No. 24-413

IN THE

Supreme Court of the United States

DEPARTMENT OF EDUCATION, ET AL.,
Petitioners,

v.

CAREER COLLEGES AND SCHOOLS OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF AMICI CURIAE PUBLIC CITIZEN AND PROJECT ON PREDATORY STUDENT LENDING IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amicus curiae Public Citizen, Inc. is a non-profit advocacy organization with members in all 50 states. Public Citizen appears before Congress, agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws to protect workers, consumers, and the public. Public Citizen submitted comments in the Department of Education's 2022 rulemaking at issue and in previous rulemakings regarding the defense to repayment recognized by 20 U.S.C. § 1087e(h).

The Project on Predatory Student Lending (PPSL) is a nonprofit organization whose mission is to remove barriers to education, training, and occupation for individuals by representing the legal interests of students against predatory practices in higher education and student lending. PPSL has represented over one million students across the country, winning landmark cases to protect borrower rights, recover money owed, and cancel fraudulent debt. PPSL submitted comments in the Department of Education's 2022 rulemaking at issue and in previous rulemakings regarding the § 1087e(h) borrower defense.

Amici submit this brief to explain how the statutory interpretation adopted by the Fifth Circuit in this case is contrary to the text, purpose, and context of 20 U.S.C. § 1087e(h). The brief also explains how the decision below, which upsets the agency's

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae made a monetary contribution to preparation or submission of the brief. Counsel for all parties received more than ten days' notice of the filing of the brief.

longstanding interpretation and application of the statute, will cause significant harm to student loan borrowers by limiting access to statutory relief only to individuals who have both already defaulted and had a collection action initiated against them.

INTRODUCTION

Unlike other cases involving student loans that have come before this and other courts in the past few years, the issue presented by the petition is not *whether* student loan debt owed to the federal government may be cancelled. Rather, the question is *when* a borrower may invoke a statutory "defense to repayment" of a loan made pursuant to the William D. Ford Federal Direct Loan Program (Direct Loan Program). *See* 20 U.S.C. § 1087e(h).

In promulgating the 2022 rule at issue in this case, the Department of Education answered that question the same way it has consistently answered it since the statute was enacted in 1994: by concluding that it has the authority to recognize "defenses to repayment" anytime a borrower has an outstanding obligation to repay a federal loan. The 2022 Rule, like earlier rules issued on the subject in 2016 and 2019 explicitly did, included mechanisms for borrowers to invoke those defenses "affirmatively"—that is, outside of post-default collections proceedings—and to get a determination *from the Department* as to whether it agreed that the defense applied.

According to the Fifth Circuit, however, every presidential administration since the statute was enacted thirty years ago was wrong. Instead, the court held, only a court, and never the Secretary, can recognize "defenses to repayment," making loan default and the initiation of collection litigation a

condition precedent to this form of statutory discharge. That decision is inconsistent with the text, context, purpose, and history of the statute, and warrants this Court's review.

Review of the Fifth Circuit's decision is particularly important because the decision will have significant implications for tens of thousands of student borrowers who are entitled to relief from their repayment obligations but would be required to default before they could invoke a statutory defense, if they could at all. Given the negative consequences of default, and the rare deployment of litigation as a means of collecting defaulted student loans, the Fifth Circuit's construction of the statute will have significant harmful impacts—particularly on military service members and other vulnerable populations.

The Court should grant the petition.

ARGUMENT

I. The Fifth Circuit's statutory interpretation is wrong.

When Congress created the Direct Loan Program in 1993, it directed the Secretary 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 made under this part." Student Loan Reform Act of 1993, Pub. L. 103–66, 107 Stat. 351, Title IV, § 14021, *codified at* 20 U.S.C. § 1087e(h)) (the borrower defense statute). The Fifth Circuit's conclusion that the "defense[s] to repayment" referenced in the statute may be "assert[ed]" only in collections proceedings after a borrower has entered default is contrary to the text, context, history, and purpose of the 1993 law. *See Truck Ins. Exch. v. Kaiser Gypsum Co., Inc.*, 602 U.S. 268, 277 (2024) (looking to

the "text, context, and history" of a statute to determine its meaning). These factors, along with the consistent interpretation of the statute given by the Department, all demonstrate that Congress intended to grant the Secretary the authority to consider defenses to repayment asserted by borrowers at any stage of repayment, including *before* default.

A. "Defenses to repayment" can be asserted prior to default.

Nothing about the statutory term "defenses to repayment" suggests that defenses may be asserted only "*after* collection proceedings have been instituted," as the Fifth Circuit held. Pet. 32a. The Fifth Circuit's contrary conclusion was based on its view that the word "defense" has a "reactive" meaning and, thus, that a defense can be invoked only in reaction to a collections action. Pet. 31–32a. That conclusion is wrong.

To begin, the Fifth Circuit cherry-picked a definition of the word "defense," ignoring the alternate and more relevant definition. *See* Pet. 31a. The more relevant definition applies in the context of financial instruments like the promissory notes at issue here: "a legally recognized basis for avoiding liability either on the instrument itself or on the obligation underlying the instrument." Defense, *Black's Law Dictionary* (6th ed. 1990). This definition recognizes that, with respect to a loan or contract, a defense can exist prior to initiation of an enforcement or collections proceeding.

Moreover, in the Student Loan Reform Act of 1993, Congress specified that the defense is a "defense to *repayment*." 20 U.S.C. § 1087e(h) (emphasis added). The term "repayment" is used throughout the statute

and is not used to refer to something that occurs only after default. Rather, the term refers to a borrower's ongoing repayment obligation, which exists throughout the lifecycle of the loan. *See, e.g.*, 20 U.S.C. § 1087e(b)(9) ("Repayment incentives"); *id.* § 1087e(d) ("Repayment plans"); *id.* § 1087e(e) ("Income contingent repayment"). For example, the statute's provision for loan "[r]epayment plans" identifies five kinds of repayment plans, *id.* § 1087e(d)(1)(A)–(E), as well as "[a]lternative repayment plans" provided on "a case by case basis," *id.* § 1087e(d)(4), each of which can be invoked before a borrower is in default. Meanwhile, the statute's separate provision governing "[r]epayment *after* default," *id.* § 1087e(d)(5) (emphasis added), demonstrates that Congress knows how to limit a provision's applicability to loans in default when it wants to do so. Thus, even if the Fifth Circuit were correct that defenses must be "reactive" and not anticipatory, the Rule is consistent with that interpretation: recognizing defenses in response to repayment obligations.

The history and purpose of the statute support the meaning given by the Department. The year before Congress enacted the borrower defense provision, it used the phrase "defense[] against repayment" in the Higher Education Amendments of 1992. There, Congress directed the Secretary to conduct a "[s]tudy of the impact of fraud-based defenses on the Federal Family Education Loan [(FFEL)] Program." Higher Education Amendments of 1992, Pub. L. 102–325, § 1403(a), 106 Stat. 817. That study was to include, among other things:

> (1) an analysis of statutory, regulatory, and case law regarding the use of fraud-based *defenses against repayment* of such loans; (2) an

> estimate of the total number of borrowers filing for relief from repayment of such loans using a fraud-based defense and amount of such loan principal involved; (3) an estimate of such loan principal relieved annually through fraud-based defenses.

Id. (emphasis added). The phrase "borrowers filing for relief from repayment … using a fraud-based defense" necessarily contemplates the borrower's assertion of the defense "affirmatively" outside the context of collections proceedings; one does not "file for relief" when raising a defense in a collections action.

When Congress enacted the borrower defense provision the following year in the Student Loan Reform Act of 1993, it employed a near-identical phrase, requiring the Secretary to establish regulations providing for "defense[s] to repayment." Pub. L. 103–66, Title IV, § 4021 (codified at 20 U.S.C. § 1087e(h)). The phrase "defense to repayment" in section 1087e(h) should be given the same meaning as the analogous phrase in the Higher Education Act Amendments enacted one year earlier, which encompassed assertions of the defense outside the default context. *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

In addition, recognizing claims pre-default is consistent with Congress's purpose in enacting the statute—making "loan repayment … less burdensome" and thereby "encourag[ing] students to seek

postsecondary education." H.R. Rep. No. 103-111, at 107 (1993). Congress intended to provide borrowers with "flexibility in managing their student loan repayment obligations," *id.* at 112, including by providing repayment plans that "would likely discourage defaults," *id.* at 107. As the Department explained in 2019 and in 2022, restricting the borrower defense to post-default collection proceedings would run contrary to this purpose by incentivizing borrowers to default on their loans so as to trigger the availability of the defense, resulting in "negative consequences for the borrower." U.S. Dep't of Educ. (ED), Final Rule, Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49788, 49796 (Sept. 23, 2019); ED, Final Regulations, Institutional Eligibility Under the Higher Education Act of 1965, as Amended, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 87 Fed. Reg. 65904, 65914 (Nov. 1, 2022).

B. The agency has consistently understood that "defenses to repayment" can be asserted pre-default.

Recognizing that the text, structure, and context all indicate that Congress did not intend to limit "defenses to repayment" to those raised post-default, the Department has consistently read section 1087e(h) to confer on it the authority to recognize defenses to repayment both pre- and post- default. Although this consistent practice is not in and of itself dispositive, as the Fifth Circuit noted, Pet. 33a, "[i]nterpretations issued contemporaneously with the statute at issue, and which have remained consistent

over time, may be especially useful in determining the statute's meaning." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024).

The 2022 Rule is the fourth significant rule implementing the borrower defense statute since its enactment. Although many aspects of the borrower defense process varied across the different regulatory regimes, the Department has entertained defenses to repayment raised pre-default under all of them—dating back to 1995, when the initial implementing rule went into effect. The Fifth Circuit did not dispute this history but sought to minimize it, stating that, "[b]efore 2016, the Department authorized borrowers to assert affirmative claims only in very limited circumstances." Pet. 33a–34a. That the Department exercised its authority sparingly, however, does not call into question that the Department understood that it had the authority. And under the Fifth Circuit's statutory interpretation, the Department erred in recognizing pre-default defenses even in the limited circumstances in which it did so in the 1990s—making 30 years of borrower defense regulations invalid.

1. Pre-default defenses under the 1994 Rule

The Department's 1994 rule, which was in effect for more than two decades, did not limit when borrowers could assert the defense to repayment—whether before the loan was in default or only in post-default collection proceedings. It gave examples, including, *"but [] not limited to*," "[t]ax refund offset proceedings," "[w]age garnishment proceedings," "[s]alary offset proceedings," and "[c]redit bureau reporting proceedings." ED, Final Regulations, William D. Ford Federal Direct Loan Program, 59

Fed. Reg. 61664, 61692 (Dec. 1, 1994), *codified at* 34 C.F.R. § 685.206(c)(1) (1995) (emphasis added). Some of these examples can, and frequently do, occur prior to a default. For example, pursuant to long-standing regulations, the Department reports information to credit bureaus prior to default, 34 C.F.R. § 30.35, and thus a "credit bureau reporting proceeding" may occur prior to any default.

Over the more than twenty years in which the 1994 Rule was in effect, "the agency's interpretations, contracts, and adjudications confirmed" that "defenses to repayment" could be raised prior to default, and that the Department would "adjudicate affirmative, pre-default applications for borrower defense relief." *Vara v. DeVos*, No. CV 19-12175-LTS, 2020 WL 3489679, at *3 (D. Mass. June 25, 2020). Indeed, language contained in the Direct Loan Master Promissory Note throughout this time period recognized as much. Those contracts directed students to contact their loan servicer if they "believe[d] that [they] have a defense against repayment of [their] loan," without suggesting they should wait until default to do so. *E.g.*, ED, Federal Direct PLUS Loan, Application and Master Promissory Note (2008).[2]

Examples of the Department's recognition of pre-default borrower defenses to repayment can be found from every Presidential administration since 1995.[3] *See* Project on Predatory Student Lending, Comment Letter, Comment ID ED-2018-OPE-0027-0011, Exhibits 6–41 (Aug. 2, 2018) (attaching various

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[2] https://fsapartners.ed.gov/sites/default/files/attachments/dlbulletins/DLB0814AttachPLUSMPNrevCCRAAFINAL.pdf

[3] https://www.regulations.gov/comment/ED-2018-OPE-0027-0011

Department memoranda and opinions dated October 1998, October 2000, February 2001, February 2003, and March 2015); *see also* Memorandum from Steven Menashi, Acting General Counsel, Re: Legal bases for approval and discharge of pending borrower defense claims, at 3 (Dec. 14, 2017)[4] (adopting legal analyses of earlier memoranda approving affirmative claims); Letter from Arne Duncan, Secretary of Educ., to Sen. Elizabeth Warren (Aug. 4, 2014)[5] (stating that "a borrower who is not in default can … assert a claim that the loan is not legally enforceable on the basis of a claim against the school" by "present[ing] the claim to the servicer handling the Direct Loan for the Department").

2. Pre-default defenses under the 2016 Rule

The 2015 collapse of Corinthian Colleges and revelations of widespread misconduct by Corinthian led to a surge of borrower defense claims. *See* Final Regulations, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75926, 76047 (Nov. 1, 2016) (2016 Rule). The Department's experience with these claims highlighted difficulties in the application and interpretation of the 1994 Rule and "the lack of clarity" surrounding the procedures that apply to borrower defense. *Id.* The Department therefore

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[4] https://int.nyt.com/data/documenthelper/6576-menashi-memo/e1518a22b8810dd9f9a3/optimized/full.pdf

[5] https://protectborrowers.org/wp-content/uploads/2023/10/2014.08.04-USED-LTR-to-Senators-re-COCO-1.pdf

amended its regulations "to establish a more accessible and consistent borrower defense standard and clarify and streamline the borrower defense process to protect borrowers and improve the Department's ability to hold schools accountable for actions and omissions that result in loan discharges." *Id.* at 75926.

In the 2016 Rule, the Department codified its longstanding practice under the 1994 Rule—that borrowers could raise a defense to repayment both before and after default. *See id.* at 75956; 34 C.F.R. § 685.206(c) (2016). Citing interpretations that it had issued while the 1994 Rule was in effect, the Department explained that this aspect of the 2016 Rule was not "an expansion of borrowers' rights," but a continuation of the Department's position since the statute was enacted. 81 Fed. Reg. at 75956–57.

3. Pre-default defenses under the 2019 Rule

In 2019, the Department promulgated a new rule, which set forth the borrower defense procedures currently in effect as a result of the injunction issued in this case. Although the 2019 Rule made several changes to the procedure by which borrowers could invoke defenses to repayment, it explicitly reaffirmed the Department's position that the statute authorizes the Secretary to recognize defenses to repayment prior to default. 84 Fed. Reg. at 49796.

In the agency's 2018 notice of proposed rulemaking, the Department had indicated that it was considering limiting the scenarios in which borrowers could invoke the statutory defense to repayment "to a proceeding to collect on the loan by the Department." ED, Notice of Proposed Rulemaking, Student

Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 83 Fed. Reg. 37242, 32754 (July 31, 2018). In light of the comments received, however, the agency "agree[d] that it is appropriate to accept both affirmative and defensive claims." 2019 Rule, 84 Fed. Reg. at 49796. The Department explained:

> [A]llowing only defensive claims may provide borrowers with an incentive to default, which, in turn, would have negative consequences for the borrower. In addition, we are concerned about the potential negative impacts on military servicemembers, their families, and borrowers, in general, which could result from increased instances of loan default triggered by borrower efforts to become eligible to assert defensive claims.

Id.

In finalizing the 2019 Rule, the Department explicitly rejected the argument that "the consideration of affirmative claims is outside of the Department's statutory authority or the purpose of the borrower defense regulations." *Id.* Rather, like the agency did in 2022, it concluded that "by providing that the Department may regulate borrowers' assertion of borrower defenses to repayment," the borrower defense statute itself "grants the Department the authority to not only identify borrower causes of action that may be recognized as defenses to repayment, but also to establish the procedures for receipt and adjudication of borrower claims—including the type of proceeding through which the Department may consider such a claim." *Id.*

C. The statute does not limit consideration of defenses to repayment to post-default collection litigation.

The Fifth Circuit's ruling goes further astray from the settled understanding of the statute by suggesting that defenses to repayment may be raised only by a borrower in the midst of a court action and, by implication, may be resolved only by a judicial factfinder. *See* Pet. 46a ("The contemporaneous legal definition of 'action' is 'a lawsuit brought in a court,' which is distinct from an adjudication brought in an administrative tribunal.").

Since, as discussed above, the statute does not limit "repayment" to scenarios where a borrower is in default, there can be no separate collections action requirement. To the contrary, as the Department recognized in 2019, the statute is silent as to how and in which fora defenses to repayment can be raised in, expressly delegating regulatory authority to the agency to do so. 2019 Rule, 84 Fed. Reg. at 49796. And given the statutory context, the Department's longstanding refusal to impose a "court action" requirement is well-supported.

Allowing borrowers to assert defenses only in litigation would eliminate the opportunity to raise a defense to repayment for the majority of borrowers. ED pursues litigation only as a "last resort" to collecting defaulted loans.[6] First, it uses administrative wage garnishment and Treasury offset procedures. Accordingly, while there were approximately 6.8 million Direct Loan and FFEL

[6] Declaration of Cristin Bulman, ECF No. 31 at 4, *Vara v. U.S. Dep't of Education*, No. 19-cv-12175 (D. Mass. Jan. 22, 2020).

program borrowers in default in 2023,[7] that same year, ED had only 13,165 active debt-collection actions—representing less than two tenths of one percent of all defaulted borrowers.[8] Under the Fifth Circuit's interpretation, only this tiny group of borrowers would be able to invoke the statutory defense.

* * *

Thirty years of consistent statutory interpretation cuts strongly against the Fifth Circuit's view that the Rule at issue represents an extraordinary invocation of authority. The 2022 Rule, providing that borrowers may assert defenses to repayment without first defaulting on their loans, takes the same view of the statutory authority as the Department has taken since it first implemented the statute thirty years ago.

II. Eliminating the ability to assert a defense to repayment in a pre-default, administrative proceeding would have a severe negative impact.

In enacting section 1087e(h), Congress recognized that certain "acts or omissions of an institution of higher education" warrant a discharge of debt incurred to attend the institution. The collapse of

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[7] ED, Office of Fed. Student Aid, Elec. Announcement GENERAL-23-119, Federal Student Aid Posts New Quarterly Reports to FSA Data Center (Dec. 20, 2023) https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2023-12-20/federal-student-aid-posts-new-quarterly-reports-fsa-data-center.

[8] Dep't of Justice, Annual Civil Debt Collection Activity Report to Congress Fiscal Year 2023, at 10 (Jan. 2024), https://www.justice.gov/jmd/media/1370026/dl.

Corinthian Colleges offers a ready example, as many thousands of students took out loans to attend a school whose deception left them with a worthless education and significant debt.[9] Requiring borrowers to default before seeking relief undermines the statutory repayment defense by forcing borrowers to choose between repaying a debt as to which they may have a statutory defense or defaulting and taking on all the negative associated consequences. And for many borrowers, requiring default would, as a practical matter, entirely eliminate the availability of the statutory repayment defense.

A. Making the section 1087e(h) borrower defense contingent on default places borrowers with a defense to repayment in a Catch-22: either make payments even though they may be entitled to debt discharge, or deliberately default and hope for the initiation of a collection lawsuit in which they can attempt to invoke the defense. The first option forces borrowers whose debt Congress believed should be discharged to make payments that should not be owed, often while they are struggling to pay for rent, groceries, or other basic needs, and potentially experiencing emotional and mental stress.[10] The second option, default, as ED noted in its 2019 rulemaking, forces borrowers to risk severe negative consequences—some of which are irreversible even if a defense to repayment is subsequently recognized. *See* 2019 Rule, 84 Fed. Reg.

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[9] *See* ED, First Report of the Special Master for Borrower Defense to the Under Secretary, at 4 (Sept. 3, 2015), https://www.ed.gov/sites/ed/files/documents/press-releases/report-special-master-borrower-defense-1.pdf.

[10] *See* Affidavits, ECF Nos. 20–29, *Sweet v. DeVos*, No. 19-cv-03674 (N.D. Cal. July 23, 2019) (cataloging borrower experiences).

at 49796 (expressing "concern[] about the potential negative impacts on military servicemembers, their families, and borrowers, in general, which could result from increased instances of loan default triggered by borrower efforts to become eligible to assert defensive claims").

When a borrower defaults, interest continues to accrue, and the entire balance may become due; collection fees—sometimes exceeding 24% of the outstanding principal and interest—may be charged.[11] At the same time, defaulted borrowers' wages may be garnished and their income-tax refunds offset, including offsets of refundable tax credits like the Earned Income Tax Credit that are specifically designed to lift children and families out of poverty.[12]

Borrowers who are in default are also ineligible for additional federal student aid.[13] Thus, requiring

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[11] Pew Charitable Trusts, Issue Brief, *At What Cost? The Impact of Student Loan Default on Borrowers* (2023), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/02/at-what-cost-the-impact-of-student-loan-default-on-borrowers.

[12] *See* 20 U.S.C. § 1095a (authorizing wage garnishment); (authorizing tax refund offsets); 26 U.S.C. § 6402(d) (collection of debts owed to federal agencies through tax refund offsets); 31 U.S.C. § 3720A (reduction of tax refunds by the amount of debt owed); *see also* Letter from National Consumer Law Center et al., to Janet Yellen, Secretary of the Treasury (Feb. 17, 2022), https://www.nclc.org/wp-content/uploads/2022/10/Group-Letter-to-Sec.-Yellen-re-CTC-and-EITC-protection-from-offset-2.17.22.pdf (Earned Income Tax Credit and the Child Tax Credit).

[13] ED, *If I defaulted on my federal student loan, can I get more federal student aid?*, https://studentaid.gov/help-center/answers/article/what-if-i-defaulted-on-federal-student-loan-but-want-federal-student-aid.

default would block students with valid defenses to repayment based on fraud from getting a second chance at an education. And in many states, borrowers in default may have their driver's or professional licenses suspended, compounding their financial distress.[14] Additionally, default on a federal student loan renders the borrower ineligible for other federal programs that assist homebuyers, including programs directed at assisting veterans and small business owners.[15]

Even for a borrower with a valid defense to repayment, the negative consequences may continue after the defaulted loan is satisfied or discharged. Defaults impact borrowers' credit scores and credit histories for years, making it difficult for borrowers to obtain car loans, pay for housing and utilities, purchase insurance, and secure credit for emergency expenditures.[16] And the black mark of a default can make it difficult to obtain employment in either the public or private sectors. Active and reserve military service members, contractors, and federal employees may all be denied security clearances, duty stations,

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[14] C.J. Dieterle, S. Weissmann, and G. Watson, R Street Instit., *How States Use Occupational Licensing to Punish Student Loan Defaults* (2018), https://www.rstreet.org/wp-content/uploads/2018/06/Final-148-for-posting.pdf.

[15] *See* Dep't of Housing & Urban Dev., Notice of a new system of records, 88 Fed. Reg. 58595, 58595 (Aug. 28, 2023) (continuing the Credit Alert Reporting Verification System (CAIVRS) as a shared database of defaulted federal debtors, accessed by HUD, VA, SBA, and others).

[16] *See* Pew Charitable Trusts, Fact Sheet, *Student Loan Default Has Serious Financial Consequences* (2020), https://www.pewtrusts.org/-/media/assets/2020/04/studentloandefaulthasseriousfinancialconsequences_.pdf.

or promotions due to a default.[17] Indeed, in an adversary complaint against the parent company of shuttered for-profit college chain ITT Technical Institutes, borrowers reported that they were forced to resign from the military because of their federal loans[18]—loans that have since been discharged because of the Department's findings that ITT engaged in widespread and pervasive misrepresentations.[19]

In addition, the vast majority of students seeking to assert the repayment defense are those who attended predatory for-profit schools, which enroll disproportionately high numbers of low-income students and students of color;[20] students from

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[17] Pew Charitable Trusts, *At What Cost?*, *supra* note 11; *see* Student Veterans of America, Comment Letter, Comment ID ED-2018-OPE-0027-16803, at 2 (Aug. 28, 2018); Veterans and Military Service Organizations, Comment Letter, Comment Comment ID ED-2018-OPE-0027-27950, at Attachment 1 (Aug. 30, 2018) ("Forcing a service member to the point of default as a prerequisite to making a borrower defense claim would likely mean they lose their security clearance and possibly be forced out of the military altogether[,] … additionally put[ting] our country's national security at risk …, harming military readiness and the recruitment of new service members to replace those forced out").

[18] Complaint, ECF No. 1 at ¶¶ 443–44, *In re ITT Educ. Servs., Inc.*, No. 17-50003 (Bankr. S. D. Ind. Jan. 3, 2017) (quoting affidavits).

[19] ED, Press Release, Education Department approves $3.9 billion group discharge for 208,000 borrowers who attended ITT Technical Institute (Oct. 31, 2021), https://www.ed.gov/about/news/press-release/education-department-approves-39-billion-group-discharge-208000-borrowers.

[20] *See* Student Borrower Protection Center, *Mapping Exploitation: Examining For-Profit Colleges as Financial*

(*Footnote continued*)

"vulnerable situations or 'low places,' including being homeless," and students who were "the first in their family to attend post-secondary schools [with] little idea what to expect from higher education."[21] The harms from requiring default, where the borrower has a defense to repayment, thus would have a disproportionate impact on populations who are "often the least able to afford the penalties that come with default."[22]

B. For many borrowers, the defense to repayment may be effectively unavailable if it can be asserted only in post-default collection proceedings or collection litigation. After a borrower defaults, collection proceedings may not be initiated for many years; unlike for private student loans, pursuant to 20 U.S.C. 1091a, there is no statute of limitations for collections on federal student loans.[23] In the meantime, the borrower is saddled with debt and the consequences of default.

Predators in Communities of Color, at 9 (July 2021), https://protectborrowers.org/wp-content/uploads/2021/07/SBPC-Mapping-Exploitation-Report.pdf.

[21] Legal Aid Community, Comment Letter, Comment ID ED-2018-OPE-0027-29073, at 31 (Aug. 30, 2018).

[22] Sarah Sattelmeyer, New America, Brief, *Trapped by Default* (July 27, 2022), https://www.newamerica.org/education-policy/briefs/trapped-by-default/; *see* Ctr. for Responsible Lending et al., *Road to Relief: Supporting Federal Student Loan Borrowers During the COVID-19 Crisis and Beyond* 6 (Nov. 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/nclc-crl-road-to-relief-23nov2020.pdf (discussing disproportionate harms for borrowers of color).

[23] Legal Aid Community Comment Letter, *supra* note 21, at 7; Sattelmeyer, *Trapped by Default*.

In addition, borrowers in post-default administrative proceedings face procedural barriers. For example, in Treasury Department collection proceedings, the borrower has only a "one-time, 65-day objection period [to assert the repayment defense]—an extremely short window that many borrowers miss or are never even aware of."[24] A borrower that misses that short window loses the opportunity to assert the defense forever, even if the Treasury offsets occur over multiple years, as is common.[25]

CONCLUSION

For the foregoing reasons, the petition should be granted.

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[24] Legal Aid Community Comment Letter, *supra* note 21, at 6; *see* 34 C.F.R. §§ 30.22(b)(1)–(3).

[25] *See* Decl. of Jessica A. Jiménez, ECF No. 57-1, ¶ 16, *Williams v. DeVos*, No. 1:16-cv-11949-LTS (D. Mass. Jan. 5, 2018) (stating that "virtually all of the borrowers that [the advocate] ha[s] spoken with who face [Treasury offsets] or who are experiencing [Treasury offsets] missed the 65-day hearing window.").

Respectfully submitted,

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