal agency—from "exercis[ing] any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system." 20 U.S.C. §§ 1232a, 3403(b). And Congress undisputedly has never authorized the Department to dictate tuition. *See* District Court Docket Entry ("D.E.") 17, at 14; H.R. Rep. No. 109-231, at 159 (2005).

Congress also prohibited the Department from undertaking "the development, implementation, or maintenance of a Federal database of personally identifiable information on individuals receiving assistance under" the HEA—with one narrow, grandfathering exception for databases in use since 2008. 20 U.S.C. § 1015c.

B. The Department's Prior, Failed Gainful-Employment Regulations

For decades after the HEA's enactment, the Department never construed the HEA's "gainful employment" requirement to mean anything more than that programs must train students for paying jobs. It concluded, for example, that programs that provided education in "Jewish culture" did not qualify, *e.g.*, *In re Acad. for Jewish Educ.*, 1994 WL 1026087, at *2-3 (Dep't of Educ. Mar. 23, 1994), but programs that prepared students to become "teachers in Jewish schools" *did*, *e.g.*, *In re Seminar L'Moros Bais Yaakov*, 1994 WL 1026093, at *1 (Dep't of Educ. Mar. 21, 1994).

Nearly a half-century after the HEA's enactment, the Department changed course. In 2009, it commenced a negotiated rulemaking under 20 U.S.C. § 1098a, proposing to adopt for the first time intricate regulations to assess whether programs "prepare students for gainful employment" using calculations of graduates' debt and earnings. *See Ass'n of Private Sector Colls. & Univs. v. Duncan* (*APSCU I*), 870 F. Supp. 2d 133, 141 (D.D.C. 2012). The negotiated rulemaking failed to reach consensus, but the Department pressed on, ultimately adopting regulations (the "2011 regulations") purporting to implement "gainful employment." *See id*. at 141-44; *see also* 34 C.F.R. §§ 668.6-.7 (2011).

The 2011 regulations adopted debt metrics that compared (1) the estimated annual loan payment of a program's recent graduates to (2) their (a) mean (or median) annual earnings and (b) discretionary income. 34 C.F.R. § 668.7(c)(1) (2011). A program "passed" if the graduates' median debt was less than either 12% of their mean or median earnings or 30% of their discretionary income. *Id.* § 668.7(a)(1)(ii). The regulations also adopted a loan-repayment-rate test, which measured the percentage of former students who had reduced (or fully repaid) their outstanding loan balance. *Id.* § 668.7(b). A program passed if at least 35% of students had done so. *Id.* § 668.7(a)(1)(i). The 2011 regulations required only that a program pass *either* the debt metrics *or* the loan-repayment-rate test. *Id.* § 668.7(a). A program that failed both tests in three out of four years would be

ineligible for Title IV funds. *Id.* § 668.7(h)-(j). The 2011 regulations also required schools to report to the Department personally identifiable student information used to calculate the metrics, including the amounts of students' *private* loans, and required schools to make various disclosures to current and prospective students. *Id.* § 668.6(a)(1)(i)(C)(2), (b).

APSCU filed suit challenging the 2011 regulations. *APSCU I*, 870 F. Supp. 2d 133. The district court granted summary judgment for APSCU and vacated almost the entire regulatory regime—including the debt metrics, loan-repayment-rate test, and the reporting requirements. *Id.* at 144-58. It held that the loan-repayment-rate test lacked a reasoned basis because it "was not based upon any facts at all," and "[n]o expert study or industry standard suggested that the rate selected by the Department would appropriately measure whether a particular program adequately prepared its students." *Id*. at 154. Although the court opined in dictum that the debt metrics did not violate the HEA or the APA, it nevertheless invalidated them because they "were designed to work together" with the defective loan-repayment-rate test. *Id*. It also held that the reporting requirements violated 20 U.S.C. § 1015c's prohibition on collecting personally identifiable information. 870 F. Supp. 2d at 155. The Department moved unsuccessfully to amend the judgment to reinstate the reporting requirements and the procedures for calculating

the metrics. *Ass'n of Private Sector Colls. & Univs. v. Duncan* (*APSCU II*), 930 F. Supp. 2d 210, 214-19 (D.D.C. 2013).

C. The New Rulemaking

The Department did not appeal *APSCU I* or *APSCU II*, but instead launched a new negotiated rulemaking to promulgate modified versions of the vacated 2011 regulations. 78 Fed. Reg. 35,179 (June 12, 2013) (J.A.__[AR-B-000220]).

The Department's effort unfortunately was marked by bias against private-sector schools. *See* J.A.__[D.E.1:¶¶5, 52-62, 71-78]. The President's Special Assistant for Education stated publicly that "the whole premise behind the gainful employment regulation" was to "cut [for-profits] out … of federal aid."[1] The Department rebuffed efforts to include appropriate representation of private-sector schools, and refused to heed the advice of its handpicked participants, who questioned holding schools responsible for students' circumstances and choices, and recommended obtaining additional data. J.A.__[D.E.1:¶¶58-59]. Thirty Members of Congress, all Democrats, wrote to Secretary Duncan expressing concerns regarding "the process by which the Department" conducted the negotiated rulemaking and its "target[ing]" of private-sector schools. J.A.__[AR-I-000367].

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[1] Roberto J. Rodriguez, Special Assistant to the President for Educ., Conference on Student Loans—Opening Plenary Session 1:05:29-1:05:49 (Oct. 24, 2013), http://tinyurl.com/kt5q5e3 (all Internet sites last visited September 28, 2015).

The negotiated rulemaking again failed to reach consensus. In March 2014, the Department proposed a new rule, which exacerbated the problems in the vacated 2011 regulations. 79 Fed. Reg. 16,425 (Mar. 25, 2014) (J.A.__[AR-B-000001]). The proposal reinstated the debt metrics, with more stringent passing thresholds and a shorter path to ineligibility. *Id.* at 16,437 (J.A.__[AR-B-000013]). It replaced the vacated loan-repayment-rate test with a program-level cohort-default-rate test, which calculated graduates' rates of default instead of repayment rates. *Id.* The agency also proposed various disclosure, reporting, and certification requirements. *Id.* at 16,428 (J.A.__[AR-B-000004]).

The proposal elicited 95,000 comments. 79 Fed. Reg. at 64,892. Members of Congress, APSCU, and numerous other stakeholders submitted detailed comments explaining the proposed rule's many problems. *E.g.*, J.A.__[AR-H-074147, AR-H-000138, AR-H-051269, AR-H-054584, AR-H-072823, AR-H-072919, AR-H-073202, AR-H-074014, AR-H-075237, AR-H-085625, AR-H-086962, AR-H-087187, AR-H-088120, AR-H-088554, AR-H-088803, AR-H-100355, AR-H-109025, AR-H-109322]. Undeterred, the Department issued a final rule (the "2014 regulations") on October 31, 2014, which took effect July 1, 2015. 79 Fed. Reg. at 64,890.

D. The Challenged Regulations

Like the vacated 2011 rule, the 2014 regulations impose debt metrics to restrict programs' Title IV eligibility based on the "gainful employment" phrase in 20 U.S.C. §§ 1001, 1002, and 1088. Unlike the 2011 regulations and the proposed rule, however, the 2014 regulations rely *exclusively* on debt metrics to determine whether programs prepare students for gainful employment, 34 C.F.R. § 668.403—despite the Department's admission in *APSCU I* that two separate tests are necessary because "'no single percentage'" can reveal "'how much students can borrow without risking repayment difficulties.'" J.A.__[D.E.31:19] (citation and emphasis omitted).

The new metrics, like the vacated 2011 regulations, purport to compare the median annual loan payment of a program's recent graduates who received Title IV aid to their mean or median annual earnings and discretionary income. 34 C.F.R. §§ 668.402-.404. The agency calculates the loan payment by amortizing graduates' median student-loan debt over a 10-year repayment period for associate's degrees, 15 years for bachelor's and master's degrees, and 20 years for doctorate or first-professional degrees. *Id.* § 668.404(b)(2). That payment is compared to graduates' mean (or median, if higher) earnings and "discretionary income," using Social Security Administration data. *Id.* § 668.404(a)(1), (c). The metrics are calculated based on a cohort of students who graduated in a two-year

period—the third and fourth fiscal years prior to the most recent award year—or, if that two-year cohort contains fewer than 30 graduates, a four-year period. *Id.* §§ 668.402, .404(b)-(d).

A program "passes" only if the estimated annual loan payment is less than either 8% of graduates' mean or median earnings or 20% of discretionary income. 34 C.F.R. § 668.403(c)(1). If the loan payment exceeds 12% of earnings or 30% of discretionary income, the program "fails"; a program that fails twice in any three consecutive years loses Title IV eligibility. *Id.* § 668.403(c)(2), (4). A program falling below the passing threshold but above the failing threshold is "in the zone"; a program loses eligibility if in each of four consecutive years it *either* fails *or* is in the zone. *Id.* § 668.403(c)(3)-(4). If a program loses eligibility, the school cannot reestablish its eligibility—or establish eligibility for "substantially similar" programs at any credential level—for three years. *Id.* § 668.410(b)(2)(i), (iv).

The Department acknowledged that the metrics will cut many programs out of federal aid. It estimated (using 2012 data) that 1,445 programs nationwide—serving more than 840,000 students—will not pass. 79 Fed. Reg. at 65,064. *Ninety-nine percent* of those programs (1,431) are offered by for-profit schools—representing 34.1% of all for-profit programs. *Id.* The Department thus has knowingly designed a rule to exclude one-third of for-profit offerings. Notably,

public and non-profit schools would fare similarly if their programs were all subject to the new metrics. A recent Department study shows that 26% of graduates of public four-year colleges and 39% of graduates of private four-year colleges would not be deemed "gainfully employed" if the test applied to them. *See* J.A.__[AR-G-002699]; *see also* J.A.__[AR-G-002910].

Like the vacated rule, the new rule requires schools to report to the Department various personally identifiable student information used to calculate the metrics, including the amount of each student's *private* loans. 34 C.F.R. § 668.411.[2]

E. The District Court's Ruling

APSCU filed suit challenging the 2014 regulations, arguing that the metrics exceed the Department's statutory authority under the HEA and are arbitrary and capricious, and challenged the reporting requirements as violating 20 U.S.C. § 1015c. J.A.__[D.E.1:¶¶7-18, 198-206]; D.E.13, at 12-38, 41-43. The parties filed cross-motions for summary judgment. D.E.13; D.E.17. The district court granted summary judgment for the Department. J.A.__[D.E.31:1].

The court held that the metrics do not violate the HEA or APA. J.A.__[D.E.31:7-28]. It concluded that the statutory requirement that programs "prepare students for gainful employment in a recognized occupation" is

[2] The rule also establishes disclosure and certification requirements, not at issue in this appeal.

"ambiguous" because Congress did not define "gainful" or how to measure "prepar[ation]," and because both terms have multiple definitions. J.A.__[D.E.31:7-9]. Invoking *Chevron*, the court deferred to the Department's current view that the gainful-employment language requires that graduates "earn enough to pay their bills" and obtain "job[s] that pa[y] enough to cover [their] educational debt." J.A.__[D.E.31:7, 15]. It also held that the metrics are not arbitrary and capricious, largely repeating the Department's explanations in the rule. J.A.__[D.E.31:15-28].

The court held that the reporting requirements do not violate 20 U.S.C. § 1015c because they satisfy the exception that permits adding certain information to existing databases in use since August 2008. J.A.__[D.E.31:33-35].

APSCU timely appealed.

SUMMARY OF ARGUMENT

The Department's debt metrics exceed its statutory authority and violate the APA. The agency has no authority to confine federal aid based on graduates' earnings relative to debt; its metrics do not rationally measure whether programs enable their students to earn enough to repay their loans; and the Department cannot lawfully collect data on which the metrics depend.

I. The HEA's requirement that certain programs "prepare students for gainful employment in a recognized occupation" does not authorize conditioning

Title IV eligibility on graduates' debt and earnings. That language simply limits the type of programs eligible for Title IV aid: those that prepare students for paying jobs. The district court deemed the statutory text ambiguous because certain terms are not formally defined by Congress and have multiple definitions, but that supposed ambiguity is irrelevant to *Chevron* because *no* plausible reading of the text supports the metrics. In any event, the Department's statutory interpretation is unreasonable in light of the statutory context and structure, Congress's purpose, and the Department's own longstanding interpretation.

II. The metrics are also arbitrary and capricious because they do not rationally measure whether programs enable their graduates to repay their debts. Instead, they judge programs based largely on factors unrelated to the quality of training—including students' employment choices and financial circumstances, and broader economic conditions—that schools cannot control. The metrics distort even those factors by evaluating earnings and debt using arbitrary, unrealistic timelines and unreliable data. They then judge schools against an equally arbitrary, unsupported threshold—illogically imported from the *mortgage*-lending context—that the Department knows the average student does not meet. The result of its draconian, unfounded metrics will be to shutter many high-quality programs that *are* preparing students for gainful employment and whose students *do* achieve success in their chosen career paths—a consequence the agency failed to confront.

III. The metrics also must be vacated because they cannot function without the reporting requirements, which separately violate the HEA. The rule compels schools to report students' personally identifiable data—concerning *private* loans—which Congress expressly forbade except for certain databases in use since 2008. 20 U.S.C. § 1015c. The Department's effort to end-run this prohibition by shoehorning *private*-loan data into an existing database designed to track *federal* loans violates the statute.

STANDARD OF REVIEW

This Court reviews a district court's APA ruling "'de novo, as if the agency's decision had been appealed to this [C]ourt directly.'" *Gerber v. Norton*, 294 F.3d 173, 178 (D.C. Cir. 2002) (citation omitted).

Courts must set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations" or is "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A), (C). Courts must "guard against bureaucratic excesses by ensuring that administrative agencies remain within the bounds of their delegated authority." *Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 712 F.2d 650, 655 (D.C. Cir. 1983). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect," and contrary "administrative constructions" must be "reject[ed]." *Chevron*, 467 U.S. at 843 n.9.

Agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), or if the action "rests upon a factual premise that is unsupported by substantial evidence," *Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992) (Thomas, J., sitting by designation).

ARGUMENT

I. THE DEBT METRICS EXCEED THE DEPARTMENT'S STATUTORY AUTHORITY.

Congress never authorized the Department to restrict eligibility for Title IV aid based on whether students earn enough (in the Department's view) to repay their debts. The Department grounds its metrics on a single statutory phrase: the requirement that certain Title IV programs "'prepare students for gainful employment in a recognized occupation.'" 79 Fed. Reg. at 64,890 (quoting 20 U.S.C. § 1001(b)(1)). That language simply limits the types of programs eligible for Title IV aid: those that train students for paying jobs. The rule stretches that text to cover an intricate scheme of debt metrics that Congress never intended. Even if the Department's reading were textually plausible, it cannot be

reconciled with the statutory context, purpose, and the Department's own longstanding view.[3]

A. The Metrics Contravene The HEA's Text.

No plausible reading of "prepare students for gainful employment in a recognized occupation" authorizes the metrics. Congress did not enact special definitions of the provision's terms. 79 Fed. Reg. at 64,893. The Court accordingly must "give the term[s] [their] ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012). If that "ordinary, common meaning" clearly answers the question at issue, it controls. *Am. Fed'n of Gov't Emps., AFL-CIO v. Glickman*, 215 F.3d 7, 10 (D.C. Cir. 2000). The Court must reject agency interpretations contrary to that "traditionally and commonly defined" meaning. *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014). "[D]eference" under *Chevron* "is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent" on the question in dispute. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004); *see also Chevron*, 467 U.S. at 843 n.9. That is not the case here.

[3] During the rulemaking, the Department also cited 20 U.S.C. § 1221e-3 and § 3474 as authority for the rule, but admitted that those statutes do not independently authorize the metrics. *See* 79 Fed. Reg. at 64,890-91, 64,904. It has not argued otherwise in this litigation, and the district court did not rely on those provisions in upholding the metrics.

The ordinary, common meaning of "prepare students for gainful employment" is straightforward. "Employment" means an "activity"—either paid "work" or a "pastime."[4] A "gainful" activity, when the HEA was enacted in 1965 and today, is one that is "productive of gain" or that "provid[es] an income."[5] And "prepare" means "to make ready" or "equip with necessary knowledge and skill."[6] "Prepare students for gainful employment" thus means to train or equip for paying jobs. No reasonable reader would construe it to mean "guarantee jobs that pay more than X" or "assure students of earnings sufficient to service debt in the amount of Y." The meaning the metrics ascribe to the statute—that programs do not prepare students for gainful employment unless their graduates achieve particular average earnings relative to debt—bears no resemblance to the text's ordinary meaning and must be rejected. *See Loving*, 742 F.3d at 1016.

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[4] *Webster's Third New International Dictionary* 743 (2002) ("*Webster's 3d*") (an "activity in which one engages and employs his time and energies," including "work (as customary trade, craft, service, or vocation) in which one's labor or services are paid for by an employer," or an "occasional activity engaged in as an avocation, pastime, habit, or expedient"); *see also Webster's New International Dictionary* 839 (2d ed. 1949) ("*Webster's 2d*") ("that which engages or occupies"; "also, an occupation, profession, or trade; service").

[5] *Webster's 3d*, at 928; *accord Webster's 2d*, at 1026 (same); *Shorter Oxford English Dictionary* 768 (3d ed. 1964) ("[p]roductive of gain or profit," or "[a] [gainful] (= paid) occupation"); *Shorter Oxford English Dictionary* 1066 (6th ed. 2007) ("(of employment) paid, useful"); *see also Black's Law Dictionary* 641 (10th ed. 2014) (defining "gainful employment" as "[w]ork that a person can pursue and perform for money").

[6] *Webster's 3d*, at 1790; *see also Webster's 2d*, at 1952.

The district court deferred to the Department's interpretation because it misunderstood the inquiry. It stated that the key terms were ambiguous because Congress did not define them and dictionaries can suggest alternative meanings, and on that basis concluded that Congress evinced no clear intention on the question at hand. J.A.__[D.E.31:8-9]. Both the court's premises and its conclusion are mistaken: Neither the absence of statutory definitions nor the mere existence of multiple dictionary definitions renders the HEA ambiguous in the only sense relevant to *Chevron*. Congress *did* speak clearly to the "precise question at issue" (*Chevron*, 467 U.S. at 842)—whether the Department may assess compliance with the gainful-employment requirement through complex earnings and debt metrics—because *every* plausible reading of the text yields the same answer: The Department may not do so.

1. No Plausible Definition Of "Gainful Employment" Permits The Metrics.

The district court first deemed "gainful" ambiguous because "Congress opted not to define" it in the HEA. J.A.__[D.E.31:8]. That is error: "[T]he lack of a statutory definition does not render a term ambiguous," but "simply leads [the court] to give the term its ordinary, common meaning." *Am. Fed'n*, 215 F.3d at 10. And the "ordinary, common meaning" of "gainful" is *paying*. *Supra* p. 21.

The court acknowledged that "gainful" can mean "'productive of gain'" or "'provid[ing] an income,'" *i.e.*, paying. J.A.__[D.E.31:8] (citation omitted). But it

asserted that "gainful" is nevertheless "'ambigu[ous]'" because some dictionaries also define it as "'profitable' or 'lucrative,'" which (the court reasoned) "implies that a 'gainful' job must not just pay, but instead must pay enough to exceed the job-holder's expenditures." *Id.* (citation omitted). Because "gainful" can "mean different things," the court concluded, it is "ambiguous," and Congress therefore evinced no clear view on the question at hand. J.A.__[D.E.31:9].

Even assuming *arguendo* that construing "gainful" to mean "profitable" were plausible in context, that does not mean the statute is ambiguous in the *Chevron* sense. Ambiguity is irrelevant when the agency picks an interpretation that "goes beyond the scope of whatever ambiguity [the statute] contains." *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 339 (1994); *accord John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 109 (1993). "It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'" *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1846 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment); *see also Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006); *Wheaton v. McCarthy*, __ F.3d __, 2015 WL 5103040, at *4 (6th Cir. Sept. 1, 2015) ("The term 'planet' might be ambiguous as applied to Pluto, but is clear as applied to Jupiter.").

It makes no difference whether "gainful employment" means a paying job, or one that "pay[s] enough to exceed the job-holder's expenditures," J.A.__[D.E.31:8], because the metrics do not measure *either one*. They undisputedly do not focus on whether employment is paying. Nor do they measure whether employment is profitable as the district court defined it. A job that pays $50 per month is not profitable, for example, if the employee must spend $60 per month to commute. The metrics do *not* ask whether graduates' jobs are profitable in this or any other sense. They do not even purport to compare job-related expenses to earnings. Instead, they compare job earnings to *other* expenses, asking whether graduates earn enough to pay *all* of their bills without devoting *more than the Department thinks prudent* to servicing student loans. 34 C.F.R. §§ 668.403-.404. Whatever the metrics measure, it is not profitability. No one would say that a $10,000 investment that yields a 20% annual return—net of taxes, fees, and the cost of capital—is not profitable simply because the investor's $2,000 return does not cover his mortgage or car payments.

Neither the district court nor the Department reconciled this conflict between their alternative definition of "gainful" and the metrics. The court noted that the Department "determined that 'gainful employment in a recognized occupation' means something like 'profitable employment,'" and blessed the Department's "conclusion that it should test the profitability of students' employment by asking

whether students earn enough to pay their bills" as a "reasonable policy choice." J.A.__[D.E.31:10, 15]. But it never explained how students' ability to pay bills unrelated to employment proves whether that employment is profitable.

The Department assumed that debt students incur attending educational programs is somehow part of the cost of subsequent employment. D.E.17, at 9; D.E.24, at 2, 3 n.4. That further distorts the statute. Whatever "gainful" means, it is the "*employment*" that must be "gainful"—*not* the entire process of attending an educational program and *then* securing and performing a job. In any event, the metrics do not even measure whether that process is "profitable." They do not compare total future returns from employment to job-related expenses plus educational costs. Instead, they calculate whether graduates spend a greater proportion of their mean or median earnings (8%) or "discretionary income" (20%) repaying debt in early years after graduation than the Department thinks they should. That is not a calculation of profit by any measure. There is thus no ambiguity in the only sense relevant to *Chevron* because *neither* definition of "gainful" at issue—"paying" or "profitable"—authorizes the metrics.[7]

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[7] The district court also asserted that the word "employment" is ambiguous—because it can mean *any* work or only *paid* work—and that if Congress meant the latter, then "gainful" must mean more than "paying" to avoid superfluity. J.A.__[D.E.31:8-9]. That is backwards. The purported ambiguity regarding "employment" confirms that "gainful" is *not* superfluous: By adding "gainful," Congress clarified that it meant "gainful employment" to cover only *paid* work.

2. The Metrics Do Not Measure How Well Programs "Prepare" Students.

The metrics also twist the statutory text by measuring not whether programs "prepare" students for gainful employment, but whether students *actually* obtain it. 20 U.S.C. § 1002(b)(1)(A). Congress's use of "prepare"—as opposed, for example, to "provide" or "ensure"—shows that it did not intend to hold schools responsible for events beyond their control, such as students' employment choices. The Department itself disavowed any intention to "hol[d] schools responsible for a student's career decisions" or to "requir[e] a school to ensure" that its graduates "obtai[n] employment." 79 Fed. Reg. at 64,895. But its metrics do exactly that by evaluating only graduates' actual earnings and debt, regardless of how well their programs *prepared* them. 34 C.F.R. §§ 668.403-.404.

The district court erroneously concluded that "prepare" is ambiguous because the statute "is silent regarding how, exactly, the Department should assess whether a program '*prepare[s]* students for'" gainful employment. J.A.__[D.E.31:9] (alteration in original). Again, the absence of a statutory definition does not render a term unclear, but requires consulting its "ordinary, common meaning." *Am. Fed'n*, 215 F.3d at 10. And "prepare" ordinarily means "to make *ready*" or "to *equip* with necessary knowledge and skill." *Webster's 3d*, at 1790 (emphases added); *accord Webster's 2d*, at 1952.

The metrics contradict that ordinary meaning. They equate "preparing" students for jobs with *guaranteeing* that students will pursue and obtain those jobs. Because the metrics turn on graduates' actual earnings, a program that does a wonderful job of preparing students may fail if many graduates elect lower-paying, socially valuable jobs or choose not to work for a time for personal reasons. No plausible meaning of "prepare" permits conflating preparation with ensuring a particular result, as the metrics do.

The district court asserted that outcomes may sometimes shed light on preparation. J.A.__[D.E.31:12 n.4]. Using an elaborate soccer-themed hypothetical, it reasoned that a soccer match's final score may reflect a team's "preparation for th[at] particular game." *Id.* That analogy only undermines the metrics. The final score standing alone *cannot* prove how well either team prepared, because many *other* factors unrelated to preparation can affect the result: The winning team may have a stronger roster, the losing team's star may have been injured, or the referee may be corrupt. So, too, equating graduates' earnings (or debt) outcomes with the quality of preparation is improper because numerous other, unrelated factors intervene. Indeed, using outcomes alone to measure preparation is even less appropriate in the higher-education context because—unlike a soccer team, which has the constant objective of winning each match—

graduates balance many competing career, personal, and family priorities beyond securing high earnings.

In any event, any ambiguity concerning "prepare" is irrelevant *unless* the Department's reading of "gainful employment" is correct, which it is not. *Supra* pp. 22-25. Even if equating outcomes with preparation were faithful to the statute, the Department's rule purports to measure preparation for the wrong thing—whether students can (in the Department's view) comfortably meet short-term debt obligations, not whether they obtain paying (or even the court's "profitable") jobs.

B. The Department's Novel, Expansive Reading Of The HEA Is Unreasonable.

Even if the gainful-employment text did not foreclose the metrics, the statutory context, Congress's purpose, and the Department's longstanding practice all demonstrate that the agency's reading is unreasonable.

1. The Metrics Disregard The Statutory Context And Structure.

Context confirms that the Department's expansive statutory interpretation is untenable. "Ambiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and text that "seem[s] ambiguous in isolation is often clarified by the remainder of the statutory scheme," *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). "*Chevron* allows agencies to choose among competing"

interpretations that are "reasonable" *in light of* that context; it "does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015). The Department pursued just such a gerrymander here.

a. The Department's broad reading of "gainful employment" is implausible in light of the statutory scheme. Congress did not ordain the gainful-employment requirement as the sole determinant of Title IV eligibility, but as just one of many criteria. *E.g.*, 20 U.S.C. §§ 1001, 1002, 1085, 1087bb, 1088, 1094. Some, like the institution-level cohort-default rate, *id.* § 1085(a)(2), (m)(1), are specific, quantitative requirements addressing debt, illustrating that Congress was perfectly capable of creating such debt-focused criteria when it wished.

The district court brushed aside these provisions because (it said) they do not directly conflict with the metrics. J.A.__[D.E.31:12]. That misses the point: Congress's decision to prescribe reticulated criteria, such as the cohort-default rate—choosing what aspects to regulate, and where to draw lines—makes little sense if (as the court believed) Congress intended the agency to have a free hand to superimpose additional requirements. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate … to an agency" in a "cryptic" manner a decision of great "economic and political significance" concerning an entire industry).

b. Congress made clear that it did *not* intend to empower the Department to pile on its own prerequisites aimed at altering the cost and content of programs. Congress expressly forbade the Department (or any federal agency) from "exercis[ing] any direction, supervision, or control" over "the curriculum, program of instruction, administration, or personnel of any educational institution." 20 U.S.C. §§ 1232a, 3403(b). And, as the Department admitted, Congress has never authorized the Department to dictate tuition. D.E.17, at 14.

The district court found no tension between these statutory prohibitions and the metrics because the metrics "say nothing about what schools must teach or how much money they can charge." J.A.__[D.E.31:12 n.5]. But the metrics' *whole point* is to influence programs' curriculum and costs. *Every way* the agency identified by which programs can try to maintain eligibility entails either reducing tuition (directly or indirectly) or changing curricular offerings and other services.[8] Schools that can make sufficient changes to pass the metrics have little choice but

[8] The Department recommended "'decreasing prices for students,'" "'[p]roviding an institution's own financial aid,'" "[r]educing program costs," and "replacing or reducing the loan debts of current students … with scholarships or tuition discounts"—all of which entail charging less or (which is the same thing) providing more for the same price—or "'improving the quality'" of training, "tailoring a program to existing job opportunities," and "improving their job placement services," *i.e.*, changing curriculum content and program administration. D.E.17, at 14, 34, 36 (alterations and citations omitted); *see also* 79 Fed. Reg. at 64,921 (asserting that, in sectors where many graduates work part-time or leave the workforce, "institutions should adjust their costs and other features").

to do so. Losing Title IV eligibility would be the death knell for most programs; many students depend on Title IV aid, and programs that cannot accept Title IV funds will face an extreme competitive disadvantage. That the metrics do not dictate *which* changes programs must adopt is irrelevant. An agency cannot sidestep limits on its authority by forcing regulated entities to pick their poison. *See New York v. United States*, 505 U.S. 144, 176 (1992).

c. Other HEA provisions confirm that Congress used the "gainful employment" language *not* as oblique authorization for the Department to invent new debt and earnings eligibility criteria, but simply to limit the type of training eligible for federal assistance: programs that train students for paying jobs. Courts presume that Congress uses the same term in the same law to mean the same thing. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); *see also United Sav. Ass'n*, 484 U.S. at 371 (ambiguity may be eliminated if "the same terminology is used elsewhere in a context that makes its meaning clear"). At least nine other provisions of Title 20 refer to "gainful employment" in contexts where it fits perfectly as a synonym for paying jobs, but makes no sense as shorthand for complex debt metrics. *See* 20 U.S.C. §§ 1036(e)(1)(B)(ii), 1134c(a), 1135c(d)(2), 1140(1)(B), 1140g(d)(3)(D), 1161g(d)(5)(B), 2008(a), 4706(a), 5605(a)(2)(B). Some provisions, for example, bar certain scholarship recipients from engaging in "gainful employment." *E.g.*, *id.* § 1036(e). That makes perfect sense if "gainful

employment" means a paying job, but it makes no sense on the Department's reading of "gainful employment": It would be bizarre to *forbid* scholarship recipients from employment that does pay enough to service a certain level of debt, while *allowing* them to take on *less*-well-paid work.

The district court dismissed these provisions because they do not use the complete phrase "'prepare students for gainful employment *in a recognized occupation*.'" J.A.__[D.E.31:11] (citation omitted). But neither the court nor the Department explained why the addition of "in a recognized occupation" makes any difference, much less saves the metrics. The metrics admittedly *do not distinguish* between earnings obtained in a recognized occupation from other income. *See* 79 Fed. Reg. at 64,953. If anything, the statute's reference to "a recognized occupation" confirms that Congress was concerned with preparation for certain *types* of jobs, not debt.

2. The Metrics Contradict The Congressional Purpose.

The Department's interpretation is also unreasonable because it "undermines congressional purpose considered as a whole" even though "alternative interpretations consistent with the legislative purpose are available." *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002); *see also United Sav. Ass'n*, 484 U.S. at 371 (purported ambiguity may be "clarified" by the fact that "only one of the permissible meanings produces a substantive effect that is

compatible with the rest of the law"). Congress made explicit the HEA's purpose of "assist[ing] in making available the benefits of postsecondary education to eligible students." 20 U.S.C. § 1070(a). Construing the gainful-employment provisions as defining a broad category of programs eligible for assistance is clearly compatible with that objective. The Department's interpretation—destroying existing programs that meet students' desire for education—is not.

a. The metrics construe "gainful employment" to create a gaping exception that hinders Congress's stated aim. They require programs to meet new, made-to-order criteria that the agency knows 1,445 currently eligible programs—serving more than 840,000 students—will not "pass," 79 Fed. Reg. at 65,064, meaning that in a few years (absent unrealistic changes) they will lose Title IV eligibility. The Department estimated that "about 32 percent of students in in-person zone and failing programs will not have nearby transfer options," and that 6% of students in such programs—representing thousands of students—will have no transfer options *at all*. *Id.* at 65,074. Neither the Department nor the district court explained how that drastic curtailment of federal aid comports with Congress's purpose.

The district court offered the truism that Congress does not pursue every purpose "at all costs." J.A.__[D.E.31:11]. But that proves nothing, absent evidence—which the Department never tendered—that Congress intended

anything like the metrics' massive carve-out to the HEA's stated aim. Similarly, that the HEA "includes several explicit limits on the financial-aid eligibility of schools" (J.A.__[D.E.31:11]) shows only that Congress deemed certain particular limits acceptable, not that it authorized limiting Title IV aid on other grounds. Tellingly, the district court's only examples of such "limits" were the gainful-employment requirement *itself*—which begs the question—and a provision requiring that schools receive no more than 90% of their tuition and fees revenue from Title IV funds, which hardly suggests that Congress was comfortable cutting thousands of students out of federal aid altogether. J.A.__[D.E.31:11-12].

b. The Department invoked legislative history—not of the HEA, but of a different statute later merged with the HEA, the National Vocational Student Loan Insurance Act of 1965 ("NVSLIA"), Pub. L. No. 89-287, 79 Stat. 1037—to support its contrary view of Congress's purpose. D.E.17, at 15-17. It even claimed that the legislative history shows that the statutory text is ambiguous. D.E.24, at 7 (legislative history "negates plaintiff's *Chevron* step one argument"). Courts, of course, cannot use "ambiguous legislative history to muddy clear statutory language." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1266 (2011). In any event, despite years to scour the record, the Department has never produced *any* direct evidence that Congress intended anything resembling the metrics. And the best evidence refutes its reading: The NVSLIA's principal author explained

that it was *not* the statute's purpose to allow the Department, "'by rule or regulation,'" to "'build barriers that will keep students from attending the so-called privately owned schools if they desire to do so.'"[9] But the metrics do just that.

The district court declared the legislative history a wash because it believed the HEA's "history … is crowded with evidence" and "each side can find its 'friends.'" J.A.__[D.E.31:14]. The Department, however, has no relevant evidence on its side. It has had ample time to survey the crowd but still cannot identify a single acquaintance.

3. The Department's Longstanding Application Of The HEA Refutes Its Unprecedented Claim Of Power.

The Department's self-aggrandizing reading of the gainful-employment provisions is further undermined by the fact that the agency never advanced anything like it for nearly five decades after the HEA's enactment—but instead construed "gainful employment" to mean paying jobs. "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941). "When an agency claims to discover in a long-extant statute an unheralded power to regulate

[9] *National Vocational Student Loan Insurance Act of 1965: Hearings Before the Select Subcomm. on Educ. of the Comm. on Educ. & Labor*, 89th Cong. 13 (1965) (statement of Chairman John H. Dent).

'a significant portion of the American economy,'" courts thus "typically greet its announcement with a measure of skepticism." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (citation omitted).

Between the HEA's enactment in 1965 and the 2009 rulemaking, the Department *never* construed the gainful-employment provisions to tie programs' eligibility to earnings and debt. Instead, when determining whether programs prepared students for gainful employment in a recognized occupation, the Department simply examined whether a program's aim was training students for paying jobs. In *Academy for Jewish Education*, 1994 WL 1026087, for example, it held that two "programs in Jewish culture" did not satisfy the gainful-employment requirement because their "goal or result" was "assimilation into a particular culture, not toward a specific area of employment"—with no consideration of earnings or debt. *Id.* at *2-3. Conversely, the Department concluded that programs that had a "major, co-equal purpose of training students to become teachers in Jewish schools" *did* "provid[e] … training to prepare students for gainful employment in a recognized occupation"—again, with no examination of earnings or debt. *Seminar L'Moros Bais Yaakov*, 1994 WL 1026093, at *1; *see also In re Sara Schenirer Teachers Seminary*, 1994 WL 1026085, at *2 (Dep't of Educ. Mar. 25, 1994) (same). The Department followed the same approach repeatedly since. *See, e.g.*, *In re Donnelly Coll.*, 138 Ed. Law Rep. 1210, 1213

(June 14, 1999); *In re Beth Jacob Hebrew Teachers Coll.*, 131 Ed. Law Rep. 1195, 1198 (Aug. 12, 1996); *In re Derech Ayson Rabbinical Seminary*, 109 Ed. Law Rep. 1473, 1478 (Jan. 12, 1995); *In re Bnai Arugath Habosem*, 1994 WL 1026098, at *1-2 (Dep't of Educ. June 16, 1994).

The Department argued (D.E.17, at 10 n.11), and the district court agreed, that cases like *Academy for Jewish Education* are insignificant because the programs the Department deemed ineligible "failed at the threshold"—preparing students for paying jobs was not their primary goal—and so the Department had no need to "settle on a more nuanced definition for the full 'gainful employment' provision." J.A.__[D.E.31:13]. But *Seminar L'Moros Bais Yaakov* (which *Academy for Jewish Education* cited) and *Sara Schenirer Teachers Academy* (heard together with *Academy for Jewish Education*) refute that strained interpretation. The only plausible explanation is that the Department understood the statute all along to require only that programs train students for certain types of jobs. The Department's failure to confront its own longstanding view embodies "the cross-your-fingers-and-hope-it-goes-away school of statutory interpretation" that this Court has rightly repudiated. *Council for Urological Interests v. Burwell*, 790 F.3d 212, 222-23 (D.C. Cir. 2015).

A Department regulation still in force embodies precisely the same reading as its past cases. Generally only students enrolled in an "eligible program" may

receive Title IV aid. 34 C.F.R. § 668.32(a)(1)(i). And 34 C.F.R. § 668.8 defines "eligible program" as one that (among other things) has a "placement rate of at least 70 percent," based on the percentage of recent graduates who "obtained gainful employment in the recognized occupation for which they were trained or in a related comparable recognized occupation." *Id.* § 668.8(e)(1)(ii), (g)(1)(ii). Section 668.8 expressly permits schools to prove the number of students who "obtained gainful employment" with documents that show only that a student is employed in a given occupation (such as "[a] written statement from the student's employer"), without any evidence of debt or earnings. *Id.* § 668.8(g)(2).

The district court dismissed this regulation because it does not "explicitly define the words that matter to this case." J.A.__[D.E.31:13 n.6]. But Section 668.8 shows that the Department understands "gainful employment" *not* to turn on earnings or debt. The regulation allows schools to prove "gainful employment" without evidence of either.

The court also deemed Section 668.8(g)(2) irrelevant because it implements a different statute. J.A.__[D.E.31:13-14 n.6] (citing 20 U.S.C. § 1088(e)(2)(a)). But that statute—recodified as amended at 20 U.S.C. § 1088(b)(2)—is immediately adjacent to one of the gainful-employment provisions, *id.* § 1088(b)(1)(A), and both subsections 1088(b)(1) and (b)(2) are part of the statutory definition of "eligible program." It is unreasonable for the Department to

read "gainful employment" one way in one statutory provision defining "eligible program," when its own regulations—construing an adjacent statutory provision that defines the same term—reflect an entirely different meaning.

II. THE DEBT METRICS ARE ARBITRARY AND CAPRICIOUS.

The metrics independently must be vacated because they do not pursue their stated objective—measuring whether programs enable students to repay their student loans—in a rational way.

A. The Metrics Turn On Outcomes Beyond Schools' Control.

The metrics do not rationally measure whether programs *enable* graduates to repay their loans because both the earnings and debt outcomes depend heavily on factors—unrelated to program quality—that schools cannot control.

1. Graduates' Earnings Cannot Reliably Reflect Program Quality.

Even if using graduates' actual earnings as a proxy for preparation did not violate the HEA, it is arbitrary and irrational because many factors unrelated to program quality intervene and make earnings an unreliable proxy.

a. Graduates routinely make rational choices that result in lower earnings than the maximum they could earn. Many may accept jobs (especially early in their careers) that yield lower earnings but provide valuable experience, which may enhance their long-term earnings. A law-school graduate, for example, may receive lower pay in a judicial clerkship or government service but obtain

valuable training, skills, and perspective. The same is true in many fields where apprenticeships or similar positions are the gateway to future success. *See*, *e.g.*, J.A.__[AR-H-075303]. Other graduates may forgo higher pay to pursue work in socially valuable but lower-paying jobs—such as teaching or the military, or practicing family medicine in underserved areas rather than pursuing higher-paying careers as specialists. *See.*, *e.g.*, J.A.__[AR-H-075250, AR-H-072936, AR-H-100355-56]. Still others may choose not to work at all for a period, or to work part-time, for personal reasons—such as to raise children. *See*, *e.g.*, 79 Fed. Reg. at 64,926; J.A.__[AR-H-075353].

Students' choices and circumstances have nothing to do with the quality of training programs provide, and schools have no control over them. The Department admits that decisions such as enlisting in the military may result in lower earnings and are "unrelated to whether a program prepares students for gainful employment," and that "it would be unfair to assess a program's performance based on the outcomes of such students." 79 Fed. Reg. at 64,945. And it disclaims any design to "hol[d] schools responsible for a student's career choices." *Id.* at 64,895. Yet that is exactly what the metrics do: Programs pass or fail based on the mean or median earnings of all graduates, regardless of how many chose to pursue lower-paying work or to stop working for a time. Two identical programs may offer exactly the same training at the same price, but one may pass

while the other fails because of the choices their students make years after graduation. That is arbitrary.

The Department speculated that graduates who leave the workforce or work part-time are "atypical," 79 Fed. Reg. at 64,921, but it never substantiated that conjecture. And when commenters pointed out that in certain fields "a significant number of program graduates tend to leave but then return to the workforce," the Department offered only the *ipse dixit* that "it is reasonable to attribute this outcome less to individual student choices than to the performance of the program." *Id.* at 64,926.

b. The link between earnings and preparation grows even more attenuated when economic conditions enter the frame. Macroeconomic trends such as recessions affect the jobs and earnings graduates can obtain. J.A.__[AR-H-074302]. Labor-market conditions also vary by location. J.A.__[AR-H-109065-66]. The Department admitted that programs should not lose eligibility "due to temporary and unanticipated fluctuations in local market conditions." 79 Fed. Reg. at 64,926. Yet, again, its test does the very thing it disavows.

The district court credited the Department's claim that the four-year "zone" "mitigate[s]" these effects, because the average formally declared recession lasts 11 months. J.A.__[D.E.31:18]. But the zone is no answer to the effect of local economic conditions, which may not track national trends. The court also

overlooked that some recessions last longer than the "average" downturn, and that recessions can depress wages long *after* they are officially over. J.A.__[AR-H-074302].

The court also cited the metrics' use of mean and median earnings figures as purportedly minimizing these effects. J.A.__[D.E.31:18]; *see also* 79 Fed. Reg. at 64,921. Using averages, however, simply papers over the fundamental problem that earnings outcomes, driven by students' choices and circumstances and by economic conditions, do not reflect quality of preparation.

The Department asserted that the metrics' use of multi-year cohorts "reduced" the effect of "economic fluctuations." 79 Fed. Reg. at 64,926. The metrics, however, consider the "most currently available mean and median annual earnings" for *all* students in that cohort. 34 C.F.R. § 668.404(c)(1). A downturn in one year thus will affect the earnings for all students in the cohort regardless of when they graduated.

2. Graduates' Debt Depends On Students' Financial Choices.

The metrics compound this arbitrariness by judging earnings in relation to debt, which itself depends on factors beyond schools' control. The proportion of a program's cost a student finances with debt depends on individual financial circumstances. Students who have (or whose families have) greater assets may be able to borrow less than those with more limited means. The extent to which

students choose to borrow also depends on their choices. Some may work while attending school while others may not, either to focus on their education or to attend to family and other obligations. Other lifestyle choices (*e.g.*, living on campus or at home, buying a car or taking the bus) also affect borrowing decisions.

Programs are judged based on the metrics' debt component, even though that component thus has nothing to do with program quality and is largely beyond schools' control. A program that serves many students with lower pre-program income or resources will likely score lower than an identical program with identical prices whose students enter education with greater assets. Worse, by making eligibility turn on students' circumstances and choices, the metrics perversely incentivize schools to shape their student bodies to track the test, by turning away students who would benefit from higher education but who would adversely affect programs' scores. As the *Washington Post* explained, editorializing against the rule, the "likely outcome … is that schools will admit only students who pose the least risk."[10]

B. The Metrics Measure Earnings And Debt Over Arbitrarily Short Periods, Using Skewed Data.

The metrics also cannot reliably gauge students' ability to repay their debt because they estimate debt and earnings using arbitrary timelines and unreliable

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[10] Editorial, *Tightening rules on for-profit colleges*, Wash. Post, Apr. 27, 2014, http://tinyurl.com/mwnf8yt.

data. They consequently deem graduates who *do* earn enough to repay their debt *not* "gainfully employed."

1. The Metrics Employ Arbitrary Amortization Timelines That Do Not Reflect Graduates' Actual Debt-Repayment Obligations.

The metrics stack the deck in calculating graduates' annual loan payments by using short, arbitrary repayment timelines. They amortize annual loan payments assuming a 10-year repayment term for associate's degrees and 15 years for bachelor's and master's degrees. 34 C.F.R. § 668.404(b)(2). They thus assume that students will repay their entire loan balance within a 10-year or 15-year period, and will do so in equal installments. Both assumptions blink reality.

The Department admitted that, "of undergraduate borrowers from two-year institutions who entered repayment in 2002," barely *half*—only "55 percent"—"had fully repaid their loans" within the Department's 10-year repayment term for associate's degrees. 79 Fed. Reg. at 64,939. And the Department "do[es] not expect the majority" of "graduate student borrowers" "to fully repay their loans within 15 years." *Id.* The Department thus calculates annual payments—and judges schools on that basis—using repayment timelines it *knows* many undergraduates do not meet and that it expects most graduate students not to meet.

The district court upheld the 10-year and 15-year timelines because "'the lines had to be drawn somewhere.'" J.A.__[D.E.31:22] (citation and brackets

omitted). But the court was obligated, and failed, to ensure that the Department's line falls "within a zone of reasonableness." *Emily's List v. FEC*, 581 F.3d 1, 22 n.20 (D.C. Cir. 2009). Simply "'picking a compromise figure is not rational decisionmaking'" without "a reasonable explanation" of why the Department chose it, *APSCU I*, 870 F. Supp. 2d at 154 (citation omitted)—which it never offered.

Moreover, other Department regulations authorize alternative repayment plans that enable students to repay their loans over a longer period, to backload their annual payments—paying a greater portion of their debt as their income rises—or to cap payments based on income. Students may choose from *extended*-repayment plans (up to a *25-year* term), 34 C.F.R. § 685.208(d)-(e), (*i*); *graduated*-repayment plans, which allow lower payments (under $50 per month) in early years after graduation, *id.* § 685.208(f)-(h); and *income-based*-repayment plans, which cap payments at 10% of a student's discretionary income, *id.* § 685.208(k); *see also id.* §§ 685.209, .221; 20 U.S.C. § 1098e.

These options can significantly reduce annual loan payments during the first few years after graduation—the period the Department measures. Yet despite comments urging the Department to account for these alternatives, *e.g.*, J.A.__[AR-H-074293, AR-H-075331-32, AR-H-109113], the Department refused

to do so. The metrics punish programs when graduates pursue the Department's own options.

The Department never explained its refusal to account for extended-repayment and graduated-repayment timelines, which alone warrants reversal. *See Del. Dep't of Natural Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015) (failure to "respond to serious objections" is "arbitrary and capricious"). It dismissed income-based-repayment plans by asserting that a "program generating large numbers of borrowers" who pursue income-based repayment—whom the Department assumed are "in financial distress"—"raises troubling questions about the affordability of those debts." 79 Fed. Reg. at 64,940. That is circular, begging the question whether such graduates *are* in "financial distress," or just taking advantage of financially beneficial programs. The Department also claimed that income-based-repayment plans "do not provide for a set repayment schedule, as payment amounts are determined as a percentage of income." *Id.* But the fact that income-based-repayment plans cap loan payments as a percentage of income *below* the metrics is precisely the point: In estimating annual loan payments, the Department arbitrarily ignored its own rules that prevent debt payments from exceeding a particular percentage of earnings.

2. The Metrics Measure Graduates' Earnings Over An Irrationally Short Time Horizon, Based On Unreliable Data.

The metrics also distort earnings by focusing on an arbitrary snapshot of income shortly after graduation—and skew even those short-term earnings by relying on flawed data that undercount income.

a. Higher education is a lifelong investment that yields benefits not fully realized within the first few years after graduation. "[G]ross earnings … will increase for program graduates over the course of their lives." 79 Fed. Reg. at 64,922. The Department concluded that education can increase income "by as much as 43 percent between the first few years out of post secondary education and the sixth to tenth years out." 75 Fed. Reg. 43,615, 43,666 (July 26, 2010). Many graduates, for example, accept lower-paying jobs in early years after graduation, often seeking experience to increase their future earnings potential. *See*, *e.g.*, J.A.__[AR-H-074204, AR-H-074258, AR-H-075314-15]; *supra* pp. 39-40.

The "widely-used and methodologically-sound process for evaluating the value of a long-lived asset, such as education," is to calculate the "net present value": the *total* "benefits *over the useful lifetime of the investment*" minus the cost—for an education, the total "additional wages" the student will earn over his

career minus the cost of attendance—discounted to present value. J.A.__[AR-H-109174-76].

The metrics, however, illogically consider earnings only in the *first few years* after graduation—starting as little as 18 months after graduation, 79 Fed. Reg. at 64,929—when graduates' income is at its lowest. The Department offered no reasoned justification for that period, J.A.__[AR-H-109176-81], which will perversely prevent many students from obtaining large net lifetime benefits simply because their *short-term* earnings are lower than the Department deems sufficient. J.A.__[AR-H-075303, AR-H-109181-90].

The district court accepted the agency's conjecture that "'[b]enefits ultimately available over a lifetime may not accrue soon enough to enable the individual to repay her student loan debt.'" J.A.__[D.E.31:21] (brackets and citation omitted). But the Department's alternative-repayment plans fully address that concern, by capping debt payments at affordable levels during the years when income is lowest. *Supra* pp. 45-46. It is irrational to deprive students of lifelong earnings gains to protect them from a speculative short-term repayment problem they never need face.

b. The metrics distort even short-term earnings by using unreliable, incomplete data that skew earnings downward. The Department uses data from the Social Security Administration's Master Earnings File (the "File"). 79 Fed. Reg. at

64,950. But the File significantly undercounts many individuals' earnings. It excludes, for example, income deducted for medical care, child care, and other elective deductions. *See* J.A.__[AR-H-074204]; 79 Fed. Reg. at 64,951.

The File also excludes unreported or underreported income, which the Internal Revenue Service estimates exceeds $100 *billion* per year. *See* IRS, *Tax Gap for Tax Year 2006*, at 2 (2012), http://tinyurl.com/ldwp8qp; J.A.__[AR-H-109084]. The Department admitted that "misreported and underreported earnings can have some effect on the earnings data." 79 Fed. Reg. at 64,955. It rejoined that individuals are legally required to report their income, D.E.17, at 29, but that is beside the point: Whatever the reason for the File's inaccuracy, the Department cannot rely on a database that it knows is inaccurate.

The district court erroneously upheld the Department's use of Social Security data because it concluded that the Department need only use the "'best data available.'" J.A.__[D.E.31:23] (citation omitted). That is incorrect. Agencies undoubtedly must use the best data at their disposal, but they may *never* rely on data that is objectively "'inadequate.'" *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (citation omitted). Using data that are unreliable—and here, systematically understated—is arbitrary and unlawful even if no better data exist. *See, e.g.*, *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1300 (D.C. Cir. 1980); *Friends of the Boundary Waters*

Wilderness v. Bosworth, 437 F.3d 815, 824-27 (8th Cir. 2006); *Raytheon Co. v. White*, 305 F.3d 1354, 1366 (Fed. Cir. 2002). If the available data are inadequate, the agency must forgo using that data to regulate, and at least must "make whatever adjustments appea[r] necessary and feasible" to offset known flaws in its data. *Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 567 F.2d 1016, 1046 (D.C. Cir. 1977). The Department made no effort to do so.

C. The Metrics Apply An Arbitrary Passing Threshold Misguidedly Imported From The Mortgage-Loan Context.

The metrics do not even measure whether graduates earn enough to make the annual payments the Department calculates, but irrationally judge graduates' earnings and debt outcomes against an arbitrary benchmark of how much the Department *thinks* they should spend, which lacks any defensible basis in the record. Programs pass only if their graduates' median debt payment is less than 8% of earnings (or 20% of discretionary income). That 8% threshold has no foundation in empirical research regarding student-loan debt or students' real-world experiences, but was admittedly "based upon mortgage industry practices," and supposedly supported by "expert recommendations." 79 Fed. Reg. at 64,919. Importing that threshold from the mortgage-lending context makes no sense and lacks any "expert" support.

In the mortgage industry, 8% represents the maximum amount of non-mortgage debt that, according to some analysts, borrowers *who also have a*

mortgage should take on. *See* J.A.__[AR-G-000299-300]. But the vast majority of recent graduates with student-loan debt—more than 75% by one measure—do *not* have mortgages. J.A.__[AR-G-000894, AR-H-109078]. The non-mortgage debt that mortgage lenders believe homeowners can afford along with a mortgage proves nothing about the amount that students without mortgages can afford on student loans.

The Department rejoined that graduates without mortgages have housing expenses, "in the form of rent." D.E.17, at 23 n.16. That may be true for many graduates—though not all, *e.g.*, those who live with family, *cf.* J.A.__[AR-G-002701]. But that hardly justifies importing the mortgage-industry benchmark because, as the very data the Department cited show, students without mortgages spend significantly *less* on housing than the 8% threshold assumes. The agency defended its 8% threshold by assuming that students spend 31% of their income on housing. 79 Fed. Reg. at 64,919. But the data it cited (*id.*) show that the average student pays much less—27% for associate's degrees graduates, and 25% for bachelor's degree graduates. *See* J.A.__[AR-H-000148]. Even using the Department's own data and arithmetic, the passing threshold should have been 50%-75% *higher* (12% for associate's degrees, 14% for bachelor's degrees).

Tellingly, a 2013 Department study found that, on average, bachelor's degree graduates "who borrowed for their undergraduate education, were

employed, and were repaying their loans 1 year after graduation" spent *13%* of their income repaying their loans. J.A.__[AR-G-002698], *cited in* 79 Fed. Reg. at 64,916 n.88, 64,921-22 nn.124-25. Graduates of non-profit schools paid even more: 16%, *twice* the 8% passing rate. *Id.* The rule thus, once again, sets a passing threshold that the Department knows the average student fails.

The district court never grappled with these serious defects. Instead, it simply accepted the agency's claim that "'[s]everal studies of student debt have accepted the 8 percent standard,'" and that "even experts who are critical of the 8% cutoff 'acknowledge'" that "'it is not … unreasonable.'" J.A.__[D.E.31:22] (omission in original) (citation omitted). The court thus viewed the dispute as a "'battle of experts'" that it could not referee. J.A.__[D.E.31:23] (citation omitted). But the court was not permitted to accept the Department's characterization of the evidence at face value. It was required—but failed—to look behind the agency's self-serving claim to determine what if anything the evidence it cited actually proves and whether, if credited, it constitutes "substantial evidence" (*Ctr. for Auto Safety*, 956 F.2d at 314) for the agency's conclusion. *See Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 985-87 (D.C. Cir. 2013).

Even a cursory look at the Department's ersatz "expert" evidence shows that substantial evidence was wanting. Its proposed rule relied on a 2006 study by Sandy Baum and Saul Schwartz. 79 Fed. Reg. at 16,443 & nn.50-51 (J.A.__[AR-

B-000019]) (citing J.A.__[AR-G-000299-300]). But Baum and Schwartz actually concluded—after reviewing several prior studies—that importing the 8% mortgage threshold to "student-loan borrowing *has no particular merit or justification*." J.A.__[AR-G-000300] (emphasis added).

In the final rule, the Department tried to backfill by citing four earlier studies, which Baum and Schwartz had surveyed. 79 Fed. Reg. at 64,919 & nn.100-03. But, as Baum and Schwartz recognized, those studies do *not* substantiate the 8% threshold. *See* J.A.__[AR-G-000299-300]. *None* performed any empirical analysis of the appropriate maximum debt-to-earnings rate; each took the 8% threshold for granted based on mortgage-industry recommendations. *See* J.A.__[AR-G-001792-800, AR-G-001929, AR-G-002148, AR-G-002865]. "[A]n agency's reliance on a report or study without ascertaining the accuracy of the data contained in the study or the methodology used to collect the data 'is arbitrary.'" *New Orleans v. SEC*, 969 F.2d 1163, 1167 (D.C. Cir. 1992) (citation omitted). *A fortiori*, relying on a study that examined *no* data and used *no* methodology is unlawful.

The district court also took out of context Baum and Schwartz's observation that the absence of evidence for the 8% figure alone does not *necessarily* mean it is "'unreasonable.'" J.A.__[D.E.31:22] (citation omitted). Baum and Schwartz explained that "any benchmark needs stronger justification than has thus far been

forthcoming." J.A.__[AR-G-000300]. Hypothetical future studies, in other words, might conceivably support the 8% (or another) threshold. But the Department has never cited, and evidently did not perform, any such study.

This is not, in short, a "'battle of the experts'" who "reached different conclusions based on" "accepted methods and data," requiring the court to defer to the agency. *Ambrosini v. Labarraque*, 966 F.2d 1464, 1468 (D.C. Cir. 1992). Here the Department has not identified *any* expert who evaluated *any* data or applied *any* method and found the 8% threshold valid.[11]

D. The Department Did Not Confront The Serious Harmful Consequences Of Its Arbitrary Debt Metrics.

The Department also unlawfully "duck[ed] serious evaluation of the costs that could be imposed" by its metrics. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1151-52 (D.C. Cir. 2011). The combined effect of the metrics' flaws will be to cut out of federal aid many programs that are providing enormous benefits to students. *Supra* p. 33. Thousands of students whose programs close will lack any

[11] That programs can also pass by meeting the 20% debt-to-discretionary-income threshold does not save the metrics. That threshold fails to account for different levels of earnings. Even if a graduate earning $20,000 cannot afford spending more than 20% of discretionary income ($733 in 2011, *see* 79 Fed. Reg. at 65,038) repaying debt, one who earns $50,000 might well be able to afford much more than 20% repaying debt. In any event, the 8% threshold is integral to the metrics, which cannot "function sensibly" without it, *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir.), *reh'g denied*, 253 F.3d 732 (D.C. Cir. 2001), and the Department has conceded that "'no single percentage'" can reflect preparation for gainful employment, J.A.__[D.E.31:19] (citation and emphasis omitted).

alternative, and many thousands more will lack any in-person option. *Id.* That foreseen, tremendously harmful social cost requires a very compelling justification, which the Department never offered.

The rule's irrationality is reflected not only in the number of programs closed and students displaced, but also which ones. Programs whose students are prepared for successful careers will be shuttered because their students choose lower-paying, socially valuable work or because of their individual and family circumstances and economic conditions. For example, more than two-thirds (71.9%) of associate's degree programs training clinical medical assistants—serving more than 56,000 students—will not pass. 79 Fed. Reg. at 65,069.

For-profit programs will be especially hard-hit: 99% of the programs the Department calculates will not pass are for-profit, representing 34% of for-profit programs subject to the regulations. *Supra* p. 14. This transparent targeting of for-profit schools is irrational. As the Department acknowledged, for-profit schools "'play a vital role in training young people and adults for jobs,'" help "'meet the explosive demand for skills'" other schools cannot, J.A.__[AR-H-055068] (citation omitted), and serve a greater proportion of disadvantaged students than other schools, *see* 79 Fed. Reg. at 64,904. They also produce graduates at a lower cost, and often have higher graduation rates, than non-profit or public schools. *See* J.A.__[AR-H-074183-84, AR-H-074186-87]. Yet the metrics are laser-focused on

closing such programs. In no other sector of the economy would the government be permitted to obliterate one-third of capacity based on such a thinly supported, speculative rule. It should not be acceptable here.

These alarming results are very real. For example, Rocky Vista University, one of Colorado's only two medical schools, has a 100% placement rate, its students achieve board scores in the 98th percentile nationwide, and it has been ranked by *U.S. News* as one of the 10 least expensive private medical schools in the country. J.A.__[AR-H-100355-56]. Many of its graduates elect to become "primary care practitioners in rural and other underserved areas"—helping to "fulfill an important need" in Colorado, which faces a "severe shortage of primary care practitioners"—or to become "military medical professionals," and earn less than they would as specialists. J.A.__[AR-H-100356]. But precisely because of its students' laudable career choices (and concomitantly lower earnings), Rocky Vista has calculated that it will be in the zone, meaning its students will lose Title IV funds in just four years. J.A.__[AR-H-100356, AR-H-022815, AR-H-022835-36, AR-H-089755].

That outcome is utterly irrational. Indeed, the Department conceded below that it would be "concerning" and "not a desired outcome" "if there is a well-functioning school that is serving its students and providing the type of preparation that Congress has required … that can be rendered ineligible." J.A.__[D.E.30:46].

That aptly describes Rocky Vista. The Department rejoined that the zone solved the problem, J.A.__[D.E.30:47], but the zone is simply a slightly slower route to ineligibility—four years rather than two or three. The agency's claim that zone programs are "not in fact providing the type of preparation that Congress has required of them" (*id.*) chases its tail; as Rocky Vista illustrates, programs may provide just such preparation, yet not pass the metrics.

The district court dismissed these arbitrary results as "hypothetical" and irrelevant to a facial challenge because the Department has not yet formally "determin[ed]" "any program's debt-to-earnings scores." J.A.__[D.E.31:24]. But Rocky Vista's plight is not hypothetical. The school is well-positioned to forecast where it falls under the rule, and the Department, with all the data at its disposal, has never tried to refute that calculation. That it has not yet officially decreed Rocky Vista to be non-passing is immaterial. The district court's logic would improperly insulate many rulemakings from scrutiny under the APA: If a rule's arbitrariness cannot be determined until its harmful effects are irreparably felt, innumerable irrational decisions that depend partly on ministerial agency implementation would be shielded from review, even where (as here) the fundamental error lies in the agency's formula itself. Rocky Vista is a concrete example of serious flaws in the metrics' design. It confirms that the problems built into the rule are real and that real students will be harmed.

III. THE REPORTING REQUIREMENTS VIOLATE THE HEA AND REQUIRE VACATING THE DEBT METRICS.

The reporting requirements independently violate the HEA. Because the metrics cannot function without the unlawful reporting requirements, both must be vacated.

A. The Reporting Requirements Violate 20 U.S.C. § 1015c.

The reporting requirements unlawfully compel schools to submit to a federal repository personally identifiable information concerning their students' *private* loans in violation of 20 U.S.C. § 1015c. Section 1015c generally prohibits "the development, implementation, or maintenance of a Federal database of personally identifiable information on individuals receiving assistance under this chapter." *Id.* § 1015c(a). Congress enacted this prohibition in response to *a proposal by the Department to collect individual student information, including about private loans*. *See APSCU II*, 930 F. Supp. 2d at 214. The Department's rule transgresses this limitation by requiring schools to report personally identifiable information—including "[i]nformation needed to identify the student" and "[t]he total amount the student received from private educational loans," 34 C.F.R. § 668.411(a)(1)(i), (2)(ii)—which is then added to the National Student Loan Data System (the "Data System"), 79 Fed. Reg. at 64,975-76.

The Department attempted to shoehorn the reporting requirements into the statute's sole exception: The prohibition does not apply to "system[s]" in use

"before August 14, 2008," that are "necessary for the operation" of a program authorized by Title IV. 20 U.S.C. § 1015c(b). The Department argued—and the district court held—that the reporting requirements satisfy that exception because the Data System was in place in August 2008 and is necessary to operate Title IV programs. D.E.17, at 42-44; J.A.__[D.E.31:33-35]. That argument rests on an untenable reading of the exception that would swallow the rule.

As *APSCU II* recognized in holding that the Department's prior reporting requirements violated Section 1015c—a ruling involving the same parties that the Department did not appeal—there comes a point at which "an existing database could be changed so substantially that it effectively bec[omes] a new database." 930 F. Supp. 2d at 218. Otherwise, Section 1015c's prohibition would be toothless, and "the Department could collect whatever individually identifiable student information it wanted, so long as it incorporated the information" into an existing database. *Id.* The Department "conced[ed]" as much and proposed a limiting construction under which only information that "'fits within the overall purpose of the existing database'" can be added. *Id.* at 219, 221 (citation omitted). *APSCU II* struck down the 2011 reporting requirements because they flunked even that standard: The Department sought to add "information on students who do not receive and have not applied for either federal grants or federal loans," which was "never" part of the Data System's "'overall purpose.'" *Id.* at 221.

The same is precisely true of the personally identifiable data concerning students' *private*, non-governmental loans that the new reporting requirements collect. The Data System's express purpose is to collect "information regarding loans made, insured, or guaranteed" under *federal* programs. 20 U.S.C. § 1092b(a). As the Department has stated, its aim is to hold "information related to an individual's receipt of *Federal* student financial aid *authorized under Title IV*." IFAP, Dear Colleague Letter, GEN-05-06/FP-05-04 (Apr. 11, 2005), http://tinyurl.com/o3w6e25 (emphases added); *see also APSCU II*, 930 F. Supp. 2d at 221 (purpose is to "'contai[n] information regarding loans made'" through "various *federal* programs" (emphasis added) (citation omitted)). Adding private loan data does not advance that purpose.

Section 1015c's history confirms this. Congress enacted the statute in response to the Department's effort in 2005 to expand another database—which contains various *institution*-level information, including private-loan data—to add such information at the *individual* level. *APSCU II*, 930 F. Supp. 2d at 214. Congress quashed that effort due to privacy concerns by enacting Section 1015c "to stop the Department." *Id.* Yet the Department here seeks to do what Congress forbade: collect *individual*-level data that an existing database collected at the *institutional* level.

The district court rejected this straightforward application of Section 1015c by reading the statute and *APSCU II* as limiting only the Department's ability to collect data on students who have no federal loans. J.A.__[D.E.31:34]. But neither the statute nor *APSCU II* is so narrow. The touchstone under the Department's own construction is whether "the information" added fits within the Data System's purpose—here, to collect "'information regarding loans made'" through "various federal programs." *APSCU II*, 930 F. Supp. 2d at 221 (citation omitted). Data on federal borrowers' *private* loans is no more germane to that purpose than their car payment or cell-phone bill.

The district court also mistakenly asserted that "the [Data System] has long collected data" about federal loans that is "similar" to the private-loan data the Department now seeks to collect—for example, the name of the borrower and the amount of the loan. J.A.__[D.E.31:34]. But the Department did not try to include private-loan data in the Data System until the failed 2011 rulemaking. *Compare* 76 Fed. Reg. 37,095, 37,097 (June 24, 2011), *with*, *e.g.*, 75 Fed. Reg. 54,331, 54,332-33 (Sept. 7, 2010).

The court also cited statutory language permitting the Department to collect "'information concerning other student financial assistance received by the borrower.'" J.A.__[D.E.31:34] (emphasis omitted) (quoting 20 U.S.C. § 1092b(b)(3)). But the Data System has never included private-loan data as part

of "other student financial assistance," which the HEA generally distinguishes from private loans. *See*, *e.g.*, 20 U.S.C. §§ 1019d(a)(3), 1098(a). Moreover, Section 1092b(b)(3) permits the Department to collect such information *only* "[f]or the purposes of research and policy analysis" and "on a statistically valid sample of borrowers under part B of this subchapter," which concerns the Federal Family Education Loan Program. *Id.* § 1092b(b)(3). These limits make clear that the overall purpose of the Data System has never reached private loans. Section 1015c therefore bars adding private-loan data to the Data System.

B. The Reporting Requirements Cannot Be Severed From The Debt Metrics.

The reporting requirements' illegality dooms the debt metrics because the metrics cannot be calculated without private-loan data. The unlawful part of a regulation cannot be severed from the remainder if the remainder cannot "function sensibly without the stricken provision." *MD/DC/DE Broadcasters*, 236 F.3d at 22. That is true even if the agency claims the invalid provision is severable. *Id.* at 22-23.

The metrics' debt component is graduates' median "annual loan payment," 34 C.F.R. § 668.404(a)—which expressly includes "[a]ny *private* educational loans … that the student borrowed for enrollment in the program and that were required to be reported by the institution" under the new reporting requirements, *id.* § 668.404(d)(1)(ii) (emphasis added). The "annual loan payment"—and thus

the metrics—cannot be calculated without the private-loan data. The metrics cannot "function sensibly" if an essential component cannot be calculated. *Id.*; *see also* 79 Fed. Reg. at 64,898 (reporting requirements are "integral" to rule's "goals").

The Department attempted to evade this outcome by suggesting, for the first time in litigation, that if the requirement to report private-loan data is unlawful, the district court should *rewrite* the rule to avoid this defect by treating private-loan amounts as "zero" and calculating the metrics based solely on federal loans. D.E.17, at 44 n.33. That post-rulemaking revision would create an entirely new approach the Department never proposed, much less adopted, in the rulemaking. *See Lacson v. U.S. Dep't of Homeland Sec.*, 726 F.3d 170, 177 (D.C. Cir. 2013) (court "can sustain an agency action only on a ground upon which the agency itself relied"); *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012) (final rule must be "logical outgrowth" of proposal). The radical surgery the Department proposes would not even "accomplis[h]" the agency's "goals as it described them," *MD/DC/DE Broadcasters*, 253 F.3d at 736; without private-loan data, the Department cannot calculate its debt metrics.

CONCLUSION

The district court's decision should be reversed and the case remanded with instructions to vacate the gainful-employment regulations.

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Respectfully submitted,

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1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because this brief contains 13,997 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2015, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the D.C. Circuit using the CM/ECF system. Service was accomplished by the CM/ECF system on the following counsel for Appellees, who are registered CM/ECF users:

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