IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAREER COLLEGE ASSOCIATION d/b/a ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES, Plaintiff, v. ARNE DUNCAN, in his official capacity as Secretary of the Department of Education, and THE DEPARTMENT OF EDUCATION, Defendants.	Civil Action No. 1:11-cv-00138 (RMC)

MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS, OR
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

AND

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

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INTRODUCTION

This case is about a severely flawed rulemaking process, and about the Department's attempt to salvage the resulting regulations by last-minute sub-regulatory guidance and assertions that are contradicted by the regulations themselves and the regulatory record. APSCU's motion for summary judgment should be granted.

Mere months after publishing its final regulations, and after the Department had the benefit of reviewing both APSCU's complaint and its memorandum in support of its motion for summary judgment, the Department felt compelled to issue an extensive guidance document—that it calls a Dear Colleague Letter ("DCL")—to attempt to address deficiencies in the regulations.[1] That *alone* demonstrates that the challenged regulations resulted from a process that was far from "the epitome of reasoned decisionmaking"—as the Department unblushingly claims in its brief, Dep't Br. at 20. But the DCL—as mere guidance that by its own terms "does not make any changes to the regulations," DCL at 1—could not and does not remedy the many deficiencies with the final regulations.

The Department makes two basic arguments in support of its flawed regulations. First, the Department argues that any infirmities with the challenged regulations are of no consequence because injured parties can sue later if and when the Department actually enforces its regulations. Dep't Br. at 1. The regulations are currently forcing schools to alter fundamentally their operations and incur undeniable regulatory burdens in order to bring themselves into compliance by the July 1, 2011 effective date; but under the Department's view of federal jurisdiction, schools must endure these burdens and face overwhelming legal risk, operating

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[1] The DCL is attached as Exhibit A to the declaration of Veronica S. Root ("Root Declaration") (Executed on April 1, 2011) (attached hereto as Exhibit 1).

under the shadow of the Department's unlawful regulations without any prompt remedy. That is not the law. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977).

Second, the Department claims that its regulations are in fact both permissible and reasonable constructions of the Higher Education Act ("HEA"). *See, e.g.*, Dep't Br. at 16-17, 35-36, 54. The Department is wrong. The regulations by their terms repeatedly conflict with the plain language of the HEA and further violate the reasoned decisionmaking requirements of the Administrative Procedure Act ("APA"). For example, whereas the HEA limits payments of "commission[s]," "bonus[es]," and "other incentive payment[s]" the Department's regulations also limit "salaries"—a form of compensation that Congress could not have simply overlooked. Further, by restricting communications with a mere "tendency to . . . confuse," the Department has strayed from the statutory text, which prohibits only "substantial misrepresentations." In the State Authorization regulations, the Department contorts the plain meaning of the requirement that schools obtain state "authorization" into a complex scheme that overrides functioning state oversight regimes and hinders schools' ability to offer innovative online educational programs.

It is well settled that when adopting regulations, agencies must hew to the boundaries of their statutory authority and avoid imposing arbitrary regulations on the public. In adopting the Compensation, Misrepresentation, and State Authorization regulations, the Department has failed to satisfy these fundamental requirements.[2]

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[2] On Defendants' motion to dismiss, all facts asserted in APSCU's complaint must be assumed to be true. Assuming the motion to dismiss is denied, the parties agree that the Court can rule on the motions for summary judgment. *E.g.*, Dep't Br. at 9.

As noted below, the Department has failed to respond to several of APSCU's arguments. *See, e.g.*, *infra* p. 28 (the Department did not address its failure to respond to concerns that the

[Footnote continued on next page]

ARGUMENT

I. THE "DEAR COLLEAGUE" LETTER REFLECTS THE DEPARTMENT'S IMPLICIT RECOGNITION THAT THE REGULATIONS ARE FATALLY FLAWED.

On March 17, 2011, the day before its brief was due, the Department took the unusual step of issuing extensive sub-regulatory guidance.[3] The timing was remarkable: after a rushed rulemaking process, *see* Compl. ¶¶ 29-34, the Department issued the final regulations on October 29, 2010; not five months later, and before the regulations' effective date, the Department felt compelled to issue the DCL, ostensibly to "assist institutions with understanding the changes to the regulations." DCL at 1.[4]

To the extent the Department hoped that the DCL would bolster its legal arguments in this case, the DCL fails to accomplish that goal. First, far from helping the Department, the DCL must be viewed as an indictment of the regulations' confusing text: the Department promulgated

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Compensation regulations increase litigation risks for schools); *id.* at 41-42 (the Department did not advance any argument that the Misrepresentation regulations are narrowly tailored). The Department has therefore conceded that APSCU is entitled to partial summary judgment at least on those non-contested grounds. *Cf. Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004) ("It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.").

[3] A statement of facts can be found in APSCU's opening brief. Pl.'s Br. at 2-8.

[4] The need for increased "understanding" is evidently widespread in the regulated community: the American Council on Education ("ACE"), an organization of approximately 1,800 schools from all sectors of the higher education community, has expressed deep concerns with the regulations both during the comment period, A.R. 5666, and afterwards. For example, in a December 22, 2010 letter to the Department, ACE explained that the Compensation regulations are unclear. A March 2, 2011 letter, sent on behalf of ACE and 60 other higher education associations and accrediting organizations, explained that full withdrawal of the State Authorization regulations is warranted. These letters are attached as Exhibits B and C to the Root Declaration. *See* Pl.'s Opp'n Br. Ex. 1.

overly broad regulations and is impermissibly attempting to use the DCL to try to give them content outside of the notice and comment requirements of the APA. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) ("It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.' That technique would circumvent section 553, the notice and comment procedures of the APA." (internal citation omitted)). Indeed, neither the DCL nor the Department's brief is entitled to any special deference regarding the meaning of the challenged regulations. *See Auer v. Robins*, 519 U.S. 452, 462 (1997) (deference is not due to "*post hoc* rationalization[s] advanced by an agency seeking to defend past agency action from attack") (internal quotation and citation omitted); *Am. Signature, Inc. v. United States*, 598 F.3d 816, 827 (Fed. Cir. 2010) ("Where the agency's interpretation [of its regulations] seeks to advance its litigating position, deference is typically not afforded to the agency's position announced in a brief.").

Second, in several respects, the DCL introduces its own irrational distinctions and ambiguities that further muddle the regulations and, in some cases, flatly contradict their text. Under such circumstances, the appropriate course is for the Department to undertake a new rulemaking, not to simply issue "guidance" that tries impermissibly to amend the regulations. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (interpretive guidance may not be used to amend regulations); *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 240-41 (D.C. Cir. 1992) (same); *see also Nat'l Wildlife Fed'n v. Costle*, 629 F.2d 118, 133 (D.C. Cir. 1980) ("[The] failure to explain at least the basis" for a determination "is fatal" to new regulations).

For example:

Compensation. The DCL provides that senior management employees with "responsibility for" recruiting, admissions, and financial aid activities, who are otherwise covered under the Compensation regulations, are "generally"—but evidently not always—exempt if their responsibility for those activities extends "only" to making "policy" decisions. DCL at 12-13. These vague standards will make it exceedingly difficult for schools to determine what activities and which employees are covered under the regulations and will subject schools' good-faith efforts at compliance to endless second-guessing by the Department and private litigants. Further, the Department has not explained why presidents and deans who "speak[] with prospective students about . . . the virtues of attending a particular institution" and have responsibilities for recruiting, admissions, and financial aid policies are not covered by the prohibition as a result of these activities. DCL at 13. These efforts at "guidance" lack any reasoned basis. *Nat'l Wildlife Fed'n*, 629 F.2d at 133.[5]

The DCL also makes an irrational and unexplained distinction between schools that earn "profits" and those that operate as non-profits. According to the DCL, schools that earn profits may share those profits with persons "engaged in" recruiting only if "distributions are made to individuals on a basis that is neutral with respect to the role the recipient plays in student recruitment." DCL at 10. But the Department clarifies that this restriction applies only to

[5] Notably, the only justification the Department has ever offered for concluding that the HEA's compensation prohibition applies to senior management is that senior management establishes policy that drives organizational culture. 75 Fed. Reg. 34,806, 34,818 (June 18, 2010). The DCL rejects this rationale; the senior management component of the Compensation regulations now, therefore, lacks any reasoned justification and must be vacated as being arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43, 52 (1983).

"profits" and not "revenues" earned by public and non-profit schools that are equally driven by success in securing enrollments—a distinction nowhere to be found in the Compensation regulations or the HEA. DCL at 13-14. In effect, the DCL subjects schools that earn profits to more stringent regulation even though there is no basis in the statutory or regulatory text, in the rulemaking record, or otherwise to justify this disparate treatment, other than perhaps animus towards for-profit institutions.

The DCL further specifies that graduation-based payments are permissible to recruiters who coach athletic teams but to no other subset of employees who engage in recruiting. DCL at 13. The Department justifies this atextual carve-out on the ground that graduation-based payments for coaches are "common" and "not typically viewed as incentive compensation based on recruitment of individuals *as students*, but at most may indirectly *reward success in recruiting* that small subset of individuals whose enrollment would benefit the institution's athletic program." *Id.* at 13 (emphases added). The distinction demeans the concept of the student-athlete, is irrational, and contradicts the text of both the HEA and the Compensation regulations. *See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 52 (1983) (stating that an agency "must offer a rational connection between the facts found and the choice made" (internal quotation and citation omitted)); *Nat'l Wildlife Fed'n*, 629 F.2d at 133.

Finally, in providing this new "guidance" the DCL does not even mention the Department's earlier attempt at guidance—the "two-part test"—which, as APSCU showed, is unworkable. Pl.'s Br. at 12 n.5. Evidently the DCL rejects the primary interpretive tool the Department put forward in its own regulations.

Misrepresentation. The DCL states that the Misrepresentation regulations do not "extend beyond substantial misrepresentations made about the nature of an eligible institution's

educational programs, its financial charges, or the employability of its graduates." DCL at 15. But the text of the regulations tells regulated parties that the Department will sanction them for making *any* substantial misrepresentation, extending far beyond statements on those three subjects. The DCL thus contradicts the plain words of the regulations. *See* 75 Fed. Reg. 66,832, 66,958 (Oct. 29, 2010); *see also Guernsey Mem'l Hosp.*, 514 U.S. at 100.

State Authorization. The Department disclaims its own statement that the regulations "require the creation of a State licensing agency" as a stray remark and points out that the regulations permit States to authorize schools by statute, constitutional provision, colonial charter, or "other action." Dep't Br. at 58. Without explanation, or indeed any reference to the statutory or regulatory text, however, the DCL declares that a letter from a "governor, legislature, or head of an executive branch agency" does not qualify as appropriate "other action." DCL at 4. The DCL appears to narrow the options available to States: States without licensing bodies will either have to enact laws or amend their constitutions each time they wish to authorize a school to be physically present within their borders or they will have to create a licensing agency. Given the impracticability of the former options, the Department's claim that the State Authorization regulations do not mandate the creation of licensing agencies is untenable.

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The DCL is sub-regulatory guidance that is rife with inconsistencies and ambiguities throughout. The DCL thus should be treated as an admission that the Department's challenged regulations are unlawful, both as a matter of procedure and of substance. Despite the Department's last-ditch effort to make the challenged regulations more legally plausible, the DCL does not—and cannot—correct the many legal infirmities of the Department's regulations.

II. THE COMPENSATION REGULATIONS VIOLATE THE HIGHER EDUCATION ACT AND THE ADMINISTRATIVE PROCEDURE ACT.

A. APSCU's Claims Regarding The Compensation Regulations Are Ripe.

To determine whether a claim is "ripe" for review, this Court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. But as the case law cited by the Department confirms, this test is readily satisfied where—as here—the challenged agency regulations adopt a substantive rule and require parties immediately to adjust their conduct to conform to it. The Department quotes a sentence from *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990), for the proposition that an agency's promulgation of regulations is "not ordinarily considered the type of agency action 'ripe' for judicial review." Dep't Br. at 11-12. But the Department omits the immediately following sentences from *Lujan*, which state:

> The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once, whether or not explicit statutory review apart from the APA is provided.

Lujan, 497 U.S. at 891. The omitted sentences guide the proper resolution of this issue. The Compensation regulations are a final, substantive rule, which—as the Department has conceded, *see* DCL at 1—requires immediate action by all schools to modify their compensation schemes by July 1, 2011—the regulations' effective date. As such, APSCU's challenges are ripe.

1. APSCU's Claims Regarding The Compensation Regulations Are Fit For Judicial Decision.

APSCU's claims regarding the Compensation regulations are fit for decision because (i) they present purely legal issues that would not benefit from a more concrete setting, and (ii) the Department's action is final. *See Reckitt Benckiser Inc. v. EPA*, 613 F.3d 1131, 1137 (D.C. Cir. 2010).

APSCU argues that the Compensation regulations on their face extend beyond the Department's statutory authority and are the "product of an unreasoned decisionmaking process." Compl. ¶ 14. These are purely legal issues and thus satisfy the first prong of the ripeness analysis. *See Great Lakes Gas Transmission Ltd. P'ship v. FERC*, 984 F.2d 426, 431 (D.C. Cir. 1993); *see also Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 464 (D.C. Cir. 2006) (explaining that a "purely legal" claim in the context of a facial statutory challenge is "presumptively reviewable") (internal quotations and citations omitted). The Court need not await the regulations' application to particular facts. For example, the parties agree that the Compensation regulations restrict the ability of schools to pay salaries that take into account enrollments in any way; apply to managerial employees who are merely "responsible for" recruitment, admissions, or financial aid; and eliminate graduation-based payments. The only question is whether those provisions are lawful.

Further, the "agency's action is sufficiently final." *Reckitt*, 613 F.3d at 1137 (internal quotation and citation omitted). Schools currently have to change their compensation policies to ensure that they are in compliance with the new regulations by the July 1, 2011 effective date. *See* Compl. ¶ 6 ("The regulations are . . . already harming schools and students by changing the way schools hire [and] recruit. . . . In addition, they are causing schools to divert significant time and money from student education to implement policies and procedures that attempt to comply with the new regulations."). Tellingly, the Department agrees: as stated in its DCL, "[a]ffected

parties are responsible for taking the steps necessary to comply by the effective dates established by the final regulations." DCL at 1.[6]

2. The Hardship To APSCU's Members Outweighs Any Other Hardship.

If the Court agrees that APSCU's claims are fit for judicial decision, it is not required to consider the hardship to the parties to support a finding of ripeness. *Action for Children's Television v. FCC*, 59 F.3d 1249, 1258 (D.C. Cir. 1995). Regardless, any hardship from addressing this case now is clearly outweighed by the harm to schools currently forced to come into compliance with the Compensation regulations. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1283 (D.C. Cir. 2005) ("Any institutional interest in postponing review must be balanced against the resultant hardship to the [plaintiff] in order to determine whether immediate review is proper.").

The Compensation regulations have inflicted financial hardship on schools, forcing them to expend significant resources trying to come into compliance with the regulations. *See, e.g.*, Compl. ¶¶ 6-7. This "financial harm" is sufficient by itself to establish hardship. *See Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1021, 1028-29 (D.C. Cir. 1991). Moreover, simply complying with the overly broad Compensation regulations will alter the composition of schools'

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6 Deferring judicial review until the Department enforces these unlawful regulations could have devastating consequences. For example, in 2000, the Department imposed a $187 million fine on Computer Learning Centers ("CLC") for making payments to its recruiters that many schools believed were permissible under the then-applicable regulations. The surprise penalty forced CLC into bankruptcy, left students without a school, and left taxpayers on the hook for students' loans. *See* Ruth E. Igoe, *School Closing Derails Student Plans, Budgets; Bankruptcy Plan Puts Fate of Fees in Limbo*, Chi. Trib., Feb. 14, 2001. There is simply no requirement that APSCU wait to challenge these regulations while the Department dangles the "sword [of] Damocles" over APSCU's members. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991).

workforces because schools will have no way of safely and effectively rewarding high-quality employees. *See, e.g.*, Compl. ¶¶ 6-7, 64; Pl.'s Br. Ex. 5 ¶ 9, Ex. 3 ¶¶ 14-16; A.R. 3522-23. [7]

APSCU's claims regarding the Compensation regulations are precisely the type considered "ripe" under *Abbott Laboratories*. "[T]he regulation is directed at [schools] in particular[, and] it requires them to make significant changes in their everyday business practices." *Abbott Labs.*, 387 U.S. at 154. Moreover, if schools fail to comply with the new regulations, "they are quite clearly exposed to the imposition of strong sanctions." *Id.* The balance of harm weighs heavily in favor of deciding this case now.[8]

B. The Compensation Regulations Violate The Higher Education Act By Restricting Salaries And Merit-Based Salary Adjustments.

The HEA prohibits schools from paying "persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance" any "commission, bonus, or other incentive payment" that is based directly or indirectly on success in securing enrollments. 20 U.S.C. § 1094(a)(20). As explained in

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[7] The Department argues that the Court should not consider the five declarations attached to APSCU's motion. *See* Dep't Br. at 10 n.7. APSCU need not rely on these declarations to rebut the Department's flawed ripeness argument as a matter of law; the declarations simply confirm that APSCU's members are currently experiencing harm and that the claims are not "contingent [on] future events," *see* Dep't Br. at 11; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (explaining that at the summary judgment stage a plaintiff may "set forth by affidavit or other evidence specific facts" supporting standing (internal quotations and citation omitted)). The five declarations were before the Department as it prepared its brief; it therefore can claim no surprise that APSCU contends that these regulations are presently harming its members. In fact, the declarations are *uncontested* evidence that the three challenged regulations are currently causing schools harm.

[8] The fact that, pursuant to 20 U.S.C. § 1089(c), Title IV regulations may not go into effect until at least eight months after they are published in final form also supports APSCU's ripeness arguments. This congressional recognition that students and schools need ample lead time to respond to changes to Title IV regulations is at odds with the Department's claim that no harm will befall schools from waiting to challenge the regulations until after they have taken effect.

APSCU's opening brief, the statutory prohibition by its plain terms does not extend to salary determinations. Pl.'s Br. at 9-13. The Department concedes that the Compensation regulations prohibit certain salary determinations, Dep't Br. at 14-15, but argues that this is a permissible interpretation of the HEA, Dep't Br. at 15. Relegating its acknowledgement that Congress expressly omitted "salaries" from § 1094(a)(20) to a footnote, the Department contends meekly that its reading is "not unambiguously foreclosed by the HEA" and thus is "permissible" under *Chevron*. *See* Dep't Br. at 15 & 17 n.10 (citing *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

But deference under *Chevron* is unavailable in this case for at least two reasons. First, as explained below, the language of § 1094(a)(20) unambiguously excludes salaries. Accordingly, there is no basis to move beyond *Chevron* Step 1: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Second, the Department is not entitled to deference because the Department itself did not recognize any ambiguity in the statute for it to interpret. 75 Fed. Reg. at 66,876 (The HEA's compensation restriction is "clear"); *id.* at 34,819 (Considering success in securing enrollments in providing merit-based compensation is not "consistent with" the HEA); *see also Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 & n.3 (D.C. Cir. 2006) (rejecting agency counsel's attempt to invoke *Chevron* deference where the agency itself said that the statute was clear). It is well established that if an agency mistakenly believes a statute is clear, then a court will vacate the agency action at issue for reconsideration. *Peter Pan Bus Lines*, 471 F.3d at 1354-55.

In any event, the Department's interpretation is wrong. Congress did not give the Department authority to regulate salaries or salary adjustments even if based on success in

securing enrollments. Pl.'s Br. at 11-13. The core of the Department's argument is that salaries and salary adjustments based in any part on success in securing enrollments are impermissible because "[i]n enacting the HEA, Congress sought to ban compensation that incentivize[s] success in securing enrollments." Dep't Br. at 16. But had Congress wished to prohibit certain types of salaries and salary adjustments—the most common forms of compensation—it could have said so. *See, e.g.*, *Dart v. United States*, 961 F.2d 284, 286 (D.C. Cir. 1992). Similarly, had it wanted to regulate all payments that have an incentive effect, as the Department claims, it could have simply said that as well. In fact, had it wanted to achieve that goal, it would have been redundant to enact a statute that prohibits "commission[s]" and "bonus[es]" along with "incentive payment[s]"; the former would be subsumed into the latter. Accordingly, the Department's interpretation of the HEA impermissibly renders terms of the statute surplusage. *See Gutierrez v. Ada*, 528 U.S. 250, 258 (2000). Contrary to the Department's overly broad construction, Congress chose to prohibit three specialized types of payments—"commission[s], bonus[es], [and] other incentive payment[s]." Under settled principles of statutory construction, the word "other" in "other incentive payments" demonstrates that the only prohibited incentive payments are those akin to commissions and bonuses, forms of compensation distinct from salaries and salary adjustments. Pl.'s Br. at 12 (collecting authorities).

The Department's incorrect statutory interpretation stems from its erroneous and unsupported belief that salaries, commissions, and bonuses are indistinguishable and differ from each other "in name only." Dep't Br. at 16; *see also id.* at 16-17 n.9 (describing salaries, bonuses, raises, and gifts as mere labels for the same thing). At their core, salaries and salary adjustments are fundamentally distinct forms of compensation from commissions and bonuses. A bonus is "money or an equivalent given *in addition* to [an employee's] usual compensation,"

which is typically a salary. *Webster's Third New International Dictionary* 252 (4th ed. 1976) (emphasis added). A salary is "fixed compensation paid regularly (as by the year, quarter, month, or week) for services." *Webster's*, *supra*, at 2003. Thus, whereas a $1,000 bonus is an "additional payment" above and beyond an employee's salary, a $1,000 salary increase becomes part of the employee's periodic compensation and lasts until there is another change in the employee's usual compensation. *See* Pl.'s Br. at 11-13.[9] The plain meaning of § 1094(a)(20) therefore forecloses the Department's position.

Further, the Department's efforts to interpret the HEA in its favor fail on several fronts. For example, the Department seeks impermissibly to overcome the plain text of the statute by references to legislative history and then proceeds to misconstrue that history. Dep't Br. at 17. Even if the text were not clear—which it is—the legislative history supports APSCU's reading. The purpose of the statutory prohibition was not, as the Department asserts without citation, to "ban compensation that incentivize[s] success in securing enrollments." Dep't Br. at 16. Rather, Congress concluded that there was a problem with "substantial program abuse . . . in . . . student aid programs with respect to the *use of commissioned sales representatives*" and accordingly enacted "legislation [that would] prohibit their use." H.R. Conf. Rep. No. 102-630, pt. G, at 499 (1992), *reprinted in* 1992 U.S.C.C.A.N. 334, 614 (emphasis added). Congress did not report any concern stemming from the use of salaried salespeople. In fact, the legislative history clearly

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[9] It may be that an upward salary adjustment followed shortly by a downward salary adjustment resembles a bonus. The 2002 Clarifying regulations, 34 C.F.R. § 668.14(b)(22)(ii)(A)-(L), guarded against that possibility, in a rational and workable manner, by presumptively deeming salary adjustments occurring more frequently than twice per year to be bonuses. Whatever authority the Department may have to decide how to distinguish bonuses from salaries, it is indisputable that the HEA does not permit the Department to declare bonuses and salary adjustments to be the same thing in every case.

contemplates that schools would continue to use salaried recruiters and base their salaries, at least in part, on success in securing enrollments. *See id.* ("The conferees wish to clarify . . . that use of the term 'indirectly' does not imply that schools cannot base employee salaries on merit. It does imply that such compensation cannot solely be a function of the number of students recruited, admitted, enrolled, or awarded financial aid.").[10]

The Department's statutory interpretation also distorts the meaning of "merit-based." In the DCL, the Department, for the first time, identified several "qualitative factors [that] may" be used as a basis for providing "merit-based" compensation to covered employees "so long as [those factors] are not related to the employee's success in securing enrollments or the award of financial aid." DCL at 13. According to this conception of merit, two recruiters who are identical on every qualitative metric, but different because one recruiter identifies and enrolls 100 qualified prospective students and the other enrolls no one, are equally strong recruiters and must receive the same "merit-based" pay. This hypothetical demonstrates how far the Department has strayed from its initial recognition that "a recruiter's job . . . is to recruit," 75 Fed. Reg. at 34,818, in trying to defend its regulations. In fact, instead of recognizing that recruiting involves identifying qualified students and helping them realize the benefits of a particular program, the Department now insists without authority that good recruiting could

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[10] The Department is simply incorrect that the 1992 enactment of the statutory compensation restriction would have been a nullity had Congress's focus been on commissioned salespeople. Dep't Br. at 17. The compensation restriction that existed before 1992 was much more narrow than the post-1992 restriction. First, the pre-1992 restriction applied to a smaller class of people: only those who "promot[ed] the availability of [certain loan programs]," 20 U.S.C. § 1085(a) (Supp. II 1991), rather than to all those "engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance," 20 U.S.C. § 1094(a)(20). Second, the pre-1992 restriction did not apply to bonuses and other similar forms of incentive payments.

consist entirely of convincing unqualified students not to enroll in a particular program.[11] Dep't Br. at 14 n.8. But a recruiter's compensation, to be merit-based, must turn in part on how well the recruiter engages in activities aimed at actually securing enrollments—as opposed to discouraging enrollments.

The DCL does not even identify a single merit-based factor, qualitative or otherwise, that is unequivocally unrelated to success in securing enrollments and on which schools can feel confident in basing their compensation decisions. Instead, the DCL noted that permissible evaluative factors "*may* include . . . job knowledge and professionalism, skills such as analytic ability, initiative in work improvement, clarity in communications, and use and understanding of technology, and traits such as accuracy, thoroughness, dependability, punctuality, adaptability, peer rankings, student evaluations, and interpersonal relations." DCL at 13 (emphasis added). Because these factors are likely to be strongly correlated to success in securing enrollments, it is virtually certain that the Department or *qui tam* plaintiffs will eventually argue that they are indirectly related to success in securing enrollments. Indeed, the Department's Inspector General and many *qui tam* plaintiffs already attempt to make similar arguments.[12] The Compensation

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[11] The Department has been inconsistent regarding its definition of a good recruiter. The Department first acknowledged that a recruiter's job is to recruit. 75 Fed. Reg. at 34,818. Now, the Department claims that a good recruiter is a "counseling profession[al]" who is "unbiased"—less an employee of the school, perhaps, than a free-floating ombudsman who may not have a duty of loyalty to the employing institution. Dep't Br. at 14, 23 n.11. Setting aside that the HEA does not require schools to hire "counseling profession[als]" as their recruiters, it should be obvious that a person who is engaged in recruiting who is unable to demonstrate the benefits of an accredited, Title IV-eligible program to a single qualified student is not very good at the job.

[12] *See, e.g.*, Dep't of Educ. Office of Inspector General, Final Audit Report, 8-9, 52-53 (Jan. 2011) *available at* http://www2.ed.gov/about/offices/list/oig/auditreports/fy2011/a05i0014.pdf; A.R. 7126-51, ¶ 48 (complaint filed in False Claims Act case against school).

regulations therefore do not protect merit-based salaries; they contravene the HEA even under the Department's distorted conception of merit.

Finally, the Department's construction of the HEA also leads to absurd results. If a school hires recruiters, it must simply hope that they will voluntarily choose to spend their time attempting to secure enrollments because, under the Department's view, schools are prohibited from making any payments to recruiters that might motivate them to make "contact in any form with . . . prospective student[s]." 75 Fed. Reg. at 66,950 (defining securing enrollments).[13]

The proper reading of the HEA avoids each of the problems engendered by the Department's interpretation. Understanding that the HEA does not permit the Department to regulate salary determinations gives meaning to each statutory term, is consonant with the statute's legislative history, preserves a sensible definition of merit, and does not lead to absurd results. The Department's contrary interpretation must be rejected.

C. The Compensation Regulations Violate The Higher Education Act By Regulating Senior Management Compensation.

Under the HEA, only persons or entities "engaged in" student recruiting, admissions, or financial aid activities are covered by the statutory compensation restriction. 20 U.S.C. § 1094(a)(20). The Compensation regulations, however, extend the restriction to "higher level employees" with "responsibility for" those activities. 75 Fed. Reg. at 66,874.

According to the Department, the HEA does not "unambiguously foreclose" interpreting the statutory words "engaged in" to cover senior management personnel "with responsibility for"

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[13] Notably, according to the Department, if government employees were covered by the Compensation regulations, an annual adjustment to their compensation would be an impermissible incentive payment if it were based in any part on successful job performance. Dep't Br. at 16 n.9. It simply defies logic to have a definition of workplace merit that entirely eliminates successful outcomes from the calculation. Not surprisingly, Congress did not enact such an irrational requirement in the HEA.

recruiting, admissions, and financial aid activities. Dep't Br. at 18. As the argument goes, those with "responsibility for" activities are "liable to be called on to answer or account" for those activities. Dep't Br. at 19 (internal quotation omitted). And people who are liable to account for an activity are "engaged in" those activities because they are "affected" by them or "involved" or "implicated" in them. *Id.*[14]

Common sense and the legislative history of the HEA compensation restriction squarely rebut the Department's logic. By the Department's reasoning, prospective students rather than being recruited are actually "engaged in" recruiting because they are "affected" by or "implicated" in those activities. *See* Dep't Br. at 19. Similarly, under the Department's definitions, the President of the United States, who is clearly "responsible for" the combat activities of the United States Armed Forces, is "engaged in" combat activities because he is affected by them and implicated in them. Clearly, the Department does not capture the common sense meaning of "engaged in."

The legislative history also contradicts the Department's interpretation of the HEA and confirms that senior executives are covered by the prohibition only to the extent they actively participate in recruiting prospective students or awarding them financial aid. The Conference Report accompanying the statutory prohibition explains that the "Senate bill eliminates any institution from Title IV eligibility that uses *commissioned salespeople*" and that the "House bill

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[14] Once again, the Department is not entitled to *Chevron* deference regarding its interpretation that senior management compensation is encompassed by the HEA's compensation restriction because (i) the language of the statute unambiguously forecloses the Department's reading, and (ii) in the alternative, the Department failed to recognize any ambiguity and bring any expertise to bear in construing the language. 75 Fed. Reg. at 34,819 ("The Department's position is that section 487(a)(20) of the HEA is clear that the incentive compensation prohibition applies all the way to the top of an institution or organization.").

adds a similar prohibition." H.R. Conf. Rep. No. 102-630, pt. G, at 499 (1992), *reprinted in* 1992 U.S.C.C.A.N. 334, 614 (emphasis added). Consistent with the statutory text, Congress focused on "salespeople," not upper management.[15]

D. The Compensation Regulations Arbitrarily And Capriciously Depart From Prior Regulations.

1. The Department Has Ignored Its Own Earlier Findings And Reliance Interests Underlying The Now-Repealed Clarifying Regulations.

The Department attempts to justify the Compensation regulations on several grounds that conflict with the findings on which it earlier justified the now-revoked Clarifying regulations. The Compensation regulations also disregard the reliance interests of regulated parties. Under such circumstances, the Department must, in addition to demonstrating that "there are good reasons" for its new regulation, offer "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). The Department has done neither.

For example, the Department has not offered a reasoned explanation for rejecting its 2002 finding that semi-annual merit-based adjustments to employee salaries would not be "a loophole that institutions could use to bundle their bonuses and pay them as a salary adjustment." 67 Fed. Reg. 67,048, 67,054 (Nov. 1, 2002). The Department's argument that permitting such salary adjustments had proven to be a loophole, making it more difficult for the Department to enforce the HEA, Dep't Br. at 21 (citing 75 Fed. Reg. at 34,817; *id.* at 66,872-73), is merely an assertion

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[15] The Department notes Congress's failure to enact legislation to clarify that the HEA's compensation restriction does not apply to senior management. *See* Dep't Br. at 18. But it is well settled that no inference can be drawn from legislative inaction. *See, e.g.*, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." (internal quotation and citation omitted)).

that the earlier finding was incorrect. The Department may have changed its mind; but it has not demonstrated that the earlier finding is incorrect, nor provided any reasoned basis for rejecting it.

The Department also ignored its own 2002 findings by expanding the compensation restriction to cover senior management. According to the NPRM, senior managers should be covered because they "may drive the organizational and operational culture at an institution." 75 Fed. Reg. at 34,818. Assuming that is true, it would have been just as true in 2002, when the Department declared that the HEA did not extend to senior management compensation. *See* 67 Fed. Reg. 51,718, 51,724 (Aug. 8, 2002). The Department has therefore failed to offer a reasoned explanation for rejecting its earlier finding, and its regulation of senior management compensation is arbitrary and capricious.[16]

Another example: in 2002, the Department determined that students who graduate from the programs they enrolled in were, by definition, qualified to attend those programs. Accordingly, the Department said that graduation-based payments do not implicate the concerns that motivated the enactment of the statutory compensation restriction. Today, the Department does not disagree with that determination, but it has nonetheless declared that graduation-based payments violate the HEA. *See* 75 Fed. Reg. at 66,874.

The Department's conclusion defies logic. The purpose of the compensation prohibition is to "curb the risk that recruiters will sign up *poorly qualified students* who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans." *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1168-69 (9th Cir. 2006) (emphasis added) (internal quotation and citation omitted). The Department *admits* that its

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[16] As noted above, the DCL now rejects the "driving the culture" explanation in any event. *See* DCL at 12-13; *supra* note 5.

prohibition on graduation-based payments is unrelated to that purpose, but asserts the authority to ban such payments because they might encourage recruiters to recruit otherwise qualified students who may not be well-served in some undefined sense by enrolling in a particular program. *See* Dep't Br. at 23 ("Just because a student is qualified for an educational program, and could graduate from that program, does not mean it is in the student's best interest to enroll.").

This explanation is impermissible in three ways. In addition to being irrational, it appears nowhere in the record outside of the Department's brief, and it is entirely unrelated to the purposes of the statute. *See State Farm*, 463 U.S. at 43, 50 (agency reliance on factors Congress did not intend it to consider is arbitrary and capricious and courts may not accept post hoc rationalizations for agency action); *S. Cal. Edison Co. v. FERC*, 603 F.3d 996, 1001 (D.C. Cir. 2010) (refusing to accept an agency rationale not relied on in the order under review).[17]

Finally, the Department does not even seriously contend that it adequately addressed schools' established reliance interests in the Clarifying regulations. The Department merely recognized that schools would have to make changes to their compensation practices in response to the Compensation regulations. Dep't Br. at 26 n.15. In other words, the Department has

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[17] APSCU has already explained why the Department's other expressed rationales for prohibiting graduation-based payments are irrational. Pl.'s Br. at 23-25. For example, the Department's restated concern about grading policies and accelerated programs goes to the quality of the Title IV-eligible program and is entirely unrelated to whether schools are recruiting unqualified students to attend those programs. And the Department's invocation of 20 U.S.C. § 1221e-3 is entirely beside the point. That section empowers the Department to adopt regulations to "carry out functions otherwise vested in the [Department] by law." 20 U.S.C. § 1221e-3. It is not an independent grant of authority to adopt whatever regulations the Department desires. Finally, the Department may not rely on *Chevron* to argue that the term "indirectly" is sufficiently ambiguous to support its prohibition on graduation-based payments. Dep't Br. at 23-24 n.12. *See supra* p. 12.

acknowledged that reliance interests exist and that schools will be harmed by the regulations, but the Department has not provided a reasoned explanation for disregarding those interests. That is insufficient under the APA. *See Fox Television Stations*, 129 S. Ct. at 1811 (agency must provide "a reasoned explanation" for disregarding reliance interests).

2. The Department's Rationale For The Compensation Regulations Is Not Supported By The Record.

The Department continues to assert that the Compensation regulations are a rational response to its conclusions that the Clarifying regulations "led institutions to establish compensation plans" that allegedly violated the HEA's compensation prohibition, forced the government to expend "enormous amounts of resources" looking "behind the documents [the] institutions allege they have used to make recruiter compensation decisions," and "made it very difficult for the Department to evaluate compliance and to successfully enforce the ban." 75 Fed. Reg. at 66,872-73; Dep't Br. at 21.

The Department's explanation flies in the face of its own statements in the final regulation. If the Compensation regulations were a real solution to a real problem, they inevitably would change the size or composition of federal student aid programs or the cost of those programs, or both. But the Department has concluded that the Compensation regulations will cause *neither* metric to change. *See* 75 Fed. Reg. at 66,972. Nor does the Department explain why if unscrupulous actors evading the safe harbor are not merely hypothetical problems, there will not be savings to the Federal Government under the Compensation regulations. Thus, because the rule runs counter to the uncontroverted evidence (including the Department's own statements), it is arbitrary and capricious. *See Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997). Indeed, APSCU raised these arguments in its opening

brief, Pl.'s Br. at 22, but the Department ignored them entirely; accordingly, the Department has waived any response.

Moreover, the Department has consistently failed to produce any evidence that circumvention of the HEA's compensation restriction is a real problem. For example, the Department now invokes a February 2010 GAO report on incentive compensation as evidence to support its claims. That report reveals that violations of the HEA's compensation restriction have not materially increased since 2002, when the Department adopted the Clarifying regulations. A.R. 7293. According to the Department, the report's conclusion is evidence that the Clarifying regulations have impeded its ability to identify and sanction bad actors. Dep't Br. at 24-25. That is only true, however, if there actually had been more bad actors in the period following the adoption of the Clarifying regulations than in the period before their adoption—which is a conclusion for which the Department has no evidence. In fact, the GAO report could simply be evidence that schools are complying with the HEA by dutifully adhering to the Clarifying regulations.

Also for the first time, the Department points to several public documents and statements—provided in large part by plaintiffs' lawyers and recruiters who stand to benefit from the Compensation regulations—as evidence in support of its conclusion that the Clarifying regulations led to an increase in compensation violations. *See* Dep't Br. at 24-25 n.13. That the Department did not rely on a single one of these statements in its own description of the rule's justification in the *final regulations* should raise red flags. *See State Farm*, 463 U.S. at 50. More importantly, the documents offer at most some evidence that violations occur; none is evidence that the Clarifying regulations caused an increase in the rate of violations. In fact, many of the cited materials are consistent with APSCU's argument that the Clarifying regulations have not

impeded enforcement. Accordingly, the citations do not support the Department's claim that the Compensation regulations are necessary to prevent circumvention of the HEA. *See ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." (internal quotation and citations omitted)). Even if the statements could be read as some evidence in favor of the Department's conclusion, the Department has not satisfied its obligation to explain why it chose to credit some evidence over other evidence. *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010) ("Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review." (internal quotation and citation omitted)).

Finally, even if the Department had timely put forth credible evidence that the Clarifying regulations had resulted in hard-to-detect circumvention of the HEA's compensation restriction, the Compensation regulations, as interpreted by the DCL, suffer from the same problem. As explained above, success in securing enrollments—especially when defined as "contact in any form with a prospective student," 75 Fed. Reg. at 66,950—is likely to be highly correlated with the qualitative factors the Department has now said may be permissible bases for compensation decisions. *See* DCL at 13. Under the Compensation regulations, the Department will still have to "look behind the documents" to see if schools are using permissible evaluation factors and forms of payment to cloak impermissible commissions, bonuses, and other incentive payments based on success in securing enrollments. In short, the Compensation regulations are not even a solution to the Department's hypothetical problem.

3. The Compensation Regulations Do Not Increase Regulatory Clarity.

In addition to the need to prohibit hypothetical unscrupulous actors from circumventing the HEA's compensation restriction, throughout the rulemaking, the Department consistently pointed to increased regulatory clarity as another rationale for the Compensation regulations. *See, e.g.*, 75 Fed. Reg. at 34,855 (listing "increased clarity about incentive compensation for employees at institutions of higher education" as the only benefit of the Compensation regulations); *id.* at 66,971 (same). But in its brief, the Department now asserts that it was "not a quest for increased clarity[] that prompted [it] to eliminate the safe harbors." Dep't Br. at 27. Because, as shown above, speculative concerns about unscrupulous actors cannot justify the Compensation regulations, the Department's concession that increased clarity was not a regulatory purpose leaves the Compensation regulations without a single reasoned basis to justify their existence. Accordingly, vacatur is required. *Fox Television Stations*, 129 S. Ct. at 1811. In fact, vacatur is required even if the Department's circumvention rationale withstands scrutiny. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006) (when one of several rationales is flawed, courts ordinarily vacate the regulation unless they are certain that the agency would have adopted the rule anyway).

It is not surprising that the Department has jettisoned the "clarity" rationale. Among other things, the need for the DCL before the regulations even take effect is proof that the regulations do not increase clarity. One additional example suffices to remove any doubt. Under the Clarifying regulations, all senior managers could be paid bonuses: a clear and simple rule. Under the Compensation regulations, schools must first determine if a senior manager has "responsibility for" recruiting, admissions, or financial aid activities and, if so, then determine whether his role is strictly confined to making "policy determinations." And as demonstrated above, the guidance the Department has provided about what those terms mean is both sparse

and contradictory. There is, quite simply, nothing clear about that chain of determinations. And if history is any guide, when the Department's regulations governing recruiter compensation do not provide clear answers, confusion that is harmful and frustrating for students, schools, and the courts is sure to result. *See* Pl.'s Br. at 19-20.[18]

4. The Department Did Not Adequately Respond To Public Comments.

The Department's contention that it adequately responded to comments is demonstrably mistaken.[19] For example, the Department has now twice opined that a college president who speaks with prospective students about the merits of the school's programs is not engaged in student recruitment. Several commenters asked the Department why speaking with prospective students about schools' programs constitutes recruiting when undertaken by a recruiter but not when undertaken by a college president. *E.g.*, A.R. 3059-60. Others asked whether persons charged with operating racial diversity programs at institutions could receive a bonus for achieving that goal. *See, e.g.*, A.R. 3308, 3386. Commenters also asked questions about whether the Compensation regulations encompassed termination, promotion, and demotion decisions based, at least in part, on employees' performance linked, directly or indirectly, to

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[18] It is worth noting that, even after negotiated rulemaking sessions, the NPRM, the final regulations, and the DCL, the Department still cannot offer a consistent, coherent explanation of the scope of its regulations. Whereas the Department's brief asserts that "salaries . . . that are based directly or indirectly on success in securing enrollments" are included within the Compensation regulations, Dep't Br. at 15, the Compensation regulations expressly exclude "fixed salar[ies]," including fixed salaries based on success in securing enrollments, from their definition of "[c]ommission, bonus, or other incentive payment." 75 Fed. Reg. at 66,950.

[19] The Department takes an unreasonably narrow view of the comments to which it failed to respond by arguing that APSCU cited to "only three questions posed by a single commenter." Dep't Br. at 29 (citing Pl.'s Br. at 26 ("[E.g.] A.R. 3059-60)"). The Department fails to note, however, that the questions on A.R. 3059-60 were explicitly cited as exemplars. *See* Dep't Br. at 29. There are numerous examples in the administrative record of questions the Department failed to answer. *See also, e.g.*, A.R. 3293, 3297, 3306-09, 3385-87, 4536, 5155 (additional examples).

securing enrollments or the award of financial aid. A.R. 3306-08, 3386. The Department has not answered any of those questions.

In addition, the Department has never responded to concerns raised in the public comments that the Compensation regulations will alter schools' workforces and student bodies in detrimental ways. *See, e.g.*, A.R. 3489, 3528-52 (Report of Daniel J. Slottje, Ph.D.). The Department responds only that the "Department is entitled . . . to determine that any loss of enrollment . . . is outweighed by the benefits of ensuring that prospective students learn about the educational opportunities and payment options available to them from recruiters who are free of any conflict of interest." Dep't Br. at 30. Perhaps that is the case—though the Department cites no authority for the proposition—but it is equally true that in exercising its discretion, the Department must explain itself and explain why it is discounting relevant harms identified by public commenters. *Reytblatt v. U.S. Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997). It is telling that the Department's response to this argument does not contain a single citation to the NPRM, the final regulations, or even the DCL.

Additionally, the Department contends that it did not ignore the compliance costs of the Compensation regulations. The section of the NPRM the Department cites contains estimates regarding the compliance costs of several regulations not challenged in this lawsuit, but it does not contain a single estimate of the compliance costs associated with the Compensation regulations. 75 Fed. Reg. at 34,855-56. Although the Department correctly states that it revised

the cost projections of some of its regulations in the final rule, those revisions make no mention of the compliance costs associated with the Compensation regulations. *Id.* at 66,972.[20]

Finally, the Department has not written a single sentence—*anywhere*—regarding commenters' concerns that the Compensation regulations would subject schools to unwarranted litigation risk. Pl.'s Br. at 27 (citing A.R. 4371). Accordingly, the Department has waived any response to APSCU's argument that it was both required to respond to those concerns and failed to do so. Pl.'s Br. at 27.

In sum, the Compensation regulations must be vacated to ensure that the Department adopts substantively valid regulations in a procedurally proper manner. *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1190-91 (D.C. Cir. 1990).

III. THE MISREPRESENTATION REGULATIONS VIOLATE THE CONSTITUTION, THE HIGHER EDUCATION ACT, AND THE ADMINISTRATIVE PROCEDURE ACT.

A. APSCU's Claims Regarding The Misrepresentation Regulations Are Ripe.

The Department asserts that APSCU's statutory challenge to the Misrepresentation regulations is not ripe for judicial review. Dep't Br. at 32. That unsupported assertion is wrong because APSCU's claims are fit for judicial decision, and postponing judicial review of its

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[20] The Department argues that "not a single commenter put a number on the alleged costs or provided any supporting data" regarding compliance costs. Dep't Br. at 31. But if no commenter "put a number" on compliance costs, it is likely because the Department gave no thorough cost analysis itself, 75 Fed. Reg. at 66,972, and provided the public with only 45 days in which to submit public comments, *id.* at 34,806. Nevertheless, at least one commenter provided an extensive and detailed qualitative study from an economic expert to demonstrate that the Department had ignored important and undeniable costs. A.R. 3529 ("[T]his regulatory change will, among other things, reduce surplus revenues at institutions resulting in diminished quality and quantity of educational programs, lowered efficacy in the recruiting and retention of qualified students, difficulties in hiring and retaining qualified admissions advisors and financial aid counselors, increases in the number of supervisory personnel needed to oversee these employees, and increases in the time and resources devoted to litigation."). The Department did not address this expert report.

challenges to the Misrepresentation regulations would impose an undue hardship on APSCU's members. *See Reckitt*, 613 F.3d at 1137.

1. APSCU's Claims Regarding The Misrepresentation Regulations Are Fit For Judicial Decision.

APSCU's claims present purely legal issues: that the Misrepresentation regulations extend beyond the Department's statutory authority, violate the Constitution, and are part of an arbitrary and capricious rulemaking. *See* Compl. ¶ 15; *see also Great Lakes Gas Transmission Ltd.*, 984 F.2d at 431; *Nat'l Ass'n of Home Builders*, 440 F.3d at 464. In addition, judicial consideration would not benefit from a more concrete setting or require application to particular facts to evaluate APSCU's claims regarding the Department's (i) adoption of regulations that extend beyond the scope permitted by statute; (ii) facially unconstitutional restrictions on schools' free speech and due process rights; and (iii) failure to include materiality and intent requirements for "substantial misrepresentations." *See Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 757 (D.C. Cir. 2003).

Finally, the Department's Misrepresentation regulations are sufficiently final. *See Reckitt*, 613 F.3d at 1137. APSCU challenges the facial validity of rules that are final under the APA and it contends that the Department's "*faithful* application [of the regulations as written] would carry the agency beyond its [Constitutional and] statutory mandate." *Nat'l Ass'n of Home Builders*, 440 F.3d at 465 (internal quotation and citation omitted). APSCU's challenge is to the regulations *as written*. Compl. ¶¶ 65-77.

2. The Hardship To APSCU's Members Outweighs Any Other Hardship.

Again, APSCU's successful demonstration that its claims are fit for judicial decision means this Court need not consider hardship to the parties. *Action for Children's Television*, 59 F.3d at 1258. In any event, the harm to schools in delaying the review of the Misrepresentation

regulations far outweighs any other hardship. *See Nat'l Ass'n of Home Builders*, 417 F.3d at 1283. For example, schools are forced to modify methods of communicating with students as a result of the regulations' chilling effect on schools' speech. *See* A.R. 6735; Pl.'s Br. Ex. 3 ¶¶ 26-27 (noting "comprehensive effort to review its publications to minimize the risk that it will run afoul of the Misrepresentation regulations"); Pl.'s Br. Ex. 2 ¶¶ 28, 30. As the Department has explained, "[a]ffected parties are responsible for taking the steps necessary to comply" with the regulations by the effective date, DCL at 1; these steps are causing financial harm to schools, *see* Compl. ¶¶ 76-77; Pl.'s Br. Ex. 2 ¶¶ 28, 30; *id.* Ex. 3 ¶¶ 26-27; *see also, e.g.*, A.R. 4888, and outweigh any hardship to other parties—especially since the Department has identified no hardship that it would suffer from adjudicating APSCU's statutory challenge now.

B. The Misrepresentation Regulations Strip Schools Of Their Constitutional And Statutory Rights To Notice And An Opportunity To Be Heard.

APSCU and the Department agree that the Department must provide reasonable notice and opportunity for a hearing before attempting to "suspend or terminate an institution's eligibility status or to impose a civil penalty based on a finding of a substantial misrepresentation." *See* Dep't Br. at 34; Pl.'s Br. at 28. The parties disagree, however, about whether the regulatory text impermissibly makes the statutorily required "notice and opportunity for a hearing" optional. *See* 20 U.S.C. § 1094(c)(3)(A), (B)(i).

On that score, the Department's attempt to retreat from the plain text of its own regulation fails. Section 668.71(a) defines the sanctions authorized by the Misrepresentation regulations:

> (a) If the Secretary determines that an eligible institution has engaged in substantial misrepresentation, the Secretary may—
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> (1) Revoke the eligible institution's program participation agreement;
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> (2) Impose limitations on the institution's participation in the title IV, HEA programs;

> (3) Deny participation applications made on behalf of the institution; *or*
> (4) Initiate a proceeding against the eligible institution under subpart G of this part.

75 Fed. Reg. at 66,958 (emphasis added). The subpart G "proceedings" referenced in (a)(4) are how the Department adheres to the statutory requirement that it provide "reasonable notice and opportunity for hearing." 20 U.S.C. § 1094(c)(3)(A), (B)(i). The regulations, however, plainly provide that the Department may "revoke, limit, or deny" a school's Title IV eligibility, "*or*" initiate a proceeding under subpart G. The regulations obviously make the subpart G protections optional—impermissibly so under the statute.

The Department points to 34 C.F.R. § 668.75(c), which states that upon concluding that a substantial misrepresentation has occurred, the Department may either initiate an action to fine the school or to limit, suspend, or terminate the institution's eligibility to participate in Title IV, or take other appropriate action. *See* Dep't Br. at 35. But § 668.75(c)'s "other action" language does not—nor could it—give the Department the authority to punish a school without the statutory protections of notice and opportunity to be heard. That would be both unconstitutional and contrary to the statutory text of the HEA. *Cont'l Training Servs., Inc. v. Cavazos*, 893 F.2d 877, 893 (7th Cir. 1990); 20 U.S.C. § 1094(c)(3)(A); *see* Pl.'s Br. at 28-29. But that is just what the clear text of the Department's regulations purport to allow it to do.[21]

[21] In the DCL, the Department appears to assert that § 668.71(a)(1) is referring to schools that are only "provisionally" certified as eligible institutions. DCL at 14-15. The final regulations contain no such distinction. Indeed, there is no mention of "provisional certification" in the regulations. Thus, the Department's attempt to make the distinction now does nothing to cure the deficiencies in the final regulatory text—but it does operate as an admission that those deficiencies are present.

C. The Misrepresentation Regulations Are Impermissibly Broad.

The Department has failed to rebut APSCU's showing that the Misrepresentation regulations exceed the Department's authority under the HEA in several respects.

First, the Misrepresentation regulations impermissibly broaden the scope of substantial misrepresentations punishable by the Department. *See* 20 U.S.C. § 1094(c)(3)(A). The Misrepresentation regulations extend the scope of punishable misrepresentations to those made "*regarding the eligible institution*, including about the nature of its educational program, its financial charges, or the employability of its graduates." 75 Fed. Reg. at 66,958 (emphasis added). The phrase "regarding the eligible institution" establishes a wide scope of punishable substantial misrepresentations, which the regulations note merely "include" those about the nature of a school's educational program, its financial charges, or the employability of its graduates. But the HEA's prohibition extends *only* to a school's "substantial misrepresentation of the nature of its educational program, its financial charges, or the employability of its graduates." 20 U.S.C. § 1094(c)(3)(A).[22]

The Department concedes in its brief and in the DCL that it may punish only substantial misrepresentations regarding the nature of a school's educational program, its financial charges, or the employability of its graduates. Dep't Br. at 33; DCL at 15. But instead of issuing new regulations that comply with the statute, the Department asks this Court to accept the Department's "limiting interpretation of its own regulation." Dep't Br. at 33.

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[22] The regulations also improperly interpret the limited term "eligible institution" to include (i) the eligible institution, (ii) one of the eligible institution's representatives, and (iii) any organization or entity the eligible institution has an agreement with to provide educational programs, marketing, advertising, recruiting, or admissions services. *See* 75 Fed. Reg. at 66,958; *see also, e.g.*, A.R. 6079 (the American Association of State Colleges and Universities noted that the Misrepresentation regulations "as written could subject an institution to punitive damages due to the actions of a volunteer tour guide").

The Department mistakenly relies on two cases to support its argument: *Weaver v. U.S. Information Agency*, 87 F.3d 1429 (D.C. Cir. 1996), and *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010). But *Weaver* and *Alexander* are inapposite; neither case permitted a limiting construction of a regulation that on its face exceeded statutory constraints, and case law rejects the Department's argument that it is entitled to such broad authority. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1048 (D.C. Cir. 2001) (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)) (courts "should not defer to an agency's interpretation imputing a limiting provision to a rule that is silent on the subject," because doing so would "'permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation'"); *see also Weaver*, 87 F.3d at 1436 (noting that the court should adopt the limiting interpretation only if it is "consistent with the language of" the regulation).

Second, the Department does not deny that its regulations punish statements that are true. It asserts only that true statements can be misleading. Dep't Br. at 36. The HEA, however, only gives the Department the power to punish "misrepresentations," not misleading statements, and misrepresentations must be untrue. *See, e.g.*, *Wieczorek v. Volkswagenwerk, A.G.*, 731 F.2d 309, 312 (6th Cir. 1984) ("The general definition of 'misrepresentation' refers to any 'untrue statement of fact.'" (citation omitted)); *Little v. Keystone Continuum, LLC*, No. 07-0241, 2008 WL 2901854, at *7 (M.D. Tenn. July 22, 2008) ("[A] misrepresentation . . . must be false."). None of the cases the Department cites involve, as here, a statutory restriction limited to "misrepresentations."

Against this, the Department raises several unavailing arguments. For example, it notes that in *Wieczorek*, the court said that the word "misrepresentation" is "subject to several interpretations." 731 F.2d at 311. But the court did not say that one of those interpretations was

that it applied to true statements. The Department also relies on the Federal Trade Commission Act ("FTCA") to support its argument that it has the authority to punish true but misleading statements. Dep't Br. at 36. That is a different statute, however, that punishes "unfair or deceptive acts or practices," 15 U.S.C. § 45(a)(1), which on its face is broader than the HEA's prohibition on "substantial misrepresentations."

Even if the FTCA and case law interpreting that statute, and similar state statutes, were relevant to this case (and they are not), they do not support the interpretation of the HEA embedded in the Misrepresentation regulations. The regulations do not simply punish misleading statements; they punish confusing statements and statements that have a "tendency to . . . confuse." The Department has not identified a single court that has held that a misleading statement is the same thing as a confusing statement or a statement that tends to confuse.[23] Statistics regarding graduation rates, job placement rates, salaries upon graduation, debt at graduation, and other factors that are important to students are complex such that they may arguably "tend[] to . . . confuse" even people who are well versed in such topics; that does not mean that they are misleading.

The Department relies on cases like *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992), which said that "even literally true statements can have misleading implications." But in *Kraft*, the literally true statement was actionable because the speaker made "clear" implied claims that

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[23] That some of the States may punish confusing statements as deceptive trade practices is irrelevant to whether the HEA permits the Department to punish confusing statements as substantial misrepresentations. The Department's invocation of the state laws addressed in *Ambrose v. New England Ass'n of Schs. & Colls., Inc.*, 252 F.3d 488 (1st Cir. 2001), and *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), is a notable concession of the dearth of supporting federal authority. Further, there was no argument in either case that the statements at issue were merely confusing—rather, the plaintiffs argued that the statements were false or misleading. *See Ambrose*, 252 F.3d at 492 & n.1; *Kasky*, 45 P.3d at 946.

were not true and, according to the FTC, had done so intentionally. *See id.* at 316, 320-21. Thus, the Department is simply incorrect that FTCA case law supports its position that it may punish true statements that merely confuse and do not reflect falsity or malicious intent to deceive.[24]

Third, the Department's assertion that its regulations punish only material misrepresentations is incorrect. Dep't Br. at 39. The Department makes three arguments. It first argues that all "[m]isrepresentations about a school's programs, charges, and the employability of its graduates are unquestionably material to enrollment decisions." Dep't Br. at 39. That is not true. In fact, it is presumably to protect schools from being punished for minor misstatements about those topics that the HEA prohibits only those misrepresentations that are "substantial."

Next, the Department insists that, because the regulations punish only misrepresentations "on which the person to whom [they were] made could reasonably be expected to rely, or has reasonably relied, to that person's detriment," they contain a materiality requirement. Dep't Br. at 39. As support, the Department notes that under the FTCA a representation is material "if it is of a kind usually relied upon by a reasonably prudent person." Dep't Br. at 39 (citing *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S.D. Fla. 2007)). That may be so; but the requirement of objectively reasonable reliance—reliance by a reasonably prudent person—is absent from the Misrepresentation regulations, which employ a subjective reliance requirement. Under that different standard, the Department may punish schools if there exists a hypothetical

[24] The Department also cites to the 2009 version of *Black's Law Dictionary* for support. But as noted above, the Department has offered no support for its authority to regulate true statements that have a "tendency . . . to confuse" that lack a clearly implied claim of falsity and that are made without an intent to deceive.

person who could have seen or heard an alleged misstatement if the Department concludes it would have been reasonable *for that person* to rely on the statement. 75 Fed. Reg. at 66,959. Accordingly, the reliance requirement set forth in the Misrepresentation regulations does not prevent the Department from punishing immaterial statements.

The Department also attempts to foreclose review by reiterating its statement that it will not enforce the regulations against immaterial misrepresentations, Dep't Br. at 39-40; that effort should be rejected. Indeed, if the Department does not intend for its regulations to reach immaterial misstatements, it is curious that the Department has repealed regulations that provided for "informal, voluntary correction" for minor misrepresentations. *See* 34 C.F.R. § 668.75(b). Moreover, APSCU's argument that the Misrepresentation regulations are outside the scope of the HEA is based on the plain text of the regulations. That argument therefore applies with equal force regardless of how the Department conveniently represents it will apply the otherwise plain text of its overbroad regulations.[25]

Finally, the Department admits that the Misrepresentation regulations punish innocent, unintentional misstatements, but argues this is a permissible construction of the HEA. Dep't Br. at 36-37. To support its argument, the Department again resorts to analogies from the FTCA context. But again, that is a different statute with a different text and a broader scope. In addition, the Department ignores the HEA's own legislative history, which provides that the HEA's prohibition on substantial misrepresentations is intended "to provide the [Department]

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[25] Nor can the Department claim to have solved the problem that its regulations punish immaterial misrepresentations by adopting a limiting construction. *See* Dep't Br. at 40. As noted above, the Department does not cite a single case applying the doctrine of limiting constructions to save a regulation that exceeds the scope of a statute. And, in any event, the doctrine does not permit the Department to adopt a construction that is inconsistent with the regulatory text. *See Appalachian Power Co.*, 249 F.3d at 1048; *Weaver*, 87 F.3d at 1436.

with the necessary tools to keep *unethical* individuals from engaging in unlawful conduct and *sharp practice* in the name of helping financially disadvantaged students obtain the education necessary to succeed." H.R. Rep. No. 94-1086, at 13 (1976) (emphases added). Accordingly, the Department's unreasonable interpretation of the HEA fails at the first step of *Chevron*, which calls upon courts to engage all the tools of statutory construction, including legislative history, if necessary, to determine if Congress has clearly spoken to the issue. *See Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000) (noting that legislative history may be used to determine *clarity* at *Chevron*'s first step). Here, the legislative materials clearly indicate that the HEA's prohibition on misrepresentations is directed only at *intentionally* untrue statements. That is the end of the matter. *Chevron*, 467 U.S. at 842-43.

D. The Misrepresentation Regulations Violate Schools' First Amendment Right To Free Speech.

1. The Misrepresentation Regulations Unconstitutionally Regulate Noncommercial Speech.

The Misrepresentation regulations are not limited to commercial speech: the text of the regulations applies to "*any statement*" made "*directly or indirectly*" by schools to "any member of the public"—even to people who are not potential students—"*regarding the eligible institution*" and thus even to statements made by schools' representatives during the course of a debate on education policy with a representative of the Department or in some other noncommercial context. *See* 75 Fed. Reg. at 66,958-59 (emphases added). Accordingly, as APSCU explained in its opening brief, on their face the regulations plainly extend beyond speech

that would be captured by *any* of the three tests the Supreme Court has established for identifying commercial speech. *See* Pl.'s Br. at 33.[26]

The Supreme Court has never said, as the Department argues, that "[s]peech is commercial in its content if it is likely to influence consumers in their commercial decisions." Dep't Br. at 41. The Department relies heavily on the California Supreme Court's holding in *Kasky*, but in 2003 the Supreme Court granted a writ of *certiorari* precisely to decide whether the California Supreme Court had gone too far in using this standard to judge the commercial nature of corporate speech. Although the Supreme Court did not resolve the issue, dismissing the writ of *certiorari* as improvidently granted, five justices went on the record to note that the case presented difficult, novel, and important First Amendment questions. *See Nike v. Kasky*, 539 U.S. 654, 663 (2003) (Stevens, J., joined by Ginsburg & Souter, JJ., concurring); *id.* at 683 (Breyer, J., joined by O'Connor, J., dissenting). In fact, several of the Justices expressed serious constitutional concerns about the chilling effect of such a standard on noncommercial corporate speech. *Nike*, 539 U.S. at 664 ("The interest in protecting" participants in a debate regarding important public issues "from the chilling effect of the prospect of expensive litigation is . . . a matter of great importance") (Stevens, J., concurring); *see also id.* at 683 (O'Connor, J., dissenting); *see also First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785 n.21 (1978)

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[26] The Department seems to imply that its motivations for adopting the Misrepresentation regulations can somehow make up for the fact that they extend too broadly and regulate noncommercial speech. *See* Dep't Br. at 43-44. That is, of course, not so, and the Department cites no authority to establish that its motive is in any way relevant to whether the terms of its regulation reach noncommercial speech or only commercial speech. In any event, the accuracy and impartiality of the GAO report that allegedly motivated the Department, and that is cited by the Department, has come under intense criticism. *See, e.g.*, Melissa Korn, *Lawmakers Increase Criticism of Report on For-Profit Colleges*, Wall St. J., Dec. 23, 2010, http://online.wsj.com/article/BT-CO-20101223-703855.html.

(expressing concern about a law's chilling effect on protected corporate political speech); *Kasky*, 45 P.3d at 331 (Brown, J., dissenting).

Kasky's holding is irreconcilable with the commercial speech doctrine as articulated by the Supreme Court because it exposes speech that contributes to public understanding of important public policy issues to potential prohibition and devastating sanctions. The *Kasky* standard advanced by the Department thus chills public discussion of all "matter[s] of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146-47 (1983). The Department's position is also inconsistent with the Supreme Court's recent First Amendment jurisprudence that points towards providing corporations with the same First Amendment protections as individuals when engaged in debate about matters of public concern. *E.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 898-99 (2010).

If the full protections of the First Amendment apply to attacks on schools by plaintiffs' lawyers in press articles, they must also apply when private sector schools respond to those allegations. APSCU does not argue, as the Department contends, that it should be permitted to "immunize false or misleading product information from government regulation simply by including references to public issues," Dep't Br. at 45 (internal quotation omitted). Rather, its argument is founded on the principle, recognized by the Supreme Court, that the State's power to regulate commercial speech cannot negate the fact that speech on matters of public importance (including speech by corporations) loses none of its protection by virtue of the fact that it may alter consumer behavior. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983). Statements about a school's programs may relate to facts that are relevant to a commercial transaction, but that is not sufficient to justify their regulation in all contexts, as the Misrepresentation regulations do. Where a corporation's statements on public issues do not

appear in "commercial speech," they enjoy the most complete protection afforded by the First Amendment.[27]

2. The Misrepresentation Regulations Unconstitutionally Restrict Commercial Speech.

Even if the Misrepresentation regulations only reached commercial speech, they still would not satisfy constitutional scrutiny. First, according to the Department, "Supreme Court precedent . . . just like the challenged regulations, has defined 'inherently misleading' commercial speech as having the likelihood, or tendency, to deceive." Dep't Br. at 48. The Department does not cite any Supreme Court precedent for this proposition, and the Department completely ignores the fact that its regulations, in addition to punishing statements that have a "likelihood or tendency to deceive" also punish statements that have a "tendency to . . . *confuse*," which is obviously not the same thing. As APSCU pointed out in its opening brief, confusing statements need not be deceptive; often they are just complex. Pl.'s Br. at 35.

The Misrepresentation regulations' prohibition on statements that merely have a "tendency . . . to confuse" regulates speech that is not inherently misleading. *See In re RMJ*, 455 U.S. 191, 203 (1982). To regulate statements that are only potentially misleading, the Department must demonstrate, by more than mere "speculation or conjecture," that its regulations "materially advanc[e]" a substantial governmental interest. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (internal quotation and citation

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[27] The Department's reliance on *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), is unpersuasive. Dep't Br. at 36, 44-45. That case predates the Supreme Court's more recent pronouncements on the scope of the commercial speech doctrine, which substantially undermine *Egg*'s rationale. *See* Pl.'s Br. at 33. In addition, the speech prohibition at issue in that case was founded on the FTC's power to enjoin false and misleading commercial speech; here, the Department asserts the broader authority to punish true statements that the Department believes are merely likely to confuse.

omitted); *see also id.* at 183 (citing *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). The Department did not even attempt to carry that burden in the regulations, the DCL, or its brief. Instead, it simply asserts that the Misrepresentation regulations advance its interest in "ensuring the integrity of educational programs receiving federal Title IV aid, preventing students from being misled into attending such programs, and protecting the taxpayers' investment in the Title IV program." Dep't Br. at 46 n.21. That assertion does not qualify as the type of "studies" or evidence from "history," "consensus," or appeal to "simple common sense," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (internal quotation and citation omitted), that the Supreme Court has held may justify regulation of commercial speech that is not inherently misleading. In short, the Department offers no reason to think that prohibiting statements that "tend to confuse" adds any protection to consumers and taxpayers that is not already achieved by prohibiting statements that tend to deceive.[28]

Further, the Department does not acknowledge that it must demonstrate a reasonable "fit"—"narrow tailor[ing]"—between the ends of its Misrepresentation regulations and the means chosen to achieve those ends. *Lorillard Tobacco*, 533 U.S. at 556. The fact that a regulation of commercial speech is overbroad "suffices to invalidate [it]." *Id.* at 571 (Kennedy, J., concurring in part). The Department does not advance any argument that reserving the power to severely punish schools for making statements that have a tendency to confuse is narrowly

[28] In fact, given the Department's conclusion that the regulations will not have any impact on the federal budget, even the Department cannot seriously contend that its new Misrepresentation regulations will have any effect on students' hypothetical decisions to enroll in postsecondary educational programs for which they are not qualified. 75 Fed. Reg. at 66,972.

tailored to the Department's need to protect students from being lied to and to protect taxpayers' investment in Title IV program funds. It therefore has conceded the narrow tailoring point.

3. The Misrepresentation Regulations Are Unconstitutionally Vague.

The Department claims that the Misrepresentation regulations are less vague than the now-repealed regulations. Dep't Br. at 48-49. But the repealed regulations covered only false, erroneous, and misleading statements. 34 C.F.R. § 668.71(b). The Misrepresentation regulations also cover statements that have a mere "tendency . . . to confuse." 75 Fed. Reg. at 66,959. Adding more words does not always resolve vagueness: a command not to lie is easier to follow than a command not to lie or confuse.

In the *Kasky* case on which the Department relies, then-Justice Janice Rogers Brown persuasively explained—in an analogous setting—why the Misrepresentation regulations should be deemed constitutionally infirm on vagueness grounds: prohibiting "advertising which, although true, is either actually misleading *or which has a capacity, likelihood or tendency to deceive or confuse the public* . . . puts a corporation at the mercy of the varied understanding of [its] hearers and consequently of whatever inference may be drawn as to [its] intent and meaning"; as a result, corporations will be forever unsure about "whether [their] truthful statements may deceive or confuse the public," corporations will "likely incur significant burden and expense in litigating the issue," and "much valuable information which a corporation might be able to provide would remain unpublished." *Kasky*, 45 P.3d at 331 (Brown, J., dissenting) (emphasis in original) (citations, alterations, and internal quotation omitted) (citing *Bellotti*, 435 U.S. at 785 n.21).

Then-Justice Brown's warning is even more forceful here. The phrase "tendency to . . . confuse" is so devoid of content that it leaves the Department with nearly unfettered discretion to silence disfavored speakers. *Cf. Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988)

(invalidating as a prior restraint a licensing statute that placed "unbridled discretion in the hands of a government official").[29]

IV. THE STATE AUTHORIZATION REGULATIONS VIOLATE THE HIGHER EDUCATION ACT AND THE ADMINISTRATIVE PROCEDURE ACT.

Contrary to the Department's assertions, APSCU has standing to challenge the State Authorization regulations, its challenges are ripe for review, and the regulations are contrary to the HEA, procedurally flawed, and arbitrary and capricious.

A. APSCU Has Standing And Its Claims Are Ripe.

The Department first contends that APSCU does not have standing to challenge the *constitutionality* of the State Authorization regulations. Dep't Br. at 50-51. But that is irrelevant because APSCU does not assert any constitutional claims with respect to these regulations. Rather, APSCU contends that the State Authorization regulations exceed the Department's statutory authority under the HEA in violation of 5 U.S.C. § 706(2)(C), *see* Pl.'s Br. at 39-42, and that the Department promulgated the regulations without reasoned decisionmaking in violation of § 706(2)(A), *see* Pl.'s Br. at 42-45. *See also* Compl. ¶ 16.

One of the arguments APSCU raised in support of its statutory challenge is that the Department's interpretation of the HEA contravenes the rule that a federal statute may not be construed to alter the balance of responsibility between the Federal Government and the States in a core area (such as education) unless the statutory text makes "absolutely certain that Congress intended such an exercise." *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). Although the

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[29] APSCU demonstrates in its opening brief that the Misrepresentation regulations are arbitrary and capricious because the Department failed to respond adequately to public comments. Pl.'s Br. at 38-39. The Department's attempt to rebut these arguments in a brief footnote, Dep't Br. at 49 n.24, is unpersuasive. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) ("[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.").

Department contends that APSCU's statutory claim is "essentially" a constitutional claim, Dept. Br. at 50, the Supreme Court has confirmed that the clear-statement canon of *Gregory* is "a rule of statutory construction," "rather than . . . a rule of constitutional law." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991).

There is no basis to preclude APSCU from asserting the clear-statement argument in support of its members' own *statutory* rights under the HEA. The Supreme Court has noted that "it is not at all unusual" for a litigant to invoke a canon of interpretation, such as constitutional avoidance, in defense of statutory rights notwithstanding that, as applied to the particular litigant, the statute raises no constitutional implications. *See Clark v. Martinez*, 543 U.S. 371, 380 (2005). Indeed, where a litigant invokes a canon of construction such as the clear-statement rule, "he is not attempting to vindicate the constitutional rights of others . . . ; he seeks to vindicate his own *statutory* rights." *Id.* at 382 (emphasis added). Accordingly, the third-party standing cases cited by the Department, such as *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975), "are not on point" because they concern "plaintiffs who seek to assert not their own legal rights, but the legal rights of others." *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 290 (2008).

The Department also contends that APSCU lacks standing—and that its claims are not ripe—under Article III because any injuries to APSCU's members due to lost Title IV funding are merely conjectural and hypothetical. Dep't Br. at 51-54. This contention, however, overlooks the obvious, actual, immediate, and certain injury from increased compliance and regulatory costs that the State Authorization regulations inflict upon APSCU's members.

Where a party is "an object of the action" at issue—as is the case here—there is "little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561-62. In such circumstances, "standing to seek review of

administrative action is self-evident." *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002). In any event, APSCU's complaint, the declarations it submitted with its opening brief, the supplemental declaration accompanying this opposition, and the administrative record readily establish APSCU's standing.[30] The complaint alleges that the distance-learning provisions of the State Authorization regulations will "impose significant and unnecessary burdens" on institutions because they will have to obtain approvals "from every State in which their students live, which will prove to be costly and difficult." Compl. ¶ 80; *see id.* ¶ 82 (regulations "create significant obstacles"); *id.* ¶ 84 (regulations "impose a significant burden" on online and distance-learning programs). Indeed, schools "will incur significant costs and regulatory burdens . . . even in those States that follow the new regulations, because the regulations force schools to change their current methods of obtaining State authorizations." Pl.'s Br. Ex. 2 ¶ 8; *see* Compl. ¶ 86 (schools will have to spend "time, money, and resources" to comply with the State Authorization regulations); A.R. 3110 (regulations "could cause tremendous increases in expenses"); *id.* at 4667 (regulations would pose "a tremendous hardship for schools"). For just one example, an APSCU member "has incurred—and will continue to incur—significant expenses" in researching state authorization regimes, working with state regulators, submitting new applications for authorizations, determining the residency of each of its students, submitting new applications to satisfy those provisions, and documenting its compliance with state

[30] APSCU's standing is apparent on the face of its complaint, which is sufficient to reject the Department's motion to dismiss, *see Lujan*, 504 U.S. at 561, and, as already noted above, the declarations accompanying APSCU's opening brief and this brief, as well as the administrative record, establish standing for the purposes of the Department's alternative motion for summary judgment, *see id.* (court may consider "affidavit[s] or other evidence"); *Sierra Club*, 292 F.3d at 900 (court may consider declarations and administrative record materials).

authorization requirements. Supplemental Declaration of Clark D. Elwood ¶ 6 (Executed on Mar. 30, 2011) (attached hereto as Exhibit 2).

There is no question that schools' costs and burdens in complying with the State Authorization regulations are sufficient to establish Article III injury. *See Lujan*, 504 U.S. at 561-62; *Sierra Club*, 292 F.3d at 899-900. Moreover, these injuries follow directly and immediately from the Department's promulgation of the State Authorization regulations. *See* Pl.'s Opp'n Br. Ex. 2 ¶ 8. Thus, APSCU's members' injuries are indisputably traceable to the State Authorization regulations. And there can be no doubt that those compliance-related injuries would be remedied by a judgment vacating and setting aside those regulations.

The cases cited by the Department regarding the absence of Article III standing for alleged injuries that depend upon the "*unfettered* choices made by *independent* actors not before the court[]," *Lujan*, 504 U.S. at 562 (internal quotation and citation omitted) (emphases added), are not on point here because APSCU's members will be injured no matter what States elect to do. Dep't Br. at 50, 52-53. States that do not currently satisfy the Department's new regulatory criteria—and there are many such States, *see* A.R. 4111 (30-40 States); *id.* at 4757 (37 States); *id.* at 6152, 6363 (same)—will either conform to the Department's criteria or they will not. If the States bend to the Department's will, then APSCU's members will be harmed because they will face even greater compliance costs to satisfy those new regimes. *See* Compl. ¶ 86; Pl.'s Br. Ex. 2 ¶¶ 6-10; Pl.'s Br. Ex. 4 ¶¶ 23-24; A.R. 4887. If the States do not, then APSCU members will lose their Title IV funding for their operations in those nonconforming States. *See* Compl.

¶¶ 81, 86; Pl.'s Br. Ex. 2 ¶ 6; A.R. 3682, 4788. Either way, APSCU's members will inevitably suffer cognizable injury.[31]

Finally, there is no merit to the Department's argument that APSCU's claims are unripe under Article III because the State Authorization regulations will not *really* take effect until 2013 and, therefore, do not impose any "imminent" injury. Dep't Br. at 53-54. The compliance costs that the State Authorization regulations inflict upon APSCU's members are certain and immediate. *See* Pl.'s Opp'n Br. Ex. 2 ¶ 7. That the Department *might* grant States extensions until 2013 to change their authorization regimes does not change the fact that APSCU's members must begin *their* efforts to comply with new state authorization regimes (and to document their compliance efforts) *immediately*, because there is no guarantee that the Department will grant any such extensions. *See id.*

Even if APSCU's members' other injuries from lost Title IV funding or from complying with new state authorization regimes are years away, they are sufficiently concrete and certain to establish jurisdiction. As already noted, either state compliance or noncompliance with the Department's new criteria will inflict injury upon APSCU's members. Accordingly, their injuries are "certainly impending," *Lujan*, 504 U.S. at 565 n.2 (internal quotation and citation omitted), by mere adoption of the State Authorization regulations and are not "conjectural or hypothetical," *id.* at 560 (internal quotation and citation omitted). That the injuries might not occur for two years does not make them uncertain. "The impending threat of injury . . . is

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[31] *See Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 45-46 (1st Cir. 2005) (liquor franchisor has Article III standing to sue State where statute has "coercive effect" on franchisees, which either "must desist" from doing business with plaintiff or must "forfeit their" liquor licenses; "[e]ither way, [plaintiff's] business relationship . . . is damaged," which injury "is fairly traceable to the statute (and thus, to the State)").

sufficiently real to constitute injury-in-fact and afford constitutional standing." *Village of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (Article III standing to challenge regulation imposing fees that *will take effect in 2017*) (internal quotation and citation omitted).

B. The State Authorization Regulations Exceed The Department's Authority Under The Higher Education Act.

The Department has no persuasive response to APSCU's demonstration, Pl.'s Br. at 39-42, that the State Authorization regulations exceed the Department's authority under 20 U.S.C. § 1001(a)(2). Congress did not empower the Department to dictate to the States how they "authorize" institutions within their borders. Although the Department invokes *Chevron*, Dep't Br. at 54, it does not dispute that the regulations alter the state-federal balance and thus implicate the clear-statement rule of *Gregory*. And because the Department must show a "clear" statement of congressional intent, *Chevron* deference is inapplicable. *See Gregory*, 501 U.S. at 464 ("mere congressional ambiguity" not sufficient (internal quotation and citation omitted)); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (*Chevron* inapplicable where "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power").

The Department also argues that Congress did in fact make its intent plain, Dep't Br. at 51 n.25, but the Department is unable to point to clear authorization for either of its proposed state mandates:

First, the Department identifies no authority—clear or otherwise—permitting it to compel States to adopt certain complaint processes, *see* 75 Fed. Reg. at 66,946. Section 1001's requirement that a school be "legally authorized" by the State in which it is located, 20 U.S.C. § 1001(a)(2), obviously does not say anything about whether the State must have in place a particular complaint process. The Department relies instead on 20 U.S.C. § 1099a(a)(3)(A),

Dep't Br. at 57, but as APSCU has already explained, Pl.'s Br. at 40, § 1099a supports *its* position, not the Department's. The section defines "State responsibilities" but does not require States to adopt the complaint process the Department now seeks to mandate by regulation. The Department also cites legislative history. Dep't Br. at 57 (citing H.R. Rep. No. 105-481 and S. Rep. No. 105-181). But even assuming for the sake of argument that legislative history can be used to meet a "clear-statement" requirement, those two committee reports have nothing to do with requiring States to adopt certain complaint processes. The reports discuss a provision of the Higher Education Amendments of 1998 that eliminated "State Postsecondary Review Entities (SPREs)." *See* H.R. Rep. No. 105-481, at 148 (1998); S. Rep. No. 105-181, at 70 (1998). Rather than make plain that States are *compelled* to adopt certain complaint processes, the reports indicate that "[t]he scaling-back of [f]ederal statutory language with respect to the State role [wa]s not intended *to preclude* States from taking the steps they deem necessary to assure consumer protection." S. Rep. No. 105-181, at 70 (emphasis added).

Second, the Department cannot point to clear evidence that Congress meant to allow it to prescribe the precise manner in which state authorization is provided, *see* 75 Fed. Reg. at 66,946-47 (mandating specific authorization "by name"). The Department contends that a State cannot "meaningfully authorize an institution without employing that institution's name." Dep't Br. at 57. But as the Department itself appears to recognize, *see* 75 Fed. Reg. at 66,861-62, certain States currently permit at least some schools to operate if they are accredited and meet specified criteria, *see, e.g.*, Ga. Code Ann., § 20-3-250.3(a)(10)-(15); Hawaii R.S. § 446E-1.6(11); Miss. Code Ann. § 37-101-241(6); N.M. Stat. Ann. § 21-23-4(6); S.C. Code Ann. § 59-58-30(2). Under *Gregory*'s clear-statement rule, the Department can prevail only if the requirement that schools be "authorized" clearly and manifestly excludes situations in which state law *permits* a

school to operate without affirmatively giving it authorization by name. The Department, however, points to no support for its reading.

The Department has also failed to support its definition of what it means for a school to be "in" a State. Section 1001 defines the term "institution of higher education" to mean "an educational institution *in* any State that . . . is legally authorized within such State to provide a program of education beyond secondary education." 20 U.S.C. § 1001(a)(2) (emphasis added). Prior to its promulgation of the State Authorization regulations, the Department gave the word "in" its natural reading in this context, which is that "an institution of higher education" is "in" a "State" if it is physically located in a State and is legally authorized *within that State* to provide postsecondary education. *See* 34 C.F.R. § 600.4(a)(3), (b); *id.* § 600.5(a)(4), (c). It defined "[l]egally authorized" to mean the "legal status granted to an institution through a charter, license, or other written document issued by the appropriate agency or official *of the State in which the institution is physically located*." 34 C.F.R. § 600.2 (emphasis added). Based on this natural reading of the statute, the Department did not require an online provider located in State X with students in State Y to be authorized by State Y.

The State Authorization regulations, however, adopt a fundamentally new and convoluted interpretation of the statute: "If an institution is offering postsecondary education through distance or correspondence education to students in a State in which it is not physically located . . . the institution must meet any State requirements for it to be legally offering postsecondary distance or correspondence education in that State." 75 Fed. Reg. at 66,947. The Department thus argues in its brief that under its regulations, "[a] state is not required to have a process to approve institutions offering distance education within that state, but if a state requires such

approval, it becomes a component of the state authorization the institution must meet for compliance with the HEA." Dep't Br. at 55.

The word "in" cannot possibly bear the Department's contorted interpretation. An institution "in" a State must be "authorized" by that State. 20 U.S.C. § 1001(a)(2). And, as described above, the Department takes the position that "authorized" under § 1001(a)(2) means affirmatively authorized *by name*. *See* 75 Fed. Reg. at 66,946-47. So if the Department believed that schools were "in" every State in which their students reside, then it would have to mandate that schools obtain affirmative authorization "by name" in every such State—which the Department has not done. Thus, the Department necessarily must be contending that a school is "in" a State where its online students reside if that State requires it to obtain approval, but that the school is not "in" the State if the State does not require approval. No amount of deference could sustain this distortion of the word "in."

The Department also contends that "in" means "operating within" and that an "institution providing distance education is . . . operating in any state . . . where its students are located." Dep't Br. at 55-56. As explained above, it is clear that this is not, in fact, the definition of "in" that the Department has adopted. But in any event, the Department provides no valid support for this interpretation. In crafting the HEA, Congress specifically recognized that some institutions provide instruction via "the Internet" to "students who are separated from the instructor." 20 U.S.C. § 1003(7) (defining "[d]istance education"). Numerous other provisions of the HEA address distance learning.[32] Yet, in § 1001, Congress required authorization only by the State an institution is "in." The word "in" means "[w]ithin the limits, bounds, or area of." *American*

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32 *See also, e.g.*, 20 U.S.C. § 1088(b)(3); *id.* § 1091(l) ("Courses offered through distance education"); *id.* § 1093 ("Distance education demonstration programs"); *id.* § 1099b(a)(4).

Heritage Dictionary 910 (3d ed. 1996); *see also Webster's New College Dictionary* 719 (2004) ("contained or enclosed by"); *Merriam-Webster's Collegiate Dictionary* 627 (11th ed. 2007) ("word to indicate inclusion, location, or position within limits"). Had Congress meant to require authorization by all States in which an online school's *students* reside, it would have—and could have—just said so. For example, in one provision, the HEA references entities that are "located in, *or that do business in*, [a] State." 20 U.S.C. § 1070c-3a(b)(2)(B)(i)(II) (emphasis added).

Furthermore, § 1002(a)(2) does not even include the Department's new word—"operating." It declares that the *institution* is the thing that must be "in" the State, not the institution's "operations." Setting aside that the Department must rewrite the statute to square its regulation with the law, it fails to support its interpretation of "in" as "operating within." The Department points to provisions *other* than § 1001 that reference schools "operating" in a State. Dep't Br. at 55. But other provisions of the HEA refer to institutions "located" in a State. *See, e.g.*, 20 U.S.C. §§ 1002(b)(2)(A), 1094(a)(8), 1099c(c)(6)(B)(i), 1099c(j)(2)(A). None of these provisions is controlling here. The Department again relies on committee reports for the Higher Education Amendments Act of 1998, Dep't Br. at 55-56, but they are the same provisions referenced above addressing elimination of "SPREs," not distance education. Moreover, in the sentence before the one relied upon by the Department, the House Report notes that "States have a number of options in overseeing institutions *within their boundaries*"—not "*operating* within." H.R. Rep. No. 105-481, at 148 (emphases added).

Even if "in" could be read to mean "operating in" (and it cannot in this context), the Department provides no reason to interpret the word to include schools with no physical

presence in a State. *See* Dep't Br. at 56 (citing only unrelated cases).[33] Indeed, the Department's interpretation is unreasonable as a matter of common usage. If you ask a lawyer, "In which States does your law firm operate?" the lawyer would naturally respond by listing the States in which the firm has its physical offices—Massachusetts, New York, California, and so forth. The lawyers of that firm may call or email their clients in Arizona, conduct telephone or video conferences with a judge in Minnesota, or even teach an *online* CLE course for lawyers in Missouri. But no one would say that the *firm*—the institution—*operates within* Arizona, Minnesota, and Missouri by reason of those activities. Moreover, the Department's interpretation would mean that every school with an online or distance learning program will have to ensure that it is authorized in each of the fifty States (and the District of Columbia and the territories) because a school *could* have a student residing in *any* of those jurisdictions at the beginning of each school year.[34] In requiring authorization for the State in which it is located, Congress could not have intended to impose a cumbersome burden of *nationwide* authorization. Simply put, the Department's interpretation of § 1001(a)(2) is unreasonable.

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[33] The Department claims that APSCU "admit[ted] that the Department's definition is correct." Dep't Br. at 56 (citing Compl. ¶ 105). But APSCU did no such thing. The cited complaint paragraph also refers to States authorizing schools "within their borders" and, in any event, is not referring to online education when it references schools "operat[ing]" in States.

[34] This would deter schools from offering beneficial online and distance-learning opportunities. A report that the Department *itself* recently commissioned, reviewing existing literature and empirical analysis concerning the efficacy of online education programs, found that "online learning appears to be as effective as conventional classroom instruction," and that a blended approach incorporating both "has been [even] more effective." Barbara Means et al., *U.S. Dep't of Education, Evaluation of Evidence-Based Practices in Online Learning: A Meta-Analysis and Review of Online Learning Studies* (2010), *available at* http://www2.ed.gov/rschstat/eval/tech/evidence-based-practices/finalreport.pdf (published originally in 2009 but reissued in revised form in 2010 to correct "several transcription errors").

C. The State Authorization Regulations Violate The Administrative Procedure Act.

The Department is also unable to refute APSCU's showing that the State Authorization regulations violate the APA in several respects.[35]

1. The Department asserts in its brief that a primary basis for its novel regulation of online and distance-learning programs was a concern that institutions offering such services "might seek authorization only in a state with the most lenient authorization review and consumer protection enforcement to the detriment of students obtaining services outside that state." Dep't Br. at 61. But the NPRM did not so much as mention the authorization requirements for distance education providers. The Department's proposal for the State Authorization regulations in 34 C.F.R. § 600.9 did not contain the terms of what would become subsection (c); the NPRM proposal stopped at subsection (b). The Department's failure to propose and seek comments on § 600.9(c) is yet another reason why the Department is not entitled to summary judgment and, instead, the distance-learning provisions of its State Authorization regulations should be vacated and set aside.

To comply with the notice-and-comment requirements of 5 U.S.C. § 553, the Department's final rule must be a "logical outgrowth" of its initial proposal, *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005), which requires that interested "part[ies], *ex ante*, should have anticipated" the final rule in light of the agency's initial notice of proposed rulemaking, *Ariz. Pub. Serv. Co.*, 211 F.3d at 1299 (internal quotation and citation omitted). "The 'logical outgrowth' doctrine does not extend to a final rule that is a brand new rule," such as § 600.9(c), because "[s]omething is not a logical outgrowth of nothing." *Int'l Union, United*

[35] Many elements of the higher education community have expressed their fundamental concerns with the final State Authorization regulations. *See supra* note 4.

Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005) (internal quotation and citation omitted). Indeed, the Department neither "expressly asked for comments" on the issue of state authorization for distance-learning programs nor "made clear that the agency was contemplating" imposing state authorization requirements on those programs. *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009). Accordingly, a reasonable commenter could not have anticipated that the Department would adopt § 600.9(c) and was under no obligation to "divine the [agency]'s unspoken" intention to do so. *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) (per curiam).[36]

APSCU and its members were undeniably prejudiced by the lack of an opportunity "to persuade the [Department] not to adopt the" state authorization requirements for distance-learning programs. *CSX Transp.*, 584 F.3d at 1083. There is a presumption of prejudice where, as here, an agency "has entirely failed to comply" with its notice-and-comment obligations and "has offered no persuasive evidence" that objections to its final regulations were "given sufficient consideration." *Shell Oil*, 950 F.2d at 752. Even without that presumption, there was plainly harm to the interests of APSCU's members, as evident by the many deficiencies with the Department's regulatory approach described above. In fact, the Department's many clarifications to the online and distance-learning provisions of § 600.9(c) in the DCL made in

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[36] In addition, if any comments were submitted to the record supporting the approach subsequently taken under § 600.9(c), that would be "of little significance" and would not absolve the Department of its obligation to provide a meaningful opportunity for notice and comment. *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (commenters are not expected "to monitor all other comments submitted"). Indeed, although a handful of schools urged the Department to rule that state authorization requirements do not compel out-of-state institutions to obtain authorization for their distance-learning programs, *see* A.R. 2998-2999, 5664, that does not mean that parties had an opportunity to comment on the legal basis and policy merits of the Department's surprising decision to do the *exact opposite* in its final rule.

reaction to the comments of APSCU's members and others following promulgation of the final rule, DCL at 5-7, are definitive proof that both APSCU and the Department would have benefited from an opportunity to comment *before* these provisions became law.

2. Next, the Department concedes, Dep't Br. at 58-59, that it erred in declaring that the State Authorization regulations "require the creation of a State licensing agency." 75 Fed. Reg. at 66,858. Although the Department tries to characterize this as an isolated error of no consequence, its inability to describe *the legal effect of its own regulation* is far more consequential given the thousands of institutions and dozens of States that have to divine the "true" meaning of the regulations.[37] Even if the Department made only one misrepresentation about what the State Authorization regulations actually require, that does not save the rule from invalidation. *See AT&T v. FCC*, 836 F.2d 1391 (D.C. Cir. 1988) (vacating and remanding where agency's "own understanding of its" rule "constitutes a self-contradiction," even though it made only a single contradictory statement).

3. The regulations are also arbitrary and capricious because the Department failed to respond to the objection that they penalize *schools* and their students for the failure of *States* to adopt compliant authorization regimes even though the schools and their students cannot control States' compliance. *See* A.R. 4667, 4788, 5731, 5841. In its brief, the Department points to the

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[37] The Department did not just use shorthand as the agency did in *North Broward Hospital District v. Shalala*, 172 F.3d 90 (D.C. Cir. 1999), in describing a statute as using the phrase "such revenues" twice, when the statute used the phrase "such revenues" once and "such net inpatient care revenues" once. *Id.* at 95. That error was, at most, a "hypertechnical" error on which absolutely nothing turned. *Id.* By contrast, the "mistake" made by the Department here illustrates a deeper flaw with the regulations: as a practical matter, States likely will not be able to comply with the State Authorization regulations unless they have an agency overseeing schools. It is implausible that many States will be able to authorize all schools within their jurisdiction using the alternative means identified by the Department. *See supra* p. 7.

statutory authorization requirements, 20 U.S.C. §§ 1001(a)(2), 1091(a)(1), as support for its position. Dep't Br. at 58-59. Those legislative requirements, however, punish a *school* for the failure of the *school* to obtain state authorization. In any event, the Department did not make this argument in its final rule and thus, even if it had any merit, it could not validate the Department's otherwise flawed rulemaking. *See State Farm*, 463 U.S. at 50; *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Further, Congress is not subject to the APA, and therefore its legislative requirements of institutions of higher education need not satisfy the requirements of 5 U.S.C. § 706(2)(A). The Department, however, is an agency that must provide reasoned explanation for its actions, and its failure to do so here is reason to vacate the State Authorization regulations.[38]

4. The Department's citation to 20 U.S.C. § 1094(a)(21) to brush off APSCU's argument that the Department failed to consider impediments to an institution's ability to document state approval for its distance-learning programs is unpersuasive. Dep't Br. at 60. Certainly, an institution must "provide evidence to the Secretary that the institution has the authority to operate within a State." 20 U.S.C. § 1094(a)(21). But APSCU's argument is not that its members can never be required to provide documentation of their authorization; it is that in the Department's rush to implement a new *method* to implement that statutory command, it failed to account for obvious implementation problems—such as the absence or inability of any state official to provide the necessary documentation to institutions—that were noted in the

[38] The Department's argument that it is not arbitrary and capricious for it "to *require that a State* be equipped to respond" to complaints again misses the mark. Dep't Br. at 59-60 (emphasis added). Even assuming that is correct, the Department still has offered no reason to penalize schools for a State's failure to adopt a complaint-response process. Indeed, the reasons offered by the Department to support its argument—that States play a role in combating fraud in higher education and that a committee report suggests that States "would take the lead in consumer protection in higher education"—only show that schools should not bear the costs of States failing to live up to the expectations of federal officials.

comments on the Department's proposal. Again, the Department failed to consider and explain the core issues raised by its proposals, a classic example of arbitrary and capricious decisionmaking.

5. The Department also cannot rebut APSCU's showing that the Department failed to justify its decision to promulgate the State Authorization regulations. The Department attempts to respond to APSCU's arguments by citing and quoting administrative record material that it claims provides the reasons behind adoption of the regulations. Dep't Br. at 60-62. The APA, however, requires the Department to provide and explain the reasons for its regulations in the rulemaking itself. *See Fox Television Stations*, 129 S. Ct. at 1811. And notably missing from the Department's brief is *any citation or quotation* from the final regulations stating a justification for adopting the regulations or explaining how they would address the targeted problem (whatever that is). The *post hoc* rationales offered in the Department's brief cannot save its regulations. *See S. Cal. Edison Co.*, 603 F.3d at 1001; *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 312 (D.C. Cir. 2006). If anything, that the Department had to resort to mining the 8,000-page record to find the justifications for the regulations that it should have offered in the final rule bolsters APSCU's point that the State Authorization regulations should be vacated and remanded so that the Department can conduct the reasoned decisionmaking process that the APA requires.

The Department's post hoc justifications also fail on their own merits. The sole example cited by proponents of the regulations was the brief lapse of a California agency's oversight authority. But the Department has provided no evidence there was any harm to students or consumers during the period of time during which the agency's authority had lapsed, *see* A.R. 3197, 4365, 5731, 5840, 6185-86, and the data before the Department showed that voluntary

compliance and the redundant "triad" system of oversight (including other state agencies and actors that continued to provide protection to students and consumers) provided a safety net, *see id.* at 281, 4365, 5731, 5840, 6185. More importantly, the Department did not respond to the argument in the comments, *see, e.g.*, *id.* at 4365, 5663, 5731, 5840-41, 6355, that the isolated California anecdote was a poor basis for such a major policy revision and, indeed, demonstrated that the current overlapping regulatory structure was robust and effective. *See State Farm*, 463 U.S. at 50.

CONCLUSION

For the foregoing reasons, the Court should deny the Department's motion to dismiss and motion for summary judgment, and grant summary judgment in APSCU's favor, declaring the Compensation, Misrepresentation, and State Authorization regulations to be unlawful, vacating them, and enjoining their enforcement.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2011 true and correct copies of the attached **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**, **OR IN THE ALTERNATIVE**, **FOR SUMMARY JUDGMENT**, **AND REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**, attached **DECLARATIONS AND EXHIBITS**, and **PROPOSED ORDER** were filed and served pursuant to the Court's electronic filing procedures using the Court's CM/ECF System.

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