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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

BETH E. GOLDMAN
NEW YORK LEGAL ASSISTANCE GROUP
7 Hanover Square, 18th Floor
New York, NY 10004
Tel.: (212) 613-5000

Jane Greengold Stevens, of Counsel
Eileen Connor, of Counsel
Danielle Tarantolo, of Counsel
Jason Glick, of Counsel
Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGES

Cases

Statutes

Regulations

Other Authorities

PRELIMINARY STATEMENT

The Secretary of the U.S. Department of Education contends that the district court was right to dismiss Plaintiffs' claim, under the Administrative Procedure Act, that he acted arbitrarily and capriciously in denying Plaintiffs' request to notify all former Wilfred students of the possibility of loan discharge based on Wilfred's undisputed false certification of students' "ability to benefit" ("ATB") from postsecondary education, and that he suspend collection to give borrowers time to apply for discharges.[1] The Secretary's arguments not only ignore the facts of this case, but also contort the legal standards governing APA review in a way that would insulate broad swaths of administrative action from judicial scrutiny.

Defendant's flawed reasoning is an attempt to avoid the consequences of Plaintiffs' key allegations. Plaintiffs assert that the Secretary's refusal to send notice and suspend collection is arbitrary and capricious precisely because the Secretary has already determined that the conditions warranting notice and suspension are present with respect to Wilfred borrowers. At every step, it is the Secretary's own actions that dictate the relief that Plaintiffs seek.

First, the Department of Education conducted an extensive investigation of Wilfred in the 1980s and 1990s. The Department found that Wilfred committed

[1] All terms have the meanings set forth in Plaintiffs' Opening Brief.

"systemic" ATB violations resulting in the false certification of student loan borrowers. JA-28–29 (¶¶ 111–15), JA-187–88, 200, 216.

Second, the Department determined that its findings about Wilfred compelled it, with respect to Wilfred borrowers, to change the manner in which it fulfills its statutory obligation to discharge falsely certified student loans. In the ordinary course, the Department reviews false certification discharge applications to see whether an applicant fulfills the statutory and regulatory requirements for discharge, and also reviews any evidence of school misconduct in its possession to determine whether it corroborates the borrower's assertion of fraud. With respect to Wilfred borrowers, Plaintiffs have alleged, and the Secretary has admitted, that his own findings provide corroboration sufficient to grant all facially valid discharge applications from Wilfred borrowers. He therefore accords a presumption of validity to all such applications.

The Secretary has also bound himself by regulation to take affirmative steps in certain circumstances to notify borrowers of the possibility of obtaining a discharge, and to suspend collection on their loans for a period of time. The Secretary must take these steps when he has "reliable" information that borrowers "may be eligible" for discharge. 34 C.F.R. § 682.402(e)(6)(ii) ("FFEL Mail/Suspend Regulation"). The same evidence that caused the Secretary to apply a presumption of validity to all Wilfred discharge applications triggers his

obligation to send notice and suspend collection; for the Secretary to conclude otherwise is arbitrary and capricious.

Rather than defend the merits of his refusal to follow through on his earlier determination about Wilfred by notifying borrowers of discharge, the Secretary seeks to dismiss this action on the ground that no court may even *examine* his decision. The Secretary first tries to get around the bedrock principle that agency action is presumptively reviewable by invoking *Heckler v. Chaney* far outside the scope of its applicability to punitive "enforcement" against regulated parties. 470 U.S. 821 (1985). Second, the Secretary defies logic and the Complaint's allegations by disclaiming the relevance of his own regulations to the judicial review Plaintiffs seek. Finally, the Secretary ignores the concrete effects of suspension and notice on the Plaintiff class, in order to cast his refusal as non-final and thus unreviewable. Each of these arguments would not only deprive Plaintiffs of the review to which they are entitled, but as a legal matter would also eviscerate the APA's strong presumption of judicial review.

Equally without merit is Defendant's claim that Plaintiffs waived arguments relating to notice and suspension by failing to present them in their Complaint or raise them below. Plaintiffs' counsel's letters to the Department straightforwardly requested notification and suspension, JA-72, 76, 214; the Department's response denied those requests, JA-216–17; and the Amended Complaint asserted that the

denial was arbitrary and capricious as a "failure to take reasonable steps" to determine which Wilfred loans qualify for discharge, JA-51; *see* JA-13, 19–20 (¶¶ 5–6, 124–26). Moreover, Plaintiffs presented argument in support of this claim in their brief below, JA-9 (Docket No. 37, at 1, 5, 9, 11, 22); Defendant responded at length, JA-9 (Docket No. 41, at 3–6); and the district court squarely considered it, JA-224, 233–34, 240, 243, 246–48, 250–52. Not a single one of Plaintiffs' arguments in this appeal has been waived.

ARGUMENT

I. PLAINTIFFS SEEK REVIEW OF AGENCY ACTION THAT IS NOT ENFORCEMENT AND IS CONSTRAINED BY REGULATION.

A. The Secretary's Refusal Has Nothing to Do with Enforcement.

Heckler v. Chaney held that an agency's "decision not to undertake certain enforcement actions" is ordinarily unreviewable. 470 U.S. at 831. According to the Secretary, his decision "not to suspend collection on all Wilfred loans and notify all Wilfred borrowers of their discharge rights" is presumptively shielded from judicial review under *Chaney*, because this decision involves his prerogative over "how to enforce the law." Def. Br. 25. The Secretary's reading of *Chaney* must be rejected, as it would encompass every challenge to an agency's *implementation* of a statute. Rather, *Chaney* removes only a "narrow" category of agency action from the strong presumption otherwise *favoring* judicial review of

agency action; the Secretary's challenged conduct falls far outside that category. *Cf. Christianson v. Hauptman*, 991 F.2d 59, 62 (2d Cir. 1993).

As an initial matter, this case has nothing to do with agency "enforcement" as defined in *Chaney*. That case applies only when a plaintiff contests an agency's decision "not to prosecute or enforce," *i.e.* not to take an elective, punitive action against a regulated party. 470 U.S. at 831. The agency action at issue here is neither elective nor punitive; Plaintiffs seek judicial review of the Secretary's refusal to grant relief to Wilfred borrowers, as provided for by law requiring suspension of collection and notice of the discharge process. Pls. Br. 29–33. This refusal simply bears no resemblance to "the decision of a prosecutor … not to indict." *Cf. Chaney*, 470 U.S. at 832.

The Secretary attempts to recast his refusal to take action as within *Chaney*'s scope by characterizing it as the Department's "decision to continue enforcing its mandate to collect on student loans." Def. Br. 26–27; *see id.* at 28. But adding this label does not make *Chaney* applicable. If the Secretary does have a general "mandate" to collect on loans, as he maintains, collection is ongoing, non-elective, and generally applicable to student borrowers. Accordingly, his decision to continue collection against Wilfred borrowers cannot fairly be analogized to a discretionary decision "to enforce"—much less the sort of decision *not* to enforce that *Chaney* exempts from review. *Cf. Chaney*, 470 U.S. at 831.

The Secretary also seeks refuge in *Chaney* by selectively referring to the policy considerations that animated that decision. For example, he argues that his refusal to send notice to Wilfred borrowers and suspend collection on Wilfred loans is "exactly the type of action that is presumptively exempt from judicial review as it involves a balancing of factors" within the agency's "expertise" and the possibility of "expending agency resources." Def. Br. 28; *see id.* at 26, 29. Even if these considerations weighed against judicial review in this case—and they do not—they cannot transform the Secretary's refusal to send notice and suspend collection into *Chaney*-type enforcement. The Supreme Court made clear in *Chaney* that its discussion of policy considerations such as the allocation of "agency resources" was "only" intended to "facilitate understanding of [the Court's] conclusion" regarding reviewability of the discrete set of agency decisions not to enforce, not as a roving license for courts broadly to insulate from review wholly distinct categories of agency action. 470 U.S. at 832.

The government's argument inverts the logic of *Chaney* and proves far too much. A presumption against judicial review applies to an agency's decision not to take elective, punitive enforcement action *because* a court likely has no basis for assessing that determination, which, among other considerations, would involve questions of expertise and resource allocation. But the simple fact that an agency action may implicate expertise or resource allocation does not mean that it is an

"enforcement" action. Were it otherwise, the narrow exception articulated in *Chaney* would swallow the APA's general presumption of judicial review, as virtually all agency action entails some judgment or resources. For good reason, courts have refused similar attempts to expand *Chaney* based solely on that decision's explanation of *why* an agency's enforcement decisions are presumptively beyond judicial review. *See Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988); *Capital Area Immigrants' Rights Coal. v. U.S. DOJ*, 264 F. Supp. 2d 14, 24 (D.D.C. 2003) (*Chaney* does not "provid[e] a blanket exception to APA review in any matter involving the allocation of agency resources").

In any event, most of the concerns animating *Chaney* are entirely inapposite in this case. It makes no sense here to ask "whether the agency is likely to succeed if it acts," because such a consideration is only relevant in an actual enforcement case, when an agency seeks to hold a party accountable for violating the law. *Cf.* Def. Br. 26 (quoting 470 U.S. at 831). Of course the Secretary will "succeed" at sending notice to Wilfred borrowers and suspending collection on Wilfred loans if he agrees to do so. And unlike in a challenge to a decision not to enforce, the Department's refusal here provides a perfectly clear "focus for judicial review," as Defendant has refused to take action that Plaintiffs requested and that is provided

for by regulation under circumstances that Plaintiffs allege have been satisfied in this case. *Cf.* 470 U.S. at 832; *see also* Pls. Br. 34–40.

Moreover, Defendant's suggestion that the notification and suspension procedures Plaintiffs invoked would implicate the Department's "expertise" and require it to "undertake an investigation" is misleading. Def. Br. 2, 23, 27–28. The agency already applied its expertise in the 1980s and 1990s when it investigated Wilfred for systemic fraud, culminating in the Department's 1996 recommendation regarding borrowers' presumptive eligibility for false certification discharges. Pls. Br. 10–11. That is the type of expert investigation *Chaney* contemplates protecting from judicial review, and it took place many years ago. Plaintiffs explicitly predicated their requests for notice and suspension of collection on the Department's own conclusions. JA-208–10, 212–13; *see* JA-79.

Because the Secretary cannot demonstrate that his refusal to send notice to Wilfred borrowers and suspend collection on Wilfred loans fits within the category of agency "enforcement" action as defined in *Chaney*, he presents an alternative theory for insulating his action from judicial review. Specifically, the Secretary suggests that this Court dramatically expanded *Chaney*'s reach beyond the core category of agency enforcement action by way of a footnote in *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 166 n.11 (2d Cir. 2004). Def. Br. 28–29.

That footnote simply cannot bear the weight that the Secretary places on it, as it merely rejected an argument the Court found waived, and in any case applied the presumption against judicial review to agency action that fit squarely within *Chaney*'s formulation of "enforcement." *See* 359 F.3d at 166 n.11. In *Riverkeeper*, the agency denied a request that it revoke the license of a regulated third party. Before this Court, the petitioner argued for the first time, in its reply brief, that it did not seek "purely enforcement relief," and therefore *Chaney* was inapplicable. *Id.* This Court deemed the argument waived. *Id.* The Court also noted that "[i]n any event," the case was "properly construed under *Chaney* as an appeal from the denial of an enforcement action"—an unremarkable alternative conclusion given the elective, punitive action that the petitioner demanded the agency take. *Id.*; *see id.* at 158, 163.

The other cases cited by Defendant provide no better support for the proposition that *Chaney* has been expanded beyond its holding. Def. Br. 29–30. *U.S. SEC v. Citigroup Global Markets Inc.* clearly involved enforcement; the case reviewed an agency's decision whether to settle an ongoing civil prosecution. 673 F.3d 158 (2d Cir. 2012); *see U.S. SEC v. Citigroup Glob. Mkts., Inc.*, 752 F.3d 285, 297 (2d Cir. 2014) (quoting *Chaney*, 470 U.S. at 831) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."). So, too, did the

agency's decision in *United Airlines, Inc. v. Brien*, to enforce immigration law against violators through one provision of law rather than another. 588 F.3d 158 (2d Cir. 2009). The remaining cases simply cite *Chaney*'s core holding: that the proper analogy is to prosecutorial discretion. Def. Br. 30.

The Secretary's refusal to send notice and suspend collection denied Plaintiffs relief pursuant to a statutory scheme intended to ensure benefits; it does not fit any reasonable definition of enforcement. The Secretary's denial is thus reviewable under 5 U.S.C. § 706(2)(A) and the judicially manageable standards discussed below.

B. Regulations and Agency Policies Provide Standards for Review.

Because the Secretary's refusal to send notices and suspend collection has nothing to do with enforcement, the APA commands judicial review unless there are no "judicially manageable standards" for determining whether that refusal was arbitrary or capricious. *Chaney*, 470 U.S. at 830. Defendant essentially contends that a reviewing court would have no way to assess whether he possessed "reliable" "information" that Wilfred borrowers "may be eligible" for false-certification discharges. *See* Def. Br. 31; FFEL Mail/Suspend Regulation. This argument ignores agency guidance describing precisely what such "information" entails, and most crucially, that the Secretary has already made decisions relying on information in his possession about Wilfred by implementing a presumption in

favor of discharges for Wilfred borrowers. A reviewing court could easily conclude that it is arbitrary and capricious for the Secretary to claim that the same information does not trigger the notice and suspension procedures.

The FFEL Mail/Suspend Regulation, which the Secretary acknowledges binds him, Def. Br. 8–9 n.4, provides that if the Secretary "receives information it believes to be reliable indicating that a borrower … may be eligible for a [false certification] discharge," the Secretary "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); *see also id.* § 685.215(d)(1) ("Direct Loan Mail/Suspend Regulation") (same obligation in Direct Loan program where "Secretary determines" borrowers "may be eligible"). The Secretary contends that there is no guidance regarding the "type of information that could be deemed 'reliable,' or the amount of information that would warrant a determination that a borrower 'may' be eligible for a discharge," Def. Br. 12, and thus trigger the notification and suspension obligation.

As an initial matter, the "term[] 'reliable' … does not defy meaningful review," nor does its "basic definition … involve[] a complicated balancing of a number of factors that are so peculiarly within the agency's expertise that jurisdiction is necessarily defeated." *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000). But in any event, other regulations and agency policies implementing the

false certification discharge statute, 20 U.S.C. § 1087(c), explicitly describe what type of information supports concluding that a borrower may be eligible for discharge: any "finding" of "improper ATB admission practices" "by an entity or organization that had oversight over the schools' [financial aid] administration or educational programs," including by the Department itself, accrediting agencies, guarantors, state licensing bodies, and the school's auditor. U.S. Dep't of Educ., DCL Gen-95-42, at 4 (Sept. 1995).[2] By definition, these oversight materials apply to groups of borrowers all affected by the same fraudulent practices, as the Department has recognized. *See* DCL Gen-95-42, at 10.

Moreover, the Secretary cannot credibly claim that the extensive evidence he possesses about Wilfred's systemic ATB violations, JA-24–31 (¶¶ 78–126), is not "reliable" since he has, in fact, relied on it. The Department reviewed that information and implemented a presumption that any Wilfred borrower who has submitted a facially valid, but otherwise uncorroborated, application should receive a discharge. JA-29 (¶ 115), JA-200, 216. In other words, the Secretary has

---

[2] *Available at* http://www.ifap.ed.gov/dpcletters/attachments/FP0709AttATBGA.pdf; *see also* 34 CFR § 682.402(e)(6)(iv) (directing review of sworn statement in light of information available from regulators and others). Other relevant materials include statements or admissions by school officials, detailed statements from other students, and withdrawal and default rates. DCL Gen-95-42, at 4; U.S. Dep't of Educ., DCL FP-07-09, at 3 (Sept. 24, 2007), *available at* http://www.ifap.ed.gov/dpcletters/attachments/FP0709AttATBGA.pdf.

determined that those borrowers "may be eligible" for false certification discharges, so long as their sworn statements meet the statutory criteria. *See* FFEL Mail/Suspend Regulation; *see also* Direct Loan Mail/Suspend Regulation (trigger is Secretary's "determin[ation]" that borrowers "may be eligible").

The Secretary's assertion that the Department's presumption in favor of Wilfred discharge applications has "nothing" to do with the regulatory requirement to send notice and suspend collection to a larger group of Wilfred students is specious. Def. Br. 33–35. The Department implemented the presumption precisely because it had extensive, reliable evidence that the entire Wilfred chain of schools routinely broke the law in certifying students as eligible for aid when in fact they were not. In light of this background, the regulation provides a reviewing court a manageable standard by which to assess whether, as Plaintiffs assert, the Secretary's position that the same information does not also trigger the obligation to notify and suspend is arbitrary and capricious.

The Secretary also argues that the FFEL Mail/Suspend Regulation cannot provide standards for judicial review because the obligation to notify and suspend "ar[i]se[s] only after [the Secretary] ma[kes] a discretionary determination." Def. Br. 33. But courts routinely exercise judicial review—and set aside agency action—where that action is constrained by provisions with discretionary triggers. In *County of Westchester v. U.S. HUD*, for example, this Court exercised review

over HUD's rejection of a housing strategy where relevant provisions allowed the agency to take that action whenever it "determine[d]" that the strategy was "inconsistent with the purposes of" the statute. 778 F.3d 412, 419 (2d Cir. 2015). The Secretary claims that the case is distinguishable because other statutory provisions provided further significant limitations, but that is not true: the additional provisions simply set forth one specific reason that HUD could not use as a basis for its decision, but provided no other constraints. *Id*. at 419–20.

Courts reviewed agency action constrained by similar provisions in *Massachusetts v. EPA*, 549 U.S. 497 (2007), and in *Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013). In neither case did the court find judicial review precluded, even though the governing statutes conditioned agency requirements on initial discretionary decisions. *See Massachusetts*, 549 U.S. at 533; *Cook*, 733 F.3d at 8; *see also* Pls. Br. 42–43. And the Second Circuit repeatedly has exercised judicial review over administrative action with even fewer constraints on agency discretion. *See Christianson*, 991 F.2d at 62–63 (agency's mandate to administer nature preserve "with the primary aim of conserving the natural resources located there" provided standards for review); *Guertin v. United States*, 743 F.3d 382, 386 (2d Cir. 2014) (reviewing and setting aside HUD's denial of fee petition where statute and regulation provided for reimbursement of any "reasonable … costs," including "required" legal expenses); *see* Pls. Br. 44–45. Where a "strong

presumption" favoring review applies, discretion in the statutory scheme affects the scope of review, not reviewability as a threshold matter. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651, 1656 (2015).[3]

NYPIRG, 321 F.3d 316 (2d Cir. 2003), is not "analogous," as the Secretary contends. Def. Br. 33. First, the plaintiff there sought review of the agency's decision not to take a quintessential enforcement action, so a presumption against judicial review applied. *See id.* at 330–31; *see also Am. Disabled for Attendant Programs Today v. U.S. HUD*, 170 F.3d 381 (3d Cir. 1999) (challenging HUD failure to investigate noncompliance with accessibility requirements). As Plaintiffs have explained, the challenged action in this case is not a refusal to enforce, and so the APA's normal presumption in favor of review operates. *See supra* Section I.A.; Pls. Br. 29–33. Second, although *NYPIRG* concerned a regulation providing for a "nondiscretionary obligation" arising after "a discretionary determination," the plaintiff there did not allege that the EPA had *already* made the triggering determination. 321 F.3d at 331. Here, by contrast, Plaintiffs allege, and the Secretary's own documentation supports, that the Secretary has already

[3] Although *Mach Mining* did not arise under the APA, the Court interpreted fundamental principles of reviewability derived from, and applicable to, APA review. *See id*. at 1651–53, 1656 (construing *Chaney*, *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), and other APA cases); *see also EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013) (relying on APA jurisprudence to assess Title VII claim), *vacated on other grounds*, 135 S. Ct. 1645.

determined, based on information he apparently deems reliable, that Wilfred borrowers will be considered eligible for discharge so long as they submit facially valid sworn statements of qualification.

Even if a presumption against judicial review did apply in this case, Plaintiffs have rebutted that presumption. The FFEL Mail/Suspend Regulation sets forth "guidelines for the agency to follow in exercising" its authority. *Chaney*, 470 U.S. at 833. Given Plaintiffs' allegation that the Secretary possesses "reliable" "information" indicating that Wilfred borrowers "may be eligible" for discharge, the regulation provides a standard for assessing whether his refusal to send notice and suspend collection was arbitrary or capricious. 34 C.F.R. § 682.402(e)(6)(ii).

II. PLAINTIFFS SEEK JUDICIAL REVIEW OF A DISCRETE, FINAL AGENCY ACTION.

The Secretary apparently concedes, with good reason, that he has reached a final decision as to whether to notify Wilfred borrowers of their discharge rights and temporarily suspend collection on Wilfred loans. His sole argument against APA finality, therefore, is that Plaintiffs cannot satisfy the second prong of *Bennett v. Spear*, 520 U.S. 154 (1997), because there has been no adjudication of each individual's discharge application. Def. Br. 38–40. This argument is based on an incorrect view of the facts and the law.

Agency action is final "notwithstanding '[t]he possibility of further proceedings in the agency' on related issues." *Sharkey v. Quarantillo*, 541 F.3d

75, 89 (2d Cir. 2008) (quoting *Bell v. New Jersey*, 461 U.S. 773, 779–80 (1983)). The agency action at issue here—the Secretary's failure to follow the notification and suspension regulation despite his reliable evidence that Wilfred committed widespread false certification fraud—unquestionably inflicts "actual, concrete injury" on Wilfred borrowers, and determines the rights and obligations of both Plaintiffs and the Secretary. *Darby v. Cisneros*, 509 U.S. 137, 144 (1993); *Bennett*, 520 U.S. at 177–78.

The Secretary does not even address, much less refute, that his decision with respect to suspension of collection on Wilfred loans has this effect on rights and obligations—nor could he. The Second Circuit has recognized that suspending collection has an "immediate and substantial impact" on the rights of those against whom collection is suspended, even though their ultimate financial obligation is not resolved. *Aquavella v. Richardson*, 437 F.2d 397, 403–04 (2d Cir. 1971). Here, suspension of collection would provide Wilfred borrowers a reprieve from the collection demands, administrative wage garnishment, Treasury offset, and other Department-instigated actions to which they are currently subject. *See* JA-37, 40, 42, 45, 47, 49 (¶¶ 182, 206, 226–27, 253, 274, 295, 297).

The decision with respect to suspension likewise has legal consequences for the Secretary himself. Defendant maintains that he has a non-discretionary mandate to collect on federal student loans. Def. Br. 11, 26. In light of this,

Defendant can hardly contest that a suspension of that mandate would alter "the legal regime" to which Wilfred borrowers *and* the Secretary are currently subject. *Bennett*, 520 U.S. at 169. This is true regardless of any subsequent actions individuals may take to apply for false certification discharges.

The Secretary attempts to minimize the practical effect that lack of notice has on Wilfred borrowers by noting that Plaintiffs' counsel have submitted discharge applications for *some* Wilfred borrowers, and that information regarding discharges is publicly available on Defendant's website. Def. Br. 39. Plaintiffs' counsel has submitted applications for approximately fifty Wilfred borrowers, a tiny fraction of the over 60,000 loans the Department attributes to Wilfred. JA-54, 203. And clearly the Department website is no substitute for individualized notice contemplated by the Mail/Suspend Regulations, as *none* of the individuals on whose behalf Plaintiffs' counsel have submitted applications had any idea about the availability of the discharge until they were informed by counsel. JA-30, 35, 40, 42, 45, 47, 50 (¶¶ 122, 155, 211, 231, 256, 278, 303); *see also* JA-55 (¶ 6). Indeed, the district court properly accepted as true Plaintiffs' allegation that "most" of the over 60,000 Wilfred borrowers "are unaware that they can apply to Defendant for a discharge and that Defendant will grant it." JA-224; *see also* JA-30 (¶ 122). Defendant's claim that this "is not substantiated by anything in the record," Def. Br. 39, makes no sense; this is an appeal from an order granting a

motion to dismiss, and the complaint's allegations must be taken as true. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd*., 493 F.3d 87, 98 (2d Cir. 2007).

Defendant's remaining attempts to dispute the finality of his refusal to send notice and suspend collection amount to policy arguments that are irrelevant to reviewability, and in any event are unconvincing. Defendant suggests that the Department declined to send notice and suspend collection of Wilfred loans because to do so would be to forego money "rightly owed to the public fisc." Def. Br. 40. Similarly, Defendant argues that to send notice to "*all* Wilfred borrowers" and to suspend collection on "*all* Wilfred loans" would be an impermissibly overbroad remedy because not all Wilfred borrowers may ultimately prove eligible for false certification discharge. *Id.* But the suspension provided for in the regulations is temporary, and should a borrower who receives notice fail to follow the required process for an individual discharge or prove unqualified, the loan will be reinstated without ultimate cost to the public fisc. *See* 34 C.F.R. § 682.402(e)(6)(iii). Regardless, the Secretary has a mandate, in no way subordinate to his mandate to collect student loans, to discharge loans that were falsely certified, *see* 20 U.S.C. § 1087(c), and is obligated to send notice and suspend collection under the circumstances present here, *see* 34 C.F.R. § 682.402(e)(6)(ii).

Nor does the Secretary's suggestion that sending notice to all Wilfred borrowers would somehow invite "collusion," Def. Br. 40, make sense. The Department has already dispensed, for Wilfred borrowers, with the individualized scrutiny that it otherwise applies to discharge applications. And the Dear Colleague Letters cited by Defendant indicate that the "possibility that there has been collusion" is a consideration only in "the absence of oversight report findings" of a school's false certification, which is certainly not the case here. Def. Br. 16 (citing DCL FP-07-09).[4]

Finally, it is simply not the case that by seeking review of a discrete agency action—denial of a request that concerns a defined and limited class of borrowers, from a school that closed in 1994—Plaintiffs mount a broad programmatic attack of the sort rejected in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Plaintiffs do not seek "implementation of an entirely new policy." Def. Br. 40. Rather, they seek judicial review of whether Defendant has acted in an arbitrary

[4] Similarly, the Department only considers the possibility that "borrower[s] may be motivated by financial self-interest" "if there is no other evidence" that a school falsely certified borrowers "beyond the [individual's] application." Def. Br. 14 (citing DCL Gen-95-42, at 4). Although Defendant has not yet produced the administrative record, it is worth noting that Chad Keller's letter on behalf of the Secretary, refusing to notify and suspend, JA-30 (¶ 121), JA-216–17, does not assert that a concern for borrower collusion or fraud motivated the actual decision on Plaintiffs' request for notification and suspension. It is the agency's actual rationale that must be reviewed under the arbitrary-or-capricious standard. *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 94–95 (2d Cir. 2006); *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

and capricious manner by failing to follow the notification and suspension procedures set forth in the Department's own regulations, for students of a chain of schools that the Secretary has already determined engaged in widespread false certification of student loans.

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.

Dated: New York, New York
July 6, 2015

Respectfully Submitted,

BETH E. GOLDMAN
NEW YORK LEGAL ASSISTANCE GROUP
7 Hanover Square, 18th Floor
New York, NY 10004
Tel.: (212) 613-5000
Jane Greengold Stevens, of Counsel
Eileen Connor, of Counsel
Danielle Tarantolo, of Counsel
Jason Glick, of Counsel
Attorneys for Plaintiffs-Appellants

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 4,869 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

Dated: July 6, 2015
New York, New York

Jason Glick, of Counsel
Attorney for Plaintiffs-Appellants