IN THE SUPREME COURT OF THE UNITED STATES

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No. 24A_____

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.
APPLICANTS

v.

CAREER COLLEGES AND SCHOOLS OF TEXAS

_____

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully requests a 30-day extension of time, to and including October 10, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The court of appeals entered its judgment on April 4, 2024, and denied rehearing en banc on June 12, 2024. Unless extended, the time within which to file a petition for a writ of certiorari will expire on September 10, 2024. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). The opinion of the court of appeals (App., infra, 1a-37a)

is reported at 98 F.4th 220. The court's order denying rehearing (App., infra, 38a) is unreported.

1. a. Title IV of the Higher Education Act of 1965 (HEA), 20 U.S.C. 1070 et seq., charges the Secretary of Education with administering the Federal Direct Loan Program, 20 U.S.C. 1087a-1087j, through which the federal government lends money directly to students. As relevant here, the HEA contemplates that borrowers may assert a defense to repayment of a federal student loan based on a school's misconduct. It directs the Secretary of Education to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan." 20 U.S.C. 1087e(h). The HEA also requires the Department of Education (Department) to "discharge [a] borrower's liability on [a] loan" when that borrower "is unable to complete the program in which such student is enrolled due to the closure of the institution." 20 U.S.C. 1087(c)(1).

In addition to providing for borrower defenses and school-closure discharges, the HEA includes provisions related to actions the Department may take against a school. The Department may "suspend or terminate" a school's eligibility to participate in the federal student financial aid programs authorized by Title IV of the HEA if, after "notice and opportunity for a hearing," the Department determines that the school has "engaged in 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). A school participating in the Title IV programs must "accept[] responsibility and financial liability stemming from its failure to perform its functions" set forth in its participation agreement, 20 U.S.C. 1087d(a)(3), and the Department may administratively assess an institution's liability, 20 U.S.C. 1094(b) and (c), 1099c-1(a)(1). In the event that a school's former student receives a loan discharge due to the school's closure, the HEA requires the Department to "subsequently pursue any claim available to such borrower against the institution * * * or settle the loan obligation pursuant to the financial responsibility authority" just mentioned. 20 U.S.C. 1087(c)(1).

The Secretary first promulgated borrower-defense regulations in 1994. See 59 Fed. Reg. 61,664 (Dec. 1, 1994). Since that time, the regulations have retained a common framework. See ibid.; 81 Fed. Reg. 75,926 (Nov. 1, 2016); 84 Fed. Reg. 49,788 (Sept. 23, 2019). First, the regulations set forth the specific grounds that borrowers may assert as a defense to repayment obligations (for example, that the borrower's school made material misrepresentations related to the borrower's loan or the provision of educational services). 34 C.F.R. 685.206(c)(1) and (e)(2), 685.222(d). Second, the regulations permit borrowers to assert those defenses directly to the Department -- the lender to whom the borrower owes money -- and request relief from their repayment obligations. See

84 Fed. Reg. at 49,796 (noting that "throughout the history of the [original] borrower defense repayment regulation," the Department evaluated and approved "affirmative borrower defense to repayment requests"). Third, the regulations provide that the Department may seek to recoup the discharged loan amounts from a school whose conduct necessitated the discharge, and that the school may dispute its liability through a formal hearing, subject to administrative appeals and judicial review. See id. at 49,790.

b. In 2015, after revelations of widespread fraud by a large now-defunct chain of for-profit colleges, an unprecedented number of borrowers began to assert defenses to repayment. See 81 Fed. Reg. at 75,926. Although the Department made several regulatory changes in the years that followed, those changes proved inadequate to address the sustained influx of claims. By June 2019, the backlog of claims had grown to more than 210,000 pending discharge claims, giving rise to a suit by a class of borrowers alleging that the Department had unlawfully withheld or unreasonably delayed adjudication of the pending claims. See Sweet v. Cardona, No. 19-cv-3674 (N.D. Cal.) (filed June 25, 2019). The Department agreed to settle the class action in Sweet in an agreement that provides relief to class members who received federal loans to attend certain specified schools and that allows for remaining class members to receive individualized adjudications using streamlined procedures to be completed on a specified timetable.

The settlement does not govern consideration of any application for relief filed after the settlement's final approval date. See generally 19-cv-3674 D. Ct. Doc. 246-1 (N. D. Cal. June 22, 2022).

c. To address the increased number of claims outside of the Sweet settlement and to avoid the circumstances that led to that case, the Department promulgated revised regulations in 2022 to establish more efficient processes for reviewing borrower-defense applications. See 87 Fed. Reg. 65,904 (Nov. 1, 2022). The Department explained that its prior regulations resulted in a patchwork of regulatory standards that "requir[ed] a multitude of additional findings and procedural steps that would require considerably more time and resources from the borrowers, institutions, and the Department." Id. at 65,912. The revised rule replaces that patchwork, creating a uniform standard for defining the acts and omissions a borrower can assert as a defense to repayment. Id. at 65,992-65,993. With respect to recoupment proceedings, however, the educational institution "will not be liable for the amount of the [borrower defense] claim paid by the Department unless the claim would have been approved under the standards in the regulations in place at the time the claim arose." Id. at 65,915.

The rule eliminates procedural steps that proved impracticable to implement, see 87 Fed. Reg. at 65,912, and provides critical efficiency by creating a process to screen facially deficient ap-

plications, id. at 65,943, and by reinstating a process for the Department to consider together claims of similarly situated borrowers who attended a common institution and who have defenses to repayment based on related acts or omissions of that institution, id. at 65,937. In addition, the rule expands the eligibility period applicable to discharges that are based on a school's closure. Like under previous regulations, a school ultimately must cease all educational instruction to be considered closed, but once a school has crossed that threshold, the rule provides that the borrower may be eligible for discharge as of an earlier date, if she withdraws shortly before the school "ceased to provide educational instruction in programs in which most students at the school were enrolled." 34 C.F.R. 685.214(a)(2)(i).

2. Respondent is a trade association of Texas-based, for-profit, higher education institutions. Before the 2022 rule went into effect, respondent brought suit challenging various provisions of the rule under the Administrative Procedure Act and seeking a preliminary injunction. After holding an evidentiary hearing, the district court denied the motion, concluding that respondent had failed to establish irreparable harm. The court declined to address the merits of respondents' claim. 681 F. Supp. 3d 647, 650. The district court explained that respondent would not be harmed unless the Department sought recoupment from one of its members for discharged loans that would not have been dis-

charged under prior regulations. Id. at 656-657. The court found that harm "too conjectural to support preliminary injunctive relief." Id. at 656. While respondent had also claimed unrecoverable compliance costs, the court found that "most of the costs described by [respondent] and its members have already been incurred" and that the record failed to show that any additional costs are "more than 'de minimis'" or based on "more than an unfounded fear." Id. at 659, 661 (citation omitted). The court was unpersuaded by respondent's contention that "uncertainty" regarding the rule's provisions regarding school-closure-based discharges was affecting its members' plans to expand or consolidate programs or campuses. Id. at 658 (citation omitted).

3. a. Respondent filed a notice of appeal and requested an administrative stay of the rule as well as an injunction pending appeal. The court of appeals issued an administrative stay limited to respondent and its members, but subsequently granted respondent's motion for an injunction pending appeal on a nationwide basis. C.A. Doc. 42-1 (Aug. 7, 2023). The court then reversed the district court's denial of the preliminary injunction. App., infra, 1a-37a.

The court of appeals first held that respondent had shown irreparable harm. App., infra, 15a-20a. The court based that conclusion on respondent's compliance costs, respondent's altered business operations in response to risks associated with the

school-closure provision, and the threat of costly adjudications in recoupment actions. Ibid.

Turning to the merits, the court of appeals identified three categories of respondent's challenges to the rule, and determined that respondent had shown a likelihood of success as to each. App., infra, 20a.

First, the court of appeals concluded that respondent had shown a likelihood of success on its claim that the Department lacks authority to provide for affirmative borrower defense claims. App., infra, 20a-27a. The court held that because the HEA refers to a borrower "defense" to loan repayment, such a defense may only be asserted "after collection proceedings have been instituted," and not in an affirmative claim filed with the Department. Id. at 21a (emphasis omitted). The court also understood the regulation to unlawfully allow for discharge of loans even if there is no causal connection between the school's actionable misconduct and the loans to be discharged. Id. at 23a-24a. The court further viewed the rule's categories of acts or omissions by the institution that may give rise to a borrower defense as insufficiently specific to fall within the agency's authority under the HEA. Id. at 24a-27a.

Second, the court of appeals determined that respondent had shown a likelihood of success on its claim that the Department may not administratively adjudicate borrower-defense claims or recoup-

ment claims. App., infra, 27a-32a. According to the court, "[n]othing in the text" of the various statutory provisions "specifically mentions the Department's authority to adjudicate claims," id. at 29a, and the court expressed concern that administrative adjudication of such claims could raise constitutional issues because it viewed the recoupment claims as involving private rights, id. at 29a-30a. The court further declared that portions of the rule that reinstated procedures providing for combined consideration of claims of similarly situated borrowers were "incompatib[le]" with the Federal Rules of Civil Procedure, which permit class actions only where common question of fact and law "'predominate.'" Id. at 31a (citation omitted).

Third, the court of appeals held that respondent had shown a likelihood of success on its claim that the school-closure regulation was unlawful and arbitrary and capricious. App., infra, 32a-35a. The court understood the rule's new trigger date for discharge eligibility to allow for discharges even if a school consolidates programs on one of multiple campuses but does not actually close. Id. at 34a. And the court further believed that the provision would unlawfully allow a borrower to obtain an "automatic" discharge without showing that her withdrawal from the school was connected to the school's closure. Id. at 34a; see id. at 34a-35a.

The court of appeals then found that the balance of harms and the public interest favored respondent. App., infra, 35a-36a. And the court determined that nationwide injunctive relief was appropriate, based on its view that "the scope of preliminary relief" under 5 U.S.C. 705, which allows a court to postpone the effective date of an agency action, should be read to "align[] with the scope of ultimate relief under Section 706, which is not party-restricted." App., infra, 36a.

b. The court of appeals subsequently denied the government's petition for rehearing en banc. App., infra, 38a.

4. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. Additional time is needed to make a final determination about the legal and practical effect of the court of appeals' decision. Additional time is also needed, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

AUGUST 2024

APPENDIX