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 IN OPPOSITION FOR RESPONDENT CAREER COLLEGES AND SCHOOLS OF TEXAS

STEPHEN B. KINNAIRD
Counsel of Record
ALLYSON B. BAKER
MICHAEL MURRAY
SAMEER P. SHEIKH
Paul Hastings LLP
2050 M Street, N.W.
Washington, DC 20036
(202) 551-1700
stephenkinnaird@paulhastings.com

December 12, 2024

QUESTIONS PRESENTED

In Section 455(h) of the Higher Education Act of 1965 ("HEA" or "Act"), 20 U.S.C. 1070 *et seq*., Congress authorized 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) (emphasis added).

Invoking this provision of the Act, the Department promulgated a borrower-defense-to-repayment rule (the "Rule" or the "2022 Rule") that establishes new loan discharge and recoupment claim adjudication processes. The Rule empowers the Department to *inter alia* adjudicate and impose presumptions when deciding: (i) claims brought by borrowers, individually or as a group, seeking to have their loan obligations entirely canceled; and (ii) recoupment claims against educational institutions.

The questions presented are:

1. Whether the HEA provision authorizing 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" also authorizes the Department to establish an adjudication process for approving affirmative loan discharge claims.

2. Whether Section 705 of the Administrative Procedure Act permits a reviewing court to postpone the effective date of a challenged rule, pending final adjudication of the merits, where the challenging party has satisfied each of the requisite elements for preliminary relief.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Respondent Career Colleges & Schools of Texas ("CCST") provides the following disclosure:

CCST is a trade association existing under the laws of the State of Texas. CCST has no parent corporation. No publicly held company owns 10% or more of CCST stock.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Constitutional Provisions

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

Petitioner Department of Education raises two distinct statutory issues, neither of which involves a conflict of authority, and both of which the court of appeals decided correctly. Furthermore, this case is a poor vehicle for addressing the question of preliminary relief, as the Department seeks review of only one of several grounds of invalidation and the moribund rule is unlikely to be maintained, let alone defended by the incoming administration.

For any one of these reasons, the Court should deny review.

In Section 455(h) of the Higher Education Act, ("HEA" or "Act"), Congress granted the Department a very specific and limited rulemaking power: 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" the Direct Loan Program. 20 U.S.C. § 1087e(h). Relying on an unjustifiably broad interpretation of this provision, the Department promulgated a sprawling borrower-defense-to-repayment rule that imposes strict liability standards for even inadvertent errors by schools, and authorizes agency adjudication of complete debt discharges on an individual and group basis. *See* Institutional Eligibility Under the Higher Education Act of 1965, 87 Fed. Reg. 65,904 (Nov. 1, 2022) (final rule) ("Rule"). The Rule's newly created adjudication processes further establish effectively unrebuttable evidentiary presumptions, the default remedy of full discharge of consolidated loans for any perceived violation, and procedures for shifting discharge liability to schools, without the right of appeal. *See id.*

In directing the district court to postpone the effective date of the rule, the Fifth Circuit identified nine separate grounds for invalidating the Rule as "almost certainly unlawful." App. 63a. The Fifth Circuit found the Rule to exceed the Department's statutory authority in multiple respects as well as impose slanted procedures and presumptions that were not designed to ascertain truth, but instead pursue the Department's express objective to "increase the number of borrowers who receive forgiveness." App. 25a.

The Department challenges only one of the nine grounds on which the Fifth Circuit relied: namely, whether CCST was reasonably likely to prove that Section 455(h) authorizes Department adjudication of borrower defense "claims." The Department does not identify any case in which this Court has granted review of only one of multiple grounds on which a court of appeals granted preliminary relief, and where resolution of the question would not restore the rule. Most importantly, the Court's review of the first question presented would be ineffective because the Department failed to seek review of the Fifth Circuit's holding that Section 455(h) is not a clear and unequivocal waiver of sovereign immunity, which independently forecloses the Department's power to adjudicate borrower defense "claims." App. 45a-46a n.18.

The Court also need not take up Petitioner's second issue as to the court of appeals' directive to postpone the effective date of the challenged provisions of the Rule. In accord with this Court's holding in *West Virginia v. EPA*, 577 U.S. 1126 (2016), the court of appeals concluded that a stay of the effective date, pursuant to Section 705 of the Administrative Procedure Act, of the challenged provisions of the Rule was both

necessary and appropriate given that the "almost certainly unlawful provisions of the Rule that CCST challenges apply to all Title IV participants and are thus almost certainly unlawful as to all Title IV participants." App. 63a. The Fifth Circuit's holding on the scope of preliminary relief is not worthy of review.

STATEMENT

A. Statutory and Regulatory Background.

In Section 455(h) of the HEA, Congress granted the Department a limited power to promulgate regulations specifying borrower defenses to repayment based on the acts or omissions of schools:

> [T]he Secretary shall 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 . . . except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan.

20 U.S.C. § 1087e(h).

Section 455(h) is a minor provision of the Act that, in its first two decades of existence, had rarely been invoked. 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. 75,926 (Nov. 16, 2016) ("[The] [s]ection . . . governing defenses to repayment[] has been in place since 1995 but, until recently, has rarely been used.").

After initially interpreting Section 455(h) narrowly in its initial 1994 implementing regulation, the Department first in 2016 and then again in 2022 invoked this minor provision to create from whole cloth

a novel scheme to adjudicate affirmative borrower defense claims and impose liability against schools in the absence of any loan enforcement action.

1. **1994 Borrower Defense Rule**

In 1994, the Department promulgated borrower defense regulations that established the standards for permitting a borrower to "assert as a defense against repayment, any act or omission of the school attended by the [borrower] that would give rise to a cause of action against the school under applicable State law." William D. Ford Federal Direct Loan Program, 59 Fed. Reg. 61,664, 61,696 (Dec. 1, 1994) ("1994 Rule").

The 1994 Rule expressly contemplated that a borrower "defense" was in fact just that—a defense that a borrower could assert during existing formal collection proceedings. 34 C.F.R. § 206(c) (1995) ("[i]*n any proceeding to collect on a Direct Loan,* the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.") If a borrower's defense against repayment is successful, a borrower may be "relieved of the obligation to repay all or part of the loan and associated costs and fees." 34 C.F.R. § 685.206(e)(12)(i).

As the court of appeals noted, "[t]he Clinton Administration's subsequent Notice of Interpretation confirmed that the borrower defense provision of the 1994 Rule 'does not provide a private right of action for a borrower and is not intended to create new Federal rights in this area.'" App. 10a (quoting Office of Postsecondary Education, 60 Fed. Reg. 37,768, 37,769 (July 21, 1995)).

2. The 2016 Borrower Defense Rule—Abandoned and Replaced by the 2019 Rule

In 2015, after the Corinthian Colleges, Inc. entered bankruptcy, the Department confronted a large number of borrowers seeking relief from student loans. *See* App. 11a. In 2016, the Department determined that it would repurpose Section 455(h) to deal with this new problem. The Department, for the first time, promulgated procedures for adjudicating affirmative borrower defense claims, including in group processes. *See* 81 Fed. Reg. 39,330, 39,347 (June 16, 2016) ("2016 Rule"). Under this group claims process, schools had the onus to rebut the presumption that all members of the group reasonably relied on the alleged misrepresentation or omission. *See id.*

Following promulgation of the 2016 Rule, litigation was initiated against the Department challenging the legality of certain provisions, including the group claims process. The Department under President Trump delayed the 2016 Rule's effective date until October 2018, until a court ordered its enforcement. *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 87 Fed. Reg. 41,878, 41,883 (July 13, 2022).

In 2019, "following consideration of public comments on the 2018 NPRM, the Department published new final borrower defense regulations that applied to loans made on or after July 1, 2020." *Id.* (citing 84 Fed. Reg. 49,788 (Sept. 23, 2019) ("2019 Rule")).

The 2019 Rule abandoned the 2016 Rule's approach for post-2020 claims and corrected for numerous deficiencies—namely, the lack of due process protections for schools to ensure a borrower defense claim adjudication process that is fair and equitable. In particular, the 2019 Rule implemented certain protections against meritless borrower defense claims by instituting the requirement that claimants prove that a school had in fact engaged in a misrepresentation that was made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth. Moreover, the 2019 Rule required that the alleged misrepresentation or omission directly and clearly relate to enrollment or continuing enrollment at the school or to the provision of educational services for which the loan was disbursed. Further, it required the claimant to have suffered actual harm from the alleged misrepresentation or omission.

The 2019 Rule precluded tag-along claims by requiring that the Department consider each borrower claim independently and on a case-by-case basis, mitigating the risk of erroneous loan discharge. The 2019 Rule's provisions applied to loans first disbursed on or after the effective date, July 1, 2020.

3. **The 2022 Rule and the Promise of "Loan Forgiveness"**

Several months before the Department published its July 13, 2022 Notice of Proposed Rulemaking ("NPRM") for the later-promulgated 2022 Rule, the Biden Department of Education announced its intent to fulfill the Administration's promise of student loan forgiveness by "expanding a handful of programs that were already on the books," which include borrower-defense-to-repayment regulations. Cory Turner, *Biden*

pledged to forgive $10,000 in student loan debt. Here's what he's done so far (NPR Dec. 7, 2021), http://www.npr.org/2021/12/07/1062070001/student-loan-forgiveness-debt-president-biden-campaign-promise.

In promulgating the 2022 Rule, the Department indeed expanded its authority and power to completely discharge loans by establishing for the first time a borrower-defense-to-repayment claim adjudication regime that:

- Eliminates the possibility of a partial loan discharge, or a discharge calculation commensurate with the alleged harm, instead providing for full discharge of the entire loan, 34 C.F.R. § 665.401(a)-(b);
- Provides for full loan discharge based on a borrower's claim asserting any misstatement or omission—whether knowing, reckless, or innocent—made by the school, its representative, or its contractor, *id.* § 668.71(c);
- Provides for full loan discharge based on school's "failure to perform its obligations under the terms of a contract with the student" if the student represents that "such obligation was undertaken as consideration or in exchange for the borrower's decision to attend, or to continue attending, the institution, for the borrower's decision to take out a covered loan, or for funds disbursed in connection with a covered loan, *id.* § 665.401(b)(3);
- Provides for full loan discharge based on any judgment against the school under state or fed-

eral law for any act or omission that has relation to the borrower's loan or the educational services for which the loan was disbursed, *id.* § 665.401(b)(5)(i);

- Provides for full loan discharge based on a school's violation of a state law (on reconsideration, for loans disbursed before July 1, 2017), *id.* § 685.401(c);
- Establishes a "streamlined" group claims process, pursuant to which the Department provides full loan discharge en masse by grouping multiple borrower claims together, and presuming, without proof, that any act or omission giving rise to a borrower defense asserted by any one claimant in the group similarly "affected each member of the group in deciding to attend, or continue attending, the institution, and that such reliance was reasonable." *Id.* § 685.406(b)(2);
- Establishes a "rebuttable" presumption of liability against schools, yet denies those schools the right to engage in discovery or cross-examine the claimant in order to rebut this presumption, *see id.* §§ 685.405, 406(b)-(c);
- Eliminates all limitations periods on borrower claims, allowing claims to be brought and loans to be completely discharged decades after the fact, *see id.* § 685.401(b);
- Creates a separate adjudication process pursuant to which: (a) the Department seeks recoupment of discharged amounts from a borrower's school; and (b) the school has the burden to prove that the Department's decision to grant

the discharge was incorrect, and yet has no ability to engage in discovery or witness-examination rights—and thus no meaningful way of defending itself against the presumption of liability, *see id.* § 685.401; and

- Interprets a statute providing for loan discharge when a student cannot complete his program because of school closure to provide for full and automatic loan discharge for a student at a closed school who does not complete his program *for any reason*. *Id.* § 685.214(a)-(c).

B. Factual and Procedural Background.

Respondent Career Colleges & Schools of Texas is a trade association. CCST's members are postsecondary schools that have trained, and are responsible for training, thousands of students to serve in highly demanded skilled professions, including as nurses and medical assistants, welders, HVAC repair technicians, plumbers, security guards, and trucking maintenance and automotive technology specialists. The vast majority of CCST's members are accredited by a U.S. Department of Education recognized agency, participate in the Ford Direct Loan Program, and are subject to the Rule's borrower-defense-to-repayment and closed-school-discharge provisions.

In response to the Department's July 13, 2022 NPRM, CCST joined with over a dozen organizations also representing career and private schools around the country to submit 137 pages of comments, urging the Department to withdraw the then-proposed rule due to its numerous legal and regulatory deficiencies,

and the ensuing harm it would cause schools (particularly, smaller institutions like those that comprise CCST's membership).

Following the Department's promulgation of the final rule, CCST filed a complaint challenging the Rule's borrower-defense-to-repayment provisions and closed-school-discharge provisions, and moved to postpone the Rule's effective date pursuant to 5 U.S.C. § 705. CCST's request for preliminary relief was limited to the borrower-defense and closed-school-discharge provisions. App. 64a. Witnesses provided extensive testimony on the irreparable injury that the Rules would cause to school upon going into effect. The United States District for the Western District of Texas nonetheless denied postponement of the effective date based on purported lack of irreparable injury. App. 89a.

On appeal, the Fifth Circuit reversed the district court's denial of preliminary relief. It found that CCST had both made a showing of irreparable harm as well as established a strong likelihood of success on the merits. App. 57a-59a. The court of appeals found multiple, independent deficiencies in the Rule that would inform its conclusion that CCST was likely to prevail on the merits:

1. "By transforming defenses that may be asserted against student loan repayment into affirmative claims, and enabling full discharges and consolidated loan discharges that expand into a damages remedy, the Rule likely violates the limits placed on the Department in Section 455(h)." App. 38a.

2. The Rule unlawfully provides for the full discharge of the student's entire consolidated debt, including debt that predates the act and omission of the

school. It "allow[s] the Department to discharge loans without requiring the borrower to show causation," and confers "outsize compensation" that essentially punishes schools. App. 36a-37a.

3. "The Rule's extremely broad definitions of actionable acts or omissions are deliberately nonspecific" and the strict liability-like standards imposed against schools for "undefined misconduct" are "contrary to law and arbitrary and capricious in violation of the APA." App. 39a.

3. "The vagueness of the Rule's liability standards is contrary to Section 455(h) and thus likely violates the APA." App. 41a.

4. The Rule's procedures for Department adjudication of loan discharge claims and recoupment claims against schools are "*ultra vires* and violate due process." App. 44a.

5. "[T]he Higher Education Act does not allow the Department to adjudicate borrower defense claims or recoupment claims by the Department against schools." App. 45a.

7. "CCST is likely to prevail in its contentions that the Department has no statutory authority to create evidentiary requirements, that the presumptions are effectively unrebuttable, and that the Department cannot use evidentiary devices to achieve substantive results." App. 51a.

8. The group-claims process lacks due process protections available under the class action process. Noting the Department's express purpose to drive enrollment from proprietary schools, "the evidentiary presumptions and group-claim procedures built into the

Rule are not designed to further the truth-seeking process. Instead, these are policy-driven mechanisms designed to selectively target proprietary schools ...." App. 54a.

9. The Rule's closed-school-discharge provision: (i) "exceeds the Department's statutory authority by re-defining a school closure to contradict the clear text of the statute," and (ii) "arbitrarily authorizes automatic, full discharges of debt ***without proof of causation.***" App. 55a (emphasis in original).

In considering the scope of preliminary relief to be granted, the court of appeals looked to Section 705 of the APA, which "authorizes a reviewing court to issue all necessary and appropriate process to postpone the effective date of an agency action that is pending review." App. 62a (quoting 5 U.S.C. § 705) (internal quotation marks omitted). The Fifth Circuit further observed that the "almost certainly unlawful provisions of the Rule that CCST challenges apply to all Title IV participants and are thus almost certainly unlawful as to all Title IV participants." App. 63a. The court of appeals concluded therefore that the stay should not be party restricted, as the Department requested. Indeed, "the stay provided here mirrors the relief granted by the Supreme Court in 2016, when it stayed the Clean Power Plan without party limitation, *West Virginia v. EPA*, 577 U.S. 1126, 136 S. Ct. 1000 (2016), and by this court in 2021, when it stayed OSHA's vaccine mandate without party limitation, *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021)." App. 63a.

For the reasons outlined above, the court of appeals concluded that CCST satisfactorily met the criteria for preliminary relief and remanded with instructions for the district court to postpone the effective

date of the challenged provisions of the Rule pending final judgment. App. 64a.

REASONS FOR DENYING THE PETITION

I. THE FIRST STATUTORY QUESTION IS UNWORTHY OF REVIEW

A. No Circuit Split Exists on the Issue of the Department's Authority to Adjudicate Affirmative Borrower Defense Claims

In deciding the propriety of preliminary relief, the Fifth Circuit determined that the Rule's recognition of and power to adjudicate affirmative borrower defense claims "likely violates the limits placed on the Department in Section 455h," App. 38a, and that CCST was also "substantial likely to prevail" on the question of the Department's authority to adjudicate such claims, App. 44a.

No other court of appeals has analyzed whether the HEA grants the Department the power to adjudicate affirmative borrower defense claims and grant complete loan discharge prior to default, let alone conclude that it does. For this reason alone, Petitioner's first statutory question is unworthy of the Court's review. *See* S. Ct. R. 10.

B. This Case is a Poor Vehicle for Addressing the Meaning of Section 455(h).

Review is also unwarranted because this Court will not definitively decide the meaning of Section 455(h); like the Fifth Circuit, it would only decide whether CCST was likely to prevail in its statutory

challenge. While the Court may sometimes decide such preliminary questions in order to restore a rule, this Court cannot even accomplish that result here. The Petition seeks review of only one of the nine reasons that the court of appeals declared the Rule as likely unlawful, *see supra* at pp.11-13, and so this Court's review will not lead to restoration of the Rule pending final judgment.

Most critically, the Department has not sought review of the Fifth Circuit's alternative ruling (1) that borrower defense claims require a waiver of sovereign immunity, and (2) that there is no such waiver here. App. 45a-46a n.18. It is not enough for the Government to argue that Section 455(h) is best read to permit affirmative claims; it must show that the statutory text clearly and unequivocally waives sovereign immunity against those claims. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 37 (1992); *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760-61 (2002) (administrative adjudication subject to sovereign immunity). Furthermore, Congress must clearly and unequivocally designate the forum that may adjudicate claims against it, *Minnesota v. United States*, 305 U.S. 382, 389 (1939), which it has not done here. The Fifth Circuit's sovereign-immunity ruling independently forecloses the Department's adjudication of borrower-defense claims. The Department's failure to seek review of that ruling is fatal to the first question presented.

The Department insists that it will battle in "additional proceedings in the district court before final judgment" and in a second appeal to overcome the Fifth Circuit's other rulings. Pet. 15 & n.2. But those rulings were comprehensive and carefully reasoned,

and the district court is highly unlikely to depart from them. And if indeed the Department were to continue the fight through final judgment and a second appeal, this Court should wait until then to review the Section 455(h) question and decide it definitively, if it believes review is merited.

With the election, however, that is improbable. The first Trump Administration did not defend the 2016 rule, and instituted a far narrower borrower-defense rule. *See supra* at pp. 6-7. The incoming administration is unlikely to defend the far more aggressive current Rule, and may withdraw it during the pendency of any review by this Court. Moreover, the President-elect is committed to seeking legislative abolition or restructuring of the Department. *See* Katie Lobosco, *What's At Stake for Student Loan Borrowers During the next Trump Administration* (CNN, Nov. 24, 2024), https://www.cnn.com/2024/11/24/politics/student-loan-forgiveness-trump/index.html. The question may become moot or may be addressed legislatively. Furthermore, nothing in the Fifth Circuit's preliminary ruling prevents the incoming administration from promulgating a new rule providing for agency adjudication, if it believes it has such authority. *Cf. United States v. Mendoza*, 464 U.S. 154, 158 (1984) (offensive nonmutual collateral estoppel does not lie against the government). If the Department does promulgate such a new rule, the Court cannot review the Section 455(h) question in challenges to that rule. It does not merit the Court's time to review a rule that is likely to be terminated or replaced during the pendency of this case.

C. Section 455(h) of the Act Does Not Authorize the Department to Create a New Adjudicatory Process for Affirmative Claims

While the foregoing reasons are sufficient to deny review, the Department also fails to offer a plausible textual basis for claiming the power to adjudicate so-called "borrower defense claims" administratively.

1. Section 455(h) is limited in scope and plain in meaning. It provides that "the Secretary *shall specify in regulations* which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of" a Direct Loan. 20 U.S.C. § 1087e(h) (emphasis added). The Department fails in its attempt to recast this narrow *rulemaking* authorization to specify defenses in regulations into an authorization to conduct administrative *adjudication* of claims.

The Department skips past the limitation authorizing it only to "specify" certain defenses in regulations, and focuses primarily on the statutory term "defense to repayment." It argues that defenses can exist prior to any contract-enforcement action. *See* Pet. 17. But, as the court of appeals observed, the term "'defense' … has a well-established common-law meaning" that Congress is presumed to incorporate: namely, grounds asserted "to diminish plaintiff's cause of action or defeat recovery," and a "matter pleaded by a defendant in an action." App. 31a-32a (quoting Black's Law Dictionary (6th ed. 1990) and Ballentine's Law Dictionary (3d. ed. 1969)). Regardless, the statute empowers the Secretary only to define what school conduct a borrower "may *assert* as a defense." 20 U.S.C. § 1087e(h) (emphasis added). Asserting a defense is the

opposite of asserting a claim. While a defense may exist beforehand, a party can only assert a defense if an offensive action has been commenced. Congress routinely distinguishes between the assertion of claims and defenses. App. 32a; 15 U.S.C. § 1641(d)(1) ("[a]ny person who purchases or is otherwise assigned a mortgage . . . shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert …"); *id.* § 1666i(b) ("[t]he amount of claims or defenses asserted by the cardholder . . . "). Here, it authorized only regulations governing the latter.

The Department likens borrower-discharge claims to claims of "restitution" or "rescission" against the Government. 87 Fed. Reg. at 65,914. While the same act of fraud or misconduct can be the basis for a claim or a defense, when one brings an action for rescission or restitution, one is asserting a claim, not asserting a defense. Section 455(h), therefore, does not apply.

Constitutional principles militate against the Department's interpretation that it has the power to authorize claims against the Government. "'Only Congress may create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates.'" App. 37a-38a (quoting *Chamber of Commerce v. Dep't of Labor*, 885 F.3d 360, 384 (5th Cir. 2018)); "[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). And as discussed above, Congress has also not waived sovereign immunity. *See supra* at pp.15,

2. Even if Section 455(h) authorized the Department to specify oxymoronic borrower-defense "claims"

in regulations, nothing in the statute authorizes the Department to adjudicate them. Judicial fora are available for "any claim against the United States founded ... upon ... any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1); *see also id.* § 1346(a)(2). "Agencies have only those powers given to them by Congress," *West Virginia v. EPA*, 597 U.S. 697, 723 (2022), and it is Congress's prerogative to commit the adjudication of public rights to administrative agencies rather than courts, *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855). This Court "has repeatedly emphasized that 'when Congress meant to confer adjudicatory authority ... it did so explicitly and set forth the relevant procedures in considerable detail.'" App. 45a (quoting *Bank One Chi., N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 274 (1996) and *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 572-74 (1989)); *see also Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995).

As the court of appeals held, Section 455(h) does not authorize the Department to adjudicate borrower-discharge claims: its text "speaks only to the Secretary's power to promulgate *regulations*—not the power to *adjudicate* cases based on its regulations." App. 45a (emphasis in original). The power to make rules does not subsume the power to adjudicate violations of those rules. *RLC Indus. Co. v. Comm'r*, 58 F.3d 413, 417-18 (9th Cir. 1995). This Court has emphasized the distinction. It interpreted provisions of a banking act to authorize "rules regarding interbank losses and liability to be developed administratively," but found no statutory "suggest[ion] that Congress meant the Federal Reserve Board to function as both regulator and

adjudicator in interbank controversies." *BankOne*, 516 U.S. at 273. That reasoning applies *a fortiori* when the regulation expressly authorizes only the promulgation of regulations, and does not separately authorize adjudication of claims.

Furthermore, the Department's reading is contrary to Congress's practice in this area. When Congress intends to authorize the Department to "cancel" or "discharge" student loans, it does so expressly. App. 32a-33a; *see, e.g.*, 20 U.S.C. § 1078-11(a)(1)(A), (2)(B) (authorizing the Department to "*cancel* a qualified loan amount" for individuals employed full time "in an area of national need") (emphasis added); *id.* § 1087(a)(1) (authorizing Secretary to "*discharge* the borrower's liability" for death or disability) (emphasis added); *id.* § 1087(c)(1) (Secretary "shall *discharge* the borrower's liability" if unable to complete program because of school closure) (emphasis added); *id.* § 1087e(m)(1) (stating that the Department "shall *cancel* the balance of interest and principal due" for borrowers employed in a public service job) (emphasis added); *id.* § 1087j(b) (directing the Department to "*cancel*[] the obligation to repay a qualified loan amount" for teachers) (emphasis added). A grant of rulemaking power to specify defenses is a far cry from a grant of the power to discharge or cancel loans.

The Department argues that Congress would not have limited borrower defenses to post-default defenses, when "borrowers in conventional consumer-lending" have resort to declaratory judgments to avoid that predicament. Pet. 18. But a direct student loan is a government contract, and parties to government contracts are barred from seeking declaratory judgments

regarding contract obligations (or defenses to performance) precisely because the United States has not waived sovereign immunity for such actions. *See United States. v. King*, 395 U.S. 1, 4 (1969); *N. Star Alaska v. United States*, 9 F.3d 1430, 1432 (9th Cir. 1993) (en banc).

The Department for the first time in this litigation now contends that Section 432(a)(6) of the Act, 20 U.S.C. § 1082(a)(6) authorizes adjudication of Direct Loans borrower defense claims. Pet. 16, 21. That argument is waived, as it was neither raised to nor passed on by the court of appeals. And it is plainly wrong. Section 432(a)(6) provides that "[i]n the performance of, and with respect to, the functions, powers, and duties, *vested in him by this part*, the Secretary may … enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption." 20 U.S.C. § 1082(a)(6) (emphasis added). The "part" referenced is Part B, the Federal Family Education Loan ("FFEL") Program. There is no comparable provision granting similar powers in Part D, the Direct Loan program, and no provision incorporating the Part B powers into Part D. *See Pa. Higher Educ. Assistance Agency v. Perez*, 416 F. Supp. 3d 75, 96 (D. Conn. 2019) ("[W]hile there are provisions making clear that loans issued under Part D are subject to the same terms, conditions, and benefits as loans issued under Part B, 20 U.S.C. § 1087e; 20 U.S.C. § 1087a(b)(2), and that contractors with Section 1087f contracts must comply with certain requirements set out under Part B, 20 U.S.C. § 1087e(p), I have not found, and the parties have not cited, language incorporating into Part D the Secretary's 'general powers[]' … from Part D"); *but see Sweet v. Cardona*, 641 F. Supp. 3d 814, 823-24 (N.D.

Cal. 2022) (accepting under *Chevron* the Department's position that it can use Part B powers to settle Part D claims), *aff'd in part and appeal dismissed in part*, 121 F.4th 32 (9th Cir. 2024). Regardless, Section 432(a)(6) says nothing about the adjudication of claims—and certainly cannot justify the scheme here where a school is coerced to participate in an adjudication of borrower defenses, at pain of losing its own defense to liability, and the adjudicated discharge becomes *prima facie* evidence of the school's liability for the amount discharged. 34 C.F.R. §§ 685.405(d), 668.125(e)(2).[1]

If anything, this belated new statutory argument is further reason to deny the petition. *If* the new Administration issues a new BDR rule that relies on Section 432(a)(6) as the source of adjudicatory authority, and *if* someone challenges that assertion of authority and a court of appeals resolves an APA challenge on that basis, then the Court may decide whether to review the issue at that point in time.[2]

---

[1] The Department's attempts to rely on a 2020 statute exempting from the Pell Grant program's 12-semester cap any periods covered by a loan that is discharged because of a successful Section 455(h) defense. Pet. 21-22. But that exemption does not depend on whether a borrower defense is asserted as a defense or claim, or on whether discharge is granted in an independent collection proceeding, by a court, or under the Secretary's Borrower Defense to Repayment ("BDR") rules; it thus sheds no light on the question of meaning of Section 455(h).

[2] Because Section 455(h) does not authorize any adjudication of borrower defense claims, the Department cannot adjudicate group claims. It is curious that the Department asks this Court to pronounce on that question separately, Pet. 25, when it failed to seek review of the Fifth Circuit's ruling finding the group-process regulation likely invalid on alternative grounds, App. 50a-55a.

3. Unable to derive any authority from the statutory text, the Department touts administrative practice, arguing that the Fifth Circuit's interpretation runs afoul of thirty years of administrative practice. Pet. 16-17. An executive department cannot capture statutory authority by adverse possession, but the Department mischaracterizes the relevant history.

The Secretary's original contemporaneous interpretation of Section 655(h) in the 1994 Rule did not authorize the adjudication of borrower defense claims; instead, it limited the assertion of borrower defenses to repayment to independently authorized collection proceedings. It provided: "*In any proceeding to collect on a Direct Loan, the borrower may assert as a defense* against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law." 34 C.F.R. § 685.206(c) (1995) (emphasis added), promulgated in 59 Fed. Reg. at 61,696. The 1994 Rule further provided that "[t]hese proceedings include, but are not limited to" tax-refund-offset, wage-garnishment, salary-offset, and credit-bureau-reporting proceedings. *Id.* The 1994 Rule did not authorize the independent assertion of borrower defense claims. Nor did it authorize the Department to create any independent claims adjudication process. While reproducing the regulation in its statement of the case, Pet. 4-5, the Department fails in its argument to acknowledge the restrictions in the 1994 regulation that are devastating to its position.[3]

---

[3] Amicus (Br. 8-9) contends that in one type of what the Department designated "collection proceedings"—namely, credit bureau reporting proceedings—"pursuant to long-standing regulations,

The Department instead contends that pre-default claims to discharge student debt for institutional misconduct were a staple of the FFEL program that preceded the Direct Loan Program, and thus Congress must have intended for the Secretary to resolve such claims in the latter. Pet. 19. Significantly, the Department cites no FFEL regulation establishing such a claims process. Instead, it attempts to establish the point obliquely, by pointing to a 1992 statute directing the Department to study fraud-based defenses under FFEL and estimate the number of borrowers "'filing for relief from repayment of such loans using a fraud-based defense.'" Pet. 19 (quoting Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1403(a), 106 Stat. 817). That most naturally refers to the right of debtors to file for relief from the debt in collection proceedings. *See, e.g.,* 5 U.S.C. § 5514(a)(2)(d); 20 U.S.C. § 1095a(a)(5); 31 U.S.C. § 3720D(b)(5)(A). Indeed, the applicable regulations specifically provide that a debtor must "file a request for review" if she wishes to challenge the existence or amount of the debt in those proceedings (including through defenses that would negate the debt based on the acts or omissions of schools). 34 C.F.R. §§ 30.24(a)-(b), 30.33(d); *see also id.* § 682.410(b)(5)(ii)(C) & (vi)(I).

Furthermore, the Government's position is antithetical to the nature of the FFEL program, under which the federal government guarantees debt issued

---

the Department reports information to credit bureaus prior to default," citing 34 C.F.R. § 30.35. The regulation does not say that; it adopts the procedures of § 30.33, which requires that "the debt is past due," *id.* §§ 30.33(b)(1), 30.35. Regardless, the point remains that the borrower defense is asserted defensively in a credit bureau reporting proceeding commenced by the Secretary, not as an affirmative claim.

by private lenders. *See* 20 U.S.C. § 1071(a)(1); Department of Education, *What to Know About Family Education Loan FFEL Programs*, https://studentaid.gov/articles/what-to-know-about-ffel-loans/. The Department addressed FFEL borrower defenses when the borrower had defaulted on his repayment obligations and the loan guarantee was invoked; it would make no sense for the Department to institute a pre-default claim process. *See* Holly Johnson, *FFEL Program Student Loans: What They Are, How They Work* (Investopedia, July 24, 2024), https://www.investopedia.com/ffel-program-student-loans-8680194 (under FFEL, the U.S. government "agreed to take financial responsibility for student loan amounts not paid back").

The Department explained this clearly in a 1995 interpretation of its 1994 regulation. It noted that the 1994 regulation had recognized a defense "that a borrower may assert, in certain specified proceedings" (*i.e.*, collection proceedings). 60 Fed. Reg. at 37,769. It emphasized, contrary to the Department's current position that "the regulation does not provide a private right of action for a borrower and is not intended to create new Federal rights in this area." *Id.* Rather, the 1994 Rule simply extended to Direct Loan borrowers the right of FFEL borrowers to present defenses based on acts or omissions of the schools "during the collection process." *Id.* at 37,770 (citing the aforementioned collection regulations). Congress legislated against the backdrop of established rights of FFEL borrowers to assert defenses in collection proceedings based on a school's acts or omission. All Section 455(h) does is empower the Secretary to "specify in regulations" the defenses that a direct borrower may likewise assert in such proceedings. 20 U.S.C. § 1087e(h).

The Department points to a few isolated instances in intervening years when it granted relief to certain borrowers injured by their schools outside of collection proceedings. Pet. 5. But, as the court of appeals observed, "[t]hese involved highly unusual circumstances including unpaid refunds, litigation settlements, or factual stipulations in judgments that established a defense," where any attempt to collect the debt would have been futile. App. 34a. These scattered resolutions do not override the plain terms of the 1994 Rule.

Indeed, the Department admitted in 2016 that "[t]he current regulations for borrower defense do not provide a process for claims." 81 Fed. Reg. at 39,346. Faced with the 2015 Corinthian Schools bankruptcy, the Department reimagined the "rarely used" borrower-defense provisions, 87 Fed. Reg. at 65,979, to devise a multi-billion-dollar loan-forgiveness and liability-shifting regime. The major-questions doctrine forbids this maneuver. *See West Virginia*, 597 U.S. at 722-23. No matter the policy imperative, the Department must respect statutory limits. If the incoming administration agrees with the Department that administrative adjudication of borrower defense claims is necessary, Pet. 13-14, then its remedy lies with Congress.

II. THE COURT OF APPEALS PROPERLY POSTPONED THE EFFECTIVE DATE OF THE RULE, PURSUANT TO SECTION 705 OF THE APA, AND THERE IS NO CIRCUIT SPLIT ON THIS ISSUE

The absence of a conflict on the second statutory question presented—whether preliminary relief under Section 705 of the APA must be limited to the parties—

is reason enough to deny review on that point. But here, too, the Department's contentions on the merits fail.

The Department maintains that "[u]nder Article III, 'a plaintiff 's remedy must be limited to the inadequacy that produced his injury.'" Pet. 26 (quoting *Gill v. Whitford*, 585 U.S. 48, 66 (2018)) (cleaned up). But *Gill* never says that Article III commands relief limited to a party's injury; it simply applies a general principle of equity in the context of limiting relief from gerrymandering to the party's own district. *See Gill*, 585 U.S. at 66. This Court's case law abounds with examples of relief in Article III courts that is not limited to redress of the party's own injury. In *Swann v. Charlotte–Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the Court declared that "flexibility rather than rigidity has distinguished" equity jurisdiction, which is an instrument for the "adjustment and reconciliation between the public interest and private needs," and approved equitable relief to ensure that a school system guilty of racial discrimination "'convert to a unitary system in which racial discrimination would be eliminated root and branch.'" *Id.* at 15 (quoting *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 437-38 (1968)) (approving busing among other remedies). Indeed, this Court has approved injunctions in multiple contexts that extend far beyond party relief.[4]

There are many other examples in which this Court does not restrict relief to the redress of plaintiff-specific injury. For example, this Court may invalidate a statute generally if a facial challenge is brought, and not limit relief to preventing application to the specific

[4] *See, e.g., Brown v. Plata*, 563 U.S. 493 (2011) (prisons); *Hills v. Gautreaux*, 425 U.S. 284 (1976) (public housing).

party. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996); *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015) ("A facial challenge is an attack on a statute itself as opposed to a particular application."). Similarly, in First Amendment overbreadth challenges, a party can seek invalidation of a statute "with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (cleaned up). Under third-party standing doctrine, a plaintiff can seek to redress injuries to another person if the latter is closely related and hindered in asserting her own rights. *Powers v. Ohio*, 499 U.S. 400, 410-15 (1991). And, under civil rights, public accommodations, antitrust, environmental, and other laws, Congress authorizes an injured plaintiff to secure equitable relief "not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (public accommodations); *Perkins v. Matthews*, 400 U.S. 379, 395-96 (1971) (approving broad injunctive relief for election discrimination); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) ("Congress considered the charging party a 'private attorney general,' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself."); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) (injunctive remedies in private actions under the Clayton Act are "not merely to provide private relief, but … to serve as well the high purpose of enforcing the antitrust laws"); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15-17 (1981) (discussing citizen suits under the Federal Water Pollution

Control Act authorizing adversely affected private parties to seek broad injunctions as "private attorneys general").[5] The Department's cursory Article III arguments cannot be reconciled with precedent.

The only question is whether in Section 705, Congress has authorized a court to postpone the effective date of the regulation rather than grant party-restricted preliminary relief. Section 705 expressly authorizes such relief: "On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court … may issue all necessary and appropriate process *to postpone the effective date of an agency action* or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705 (emphasis added). Section 705 by its plain terms authorizes preliminary relief in the disjunctive. In addition to process to preserve "rights or status," Congress has also authorized preliminary relief against the agency action itself by delaying its effective date. Thus, just as relief in a facial challenge acts "on a statute itself", *see Patel*, 576 U.S. at 415, postponement of the effective date in a pre-enforcement challenge acts on the regulation itself. "[T]emporary relief from an administrative order—just like temporary relief from a court order—is considered a stay," and a stay "temporarily divest[s] an order of enforceability." *Nken v. Holder*, 556 U.S. 418, 428, 429, n.1 (2009).

---

[5] There is a long history of private party suits to vindicate public rights even before the founding, which belies any attempt to derive limitations on equitable relief from Article III. *See* N. Baronia et al., Private Enforcement at the Founding and Article II (last revised Oct. 24, 2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4821934.

This relief by its nature is not party-specific; a regulation has only a single effective date. "An APA stay issued under § 705 presumably has automatic, nationwide applicability," and does not create conflicting obligations like a nationwide injunction. Frank Chang, Note, The Administrative Procedure Act's Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions, 85 Geo. Wash. L. Rev. 1529, 1549-51 (2017). The fact that postponement of the regulation spares other regulated entities is not reason to curtail relief that Congress expressly authorized.

Section 705's broad authorization of relief makes sense because an APA plaintiff acts as a private attorney general vindicating the broader rights of other regulated entities and the public at large:

> [T]he fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate. … [W]e have used the phrase "private attorney general" to describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action.

Sierra Club v. Morton, 405 U.S. 727, 737-38 (1972) (footnote omitted); *see also Bennett v. Spear*, 520 U.S. 154, 165 (1997). In other words, an APA plaintiff must have suffered personal injury to commence the proceeding, but thereafter has "standing to assert the

rights of the public or of third persons once the proceeding is properly initiated." *Sierra Club*, 405 U.S. at 737 n.12.

The courts play an important role in ensuring that administrative agencies heed the limits that Congress has placed upon them. "If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 10 (1942). Precisely because the APA authorizes suits to vindicate the public interest, its "'generous review provisions' must be given a 'hospitable' interpretation." *Abbot Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)). It would defeat the APA plaintiff's role as a private attorney general if a plaintiff could only secure relief, including preliminary relief, from its own injury. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156 (1970) (construing the APA "not grudgingly but as serving a broadly remedial purpose").

The Department accordingly misconstrues the provision of Section of 705 authorizing relief "to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705. That is simply the familiar requirement that a plaintiff show irreparable injury to secure preliminary relief, and the Department does not contest the Fifth Circuit's findings that CCST demonstrated three types of irreparable injury. App. 19a-28a. Moreover, CCST is entitled "to assert the rights of the public or of third persons once the proceeding is properly initiated." *Sierra Club*, 405 U.S. at 737 n. 12. All of the irreparable

injuries that the court of appeals found—compelled compliance and compliance costs, altered business opportunities, and subjection to costly and unlawful adjudications, App. 19a-28a—are common to all schools affected by the rule, and could not be averted except by postponement of the effective date. And as the Fifth Circuit declared; it did postpone the borrower-defense rule only to the extent necessary to prevent irreparable injury; it did not postpone any provisions of the rule that were not shown to cause irreparable injury by likely violations of the law. App. 63a-64a.

In its grudging interpretation of Section 705, the Department contends that stays of generally applicable regulations should never be granted (since generally it may be impossible to join all regulated entities in a single suit). Pet. 29. The Department correctly observes that "Section 705 provides for relief pending judicial review of any 'agency action,' which includes both orders and rules." Pet 29 (citing 5 U.S.C. § 551(8), (10), and (13)). The Department maintains that the effective date of an order might be postponed if it "affect[s] only one or several parties" to suit—but not broadly applicable executive orders or regulations. Pet. 29. The Department's construction is backwards. If Congress had intended only certain orders affecting few persons to be postponed, it would have so provided; by instead using the broader and unqualified term "agency action," Congress clearly intended courts to have the power to postpone the effective dates of regulations. *See* Administrative Procedure Act, S. Rep. No. 752, 79th Cong., 1st Sess. 213 (1945) ("While it would not permit a court to grant an initial license, it provides intermediate judicial relief *for every other situation* in order to make judicial review effective.") (em-

phasis added). Although Congress, in an era when orders were the prevalent form of agency action, may have anticipated that "normally" equitable relief would be "limited to the parties complainant," Pet. 28 (quoting S. Rep. No. 1980, 79th Cong., 2d Sess. 43 (1946)) it left that equitable determination to the courts. There is no basis for the categorical bar that the Department propounds.[6]

The Department's arguments from policy fare no better. It contends that the decision below "encourages forum shopping"; pretermits meaningful litigation of the rule in other suits; and allows a single plaintiff to derail nationwide policy. Pet. 27. Those arguments miss the mark. Forum shopping will occur regardless; APA plaintiffs will always seek what they deem to be the most favorable venue available to them. All the Department's position would do if adopted is cause an explosion of duplicative pre-enforcement litigations across the country and destroy uniformity in the application of federal law (with some regulated entities subject to the new rule while the legal challenges proceed, and some not).

---

[6] The Department inaccurately faults the court of appeals for suspending the effective date of the regulation after it was in effect. Pet. 28 n.3. CCST moved the district court for relief under section 705 almost 3 months before the Rule's effective date. The district court sat on the motion until hours before the rule went into effect, disregarding requests for an administrative stay of the effective date pending disposition of the motion, and acting only when CCST filed an All-Writs-Act motion for injunction in the court of appeals to preserve jurisdiction. The court of appeals granted an administrative stay limited to CCST members before the rule went into effect. The Fifth Circuit later granted full postponement without party restriction. Such a *nunc pro tunc* order is fully appropriate.

According to the Department, each of potentially thousands or tens of thousands of regulated entities must challenge the rule and prove its own irreparable injury in order to get a temporary reprieve from a rule that an Article III court has found likely to be unlawful. It would be utter chaos if every property owner affected by a wetlands regulation; every worker or employer affected by an OSHA regulation; every public company affected by an SEC regulation; every immigrant affected by an executive order on border enforcement; and every veteran affected by a VA regulation would have to take those steps. Furthermore, many APA challenges are brought by groups of state attorneys general, often aligned by partisan affiliation. *See Nebraska v. Biden*, 52 F.4th 1044, 1048 (8th Cir. 2022) (declining to limit preliminary injunction against federal student loan discharge plan to six plaintiff states) (per curiam), application to vacate injunction denied as moot sub nom. *Biden v. Nebraska*, 143 S. Ct. 2355 (2023). It would offend federal uniformity for a challenged regulation to be operative only in some states.

The Department suggests that class actions can be brought, Pet. 27—with the attendant high costs, difficulties, and delays of class certification disputes—but class actions have never been necessary in APA litigation precisely because Congress authorized any aggrieved person to be a private attorney general vindicating the public interest in lawful agency actions. Under the current venue laws where affected persons choose their forum for a pre-enforcement challenge to regulations, a system where the courts may postpone the effective date of a regulation upon a finding that the equitable factors are met is the only workable solution. *See Abbot Labs.*, 387 U.S. at 156 (courts will refuse to postpone the effective date of agency action if

"delay would be detrimental to the public health or safety"). Courts of appeals may police abuses of discretion by district courts, and this Court may police abuses of discretion by courts of appeals.

It should come as no surprise that no court has embraced the Department's position. This Court has stayed regulations without limiting relief to the parties. *See, e.g., See, e.g., Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 120 (2022) (per curiam) (staying OSHA vaccine mandate)*; West Virginia v. EPA,* 577 U.S. at 1126 (staying the EPA's Clean Power Plan)*; West Virginia v. EPA,* 597 U.S. at 715 (observing that the Court had "granted a stay" of the Clean Power Plan, thereby "preventing the rule from taking effect").

Indeed, as the court of appeals observed, postponing a rule's effective date makes sense because preliminary relief should align with permanent relief under the APA, and the typical relief in a pre-enforcement challenge to a regulation is vacatur, which operates on the rule as a whole. *See* 5 U.S.C. § 706(2) (authorizing reviewing court to "set aside" agency action, including regulations); App. 62a; *Corner Post, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 603 U.S. 799, 826-27 (2024) (Kavanaugh, J., concurring); Mila Sohoni, The Power to Vacate a Rule, 88 Geo. Wash. L. Rev. 1121, 1173 (2020) ("The term 'set aside' means invalidation—and an invalid rule may not be applied to anyone.") (footnote omitted). This Court commonly vacates the entire rule that it finds unlawful, rather than order party-restricted relief. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (affirming vacatur of regulation); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 n.18 (1979); *Kavanagh v. Noble*, 332 U.S. 535, 537 (1947) (describing regulation "held void" by

this Court). Accordingly, for consistency with Section 706, the proper interim relief under Section 705 against a rule that has found to be likely unlawful in a pre-enforcement challenge is to suspend its effective date.

CONCLUSION

The Department's petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN B. KINNAIRD
Counsel of Record
ALLYSON B. BAKER
MICHAEL MURRAY
SAMEER P. SHEIKH
PAUL HASTINGS LLP
2050 M Street, N.W.
Washington, DC 20036
(202) 551-1700
stephenkinnaird@paulhastings.com

Counsel for Respondent

December 12, 2024