No. 18-16375

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN CALVILLO MANRIQUEZ, JAMAL CORNELIUS, RTHWAN DOBASHI and JENNIFER CRAIG, on behalf of themselves and all others similarly situated

Plaintiffs-Appellees,

v.

ELISABETH DEVOS, in her official capacity as Secretary of the United States Department of Education and THE UNITED STATES DEPARTMENT OF EDUCATION,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 17-cv-07210
Hon. Sallie Kim

PLAINTIFFS-APPELLEES' RESPONSE BRIEF

Noah Zinner
Megumi Tsutsui
HOUSING & ECONOMIC RIGHTS ADVOCATES
1814 Franklin Street, Suite 1040
Oakland, CA 94612
(510) 271-8443

Eileen M. Connor
Toby R. Merrill
Joshua D. Rovenger
LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
122 Boylston Street
Jamaica Plain, MA 02130
(617) 522-0715

Attorneys for Plaintiffs-Appellee

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INTRODUCTION

Named Plaintiffs and members of the proposed class ("Corinthian Students" or "Students") borrowed federal student loans to finance career training programs at schools operated by Corinthian Colleges, Inc. ("Corinthian"). Corinthian was a sham and no longer exists. However, the harm Corinthian caused to Students remains, and the Department of Education ("Department") is exacerbating the damage.

Between 2015 and 2017, the Department adopted and employed a rule (the "Corinthian Rule") by which it fully discharged the loans of, and returned any money paid by, Students who attended particular Corinthian programs at specific campuses during a delineated period of time. The Rule implemented a Department regulation and the terms of its standard loan note, both of which give Students the right to cancel their loan obligations when a school's misconduct violates state law. The Department broadly publicized this Corinthian Rule, created a special application form for Students, and engaged in extensive outreach efforts to notify each and every Student of the process for obtaining complete loan cancellation. It then cancelled the loans of approximately 27,000 Students pursuant to the Corinthian Rule.

In 2017, with tens of thousands of applications pending and many Students yet to apply, the Department abruptly abandoned the Corinthian Rule and instead

devised a formula that purportedly measures the "value" Students received from having attended Corinthian. Under this new rule (the "Average Earnings Rule" or "New Rule"), the Department determines this "value" by comparing the average 2014 earnings of a subset of Corinthian Students—those who had applied for loan cancellation as of July 31, 2017—with the average 2014 earnings from students at "peer" schools with a "passing Gainful Employment ("GE") program." The upshot is that Students as a whole are required to repay the majority of loans that they obtained to attend Corinthian. Perversely, the Department gathered the data for its New Rule by unlawfully invoking an information sharing agreement with the Social Security Administration ("SSA") entered into for the purpose of protecting the public at large, and Students specifically, from predatory institutions like Corinthian.

In May 2018, the District Court preliminarily enjoined application of the Average Earnings Rule because the Department violated the Privacy Act, 5 U.S.C. § 552a, when it disclosed the names, dates of birth, and social security numbers of over 60,000 Corinthian Students to the SSA, and when it then used the information about their earnings to partially deny their applications for loan cancellation. The Rule was therefore "not in accordance with law" and invalid under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). Although Corinthian Students are entitled to, and are seeking through the underlying litigation, the full

cancellation of their invalid loans, the limited question currently on appeal is whether the District Court properly exercised its discretion to enjoin the Department from utilizing this unlawful Average Earnings Rule. It did.

First, the District Court was correct that the Department violated the Privacy Act. Specifically, because the Department disclosed Corinthian Students' personal information *for the purpose of* deciding their applications for full loan cancellation, the Department conducted a "matching program." There is no exception that applies and the Department was required to, but undisputedly did not, follow statutorily-mandated procedures designed to protect Students' due process rights. Moreover, even if the Department was not utilizing a "matching program," the disclosure of personal information was not otherwise lawful. The disclosure was not made pursuant to any established routine use; it was inconsistent with the Department's stated purpose for collecting the data; the Department did not collect earnings information directly from Students; and, the Department's disclosure constituted a blatantly unlawful and unauthorized use of its information sharing agreement with the SSA.

Second, the District Court properly enjoined the Department from utilizing this New Rule. The Department does not dispute that Students faced irreparable harm absent an injunction. Instead, it asserts that the injunction is improper because, although illegal, its data exchange is complete. This argument is factually

wrong: The Department violates the Privacy Act each and every time it applies the Average Earnings Rule to Students. It is also legally wrong: even if no further violation occurred, the Court has equitable authority under the APA to preliminarily enjoin an unlawfully developed rule that is causing irreparable harm.

Third, the record contains an independent basis that is available to this Court as grounds to affirm the injunction: The Average Earnings Rule is arbitrary and capricious. The Department invented a formula that fails to measure what it purports to (the "value" of any Student's program) and, in any event, the borrower defense regulation does not permit the Department to use "value" alone as the metric to determine a Student's remedy.

The Department's actions harm the very Students it is tasked with protecting and this Court should affirm the preliminary injunction.

STATEMENT OF JURISDICTION

Students concur with the Department's statement of jurisdiction.

ISSUES PRESENTED

1. Whether the Department violated the Privacy Act by disclosing the personal information of Students to SSA for the purpose of using their earnings information to decide individual applications for loan cancellation?

2. Whether the District Court properly exercised its discretion to enjoin the ongoing use of this data to resolve individual applications for loan cancellation?
3. Whether, in the alternative, the injunction should be affirmed because the record demonstrates that Plaintiffs are likely to succeed on the merits of their claim that the Average Earnings Rule is arbitrary and capricious and must be set aside under the APA?

PERTINENT STATUTES AND REGULATIONS

Except for the statutes and regulations reproduced in the addendum to this brief, all other pertinent statutes and regulations are produced in the addendum to the brief for Appellants, ECF No. 15.

STATEMENT OF THE CASE

I. Legal Background

A. Borrower Defense

The Department is responsible for overseeing and implementing "Title IV" of the Higher Education Act of 1965, 20 U.S.C. § 1070, *et seq.*, ("HEA"), which includes the William D. Ford Direct Loan Program, 20 U.S.C. § 1087a, *et seq*. Under the Direct Loan Program, the Department directly lends money to eligible student borrowers enrolled in eligible programs at "participating institutions of higher education," as approved by the Department.

The HEA provides for student loan borrowers to seek cancellation of their loans on the basis of school misconduct. It directs that "the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part[.]" 20 U.S.C. § 1087e(h). This Congressional mandate was issued against the backdrop of the Federal Trade Commission's Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses ("Holder Rule"), 16 C.F.R. Pt. 433, which was promulgated in 1975. 40 Fed. Reg. 53506 (Nov. 18, 1975). The Holder Rule ensures that consumers are not forced to repay loans to a financer when a seller fails to provide the goods or services purchased. The logic of the rule is that, as between "an innocent consumer, whose dealings with an unreliable seller are, at most, episodic, and a finance institution . . . the financer is in a better position both to protect itself and to assume the risk of a seller's reliability." *Id.* at 53509. By making financers liable for a seller's misconduct, the Holder Rule encourages lenders to avoid commercial dealings with disreputable sellers that defraud consumers.

In 1995, the Secretary promulgated a regulation that states:

> (c) ***Borrower defenses.***
>
> (1) In any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would

> give rise to a cause of action against the school under applicable State law.
> …
> (2) If the borrower's defense against repayment is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include, but is not limited to, the following:
>
> > (i) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection.
> >
> > (ii) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.
> >
> > (iii) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

34 C.F.R. § 685.206(c). This regulation was based on an earlier Department regulation that allowed borrowers to assert state law claims and defenses against the holders of their federal student loans, which "in turn was adopted from the FTC's Holder Rule provision." 81 Fed. Reg. 75,926, 75,956 (Nov. 1, 2016). The Department has interpreted sub-section (1) of the regulation to require a determination of *both* merits *and* remedy under "applicable State law." *See* (Supp ER 4-7) (excerpts of 2017 ACI memoranda applying state law to question of remedy); (Supp ER 8-10) (excerpts of Department Borrower Defense Unit's Claims Review protocol showing that state law may "recognize an offset of the full

amount of restitution"); (Supp ER 84-96) (excerpts of Department Office of General Counsel (OGC) memoranda from 2000, 2001, and 2003, applying state law to determine borrower defense relief).

Similarly, all Direct Loans are issued pursuant to a form Master Promissory Note, which incorporates a borrower's right to defend against collection of the loan on the basis of school misconduct "if what the school did or did not do would give rise to a legal cause of action against the school under applicable state law." (ER 140).

B. The Privacy Act

Congress adopted the Privacy Act, 5 U.S.C § 552a (the "Act"), to "protect the privacy of individuals identified in information systems maintained by Federal agencies." Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896. The Act protects United States citizens and lawful permanent residents, § 552a(a)(2) (defining "individual"), by "regulat[ing] the collection, maintenance, use, and dissemination of information by [federal] agencies," *Doe v. Chao*, 540 U.S. 614, 619 (2004) (citation omitted), and thereby minimizing "substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained." § 552a(e)(10).

The Privacy Act requires an agency to "inform each individual whom it asks to supply information, on the form which it uses to collect the information . . . the

principal purpose or purposes for which the information is intended to be used." § 552a(e)(3). Further, the Act prohibits disclosure of personal information unless used for an enumerated purpose, such as "for a routine use." § 552a(b)(3). A "routine use" means "the use of such record for a purpose which is compatible with the purpose for which it was collected." § 552a(a)(7). Finally, the law requires federal agencies to "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs." § 552a(e)(2). Federal benefit programs include "any program administered or funded by the Federal Government" that provides "payments, grants, loans, or loan guarantees to individuals." § 552a(12).[1]

Congress amended the Act in 1988 to address "computer matching" or the "establishing or verifying eligibility for a Federal benefit program" without proper "due process." *See* The Computer Matching and Privacy Protection Act of 1988, Pub. L. 100-503, 102 Stat. 2507. The purpose of the computer matching provisions is to ensure that data is "independently verified before any adverse action can be taken" against individuals and that people "are given notice and an opportunity to contest any findings resulting from a computer match." House

[1] To reflect the import of the Privacy Act's protections, Congress provided for both civil and criminal penalties for violations of the Act. *See* 5 U.S.C. § 552a(i).

Comm. on Government Operations, Report 100-802 at 3107 (July 27, 1988) ("Report 100-802"). To effectuate these goals, the law imposes concrete procedural requirements on an agency's use of computer matches with other agencies in making decisions about an individual's federal benefits. *See* §§ 552a (o-p & r).[2]

A "matching program" includes "any computerized comparison of two or more automated systems of records" done "for the purpose of" taking action in relation to "applicants for, recipients or beneficiaries of, [or] participants in" federal benefits programs. 5 U.S.C. § 552a(a)(8)(A)(i). It also includes computerized matches involving federal personnel or payroll record systems, regardless of purpose. §552a(a)(8)(A)(ii).

The Act excludes certain computerized matches from the definition of a "matching program." § 552a(a)(8)(B). Some exclusions apply by virtue of the reason that a match is performed, *id.* §§ (B)(i-vi), and others apply without regard to the purpose for the match, but rather because the match is performed pursuant to

[2] These procedural requirements include: the agency must inform applicants for a federal benefit that matching programs may be used in verifying their application; the agency must inform individuals that they have the right to contest the agency's findings from the matching program before the agency takes any adverse action; the agency must enter into a written agreement specifying the legal purpose and authority of the program; and, the agency must report any new or revised matching program to the House Committee on Governmental Operations, the Senate Committee on Governmental Affairs, and the Office of Management and Budget.

a specific statutory authority, *id.* §§ (B)(vii-x). Matches performed "to produce aggregate statistical data," §(B)(i), and those done "to support any research or statistical project," §(B)(ii), are excluded from the definition, and thus the requirements, of a matching program.

C. Gainful Employment

Although the Department's Gainful Employment regulations are not directly at issue in this appeal, they are relevant because the Department incorporated aspects of the Gainful Employment analysis into its Average Earnings Rule.

Under the HEA, a proprietary institution (*i.e.*, one that is operated as a for-profit business) is eligible to participate in Title IV programs only to the extent that it provides "an eligible program of training to prepare students for gainful employment in a recognized occupation[.]" 20 U.S.C. § 1002(b)(1)(A)(i); *see also* 20 U.S.C. § 1088(b)(1)(A)(1). The Department determines whether a program in fact prepares students for gainful employment by measuring, at the programmatic level, the ratio of student loan debt owed by a cohort of students from a specific program upon leaving or completing the program, to the earnings of *that same cohort* two years later ("D/E Metrics"). *See* 34 C.F.R. §§ 668.402, 668.404.[3] Programs that do not pass the thresholds of these metrics face termination from

[3] The Department released a Notice of Proposed Rulemaking in August 2018 that would rescind the Gainful Employment Rule. 83 Fed. Reg. 40,167 (Aug. 14, 2018).

participation in Title IV. 34 C.F.R. § 668.410. These calculations are done "to assess whether a GE program has prepared students to earn enough to repay their loans, or was sufficiently low cost, such that students are not unduly burdened with debt, and to safeguard the Federal investment in" Title IV programs. 79 Fed. Reg. 64,890, 64,891 (Oct. 31, 2014).

Department regulations spell out in precise detail the procedures for determining a program's compliance with the gainful employment requirement. In sum, in order to calculate the D/E Metrics, the Department requires institutions to report information about students, including information about the identity of all students who completed or left the specified program in the prior year, and the total amount of private and institutional debt incurred by each member of the cohort. 34 C.F.R. § 668.411. After the institution is given an opportunity to correct the program cohort list compiled by the Department, the Department submits the list to the SSA. 34 C.F.R. § 668.405(d). SSA compares the social security numbers provided by the Department with earnings records in its Master Earnings File (MEF) database. SSA then returns to the Department the mean and median annual earnings of the program cohort, "in aggregate and not in individual form," and "the

number, but not the identities, of students on the list that SSA could not match." 34 C.F.R. § 668.413(b)(8)(iv).[4]

This data exchange is made pursuant to an information sharing agreement between the Department and SSA. This agreement sets forth each agency's responsibilities for maintaining the security of data, and strictly limits the authorized uses of the agreement to enable the Department to provide "aggregate disclosures of earnings information to the public to assist them in evaluating institutions that participate in the federal student aid programs . . . to consider policy options for revising the regulations for programs that are required to prepare students for gainful employment in recognized occupations . . . [and to] determine each educational aid program's institutional eligibility." (ER 150-58) ("GE Agreement"). Because the GE Agreement contemplates the sharing of personal information of borrowers that is otherwise protected from disclosure by the Privacy Act and other statutes, the Department designates the SSA as its "authorized

[4] The information provided by SSA to the Department must be aggregate because SSA is barred by statute from disclosing the kind of personal data that would identify the wage earners and from disclosing their reported earnings, absent specific authorization in the Internal Revenue Code. 26 U.S.C. § 6103(a). Relatedly, Congress has barred the Department from developing, implementing, or maintaining a database of personally identifiable information. 20 U.S.C. § 1015c ("Student Unit Record Rule"). This prohibition exempts any database in use by the Department as of 2008, which is "necessary for the operation of" Title IV. 20 U.S.C. § 1015c(b). No current Department database stores individual earnings information of Students receiving Title IV assistance.

representative" to receive and maintain such information "solely for the purpose of" calculating gainful employment D/E metrics. (ER 153).

II. Factual Background

A. The Department uniformly applies the Corinthian Rule to 27,000 Students.

Corinthian was a large for-profit chain that cheated students and wasted taxpayer money. It operated campuses across the country and online under the brands Everest, Heald, and WyoTech, and primarily offered certificate and associate degree programs that purported to provide training in a variety of vocations. (ER 5). At its peak, in 2009 and 2010, Corinthian had over 100 campuses in 25 states, enrolled over 110,000 students, and collected $1.7 billion annually in revenue. (*Id.*) Corinthian targeted for recruitment individuals who were vulnerable to its false promise: first-generation college students; the unemployed; those without a high school diploma; single mothers looking to support a family; and veterans seeking employment. (Supp ER 23).

Between 2007 and 2013, the Attorneys General of 23 states and the Consumer Financial Protection Bureau investigated Corinthian for its predatory, deceptive practices, including for its lies about the job outcomes of its graduates. *See Consumer Fin'l Prot. Bureau v. Corinthian*, No. 1:14-cv-07194, 2015 WL 10854380 (N.D. Ill. Filed Oct. 27, 2015); *Mass. v. Corinthian Coll., Inc.*, No. 14-

1093 (Mass. Super. Ct., filed April 3, 2014); *People v. Corinthian Coll., Inc.*, No. CGC-13-534793 (Cal. Super. Ct., filed Oct. 11, 2013*); People v. Corinthian Schools, Inc., et. al.*, No. BC374999 (Cal. Super Ct., filed July 31, 2007).

The Department's own investigation found that Corinthian published falsely inflated job placement rates for 947 separate programs at its Heald College locations. (Supp ER 139). The Department concluded that "Heald College's inaccurate or incomplete disclosures were misleading to students; that they overstated the employment prospects of graduates of Heald's programs; and that current and prospective students of Heald could have relied upon that information as they were choosing whether to attend the school." (*Id.*). By way of example, Corinthian advertised that its Medical Office Administration Associate Degree at Heald Hayward and Modesto had a 100 percent job placement rate, when in reality it was only 38 percent. (Supp ER 137). Heald also paid temporary agencies to hire its graduates for periods as short as two days, and then counted those graduates as placed in their field of study. (Supp ER 139). Similarly, "one campus classified a 2011 graduate of an Accounting program as employed in the field based upon a food service job she started at Taco Bell in June 2006." (Supp ER 139-40).

Unable to withstand scrutiny, Corinthian closed in April 2015. Students started to assert their right to loan cancellation under the borrower defense

regulation and the terms of their loan notes. Recognizing that Students' claims were valid because Corinthian's operations were rife with illegality, the Department established a process to expeditiously adjudicate the large volume of Student claims in a just and lawful manner.

Specifically, the Department determined that California law was the "applicable state law" governing the claims of all former Corinthian Students. (ER 9); (Supp ER 120-21). The Department also concluded that Corinthian's conduct violated California law, the correct measure of the harm to Students caused by this specific illegal conduct was full restitution of any money paid, and there was no basis to conclude that Corinthian provided any value sufficient to offset Students' harm.[5] (Supp ER 131 & 134). The Department published lists specifying exactly when and where Corinthian published misleading job placement rates, (ER 6) ("the Lists"); (Supp ER 169-210), which are broken out by campus location, program, credential level, and date of first attendance. The Department then released a simplified form to facilitate loan cancellation for Students who borrowed a Direct Loan to attend a program on the Lists (and who first enrolled on or after the beginning of the enumerated time period). (ER 142-49). Submission of this form

[5] In addition to federal student loans, Corinthian received money from Students under federal and state grant programs, military-related tuition benefit programs, private (non-governmental) student loans, and cash payments. Under California law, "full restitution" would include a return of all such payments regardless of source. Borrower defense and the Corinthian Rule concern only federal student loans.

(or of the information requested on the form) was sufficient to trigger full loan cancellation under the Rule. (ER 6-7); (ER 142-49); *see also* Defs' Br. 10-11; (Supp ER 131 & 134).[6]

The Corinthian Rule applies to approximately 50,000 Students who attended roughly 800 Heald programs between 2010 and 2015. (ER 8). The Rule also covers approximately 85,000 Students who attended nearly 800 Everest and WyoTech programs in over 20 states. (*Id.).* In order to ensure that Students were aware of the Rule, the Department conducted outreach in coordination with Attorneys General from 42 states and the District of Columbia. (ER 7); (Supp ER 21-22 & 111). The Department provided the Attorneys General with programmatic-level enrollment data to enable them to inform more than 100,000 Corinthian Students of their right to full relief under this rule. *See, e.g.*, (Supp ER 21-22); (Supp ER 103-04 & 111).

Until January 20, 2017, the Department did not reject any Corinthian Student applications under the Rule. (ER 10). Instead, as the Rule dictated, "the Department awarded full loan discharges to all Corinthian Students who

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[6] Students have moved for certification of a class consisting of all students who borrowed a Direct Loan in connection with attendance at any of the programs, during the delineated time periods, identified by the Department, *i.e.*, all those who would be eligible for full loan cancellation under the Corinthian Rule absent the Department's abandonment of it. On September 17, 2018, the Department conceded that class treatment is appropriate, but disputed Students' proposed class definition. The District Court is scheduled to hear argument on the merits of class certification on October 15, 2018.

successfully asserted a borrower defense," Defs' Br. 10-11. The Department provided this full discharge to approximately 27,000 Corinthian Students. (ER 7).

B. The Department abandons the Corinthian Rule in favor of the Average Earnings Rule

From January 20, 2017 until December 2017, the Department halted application of the Corinthian Rule and stopped providing *any* loan cancellation to Students. In "early January 2017," pursuant to an observation "that many Corinthian programs had actually performed acceptably" on the gainful employment D/E metrics, the Department "convened a review panel to reconsider" the Rule. Defs' Br. 11. These GE metrics, publicly released in January 2017, measured the 2014 cohorts of gainful employment programs. Of the approximately 1600 Corinthian programs included on the Lists, only 106 programs (approximately 6.6 percent) had D/E metrics calculated. (ER 116). Defendant Secretary of Education Betsy DeVos also stated her belief that, under the Rule, "all one had to do was raise his or her hands [sic] to be entitled to so-called free money." (Supp ER 72).

On December 20, 2017, the Department confirmed its abandonment of the Corinthian Rule and publicly announced its replacement. (ER 124-31); (Supp ER 74-76). Under its New Rule, the Department purports to calculate borrower defense relief based on the "value" of the education received by the Student. It

ostensibly does this by comparing the average earnings of a sub-set of Students (those who applied for loan cancellation on or before July 31, 2017), with the average earnings from unknown individuals at "peer" schools with a "passing GE program." (ER 124, 126-28); (Supp ER 74-75). For Students who otherwise satisfy the requirements of the Corinthian Rule, but who are assigned by the Department to a "program" with average earnings at 50 percent or more of the average earnings of the comparator group, the Department partially denies the borrower defense claim and requires the Student to repay up to 90 percent of their fraudulent loans. (ER 127-28).

The methodology of the New Rule, as described by the Department, is as follows. First, the Department categorized 68,836 Corinthian Students who had submitted a borrower defense claim as of July 31, 2017 into 79 different categories. (ER 124-26). These 79 groups do not correspond with specific programs of study, credentials, locations, or time periods. For instance, a Student who attended the Pharmacy Technician Program at Everest in Miami in July 2010, would be grouped with a Student who attended that program in Aurora, Colorado in September 2012, and with a Student who attended it in San Francisco in 2014. *See* (Supp ER 31-68) (showing the various and divergent types of programs that were lumped together into 79 different categories). Second, and for various reasons, the Department excluded from these 79 categories nearly 10 percent of the

Students who had applied for borrower defense as of July 31, 2017. (ER 118). Third, the Department sent the names, dates of birth, and social security numbers of 61,717 Students to the SSA. (*Id.*). Fourth, SSA matched this information with its Master Earnings File for 2014, and provided to the Department the mean and median income for each of the 79 groups. (ER 126-27). Fifth, the Department compared that data to the 2014 mean and median earnings of students who attended "peer" passing GE programs. (ER 126-28). All of the students in the comparator groups completed or left their respective programs in the year 2012, whereas Students in the 79 groups attended or left Corinthian in different years. Finally, based on the comparison, the Department calculated the amount of loan discharge that individuals from each program on the Lists would receive, (ER 128-29); (Supp ER 39-68), and started to individually notify Students of their partial denials, (Supp ER 149-51).

To obtain this data "for the purpose of determining the amount of relief to provide to CCI borrower defense claimants," (ER 115), the Department relied on the GE Agreement between itself and SSA that was executed for the exclusive purpose of calculating gainful employment D/E metrics. (ER 150-58). The SSA's Office of the Inspector General confirmed that SSA was not aware that the Department invoked the GE Agreement to obtain earnings data for the New Rule, and that such use "could not have been foreseen at the time the agreement was

established." (Supp ER 97-98). The matter was referred to SSA's Data Integrity Board for "appropriate action and response." (*Id.*).

As of April 12, 2018, the Department had partially denied 8,809 claims, (Supp ER 27). By denying these Students the full relief they were due, the Department reduced the amount of discharged student debt by approximately $70.3 million, (Supp ER 28), ensuring that Students would continue to carry this burden and causing them significant and irreparable harm. Students spent their time, money, and eligibility for federal student aid on sham programs. They must forgo or defer further education. 34 C.F.R. § 668.32(g); (Supp ER 146 & 158). They are unable to qualify for loans (or can only obtain the most predatory ones), they have damaged credit, and they have lost innumerable opportunities, including the ability "to obtain a mortgage for a home because of the existence of [the] loans." (ER 36); *see also* (Supp ER 17). Students who received partial denials faced the choice of putting food on their table or paying their invalid debt. (ER 35); (Supp ER 146 & 164). Indeed, "repayment of loans threatens these Students' ability to pay for basic expenses like food and rent[.]" (ER 35). Because Corinthian targeted individuals with few financial resources, "any additional dollar they are required to repay takes away from [their] basic need for food and shelter." (*Id.*).

III. Procedural History

On December 20, 2017, Corinthian Students filed this suit on behalf of themselves and a class of similarly situated individuals. On March 17, 2018, they sought leave to file an amended complaint and moved for a preliminary injunction requiring the Department to stop applying the Average Earnings Rule and to timely discharge Students' loans under the Corinthian Rule. The Court heard argument on the motions on April 30, 2018.

On May 18, 2018, the Court allowed Students to file a First Amended Complaint and, on May 25, 2018, the Court partially granted and partially denied Students' preliminary injunction motion, (ER 3-41). The Court agreed that the Average Earnings Rule violated the Privacy Act and was invalid under the APA. (ER 19-24). The Court also agreed that the Average Earnings Rule was causing ongoing irreparable harm and that an injunction was in the public interest. (ER 33-37). The Court disagreed with Students' other claims related to the Average Earnings Rule (including that the rule was arbitrary and capricious), and refused to preliminarily require the Department to return to the Corinthian Rule because, at least as the record existed at the time of the injunction, "the parameters of the Corinthian Rule [were] not clearly defined." (ER 38).

Although the Court found the Average Earnings Rule unlawful, and notwithstanding an injunction prohibiting the Department from collecting on

Students' loans, the Department only stopped collecting on the loans of Named Plaintiffs. (Supp ER 12). The Court thereafter amended its order on June 19, 2018, to expressly bar the Department from collecting on any Corinthian Student whose loans went back into repayment on account of the Average Earnings Rule. (ER 1-2). The Court also ordered the Department to halt collection on any Corinthian Student who asserted a borrower defense and was awaiting a decision. (*Id.*). The Department subsequently sought clarification from the Court to confirm that it could continue to collect on Students who had not yet asserted a borrower defense. On August 30, 2018, the Court granted the Department's unopposed motion to clarify. (Supp ER 1).

The Department filed its notice of appeal of the preliminary injunction on July 24, 2018, (ER 41-42), and subsequently moved to stay all district court proceedings. On August 30, 2018, the Court granted, in part, Defendant's opposed motion and stayed all proceedings in the case pending appeal except for the Students' Motion for Class Certification. (Supp ER 2-3).

STANDARD OF REVIEW

This Court applies a "limited and deferential" abuse of discretion standard when reviewing a District Court's decision to grant a preliminary injunction. *See Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). Findings of

facts are reviewed for clear error, and conclusions of law are reviewed *de novo*. *Indep. Living Ctr. of S. Cal. v. Shewry*, 543 F.3d 1050, 1055 (9th Cir. 2001).

A preliminary injunction is warranted where: (1) plaintiffs are "likely to succeed on the merits," (2) plaintiffs are "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities" tips in their favor, and (4) an "injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). When the government is a defendant, the last two preliminary injunction factors merge. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

SUMMARY OF THE ARGUMENT

Under the APA, a court must set aside final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2). Here, the District Court properly enjoined the Department's use of the Average Earnings Rule because it was "not in accordance" with the Privacy Act and was irreparably harming Students. This Court could also affirm the injunction on an alternative basis in the record because the Average Earnings Rule is arbitrary and capricious.

First, the District Court correctly concluded that the Department's data experiment violated the Privacy Act. The Department's *ultra vires* use of the GE Agreement to decide individual borrower defense claims constitutes a matching

program, and the Department has indisputably failed to comply with any of the Act's associated procedural mandates. The data exchange is a matching program for a straightforward reason: The Department's sole and stated purpose for disclosing Students' personal information was to decide Students' eligibility for a full loan discharge. Moreover, as the Department conceded below, it is irrelevant whether the data from the SSA was aggregated because the statutory exclusion that the Department invokes, 5 U.S.C. § 552(a)(8)(B)(i), applies *only* if the aggregate statistical data is, itself, the end goal, and not if the data is aggregated *for the purpose of* rendering a decision on an individual's eligibility for a federal benefit.

The Department further violated the Privacy Act when it failed to inform Students that their personal information would be disclosed to SSA for the purpose of deciding *other* Corinthian Students' applications for loan relief. The Department likewise independently violated the Act by failing to obtain the data relevant to its decisions directly from individual Students. And, of course, the Department acted unlawfully by disclosing protected information and receiving earnings information under the false pretense that it was doing so for the purpose of enforcing gainful employment requirements. The Department not only deceived Students, but another federal agency, which has since undertaken an investigation of the matter.

Second, after concluding that the Average Earnings Rule was invalid, and that it was causing Corinthian Students irreparable harm, the District Court properly enjoined the Rule. As a factual matter, the Department is incorrect to assert (for the first time on appeal) that it only violated the Privacy Act when it disclosed the Students' personal information to the SSA. In reality, the Department violates the Privacy Act each and every time it uses the data to decide an individual's eligibility for a full loan discharge. The Department also violates the Act each time it fails to provide Students with the procedural protections the Act requires, including by denying them the opportunity to contest the findings upon which the Department's decision is based. But, even assuming that the illegality occurred only as the Department was concocting the Rule, the Department's argument—that it could have violated an unlimited number of laws in countless ways before it applied the Rule to Students—misunderstands the APA and the equitable authority vested in the Court. It is also legally perilous. Simply stated, a District Court possesses the authority to set aside rules that are illegally formulated and to preliminarily enjoin an unlawful rule's application if it is causing ongoing irreparable harm.

Third, the record provides an alternative basis for affirmance: The Rule is arbitrary and capricious. The Department engaged in countless contortions to graft its New Rule onto the existing gainful employment regulatory framework. But

these acrobatics fail, for two reasons. First, the Average Earnings Rule does not actually measure what it purports to (the "value" a Student's attendance at Corinthian), and instead relies on an illogical comparison of mismatched data points. Second, the Average Earnings Rule selects a measure of relief ("value") that is inconsistent with the text of the borrower defense regulation, and constitutes an impermissible and unexplained departure from the Department's longstanding interpretation of the regulation that tethers relief to the remedy available under state law.

Ultimately, the District Court properly enjoined the Department's use of the Average Earnings Rule and this Court has multiple avenues to affirm that decision. This Court should expeditiously do so to allow this litigation to move forward and to permit Students to pursue the full loan discharges that they are due.

ARGUMENT

I. The Department's *ultra vires* disclosure of Students' personal information to the SSA violates the Privacy Act.

The District Court correctly concluded that the Department's conduct violates the Privacy Act. First, the Department was utilizing a matching program because it disclosed protected data for the sole purpose of rendering individual benefits decisions and then, in fact, used the SSA's earning data to decide individual applications for loan relief. Absent the District Court's injunction, it

would have continued to do so. Critically, the Department does not dispute that it failed to comply with any of the Act's procedural requirements for matching programs. Second, even if the Department was not engaged in a matching program, its disclosure of data was not otherwise lawful under the Privacy Act.

A. The Department's data experiment constitutes a matching program and the Department indisputably failed to comply with any of the Privacy Act's procedural requirements.

The Department's action—sending a data file containing personally identifying information of Students who applied for borrower defense relief to the SSA so that SSA would match those Students to SSA's records in order to extract their reported earnings—meets the statutory definition of a matching program. §552a(8)(A)(i). Indeed, there is no dispute that the Department engaged in a "computerized comparison of two or more automated systems of records" with the SSA. § 552(a)(8). Nor does the Department disagree that data sharing for the purpose of establishing the amount of loan forgiveness under the borrower defense regulation would constitute "establishing . . . eligibility … under [a] Federal benefit program." *Id*. Instead, the Department argues that the comparison was not done "for the purpose of" determining Students' rights under the borrower defense regulation, and that its conduct fits within an exclusion to the definition of "matching program" that carves out "matches *performed to produce* aggregate statistical data." Defs' Br. 23 (citing § 552a(8)(B)(i)) (emphasis added).

It is not plausible for the Department to claim that the match had any purpose independent from its endeavor to create a new methodology to decide individual borrower defense claims. As the Department's memorandum detailing the Rule explains, it *only* disclosed Students' personal information, and *only* developed the rule, "to calculate the amount of relief to award former Corinthian Colleges Inc. (CCI) students with borrower defense claims eligible for approval." (ER 124) ("[t]his methodology was developed *to provide Students* relief…") (emphasis added). The Department was not engaged, nor had any other reason to engage, in an independent assessment of the "value furnished by the programs," Defs' Br. 19, outside of its attempt to create "the framework for approving and awarding relief," (ER 129), and to "apply[] the results to calculate amounts of relief, in terms of amounts of Federal student loans discharged and reimbursements of loan payments already made to the Secretary by CCI borrower defense claimants." (ER 120). If there were any question, the author of the explanatory memorandum testified that he was asked to "asses[] the extent to which CCI students had been harmed by CCI's misrepresentations, *for the purpose of* determining the amount of relief to provide to CCI borrower defense claimants." (ER 115) (Emphasis added). Contrary to the Department's current assertion, there was nothing "wholly derivative," Def's Br. 25, or attenuated about the relationship between the disclosure and the consequences to individual Students.

Although the Department also argues that its conduct is excluded from the matching program requirements because its "focus was squarely on the value furnished by the various *programs*," (Def's Br. 19), that explanation falters, because the groupings made by the Department are *not programs* as that term is used in the HEA and the specific gainful employment provisions. *See, e.g.*, 34 C.F.R. § 668.402; (ER 124) (explaining difference between "Gainful Employment (GE) Program," which is limited to a program offered at a specific institution, and "CCI Program/Credential Group," which is not). The 79 "programs" that the Department used for its comparison were artificial creatures of the Department's own imagination; they comprised Students who attended different programs, at distinct campuses around the country, across a number of years. As a factual matter, the comparison of data was thus not done on a "programmatic basis." And, as explained above, the Department's sole reason for engaging in the analysis was to decide how much loan cancellation to provide any given Student.[7]

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[7] The Department states that no action was taken "against" any individual as a result of the New Rule. Defs' Br. 26. To the extent that this is a distinct argument, and the Department is claiming that no "adverse action" is taken against Students when their claims are partially denied, the Department never raised this argument below and the Court should not address it. *Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. 2014). But, even if the Department preserved the argument, its position is wrong. A partial denial (*i.e.*, only a partial discharge of a student loan when a Student has applied for a full loan discharge and a return of any money paid) constitutes adverse action because the Student is only receiving a portion of what she asserts that she is legally entitled to. *See, e.g., Robbins v. SSA*, 466 F.3d 880, 882 (9th Cir. 2006) (challenging "partial denial" of social security benefits).

The Department's claim that its conduct is excluded from the definition of a matching program under sub-section 552a(a)(8)(B)(i) fares no better because, by its plain terms, the exclusion for aggregate statistical data applies *only* when the data matching is "performed to produce" aggregate statistical data. 5 U.S.C. § 552a(a)(8)(B)(i) ("matches performed to produce aggregate statistical data without any personal identifiers"). That is, the exclusion applies when the aggregate statistical data is the end goal itself (*i.e.*, to allow for an agency to engage in a broader policy analysis or to develop a rule), but *not* when the aggregate statistical data is merely a step in some other process (such as deciding an individual's eligibility for a federal benefit). Produce, *Oxford English Dictionary*, (2018) *available at* https://en.oxforddictionaries.com/definition /produce ("Cause (a particular result or situation) to happen or exist"). By comparison, disclosures properly completed under the GE Agreement, and thus made to SSA for the purpose of calculating the D/E metrics of gainful employment programs, are "performed to produce" the aggregate statistical data. The whole point of that exchange is to get aggregate data to allow the Department to render broader policy decisions, to engage in policy analysis, and to educate the public.[8]

[8] To be sure, such a comparison may have consequences on a program's eligibility for Title IV funding which, in turn, may impact an individual Student. But, unlike under the Average Earnings Rule, such consequences *could* be fairly described as "wholly derivative" of the disclosure.

In contrast, under the New Rule, the sole purpose of the exchange is to "adjudicate[] claims' systematically under the newly announced discharge policy," (Supp ER 76), and to apply the data *to specific students* in particular programs. *See* Defs' Br. 25-26.

The structure of the statute also suggests that purpose is paramount. The statute defines two types of matching programs: Those that are made for the purpose of deciding individual rights under federal benefits programs, subsection (A)(i), and those that more broadly involve a Federal personnel or payroll systems of records, regardless of purpose, subsection (A)(ii). The exclusion in (B)(i), like all the subsection (B) exclusions that are applicable by reference to the purpose of the match, *see, e.g.,* §§ (B)(i-vi), does significant work to limit the broad scope of § 552a(a)(8)(A)(ii). But, the exclusion in (B)(i) cannot, and does not, apply to matches made for the purpose described in subsection (A)(i) because both are expressly defined by reference to their primary purpose.[9] In other words, a matching program that satisfies the definition of subsection (A)(i) is done to render

[9] In contrast, the exclusions that are defined by reference to a specific statutory authority, *id.* §§ (B)(vii-x), limit both § (A)(i) and § (A)(ii) matching programs.

an individualized federal benefits determination and cannot simultaneously be "performed to produce" aggregate statistical data.[10]

This reading is bolstered by Congress' stated intent. Defs' Br. 24, n.4. Congress enacted the 1988 Amendments to provide individuals with sufficient process before an agency could use government-maintained data to make life-altering benefits decisions. *See* (House Report No. 100-802) (noting that there was a lack of information regarding how many matching programs existed and the need for enhanced information and procedural protections); *id.* at 310 (seeking to ensure that data was "independently verified before any adverse action c[ould] be taken" against individuals and that "individuals . . . [were] given notice and an opportunity to contest any findings resulting from a computer match"). Its concerns exist irrespective of whether data is individual or aggregated, which is presumably why the report from the House Committee on Government Operations explicitly states that "[t]o qualify under the [Aggregate Statistical Data] exclusion,

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[10] Sub-section (B)(ii) includes the clause, "the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals," while sub-section (B)(i) does not contain this additional language. Contrary to the Department's interpretation, this was not a Congressional invitation for agencies to use aggregate data to decide individual benefits claims. The carve out in (B)(ii) applies only to the extent the statistical data is not used to make *any* decision that "concern[s] the rights, benefits, or privileges of specific individuals," including, presumably, decisions that impact federal employees whose records are matched under (A)(ii). That language addresses more types of decisions than a determination of eligibility for a federal benefits program.

no information resulting from the match may be produced or retained in individually identifiable form or *may be used in any way to affect the rights, benefits, or privileges, of any individual*." Report 100-802 at 3130 (emphasis added).

Even if there were ambiguity as to the scope of this exclusion, the OMB (the agency explicitly tasked with promulgating regulations under the Act, § 552a(v)), has interpreted § 552(a)(8)(B)(i) as precluding aggregate data collection for the purpose of individual benefit determinations. 54 Fed. Reg. 25,818, 25,823 (June 19, 1989) (stating that "to qualify under this exclusion, no information resulting from the match may be produced or retained in individually identifiable form or may be used in any way to affect the rights, benefits, or privileges of any individual"). And, the OMB has expressed particular "concern[] that agencies not avoid the reach of the Act by disguising the real purpose of their matching program." *Id.* The OMB's interpretation is entitled to significant deference and the Department does not argue otherwise. *See Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1120 (D.C. Cir. 2007) (explaining the deference due to OMB guidance on the Privacy Act); *see also Smiley v. Citibank* (South Dakota), N.A., 517 U.S. 735, 742 (1996) (providing *Chevron* deference in dispute not involving agency responsible for interpretation).

In fact, the Department expressly adopted the OMB's interpretation before the District Court. *See* (Supp ER 70) (stating that "although the statutory text contains no further limitations, it includes the "implicit" restriction that aggregate statistical data matches not be "done to take action against specific individuals"); (Supp ER 70-71) (accepting this interpretation but then arguing that it was not obtaining the data to take action against specific individuals). Its new interpretation of the statute is waived. *Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. 2014) (explaining that an argument will "generally be deemed waived on appeal if the argument was not raised sufficient for the trial court to rule on it").

Ultimately, this Court should reject the Department's attempt to insert an exception into the Act that is inconsistent with its purpose. This Court should also reject the Department's attempt to camouflage its conduct, which was plainly to obtain the SSA's earnings data to render individual benefits decisions. And, because the Department concedes that it did not comply with any of the requirements for a matching program, (ER 22), this Court should affirm the District Court's decision.

B. The Department's disclosure of Students' personal information violates the law in several other, independent ways.

The Department's disclosure of Students' personal information violated the Act in a number of alternative, independent ways. And, contrary to the

Department's argument, Defs' Br. 14, Students preserved these arguments below. *See* (ER 62-65) (alleging facts related to the Privacy Act violations); (Supp ER 167-68) (expressly asserting various and additional violations of the Privacy Act); (Supp ER 19) (highlighting the Department's failure to substantively address Borrowers' assertion that the Department violated additional provisions of the Privacy Act).

First, the Department is barred under the Privacy Act from disclosing "any record which is contained in a system of records . . . unless disclosure of the record would be … for a routine use[.]" 5 U.S.C. § 552a(b)(3). The Department must also "inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained . . . the routine uses which may be made of the information [and] . . . the effects on him, if any." § 552a(e)(3). And, the Department must "publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include . . . each routine use of the records contained in the system, including the categories of users and the purpose of such use." § 552a(e)(4)(D).

The Department claims to have satisfied the publication requirement by citing a systems of records notice concerning the "Common Services for Borrowers," Defs' Br. 28 (*citing* 81 Fed. Reg. 60,683 (Sept. 2, 2016)), but it is not

clear that this system of records has anything to do with borrower defense, or how the routine use published in this notice—disclosure for resolving guaranty agency appeals and ensuring contractor compliance—provides advance warning to Students that their information will be shared with SSA for the purpose of resolving their own and other Students' borrower defense applications.[11] The Department further identifies two routine use clauses that it provided to Students to claim that it was allowed to disclose the data to "permit making, servicing, collecting, assigning, adjusting, transferring, referring, or discharging a loan," and "to determine your eligibility to receive . . . a benefit on a loan (such as a deferment, forbearance, discharge of forgiveness)." Defs' Br. 27-28 (citations omitted). However, simply providing Students with this notice is not sufficient; these routine uses must be published in the appropriate systems of records notice. § 552a(e)(4)(D); (ER 145) ("The information in your file may be disclosed…to third parties as authorized under routine uses in the appropriate systems of records notices").

[11] The Office of Inspector General Report on the Department's Borrower Defense process references the National Student Loan Data System for Students (NSLDS), which is also the system of records that the Department modified as requested under the GE Agreement (although such modifications did not relate to borrower defense). (Supp ER 122-23). Meanwhile, the Department's explanation of its methodology is silent as to the systems of records at issue, speaking only of a "combined claim file" from which data was extracted and sent to SSA. (ER 125-26).

Furthermore, even assuming that it was a properly-published routine use for the Department to disclose a Borrower's data to decide her *own* individual borrower defense claim, the Department also disclosed the personal information to decide *every other* Students' individual eligibility for a loan discharge. The "routine use" exception is limited to any disclosure "compatible" with the purpose for which it was collected. *Swenson v. U.S. Postal Serv.*, 890 F.2d 1075, 1078 (9th Cir. 1989) (explaining that a "routine use" requires more than "mere relevance" and there must be a "concrete relationship" between the purposes for which the data is collected and how it is disclosed); *see also U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 9 F.3d 138, 144-45 (D.C. Cir. 1993) (explaining that there must be a far tighter nexus—a nexus approaching an identity of purpose—between the reason the information was collected and the proposed routine use than the word "compatible" might imply"). Here, even if the Department were permitted to disclose a Students' personal data to determine *her* eligibility for relief, it is incompatible with that purpose to disclose her information in order to decide *every other* Students' eligibility for a loan discharge.

Second, the Department is required to "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs." § 552a(e)(2). The Department did not even

attempt to seek earnings information directly from Students, nor has it explained why it would have been "impracticable" to do so. Instead, the Department blatantly ignored Congress' judgment that the individual is the best source of accurate information about him or herself. *See Waters v. Thornburgh*, 888 F.2d 870, 874 (D.C. Cir. 1989), *abrogated on other grounds by Doe v. Chao*, 540 U.S. 614, 618 (2004).[12]

Third, the Department's disclosures were "not in accordance with the law" because it lacked any legal authority to make the disclosures. The GE Agreement provided the Department with narrow authority to disclose personal information for the purposes of informing the public about for-profit institutions and to further develop policy around GE. *See* (ER 150-51) (*citing* 20 U.S.C. § 1231a) (providing authority to gather program data and to inform the public); 20 U.S.C. § 9511(b)(1)(C) (permitting the Department to evaluate the effectiveness of educational programs); 20 U.S.C. §§ 1015a(i), 1101 (evaluating programs preparing students for gainful employment in recognized occupations). Indeed,

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[12] Similarly, the Department violated this provision when it assigned Students to its 79 invented programs. To determine how to cram Students into the 79 various categories, the Department needed to first determine the Students' program of study and level of credential. The Department solicited this information from both Students and from Zenith (the company that acquired a majority of CCI campuses in 2015). However, "if there was a discrepancy between the CCI Program Name and/or credential as reported by the individual and as reported by Zenith, the claim was mapped to the Program Name found in the data provided by Zenith. This is because, as a general rule, [the Department] found the Zenith data to be more accurate and closely aligned to the Department's official list of former title IV eligible CCI Program Names." (ER 125).

pursuant to the agreement, the Department was only permitted to disclose "personally identifiable information (PII) from students' education records . . . protected by the Family Educational Rights and Privacy Act" for the limited purposes enumerated in that document. (ER 153). The Department's use of the GE Agreement for borrower defense purposes was blatantly inconsistent with the authority that permitted the exchange.[13]

Ultimately, the District Court correctly determined that the Average Earnings Rule violated the Privacy Act, and this Court has multiple ways to affirm that decision.

II. The District Court properly exercised its discretion to enjoin the Average Earnings Rule because the rule is invalid and was causing Students irreparable harm.

The Department next asserts that its only "purported" violation was a "single exchange of information between the Department and SSA," Defs' Br. 18, and that it is a "completed past wrong." Defs' Br. 32. Essentially, the Department attempts to dissociate the illegal foundation of the Average Earnings Rule from the Rule itself and then claim that the court lacked the authority to issue the injunction.

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[13] The Department also argues that the SSA's disclosure of aggregate data was not "one contained in a "system of records." Defs' Br. 29. The Department's position is somewhat opaque but, to the extent it is arguing that the data from the SSA in the matching program did not involve a "system of records," the argument is incorrect because the SSA records were contained in the SSA's Master Earnings File, and then "retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." § 552a(a)(5).

Although the Department never raised this argument below (or attempted to establish the factual predicates for its argument before the District Court), *Bolker v. Comm'r Internal Revenue*, 760 F.2d 1039, 1042 (9th Cir. 1985), it is factually wrong to describe the violation as a "completed past wrong." More fundamentally, the Department's perilous legal argument would upend the APA and the Court's equitable authority.

First, the Department is incorrect that it only violated the law when it disclosed the data to the SSA, because the Department's very use of the unlawful data to decide individual benefits claims is an ongoing illegality that would continue absent the injunction. Indeed, "a matching program covers not only the actual computerized comparison, but the investigative follow-up and ultimate action, if any." 54 Fed. Reg. at 25,822. This makes good sense. The Act's procedural protections aim to ensure that individual benefits decisions are fair and based on accurate information; it would contravene that purpose to allow an agency to make benefits decisions using unlawfully-obtained data.

Furthermore, the Department also violates the Privacy Act each and every time it applies the Average Earnings Rule to Students without providing them with the statutorily-required procedural protections. As previously noted, the Act requires the Department to provide individuals with the opportunity to contest the accuracy of the results of a matching program. § 552a(p)(1)(B). In failing to

provide Students with the opportunity to contest the earnings data as it decides their borrower defense claims, the Department violates the Act as it employs the Average Earnings Rule.

Second, even assuming, *arguendo*, that the Department only violated the law when it developed the Average Earnings Rule, the District Court was still permitted to set aside the rule on that basis and to enjoin it because it was causing ongoing irreparable harm. Under the APA, courts are expressly permitted to set aside agency action "not in accordance with law" or "without observance of procedure required by law." § 706(2). Courts also possess the equitable authority to preliminarily enjoin unlawfully developed agency action that causes irreparable harm. *See, e.g.*, *Children's Hospital of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 616-17 (4th Cir. 2018) (affirming the injunction of a policy under the APA because the agency failed to follow procedural requirements in enacting the policy and the moving party would have suffered harm through application of the policy); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (affirming injunction, in part, on the basis that agency action was unlawfully formulated and that the application of the policy to states was causing irreparable harm); *see also League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014) (remanding for entry of preliminary injunction where plaintiffs sought to enjoin a timber sale for a logging project on the basis of a flawed environmental impact

statement). Here, after concluding that the Average Earnings Rule was unlawfully formulated and "invalid under the APA," (ER 34), and after determining that its application was causing ongoing, irreparable harm to Corinthian Students, the District Court had the discretion to enjoin the Department.

The Department's argument to the contrary would set a dangerous precedent and upend this well-established authority. In the Department's view, it does not matter how it obtained the data for the Average Earnings Rule so long as its unlawful conduct occurred before it applied the Rule to Students. Theoretically, the Department could have sent an employee over to the SSA to physically steal the data and the Court would be powerless to act. Or, the Department could have hacked into every Student's computer to obtain the earnings data and it would be no issue. To justify this extreme position, the Department cites three cases that are simply inapplicable in the APA context where courts unquestionably have authority to set aside unlawfully-developed agency action and to halt ongoing, irreparable harms stemming from such administrative conduct. At bottom, the Department seeks immunity from court oversight that the law does not, and certainly should not, permit.

III. The Average Earnings Rule is arbitrary and capricious because it does not rationally measure the "value" of any given Corinthian program and because any reliance on "value" as the sole determinant of relief is inconsistent with the borrower defense regulation.

This Court may affirm the District Court's order on any basis in the record. *See Enyart v. Nat'l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011); *Engleson v. Burlington N. R.R. Co.*, 972 F.2d 1038, 1041 (9th Cir. 1992) (stating that "arguments that support the judgment as entered can be made without a cross-appeal . . . [and] [a] cross-appeal is unnecessary even when the argument being raised has been explicitly rejected by the district court.") (internal quotation marks and citations omitted).[14]

Under the APA, a court must "carefully review[] the record [to] satisfy[] [itself] that the agency has made a reasoned decision," utilizing an inquiry that is "searching and careful." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). There must be a "rational connection between the facts found and the choice made[,]" *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted), and the agency cannot "entirely fail[] to consider an important aspect of the problem, offer[] an explanation for its decision that runs counter to the evidence before the agency, or [adopt a rule that] is so

[14] Students asserted a number of alternative claims before the District Court that would justify invalidating the Average Earnings Rule and that would require the Department to reinstate its Corinthian Rule. Students do not intend to abandon or waive those other claims by not addressing them in this interlocutory appeal.

implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001) (citation omitted). Further, an "agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of § 706 [of the APA]." *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010).

In discounting Students' arguments as "attempts to second-guess the Secretary's decision-making," (ER 30-31), the District Court failed to take a "searching and careful" look at the Department's conduct. However, even a cursory review shows that the Department's Rule does not rationally measure what it purports to (the "value" of a Student's experience), and that its approach is inconsistent with the borrower defense regulation. The rule is arbitrary and capricious.

First, the New Rule is arbitrary and capricious because it does not provide a meaningful measure of the "value" that any Student received from Corinthian, or that any specific Corinthian program provided. To begin, the Department's analysis rests on the unsupported assumption that a certain segment of Students who applied for loan relief prior to July 31, 2018 are representative of all Corinthian Students. As the Department states, Students who apply after that date will "have their borrower defense claims resolved based on the same methodology as those [Students] whose data was included in the information exchange." Defs'

Br. 33. Similarly, Students like Plaintiff Jennifer Craig who were attending Corinthian in 2014 and 2015 will have their claims decided on the basis of the other Students' earnings data. But, the Department has not explained why the earnings of this subset of Students is representative of the value received by any given Student, or even any statistically-typical Student. The Department's assumption is particularly capricious given differences across Student experiences that would impact the "value" an individual received, and an individual's earnings, including: when the Student attended Corinthian, whether she attended for one week or one year, where she lives, what she earned *before* attending Corinthian, whether she is working in her field of study, or whether she obtained a job and earnings *because of* (or irrespective of) attending Corinthian.

But, even assuming that the numerator of the Department's metric—average earnings of a group of Students who applied before July 31, 2017—represents the typical earnings of a Corinthian student, the comparison to the 2014 earnings of passing gainful employment programs cannot show the "value" a student received from having attended Corinthian. The comparison is based on another faulty and unsupported assumption: had Corinthian not convinced Students to enroll on the basis of false representations, the Students would have enrolled in some other for-profit program subject to the gainful employment requirements. (ER 111). But, again, the Department has provided absolutely no evidence to support this premise.

The Department's decision to rely on one-half of the GE metric, and to then only draw the comparison between Students and programs that "passed" GE metrics, is also problematic. A "GE passing" school could conceivably have a passing average debt-to-earnings ratio if it has relatively low-earning graduates but charges virtually nothing to attend. Indeed, the list of the "peer" schools the Department used for its data experiment is abound with examples of GE-passing programs that cost nothing to attend and whose graduates have limited earnings.[15] In utilizing only one-half of the GE ratio, and then only comparing Students with "passing" GE programs, the Average Earnings Rule rests on an artificial comparison that does not yield any meaningful information on the value of specific programs.

By limiting itself to only one-half the GE ratio, the Department's formula is grounded in yet another flaw: it discounts debt in assessing the "value" a Student received. Under the Average Earnings Rule, a Corinthian borrower who earns $10,000 but has $30,000 in loans would only receive a 10 percent discharge if individuals in comparable programs at "peer" schools earned $10,000 but had no federal student loans. The Department has not explained how this makes any sense

[15] It would arguably make more sense to compare Student earnings to those of students in GE programs who scored the highest on the earning side of the D/E metric, rather than drawing this arbitrary cutoff based on the entire GE metric and then discarding the impact of one-half of the ratio.

or how earnings alone, absent an accounting of debt, is a viable metric for the "value" of a Corinthian program.

In sum, even if "value" were a lawful metric to determine relief under the borrower defense regulation, the Department's formula does not rationally measure such value.

Second, "value" is, in fact, not a lawful metric to determine relief because the borrower defense regulation anchors its remedy to the state law cause of action. 34 C.F.R. § 685.206(c) (stating that "the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law"). Contrary to the Department's new stance, the regulation does not sever borrower defense into an initial decision on the substance and then a subsequent one on relief; instead, the plain text commands the Department to decide both result and remedy under "applicable state law" and then, under sub-section (2), to notify the applicant of the outcome. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587-88 (2000) (focusing on the regulation's text and noting that an agency's interpretation cannot conflict with the text). Sub-section (2) also permits "[t]he Secretary [to] afford[] the borrower such further relief as the Secretary determines is appropriate under the circumstances." § 685.206(c); *see also* § 685.206(c)(3) ("the Secretary *may* initiate an appropriate proceeding . . .") (emphasis added). That sentence

shows that further relief is discretionary; borrower defense relief is not. Put another way, while additional relief peculiar to Title IV is discretionary, the relief afforded under state law constitutes a hard floor as to what the Secretary must provide in terms of cancellation of a Student's debt.

Notably, the Department has consistently employed this interpretation for over two decades, including most recently in 2017. *See* (Supp ER 4-7) (excerpts of 2017 ACI memoranda applying state law to question of remedy); (Supp ER 8-10) (excerpts of Borrower Defense Unit Claims Review protocol showing that state law may "recognize an offset of the full amount of restitution"); (Supp ER 84-96) (excerpts of OGC memoranda from 2000, 2001, and 2003, applying state law to the question of borrower defense remedy stating, "[t]o quantify [Students'] damages, we have to determine the amount of damages they could receive from [the school] under state law"). Neither the Average Earnings Rule nor the Department's *post-hoc* rationales mention this evidence, refer to its long-standing prior interpretation (including, presumably, its reliance on this interpretation when formulating the Corinthian Rule), explain why the Department has now changed course, or argued why its new unsupported interpretation is entitled to deference. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change") (citation omitted);

Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (agency position that "conflicts with a prior interpretation" may "not reflect the agency's fair and considered judgment") (citation omitted).

Nor can the Department claim that its approach is valid because it somehow yielded a result that is consistent with state law. Under the APA, an agency action can only be upheld on the reasons provided by the agency. *Cal. Energy Comm'n v. Dep't of Energy*, 585 F.3d 1143, 1150 (9th Cir. 2009). But, even if it could be upheld on an alternative basis, California law requires full restitution in this instance because "[t]he fraud [was] in the selling, not the value of the thing sold." *F.T.C. v. Figgie Int'l. Inc.*, 994 F.2d 595, 606 (9th Cir. 1993). In other words, when a consumer did not "receive what they thought they were buying," their recovery under California law is *not* measured as "the difference between what they paid" and a fair price for what they received. *Makaeff v. Trump Univ., LLC*, 309 F.R.D. 631, 638 (S.D. Cal. 2015).

Ultimately, the Department has adopted a Rule that is inconsistent with the law and fails to rationally capture what it claims to. This Court should now affirm the lower court's injunction because the Rule is arbitrary and capricious.

CONCLUSION

Corinthian intentionally targeted people of limited financial means, brought in billions of federal taxpayer dollars, and left vulnerable Students with nothing.

Rather than protect these Students, the Department is engaging in irrational actions—going so far as to deceive their colleagues at another federal agency—and compounding the damage that Corinthian caused. This Court should not permit the Department to irreparably harm Corinthian Students by utilizing a rule that is contrary to law and that fails to rationally measure what it purports to. This Court should expeditiously affirm the District Court's preliminary injunction.

Date: October 3, 2018

s/ Joshua D. Rovenger

Noah Zinner
Megumi Tsutsui
HOUSING & ECONOMIC RIGHTS ADVOCATES
PO Box 29435
Oakland, CA 94604
Tel.: (510) 271-8443
Fax: (510) 280-2448

Eileen M. Connor
Toby R. Merrill
Joshua D. Rovenger
LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
122 Boylston Street
Jamaica Plain, MA 02130
Tel.: (617) 390-3003
Fax: (617) 522-0715

Attorneys for Plaintiffs-Appellees

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-appellees state that they know of no related case pending in this Court.

s/ Joshua D. Rovenger
Joshua D. Rovenger

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,916 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

Date: October 3, 2018

s/ Joshua D. Rovenger
Joshua D. Rovenger

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: October 3, 2018

s/ Joshua D. Rovenger
Joshua D. Rovenger

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-16375

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

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Signature of Attorney or Unrepresented Litigant: s/ Joshua D. Rovenger

Date: 10/3/2018

("s/" plus typed name is acceptable for electronically-filed documents)

ADDENDUM

5 U.S.C. § 552a – Records Maintained on Individuals

(r)Report on New Systems and Matching Programs.—
Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

20 U.S.C. § 1088 – Definitions

(b) Eligible program

(1) For purposes of this subchapter, the term "eligible program" means a program of at least—

(A) 600 clock hours of instruction, 16 semester hours, or 24 quarter hours, offered during a minimum of 15 weeks, in the case of a program that—

(i) provides a program of training to prepare students for gainful employment in a recognized profession; and

(ii) admits students who have not completed the equivalent of an associate degree; or

(B) 300 clock hours of instruction, 8 semester hours, or 12 hours, offered during a minimum of 10 weeks, in the case of—

(i) an undergraduate program that requires the equivalent of an associate degree for admissions; or

(ii) a graduate or professional program.

(2)

(A) A program is an eligible program for purposes of part B of this subchapter if it is a program of at least 300 clock hours of instruction, but less than 600 clock hours of instruction, offered during a minimum of 10 weeks, that—

(i) has a verified completion rate of at least 70 percent, as determined in accordance with the regulations of the Secretary;

(ii) has a verified placement rate of at least 70 percent, as determined in accordance with the regulations of the Secretary; and

(iii) satisfies such further criteria as the Secretary may prescribe by regulation.

(B) In the case of a program being determined eligible for the first time under this paragraph, such determination shall be made by the Secretary before such program is considered to have satisfied the requirements of this paragraph.

(3) An otherwise eligible program that is offered in whole or in part through telecommunications is eligible for the purposes of this

subchapter if the program is offered by an institution, other than a foreign institution, that has been evaluated and determined (before or after February 8, 2006) to have the capability to effectively deliver distance education programs by an accrediting agency or association that—

(A) is recognized by the Secretary under subpart 2 of part H; and

(B) has evaluation of distance education programs within the scope of its recognition, as described in section 1099b(n)(3) of this title.

(4) For purposes of this subchapter, the term "eligible program" includes an instructional program that, in lieu of credit hours or clock hours as the measure of student learning, utilizes direct assessment of student learning, or recognizes the direct assessment of student learning by others, if such assessment is consistent with the accreditation of the institution or program utilizing the results of the assessment. In the case of a program being determined eligible for the first time under this paragraph, such determination shall be made by the Secretary before such program is considered to be an eligible program.

§ 668.402 Definitions.

The following definitions apply to this subpart.

…

Classification of instructional program (CIP) code. A taxonomy of instructional program classifications and descriptions developed by the U.S. Department of Education's National Center for Education Statistics (NCES). The CIP code for a program is six digits.

Cohort period. The two-year cohort period or the four-year cohort period, as applicable, during which those students who complete a program are identified in order to assess their loan debt and earnings. The Secretary uses the two-year cohort period when the number of students completing the program is 30 or more. The Secretary uses the four-year cohort period when the number of students completing the program in the two-year cohort period is less than 30 and when the number of students completing the program in the four-year cohort period is 30 or more.

Credential level. The level of the academic credential awarded by an institution to students who complete the program. For the purposes of this subpart, the undergraduate credential levels are: Undergraduate certificate or diploma, associate degree, bachelor's degree, and post-baccalaureate certificate; and the graduate credential levels are graduate certificate (including a postgraduate certificate), master's degree, doctoral degree, and first-professional degree (e.g., MD, DDS, JD).

Debt-to-earnings rates (D/E rates). The discretionary income rate and annual earnings rate as calculated under § 668.404.

Discretionary income rate. The percentage of a GE program's annual loan payment compared to the discretionary income of the students who completed the program, as calculated under § 668.404.

…

Gainful employment program (GE program). An educational program offered by an institution under § 668.8(c)(3) or (d) and identified by a combination of the institution's six-digit Office of Postsecondary Education

ID (OPEID) number, the program's six-digit CIP code as assigned by the institution or determined by the Secretary, and the program's credential level.

…

Student. An individual who received title IV, HEA program funds for enrolling in the GE program.

Title IV loan. A loan authorized under the Federal Perkins Loan Program (Perkins Loan), the Federal Family Education Loan Program (FFEL Loan), or the William D. Ford Direct Loan Program (Direct Loan).

Two-year cohort period. The cohort period covering two consecutive award years that are -

(1) The third and fourth award years prior to the award year for which the D/E rates are calculated pursuant to § 668.404. For example, if D/E rates are calculated for award year 2014-2015, the two-year cohort period is award years 2010-2011 and 2011-2012; or

(2) For a program whose students are required to complete a medical or dental internship or residency, the sixth and seventh award years prior to the award year for which the D/E rates are calculated. For example, if D/E rates are calculated for award year 2014-2015, the two-year cohort period is award years 2007-2008 and 2008-2009. For this purpose, a required medical or dental internship or residency is a supervised training program that -

(i) Requires the student to hold a degree as a doctor of medicine or osteopathy, or as a doctor of dental science;

(ii) Leads to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility that offers post-graduate training; and

(iii) Must be completed before the student may be licensed by a State and board certified for professional practice or service.

§ 668.411 Reporting requirements for GE programs.

(a) In accordance with procedures established by the Secretary, an institution must report -

(1) For each student enrolled in a GE program during an award year who received title IV, HEA program funds for enrolling in that program -

(i) Information needed to identify the student and the institution;

(ii) The name, CIP code, credential level, and length of the program;

(iii) Whether the program is a medical or dental program whose students are required to complete an internship or residency, as described in § 668.402;

(iv) The date the student initially enrolled in the program;

(v) The student's attendance dates and attendance status (e.g., enrolled, withdrawn, or completed) in the program during the award year; and

(vi) The student's enrollment status (e.g., full-time, three-quarter time, half-time, less than half-time) as of the first day of the student's enrollment in the program;

(2) If the student completed or withdrew from the GE program during the award year -

(i) The date the student completed or withdrew from the program;

(ii) The total amount the student received from private education loans, as described in § 668.404(d)(1)(ii), for enrollment in the program that the institution is, or should reasonably be, aware of;

(iii) The total amount of institutional debt, as described in § 668.404(d)(1)(iii), the student owes any party after completing or withdrawing from the program;

(iv) The total amount of tuition and fees assessed the student for the student's entire enrollment in the program; and

(v) The total amount of the allowances for books, supplies, and equipment included in the student's title IV Cost of Attendance (COA) for each award year in which the student was enrolled in the program, or a higher amount if assessed the student by the institution;

(3) If the institution is required by its accrediting agency or State to calculate a placement rate for either the institution or the program, or both, the placement rate for the program, calculated using the methodology required by that accrediting agency or State, and the name of that accrediting agency or State; and

(4) As described in a notice published by the Secretary in the Federal Register, any other information the Secretary requires the institution to report.

(b)

(1) An institution must report the information required under paragraphs (a)(1) and (2) of this section no later than -

(i) July 31, following the date these regulations take effect, for the second through seventh award years prior to that date;

(ii) For medical and dental programs that require an internship or residency, July 31, following the date these regulations take effect for the second through eighth award years prior to that date; and

(iii) For subsequent award years, October 1, following the end of the award year, unless the Secretary establishes different dates in a notice published in the Federal Register.

(2) An institution must report the information required under paragraph (a)(3) of this section on the date and in the manner prescribed by the Secretary in a notice published in the Federal Register.

(3) For any award year, if an institution fails to provide all or some of the information in paragraph (a) of this section to the extent required, the institution must provide to the Secretary an explanation, acceptable to the Secretary, of why the institution failed to comply with any of the reporting requirements.