UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK LEGAL ASSISTANCE GROUP, Plaintiff, v. ELISABETH DeVOS, in her official capacity as Secretary of Education, and UNITED STATES DEPARTMENT OF EDUCATION, Defendants.	No. 20 Civ. 1414 (LGS)

BRIEF OF *AMICUS CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, non-profit civil rights organization founded in 1963 at the request of President Kennedy to mobilize the private bar in securing equal justice for all through the rule of law, targeting in particular the injustices and inequities confronting Blacks[1] and other people of color. Among other goals, the Lawyers' Committee has a vested interest in ensuring that equal educational opportunities are available to students of all racial and ethnic backgrounds.

To advance this mission, the Lawyers' Committee challenges predatory and fraudulent practices that target communities of color and deny them the educational and professional opportunities necessary to achieve economic security. Of relevance here, the Lawyers' Committee participated as *amicus curiae* in *Bauer v. Department of Education* (No. 1:17-cv-01330-RDM, Dkt. 20-1 (D.D.C. Oct. 3, 2017)) and *Commonwealth of Massachusetts v. Department of Education* (No. 1:17-cv-01331-RDM, Dkt. 37-1 (D.D.C. Oct. 3, 2017)) to support challenges to the Education Department's repeated attempts to suspend the 2016 Borrower Defense Rule, submitting a brief that detailed how the delay would disproportionately harm on students of color. The Lawyers' Committee has also served as *amicus curiae* in several cases to defend policies designed to relieve students of debt caused by the deficient or deceptive practices of for-profit colleges or private loan servicers, including: *Nelson v. Great Lakes Educational Loan Services* (No. 18-1531, Dkt. 17 (7th Cir. Jul. 2, 2018)), *Martin Calvillo Manriquez v. DeVos* (No. 18-16375,

[1] Amicus uses the terms "Black" and "African American" interchangeably and the term "White" means White/Non-Hispanic. Amicus use the term "Hispanic" interchangeably with the gender-neutral term "Latinx." This Amicus generally focuses on the Rule's impact on Black and Latinx borrowers because of the significant data limitations with regard to disaggregating trends across different Asian American and Pacific Islander (AAPI) subgroups. Preliminary research indicates some AAPI subgroups, such as Native Hawaiians and Pacific Islanders, are just as likely as Black undergraduates to enroll in for-profit colleges, but more disaggregated research is needed in this area. *See, e.g.*, The Campaign for College Opportunity, *The State of Higher Education in California* 3, 12 (Sept. 2015), http://collegecampaign.org/wp-content/uploads/2015/09/2015-State-of-Higher-Education_AANHPI2.pdf.

Dkt. 25-2 (9th Cir. Oct. 10, 2018)), *Student Loan Servicing Alliance v. Taylor* (No. 1:18-cv-640, Dkt. 24 (D.D.C. Sep. 11, 2018)), and *Commonwealth of Pennsylvania v. Navient Corporation* (No. 19-2116, Doc. 3113333926 (3d. Cir. Aug. 29, 2019)). The Lawyers' Committee Lawyers' Committee submitted comments individually and jointly with other organizations in August 2018 opposing the Department of Education's then-proposed Borrower Defense Rule, which is the subject of this litigation.[2]

As a leading racial justice organization, the Lawyers' Committee respectfully submits this brief to provide background on the disproportionate impact of predatory for-profit institutions' practices on students of color, and detail the long-lasting harms that the 2019 Borrower Defense Rule poses to students of color—harms which the Department entirely ignored or failed to adequately address in violation of the Administrative Procedure Act.

INTRODUCTION AND SUMMARY OF ARGMENT

The 2016 Borrower Defense Rule[3] (the "2016 Rule") was promulgated in response to rampant fraud by for-profit institutions. It was replaced by the 2019 Borrower Defense Rule[4] (the "2019 Rule"), which, instead, seeks to protect fraudulent institutions and renders it far more difficult for student borrowers to obtain relief. This change in policy can be expected to have a demonstrable negative impact, particularly on Black students and other students of color.

Prior to the passing of the 2016 Rule, an investigation by the Senate Committee on Health,

[2] *See* Lawyers' Committee for Civil Rights Under Law Comments on ED-2018-OPE-0027-26266 (Aug. 30, 2018), https://www.regulations.gov/document?D=ED-2018-OPE-0027-26266; The Leadership Conference on Civil and Human Rights on ED-2018-OPE-0027-28068, https://www.regulations.gov/document?D=ED-2018-OPE-0027-28068 (coalition comments).

[3] 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 (Nov. 1, 2016) (the "2016 Rule").

[4] Education Department, Final Rule, Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49788 (Sept. 23, 2019) (the "2019 Rule").

Education, Labor, and Pensions ("Senate HELP") documented widespread misuse of federal funding within the for-profit education sector.[5] From 2011 to 2014, fifty-four lawsuits and investigations into fraudulent for-profit schools were initiated.[6] As one example, a California Superior Court found that Corinthian College, the most prominent offender among these for-profit schools,[7] had made false statements to students and investors regarding job placement rates, advertised nonexistent programs, made unlawful use of military seals in its advertising, inserted unlawful clauses into enrollment agreements, and engaged in unlawful debt collection practices, among other fraudulent conduct.[8] Such predatory tactics were also racialized, aggressively targeting low-income Black students and other communities already marginalized within our education system.[9] Students enrolled in such predatory programs—who were predominantly Black, Latinx, and low-income students—were left with overwhelming debt, weak career prospects, and valueless degrees or no degree at all.

To right these wrongs, the Department of Education ("Department") promulgated the 2016 Borrower Defense Rule, which strengthened procedural measures designed to ensure that defrauded borrowers received relief, curb fraudulent behavior through deterrence and accountability mechanisms, and increase administrative and economic efficiencies. The 2019 Borrower Defense Rule, however, reverses and rescinds vital protections established by the prior

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[5] U.S. Senate Health, Educ., Labor and Pensions Comm., 112th Cong., *For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*, 81 (July 30, 2012), https://www.help.senate.gov/imo/media/for_profit_report/Contents.pdf (hereinafter "Senate HELP")

[6] *See* NAT'L CONSUMER LAW CTR., ENSURING EDUCATIONAL INTEGRITY: 10 STEPS TO IMPROVE STATE OVERSIGHT OF SCHOOLS, 8 (June 2014), https://www.nclc.org/images/pdf/pr-reports/for-profit-report.pdf (hereinafter "NAT'L CONSUMER LAW CTR.").

[7] Student Assistance General Provisions, *supra* note 2, 81 Fed. Reg. at 75926.

[8] *People v. Heald College*, No. CGC-13-534793, 2015 WL 10854380 (Cal. Mar. 23, 2016).

[9] *See, e.g.,* Tressie McMillan Cottom, LOWER ED THE TROUBLING RISE OF FOR-PROFIT COLLEGES IN THE NEW ECONOMY, 256 (The New Press 2017); Patrick F. Linehan, *Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations*, 89 GEO. L.J. 753, 762 (2001) (hereinafter "Linehan"); *see* First Amended Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief, *California v. Corinthian*, ¶ 2 (Cal. Sup. Ct., Case No. CGC-13-534793, filed Feb. 19, 2014) *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/consumers/first-amendedcomplaint.pdf.

2016 Rule. The 2019 Rule works against congressional intent, and harms students by: (1) enacting heightened procedural hurdles for students to apply for and obtain relief from fraudulently incurred debt; (2) eliminating processes that streamline relief for students wronged by institutions; and (3) removing procedural protections that inform students of misconduct, hold schools accountable when misconduct occurs, and deter misconduct from occurring in the first place.

Under the Administrative Procedure Act ("APA") these changes are arbitrary and capricious because they reverse the agency's prior position without sufficient explanation, and run counter to the evidence before the agency. The Department's 2016 Rule rightly recognized that students and taxpayers alike would substantially benefit from a regulatory regime that expanded avenues for defrauded borrowers to obtain relief, paired with enhanced measures to hold fraudulent institutions accountable. In rolling back key provisions in the 2016 rule, the Department failed to account for the economic and social harm to borrowers and society of forgone loan discharges. In so doing, it ignored its own prior reasoning and abundant evidence throughout the rulemaking process showing the crippling consequences of debt acquired at predatory institutions, which follows students for the rest of their lives, severely limiting their educational opportunities and economic security.

Although the 2019 Rule is facially neutral with regard to race, its implementation will inflict disproportionate harms on low-income Black students and other underserved students of color, harms which the Department entirely ignored or failed to adequately address in violation of the Administrative Procedure Act. Section I, *infra*, details how Black and Latinx students are disproportionately affected by the predatory tactics and exploitative practices of for-profit institutions, as well as the resulting poor outcomes for students of these schools. Section II, *infra*, clarifies how the 2019 Rule's removal of protections and procedural mechanisms for borrowers,

and the higher burden set forth by the 2019 Rule for these borrowers to obtain relief, has harmful implications for Black and Latinx borrowers in particular. The consequences of such actions can be expected to lead to greater levels of financial insecurity and leave these borrowers especially vulnerable to carrying unfair debt. In sum, *amicus curiae* reveals how the 2019 Borrower Defense Rule creates a civil rights crisis that will exacerbate the already significant racial disparities in education, wealth, and economic mobility.

ARGUMENT

I. STUDENTS OF COLOR ARE DISPROPORTIONATELY HARMED BY FOR-PROFIT COLLEGES' ABUSIVE CONDUCT

While higher education can provide underserved students a pipeline to meaningful opportunity in college and in life, many for-profit institutions deliver the opposite result. Extensive research and investigations have exposed how many for-profit institutions seek financial gain by aggressively targeting the most vulnerable cohorts of students for enrollment, including low-income students of color.[10] Once students are enrolled, these for-profit institutions deceptively encourage them to take on oversized debt while failing to adequately prepare them for meaningful employment.[11] This predatory conduct has disastrous educational and economic outcomes for targeted students, including higher-than-average levels of debt and drop-out rates, but fewer meaningful job prospects.[12] By ignoring these severe consequences—and compounding them without adequate explanation or justification—the 2019 Rule falls far short of the APA's arbitrary and capricious standards. *See* Section II, *infra*.

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[10] *See, e.g.,* McMillan Cottom, *supra* note 8, at 256; Linehan, *supra* note 8, at 762; *see* First Amended Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief, *California v. Corinthian*, ¶ 2 (Cal. Sup. Ct., Case No. Case No. CGC-13-534793, filed Feb. 19, 2014) *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/consumers/first-amendedcomplaint.pdf.

[11] Leadership Conference on Civil & Human Rights, *Gainful Employment: A Civil Rights Perspective* 2 (Oct. 2019) http://civilrightsdocs.info/pdf/education/Gainful-Employment-Brief-Final.pdf (hereinafter "*Gainful Employment*").

[12] *Id.*

A. Students of Color are Overrepresented in For-Profit Institutions Due to Targeted and Predatory Recruiting.

Troublingly, research reveals that the predatory conduct of for-profit institutions has been racialized and has exacerbated existing racial disparities in educational outcomes and economic opportunity. Specifically, for-profit institutions "often target their predatory marketing efforts toward low-income and predominantly minority communities."[13] For example, one for-profit school directed an admissions officer to recruit as follows:

- Drive through large housing projects SLOWLY with door sign on. Best times are Friday afternoons and Sunday afternoons.
- Meet the managers of low-income and Government housing apartment. Give group presentations.
- [Provide] [c]ollege career days on black campuses. Food stamp offices-leave referral cards.
- Welfare office-leave referral cards.[14]

Unsurprisingly, the results of these predatory recruitment tactics are reflected in student demographics at for-profit institutions: 28 percent of Black students and 15 percent of Latinx students attending four-year programs enroll in for-profit institutions compared to just 10 percent of White students.[15] Similarly, a greater proportion of Black and Latinx students attend two-year for-profit institutions than White students.[16] And Black and Latinx students represent 51 percent of total students at for-profit colleges in general, but only 34 percent of all postsecondary

[13] Linehan, supra note 8, at 762.
[14] Hearings on Abuses in Federal Student Aid Programs Before the Permanent Subcomm. on Investigations of Senate Comm. on Gov't Affairs, 101st Cong. 64 (1990) (statement of David B. Buckley, Chief Investigator, Permanent Subcomm. on Investigations), quoted in Linehan, *supra* note 8, at 762-63.
[15] Peter Smith & Leslie Parrish, Center for Responsible Lending, *Do Students of Color Profit from For-Profit College? Poor Outcomes and High Debt Hamper Attendee' Futures, Center for Responsible Lending* 9 (Oct. 2014), http://www.responsiblelending.org/student-loans/research-policy/CRL-For-Profit-Univ-FINAL.pdf (hereinafter "Smith & Parish").
[16] *Id.*

enrollments.[17] As discussed below, the overrepresentation of students of color at these for-profit colleges means that students of color are exploited—with the United States government's knowledge—by for-profit institutions.

B. Students of Color Suffer Disproportionately From For-Profit Institutions' Excessive Tuition and Lack of Meaningful Educational or Employment Opportunities.

For-profit institutions often charge exorbitant tuition rates without investing in critical educational and support services. On average, the tuition costs of for-profit colleges are significantly higher than the tuition costs of in-state public and private two-year institutions.[18] After accounting for grants and scholarships, four-year for-profit colleges are also more expensive than private, non-profit four-year schools.[19]

However, data suggests that for-profit colleges divert far more funds into marketing and recruiting than to actual instruction, substantive educational achievement, or employment advancement.[20] In 2009, for-profit institutions spent one billion dollars *more* on marketing than on instruction.[21] A 2012 study found that "[f]or-profit institutions spend nearly one-quarter (23%) of their revenue on marketing and recruiting, while spending just 17% on actual instruction."[22] And for-profit colleges invest little in student support or career services, as evidenced by the low number of career placement staff hired to help students find employment.[23]

As a result, despite the costly toll of for-profit education, students of color are unlikely to experience positive educational and employment outcomes. Black and Latinx students attending

[17] *Gainful Employment*, *supra* note 11, at 2.
[18] *Id*. at 10.
[19] *Id*.
[20] Senate HELP, *supra* note 4, at 81.
[21] *Id*. at 3, 6.
[22] Smith & Parrish, *supra* note 15, at 7.
[23] Senate HELP, *supra* note 4, at 96-98.

for-profit colleges are far less likely to graduate than their peers at non-profit schools. In a study based on 2017-2018 data, only 13 percent of Black students and 26 percent of Latinx students at for-profit institutions obtained Bachelor's degrees within six years (meaning approximately nine in ten Black students and nearly three in four Latinx students did not complete for-profit programs).[24] By comparison, 41 percent of Black students and 54 percent of Latinx students did not graduate at less costly, public universities.[25] Even if students of color attending for-profit colleges graduate, they are more likely to face challenges obtaining gainful employment[26] and to experience slower wage growth if they find employment[27] because, in many cases, employers believe that for-profit schools do not provide adequate training and preparation.[28]

For-profit institutions, therefore, often harm their students simply by enrolling them.[29] Indeed, one 2016 study found those who graduate from a for-profit college do worse in the labor market than they otherwise would with only a high school education,[30] even though such for-profit programs charge high costs.[31] The lack of potential (and actual) gainful employment, the high amount of student loan debt acquired from attending a for-profit institution, and the lack of any true market value of a for-profit degree pose grave dangers to all students, but especially to students of color disproportionately represented at for-profit schools.

II. THE 2019 RULE ENACTS ARBITRARY AND CAPRICIOUS CHANGES, WHICH FAIL TO ACCOUNT FOR THE LOST BENEFITS AND SEVERE HARMS

[24] *Gainful Employment*, *supra* note 11, at 5; *see also* Smith & Parrish, *supra* note 15, at 22.
[25] *Id*.
[26] Smith & Parrish, *supra* note 15, at 20.
[27] *Gainful Employment*, *supra* note 11, at 4
[28] Letter from fourteen state Attorneys General to Sen. Richard J. Durbin & Rep. Elijah E. Cummings, 2 (Sept. 9, 2014), http://ag.ky.gov/pdf_news/s2204-letter.pdf.
[29] *Id*.
[30] Stephanie Riegg Cellini & Nicholas Turner, *Gainfully Employed? Assessing the Employment Earnings of For-Profit College Students Using Administrative Data*, NBER Working Paper No. 22287 (May 2016, Rev. Jan. 2018), https://predatorystudentlending.org/wp-content/uploads/2018/03/2016_-_NBER_-_worse_off.pdf.
[31] *Gainful Employment*, *supra* note 15, at 2, 7 (reflecting for-profit colleges cost much more than public colleges – and more than twice as much as public two-year colleges).

IMPOSED ON STUDENTS, PARTICULARLY STUDENTS OF COLOR AND THEIR COMMUNITIES

Under the APA, the Court must "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). Agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [made a decision that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The 2019 Rule reverses and rescinds key provisions of the 2016 Rule, which were designed to curb for-profit institutions' abusive conduct by providing meaningful redress to defrauded students and by discouraging such misconduct in the first instance. The promulgated changes harm students in the following three ways. First, the 2019 Rule enacts heightened procedural hurdles when applying for, and endeavoring to obtain relief from, fraudulently incurred debt, which will be nearly impossible for students to meet. While the 2016 Rule created a streamlined and accessible process for identifying valid claims,[32] the 2019 Rule removes entirely certain grounds for relief[33] and significantly raises the bar for remaining avenues of relief. More specifically, the 2019 Rule places the burden on the defrauded borrower to produce evidence of

[32] Borrowers could defend against repayment of loans by showing: (i) a substantial misrepresentation—including a false or misleading statement on which the borrower relied; (ii) a breach of contract; or (iii) a favorable non-default judgment against the institution. *See* Student Assistance General Provisions, *supra* note 2, 81 Fed. Reg. 75926. *Id.* at 76083.

[33] Judgments against a school for misconduct are no longer sufficient grounds for a borrower to receive a discharge. Complaint, *New York Legal Assistance Group v. Devos*, No. 20-CV-01414, at 26-29 (S.D.N.Y. February 19, 2020).

the institution's intent to mislead or its reckless disregard for a borrower.[34] These standards are—as numerous commentators noted—virtually insurmountable for most borrowers given the informational asymmetry between students and institutions.[35] These challenges are compounded by imposing a three-year statute of limitations on both affirmative and defensive claims.[36] Such curtailments and obstacles virtually guarantee that countless students who have been wronged by institutions will miss out on entitled relief.[37]

Second, the 2019 Rule eliminates processes that streamlined relief for students wronged by institutions. Such changes include eliminating group discharge provisions, which previously allowed the Department to proactively identify eligible groups of borrowers from individually filed applications *or* from any other source of information.[38] If common facts and claims applied, the Department could then award relief to *all* eligible borrowers, not just to those who applied.[39] As the 2016 Rule noted, group discharges furthered the Department's dual goals of ensuring defrauded students received much-needed relief while also "conserv[ing] the Department's administrative resources."[40]

Another change stymying relief is the 2019 Rule's elimination of automatic discharges for students whose schools abruptly close and who do not enroll in another Title IV-eligible institution within three-years.[41] This rescission removes a path towards relief for students saddled with debt

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[34] *Id.*
[35] *See, e.g.*, Lawyers' Committee Comments (26266) at 6; Legal Aid Cmty. Comments (29073) at 32, 41–42; Public Citizen Comments (27568) at 23–24.
[36] *See, e.g.,* California Attorney General Coalition Comments (26408) at 10;
[37] *Id.*
[38] Student Assistance General Provisions, *supra* note 2, 81 Fed. Reg. at 76084.
[39] *Id*.
[40] Student Assistance General Provisions, *supra* note 2, 81 Fed. Reg. at 75965; *see also* New York State Higher Education Services Corporation Comments (28506) at 1; American Association for Justice Comments (24647) at 5.
[41] 84 Fed. Reg. at 49847.

who, post-closure, may be unable to complete their degree due to various barriers associated with participating in a "teach-out"[42] or other educational opportunities. As commentators noted, such barriers may include limited transportation, lack of Internet access, or scheduling constraints due to childcare or work obligations.[43]

Third, the 2019 Rule removes procedural protections, which inform students of institutional misconduct and anticipated closures, hold schools accountable when misconduct occurs, and deter misconduct from occurring in the first place. Such changes include eliminating protections against forced arbitration and class action bans;[44] eliminating mandatory disclosure requirements for schools that were in financially precarious situations, had poor records of student success, or were closing;[45] and eliminating financial responsibility provisions, which helped ensure schools were insured against future borrower claims.[46]

These changes have the cumulative effect of substantially reducing relief for student borrowers. The Department openly acknowledges this fact. Its 2019 Rule notes student-loan discharges will drop by roughly $500 million annually.[47] Such changes will also substantially weaken deterrence mechanisms by reducing the information provided to students and removing the threats of class actions, mandatory disclosures, and posting letters of credit when there are indications of misconduct. This lesser deterrent effect is reflected, in part, by the Department's acknowledgement that the 2019 Rule will drastically reduce the percentage of discharged loans

[42] The 2019 Rule states closing institutions may offer a "teach-out" plan which provides enrolled students with *alternative* educational programs to complete their degree. 84 Fed. Reg. at 49846. Teach out plans may be offered by either the closing institution or from a teach-out partner. *Id.*
[43] *See. e.g.,* Lawyers' Committee for Civil Rights Under Law Comments (26266) at 9; Legal Aid Community Comments (29073) at 67-69; National Student Legal Defense Network Comments (31574) at 2.
[44] 84 Fed. Reg. at 49840-1.
[45] 84 Fed. Reg. at 49876, 84 Fed. Reg. at 49847.
[46] Complaint, *New York Legal Assistance Group v. Devos*, No. 20-CV-01414, at 26-29 (S.D.N.Y. February 19, 2020).
[47] 84 Fed. Reg. at 49888.

recouped from culpable institutions[48] and will save the industry roughly $150 million annually in discharge reimbursements.[49]

The 2019 Rule's drastic cuts to borrower relief and removal of critical safeguards are arbitrary and capricious because, among other reasons, the Department failed to account for its prior position that the 2016 Rule's more streamlined, accessible process for relief resulted in widespread benefits for defrauded borrowers while also deterring misconduct. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2008) (explaining when an agency reverses its prior position, it must acknowledge that it is changing positions and "show that there are good reasons for the new policy."). More specifically, the Department: (1) failed to acknowledge the harm that the 2019 Rule will cause to students and their communities, including its decision to ignore the crushing consequences of student debt itself; (2) failed to account for the 2016 Rule's well-supported conclusion that debt relief for defrauded borrowers carries "significant positive consequences for affected borrowers" who can become "bigger participants in the economy," spurring "associated spillover economic benefits"; and (3) failed to meaningfully consider the increased burden on students imposed by the heightened procedural hurdles and the rescission of group-relief processes. The explanations that the Department did offer for rescinding the 2016 Rule's key protections for students—such as so-called "frivolous" claims by borrowers and "unscrupulous third parties" gaming the system—do not find credible support in the record and, in any case, do not provide a reasoned basis for eliminating the 2016 Rule's provisions, as further discussed in Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary

[48] *Id*. at 49894
[49] *Id*. at 49899 tbl.5.

Judgment.[50] Instead, the Department's justifications, and its unsupported skepticism of students, expose the Department's true allegiance to industry actors at the expense of defrauded students.

As detailed below, the lost benefits and substantial harms of the 2019 Rule disproportionately fall on low-income students of color.

A. The 2019 Rule's Arbitrary and Capricious Reduction in Relief Awarded to Defrauded Borrowers Disproportionately and Acutely Harms Students of Color Due to Widespread Racial Disparities in Educational and Economic Opportunities.

The drastic cuts to relief under the 2019 Rule—approximately $500 million annually by the Department's own account—carries disproportionate harms for students of color due to several compounding factors. In addition to being overrepresented at predatory for-profit colleges, *supra* Section I, Black and Latinx borrowers face a myriad of barriers that make the crippling consequences of fraudulently incurred debt even more acute.

Research shows that students of color face more barriers to repaying their student debt than other groups. For generations, government-sanctioned policies have kept Black families from accumulating wealth through practices such as redlining, restrictive covenants, lending discrimination, and encouragement of neighborhood segregation.[51] Starting from early childhood,

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[50] *See* Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, *New York Legal Assistance Group v. Devos*, No. 20-CV-01414, Dkt. 39, at 17-34 (S.D.N.Y. June 29, 2020) (detailing the Department's stated reasons for rescinding the 2016 Rule and how these reasons are inconsistent with the record, replete with illogical, unsupported, and conclusory statements, and fail to include meaningful justification for its departures from both the policy and factual determinations contained in the 2016 Rule).

[51] *See, e.g.,* Amy Traub, Laura Sullivan, Tatjana Meschede, and Tom Shapiro, *The Asset Value of Whiteness: Understanding the Racial Wealth Gap* (2017), Demos, http://www.demos.org/publication/asset-value-whitenessunderstanding-racial-wealth-gap; Katie Nodjimbadem, *The Racial Segregation of American Cities Was Anything But Accidental* (2017); Smithsonian.com, https://www.smithsonianmag.com/history/how-federal-governmentintentionally-racially-segregated-american-cities-180963494/. These racial inequities in wealth persist today and have worsened in recent decades. A recent study noted that between 1983 and 2013, the median African-American household wealth declined from $6,800 to $1,700 and the median Latino household wealth declined from $4,000 to $2,000, while the median White household wealth increased from $102,000 to $116,800. Asante-Muhammad, D., Collins, C., Hoxie, J., & Nieves, E., *The road to zero wealth: How the racial wealth divide is hollowing out America's middle class* (September 2017), Institute of Policy Studies, https://ips-dc.org/wp-content/uploads/2017/09/The-Road-to-Zero-Wealth_FINAL.pdf.

students of color are more likely to be affected by exposure to high levels of poverty and violence, the effects of "toxic stress," and inadequate housing and transportation.[52] Students of color are also more likely to attend schools that lack adequate funding, which means larger class sizes, less challenging curriculums, and lower qualified teachers.[53] And there is a greater likelihood of disciplinary action for Black and Latinx students than for White students.[54]

Due, in part, to these factors, White families on average have seven times the wealth of Black families and five times the wealth of Latinx families.[55] It is estimated that Black households will need *228 years* to acquire the amount of wealth that the average White household possesses today.[56] With less wealth than their White peers, Black students are more likely than other racial groups to borrow, and to borrow more, for their education.[57] In fact, the average Black student graduates with about $7,400 more student loan debt than their White peers.[58] Moreover, additional barriers widen this gap post-graduation.[59] Once in the workforce, graduates of color have lower wages than their White peers, even when controlling for education level.[60]

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[52] Annie E. Casey Found., *Race for Results: Building a Path to Opportunity for All Children, Kids Count Policy Report*, 3 (2014), http://www.aecf.org/m/resourcedoc/AECF-RaceforResults-2014.pdf (hereinafter "Casey Found").

[53] Linda Darling-Hammond, *Unequal Opportunity: Race and Education,* BROOKINGS (Mar. 1, 1998), https://www.brookings.edu/articles/unequal-opportunity-race-and-education/.

[54] Casey Found., *supra* note 52, at 4.

[55] Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 St. Louis U. L.J. 419, 421 (2018).

[56] *Id.*

[57] Mark Huelsman, The Debt Divide: The Racial and Class Bias Behind the "New Normal" of Student Borrowing (2015), Demos, *available at* http://www.demos.org/publication/debt-divide-racial-and-class-bias-behind-new-normal-student-borrowing.

[58] Scott-Clayton, J. & Li, J, Black-white disparity in student loan debt more than triples after graduation (October 2016), BROOKINGS, *available at* https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-thantriples-after-graduation/.

[59] *Id*. at 37 (detailing how, four years after graduation, the debt disparity triples).

[60] Bureau of Labor Statistics data shows that median weekly earnings for Latinx students with a Bachelor's degree are only 83 percent of what Whites earn. For African-American Bachelor's degree holders, their weekly median earnings are only 79 percent of what Whites earn. Bureau of Labor Statistics, Median weekly earnings by educational attainment in 2014 (published 2015), *available at* https://www.bls.gov/opub/ted/2015/median-weekly-earnings-by-education-gender-race-and-ethnicity-in-2014.htm.

Black and Latinx students burdened with a combination of debt and a worthless degree face a steep uphill battle.[61] In fact, nearly 50 percent of Black borrowers default on their student loans within a 12-year period, and amongst Black students who drop out of for-profit schools, 75 percent default on their loans within 12 years.[62] And the default itself often causes devastating consequences for already financially distressed Black borrowers, as well as their families.[63] Borrowers who default are ineligible for further federal student aid, preventing them from getting a second chance at an education.[64] In short, Black and Latinx students will continue to bear the harms committed by for-profit institutions more than White students for the rest of their lives. Accordingly, if the 2019 Rule stands, people of color will suffer immediate, disproportionate financial harm.

B. The 2019 Rule's Arbitrary and Capricious Disregard of the Benefits of Debt Relief Disproportionately Forecloses Future Opportunity for Economic Mobility for Students of Color.

The Department's 2016 Rule noted that increasing the availability of discharges would allow borrowers "to become bigger participants in the economy, possibly buying a home, saving for retirement, or paying for other expenses," benefitting not just the individual borrowers, but the larger economy.[65] In the 2019 Rule, the Department never accounted for or addressed these "spillover economic benefits,"[66] nor did it account for the corresponding loss of such benefits under the 2019 Rule's substantial cuts to relief. Its silence on these issues falls far short of the "reasoned explanation" required under the Administrative Procedure Act. *Fox,* 556 U.S. at 515-

[61] California Attorney General Coalition Comments (26408) at 12.
[62] National Urban League Comments (26554) at 1 (citing Paul Fain, *Default Crisis for Black Student Borrowers*, INSIDE HIGHER ED, (October 17, 2017), https://www.insidehighered.com/news/2017/10/17/half-black-student-loan-borrowers-default-new-federal-data-show/).
[63] Legal Aid Community Comments (29073) at 7.
[64] *Id*.
[65] Student Assistance General Provisions, *supra* note 2, 81 Fed. Reg. at 76051.
[66] *Id*.

516; *see also Make the Road N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647, 661 (S.D.N.Y. 2019) ("'a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.'") (quoting *Fox,* 556 U.S. at 516).

These lost benefits disproportionately fall on Black and Latinx communities who will be foreclosed from capitalizing on opportunities for economic mobility that would otherwise be available under the 2016 Rule. As discussed above and noted by comments in the record, Black and Latinx students are more likely to borrow and to borrow more than White peers.[67] The monetary resources allocated to loan repayment impact individuals' ability to make short-term savings and long-term investments, as well as the option to pursue further education and save for homeownership.[68] The reduction in debt forgiveness resulting from the 2019 Rule renders it almost impossible for students of color to accumulate wealth.[69] Difficulty paying student debt may lower credit scores and impact borrowers' abilities to finance further education or obtain gainful employment.[70] Student debt can also impede the ability of recent college graduates, especially those with negative credit history, to qualify for a mortgage and become homeowners.[71]

Indeed, statistics relating to home ownership are also indicative of racial disparity and are similarly affected by the denial of debt forgiveness. Property ownership has long been a common

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[67] Caroline Ratcliffe & Signe-Mary McKernan, Forever in Your Debt – Who Has Student Loan Debt, and Who's Worried? (2013), Urban Institute, *available at* https://www.urban.org/sites/default/files/publication/23736/412849-Forever-in-Your-Debt-Who-Has-Student-Loan-Debt-and-Who-s-Worried-.PDF; Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers* (2017), Center for American Progress, https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/ new-federal-data-show-student-loan-crisis-african-american-borrowers/. *See* Huelsman, *supra* note 57; National Urban League Comments (26554) at 2; NAACP Legal Defense and Educational Fund Comments (25363) at 4.

[68] Tom Allison, *Financial Health of Young America: Measuring Declines between Baby Boomers & Millennials* (2017), Young Invincibles, *available at* http://younginvincibles.org/wp-content/uploads/2017/01/FHYA-Final2017-1.pdf.

[69] Rohit Chopra, *Student Debt Domino Effect?*, Consumer Financial Protection Bureau, (May 9, 2013), *available at* https://www.consumerfinance.gov/about-us/blog/student-debt-domino-effect/.

[70] *Gainful Employment*, *supra* note 17, at 18.

[71] Chopra, *supra* note 69.

way for Americans to build wealth: a down payment on a home early in one's life often results in paying off a mortgage earlier and saving for retirement longer.[72] However, home-ownership rates of Black and Latinx households lag dramatically behind that of White households.[73] Years of discriminatory housing and lending policies, including the subprime mortgage lending crisis, have contributed to wide disparity in those able to own a home. Today, 41 percent of Black households own their homes, compared to 71 percent of White households.[74] The disparity in home ownership is significantly exacerbated when student debt is a factor. According to the Pew Research Center and Rutgers University, 25 to 40 percent of borrowers report postponing major purchases such as homes and cars.[75]

The 2019 Rule not only creates the immediate problem of unforgiven debt, it impacts in multiple ways any opportunity for economic mobility in the future. In other words, the 2019 Rule perpetuates a vicious cycle of racial wealth disparity, the very cycle students sought to escape by furthering their education.

C. The 2019 Rule's Arbitrary and Capricious Erection of Onerous Procedural Hurdles and Rescission of Procedural Safeguards Impairs the Ability of Students of Color to Access Courts and Obtain Relief.

As described above, the 2019 Rule creates high procedural standards which necessitate Herculean efforts from indebted borrowers to apply for and obtain entitled relief. In addition, it removes critical procedural safeguards such as the 2016 Rule's ban on forced arbitration clauses

[72] Sarah Holder, How Student Loans Are Killing Homeownership (2018), Citylab, *available at* https://www.citylab.com/equity/2018/01/student-loans-are-killing-homeownership/551300/.
[73] Gillian B. White, Why African-Americans and Hispanics Have Such Expensive Mortgages (2016), The Atlantic, *available at* https://www.theatlantic.com/business/archive/2016/02/blacks-hispanics-mortgages/471024/.
[74] Dedrick Asante-Muhammad, Chuck Collins, Josh Hoxie, and Emanuel Nieves, The Ever-Growing Gap: Without Change, African-American and Latino Families Won't Match White Wealth for Centuries (2016), CFED and the Institute for Policy Studies, *available at* https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED_IPS-Final-2.pdf.
[75] Virginia Myers, The high cost of living with student debt (2015), On Campus, Vol.35, No. 1, *available at* https://www.aft.org/sites/default/files/periodicals/oc_fall2015.pdf.

and class action waivers. In so doing, it deprives the Department of Education of tools that would expand relief to eligible borrowers and expose the most fraudulent institutions.[76] These procedural barriers are particularly harmful to students of color who are less likely to bring civil litigation and who lack access to courts and legal counsel. A 2016 study on the racial differences in access to civil justice[77] concluded that "black respondents . . . were less likely than White respondents to have sought, or considered seeking, legal help for their civil legal problems."[78] The study attributed this difference in part to racial differences in trust in institutions—of the respondents polled in the study, 75 percent of White respondents answered that they trusted the court system while only 22 percent of Black respondents answered the same.[79] According to the study, Black people's distrust of the judicial system stems from experiencing discriminatory treatment in the context of courts and/or law enforcement, as well as broader institutional discrimination.[80] In other words, Black students face significant societal obstacles to bringing any civil suit.

Distrust of the judicial system affects the likelihood that Black students will bring a borrower defense claim against for-profit institutions. While the 2016 Rule sought, in part, to pave the road for defrauded borrowers to discharge their debt more easily,[81] the 2019 Rule leaves borrowers at a disadvantage in their claims against predatory for-profit institutions because, as discussed above, claims must be affirmatively raised and borrowers must meet a higher burden.[82]

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[76] New York State Higher Education Services Corporation Comments (28506).

[77] Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1322 (2016). The study was analyzed a sample data set obtained by interviewing 97 individuals who lived in a public housing complex in Cambridge, Massachusetts. The sample data set was controlled for socioeconomic background—all those interviewed lived below 80 percent of the area median income and also removed any convicted felons from the data set, in other words, removing those who had serious encounters with the criminal justice system. *Id.* at 1283.

[78] *Id*. at 1268.

[79] *Id.* at 1301-02.

[80] *Id.* at 1266-67, 1278.

[81] *See* Student Assistance General Provisions, *supra* note 2, 81 Fed. Reg. at 76080, 76083-86.

[82] National Student Legal Defense Network Comments (31574) at 1.

Students of color who distrust the court system will be most impacted by this barrier to initiating civil litigation.

Even when students of color do commence litigation against for-profit institutions, these students are often at a disadvantage because they are more likely to lack adequate resources for legal representation and therefore more likely to bring their claims as pro se litigants. Though there has been sparse research on the issue,[83] it is generally understood that "a substantial number of pro se litigants are minorities and women."[84] Importantly, a Second Circuit Task Force Report observed that "the majority of non-prisoner pro se cases are likely to be brought by women and minorities because they are disproportionately poor."[85] Similarly, a statistical analysis of employment discrimination actions in 2012 explained "that Blacks are 2.5 times more likely to file pro se than Whites."[86] Without representation, pro se litigants face significant hurdles including being "more likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim."[87] Students of color with pro se claims will face these hurdles disproportionately and will be left to struggle with the procedural and substantive laws that govern borrower defense cases.

Finally, even seemingly simple requirements such as returning a form attesting to eligibility may pose a high barrier for Black and Latinx borrowers who are disproportionately low-income.

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[83] *See, e.g.* Amy Myrick, et al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 758 (2012) (hereinafter "Myrick"); John H. Doyle et al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 117, 297-98 (1997) ("Although no clear statistical profile on the gender, race or ethnicity of the civil pro se litigants in the Second Circuit exists, it is highly probable that many of these litigants are minorities and/or women and that women and minorities are more prevalent litigants bringing pro se cases than in represented matters.").

[84] Doyle, *supra* note 83, at 343.

[85] *Id.* at 298.

[86] Myrick, *supra* note 83, at 758.

[87] Nina Ingwer Van Wormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 1020 (2007).

For example, those living below the poverty line are more likely to change addresses in a year.[88] As a result, they may not receive the mail that the Department sends notifying them of their rights to discharge. The persistent racial and economic "digital divide" means that email and web-based forms are similarly likely to miss many low-income borrowers who deserve relief.[89]

In these ways, the 2019 Rule limits the ability of students of color not only to have their day in court, but also ultimately to apply for and obtain relief, regardless of how widely acknowledged the wrongdoing of the relevant institution may be. The Department has failed to adequately explain its departure from the factual determinations and policy contained in the 2016 Rule which recognized the critical importance of expanding relief to defrauded borrowers and enhancing accountability measures to rein in fraudulent conduct by predatory institutions. Running contrary to the record and without a reasonable explanation, the 2019 Rule's rescission and revision of key procedural protections should be set aside as arbitrary and capricious. *Motor Vehicle Mfrs.,* 463 U.S. at 43 (983) (agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency"); *see also Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 79 (2d Cir. 2006) (a court's "review is particularly searching" where the agency is reversing course).

CONCLUSION

Students who enter programs of study with poor outcomes are burdened with crippling debt, few prospects for repayment, and limited opportunities. The 2019 Rule's removal of automatic and group discharges, enablement of for-profit institutions to arbitrate claims in forums

[88] *See* Robin Phinney, *Exploring Residential Mobility among Low-Income Families*, Social Service Review 87, No. 4, at 780, The University of Chicago Press (December 2013).
[89] Center for Responsible Lending Comments (28126) at 11.

less desirable to Black and Latinx students, and removal of critical safeguards and pathways to relief, creates nearly insurmountable barriers to debt relief for Black and Latinx students. Such changes are arbitrary and capricious, and compel setting aside the 2019 Rule. Black and Latinx students, a growing share of the future student population, have already waited too long for equal access to a high quality postsecondary education. If the 2019 Rule is not vacated, these institutions will continue to enroll and defraud Black and Latinx students at disproportionate rates, only to deliver a broken promise. For these reasons, Amicus respectfully urges the Court to grant Plaintiff's motion for summary judgment and vacate the 2019 Rule.

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Respectfully submitted,

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