15-832

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ANA SALAZAR, on behalf of herself and all others similarly situated, MARILYN MERCADO, on behalf of herself and all others similarly situated, ANA BERNARDEZ, on behalf of herself and all others similarly situated, JEANNETTE POOLE, on behalf of herself and all others similarly situated, LISA BRYANT, on behalf of herself and all others similarly situated, CHERRYLINE STEVENS, on behalf of herself and all others similarly situated, EDNA VILLATORO, on behalf of herself and all others similar situated,

Plaintiffs-Appellants,

v.

ARNE DUNCAN, in his official capacity as Secretary of the United States Department of Education,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs are former students of a now-defunct, and highly corrupt, chain of "beauty" schools run by Wilfred American Educational Corporation ("Wilfred"). For many years, Wilfred enriched itself by committing systemic fraud under a provision of the Higher Education Act ("HEA") that extended federal financial aid to students with the "ability to benefit" ("ATB") from postsecondary education. Over and over, Wilfred falsely certified to the U.S. Department of Education (the "Department") that its students—overwhelmingly vulnerable, unsophisticated individuals with limited English—had the ability to benefit from Wilfred's programs when they did not. As a result, the Department paid millions of dollars of federal aid directly to Wilfred, and the students were left not only with a meaningless education but with crushing debt obligations that should never have been imposed on them.

Congress has provided a remedy for students like Plaintiffs, directing the Department to discharge loans of "falsely certified" students and make them whole for payments they have made. Over many years and through a number of civil and criminal investigations, the Department accumulated overwhelming evidence that Wilfred's systemic "ATB fraud" entitled most of its students to these statutory discharges, and recommended that all ATB applications from Wilfred students be discharged.

Department regulations provide procedures for notifying potentially qualified borrowers of their discharge rights, and suspending collection of their loans to give them an opportunity to apply. But because the Department has never followed these procedures for Wilfred borrowers, the vast majority have no idea that they can seek discharge of their loans. Instead, the Department has continued aggressively to collect against these very same fraud victims—seizing their tax refunds year after year to satisfy the dischargeable debts, intercepting public benefits, and garnishing wages, among other tactics.

Plaintiffs petitioned the Secretary of the Department (the "Secretary") on behalf of these Wilfred students, requesting that the Department notify borrowers that they may qualify for discharges and suspend collection of their loans. The Secretary refused to take that action. Plaintiffs then brought this lawsuit to challenge that denial as arbitrary and capricious in violation of the Administrative Procedure Act ("APA").

The district court dismissed the case on the ground that, notwithstanding the APA's strong presumption of judicial review, Plaintiffs were not entitled to review of Defendant's action. Construing Plaintiffs' challenge to be solely to the Secretary's separate refusal of Plaintiffs' request to grant a "blanket" discharge of all Wilfred students' loans without individual applications—not to the Secretary's refusal to send notice and suspend collection—the court decided that Defendant's action was not "final" because it did not resolve any individual borrower's

discharge application. The court also held that because statutes and regulations did not explicitly compel the Secretary to take the actions Plaintiffs requested, his refusal to do so was completely unreviewable as "committed to agency discretion by law." These conclusions rested on an erroneous understanding of Plaintiffs' challenge and of the applicable law. Plaintiffs respectfully request that this Court vacate the district court's decision, and hold instead that Plaintiffs are entitled to have a court determine whether the Department's conduct was arbitrary and capricious.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because Plaintiffs' claims arise under the APA, 5 U.S.C. § 702.

Plaintiffs appeal from the district court's January 22, 2015 final judgment, and the underlying January 9, 2015 Opinion and Order, which granted Defendant's motion to dismiss and denied as moot Plaintiffs' motion for class certification. JA-260. On March 19, 2015, Plaintiffs timely filed a Notice of Appeal, and filed a corrected Notice of Appeal on March 20, 2015. JA-262–63. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Did the district court err by finding that Defendant's denial of Plaintiffs' request that the Department send notice to Wilfred borrowers of their potential qualification for statutory loan discharges and suspend collection on Wilfred borrowers' loans is not "final agency action" under 5 U.S.C. § 704?
2. Did the district court err by concluding that Defendant rebutted the strong presumption that the APA entitles Plaintiffs to judicial review, under § 706(2)(A)'s arbitrary-or-capricious standard, of Defendant's refusal to send notice to Wilfred borrowers and to suspend collection?

STATEMENT OF THE CASE

Named Plaintiffs are seven students whom Wilfred fraudulently certified as eligible for federal student aid. As a result of this fraud, Plaintiffs incurred substantial loans that they have a statutory right to discharge. Plaintiff Ana Salazar, for example, was recruited to attend Wilfred in the late 1980s, despite the fact that she was unable to speak English, had no high school diploma, and did not have the "ability to benefit" from Wilfred's programs. JA-32–33 (¶¶ 130–37). Notwithstanding statutory requirements that Ms. Salazar have either a high school diploma or the ability to benefit from Wilfred's programs, Wilfred falsely certified her eligibility for student loans, and Ms. Salazar borrowed thousands of dollars to pay Wilfred for a worthless education. JA-33–34 (¶¶ 139, 146). She did not

receive meaningful training, could not get a job in the relevant field, and spent decades in default. JA-34 (¶¶ 147–52).

The Department knew that Wilfred fraudulently certified the eligibility of borrowers like Ms. Salazar, and regulations provide that in such circumstances, borrowers who potentially qualify for discharges should be provided notice and collection of their loans should be suspended. JA-24, 30–31 (¶¶ 78, 124–25). But the Department never informed Ms. Salazar or any other Wilfred students about the likelihood that Wilfred's fraudulent practices would entitle them to discharge their loans. JA-35 (¶¶ 154–55). Instead, the Secretary repeatedly directed that Ms. Salazar's and countless others' tax refunds be seized, and other collection undertaken, to repay the fraudulently certified loans. JA-34 (¶ 151); *see* JA-35–50 (¶¶ 156–303).

Plaintiffs filed this action on behalf of themselves and all those similarly situated, alleging that the Department violated the Administrative Procedure Act when it arbitrarily and capriciously denied Plaintiffs' request to notify, and suspend collection against, Wilfred borrowers who presumptively qualify for discharges of their student loans. JA-3, 12–53. Plaintiffs promptly moved to certify a Rule 23(b)(2) class, and Defendant moved to dismiss. JA-5, 7, 9; *see* Dkt. Nos. 12, 23, 33. The district court (Sweet, *J.*) granted Defendant's motion to dismiss Plaintiffs' claims and denied as moot Plaintiffs' motion for class certification. JA-218–59; *see* 2015 WL 252078 (S.D.N.Y. Jan. 16, 2015).

I. Wilfred's Systemic False Certification of Borrowers' Eligibility for Federal Student Loans

Wilfred began its operations in the 1970s, as a small chain of schools claiming to offer meaningful vocational training in "beauty"-related professions. JA-22 (¶¶ 56–57). Wilfred's strategy was to recruit immigrants and economically disadvantaged individuals for enrollment, then induce these students—who could not afford Wilfred's tuition and fees—to draw federal student aid, including substantial loans, paid directly to Wilfred. JA-22–23, 25 (¶¶ 63–64, 89). Between 1980 and 1989, federal student aid accounted for between 80 and 90 percent of Wilfred's revenue, and Wilfred received at least $405 million in federal student aid. JA-22 (¶¶ 60–61). By the late 1980s, Wilfred had expanded into a nationwide chain of 58 campuses with over 11,000 students enrolled annually. *Id.* (¶¶ 56–58).

But Wilfred's success depended on its routinely defrauding its students and the Department of Education to obtain the federal financial aid that sustained its operations. JA-23 (¶¶ 66–70). The federal financial aid eligibility requirements—designed to protect individuals from incurring postsecondary educational debt if they lacked the fundamentals to make use of that education—demanded that borrowers have a high school diploma or equivalent. The only exception was if a school certified the borrower as having the "ability to benefit" from the program. JA-16 (¶¶ 26–28 (citing 20 U.S.C. §§ 1088, 1091(d))). Wilfred schools fraudulently made these certifications, regularly attesting that students had received a passing score on a school-administered, Department-approved ATB

examination without ever giving it to them, or by improperly reporting a passing score when the student actually failed the exam. JA-16, 23 (¶¶ 28, 66, 68–69). Wilfred also routinely certified that students had high school diplomas or the equivalent, when they did not. JA-23 (¶ 67).

II. The Department's Longstanding Knowledge of Wilfred's Fraud

Wilfred's widespread misconduct did not go undetected by authorities. The Department knew of Wilfred's fraud as early as 1983, when the Department's Office of the Inspector General ("OIG") investigated the financial aid practices of Wilfred schools in Massachusetts. JA-24 (¶ 81). This investigation expanded in 1985 to include Wilfred's Florida schools, and, by 1986, Wilfred's schools nationwide. *Id.* (¶¶ 82–83). Soon, the Department's OIG and the U.S. Department of Justice jointly operated a taskforce to examine Wilfred's nationwide fraud. JA-25, 27 (¶¶ 87, 100).

The Department of Justice swiftly brought criminal prosecutions against Wilfred, its officers, and individual employees in Massachusetts and Florida, for financial aid fraud and other crimes. JA-25–26 (¶¶ 88–96). These prosecutions resulted in the conviction of Wilfred's president and employees in several states. JA-27–28 (¶¶ 102–05). The Department's OIG concluded in 1989 that Wilfred's corporate headquarters was responsible for establishing the fraudulent ATB certification practices uncovered at multiple Wilfred locations. JA-27 (¶¶ 100, 102); *see* JA-190–95. The Department also sought to terminate Wilfred schools

from the federally guaranteed student loan program, and eventually placed Wilfred on a probationary status within the program. JA-27 (¶¶ 97–98). Wilfred ceased operations in 1994. JA-28 (¶ 106).

III. Congress's Command to Provide Relief to ATB Fraud Victims Like Wilfred Students

Wilfred was not the only school to abuse the so-called "ATB exception." By the early 1990s, it became widely recognized that many for-profit vocational schools sustained themselves by targeting for enrollment, and falsely certifying as eligible for federal financial aid, vulnerable individuals with limited education and insufficient knowledge, aptitude, or language skills to pass an ATB examination. JA-28 (¶ 107); *see Abuses in Federal Student Aid Programs*, S. Rep. No. 102-58 (1991). As a result, such individuals were saddled with federal student loan debt that they had no realistic possibility of repaying and from which they could obtain no relief, even as the schools themselves retained revenues from the loans. JA-28 (¶ 110).

To provide relief to student borrowers victimized by for-profit schools' predatory practices, and to make up for the Secretary's "abdicat[ion]" of its oversight responsibilities over those schools, in 1992 Congress commanded the Secretary to discharge all falsely-certified loans. JA-28 (¶ 108); *see* Pub. L. No. 102-325 § 437 (July 23, 1992), *codified at* 20 U.S.C. § 1087(c); JA-16–17, 28 (¶¶ 29–30, 107, 109). This "false certification discharge" provision extends relief to all borrowers who were not in fact eligible to receive federal student loans, but

whose schools nonetheless fraudulently certified them for such loans. Congress enumerated criteria pursuant to which borrowers qualified for the false certification discharge, including that the loan was disbursed after January 1, 1986. 20 U.S.C. § 1087(c)(1). Congress provided that those who qualified as falsely certified borrowers be made whole: that their remaining debt be discharged, and that they be reimbursed for payments made, have their eligibility to receive student aid restored, and have their adverse credit history repaired. *Id.* § 1087(c)(1), (4)–(5).

The Secretary issued regulations to ensure that qualified borrowers would be identified and granted appropriate relief. *See* 34 C.F.R. § 682.402(e). At the time, federal student aid was issued through the Federal Family Education Loan ("FFEL") Program, under which private lenders extended loans to individuals guaranteed by state "guaranty agencies" acting on behalf of, and ultimately guaranteed by, the federal government. 20 U.S.C. §§ 1085(j), 1078(b). The Secretary promulgated regulations describing the process by which guaranty agencies should review and approve discharge applications. *See, e.g.*, 34 C.F.R. § 682.402(e)(1), (3), (7). In addition, the regulations set forth a notification and suspension procedure to help identify and grant relief to qualified borrowers:

> If the guaranty agency receives information it believes to be reliable indicating that a borrower whose loan is held by the agency may be eligible for a [false certification] discharge … the agency shall immediately suspend any efforts to collect from the borrower on any loan received for the program of study for which the loan was made … and inform the borrower of the procedures for requesting a discharge.

Id. § 682.402(e)(6)(ii). Later, when the Department began itself issuing loans to students under the Direct Loan Program, the Secretary provided for a comparable procedure:

> If the Secretary determines that a borrower's Direct Loan may be eligible for a [false certification] discharge … the Secretary mails the borrower a disclosure application and an explanation of the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower on any affected loan.

Id. § 685.215(d)(1) (together with § 682.402(e)(6)(ii), "Mail/Suspend Regulations"). The Secretary subsequently provided for a "blanket" discharge process by which a borrower or groups of borrowers could receive discharges without submitting an application. *Id.* §§ 685.215(c)(7), 682.402(e)(15).

IV. The Department's Determination that Most Wilfred Borrowers Qualify for ATB Relief

By 1996, the Department had accumulated overwhelming, reliable evidence that Wilfred borrowers were entitled to relief under the false certification discharge statute and implementing regulations. A 1996 Department report, entitled "Documentation of ATB Violations," summarized that information drawn from OIG and other audit reports of approximately 50 Wilfred schools. JA-28 (¶ 111), JA-187–88. The Department concluded that the evidence showed that Wilfred committed "[s]ystemic violations" and engaged in a "[c]onsistent pattern of gross violations of [Department] regulations," "indicat[ing] a strong resistance to following [Department] regulations for administering funds and ATB student

testing." JA-29 (¶¶ 112–13), JA-188. The Department accordingly "recommended that *all ATB applications be discharged*." JA-29 (¶ 114) (emphasis added), JA-188. When the Department receives a facially valid application from a Wilfred borrower who, by happenstance, has learned how to submit one, the Department—in contrast to normal procedures—presumes that the borrower was in fact falsely certified without requiring additional corroboration. JA-29 (¶ 115), JA-200, 216. The Department thus clearly has information in its possession that each Wilfred borrower "may be eligible for a [false certification] discharge." *See* 34 C.F.R. §§ 682.402(e)(6)(ii), 685.215(d)(1).

But the Department has refused to notify potentially qualified Wilfred borrowers in the manner set forth in the Mail/Suspend Regulations. JA-30–31 (¶¶ 121, 126). As a result, the overwhelming majority of them remain unaware that statutory discharges are available and thus never have the opportunity to submit an application. JA-30 (¶¶ 122–26).

Not only has Defendant failed to notify Wilfred victims of the availability of discharge, it has continued actively to collect on loans. JA-30 (¶ 125). This conduct has caused serious injury to Plaintiffs and other members of the putative class, who have had their income tax refunds seized, their wages garnished, and their credit ruined at Defendant's direction. JA-34, 37, 40, 42, 45, 47, 49 (¶¶ 150, 182, 206, 226–27, 253, 274, 295, 297).

V. The Secretary's Denial of Plaintiffs' Request to Send Notices to, and Suspend Collection Against, Wilfred Borrowers

In light of the Secretary's longstanding failure to provide notice to and suspend collection against Wilfred students, on April 16, 2013, Plaintiffs' counsel wrote to the Secretary regarding these borrowers' plight. JA-29–30 (¶¶ 118–19), JA-209. In addition to submitting individual discharge applications, Plaintiffs' counsel cited the Department's extensive evidence of systemic fraud, culminating in the Department's 1996 recommendation that all individual discharge applications from Wilfred students be granted without further inquiry, and requested a blanket discharge for all Wilfred borrowers without requiring individual applications. JA-29–30 (¶¶ 118–19), JA-208. The letter went on to specifically request that, in the alternative:

> USED [that is, the Department] contact all student loan debtors whose loans were taken out in order to attend any Wilfred-operated schools, to advise them of their right to apply for discharges if they meet the requirements. USED should then follow the recommendation of the OIG and grant every ATB application for discharge from Wilfred students, and direct all guaranty agencies holding such loans to do the same. In the meantime, USED should suspend all collection efforts on these loans.

JA-210.

Having received no response, Plaintiffs' counsel again wrote to Defendant on July 16, 2013 to "reiterate our request that USED contact all student loan debtors whose loans were taken out in order to attend these schools, to advise them of their right to apply for discharges if they meet the requirements . . . . In the

meantime, USED should suspend all collection efforts on these loans." JA-30 (¶ 120), JA-74–76. Finally, on September 24, 2013, Plaintiffs' counsel wrote to the Secretary "to formally request that USED" cease collection against Wilfred borrowers, and provide notice "about the availability, for eligible debtors, of full discharges of their loans with all attendant relief if the school falsely certified their ability to benefit." JA-30 (¶ 120), JA-212–14.

On February 18, 2014, the Department responded to Plaintiffs' counsel's petition by way of a letter signed by Chad Keller, Supervisory Program and Management Analyst for Federal Student Aid. JA-30 (¶ 121), JA-216–17. Notwithstanding the Department's 1996 Report, Keller explained that, except with respect to one Wilfred campus, the Department "did not find sufficient information or circumstances" to "warrant" sending notice to all borrowers and suspending collection. JA-216; *see* JA-30 (¶ 121). Keller also confirmed that the Department grants all facially valid discharge applications from Wilfred students. JA-216; *accord* JA-29 (¶ 115), JA-200.

VI. District Court Proceedings

Plaintiffs filed this action on behalf of themselves and similarly situated Wilfred borrowers on February 25, 2014. JA-4 (Dkt. No. 1). Plaintiffs amended their complaint on May 29, 2014. JA-7 (Dkt. No. 22). Plaintiffs claimed that in light of the false certification discharge provision and implementing regulations, and the Department's own findings and conclusions regarding Wilfred's

misconduct and Wilfred borrowers' qualification for discharges, the Secretary acted arbitrarily and capriciously, in violation of the APA, by refusing to suspend collection and notify Wilfred borrowers of their discharge application rights. Plaintiffs also brought other claims not relevant on this appeal, including that the Secretary unlawfully withheld agency action in violation of 5 U.S.C. § 706(1).

On May 29, 2014, Plaintiffs moved to certify a class of all individuals who drew federal student loans after January 1, 1986 to attend Wilfred, and whose eligibility Wilfred falsely certified. JA-7 (Dkt. No. 23). Defendant opposed that motion and also moved to dismiss, primarily on the grounds that the Secretary's actions were unreviewable because they were not "final," 5 U.S.C. § 704, and were "committed to agency discretion by law," *id.* § 701(a)(2).

On January 16, 2015, the district court (Sweet, *J.*) granted Defendant's motion to dismiss. JA-218. In analyzing Plaintiffs' challenge, the court focused almost exclusively on the agency's denial of one portion of Plaintiffs' request, not at issue on appeal: that the Secretary grant a "blanket" discharge of all Wilfred borrowers' loans—that is, discharge these loans without requiring individual applications. The court did not meaningfully analyze the Department's refusal to grant Plaintiffs' stand-alone request for notice and suspension of collection. As to the Department's refusal to grant a blanket discharge, the court held that Plaintiffs had not alleged final agency action, as Wilfred borrowers remained able to submit individual discharge applications if by happenstance they learned of their right to

do so. As an alternative holding, the court concluded that Plaintiffs' challenge was not subject to judicial review because the Secretary's refusal was committed to his unfettered discretion.

In light of the court's dismissal of Plaintiffs' complaint, the court denied Plaintiffs' motion for class certification as moot. JA-258.

SUMMARY OF ARGUMENT

Plaintiffs challenge the Secretary's denial of their request that he notify Wilfred borrowers of their right to apply for false-certification discharges of their loans and suspend collection against them. This refusal is "final" under 5 U.S.C. § 704, and it does not fall into the narrow exception to review for actions "committed to agency discretion by law," *id.* § 701(a)(2). The district court therefore erred in concluding that Plaintiffs were not entitled to judicial review of whether that refusal was arbitrary and capricious.

The Secretary's refusal to send notice and suspend collection meets both prongs of the *Bennett v. Spear* finality test. 520 U.S. 154, 177–78 (1997). First, the refusal represented the culmination of the agency's decisionmaking process with respect to notice and suspension, because the agency unequivocally refused to take those steps after internal deliberation. Second, the refusal had a direct impact on the parties. Had the Secretary granted Plaintiffs' request, he would have ceased collecting on their loans after notifying them of their rights. His denial thus subjected the class to collection they otherwise would have escaped. Moreover, as

a practical matter, the Secretary's refusal to send notice ensures that only a small fraction of qualified Wilfred borrowers will ever obtain cancellation of their loan obligations. The district court found the Secretary's conduct "non-final" because it did not resolve any individual borrower's discharge application, but the refusal to send notice and suspend collection is final in its own right.

Nor is the Secretary's denial of Plaintiffs' request "committed to agency discretion by law." The district court erroneously concluded that Plaintiffs' request sought "enforcement," such that the Secretary's denial of that request fell within the narrow category of agency action that *Heckler v. Chaney* held to be presumptively unreviewable. 470 U.S. 821 (1985). But the action Plaintiffs requested was not enforcement activity; Plaintiffs requested relief for the statute's intended beneficiaries, not punitive sanctions against regulated parties. Accordingly, a presumption in *favor* of judicial review applied, not against it.

There is also substantial "law to apply" to guide a reviewing court's assessment of whether the Secretary's refusal to send notice and suspend collection was arbitrary and capricious. Regulations promulgated under the false-certification discharge statute, which obligates the Secretary to grant such discharges where statutory criteria are met, set forth notification and suspension procedures designed to identify borrowers who "may be" qualified for discharge. Plaintiffs have alleged that the Secretary consulted precisely the evidence that regulations describe as relevant to determining qualification, concluded that

Wilfred borrowers likely qualify for discharge, and yet refused to send notices and suspend collection when Plaintiffs requested it. Whether or not any provision explicitly requires the relief Plaintiffs sought—a condition for review that the district court erroneously imposed—the false certification statute, regulations, and related agency guidance provide wholly manageable judicial standards against which to measure whether Defendant's action was arbitrary and capricious.

STANDARD OF REVIEW

Defendant moved to dismiss under subsections (b)(1) and (b)(6) of Rule 12 of the Federal Rules of Civil Procedure. The district court granted Defendant's motion without specifying under which subsection the court decided the motion. This Court reviews *de novo* a district court decision granting a motion to dismiss under either subsection of Rule 12(b). *See Cnty. of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 778 F.3d 412, 416 n.6 (2d Cir. 2015); *Barrows v. Burwell*, 777 F.3d 106, 111 (2d Cir. 2015).

ARGUMENT

I. THE SECRETARY'S REFUSAL TO SEND NOTICES AND SUSPEND COLLECTION, AN ACTION THE DISTRICT COURT FAILED TO ANALYZE, IS FINAL UNDER THE APA.

The district court found the Secretary's denial of what he construed as Plaintiffs' request for a "blanket" discharge to be "non-final" and thus unreviewable, but the court failed to meaningfully analyze the finality of the Secretary's denial of Plaintiffs' stand-alone request to send notice to Wilfred

borrowers informing them of the process for discharge, and suspend collection on those loans. *See* JA 224–25. The Secretary's denial of this separate request represented the culmination of the agency's decisionmaking process with regard to notice and suspension of collection, and directly impacted the parties. It thus unquestionably constitutes final agency action.

To the extent the court considered notice and suspension at all, it wrongly characterized those actions as merely incidental to the ultimate discharge, rather than as a separate action the Secretary refused to perform. *See* JA-240, 242–43. The court's failure even to address finality as to Plaintiffs' request for notice and suspension renders the court's analysis flawed with respect to both prongs of the finality test, and also accounts for the court's erroneous characterization of Plaintiffs' case as a "broad programmatic" challenge not subject to APA review.

A. The Secretary's Denial of Plaintiffs' Request to Send Notice and Suspend Collection Represents the Culmination of the Agency's Decisionmaking Process.

The APA subjects to judicial review "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. An agency action is "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). For an agency action to be final, and thus reviewable, the action (1) "must mark the consummation of the agency's decisionmaking process," and (2) "must be one by which rights or obligations have been determined or from which legal consequences will flow." *Bennett*, 520 U.S.

at 177–78 (internal quotation marks omitted). "The core question for determining finality" under the first *Bennett* prong is "whether the agency has completed its decisionmaking process." *Sharkey v. Quarantillo*, 541 F.3d 75, 88 (2d Cir. 2008).

The Secretary's denial of Plaintiffs' request to send notice to borrowers and suspend collection of Wilfred loans plainly represents the culmination of the agency's decisionmaking process with respect to that relief. As Defendant's response stated that the Department had reviewed at least some records in the course of its deliberations, JA-216, the Department plainly had ample "opportunity to apply its expertise" to the question whether to send notices and suspend collection. *Air Espana v. Brien*, 165 F.3d 148, 152 (2d Cir. 1999) (discussing purpose of finality requirement). Yet the Department decided *not* to mail discharge applications to the vast majority of Wilfred borrowers. JA-30 (¶¶ 120–21), JA-216; *see* JA-202–03. The first prong of finality is met where, as here, the agency takes an "unequivocal decision … that is not contingent on future agency actions." *Am. Airlines, Inc. v. TSA*, 665 F.3d 170, 174 (D.C. Cir. 2011).

The district court concluded otherwise, framing the Secretary's action as a refusal to grant a "blanket" discharge to Wilfred borrowers. That action, the court reasoned, was not final because the Department "has made no determination, one way or the other, with respect to the eligibility for discharge of the named or proposed class members who have not submitted applications." JA-244. But this analysis ignores the agency's refusal to send notice and suspend collection on

Wilfred loans, which is separate from—and not merely incidental to—any ultimate discharge.

It is true, and Plaintiffs' request contemplates, that notice and suspension will not result in a false certification discharge without additional action by individual class members and the Secretary. But that fact does not diminish the finality of the Department's actions with respect to Plaintiffs' request. Agency action is final "notwithstanding '[t]he possibility of further proceedings in the agency' on related issues." *Sharkey*, 541 F.3d at 89 (quoting *Bell v. New Jersey*, 461 U.S. 773, 779–80 (1983)); *see also Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (reviewing as final agency order despite further, related agency action).

In addition, as a practical matter, the refusal to send notice means that the vast majority of Wilfred borrowers will *not* learn of the potential for a discharge, and thus only a tiny portion of borrowers will even have the opportunity to submit discharge applications. Because notice is the only means by which discharge as contemplated by the statute will occur for most Wilfred borrowers, the Secretary's refusal to provide notice in and of itself deprives those defrauded Wilfred borrowers of this relief and subjects them to unwarranted collection efforts by the very agency charged with protecting them.

The Department's allusion to possible future reconsideration—that it "will consider taking additional steps if this appears warranted in the future," JA-216—has no bearing on the finality of its *present* disposition of Plaintiffs' request. In

Fox Television Stations, Inc. v. FCC, the agency was required by statute to reconsider certain of its regulations periodically. 280 F.3d 1027, 1033–34 (D.C. Cir. 2002). The challenged agency decision not to modify any of its regulations at the time was the "last word on whether, as of [the present]," existing regulations comported with the governing statute's mandate, and thus was "final as a matter of law" notwithstanding the agency's assertion that it "intend[ed] to continue considering" its regulations. *Id.* at 1037–38 (internal quotation marks omitted). Nor can the Department's self-serving characterization of its decision as subject to revision undercut finality. In *Humane Society of the United States v. U.S. Postal Service*, the court found that an agency's suggestion that it would grant "reconsideration" of the Humane Society's request if the organization "can point to another authority" failed to "withstand even casual scrutiny." 609 F. Supp. 2d 85, 93 (D.D.C. 2009).[1] The Department has clearly stated its present position that the circumstances known to it do not warrant following the procedures for notification and suspension in the Mail/Suspend Regulations. As a practical matter, no new

[1] *See also De La Mota v. U.S. Dep't of Educ.*, No. 02-4276, 2003 WL 21919774, at *8 (S.D.N.Y. Aug. 12, 2003) ("Nor is the insertion of language stating that an agency's action is not binding sufficient to render the action non-final."); *U.S. Gypsum Co. v. Muszynski*, 161 F. Supp. 2d 289, 291–92 (S.D.N.Y. 2001) (agency statement that order is "subject to continuing revision" is "of no import" in assessing finality); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022–23 (D.C. Cir. 2000) (agency characterization of disposition as subject to change, non-final, and non-binding is not dispositive).

information about Wilfred's routine abuse of the student loan program is likely to prompt a revised response by the agency, given that Wilfred has been closed for decades. JA-28 (¶ 106).

B. The Department's Denial of the Request for Notification and Suspension Has Significant, Direct Impact on the Parties.

The agency action Plaintiffs have challenged also satisfies the second prong of the *Bennett* finality test, as it is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177–78 (internal quotation marks omitted). The "core question" under this prong is whether "the result" of the agency decision "is one that will directly affect the parties." *Sharkey*, 541 F.3d at 88 (internal quotation marks omitted); *accord Franklin v. Massachusetts*, 505 U.S. 788, 796–97 (1992). This is another way of asking whether the "definitive position" of an agency "inflicts an actual, concrete injury." *Darby v. Cisneros*, 509 U.S. 137, 144 (1993). The purpose of this rule is to preclude review of agency action that compels no immediate behavior, but rather merely "recommends" a certain course of conduct—a concern not implicated here. *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 14 (D.C. Cir. 2005); *see also Paskar v. U.S. DOT*, 714 F.3d 90, 96 (2d Cir. 2013). The finality element is to be interpreted "in a pragmatic way." *Sharkey*, 541 F.3d at 88 (quoting *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980)); *see also Paskar*, 714 F.3d at 98 (looking to "practical effect" of agency action).

Here, the Department's refusal to send notice to Wilfred borrowers and suspend collection activities has an "immediate and substantial impact" on the Plaintiff class. *Aquavella v. Richardson*, 437 F.2d 397, 403–04 (2d Cir. 1971). The Department has indicated that there are at least 61,300 loans issued to Wilfred borrowers, and that a significant number of these were falsely certified. JA-203 (¶ 23), JA-23, 28–29 (¶¶ 65–69, 111–14). Moreover, as the district court itself recognized, "[m]ost" Wilfred borrowers "are unaware that they can apply to Defendant for a discharge and that Defendant will grant it." JA-224. Thus, the "practical effect" of Defendant's decision not to send notice is that virtually no Wilfred borrowers will obtain the relief from their debt obligations to which they are entitled. *See Paskar*, 714 F.3d at 98.

The Department's refusal of Plaintiffs' request to suspend collection inflicts concrete and significant injury on class members, who will suffer from the Secretary's additional collection activities. The Department regularly collects on loans, including Wilfred loans, through a variety of methods, including administrative wage garnishment, Treasury offset, litigation by the Department of Justice, and offset of public benefits.[2] Indeed, the Secretary has taken these steps

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[2] *See, e.g.*, 34 C.F.R. § 34.4 ("We may start proceedings to garnish your wages whenever we determine that you are delinquent . . . ."); *id.* § 30.33(a) ("[T]he Secretary may refer the debt for offset to the Secretary of the Treasury . . . ."); *see generally* 34 C.F.R. Part 30.

against the Named Plaintiffs. *See* JA-37, 40, 42, 45, 47, 49 (¶¶ 182, 206, 226–27, 253, 274, 295, 297). If the Secretary had granted Plaintiffs' request instead of denying it, the effect of the suspension would be that in the immediate term, class members would not have their wages garnished; would not have their benefits or tax refunds offset; and would not have adverse reports issued against their credit. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 84–86 (1972)) (even a "temporary, nonfinal deprivation of property" triggers constitutional due process protections); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 339–42 (1969) (interim wage garnishments are subject to procedural due process requirements).

That suspension of collection would be temporary does not render it non-final and thus immune from review. In an analogous context, this Court has held that an agency's denial of a "temporary remedy" constitutes final agency action subject to judicial review, notwithstanding that the remedy may later be terminated, allowing the interrupted agency action to resume. *See Ortiz-Franco v. Holder*, 782 F.3d 81, 89 (2d Cir. 2015). The Court in *Ortiz-Franco* held that the denial of temporary deferral of a removal order constituted final agency action because denial "means that a removal order may be carried out at once." *Id.*; *accord Envtl. Def. Fund v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970) (finding reviewable agency denial of request for interim suspension order). Likewise, this Court has held that temporary suspension of reimbursement payments to a Medicare provider constitutes final agency action, even if the agency

does not "determine administratively" the provider's entitlement to reimbursement until later. *See Aquavella*, 437 F.2d at 403–04. By the same logic, suspending the Department's collection of Wilfred loans would have immediate, concrete, legal consequences for both the Department and Wilfred borrowers, regardless of whether collection ultimately would resume against borrowers who do not submit applications or are found not to qualify for discharge.

The district court did not even consider these impacts on class members, because it characterized the action under review as the refusal to grant a blanket discharge, and the determination on any individual borrower's loan is not made until an application is submitted. JA-243. The court never evaluated whether the refusal to send notice and suspend collection was final in its own right.

In any event, agency actions that define rights and procedures are final, even if the definitive agency position may not ultimately preclude individuals from obtaining related relief. In *National Association of Home Builders v. U.S. Army Corps of Engineers*, the court considered whether the adoption of new standards for nationwide permits under the Clean Water Act constituted final agency action. 417 F.3d 1272, 1278 (D.C. Cir. 2005). The lower court concluded that there was no final agency action because a prospective permit applicant "is not legally denied anything until [his] individual permit is rejected." *Id.* (internal quotation marks omitted). The D.C. Circuit reversed, holding that the permit standards "carr[ied] easily-identifiable legal consequences" on the plaintiffs' "day-to-day business."

Id. at 1279–80. Here, the agency's resolution of the request for notice and suspension also has "easily-identifiable" effects on Plaintiffs' "day-to-day" lives, regardless of what happens to any eventual discharge applications.

The denial of Plaintiffs' request for notice and suspension also has a "powerful coercive effect" on the agency itself, which further establishes that the agency action is final. *Bennett*, 520 U.S. at 169. An interruption in the Department's ability to commence or continue collection action against Plaintiffs is one that would work a change in the "legal regime to which the action agency is subject"—an unmistakable indication of finality. *Id.* at 169–70. In *Humane Society*, for example, the court found that the Postal Service's determination that a publication remained "mailable," was final, because it bound the Postal Service to continue processing the publication through the mail. 609 F. Supp. 2d at 94.

By contrast, in *National Association of Home Builders v. Norton*, cited by the district court, JA-241, the court's holding that an agency's issuance of certain "protocols" was not final depended on the fact that the agency's own "failure to comply" with protocols would "not change the legal burden placed on the government" in a future enforcement action. 415 F.3d at 15. *Norton* is inapposite where, as here, Plaintiffs' requested relief would immediately halt the Department's ongoing collection activity.

Nor does the fact that the agency's resolution of Plaintiffs' request effectively leaves in place the status quo—the Department's ongoing collection

actions against the Plaintiff class—render the agency's refusal non-final. It is well-established that the denial of a request to alter the status quo, with the effect that the status quo continues, constitutes final agency action. *See New York v. U.S. EPA*, 350 F. Supp. 2d 429, 435 (S.D.N.Y. 2004) (finding "final" agency determination to preserve guidelines rather than reevaluate them); *Humane Soc'y*, 609 F. Supp. 2d at 93–95 (similar).

C. Plaintiffs' Challenge to a Discrete, Final Agency Decision with Direct Consequences Is Not a Broad Programmatic Attack.

The district court incorrectly opined that Plaintiffs' case constitutes a "broad programmatic attack" of the sort the Supreme Court declared impermissible under the APA in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). JA-246–48. The Court so characterized Plaintiffs' case by finding that they "effectively demand" that the Secretary "initiate an investigation and/or issue a group discharge" to Wilfred borrowers. JA-247–48. But that mischaracterizes both Plaintiffs' request and *Lujan*. Unlike the plaintiffs in *Lujan*, who failed to identify "a single [agency] order or regulation, or even … a completed universe of particular" agency actions, Plaintiffs seek judicial review of a specific agency action—the Department's denial of Plaintiffs' request to send notice to Wilfred borrowers and suspend collection on Wilfred loans—pursuant to the Mail/Suspend Regulations and other authorities. *See Lujan*, 497 U.S. at 890–91.

II. THE SECRETARY'S REFUSAL TO SEND NOTICE AND SUSPEND COLLECTION IS REVIEWABLE BECAUSE IT IS NOT AN ENFORCEMENT ACTION AND THERE IS LAW TO APPLY.

In light of the APA's broad grant of judicial review, the district court erred in foreclosing review of the Department's refusal to send notice to Wilfred borrowers and suspend collection. Courts must apply a "'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)). That presumption is rebutted—and action is considered unreviewable as "committed to agency discretion by law," 5 U.S.C. § 701(a)(2)—"only in those rare instances where" a reviewing court has "no law to apply" in evaluating agency action. *Cnty. of Westchester*, 778 F.3d at 419 (internal quotation marks omitted).

In concluding that the Secretary's refusal of Plaintiffs' request was the type of "enforcement" action that *Heckler v. Chaney* held was presumptively unreviewable, the district court committed a category error and impermissibly reversed the APA's presumption favoring judicial review. This agency action was not coercive "enforcement," as the district court held, but rather denied Plaintiffs relief under a benefits-conferring statute.

In fact, the Department cannot meet the "heavy burden" required to evade judicial review under the APA. *Mach Mining*, 135 S. Ct. at 1651. The false-certification discharge statute, which imposes a duty on the Secretary to discharge

qualified borrowers' loans; the Mail/Suspend Regulations that set forth the notification and suspension procedures Plaintiffs requested that the Secretary follow; and other agency regulations and guidance, taken together, provide ample law to apply. These provisions offer judicially manageable standards for assessing whether the Department's refusal to send notices and suspend collection was arbitrary or capricious in light of the record before the agency.

A. The Secretary's Refusal to Send Notice and Suspend Collection Is Presumptively Reviewable Because It Is Not an Enforcement Action.

The APA's exception to the rule of reviewability for action "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), is "very narrow," *Christianson v. Hauptman*, 991 F.2d 59, 62 (2d Cir. 1993) (internal quotation marks omitted). *Heckler v. Chaney* held that an agency's "decision not to prosecute or enforce" is a discrete category of agency action that is presumptively unreviewable. *Chaney*, 470 U.S. at 831. The district court wrongly concluded that Plaintiffs' case fits within this category because, it reasoned, Plaintiffs seek judicial review of how the Department "*enforce[s]* statutes and regulations under its authority." JA-254 n.6 (emphasis added), *see* JA-249. The district court's reading contorts *Chaney* to apply any time a plaintiff challenges an agency's *implementation* of a statute, regardless of whether the agency action involves *enforcement*, and would make § 701(a)(2) the rule of APA review rather than a narrow exception.

The agency action that Plaintiffs requested and the Secretary refused to provide—sending notice to Wilfred borrowers and suspending collection of their loans—would provide benefits to a class of individuals protected by statute. It is not *punitive* action *against* a regulated party as a result of its past misconduct—the category of action *Chaney* delineates as presumptively unreviewable. *See, e.g.*, 470 U.S. at 831 (describing the "decision not to prosecute or enforce, whether through civil or criminal process"); *id.* at 832 (analogizing to "the decision of a prosecutor … not to indict").[3] An agency's "refusal to institute investigative … proceedings" is also generally unreviewable if those investigations are precursors or collateral to punitive enforcement proceedings. *See id.* at 824, 837–38.

Subsequent decisions have faithfully construed *Chaney* as applying to discretionary agency decisions to refrain from taking punitive action against a regulated party. In *New York Public Interest Research Group v. Whitman*, for example, a panel of this court found unreviewable the Environmental Protection Agency (EPA)'s decision not to issue a notice to New York that would carry punitive consequences. 321 F.3d 316, 322 (2d Cir. 2003) ("*NYPIRG*"). *NYPIRG*

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[3] *See also Chaney v. Heckler*, 718 F.2d 1174, 1195 (D.C. Cir. 1983) (Scalia, J., dissenting) (describing the relevant category as "enforcement discretion in the sense of a refusal to proceed *against alleged law violators*") (emphasis added), *rev'd*, 470 U.S. 821; *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1056 (D.C. Cir. 1987) (describing an agency's discretion to decide "where to concentrate enforcement efforts within a universe of valid *targets*") (emphasis added).

and countless cases in this Circuit and elsewhere are entirely consistent with *Chaney*'s holding: that an agency's discretion is at its pinnacle when the agency determines "not to invoke an enforcement mechanism" against a regulated party for misconduct. *Id.* at 331.[4] By contrast, not a single case has embraced the district court's expanded view of *Chaney* as applying to all agency *implementation* of its statutory authority.

Judged against the appropriate standard, Plaintiffs' challenge falls far outside *Chaney*'s scope. The relief Plaintiffs seek—notice of the discharge process and suspension of collection while their qualification is determined—does not

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[4] *See U.S. SEC v. Citigroup Global Markets Inc.*, 673 F.3d 158, 164 (2d Cir. 2012) (agency's decision whether to compromise a civil prosecution); *United Airlines, Inc. v. Brien*, 588 F.3d 158, 173 (2d Cir. 2009) (discretionary decision to issue visa waivers, rather than parole foreigners, thereby leaving the plaintiff subject to fines); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 158–59, 164–65 (2d Cir. 2004) (applying *Chaney* to agency's denial of request to sanction third party by conditioning continued licensure on completion of expensive structural retrofitting); *N.Y.C. Emps. Ret. Sys. v. SEC*, 45 F.3d 7, 11 (2d Cir. 1995) (explaining *Chaney*'s application to "agency decisions not to prosecute"); *In re Application for Appointment of Indep. Counsel*, 766 F.2d 70, 75 (2d Cir. 1985) (describing *Chaney* as "analogizing an agency's decision to enforce with the prosecutor's decision to indict"); *see also Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 237 (5th Cir. 2015) (rejecting argument that agency action was presumptively unreviewable in significant part because no regulated party faced "sanctions … essentially punitive in nature, a marking of enforcement"); *Beaty v. FDA*, 853 F. Supp. 2d 30, 40 (D.D.C. 2012) (*Chaney* applies to agency's "decision whether to initiate enforcement proceedings against a violator of [an a]ct"), *aff'd on other grounds sub nom. Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013).

involve a refusal to sanction regulated parties, or a refusal to investigate potential violations as a predicate step toward enforcement. Instead, it is a means of ensuring that Plaintiffs receive benefits to which they are entitled based on the statutory scheme and evidence in the agency's possession. *See* JA-16–19, 24–31 (¶¶ 29–41, 80–126). That the requested agency action would "grant rights" is a "hallmark" of reviewability under the APA. *Gulf Restoration Network*, 783 F.3d at 236 (quoting *Am. Hosp. Ass'n*, 834 F.2d at 1056). Unlike in *Chaney*, the agency's coercive power is not at issue, nor can the agency's refusal to provide benefits to individuals be analogized to a prosecutor's decision not to indict a wrongdoer. *Cf. Chaney*, 470 U.S. at 832 (agency action that "infringe[s]" on "property rights" "provides a focus for judicial review").

The structure of the false-certification discharge statute and the relevant regulations confirms that the relief Plaintiffs seek is distinct from the Secretary's separate authority to carry out any enforcement actions in relation to false certifications. For example, if the Secretary concludes that a school has falsely certified borrowers' eligibility, he may conduct audits, withhold funds, and suspend or terminate schools' participation in the federal student financial aid program. 20 U.S.C. § 1094(c). These powers are codified in an entirely separate section of the statute from the individual discharge right provided in § 1087(c). Moreover, even with respect to discharged loans, the Secretary may, in his discretion, take steps to "recover" the amount of a discharged loan from the school

that committed the false certification violation. 34 C.F.R. §§ 682.402(e)(4)(i), 685.215(c)(6)(ii), 685.214(d)–(e). The provisions describing this authority are separate and apart from those describing borrowers' entitlement to suspension of collection and notice of the procedures for requesting a discharge—the relief Plaintiffs request. *Id.* §§ 682.402(e)(6)(ii), 685.215(d)(1).

Finally, the district court's uncabined expansion of *Chaney* would eviscerate arbitrary-or-capricious review altogether. Under the district court's view, any time a court determines that an agency took any action to implement "statutes and regulations under its authority"—action the district court viewed as "enforcement," JA-254 n.6—review would halt. But the APA's command that courts "hold unlawful" action that is "arbitrary [or] capricious" contemplates that some actions within the scope of an agency's authority must nonetheless be "set aside," for example, when they were not "'based on a consideration of the relevant factors'" or "'there has been a clear error of judgment.'" *Judulang v. Holder*, 132 S. Ct. 476, 484 (2011) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1982)); *see* 5 U.S.C. § 706(2)(A). In addition to pretermitting arbitrary-or-capricious review, the district court's reading of *Chaney* would make surplusage of the separate APA provision that directs courts to set aside agency action that is "in excess of statutory … authority," because the only actions that could ever be set aside as arbitrary or capricious would also fall within that provision. 5 U.S.C. § 706(2)(C).

B. There Are Meaningful Standards by Which to Judge Whether the Secretary's Refusal to Send Notices to Wilfred Borrowers and Suspend Collection Was Arbitrary or Capricious.

Nor can the Secretary's refusal to send notice to, and suspend collection against, Wilfred borrowers be considered unreviewable on the ground that there is "no law to apply" to the question of whether that decision was arbitrary and capricious. *Cnty. of Westchester*, 778 F.3d at 419. Plaintiffs have alleged that the Department determined that all ATB applications from Wilfred borrowers should be discharged under the false certification discharge statute, but refused to notify Wilfred borrowers of the availability of discharge and cease collecting on their loans despite regulations and agency guidance that provide for precisely those procedures on the basis of precisely this type of evidence. JA-28–31 (¶¶ 111–15, 118–21, 124–26). The statute, regulations, and agency guidance together provide "judicially manageable standards" for determining whether the Secretary's refusal of Plaintiffs' request was arbitrary and capricious, after appropriate discovery upon remand from this Court. *Chaney*, 470 U.S. at 830.

The district court's conclusion that there was "no law to apply" in evaluating the agency's action was based on two errors. First, the court focused on what it understood to be Plaintiffs' request for a blanket discharge, and not on Plaintiffs' independent request to notify and suspend collection against Wilfred borrowers. With regard to blanket discharge, the court deemed the statute and relevant regulations insufficient because members of the putative class had not yet

submitted information that would show their qualification for discharge, and because the regulation authorizing "discharge without application" was "permissive." JA-250, 253–55. Second, the court conflated the need for some "meaningful standards" by which to assess whether agency action is arbitrary or capricious with the requirement—not applicable to Plaintiffs' § 706(2)(A) claim—that relevant statues and regulations must "explicitly require" the requested action. JA-254 n.6. But the law imposes no such precondition for judicial review.

1. The False Certification Discharge Statute, Regulations, and Agency Guidance Provide a Reviewing Court "Law to Apply."

To determine whether Congress intended to grant an agency unfettered discretion over a challenged action, a court starts by examining the relevant statute. *See Cnty. of Westchester*, 778 F.3d at 419. Unless the statute has "left *everything* to" the agency, the presumption of judicial review holds. *Mach Mining*, 135 S. Ct. at 1652 (emphasis in original).

Here, the Mail/Suspend Regulations that describe the notice and suspension procedures Plaintiffs sought were promulgated to implement the false-certification discharge statute. That statute does not "leave *everything*" related to false discharges to the Secretary. On the contrary, it imposes a mandatory duty on the Secretary: "If a borrower … received … a loan … [and the] student's eligibility to borrow … was falsely certified by the … institution … then the Secretary *shall discharge* the borrower's liability on the loan . . . ." 20 U.S.C. § 1087(c)(1)

(emphasis added). That this language is "mandatory, not precatory," is strong evidence that Congress intended to preserve judicial review over the statutory scheme, notwithstanding that the agency ultimately has some degree of "latitude over the [discharge] process." *Mach Mining*, 135 S. Ct. at 1651–52. Legislative history confirms that the objective of the provision was to mandate discharge for all borrowers meeting the statutory criteria.[5] By contrast, other provisions of the Higher Education Act leave open the Secretary's obligations with respect to other types of borrower relief. For example, 20 U.S.C. § 1087e(h) directs 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 student loans, without providing substantive standards such as those found in § 1087(c).

As is his duty under the Higher Education Act, *see* 20 U.S.C. § 1098a; *id.* § 1070(b), the Secretary promulgated the Mail/Suspend Regulations, among others, to fulfill the Congressional mandate that falsely certified loans of statutorily qualified borrowers be discharged. These regulations provide for precisely the relief Plaintiffs have requested here. The FFEL regulation provides that any time a guaranty agency possesses "reliable" information "indicating that a borrower

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[5] *See* 138 Cong. Rec. H1785-03 (Mar. 26, 1992) (provision intended "to require the Secretary to discharge [falsely certified students'] loan liabilities") (statement of Rep. George Miller, author of House bill); S. Rep. No. 102-204, 113 (1992) (bill "requires the Secretary to pay loans of borrowers … if the borrower's eligibility was fraudulently certified").

whose loan is held by the agency may be eligible," it "shall immediately suspend any efforts to collect from the borrower" and "inform the borrower of the procedures for requesting a discharge." 34 C.F.R. § 682.402(e)(6)(ii). The parallel provision under the Direct Loan program states that if the Secretary "determines" that a borrower's loan "may be eligible" for a false certification discharge, the Secretary must "mail[] the borrower a disclosure application and an explanation of the qualifications and procedures for obtaining a discharge," and "promptly suspend[] any efforts to collect from the borrower." 34 C.F.R. § 685.215(d)(1).[6]

Both regulations implement the Secretary's duty to discharge falsely certified loans. Guaranty agencies administer the FFEL Program at the state level on behalf of the Secretary, and "[i]t is the obligation of the Department of Education to see that this role is properly performed." *McNamee, Lochner, Titus & Williams, P.C. v. Higher Educ. Assist. Found.*, 50 F.3d 120, 124 (2d Cir. 1995). As a matter of practice, the Department understands borrower-relief regulations that impose obligations on guaranty agencies, such as the FFEL's Mail/Suspend Regulation, to apply to the Department itself. *See, e.g.*, Notice of Proposed Rulemaking, 65 Fed. Reg. 46,316, 46,318 (July 27, 2000) ("The FFEL and Direct Loan regulations on false certification discharges have the same rules with request

[6] All Wilfred borrowers initiated their loans under the FFEL Program. JA-15 (¶ 19). Some borrowers later consolidated those loans under the Direct Loan Program. JA-19, 24 (¶¶ 42, 77).

to a discharge based on an improper determination of the student's ability-to-benefit (ATB)."); U.S. Dep't of Educ., Dear Colleague Letter Gen-95-42 (Sept. 1995) (guidance applies equally to guaranty agencies and the Secretary).[7]

That the Mail/Suspend Regulations apply on their face to "a borrower" and not to groups of borrowers does not render them inapplicable here, as the district court implicitly concluded. *See* JA-251 (opining that regulations mandate steps only when "a particular borrower might be eligible for discharge"); JA-252 (construing regulatory obligation as applicable only after a determination that "an individual borrower may be eligible"). As a matter of logic, where the Secretary or a guaranty agency has knowledge that applies to a group of borrowers, it applies equally to each and every member of the group. In addition, the regulations cited by the district court as pertaining to "group discharges," JA-235, *i.e.*, actions by the Secretary with respect to a group of borrowers, refer to borrowers in the singular, just as do the Mail/Suspend Regulations.[8] But the Secretary promulgated these regulations to give relief when circumstances "strongly suggest that all borrowers

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[7] *Available at* http://www.ifap.ed.gov/dpcletters/attachments/FP0709AttGen9542.pdf.

[8] *See* 34 C.F.R. § 682.402(e)(15) ("*A borrower's* obligation … may be discharged without an application" if the Secretary or guaranty agency "determines that *the borrower* qualifies") (emphasis added); *id.* § 685.215(c)(7) ("The Secretary may discharge *a loan* under this section without an application from *the borrower* if the Secretary determines" that "*the borrower* qualifies") (emphasis added).

in a certain category would likely qualify for a false certification discharge." JA-18 (¶ 39) (citing Fed. Reg. 46,316, 46,318 (July 27, 2000)).

Additional regulations and the Department's own guidance on false certification discharges provide further standards that constrain the agency's conduct and against which the agency's response to Plaintiffs' request may be measured. Provisions governing both the FFEL and Direct Loan Programs require the guaranty agency or Secretary to review "information available from" the records of the guaranty agency or Secretary, "and from other sources, including other guaranty agencies, state authorities, and cognizant accrediting associations," in determining false certification discharges. 34 C.F.R. §§ 682.402(e)(6)(iv), 685.215(d)(3). One of the Department's Dear Colleague Letters ("DCLs") outlines the type of evidence that guaranty agencies and the Secretary should review in evaluating a false certification discharge application, including reports by entities overseeing the school. DCL Gen-95-42, at 4; *see also* U.S. Dep't of Educ., DCL FP-07-09 (Sept. 24, 2007).[9] The 1995 DCL further explains that the same source materials may lead the Department to conclude that an entire cohort of borrowers was falsely certified through a school's "pervasive and serious violations of the Department's regulations." DCL Gen-95-42, at 10.

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[9] *Available at* http://www.ifap.ed.gov/dpcletters/attachments/FP0709AttATBGA.pdf.

"'[R]egulations promulgated by an administrative agency in carrying out its statutory mandate can provide standards for judicial review of agency action.'" *McAlpine v. United States*, 112 F.3d 1429, 1434 (10th Cir. 1997) (citing *Ctr. for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988) (per curiam)); *see also Guertin v. United States*, 743 F.3d 382, 386 (2d Cir. 2014) (examining HUD regulations to determine that action was arbitrary and capricious); *Menkes v. DHS*, 486 F.3d 1307, 1313 (D.C. Cir. 2007) (agency regulations may provide "law to apply"); *Kenney v. Glickman*, 96 F.3d 1118, 1124 (8th Cir. 1996) (similar). The same is true for other "agency policies." *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003). It is a "long-settled principle" that the "rules promulgated by a federal agency, which regulate the rights and interests of others, are controlling upon the agency," and that the principle "is not limited to rules attaining the status of formal regulations." *Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991). Indeed, an agency's "irrational departure" from its own policies must be overturned as arbitrary and capricious under the APA. *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996). It is particularly "'incumbent upon agencies to follow their own procedures'" where, as here, "'the rights of individuals are affected.'" *Montilla*, 926 F.2d at 167 (quoting *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)).

Here, the regulatory framework, taken together with the statute, provides "meaningful standards" by which to judge the Secretary's refusal of Plaintiffs' request. *Cnty. of Westchester*, 778 F.3d at 418. Plaintiffs allege that the

Department reviewed precisely the materials that regulations and agency guidance describe as relevant to determining if borrowers are falsely certified, then reached a "determination" that all Wilfred borrowers were likely falsely certified, on which the Department has acted by granting every facially valid Wilfred discharge application it receives. JA-12–13, 24–29 (¶¶ 3, 79–105, 111–15). The Mail/Suspend Regulations describe procedures that must be taken upon such a threshold determination that borrowers "may be eligible" for false certification discharges. Yet despite having made that determination here, the Department refused Plaintiffs' request to send notice and suspend collection, instead choosing to continue aggressive collection tactics against the individuals to whom Congress required the agency to provide relief. The statutes, regulations, and agency guidance provide a yardstick against which the court may judge whether the agency's action was arbitrary or capricious—that is, whether it was not "'based on a consideration of the relevant factors,'" reflected a "'clear error of judgment,'" "r[a]n[] counter to the evidence before the agency," or "failed to consider an important aspect of the problem." *See Judulang*, 132 S. Ct. at 484; *State Farm*, 463 U.S. at 43.

2. Plaintiffs Need Not Show that the Relief Sought Was "Explicitly Required" to Obtain Review.

To the extent the district court considered the regulatory notification-and-suspension requirements at all—rather than, for example, those governing

discharge without application—and concluded that they did not provide meaningful standards, the court did so erroneously. The court rejected the Mail/Suspend Regulations as irrelevant because they turned on a "threshold determination." JA-251. Similarly, the court refused to rely on the statute itself and other regulations and guidance because none "explicitly required" the actions Plaintiffs requested. JA-254 n.6. But a party seeking judicial review need not show that applicable laws or regulations *compel* the specific action sought.

The APA's plain text makes clear that courts may review—and set aside—an action taken by an agency in the exercise of its discretion, where the action exceeds the bounds of that discretion. *See* 5 U.S.C. § 706(2)(A) (directing courts to "hold unlawful" "agency action" "found to be arbitrary, capricious, [or] an *abuse of discretion*" (emphasis added)). The district court's interpretation—that only mandatory actions can be reviewed—would collapse the reviewability inquiry with the substantive, separate APA provision under which courts may "compel agency action unlawfully withheld." *Id.* § 706(1). As the Supreme Court recently confirmed, the fact that a statutory scheme grants *some* agency discretion may affect the *scope* of a court's review of agency action—not whether the action may be reviewed at all. *Mach Mining*, 135 S. Ct. at 1656.

Here, the Mail/Suspend Regulations direct that notice be sent and collection suspended upon an initial determination that borrowers may qualify for discharge—a determination Defendant has made with respect to Wilfred. Courts

regularly exercise judicial review based on other statutory and regulatory schemes with a similar structure, in which a mandatory duty follows from a discretionary determination. In a recent opinion, which post-dated the district court's decision in this case, this Court considered statutory language that, like relevant language here, imposed an obligation on an agency once triggered by an initial "determin[ation]." *Cnty. of Westchester*, 778 F.3d at 419. Westchester sought review of an agency's denial of the County's grant applications. *Id*. at 413. The Court held that a statute containing a discretionary trigger similar to that in the Mail/Suspend Regulations in fact "provide[s] meaningful standards constraining [the agency's] exercise of discretion," and thus judicial review was required. *Id.* at 418; *see id.* at 419, 421 (internal quotation marks omitted) (relying on provision that submission shall be approved "unless the Secretary determines … that" submission was inconsistent with statutory provisions); *see also M & T Mortg. Corp. v. White*, No. 04-4775, 2006 WL 47467, at *9 (E.D.N.Y. Jan. 9, 2006) (provision requiring Secretary "affirmatively to further" goals of statute supplied "law to apply"). And the Supreme Court considered parallel language in *Massachusetts v. EPA*, where the Clean Air Act directed the EPA to regulate emission of any air pollutant that, "in [the Administrator's] judgment cause[s], or contribute[s] to, air pollution." 549 U.S. 497, 506 (2007) (citation omitted). Not only did the Court exercise review, it set aside the agency's decision not to regulate. *Id*. at 528–35.

NYPIRG, on which the district court relied, does not compel a different result. *See* JA-251–53 (citing 321 F.3d 316 (2d Cir. 2003)). The question in that case was whether the EPA's refusal to "invoke an enforcement mechanism" was reviewable, where the governing statute provided that the EPA would do so once it "ma[de] a determination" that a program was not in compliance. 321 F.3d at 319, 330–31. The Court relied on the presumption against review applicable in the enforcement context, finding that, because the challenged action fell into that category of presumptively unreviewable action, the statutory grant of discretion precluded review. *Id*. at 331. *NYPIRG* does not apply here, however, where enforcement powers are not implicated. Outside the enforcement context, the existence of some discretion in an authorizing statute or regulation does not preclude judicial review. *See Mach Mining*, 135 S. Ct. at 1651–52.

Here, the Secretary's response to Plaintiffs' request that he provide relief to Wilfred borrowers, by notifying them of statutory discharge rights and suspending collection, was not subject to his unfettered discretion. Instead, the statutory mandate and regulatory framework constrained that discretion in a way that provides judicially manageable standards for review. Courts routinely set aside as arbitrary and capricious actions governed by standards providing far greater discretion than those here. *See*, *e.g.*, *Guertin*, 743 F.3d at 386–87 (denial of fee request was arbitrary and capricious where statute and regulation provided merely that "reasonable" and "required" fees were covered); *Haselwander v. McHugh*,

774 F.3d 990, 993 (D.C. Cir. 2014) (finding arbitrary and capricious agency denial of medical record correction request where statute and regulation authorized correction on agency "determin[ation]" that correction was necessary to "remove an injustice"); *SecurityPoint Holdings, Inc. v. TSA*, 769 F.3d 1184, 1186–88 (D.C. Cir. 2014) (TSA's refusal to alter a memorandum was arbitrary and capricious where discretion was constrained only by the statutory duty to "administer[] the screening of all … property … that will be carried aboard a passenger aircraft"). Like the plaintiffs in those cases, Plaintiffs here are entitled to judicial scrutiny of whether the Secretary's refusal of their request was arbitrary and capricious, upon a full record after remand by this Court.

III. THIS COURT SHOULD REMAND FOR CONSIDERATION OF PLAINTIFFS' CLASS CERTIFICATION MOTION BY THE DISTRICT COURT IN THE FIRST INSTANCE.

Plaintiffs also appeal from the district court's denial of their class certification motion. Because the district court dismissed Plaintiffs' claims, it denied Plaintiffs' motion for class certification as moot without reaching the merits of that motion. JA-258. For the reasons described above, this dismissal was in error. Moreover, for the reasons articulated in Plaintiffs' class certification motion, Plaintiffs' proposed class meets all the requirements of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, and class certification is essential to the fair and efficient adjudication of this controversy. Because this Court does not rule on fact-bound issues never decided in the lower court, the appropriate remedy here is to

remand so that the district court may consider the merits of Plaintiffs' class certification motion in the first instance. *See, e.g.*, *Cnty. of Nassau v. Hotels.com, LP*, 577 F.3d 89, 91–93 (2d Cir. 2009) (per curiam); *Breault v. Heckler*, 763 F.2d 62, 65 (2d Cir. 1985).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court vacate and remand for further proceedings, including appropriate discovery, on Plaintiffs' § 706(2)(A) claim, and for consideration of Plaintiffs' class certification motion by the district court in the first instance.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, according to the word count feature of the word-processing program used to prepare the brief, the brief contains 11,065 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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