UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

DEVRY UNIVERSITY, INC. Plaintiff, v. UNITED STATES DEPARTMENT OF EDUCATION and DR. MIGUEL CARDONA, *in his official capacity as Secretary of the United States Department of Education*, Defendants.	Case No. 1:22-cv-05549 Honorable LaShonda A. Hunt

PLAINTIFF'S UNCONSENTED MOTION FOR LEAVE TO AMEND THE COMPLAINT

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, Plaintiff DeVry University, Inc. ("DeVry") by and through undersigned counsel, hereby moves for leave to amend the Complaint. In support, Plaintiff submits a memorandum of law and states as follows:

1. DeVry seeks to amend the Complaint to include claims challenging the authority of the United States Department of Education (the "Department") to adjudicate borrower defenses to repayment ("BDR") and recoupment claims for student loan discharges. The Supreme Court's recent decision in *Axon Enterprise, Inc. v. Federal Trade Commission*, 143 S. Ct. 890 (2023), holds that a party to agency proceedings may seek immediate review in federal district court of constitutional claims challenging an agency's structure and authority. A party alleging such claims faces the "here-and-now injury" of being subjected to "unconstitutional agency authority," which "is impossible to remedy once the proceeding is over." *Id.* at 903 (citations omitted). The proposed First Amended Complaint ("FAC") alleges the Department's recoupment scheme is structurally

unconstitutional on two separate grounds and that DeVry is suffering irreparable injury as the respondent in an unconstitutional recoupment action pending before the Department (the "Recoupment Action").

2. DeVry's proposed FAC seeks to raise two constitutional claims, in addition to the prior claims asserted in the Complaint, as follows:

a. ***Count 5 (Article II Violation – Unconstitutional Structure of the Department's Administrative Law Judges (ALJs))***: DeVry alleges the Department's ALJs, who preside over recoupment proceedings, among other proceedings, are unconstitutionally insulated from removal by the President. (FAC ¶ 160.) These executive officials are inferior officers of the United States. (*Id*.) And they are subject to dual layers of good cause removal protection: (1) the ALJs may be removed only by the Merit Systems Protection Board ("MSPB") for good cause, and (2) MSPB members are in turn subject to good cause removal. These layers of removal protection unconstitutionally interfere with the President's Article II executive power. (*Id*. ¶¶ 160–62.)

b. ***Count 6 (Article I Violation – Unconstitutional Exercise of Legislative Power by an Executive Department)***: DeVry alleges the Department has unconstitutionally exercised the legislative power the Constitution reserves to Congress by creating through regulatory fiat—without congressional authorization—an entire administrative scheme to adjudicate BDR defenses for individual borrowers and groups of borrowers and to adjudicate recoupment claims against schools based on the discharge of student loans.

(*Id*. ¶¶ 165–66.) Congress delegated to the Department only the limited authority to promulgate regulations that specify which acts or omissions of an institution may constitute a borrower defense. (*Id*. ¶¶ 53, 77, 85 (citing 20 U.S.C. § 1087e(h)).) Nothing in that delegation purports to authorize the Department to create the far-reaching administrative adjudication scheme it has fashioned, nor does that delegation authorize the Department to "adjudicate" an institution's purported liability for recoupment of discharged loans. (*Id*.) The Department's creation of this scheme through regulations that purport to have the force of law is therefore an unconstitutional exercise of legislative power in violation of Article I of the U.S. Constitution.

3. Leave to amend "sh[all] [be] freely given when justice so requires." Fed. R. Civ. P. 15(a)(2). As explained in the accompany memorandum of law, justice requires granting DeVry leave to amend the Complaint to assert its proposed structural constitutional claims to challenge the Department's BDR and recoupment scheme because *Axon* constitutes an intervening change in law that justifies the amendment. *See, e.g.*, *Larkin v. Galloway*, 266 F.3d 718, 721–22 (7th Cir. 2001) (affirming decision to allow amendment where there was an intervening change in circuit law).

4. There is no "good reason" to deny leave to amend under the circumstances here. *See Kreg Therapeutics, Inc. v. VitalGo, Inc.*, 919 F.3d 405, 417 (7th Cir 2019) (identifying "futility, undue delay, prejudice, or bad faith" as reasons that may warrant denial of a motion for leave to amend). As explained in the accompany memorandum of law, DeVry's FAC adds constitutional claims that are plausible, and clearly not futile. DeVry has not unduly delayed

seeking leave to amend, but rather moved within a reasonable period following the Supreme Court's *Axon* decision. The Department cannot show that DeVry's proposed claims will cause undue prejudice. Nor has DeVry sought to raise the constitutional claims in bad faith.

5. Pursuant to this Court's Rules, a clean copy of the proposed FAC and a redline comparing the proposed FAC to the Complaint are included as Exhibits 1 and 2 to this Motion, respectively.

6. Pursuant to this Court's Rules, DeVry has conferred with the Department on this Motion. As of the date of this filing, the Department takes no position on DeVry's Motion. If the Department intends to oppose the Motion, the Department has agreed to file an opposition by July 7, 2023. DeVry agrees to file any reply in support of its Motion by July 19, 2023. This reflects the parties' proposed briefing schedule on DeVry's Motion.

For the reasons stated above and those set out more fully in DeVry's supporting memorandum of law, DeVry respectfully requests that the Court grant DeVry's Motion and deem the FAC as filed.

Dated: June 16, 2023

Respectfully submitted,

/s/ Matthew Kutcher

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UNITED STATES DISTRICT COURT
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DEVRY UNIVERSITY, INC.

Plaintiff,

v.

UNITED STATES DEPARTMENT OF EDUCATION and

DR. MIGUEL CARDONA, *in his official capacity as Secretary of the United States Department of Education*,

Defendants.

Case No. 1:22-cv-05549

Honorable LaShonda A. Hunt

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO AMEND

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INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 15(a)(2), Plaintiff DeVry University, Inc. ("DeVry") respectfully seeks leave to file the proposed First Amended Complaint ("FAC") attached as Exhibit A.[1]

DeVry seeks to amend the Complaint to include claims challenging the authority of the United States Department of Education (the "Department") to adjudicate recoupment claims for student loan discharges. The Supreme Court's recent decision in *Axon Enterprise, Inc. v. Federal Trade Commission*, 143 S. Ct. 890 (2023), holds that a party to agency proceedings may seek immediate review in federal district court of constitutional claims challenging an agency's structure and authority. A party alleging such claims faces the "here-and-now injury" of being subjected to "unconstitutional agency authority," which "is impossible to remedy once the proceeding is over." *Id.* at 903 (citations omitted). The FAC alleges the Department's recoupment scheme is structurally unconstitutional on two separate grounds and that DeVry is suffering irreparable injury as the respondent in an unconstitutional recoupment action pending before the Department (the "Recoupment Action").

As detailed in the FAC, DeVry proposes to add two structural constitutional claims to the four existing claims in the Complaint, both new claims based on the same core facts alleged in the Complaint. New Count 5 alleges that the Department's administrative law judges ("ALJs")—who preside over recoupment proceedings, including the Recoupment Action here—are unconstitutionally insulated from removal by the President in violation of Article II of the U.S. Constitution. And new Count 6 alleges that the Department's administrative recoupment scheme—which the Department created by regulation—is an unconstitutional exercise of

[1] A clean copy of the FAC is attached as Exhibit 1. A redline of the FAC compared to the Complaint is attached as Exhibit 2.

legislative authority in violation of Article I of the U.S. Constitution. Congress never authorized the Department to create an administrative adjudication system for recoupment claims, nor even mentioned recoupment, but rather gave the Department only limited authority to specify the types of defenses that student borrowers may raise in actions seeking repayment of their loans. As a result of these constitutional deficiencies, the Recoupment Action inflicts immediate and ongoing harm on DeVry.

DeVry should be granted leave to amend under Rule 15's liberal standard, which "freely" allows amendment "when justice so requires," for two reasons. *See* Fed. R. Civ. P. 15(a)(2). *First*, justice requires allowing DeVry to amend its Complaint because *Axon* reflects a fundamental change in the law since the filing of the initial Complaint. Pursuant to *Axon*, DeVry may now raise its structural constitutional objections to the Department's recoupment scheme in this Court without waiting for the Recoupment Action to conclude.

Second, there is no good reason to deny DeVry leave to file the FAC because: (1) the proposed claims are not clearly futile, (2) DeVry has not unduly delayed seeking leave to amend, (3) the Department faces no undue prejudice from these constitutional claims, which present purely legal issues, and (4) DeVry does not seek to amend in bad faith.

RELEVANT BACKGROUND

I. DEVRY'S COMPLAINT.

On October 11, 2022, DeVry brought this suit against the Department. (ECF No. 1, Complaint for Declaratory and Injunctive Relief ("Compl.").) In Count 1, DeVry alleges the Department acted beyond its limited statutory authority by promulgating the 2017 borrower defense to repayment ("BDR") Rule, specifically by authorizing "group" discharges and expanding the definition of the term "notice" and applying it retroactively. 5 U.S.C. § 706(2)(C); (Compl. ¶¶ 77–85). In Count 2, DeVry alleges the Department failed to follow the Administrative

Procedure Act ("APA") notice and comment procedures in promulgating the 2017 BDR Rule, failed to follow its own regulations in issuing the 2021 Policy Memoranda[2] adopting a presumption of full relief, and wrongly applied that presumption in granting discharges. 5 U.S.C. § 706(2)(D); (Compl. ¶¶ 86, 94). In Count 3, DeVry alleges the Department has acted arbitrarily and capriciously in initiating the Recoupment Action based on the conduct alleged in Counts 1 and 2. 5 U.S.C. § 706(2)(D); (Compl. ¶¶ 96–100). In Count 4, DeVry alleges constitutional due process violations because the Department's 2017 BDR Rule provides no durational limit on the authority to initiate a recoupment proceeding, and the Department's group adjudication Rules are facially defective. 5 U.S.C. § 706(2)(B); (Compl. ¶¶ 102–03, 106, 109).

The Department moved to dismiss the Complaint on December 23, 2022. (ECF No. 21 ("Motion to Dismiss").) DeVry filed its opposition to the Department's Motion to Dismiss on February 3, 2023. (ECF No. 24 ("Opposition").) The Department filed a reply brief on March 3, 2023. (ECF No. 25 ("Reply").) Because the Department's Reply raised new Article III arguments and given newly available facts, DeVry sought leave to file a sur-reply, which the Court granted. (ECF Nos. 26, 27, 28.) On April 12, 2023, the Department filed a sur-sur-reply. (ECF No. 29.) The motion remains pending, and oral argument has not been scheduled.

II. THE *AXON* DECISION AND DEVRY'S PROPOSED STRUCTURAL CONSTITUTIONAL CLAIMS.

On April 14, 2023, the Supreme Court issued the *Axon* decision. In *Axon*, the Court held that federal district courts have jurisdiction under 28 U.S.C. § 1331 immediately to hear constitutional challenges to an agency's structure and authority asserted by a party to an administrative proceeding, notwithstanding a statutory review scheme that ordinarily would

[2] The "2021 Policy Memoranda" refers to the Department's March 2021 Press Release and August 2021 electronic announcements discussing the "legal rationale" for the presumption of total relief. (Compl. ¶ 94 & n.7.)

require the party to wait for a final agency order before seeking judicial review. 143 S. Ct. at 898–900. The Court underscored that a party raising such structural constitutional claims suffers the "here-and-now" harm of being subjected to allegedly unconstitutional agency proceedings, which later judicial review cannot remedy. *Id*. at 903 (citations omitted).

In light of *Axon*, DeVry seeks to add two structural constitutional claims:

- ***Count 5 (Article II Violation – Unconstitutional Structure of the Department's Administrative Law Judges (ALJs))***: DeVry alleges the Department's ALJs, who preside over recoupment proceedings, among other proceedings, are unconstitutionally insulated from removal by the President. (FAC ¶ 160.) These executive officials are inferior officers of the United States. (*Id*.) And they are subject to dual layers of good cause removal protection: (1) the ALJs may be removed only by the Merit Systems Protection Board ("MSPB") for good cause, and (2) MSPB members are in turn subject to good cause removal. These layers of removal protection unconstitutionally interfere with the President's Article II executive power. (*Id*. ¶¶ 160–62.)

- ***Count 6 (Article I Violation – Unconstitutional Exercise of Legislative Power by an Executive Department)***: DeVry alleges the Department has unconstitutionally exercised the legislative power the Constitution reserves to Congress by creating through regulatory fiat—without congressional authorization—an entire administrative scheme to adjudicate BDR defenses for individual borrowers and groups of borrowers and to adjudicate recoupment claims against schools based on the discharge of student loans. (*Id*. ¶¶ 165–66.) Congress delegated to the Department only the limited authority to promulgate regulations that specify which acts or omissions of an institution may constitute a borrower defense. (*Id*. ¶¶ 53, 77, 85 (citing 20 U.S.C. § 1087e(h)).) Nothing in that delegation purports to authorize the Department to create the far-reaching administrative adjudication scheme it has fashioned, nor does that delegation authorize the Department to "adjudicate" an institution's purported liability for recoupment of discharged loans. (*Id*.) The Department's creation of this scheme through regulations that purport to have the force of law is therefore an unconstitutional exercise of legislative power.

Adding these proposed claims would be DeVry's first amendment to the Complaint in this action. The Department has not consented to this motion.

LEGAL STANDARD

Leave to amend "sh[all] [be] freely given when justice so requires." Fed. R. Civ. P.

15(a)(2). This "liberal standard" for amendment favors decision of a case on the merits, rather than on technicalities. *See Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 520 (7th Cir. 2015); *Foerderer v. Mathias*, 2018 WL 278716, at *1 (S.D. Ill. Jan. 3, 2018). Although the decision to grant a motion for leave to amend is within a court's discretion, a court "should not deny leave absent a 'good reason'—such as futility, undue delay, prejudice, or bad faith." *Kreg Therapeutics, Inc. v. VitalGo, Inc.*, 919 F.3d 405, 417 (7th Cir. 2019) (citation omitted); *see Foman v. Davis*, 371 U.S. 178, 182 (1962) (same). "Leave to amend should be freely granted early in a case." *Holstein v. Brill*, 987 F.2d 1268, 1270 (7th Cir. 1993).

ARGUMENT

I. JUSTICE REQUIRES GRANTING DEVRY LEAVE TO AMEND.

The Supreme Court's recent *Axon* decision constitutes a fundamental change in federal administrative law, allowing parties to agency proceedings immediately to raise constitutional claims in federal court challenging the structure and authority of the agency to require the party to endure the allegedly unconstitutional proceeding. *Axon* holds that a party to an agency enforcement proceeding may seek immediate judicial review of constitutional challenges to the agency's structure and authority in federal district court notwithstanding a statutory review scheme that otherwise would require the party to seek judicial review only after the proceeding is concluded, if at all. *Axon*, 143 S. Ct. at 906. DeVry seeks leave to amend the Complaint to assert precisely these types of claims to challenge the Department's recoupment scheme, a right not previously available to DeVry. *See, e.g.*, *Larkin v. Galloway*, 266 F.3d 718, 721–22 (7th Cir. 2001) (affirming decision to allow amendment where there was an intervening change in circuit law); *McBeth v. Gabrielli Truck Sales, Ltd.*, 731 F. Supp. 2d 316, 321 (E.D.N.Y. 2010) ("Since this reversal [of the Second Circuit by the Supreme Court] provides a class action cause of action not previously available to Plaintiffs . . . Plaintiffs are afforded leave to amend their complaint to

add this claim."); *Darney v. Dragon Prods. Co.*, 266 F.R.D. 23, 27 (D. Me. 2010) ("[I]t seems fundamentally just that Plaintiffs should have recourse to a strict liability theory recently adopted by the Law Court that had been expressly rejected by the Law Court's existing precedent.").

The decision in *Axon* constitutes a change in law that justifies DeVry's proposed amendment. Prior to *Axon*, the Seventh Circuit had affirmed dismissal of structural constitutional claims asserted against an agency by a plaintiff "already subject to ongoing agency enforcement proceedings" and required the plaintiff "to use the administrative review scheme[] established by Congress." *Bebo v. SEC*, 799 F.3d 765, 775 (7th Cir. 2015) (affirming dismissal of structural constitutional challenges, including Article II challenge to SEC ALJs, because plaintiff could obtain meaningful review of those claims on appeal after SEC's enforcement proceedings before ALJ concluded). *Axon* clearly abrogates this precedent by allowing plaintiffs subject to an ongoing agency enforcement proceeding to assert structural challenges immediately in federal district, notwithstanding a statutory review scheme providing for review of final agency action.

The underlying statutory review schemes addressed in *Axon* provided for judicial review of final agency orders (SEC and FTC) in federal court, but the Supreme Court determined that these review schemes do not divest the district courts of jurisdiction under 28 U.S.C. § 1331 over structural constitutional challenges to an agency for three reasons. *Axon*, 143 S. Ct. at 898, 900. First, the Court explained that delaying judicial review until the issuance of a final agency order would cause the party to "lose [its] rights not to undergo the complained-of agency proceedings if [it] cannot assert those rights until the proceedings are over." *Id.* at 904. Second, the Court explained that the constitutional challenges to the agencies' structure and authority to proceed were collateral to any agency order or rules from which review might be sought because the claims concerned the agencies' "power to proceed at all, rather than actions taken in the agency

proceedings." *Id*. at 904–05. Finally, the Court concluded that the parties' "structural constitutional challenges" were outside the agencies' expertise. *Id*. at 905 (citation omitted).

Based on these same principles, it is "fundamentally just" to allow DeVry to amend its Complaint to assert the same structural constitutional claims at issue in *Axon* against the agency here. *See Darney*, 266 F.R.D. at 27 (concluding it was "fundamentally just" to allow a proposed amendment given a change in law). Like the parties in *Axon* who were subject to agency proceedings, DeVry is subject to the Department's pending Recoupment Action, and seeks to assert constitutional challenges to the Department's structure and authority underlying that proceeding. While the APA's general review scheme generally would require DeVry to await final agency action in the proceeding before such a challenge could be asserted,[3] 5 U.S.C. § 704, *Axon* instructs that requiring DeVry to delay its structural constitutional challenges to the Department's recoupment scheme would cause immediate harm to DeVry because DeVry would be forced to endure unconstitutional proceedings that will be "impossible to remedy once the [Recoupment Action] is over." *Axon*, 143 S. Ct. at 903. Thus, if the proposed amendment is not allowed, there will be no possibility for DeVry to obtain full relief on DeVry's structural constitutional claims.

Accordingly, justice requires granting leave to file the FAC. *Cf. T&M Indus. v. Great Lakes Salt, Inc*., 2016 WL 693231, at *7 (N.D. Ill. Feb. 22, 2016) (granting leave to add compulsory counterclaims because "if the Court denies Midwest's motion, Midwest will forever

[3] Even absent *Axon*, the Department's BDR Rules reflecting the Department's recoupment scheme constitute final agency actions of which DeVry is entitled to judicial review under the APA. *See infra* Part II.A.2; *see also* 5 U.S.C. §§ 702, 704, 706(2)(B). *Axon* confirms that DeVry is entitled to judicial review *now* of DeVry's additional challenges to the Department's unconstitutional BDR and recoupment scheme given the "here-and-now injury" of being subjected to the unconstitutional Recoupment Action.

lose the opportunity to bring possibly valid claims against T&M").

II. THERE IS NO GOOD REASON TO DENY LEAVE TO AMEND.

There is no "good reason" to deny leave to amend under the circumstances here. *See Kreg Therapeutics*, 919 F.3d at 417 (identifying "futility, undue delay, prejudice, or bad faith" as reasons that may warrant denial of a motion for leave to amend). DeVry's FAC adds constitutional claims that are plausible, and clearly not futile. DeVry has not unduly delayed seeking leave to amend, but rather moved within a reasonable period following the Supreme Court's *Axon* decision. The Department cannot show that DeVry's proposed claims will cause undue prejudice. Nor has DeVry sought to raise the constitutional claims in bad faith.

A. DeVry's Requested Amendment Is Not Futile.

DeVry's proposed claims state plausible structural constitutional challenges and certainly are not plainly futile. *See Smith v. Turner*, 2023 WL 143040, at *4 (S.D. Ill. Jan. 10, 2023) ("Before denying a motion to amend . . . it should be 'clear' that the proposed amended complaint 'is deficient' and would not survive" a motion to dismiss) (citation omitted); *Pactiv Corp. v. Multisorb Tech. Inc.*, 2011 WL 5244359, at *2 (N.D. Ill. Nov. 2, 2011) ("Because it is not clear to the Court that an amendment would be futile, the Court will not deny the motion to amend on that basis."). For example, claims barred by a statute of limitations would be futile, *see Rodriguez v. United States*, 286 F.3d 972, 980 (7th Cir. 2002), but DeVry's proposed claims are timely.

1. DeVry's Structural Constitutional Claims Are Plausible.

DeVry's proposed FAC states claims concerning two structural constitutional challenges. *See Runnion*, 786 F.3d at 524, 529 (amendment is futile only where it fails to state a claim upon which relief could be granted under the Rule 12(b)(6) standard); *Barwin v. Vill. of Oak Park*, 2020 WL 136304, at *8 (N.D. Ill. Jan. 13, 2020) (same); *Smith*, 2023 WL 143040, at *4–5.

First, in Count 5, DeVry alleges that the Department's ALJs, who are inferior officers of

the United States, are unconstitutionally insulated from removal by the President. (FAC ¶ 160.) There is no plausible dispute that the Department's ALJs are inferior officers of the United States, that they may be removed only for good cause by members of the MSPB, and that the MSPB members are in turn removable by the President only for good cause. This multi-layered tenure protection system for the Department's ALJs violates Article II of the United States Constitution because it interferes with the President's duty to "take care that the Laws be faithfully executed." U.S. Const. art. II, § 3; *Jarkesy v. SEC*, 34 F.4th 446, 464–65 (5th Cir. 2022) (striking down identical removal restrictions as unconstitutional as applied to SEC ALJs, who were inferior officers of the United States); *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010) (finding unconstitutional a scheme that imposed dual layers of good cause removal protection for members of the Public Company Accounting Oversight Board).

And second, in Count 6, DeVry alleges that the Department's creation of an elaborate administrative adjudication recoupment scheme, reflected in the Department's BDR Rules, constitutes an impermissible exercise of legislative power in violation of Article I of the United States Constitution because Congress never delegated such authority to the Department. (FAC ¶ 166.) Congress delegated only the limited authority to "specify in regulations which acts or omissions . . . a borrower may assert as a defense against repayment." 20 U.S.C. § 1087e(h). The Department has taken this single, specific and limited grant of power and used it to create a sprawling administrative recoupment scheme through which it not only determines what defenses a borrower may assert (as Congress directed) but also discharges loans, demands recoupment from institutions, and adjudicates recoupment claims through an increasingly detailed regulatory adjudication process.

Surely, Congress did not intend that its singular and limited direction to establish what

defenses may be asserted to avoid repayment of loans would instead result in a massive new program for the adjudication of recoupment claims. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *see, e.g.*, *W. Va. v. EPA*, 142 S. Ct. 2587, 2606–09 (2022); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021). In fact, and in stark contrast, Congress expressly granted the Department authority to undertake adjudicatory recovery proceedings for other types of conduct, but conspicuously omitted borrower defense and recoupment claims from that delegation of authority. *See, e.g.*, 20 U.S.C. § 1234a [4]; *see also United States v. Dvorkin*, 799 F.3d 867, 876 (7th Cir. 2015) ("It is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another.") (citation omitted).

Accordingly, DeVry's structural constitutional claims are plausible and not clearly futile.

2. DeVry's Claims Are Timely.

DeVry's proposed constitutional claims cannot be deemed futile as untimely. *See Rodriguez*, 286 F.3d at 980 (noting that claims will be deemed futile when they would be barred by the statute of limitations). Constitutional challenges against the United States are governed by a six-year statute of limitations. *See* 28 U.S.C. § 2401(a); *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 36 (D.D.C. 2018). The proposed FAC falls well within the six-year statute of limitations, which is based on when the Department "began subjecting" DeVry to the unconstitutional BDR

[4] This statute authorizes the Secretary to render a "preliminary department decision" "[w]henever the Secretary determines that a recipient of a grant or cooperative agreement under an applicable program must return funds because the recipient has made an expenditure of funds that is not allowable under that grant or cooperative agreement, or has otherwise failed to discharge its obligation to account properly for funds under the grant or cooperative agreement." 20 U.S.C. § 1234a(a). Under this statute, Congress expressly made this preliminary determination subject to review by a Department ALJ. *Id.* § 1234a(b)–(c).

and recoupment scheme. *See Jafarzadeh*, 321 F. Supp. 3d at 38 (explaining that the six-year statute of limitations ordinarily applies based on when the government "began subjecting" the plaintiff to the challenged action); *Tzirides v. U.S. Dep't of Homeland Sec.*, 2013 WL 1286675, at *4–5 (N.D. Ill. Mar. 27, 2013) (concluding that § 2401(a) limitations period began to run when the government took the action of which the plaintiff complained, namely, the denial of an application).

The proposed counts are challenges to the structure of the Department's recoupment scheme as applied to DeVry, and thus the claims accrue when the Department subjected DeVry to that scheme. Specifically, Count 5 (Article II violation) accrued on October 25, 2022, when the Department's ALJ began presiding over the Recoupment Action. (FAC ¶ 48.) And Count 6 (Article I violation) accrued on August 15, 2022, when the Department issued the Recoupment Notice against DeVry and asserted the Secretary's recoupment claims, thereby applying its unconstitutional BDR and recoupment scheme to DeVry and causing the ongoing harm DeVry challenges in the FAC. (Complaint ¶ 32; FAC ¶ 42.)

Even if the Court were to construe DeVry's challenge in Count 6 as a facial challenge to the regulations underlying the Department's unconstitutional BDR and recoupment scheme, the claims are still timely.[5] The 2017 BDR Rule—the genesis of the Department's recoupment scheme as it appears today—became final when the Department published the Rule in the Federal Register on November 1, 2016, thus triggering the six-year statute of limitations for facial challenges to a regulation. *See N.D. Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634, 641 (8th Cir. 2022) (holding that a facial challenge to a regulation begins to run when the agency

[5] Count 5 is not a challenge to a specific Department regulation, but rather to the statutes that impermissibly insulate the Department's ALJs (including the ALJ who currently presides over the Recoupment Action) from Presidential removal. The fact that a Department ALJ who is unconstitutionally insulated from Presidential removal presides over the Recoupment Action demonstrates the harm to DeVry from the alleged Article II violation.

publishes the regulation in the Federal Register); *Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, 983 F.3d 671, 681–82 (4th Cir. 2020) (same). Applying the statute of limitations from that date, DeVry had until November 1, 2022, to assert facial challenges to the Rule, or to file a complaint to which the challenges relate back under Rule 15(c).

Therefore, even if Counts 5 and 6 are considered facial challenges to the BDR and recoupment regulations, they relate back to the Complaint, which DeVry timely filed on October 11, 2022.[6] Under Rule 15(c), an amendment "relates back" to the original pleading when it "asserts a claim . . . that arose out of the conduct, transaction, or occurrence set out . . . in the original [complaint]." Fed. R. Civ. P. 15(c)(1)(B); *see also Bularz v. Prudential Ins. Co. of Am.*, 93 F.3d 372, 379–80 (7th Cir. 1996) ("[R]elation back is permitted under Rule 15(c)[(1)(B)] where an amended complaint asserts a new claim on the basis of the same core of facts, but involving a different substantive legal theory than that advanced in the original pleading."); *see also Batiste v. Dart*, 2011 WL 4962945, at *5 (N.D. Ill. Oct. 19, 2011) (finding plaintiff's state statutory claim related back to filing of § 1983 claim because it arose from same set of facts). A claim relates back when the defendant was sufficiently on notice of the new claims based on the facts pleaded in the original complaint. *See Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 573 (7th Cir. 2006) ("The criterion of relation back is whether the original complaint gave the defendant enough notice of the nature and scope of the plaintiff's claim that he shouldn't have been surprised by the amplification of the allegations of the original complaint in the amended one.").

DeVry's structural constitutional challenges to the Department's recoupment scheme relate

[6] Although whether Counts 5 and 6 relate back to the original Complaint under Rule 15(c) is a separate question from whether DeVry should be granted leave to amend under Rule 15(a), *see Joseph v. Elan Motorsports Techs. Racing Corp.*, 638 F.3d 555, 558 (7th Cir. 2011), DeVry addresses relation back to eliminate any doubt on the issue.

back to the Complaint because they are based on "the same core of facts." *Bularz*, 93 F.3d at 379–80; *Pearson v. Vill. of Broadview*, 2020 WL 2084993, at *2 (N.D. Ill. Apr. 30, 2020) (finding that third amended complaint related back because "the gravamen of both complaints" concerned the same "central allegations of inappropriate behavior surrounding a . . . tax renewal for [the plaintiff's] property"). In the Complaint, DeVry repeatedly alleges that the Department's 2017 BDR Rules and subsequent actions "vastly exceed[] th[e] authority" Congress delegated to the Department over repayment relief. (Compl. ¶ 9; *see also id.* ¶ 4 ("[I]n 2016 . . . the Department, without congressional approval, vastly expanded the BDR regulations by claiming authority to discharge the loans en masse" and "[p]ursuant to that supposed authority[,]. . . the Department now seeks to recoup."); *id.* ¶¶ 3, 10, 12, 52–63.) Counts 5 and 6 are based on the same core facts because they challenge the Department's BDR Rules as unconstitutional—Count 5 because the ALJs are dually insulated from the President, and Court 6 because it is an exercise of legislative power that Congress never delegated to the Department. (FAC ¶¶ 165–66.) Thus, the claims are timely under the relation back doctrine and are not futile.

B. The Department Faces No Undue Prejudice if Amendment Is Allowed.

The Department cannot meet its burden to show that it faces "undue prejudice." *Parker v. EMC Mortg. Corp.*, 2014 WL 7205474, at *3–4 (N.D. Ill. Dec. 18, 2014) ("The non-moving party bears the burden of showing undue prejudice as a result of a proposed amendment."). Undue prejudice may result when "the amendment brings entirely new and separate claims, adds new parties, or at least entails more than an alternative claim or a change in the allegations of the complaint and where the amendment would require expensive and time-consuming additional discovery." *Barwin*, 2020 WL 136304, at *7 (internal quotation marks and citation omitted). No such circumstances are present here.

The FAC does not add any parties or facts that would require discovery, but rather adds only two legal claims that are entirely consistent with the challenges alleged in the original Complaint regarding the Recoupment Action. *See Stimac v. J.C. Penney Corp.*, 2018 WL 497367, at *1–3 (N.D. Ill. Jan. 22, 2018) (concluding defendant would not be unduly prejudiced by addition of claims after close of discovery where "any additional discovery would not be so time consuming and expensive as to justify den[ial]").

Here, only legal claims are added, and they are "based on facts already known" to the Department; thus "no prejudice exists" from the proposed amendment. *See Cement Masons' Pension Fund, Loc. 502 v. Clements*, 1993 WL 398643, at *2 (N.D. Ill. Oct. 6, 1993) (granting leave to amend pleading because amendment concerned facts already known to the parties, which meant "no prejudice exist[ed]" from the amendment). Indeed, the Complaint details the Department's unlawful exercise of authority, which DeVry further addressed in its Opposition to the Department's Motion to Dismiss. *See supra* Part II.A.1; (Opposition at 1–6). Surely, the Department could have anticipated that DeVry would assert such constitutional claims at the conclusion of the Recoupment Action. *See, e.g.*, 5 U.S.C. §706(2)(B) (allowing a court to set aside unconstitutional agency action). The Supreme Court's decision in *Axon* simply allows the assertion of structural constitutional claims earlier in the administrative process.

The potential "inconvenience" to the Department "of having to move for dismissal of the new claim[s] . . . does not outweigh the liberal policy toward leave to amend embodied in Rule 15(a)." *Patrick v. City of Chi.*, 103 F. Supp. 3d 907, 917 (N.D. Ill. 2015). That is especially true here given that DeVry seeks to assert the proposed constitutional claims following a fundamental change in law that occurred after the briefing on the motion to dismiss the Complaint was completed. *See supra* Part I. Thus, there is no undue prejudice to the Department that could

warrant denial of DeVry's motion for leave to amend.

C. DeVry Has Not Unjustifiably Delayed Seeking Amendment.

DeVry has not delayed seeking amendment, let alone unjustifiably. This motion for leave is filed approximately two months after the Supreme Court's *Axon* decision, which does not constitute undue delay here. *See, e.g.*, *FireBlok IP Holdings, LLC v. Hilti, Inc.*, 2022 WL 18937943, at *2 (N.D. Ill. Mar. 23, 2022) (finding no undue delay where plaintiff sought leave to amend "three months" after receiving new facts).

Moreover, delay typically is an insufficient reason to deny leave unless the delay would cause undue prejudice to the nonmovant. *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 792–93 (7th Cir. 2004). As discussed above, there is no undue prejudice to the Department here.

D. DeVry's Amendment Is Not Made in Bad Faith.

Finally, DeVry does not seek to amend in bad faith. The rationale for seeking leave to amend is plain and fully justified in light of the Supreme Court's recent decision in *Axon*, which negates any notion that amendment is sought in bad faith. *See Trs. of Chi. Reg'l Council of Carpenters Pension Fund v. Drive Constr., Inc.*, 2023 WL 22141, at *3 (N.D. Ill. Jan. 3, 2023) (noting that amendment was sought due to "a bona fide change in circumstances, rather than . . . any bad faith or dilatory motive on Plaintiffs' part"); *see also Green v. Valdez*, 2020 WL 4437807, at *3 (N.D. Ill. Aug. 3, 2020) ("courts look at the actions and intentions of the plaintiff when requesting leave to amend" to evaluate bad faith).

CONCLUSION

For the foregoing reasons, DeVry respectfully requests that the Court grant DeVry's motion for leave to amend the Complaint and deem the FAC as filed. Because "an amended complaint supersedes any prior complaint, and becomes the operative complaint," *Riley v. Elkhart Cmty. Sch.*, 829 F.3d 886, 890 (7th Cir. 2016), granting DeVry leave to amend will moot the

Department's pending Motion to Dismiss.

Dated: June 16, 2023

Respectfully submitted,

/s/ Matthew Kutcher

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EXHIBIT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

DEVRY UNIVERSITY, INC.

Plaintiff,

v.

UNITED STATES DEPARTMENT OF EDUCATION and

DR. MIGUEL CARDONA, *in his official capacity as Secretary of the United States Department of Education*,

Defendants.

Case No. 1:22-cv-05549

Honorable LaShonda A. Hunt

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. By this First Amended Complaint, DeVry University, Inc. ("DeVry") seeks to enjoin as a violation of Article I of the U.S. Constitution the elaborate recoupment adjudication scheme the United States Department of Education ("Department") has created by regulatory fiat—exceeding its delegated authority from Congress—and imposed on DeVry to force the school to pay for massive discharges of student debt the Department unilaterally granted. DeVry also challenges as unconstitutional the structure of the adjudicatory process imposed on the school, which relies on administrative judges who are improperly insulated from and not accountable to the President in violation of Article II of the U.S. Constitution. Finally, DeVry challenges related and equally improper final agency actions that undergird the recoupment action initiated against DeVry.

2. Based on a single directive from Congress simply to determine the defenses students may assert to the repayment of federal loans—a "Borrower Defense to Repayment" ("BDR") rule that lay essentially dormant for two decades—the Department has fashioned an

extensive and convoluted scheme (a) to approve *en masse* borrower loan discharges, (b) to presume entitlement to full relief in amounts the Department determines on the basis of allegations for which the Department's officials alone make findings, and (c) to force institutions to pay these amounts through a Department-established and -controlled recoupment adjudication process. Officials from the Department prosecute the recoupment claims, and administrative law judges ("ALJs") from the Department adjudicate them. The ALJs, inferior officers of the United States, exercise executive authority but are insulated from and not accountable to the President of the United States.

3. In addition, the rules and regulations the Department recently enacted to modify the recoupment scheme improperly allow "group" adjudications, revive long-expired claims through a modification of the limitations period enacted in violation of notice-and-comment requirements, and establish a presumption of full relief against institutions in violation of internal agency notice requirements, among other legal infirmities.

4. DeVry is caught in the crosshairs of the Department's unconstitutional recoupment scheme. In August 2022, the Department declared that DeVry was liable to the Department for some $23 million—an amount reflecting federal student loans the Department unilaterally discharged on behalf of 649 borrowers without statutory authority and in violation of regulatory requirements (the "Recoupment Action"). Rather than pay the improper assessment (or risk default and a collection action), and in the absence (at the time) of a right to challenge the recoupment scheme in federal court before enduring the unconstitutional proceeding, DeVry was forced to request and endure a hearing before a Department ALJ to challenge the Department's findings and conduct.

5. At the same time, DeVry filed the Complaint in this case challenging certain final

agency actions that are part of the Recoupment Action because the Department (i) violated its authority in extending retroactively the limitations period on discharge and recoupment claims and otherwise in its prosecution of the Recoupment Action; (ii) exceeded its statutory mandate and violated controlling procedures in adjudicating the underlying borrower defense claims *en masse*; and (iii) violated DeVry's due process rights by failing to provide adequate notice or a meaningful opportunity to contest the discharged sums on which the recoupment claims are based. Recognizing the Recoupment Action might proceed even while its challenges were pending, DeVry alternatively seeks declaratory relief to clarify the recoupment scheme's procedures to ensure DeVry has a fair opportunity to present a meaningful defense and to clarify the appropriate legal basis (if any) for the Department's demand.

BACKGROUND

6. Founded in 1931 by inventor Dr. Herman DeVry, Chicago-based DeVry University has become a leader in online education. Accredited by the Higher Learning Commission, DeVry offers academic programs in technology, business, and healthcare across a range of degree levels. DeVry has educated hundreds of thousands of students over its almost century-long history. Most have earned degrees, enjoyed successful careers and, to the extent they obtained loans to attend DeVry, repaid those loans.

7. In recent years, a number of former DeVry students have sought discharge of their federal loans by filing Borrower Defense to Repayment applications ("BDR Applications") with the Department. By filing a BDR Application, a qualifying borrower may seek discharge of his or her federal loans under certain conditions, which the Department may grant only after it has followed very particular rules. As to the 649 BDR Applications underlying this action, the Department has disregarded those rules by summarily discharging the underlying loans without

individualized assessment and by pursuing recoupment of the discharged sums without following applicable procedures or providing adequate notice of the underlying claims sufficient to allow DeVry to defend itself.

8. In 1993, Congress authorized the federal government to lend directly to eligible students ("Direct Loans"). Ordinarily, Direct Loans must be repaid. However, Congress directed the Department to publish regulations specifying "which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment." 20 U.S.C. § 1087e(h). The Department thus published the initial BDR regulations, effective in 1995, establishing an "interim" process by which borrowers could assert a defense to repayment of their Direct Loans based on certain acts of the school they attended.

9. However, in 2016—after more than two decades of agency inaction on the interim BDR process—the Department, without congressional approval, vastly expanded the BDR regulations by claiming authority to discharge loans *en masse*, and then to seek recoupment without meaningful school participation in the process. Pursuant to that supposed authority—and without affording basic due process—the Department now seeks to recoup millions of dollars in discharged loans from DeVry.

10. Specifically, on February 16, 2022, the Department announced it had granted over 1,800 BDR Applications filed by former DeVry students based on allegedly deceptive advertising that DeVry ceased running by September 2015.[1] Like the rest of the world, DeVry learned of this action from the media, and despite DeVry's subsequent request for information, the Department

[1] *See* Press Release, U.S. Dep't of Educ., *Education Department Approves $415 Million in Borrower Defense Claims Including for Former DeVry University Students* (Feb. 16, 2022), https://www.ed.gov/news/press-releases/education-department-approves-415-million-borrower-defense-claims-including-former-devry-university-students.

provided none.

11. Then, on August 15, 2022, the Department notified DeVry of its intent to recoup more than $23 million in discharged debt on behalf of 649 borrowers, based on DeVry's allegedly deceptive advertising that had ended years earlier ("Recoupment Notice"). The Department also provided—for the first time—some (but not all) of the students' identities referenced in the press release and the amounts of their discharged loans.

12. The Recoupment Notice came on the heels of a proposed $6 billion class settlement involving almost 200,000 BDR Applications from students attending more than 150 colleges[2] (including many who are part of this action), and immediately before President Biden's declaration of loan forgiveness for millions of borrowers.

13. The legal shortcomings presented by the Recoupment Notice are numerous. For example, nothing in the Recoupment Notice indicates (i) whether the Department determined that each of the underlying BDR Applications should be granted based on individualized facts; (ii) on what basis the Department is authorized to initiate a recoupment action beyond the regulatorily prescribed limitations period (which, if applied, would bar recovery of more than 90% of the $23 million the Department demands from DeVry); (iii) why the Department believes that DeVry is liable for claims of students who will receive (or have received) settlement funds or loan forgiveness outside of the BDR process; or (iv) whether the Department has ensured, as it must under 20 U.S.C. § 1087e(h), that no student has received "an amount in excess of the amount such borrower has repaid on such loan[s]."

14. The Department has also grossly exceeded its statutory authority by enacting the

[2] *See* Order Granting Preliminary Approval of Class Action Settlement, *Sweet v. Cardona*, No. 3:19-cv-03674 (N.D. Cal. Aug. 4, 2022), ECF No. 307.

various versions of the BDR regulations that it now seeks to enforce against DeVry, and by discharging the underlying loans without proper adjudication, often beyond the applicable limitations period. Congress created a *limited* right to repayment relief for students in *specific* circumstances, subject to the Department defining defenses consistent with that mandate. But the Department issued regulations vastly exceeding that authority, and now attempts to apply those regulations to impose financial liability on DeVry without due process of law.

15. The Department's regulations—specifically, beginning with the 2017 BDR Rules—vastly exceed the limited authority Congress delegated to the Department to specify by regulation the specific acts or omissions that a student may assert as a defense to repayment of federal student loans in an action. *See* 20 U.S.C. § 1087e(h). That specific and narrow delegation of authority provides no basis for the recoupment scheme that the Department has fashioned. The Department's recoupment scheme is thus an unconstitutional exercise of legislative authority by the Department.

16. In the Department's scheme, the Department alone determines which borrower defense claims it can assert against an institution by approving discharges in amounts that the Department selects, as the Department's Recoupment Notice exemplifies. While the Department's regulations purport to authorize a Department ALJ to preside over recoupment proceedings brought against an institution, the Department's regulations authorize the Secretary to decide borrower defense claims asserted on the Secretary's behalf.

17. The Department's regulations, which allow the Department's ALJs to preside over recoupment proceedings, including the Recoupment Action, also violate Article II because the Department's ALJs exercise executive authority but are not politically accountable to the President of the United States. Indeed, an ALJ subject to at least two layers of good cause removal presides

over the Recoupment Action.

18. The Department's final decision to discharge thousands of loans without meaningful participation from DeVry violates regulatory, statutory, and constitutional principles. Both the BDR regulations and the process by which the Department is prosecuting the Recoupment Action conflict with other applicable rules, the Administrative Procedure Act ("APA"), Articles I and II of the United States Constitution, and the Due Process Clause of the Fifth Amendment to the United States Constitution, in at least the following ways:

a. The Department has discharged thousands of loans without providing DeVry a meaningful opportunity to participate in the discharge process or challenge the underlying obligations, as required by law.

b. The Department has failed to provide sufficient notice to DeVry of the BDR Applications, including the basic information DeVry needs to understand and defend against both the individual student claims and the Recoupment Action. Here, that means providing, at a minimum, information about each student's attendance, the basis for each student's alleged defense to repayment, and any receipt of offsetting payments—among other things plainly relevant to the merits of the claims, DeVry's defenses, and amounts purportedly owed.

c. The Department has adjudicated the underlying BDR Applications in a single group process, but there is no lawful basis for such an act. Congress has not authorized the Department to adjudicate BDR Applications and seek reimbursement in this manner, and the Department cannot circumvent controlling regulations or suspend due process because the volume of claims is large. Rather, the Department must *individually* assess the viability of each student's claimed defense to repayment—

and thereby eliminate ineligible claims and identify applicable offsets to relief—*before* seeking reimbursement. Instead, the Department turned the process on its head by requiring DeVry to sort it out, without providing the information DeVry needs to do so.

d. The Department relies on regulations promulgated without proper notice and comment, and on policy memoranda issued in contravention of then-controlling processes for issuing guidance documents.

e. The haphazard process by which the Department has prosecuted the Recoupment Action lacks clear standards for establishing liability, eliminates nearly every protection to meaningful legal process to which DeVry is entitled, and eviscerates congressional and constitutional limitations on the Department's power to seek recoupment.

19. DeVry thus is currently suffering considerable constitutional and pecuniary harm by being forced to endure the ongoing Recoupment Action, which is exacerbated by the Department's seemingly unfettered discretion to impose devastating financial and operational demands on DeVry, including the possibility of a letter of credit that would irreversibly impact DeVry during the administrative process and create needless uncertainty for thousands of current students.

20. Accordingly, DeVry seeks injunctive and declaratory relief to stay the unconstitutional recoupment process, enforce pertinent constitutional and statutory limits on the Department's authority, clarify the parties' rights and the governing rules, and, if a recoupment action were to move forward, ensure a fair process so DeVry can present a meaningful defense.

PARTIES

21. Plaintiff DeVry is a university incorporated under Illinois law with a principal place of business in Naperville, Illinois.

22. Defendant United States Department of Education is an executive agency of the United States Government. The Department's principal address is 400 Maryland Avenue SW, Washington, D.C. 20202.

23. Defendant Dr. Miguel Cardona is the Secretary of the Department. Dr. Cardona is sued in his official capacity and maintains an office at 400 Maryland Avenue SW, Washington, D.C. 20202.

24. All defendants are collectively referred to hereinafter as the "Department."

JURISDICTION AND VENUE

25. This Court has subject matter jurisdiction under Article III, § 2 of the United States Constitution and 28 U.S.C. § 1331, because this action arises under Articles I and II of the United States Constitution, the Due Process Clause of the Fifth Amendment to the United States Constitution, the APA, 5 U.S.C. § 500 et seq., and Title IV of the Higher Education Act of 1965 ("HEA"), 20 U.S.C. § 1001 et seq. The HEA provides federal courts with subject matter jurisdiction over actions against the Secretary of Education. 20 U.S.C. § 1082(a)(2).

26. Judicial review of the Department's final agency actions is authorized under the APA. DeVry has "suffer[ed a] legal wrong because of agency action." 5 U.S.C. § 702. The Department's 2017 BDR Rules, discharges of the underlying loans, and the recoupment demand constitute final agency action permitting judicial review. *Id.* § 704; *see also Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

27. Judicial review of Defendants' allegedly unconstitutional conduct is authorized

under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.

28. Because this is an action against an officer and agency of the United States, venue is proper under 28 U.S.C. § 1391(e)(1).

29. This Court may award the requested declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, the APA, 5 U.S.C. § 706, the Mandamus Act, 28 U.S.C. § 1361, the HEA, 20 U.S.C. § 1082, and the Court's inherent equitable powers.

FACTUAL ALLEGATIONS

I. DeVry Settles Claims Relating to the "90-Percent Ads" Without a Finding or Admission of Wrongdoing

30. Beginning in 2014, certain governmental authorities investigated DeVry for advertised statements regarding the employment prospects of its graduates, namely, that 90-percent of students in certain of DeVry's programs obtained jobs in their field within six months of graduation ("90-percent ads").

31. In January 2014, the Federal Trade Commission ("FTC") sent DeVry a civil demand for information regarding the 90-percent ads and other topics. Although DeVry had significant documentation and analysis supporting the 90-percent ads, it stopped running the ads in September 2015.

32. On January 27, 2016, after a two-year investigation, the FTC filed a federal action against DeVry alleging the 90-percent ads violated section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by constituting deceptive practices affecting commerce.[3] DeVry vigorously disputed the FTC's allegations.

33. On December 19, 2016, DeVry settled the FTC dispute and stipulated to a judgment

[3] *See* Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. DeVry Educ. Grp.*, No. 2:16-cv-00579 (C.D. Cal. Jan. 27, 2016), ECF No. 1.

under which DeVry agreed—without admitting wrongdoing—to pay approximately $50 million to the FTC for distribution to eligible then-current and former DeVry students, and to forgive approximately $50 million in loan balances for eligible then-current and former DeVry students. Of the 649 borrowers underlying this action, 602 were eligible to receive relief under the FTC settlement.

34. Around this time, DeVry also settled claims relating to the 90-percent ads with the Department and the Attorneys General of New York and Massachusetts. Under these settlements, DeVry paid—without admitting wrongdoing—$2.25 million for distribution to students in New York and $455,000 for distribution to students in Massachusetts. Under the settlement agreement with the Department, DeVry posted a letter of credit exceeding $68 million (which the Department has since allowed to expire). Over the next four years, DeVry settled other class and individual actions based on the 90-percent ads, also without any admission or finding of wrongdoing.[4]

35. To date, DeVry has paid over $122 million to former students to resolve claims relating to the 90-percent ads.

II. THE DEPARTMENT GRANTS BDR RELIEF *EN MASSE* AND INITIATES THE RECOUPMENT ACTION

36. On June 23, 2020, the Department informed DeVry that the Department had received and would investigate several thousand BDR Applications from then-current and former DeVry students. The Department undertook to inform DeVry of the applications on a rolling basis and allowed DeVry to respond to each, which DeVry promptly began to do.

37. To date, DeVry has received over 47,000 BDR Applications from the Department. Many of the applications were filed as many as eight years before the Department sent them to

[4] *See, e.g.*, *McCormick, et al. v. Adtalem Global Education Inc., et al.*, No. 2018-CH-04872 (Cir. Ct. Cook Cty.).

DeVry. Equally problematic, many of the Department's notices to DeVry attached BDR Applications that are illegible, blank, or incomplete; contain names that do not match those provided by the Department; are duplicative of other applications; or are otherwise inaccessible (including because they are missing passwords or provided incorrect passwords). Other of the Department's notices failed to attach a BDR Application, or attached BDR Applications from students who did not attend DeVry.

38. On February 16, 2022, without communicating with or notifying DeVry, the Department issued a press release (i) summarizing the "findings" of its "investigation" into the thousands of BDR Applications that it claims had been filed based on DeVry's 90-percent ads (conduct that DeVry settled with the FTC in 2016 without any admission or finding of wrongdoing); (ii) announcing roughly $71.7 million in discharges for approximately 1,800 students; and (iii) stating its intent to recoup the discharged sums from DeVry in the "first approved" recoupment action "associated with a currently operating institution."[5] The Secretary publicly endorsed these findings, stating that the Department's "findings show too many instances in which students were misled into loans at institutions or programs that could not deliver what they'd promised."[6]

39. Shortly thereafter, DeVry asked the Department for information about the announced discharge, including the identities of the borrowers. Apart from continuing to forward BDR Applications, the Department did not reply to DeVry's requests or contact DeVry about its decision. Indeed, after receiving several initial notices of individual BDR Applications, DeVry

[5] *See* Press Release, U.S. Dep't of Educ., *Education Department Approves $415 Million in Borrower Defense Claims Including for Former DeVry University Students* (Feb. 16, 2022), https://www.ed.gov/news/press-releases/education-department-approves-415-million-borrower-defense-claims-including-former-devry-university-students.

[6] *See id.*

received no further communications from the Department, other than one isolated (and unexplained) e-mail directed to one borrower (who is not affiliated with the Recoupment Action) that the Department had granted that borrower's BDR Application.

40. On March 31, 2022, James Kvaal, Undersecretary of the Department, sent a letter to Congressman Robert C. Scott stating that the Department had "recently announced the approval of more than $70 million in borrower defense claims for former students from DeVry" and that "[i]f those claims are ultimately adjudicated as final liabilities against DeVry, the Department will seek repayment of those liabilities under the authority granted by 34 C.F.R. § 685.308." *See* March 31, 2022 Letter from James Kvaal to Robert C. Scott ("Exhibit A").

41. Then, on August 15, 2022, the Department sent DeVry the Recoupment Notice, purportedly under the authority of Title IV of the HEA, 20 U.S.C. § 1070 et seq. (as amended). *See* Aug, 15, 2022 Letter from Susan D. Crim to Thomas L. Monahan III ("Exhibit B"). The Department demands $23,638,104 in discharged amounts for 649 students who purportedly attended DeVry between 2008 and 2015, and who the Department claims have successfully asserted defenses to repayment based on alleged "substantial misrepresentations" and state law causes of action involving the 90-percent ads. The Recoupment Notice is signed by Susan D. Crim, Director of the Department's Administrative Actions and Appeals Service Group, who is authorized to seek recoupment on the Department's behalf.

42. The Recoupment Notice states that the Department would impose the multimillion-dollar collection on September 6, 2022, unless DeVry responded as provided therein, and that the stated amount constitutes only a portion of the $71.7 million already discharged. *See* Ex. B at 6. The Notice also cautions that the "Department . . . anticipates the number of approved discharge amounts to continue to grow as the Department continues to adjudicate additional applications

from former DeVry students." *Id.* Accordingly, the Department reserves "the right to seek future recovery actions, as warranted, for collection from DeVry for those additional approved amounts." *Id.* The Department further threatens to impose financial penalties if DeVry fails to respond or timely pay the demanded sum. *Id.* at 7.

43. On August 19, 2022, DeVry replied to the Recoupment Notice, raising critical deficiencies that encumbered DeVry's ability to respond. *See* Aug. 19, 2022 Letter from Joseph J. Vaughan to Susan D. Crim ("Exhibit C"). Accordingly, DeVry asked the Department for specific information and an extension of the allotted 20-day response period (the minimum provided under 34 C.F.R. § 668.87(a)(1)(iii)).

44. On August 29, 2022, the Department answered by extending the response deadline to September 28, 2022, and by enclosing certain materials concerning the BDR Applications that had not previously been provided. *See* Aug. 29, 2022 Letter from Susan D. Crim to Joseph J. Vaughan ("Exhibit D"). Yet the Department declined DeVry's request for the exhibits and appendices supporting the Department's Statement of Facts, claiming that providing DeVry with the Statement of Facts alone (without its referenced exhibits and appendices) was sufficient under the BDR regulations. *Id*.

45. On September 12, 2022, DeVry responded to the Department, reiterating its request for the missing BDR Applications and the exhibits and appendices to the Statement of Facts, and noting other serious legal deficiencies in the discharge and recoupment processes. *See* Sept. 12, 2022 Letter from Joseph J. Vaughan to Susan D. Crim ("Exhibit E"). The Department responded on September 19, 2022, restating its position "that it has met its obligation[s]" under applicable regulations, but providing information to assist DeVry in accessing all but two of the missing BDR Applications and a list of 36 state statutes on which the BDR Applications are purportedly based.

See Sept. 19, 2022 Letter from Susan D. Crim to Joseph J. Vaughan ("Exhibit F"). The Department also extended DeVry's response deadline to October 11, 2022. *Id*.

46. On October 11, 2022, concurrently with filing this Complaint, and as circumstances at the time allowed, DeVry formally responded to the Recoupment Notice to stay the payment demand, preserve DeVry's ability to challenge the Recoupment Action, and avoid immediate financial and potentially other penalties.

47. On October 25, 2023, an administrative law judge ("ALJ") in the Department's Office of Hearings and Appeals issued an order and notice of pre-hearing conference in *In the Matter of DeVry University*, Docket No. 22-54-BD.

48. As of the filing of this First Amended Complaint, the Department's Recoupment Action remains ongoing.

III. THE DEPARTMENT'S BORROWER DEFENSE RULES

A. The Higher Education Act & Direct Loan Program

49. In 1965, Congress adopted the HEA to "mak[e] available the benefits of postsecondary education to eligible students." 20 U.S.C. § 1070(a).

50. In 1993, Congress amended Title IV of the HEA to establish the William D. Ford Federal Direct Loan Program ("Direct Loan Program"), under which students may borrow directly from the federal government to finance their postsecondary education. *See* Student Loan Reform Act of 1993 ("Student Loan Reform Act"), Pub. L. No. 103-66, 107 Stat. 341 (codified at 20 U.S.C. §§ 1087a–h); 20 U.S.C. § 1087a(a).

51. To partake in the Direct Loan Program, a school must, among other things, "accept[] responsibility and financial liability stemming from its failure to perform its functions" under the program. 20 U.S.C. § 1087d(a)(3). Schools must also adhere to "such other provisions as the Secretary determines are necessary to . . . promote the purposes of [the program]."

Id. § 1087d(a)(6). For example, the Secretary may require an irrevocable letter of credit, or impose a heightened cash monitoring obligation requiring a school to credit a student's account with institutional funds before receiving those funds from the Title IV program. *See* 34 C.F.R. §§ 668.175(c), 668.162(d). Either of these actions may impose an extreme financial burden that alone would force a school to cease operations.[7]

52. In connection with certain federal loans available to student borrowers, Congress has specified that: "[n]otwithstanding any other provision of State or Federal law, 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, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan." 20 U.S.C. § 1087e(h).

B. The Borrower Defense to Repayment Rules

53. Since the enactment of the Direct Loan Program, the procedures by which student borrowers may seek (and the Department may grant) repayment relief have been delineated by regulations referred to as the "BDR Rule." The BDR Rule allows a student borrower to seek discharge of his or her federal loan balance by asserting certain arguments depending on when the loan was disbursed. Such claims must generally assert that a participating school committed an act or omission relating "to the making of the loan for enrollment at the school" that would "give rise to a cause of action against the school under applicable State law." 34 C.F.R. § 685.206(c)(1).

[7] *See* Danielle Douglas-Gabriel, *ITT Technical Institutes Shut Down After 50 Years in Operation*, The Washington Post (Sept. 6, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/09/06/itt-technical-institutes-shut-down-after-50-years-in-operations/ ("Financial analysts said the deathblow to ITT came in the form of a letter of credit.").

54. There are three relevant versions of the BDR Rule at issue here: the "1995 BDR Rule"; the "2017 BDR Rule"; and the "2020 BDR Rule." While the Department has issued another BDR Rule that is set to become effective in July 2023 ("the 2023 BDR Rule"), the Department has not invoked that Rule in the Recoupment Action.

55. Pursuant to these BDR Rules, the Department seeks to recoup from DeVry amounts for 7,622 discharged loans on behalf of 649 borrowers. As outlined below, the Recoupment Action is unconstitutional and unlawful, and must be enjoined.

IV. THE RECOUPMENT ACTION IS UNCONSTITUTIONAL

56. The Department's ALJs—who preside over recoupment proceedings in the Department—are not removable by the President at will, thereby allowing unelected officials to wield significant executive power without political accountability in violation of Article II of the United States Constitution. Moreover, the Department's complex recoupment scheme—fashioned without congressional authorization—violates Article I of the United States Constitution.

A. The Department's ALJs Lack Political Accountability in Violation of Article II

57. Article II of the United States Constitution "vest[s]" all "executive Power" in the President of the United States. U.S. Const., art. II, § 1, cl. 1. The President alone is charged with "tak[ing] Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. This command necessarily encompasses rules and regulations enacted pursuant to Congress's delegation of authority to the Department to specify by regulation defenses to repayment of federal student loans. 20 U.S.C. § 1087e(h).

58. The concentration of Executive power solely in the President "ensure[s] . . . accountability" of the Executive Branch to the people. *Printz v. United States*, 521 U.S. 898, 922 (1997). Indeed, "the restraints of public opinion" is one of the "greatest securities" for the "faithful

exercise" of Executive power. The Federalist No. 70 at 424, 428–29 (Alexander Hamilton).

59. "[T]he President alone and unaided could not execute the laws." *Myers v. United States*, 272 U.S. 52, 117 (1926). Thus, the Constitution authorizes the President to delegate some executive authority to a "principal Officer in each of the executive Departments" as well as "inferior officers" of the United States in these executive departments. U.S. Const. art. II., § 2, cl. 2.

60. In connection with the President's delegation of executive authority, the President must have the "authority to remove those who assist him in carrying out his duties." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010). "[T]he President's removal power is the rule, not the exception." *Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2206 (2020). This removal power applies both to principal officers of the United States as well as to inferior officers of the United States who wield executive power.

61. The Department's ALJs are inferior officers of the United States, housed within the Department of Education, an executive department. Yet, these ALJs are shielded from at-will removal by the President, thereby insulating them from the democratic accountability Article II requires for those who exercise executive power. This scheme is unconstitutional.

1. The Department's ALJs Are Inferior Officers of the United States

62. The Department's ALJs satisfy each of the considerations the Supreme Court identified in *Lucia v. Securities & Exchange Commission*, 138 S. Ct. 2044 (2018), to conclude that an agency's ALJs are inferior officers of the United States.

63. First, the Department's ALJs "hold a continuing office established by law." *Id.* at 2053. Congress requires the Secretary to establish in the Department of Education an Office of Administrative Law Judges. 20 U.S.C. § 1234(a). The ALJs "shall be appointed by the Secretary in accordance with [5 U.S.C. § 3105]." 20 U.S.C. § 1234(b).

64. Second, the Department's ALJs "have all the authority to ensure fair and orderly adversarial hearings," including taking testimony, conducting trials, ruling on the admissibility of evidence, and possessing the power to enforce compliance with discovery orders, *Lucia*, 138 S. Ct. at 2053:

a. Congress has authorized the Department's ALJs to "order a party to . . . (A) produce relevant documents; (B) answer written interrogatories that inquire into relevant matters; and (C) have depositions taken." 20 U.S.C. § 1234(g)(1).

b. Congress has provided that "[i]n order to carry out the provisions of subsections (f)(1) and (g)(1), the judge is authorized to issue subpoenas and apply to the appropriate court of the United States for enforcement of a subpoena. The court may enforce the subpoena as if it pertained to a proceeding before that court." *Id.* § 1234(g)(2).

c. In the context of the Department's recoupment scheme, ALJs presiding over the recoupment proceedings significantly shape the administrative record, through their powers to "accept only evidence that is relevant and material to the proceeding and is not unduly repetitious," 34 CFR § 668.89(b)(5), "restrict the number of witnesses or exclude witnesses to avoid undue delay or presentation of cumulative evidence," *id.* § 668.89(b)(6), and manage expert witnesses, *id*. § 668.89(b)(7).

d. Although ALJs presiding over recoupment proceeding are "not authorized to issue subpoenas," *id.* § 668.90(b)(1), the Department's regulations empower the ALJs to enforce compliance with discovery deadlines by authorizing the ALJs to "terminat[e] the hearing and issu[e] a decision against a party that does not meet those time limits" set by the ALJs, *id.* § 668.90(c)(3).

65. Third, the Department's ALJs "issue decisions" that contain factual findings, legal conclusions, and appropriate remedies, with the "capacity" to be the "last-word" where the agency declines to review the decision, *Lucia*, 138 S. Ct. at 2053–54. For example:

a. By statute, in a recovery of funds proceeding, the Department's ALJs issue preliminary decisions with "findings of fact" that "if supported by substantial evidence, shall be conclusive." 20 U.S.C. § 1234a(d)(1). A decision by the Department's ALJs "shall become final agency action 60 days after the recipient [of funds] receives written notice of the decision" when the Secretary takes no action. *Id*. § 1234a(g).

b. In the context of the Department's recoupment proceedings, the Department's regulations allow the Secretary to render a "final decision" when a party appeals the ALJ's initial decision. *See* 34 C.F.R. § 668.91(c)(2)(vii). The ALJ's decision is final where the parties do not appeal to the Secretary.

2. The Department's ALJs Are Subject to Dual Layers of Removal Protection

66. The Department's ALJs are subject to dual layers of removal protection that unconstitutionally insulate them from removal by the President.

67. The Supreme Court has underscored that it is "incompatible with the Constitution's separation of powers" when there are two layers of for-cause removal protection between the President and an "inferior Officer." *Free Enter. Fund*, 561 U.S. at 498.

68. Here, at the first layer, the Department's ALJs may be removed only for good cause, as determined by the Merit System Protection Board ("MSPB"). 5 U.S.C. § 7521(a).

69. At the second layer, members of the MSPB can be removed only by the President for good cause. 5 U.S.C. § 1202(d). MSPB members are principal officers of the United States.

See McIntosh v. Dep't of Def., 53 F.4th 630, 639 (Fed. Cir. 2022) ("The MSPB itself is made up of three members who are appointed by the President with the advice and consent of the Senate, making them principal officers. 5 U.S.C. § 1201.").

70. Although the Secretary is removable by the President at will, the Secretary cannot remove a Department ALJ unless the MSPB finds good cause. 5 U.S.C. § 7521(a).

71. The dual layers of removal protection between the Department's ALJs and the President violate Article II of the United States Constitution. *See Jarkesy v. SEC*, 34 F.4th 446, 464–65 (5th Cir. 2022) (striking down identical removal restrictions as unconstitutional as applied to SEC ALJs); *see also Free Enter. Fund*, 561 U.S. at 484.

72. DeVry is subject to the Department's unconstitutionally insulated ALJs by virtue of the Recoupment Action, over which a Department ALJ presides.

B. The Department's Recoupment Scheme is Not Authorized by Any Congressional Delegation of Authority

73. Article I of the United States Constitution "vest[s]" all "legislative Powers" in Congress. U.S. Const., art. I, § 1.

74. Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *Wayman v. Southard*, 23 U.S. 1, 10 Wheat. 1, 42-43 (1825)). But Congress "may 'obtain[ ] the assistance of its coordinate Branches'—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws." *Id.* (quoting *Mistretta v. United States*, 488 U. S. 361, 372 (1989).

75. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also W. Va. v. EPA*, 142 S. Ct. 2587, 2609 (2022) ("Agencies have

only those powers *given* to them by Congress[.]" (emphasis added)).

76. In 1993, Congress delegated specific and limited authority to the Department to determine the defenses borrowers may assert to avoid repayment of federal student loans. Specifically, Congress provided that: "[n]otwithstanding any other provision of State or Federal law, 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, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan." 20 U.S.C. § 1087e(h).

77. Section 1087e(h)—a single subsection tucked within an extensive statutory provision—plainly provides only limited authority for the Secretary to promulgate regulations that specify which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a federal student loan. Congress never authorized the Department to create an administrative adjudication system for recoupment claims, nor did Congress even mention recoupment against institutions of higher education.

78. The Department promulgated a BDR rule in 1995. 34 C.F.R. § 685.206(c) (1995 version). This Rule allowed borrowers to "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" in certain specified formal proceedings—none of which concerned Department adjudication of borrower defense claims. *Id.* § 685.206(c)(1) (1995 version). The Department's 1995 BDR Rule also purported to authorize the Secretary to "initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the

loan to which the defense applies." *Id.* § 685.206(c)(3) (1995 version). The Rule did not specify what "an appropriate proceeding" would be.

79. In 2016, without authorization from Congress, the Department began to fashion its extensive and complex administrative recoupment scheme, departing dramatically from § 2087e(h)'s text and the Department's 1995 BDR Rule. The Department promulgated the 2017 BDR Rule. *See* 81 Fed. Reg. 75,926 (Nov. 1, 2016) (codified at 34 C.F.R. § 685 *et seq*.); *see also* 34 C.F.R. § 685.22 ("2017 version"). The Department also promulgated a regulation creating "borrower defense and recovery proceedings." 34 C.F.R. § 668.87 (the "2017 BDR Recoupment Rule").

80. The Department's scheme under these 2017 Rules operates, in relevant part, as follows:

a. The 2017 BDR Rule purported to allow the Secretary to designate a Department official to resolve borrower defenses by individual student borrowers. 34 C.F.R. § 685.222(e)(3) (2016 version). The Rule authorized the Secretary "to initiate a proceeding to collect from the school the amount of relief resulting from a borrower defense under this section." *Id.* § 685.222(e)(7).

b. The 2017 BDR Rule also authorized the Secretary to designate a Department official to assert borrower defenses against an open school on behalf of a group of borrowers before a Department "hearing official." *Id.* § 685.222(h). If successful, the Secretary "collects from the school any liability to the Secretary for any amounts discharged or reimbursed to borrowers," *id.* § 685.206(h)(5)(i), and "may initiate a proceeding to collect at any time." *Id.* § 685.222(h)(5)(ii).

c. The 2017 BDR Rule provided that "the granting of any relief under this section"

"transfer[s]" to the Secretary "the borrower's right of recovery against third parties," including "against the school." *Id.* § 685.222(k).

d. The Department's 2017 BDR Recoupment Rule refers to these proceedings as "borrower defense and recovery proceedings," governed by 34 C.F.R. Part 668, Subpart G. 34 C.F.R. § 668.81(a)(5)(ii); *see generally* 82 Fed. Reg. 6,253 (Jan. 19, 2017).

e. Subpart G provides that "[a] designated department official begins a borrower defense and recovery proceeding against an institution by sending the institution a notice by certified mail[.]" 34 C.F.R. § 668.87(a)(1). The notice "[i]ncludes a statement of facts and law sufficient to show that the Department is entitled to grant any borrower defense relief asserted within the statement, and recover for the amount of losses to the Secretary caused by the granting of such relief," *id.* § 668.87(a)(1)(ii), as well as "the date on which the Secretary intends to take action to recover the amount of losses arising from the granting of such relief, which date will be at least 20 days from mailing of the notice of intent." *Id.* § 668.87(a)(1)(iii).

f. The institution may submit a written response, which can include a request for a hearing. *Id.* If the institution submits such a response, "the Secretary will not take action" on the date specified in the notice. *Id.* If the institution submits no response, then the regulation contemplates, and the Department's Recoupment Notice confirms, that the institution will be deemed liable for the amount specified in the notice.

g. A "hearing official" presides over hearings related to recoupment proceedings. *See generally id.* § 668.90; *see also id.* § 668.89(a) ("A hearing is an orderly

presentation of arguments and evidence conducted by a hearing official."). As DeVry's experience confirms, the hearing official is a Department ALJ.

h. The hearing official is authorized to convene pre-hearing conferences to facilitate the efficient resolution of the matter. *See id.* § 668.88(a)–(c). During the hearing, parties may submit non-dispositive motions as well as motions for summary disposition. *Id.* § 668.88(d)–(e); *see also id.* § 668.89(a). The hearing official may also authorize "an oral evidentiary hearing conducted in person, by telephone, by video conference, or any combination thereof; or a review limited to written evidence." *Id.* § 668.89(a). Although formal discovery is not permitted, the hearing official may receive relevant documentary evidence and allow the testimony of witnesses, including expert witnesses. *Id.* § 668.89(b)(4)–(7).

i. After considering the evidence presented during the hearing, the hearing official issues an "initial decision." *Id.* § 668.91(a)(1)(i). That "initial decision states whether the imposition of the . . . recovery sought by the designated department official is warranted, in whole or in part." *Id.* § 668.91(a)(2)(i).

j. Either the institution or designated Department official may appeal the hearing official's initial decision to the Secretary within 30 days of receiving that decision. *Id.* § 668.91(c)(2). During the pendency of the appeal, the initial decision of the hearing official does not take effect. *See id.* § 668.91(c)(2)(vi). In an appeal, "[t]he Secretary renders a final decision." *Id.* § 668.91(c)(2)(vii).

81. In 2020, again without authorization from Congress, the Department promulgated another BDR Rule. *See* 34 CFR § 685.206; *see also* 84 Fed. Reg. 49,788 (Sept. 23, 2019) ("2020 version"). In relevant part, under the 2020 BDR Rule:

a. "[T]he Secretary issues a written decision" on a BDR application, 34 CFR § 685.206(e)(11)(i), and notifies the borrower and the school if the Secretary grants" relief. *Id.* § 685.206(e)(12)(i).

b. The Secretary's BDR determination is "final" and "not subject to appeal within the Department." *Id*. § 685.206(e)(13).

c. The 2020 BDR Rule also transfers to the Secretary "the borrower's right of recovery against third parties," including "against the school." *Id.* § 685.206(e)(15)(i).

d. The 2020 BDR Rule authorizes the Secretary to initiate a proceeding against a school "to pay to the Secretary the amount" discharged in accordance with 34 C.F.R., subpart G. *Id*. § 685.206(e)(16). Thus, the 2020 BDR Rule relies on the same "borrower defense and recovery proceedings" created by the 2017 BDR Recoupment Rule.

82. The Department's sprawling recoupment scheme contravenes the limited role Congress delegated to the Department over borrower defenses to repayment, which solely contemplates establishing permissible defenses for student borrowers, not the adjudication by the Department of recoupment claims.

83. Section 1087e(h) does not authorize the Department to establish an adjudicatory system, which is an extraordinary power for an executive agency. *See W. Va.*, 142 S. Ct. 2587 at 2610 (extraordinary powers should not be readily gleaned from "ancillary" statutory provisions). The statute does not mention adjudication *by the Department* at all—let alone adjudication of recoupment claims against an institution—but rather only authorizes the Department to specify borrower defenses.

84. Although the Department labels its adjudication of recoupment claims as "recovery proceedings," Congress did not provide such authority to the Department in 20 U.S.C. § 1087e(h), in contrast to other situations where Congress expressly delegated to the Department authority to recover funds from a recipient for certain conduct by initiating an adjudicatory process through the Department's ALJs. *See, e.g.*, 20 U.S.C. § 1234a.

85. The Department's promulgation of the recoupment scheme without congressional delegation of authority constitutes an unauthorized exercise of legislative power by an executive department in violation of Article I.

V. THE RECOUPMENT ACTION IS UNLAWFUL UNDER THE BDR RULES

86. As outlined below, the Recoupment Action is not authorized under the 1995 BDR Rule, the 2017 BDR Rule, or the 2020 BDR Rule.

A. The Recoupment Action Is Not Authorized Under the 1995 BDR Rule

87. The 1995 BDR Rule governs BDR Applications relating to loans disbursed before July 1, 2017. *See* 34 C.F.R. § 685.206(c)(1). Of the 7,622 loans underlying the Recoupment Action, 7,512 (98.6%) are controlled by the 1995 BDR Rule. Each of the 649 underlying borrowers held at least one of these 7,512 loans.

88. Under the 1995 BDR Rule, a "borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law." 34 C.F.R. § 685.206(c)(1) (1995 version). References to an "act or omission" under "applicable State law" are "intended to reflect the *limited* scope" of available relief, such that relief may be awarded "*only* if the school's act or omission has a clear, direct relationship to the loan." *See* 60 Fed. Reg. 37,768, 37,769 (July 21, 1995) (emphases added). At the time of adoption, the Department also stated that it "expect[ed] . . . the adjudication of individual claims [would] provide further explanation of the Secretary's interpretation of the

regulatory requirements." *Id.*

89. Under the 1995 BDR Rule, upon a successful showing, the Secretary may "relieve[] [a borrower] of the obligation to repay all or part of the [challenged] loan," 34 C.F.R. § 685.206(c)(2) (1995 version), notwithstanding that the HEA by its own terms limits relief to "the amount such borrower has repaid on such loan[s]," 20 U.S.C. § 1087e(h).

90. Despite providing virtually no procedural guidance for adjudicating BDR Applications, the 1995 BDR Rule empowers the Secretary to "initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment . . . to pay . . . the amount of the loan to which the defense applies." 34 C.F.R. § 685.206(c)(3) (1995 version).

91. The regulations limit this recoupment power, however, by barring the Secretary from initiating a recoupment proceeding "after the period for the retention of records described in § 685.309(c) unless the school receive[s] actual notice of the claim during that period." 34 C.F.R. § 685.206(c)(3) (1995 version). Since its promulgation, § 685.309(c) has referenced § 668.24, which imposes a three-year record retention requirement following the end of the "award year" in which the student last attended the institution. *See* 61 Fed. Reg. 60,490, 60,492 (Nov. 27, 1996). Thus, absent actual notice of a borrower's claim for relief during the three-year retention period, the 1995 BDR Rule allows the Department to seek recoupment only within the three-year period after the borrower stopped attending DeVry.

92. In pursuing recoupment, the Department disregards or violates several dispositive sections of the 1995 BDR Rule. For example:

a. The Department ignores the limitations period set forth in § 685.206(c)(3), which bars the Department from pursuing recoupment for a loan amount more than three

years after the last day of the last award year in which the borrower attended DeVry, absent actual notice of the claimed defense to repayment within that three-year period. Because DeVry did not receive any of the BDR Applications relating to 7,061 of the 7,512 loans governed by the 1995 BDR Rule within this three-year period (and in fact did not receive any notices related to any of the underlying borrowers until 2020, at the earliest), the Secretary is time-barred from recouping any amounts for those 7,061 discharged loans (approximately $21,735,305).

b. The Recoupment Notice does not provide adequate information to assess the grounds on which the underlying borrowers purported to assert a defense to repayment. For example, many of the BDR Applications do not assert reliance upon the 90-percent ads (the supposed basis for the Recoupment Action). Thus, the Department has failed to provide a factual basis—let alone evidence—to show that any of those BDR Applications governed by the 1995 BDR Rule have asserted an "act or omission" that would "give rise to a cause of action against [DeVry] under applicable State law." 34 C.F.R. § 685.206(c)(1) (1995 version).

c. The Department has ostensibly adjudicated the underlying BDR Applications in a single "group" process, which the 1995 BDR Rule does not authorize. Indeed, the regulatory history of the 1995 BDR Rule shows that BDR Applications were to be adjudicated *individually*, not in batches. *See* 60 Fed. Reg. at 37,769 (noting that the Department "expect[ed] that the adjudication of *individual claims* [would] provide further explanation of the Secretary's interpretation of the regulatory requirements" (emphasis added)).

d. The Department has not provided any information by which to verify that the

amounts it seeks were accurately calculated under the state law governing each BDR Application. Rather, to avoid its obligation to analyze the relief to which each individual borrower is actually entitled, the Department applies a presumption of total relief derived from an August 2021 policy memorandum issued in contravention of then-effective Department processes for issuing guidance documents. This is particularly vexing given the Department's previously articulated position that quantification of BDR relief is governed by state law. *See, e.g.*, Ex. 8 to Decl. of Joshua D. Rovenger in Supp. of Pls.' Mot. for Prelim. Inj. at 73–82, 86–99, *Calvillo Manriquez v. DeVos*, No. 3:17-cv-07210 (N.D. Cal. Mar. 17, 2018), ECF No. 35-8 (detailing the Department's position that BDR relief must be calculated by reference to state law).

93. For these and other reasons, the Recoupment Action is unlawful with respect to loans governed by the 1995 BDR Rule.

B. The Recoupment Action Is Not Authorized Under the 2017 BDR Rule

94. The 2017 BDR Rule governs BDR Applications relating to loans disbursed on or after July 1, 2017 but before July 1, 2020. *See* 34 C.F.R. §§ 685.206(d), 685.222. Of the 7,622 loans underlying the Recoupment Action, 98 (about 1.3%) are controlled by the 2017 BDR Rule. These 98 loans were held by 32 of the 649 underlying borrowers.

95. In 2016, the Department published sweeping changes to the BDR Rule, despite no intervening changes to the relevant statutory provisions governing the Direct Loan Program. *See* 81 Fed. Reg. 75,926 (Nov. 1, 2016) (codified at 34 C.F.R. § 685 et seq. ("2017 version")). The 2017 BDR Rule took effect on October 18, 2018.

96. As relevant here, under the 2017 BDR Rule, a borrower may assert a defense to repayment of a loan disbursed on or after July 1, 2017 based on a "substantial misrepresentation

. . . that the borrower reasonably relied on to the borrower's detriment when the borrower decided to attend, or to continue attending, the school or decided to take out a Direct Loan." 34 C.F.R. § 685.222(d) (2017 version). In so doing, individual borrowers may seek "to recover amounts previously collected by the Secretary on the Direct Loan," *id*. § 685.206(c)(ii) (2017 version), but only within the six-year period after the borrower could have reasonably discovered the purported misrepresentation upon which the borrower's claim is based, *id*. § 685.222(d)(1) (2017 version). The borrower must also offer "evidence that supports the borrower['s] defense [to repayment]." *Id*. § 685.222(e)(1)(i)(B) (2017 version).

97. If a borrower states an appropriate claim for relief, the Department must notify the borrower's school and initiate an investigation during which the Department must consider any response submitted by the school. *See* 34 C.F.R. § 685.222(e)(3) (2017 version).

98. The 2017 BDR Rule also purports to provide the Secretary with authority to forgo individualized assessment of BDR Applications and instead adjudicate BDR Applications in groups. *See* 34 C.F.R. § 685.222(e)(6) (2017 version) ("The Secretary may consolidate applications . . . that have common facts and claims, and resolve the borrowers' borrower defense claims as provided in paragraphs (f), (g), and (h) of this section." (together, the "Group Adjudication Provisions")); *see generally id*. § 685.222(f) (2017 version).

99. To initiate group adjudication under the 2017 BDR Rule, the Secretary must identify a subset of borrowers sharing "common facts and claims." 34 C.F.R. § 685.222(e)(6) (2017 version). After considering the common facts and claims and other factors (e.g., the fiscal impact of affording relief and the public interest in promoting compliance), the Secretary must then assess whether the borrower group has a valid defense. *Id*. § 685.222(f)(1) (2017 version). To that end, the Secretary must notify "the school of the basis of the group's borrower defense, the

initiation of the fact-finding process," and "any procedure by which the school may request records and respond." *Id*. § 685.222(f)(2)(iv) (2017 version). As with individualized adjudication of BDR Applications, the Department must "consider[] any evidence and argument presented by the school." *Id*. § 685.222(h)(1) (2017 version).

100. If the Secretary grants relief (either on an individual or group basis), the Department may "discharge[] the borrower's [or borrowers'] obligation to repay all or part of the [applicable] loan . . . and, if applicable, reimburse[] the borrower [or borrowers] for amounts paid toward the loan voluntarily or through enforced collection." 34 C.F.R. §§ 685.222(i)(1), (6) (2017 version). However, such relief must be "reduced by the amount of any refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, compromise, or any other financial benefit received by . . . the borrower that was related to the borrower defense." *Id*. § 685.222(i)(8) (2017 version).

101. Where the 2017 BDR Rule is successfully asserted, and upon the Department's grant of relief, "the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the contract for educational services for which the loan was received, against the school." 34 C.F.R. § 685.222(k) (2017 version).

102. Following a grant of relief, the 2017 BDR Rule authorizes the Secretary to initiate recoupment proceedings against the borrower's school. *See* 34 C.F.R. §§ 685.222(h)(5), 685.222(e)(7), 685.206(c)(3) (2017 version). Before seeking recoupment, however, the Department must provide the targeted school with "a statement of facts and law sufficient to show that the Department is entitled to grant any borrower defense relief asserted." *Id*. § 668.87(a)(1)(ii) (2017 version).

103. Recoupment actions under the 2017 BDR Rule are also limited in time. Unless the targeted school has "notice" of a borrower's claimed defense to repayment, a recoupment proceeding must be initiated within (1) six years for BDR Applications based on breach of contract or substantial misrepresentation by the school; or (2) any time for BDR Applications based on a judgment against the school. 34 C.F.R. §§ 685.222(e)(7)(i)–(iii) (2017 version). Notably, in adopting the 2017 BDR Rule—but without following the mandatory notice-and-comment procedures that accompanied the changes to the 1995 BDR Rule—the Department significantly and substantively expanded the definition of "notice" to purportedly allow the Secretary to initiate recoupment proceedings *at any time* and resurrect long-expired claims. *See id.* § 685.206(c)(4) (2017 version).

104. Specifically, under the 2017 BDR Rule, the Secretary modified the definition of "notice" to mean (1) "[a]ctual notice from the borrower, from a representative of the borrower, or from the Department," (2) a "class action complaint asserting relief for a class that may include the borrower," or (3) "[w]ritten notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower." 34 C.F.R. §§ 685.206(c)(4)(i)–(iii) (2017 version).

105. In pursuing recoupment against DeVry, the Department disregards or violates several dispositive sections of the 2017 BDR Rule. For example:

a. The Recoupment Notice fails to provide adequate information to assess the basis on which the underlying borrowers purportedly asserted a defense to repayment. Many of the BDR Applications, for example, do not indicate whether the pertinent borrowers relied upon (or even knew of) the 90-percent ads (the purported basis for

the Recoupment Action). Thus, the Department has failed to provide sufficient facts—let alone evidence—to show that any of the 32 relevant borrowers have stated a basis for finding a "substantial misrepresentation . . . that the borrower reasonably relied on to the borrower's detriment when the borrower decided to attend, or to continue attending, the school or decided to take out a Direct Loan." 34 C.F.R. § 685.222(d) (2017 version).

b. The Recoupment Notice fails to provide sufficient information to assess the relief available to each borrower under the 36 state statutes the Department claims govern the BDR Applications. Indeed, the Recoupment Notice does not indicate whether the Department considered *any* of the required factors relevant to determining the proper discharge amounts for loans disbursed on or after July 1, 2017, including (i) the value of the education the borrower received, (ii) the value of the education that a reasonable borrower in the borrower's circumstances would have received, or (iii) the value of the education the borrower should have expected given the information provided by DeVry. *See* 34 C.F.R. § 685.222(i)(2)(i) (2017 version).

c. The Recoupment Notice fails to provide any information to verify that the Department accurately offset from the demanded sums the "amount of . . . any other financial benefit received by, on or behalf of the borrower that was related to the borrower defense," 34 C.F.R. § 685.222(i)(8), including, for example, the numerous settlements related to the 90-percent ads, outlined *supra* at paragraphs 21–26.

106. For these and other reasons, the Recoupment Action is unlawful with respect to loans governed by the 2017 BDR Rule.

C. The Recoupment Action Is Not Authorized Under the 2020 BDR Rule

107. The 2020 BDR Rule governs BDR Applications relating to loans disbursed on or after July 1, 2020. *See* 34 C.F.R. § 685.206(e). Of the 7,622 loans underlying the Recoupment Action, 12 loans (less than 1%) are controlled by the 2020 BDR Rule. These 12 loans (which were disbursed nearly five years after DeVry ceased using the 90-percent ads) were held by six of the 649 underlying borrowers.

108. On September 23, 2019, the Department published a modified BDR Rule for loans disbursed on or after July 1, 2020. *See* 84 Fed. Reg. 49,788 (Sept. 23, 2019) (codified at 34 CFR § 685.206(e) ("2020 version")). Under these regulations, a borrower may assert a repayment defense based on a misrepresentation of "material fact upon which the borrower reasonably relied in deciding to obtain a Direct Loan" if it "directly and clearly relates to [the borrower's] [e]nrollment or continuing enrollment," and if the "borrower was financially harmed by the misrepresentation." 34 C.F.R. §§ 685.206(e)(2)(i)–(ii) (2020 version). Such a defense must be asserted "within three years from the date the student is no longer enrolled at the institution." *Id.* § 685.206(e)(6)(i) (2020 version).

109. An actionable "misrepresentation" is one that is (i) "false, misleading, or deceptive" and (ii) "made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth." 34 C.F.R. § 685.206(e)(3) (2020 version).

110. Importantly, a borrower must have suffered "financial harm" from the misrepresentation, exclusive of damages resulting from (i) "nonmonetary loss" such as "inconvenience" or "opportunity costs," (ii) "intervening . . . labor market conditions," or (iii) the "borrower's voluntary decision to pursue less than full-time work." 34 C.F.R. § 685.206(e)(4) (2020 version).

111. After receiving a BDR Application, the Department must "notify the school" and

provide the school (i) "a copy of the borrower's request," (ii) "any supporting documents," (iii) "a copy of any evidence otherwise in the possession of the Secretary," and (iv) "a waiver . . . permitting the institution to provide the Department with items from the student's education record relevant to the defense to repayment claim." 34 C.F.R. § 685.206(e)(10)(i) (2020 version).

112. The school must be allowed to "respond and to submit evidence," after which the borrower may submit a reply. *See* 34 C.F.R. §§ 685.206(e)(10)(i)–(ii) (2020 version). Following this process, the Secretary must "specify[] the relief determination" in writing. *Id.* §§ 685.206(e)(11)(i)(A)–(C) (2020 version).

113. The 2020 BDR Rule also removed the 2017 BDR Rule's Group Adjudication Provisions for loans disbursed on or after July 1, 2020. *See* 34 C.F.R. § 685.206(e).

114. In seeking recoupment from an institution under the 2020 BDR Rule, the Department must provide "a statement of facts and law sufficient to show that the Department is entitled to grant any borrower defense relief" for which it seeks to recover. 34 C.F.R. § 668.87(a)(1)(ii) (2020 version).

115. In pursuing recoupment from DeVry, the Department disregards or violates several dispositive sections of the 2020 BDR Rule. For example:

a. The 2020 BDR Rule does not authorize the Department to adjudicate BDR Applications by group, as the Department has ostensibly done here. In modifying the BDR Rule, the Department *removed* the 2017 BDR Rule's Group Adjudication Provisions such that they do not apply to BDR Applications relating to loans disbursed on or after July 1, 2020. Just as the Recoupment Action is unlawful as to loans controlled by the 1995 BDR Rule, the Recoupment Action is unlawful as to loans controlled by the 2020 BDR Rule because the Department improperly

discharged the loans in a group adjudication and may not pursue recoupment for such unlawfully discharged sums. *See* 34 C.F.R. § 668.87(a)(1)(ii) (2020 version) (requiring the Department show a legal basis for granting BDR relief before pursuing recoupment).

b. The Department has failed to provide any information to suggest that, for the six borrowers for whom the 2020 BDR Rule applies, the Department considered whether the borrowers have proven "by a preponderance of the evidence," 34 C.F.R. § 685.206(e)(2) (2020 version), that (i) DeVry made a "false, misleading, or deceptive" statement with *scienter*, *id*. § 685.206(e)(3) (2020 version); (ii) reasonable reliance on that statement, *id*. § 685.206(e)(2)(i) (2020 version); and (iii) resulting financial harm, *id*. §§ 685.206(e)(2)(ii), 685.206(e)(4) (2020 version).

c. The Department has not provided any information by which to verify that the amounts it seeks were accurately assessed. *See supra* at paragraph 62.

116. For these and other reasons, the Recoupment Action is unlawful with respect to loans governed by the 2020 BDR Rule.

D. The Department Proposes Additional Changes to the BDR Rule

117. In July 2022, the Department announced it would revise the BDR rules for the third time in six years to (i) to resurrect the broad bases of relief afforded under the 2017 BDR Rule; (ii) to reinstate the 2017 BDR Rule's Group Adjudication Provisions; and (iii) to change many of the evidentiary presumptions for obtaining relief. *See* 87 Fed. Reg. 41,878 (July 13, 2022). The revised BDR regulations are expected to take effect in 2023. *Id.* at 41,880.

VI. DeVry Suffers Ongoing Harm from the Recoupment Action and Faces an Imminent Threat of Substantial Injury from the Recoupment Action

118. DeVry currently suffers and will continue to suffer ongoing harm as a result of the Recoupment Action given the structural constitutional flaws in the Department's recoupment scheme. *See Bond v. United States*, 564 U.S. 211, 223 (2011) ("[I]ndividuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies.").

119. DeVry is harmed by being subjected to the Recoupment Action because the ALJ who presides over the Recoupment Action is unconstitutionally insulated from removal by the President, thereby depriving DeVry of the political checks and safeguards under the President's Article II power to remove inferior officers of the United States.

120. DeVry is also harmed by being subjected to the Recoupment Action because the Department exceeded its authority in establishing the regulatory scheme pursuant to which the Action is being prosecuted in violation of Article I of the U.S. Constitution.

121. The harm to DeVry from being subjected to the Department's unconstitutional recoupment scheme is a "here-and-now injury" that cannot be remedied by later judicial review. *Axon*, 143 S. Ct. at 903; *Seila Law*, 140 S. Ct. at 2196.

122. In addition, if not enjoined, the Recoupment Action poses considerable harm to DeVry by, among other things, forcing DeVry to endure an administrative proceeding that denies DeVry due process of law. *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *Davis v. D.C.*, 158 F.3d 1342, 1346 (D.C. Cir. 1998).

123. Moreover, DeVry faces an imminent threat of substantial injury from the Recoupment Action because the Department seeks to recoup $23 million from DeVry, which threatens substantial financial injury, and also because the Department has stated its intent to

recoup significantly more from DeVry, including—but not limited to—approximately $71.7 million in already-discharged loans. Taken together, the Recoupment Action (and similar actions the Department has stated will follow) will burden DeVry's ability to continue operating, thereby imposing existential pecuniary and reputational damage.

FIRST CLAIM FOR RELIEF
Violation of APA—Action in Excess of Statutory Jurisdiction, Authority, or Limitations

124. The above paragraphs are incorporated by reference herein.

125. The APA, 5 U.S.C. § 706(2)(C), provides that a reviewing court shall "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations." There are at least two grounds to do so here.

126. *First*, the Department claims to have initiated the Recoupment Action "in accordance with the procedures" promulgated under Title IV of the HEA. Yet the Group Adjudication Provisions by which the Department purports to act are not authorized under the HEA.

127. Under Title IV of the HEA, the Department is directed to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan." 20 U.S.C. § 1087e(h). The Department is also directed to collect payment on loans funded pursuant to the HEA. *See, e.g.*, *id.* §§ 1087e(d)–(e).

128. The Department issued regulations exceeding this prescribed power that purportedly authorize the group discharge of Direct Loans. *See* 34 C.F.R. §§ 685.222(f)–(h). And although Congress may choose to authorize the Department to discharge Direct Loans *en masse*, it has not done so. Rather, Congress has explicitly authorized discharge of repayment amounts or terms only in very limited circumstances. *See, e.g.*, 20 U.S.C. §§ 1087e(f), 1087e(h), 1094(c)(3), 1098aa.

129. For this reason, the Department itself has conceded that "[n]either Title IV [of the HEA] nor the [APA] specifically authorizes" the Group Adjudication Provisions, including "the 'class action' provision of the [2017 BDR Rule], 34 C.F.R. §§ 685.222(f)–(h), providing for blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances based on substantial misrepresentations." Mem. from U.S. Dep't of Educ. Principal Deputy Gen. Counsel Reed Rubinstein to Sec'y of Educ. Betsy DeVos, at 4 n.2 (Jan. 12, 2021), https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf.

130. Accordingly, through its collective "group" determination of the BDR Applications and initiation of a Recoupment Action, the Department's actions exceed its statutory authority.

131. *Second*, the Department's redefining of the term "notice" in the 2017 BDR Rule is unlawful because, in adopting a substantively modified and expanded definition, the Department failed to follow required notice and comment procedures. *See* 5 U.S.C. § 553(b) (requiring the terms or substance of a proposed rule to be published in the Federal Register so that the public may submit written comments).

132. For these reasons, the Group Adjudication Provisions in the 2017 BDR Rule, the adjudication of the BDR Applications, and the Department's prosecution of the Recoupment Action violate the APA.

SECOND CLAIM FOR RELIEF
Violation of APA—Failure to Observe Procedure Required by Law

133. The above paragraphs are incorporated by reference herein.

134. The APA, 5 U.S.C. § 706(2)(D), provides that a reviewing court shall "hold unlawful and set aside agency action" that is "without observance of procedure required by law."

135. Agency action is unlawful if it is "inconsistent with" governing regulations. *Ind.*

Ass'n of Homes for the Aging Inc. v. Ind. Off. of Medicaid Pol'y & Plan., 60 F.3d 262, 266 (7th Cir. 1995). The Department's conduct underlying the Recoupment Action is unlawful because the Department has failed to adjudicate the BDR Applications underlying the Recoupment Action in accordance with the procedures specified in the Department's own regulations.

136. As to the 7,512 underlying loans disbursed before July 1, 2017, the Department has failed to apply the governing standards set forth in the 1995 BDR Rule. Namely, the Department has failed to establish that any of the BDR Applications for which it seeks to recoup funds stated a basis for a discharge, including: (a) that an "act or omission" of DeVry gave rise to a state law claim, as required under 34 C.F.R. § 685.206(c) (1995 version); (b) that the Recoupment Action falls within the applicable limitations period, *see id.* § 685.206(c)(3) (1995 version); (c) that group discharge and recoupment processes apply to these loans; or (d) that the relief for which the Department seeks recoupment was rightly assessed under the state laws applicable to each individual borrower.

137. As to the 93 loans at issue in the Recoupment Notice that were disbursed on or after July 1, 2017 but before July 1, 2020, the Department has failed to apply the standards set forth in the 2017 BDR Rule. *See supra* at paragraphs 51–63.

138. As to the 12 loans at issue in the Recoupment Notice that were disbursed on or after July 1, 2020, the Department has failed to apply the standards set forth in the 2020 BDR Rule, including by failing to establish, among other things, that the applicable borrowers have shown "by a preponderance of the evidence," *see* 34 C.F.R. § 685.206(e)(2), (i) that DeVry made a "false, misleading, or deceptive" statement with *scienter*, *id.* § 685.206(e)(3) (2020 version); (ii) reasonable reliance on that statement, *id.* § 685.206(e)(2)(i)–(ii) (2020 version); and (iii) resulting financial harm, *id.* § 685.206(e)(4) (2020 version).

139. As to *all* of the loans at issue in the Recoupment Action, the Department has failed to establish that the full relief granted to the individual borrowers is not improper or excessive, including where borrowers have already received relief through settlement with DeVry, FTC settlement proceeds, or other circumstances, *see* 34 C.F.R. § 685.222(i)(8), or that the Department is legally entitled to discharge the underlying loans, a prerequisite to recoupment, *see id*., § 668.87(a)(1)(ii). These failures are of particular concern considering the Department's ostensible failure to consider:

a. whether any claims or rights, including those that would be transferred to the Department to bring a Recoupment Action, have been waived in or precluded by prior settlement agreements with or judgments involving DeVry;

b. whether any prior settlements can be properly considered evidence of wrongdoing, including when those agreements expressly disclaim any admission or finding of fault or wrongdoing; and

c. any individualized facts regarding the 649 borrowers underlying the Recoupment Notice, including whether each of the 649 borrowers attended DeVry and enrolled in a relevant program and could have reasonably relied on the misrepresentations alleged by the Department (which ceased in 2015), took out the borrowed funds for the purpose of attending DeVry, graduated from DeVry, or received any proceeds as part of settlements or other adjudications regarding the 90-percent ads.

140. Moreover, in its June 23, 2020 letter, the Department notified DeVry that it would undertake *individualized* assessment of each of the BDR Applications under 34 C.F.R. § 685.222(e). The Department has failed to follow the procedures governing the adjudication of individual BDR Applications, including by failing to:

a. consider "evidence or argument presented by the borrower" as required under 34 C.F.R. § 685.222(e)(3)(i);

b. provide any written decision of the Department's determination as required under 34 C.F.R. § 685.222(e)(4)(i);

c. notify DeVry of the fact-finding process or any procedure by which the school could request records and respond as required under 34 C.F.R. § 685.222(f)(2); and

d. provide DeVry with other basic information about the underlying borrowers as required under 34 C.F.R. § 685.222(e)(1).

141. Finally, in granting the underlying discharge, the Department wrongly applied a rebuttable presumption of full relief derived from policy memoranda that were issued in violation of then-controlling processes for issuing guidance documents.[8] The rebuttable presumption of complete relief is inappropriate, including because the Department failed to observe the required "period of public notice and comment of at least 30 calendar days" prior to its issuance. *See* 34 C.F.R. § 9.14(h)(1) (2020 version).

142. For these reasons, the adjudication of the BDR Applications and the prosecution of the Recoupment Action violate the APA.

THIRD CLAIM FOR RELIEF
Violation of APA—Arbitrary & Capricious Agency Action

143. The above paragraphs are incorporated by reference herein.

[8] *See* Rescission of Borrower Defense Partial Relief Methodology, Office of the Under Secretary of the U.S. Dep't of Educ. (Aug. 24, 2021), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2021-08-24/rescission-borrower-defense-partial-relief-methodology-ea-id-general-21-51; Department of Education Announces Action to Streamline Borrower Defense Relief Process, U.S. Dep't of Educ. (March 18, 2021), https://www.ed.gov/news/press-releases/department-education-announces-action-streamline-borrower-defense-relief-process; *see also* Rulemaking & Guidance Procedures, 85 Fed. Reg. 62,597 (Oct. 5, 2020); Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 9, 2019).

144. The APA, 5 U.S.C. § 706(2)(A), states that a reviewing court shall "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or . . . not in accordance with law."

145. Under this provision, agency action is unlawful where the agency fails to articulate a rational connection between the facts found and a decision rendered, fails to consider an important aspect of the issue underlying the agency action, or fails to explain its decision that runs counter to the evidence. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

146. The Department's initiation of the Recoupment Action is "arbitrary, capricious, an abuse of discretion, or . . . not in accordance with law," including for the reasons stated in paragraphs 77–95.

147. For these reasons, the adjudication of the BDR Applications and prosecution of the Recoupment Action violate the APA.

FOURTH CLAIM FOR RELIEF
Violation of APA—Agency Action Contrary to the Fifth Amendment to the United States Constitution

148. The above paragraphs are incorporated by reference herein.

149. The APA, 5 U.S.C. § 706(2)(B), provides that a reviewing court shall "hold unlawful and set aside agency action" that is "contrary to constitutional right, power, privilege, or immunity."

150. The Fifth Amendment to the United States Constitution demands DeVry be afforded due process before it is deprived of a protected interest. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). DeVry is thus entitled to notice and an opportunity to be heard at a "meaningful time and in a meaningful manner." *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S.

545, 552 (1965)).

151. DeVry's right to due process has been violated by the Department's prosecution of the Recoupment Action because it adversely affects a protected interest of DeVry and poses a risk of erroneous deprivation of that interest.

152. The Department's prosecution of the Recoupment Action violates the Due Process Clause of the Fifth Amendment because it relies on an impermissibly vague state-law standard that purports to allow the Department to grant relief and seek recoupment without any identification, analysis, or adjudication of a school's violation of pertinent state law. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.").

153. The 2017 BDR Rule violates the Due Process Clause because it does not provide a durational limit on the Department's ability to initiate a recoupment proceeding, including without limitation seeking recoupment based on BDR Applications the Department originally received as early as 2012 but delayed processing for years.

154. The Department failed to provide DeVry with sufficient notice of the underlying BDR Applications for DeVry to meaningfully respond either to the claims or to the Recoupment Action, including by failing to provide DeVry with: (a) a calculation of the relief sought, including with respect to appropriate offsets and whether interest is included; (b) a full statement of facts, including all relied upon exhibits and appendices; or (c) all other documents and information, including internal reports and policy directives, considered by the Department in making its findings and determinations, including in granting the BDR Applications and prosecuting the Recoupment Action against DeVry.

155. The Department has not provided sufficient time for DeVry to respond to the

Recoupment Action on behalf of 649 individual claimants with 7,622 loans in a reasonable time and manner under the circumstances here. *See Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950) (noting that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

156. The Rules relating to the Department's assertion of consolidated, group recoupment actions are also facially defective under the Due Process Clause of the Fifth Amendment to the United States Constitution.

157. For these reasons, the prosecution of the Recoupment Action violates the Fifth Amendment to the United States Constitution, which guarantees the right to due process of law.

FIFTH CLAIM FOR RELIEF
Violation of Article II, U.S. Constitution – Unconstitutional Structure of the Department's ALJs

158. The above paragraphs are incorporated by reference herein, as applicable.

159. The Department's ALJs are inferior officers of the United States who, by statute, may be removed only for good cause, as determined by the MSPB. 5 U.S.C. § 7521(a). Members of the MSPB can only be removed by the President for good cause. 5 U.S.C. § 1202(d). Although the Secretary is removable by the President at will, the Secretary cannot remove a Department ALJ unless the MSPB finds good cause to do so. 5 U.S.C. § 7521(a).

160. As currently structured, the multiple layers of tenure protection for the Department's ALJs violate Article II of the United States Constitution.

161. For these reasons, the Department's BDR Rules and the Recoupment Action violate Article II of the United States Constitution.

162. DeVry is irreparably harmed by the ongoing violation of Article II because DeVry is subject to the Recoupment Action over which a Department ALJ who is unconstitutionally

insulated from removal presides. Monetary damages cannot remedy the harm to DeVry from the deprivation of fundamental protections offered by the constitutional separation of powers.

SIXTH CLAIM FOR RELIEF
Violation of Article I, U.S. Constitution – Unconstitutional Exercise of Legislative Power by an Executive Department

163. The above paragraphs are incorporated by reference herein, as applicable.

164. Congress did not delegate authority to the Department to create a recoupment or administrative adjudication scheme to recoup discharged loans, yet the Department has fashioned by regulations with the force of law a recoupment scheme in which the Department unilaterally approves borrower defense discharges in amounts the Department determines based on alleged misrepresentations or omissions by an institution for which the Department's officials alone make findings. The Department requires an institution to agree to pay the amount of loans for which the Department approves a discharge or to subject itself to an administrative recoupment action.

165. Congress did not delegate authority to the Department to create the recoupment scheme, so the Department's promulgation of regulations creating this scheme was an unconstitutional exercise of legislative power by an executive department.

166. For these reasons, the Department's BDR Rules and the Recoupment Action violate Article I of the United States Constitution.

167. DeVry is irreparably harmed by the Department's Article I violations because the Department is subjecting DeVry to the Recoupment Action, a proceeding that is beyond the delegated authority of the Department to establish and prosecute. Monetary damages cannot remedy the harm to DeVry from the deprivation of fundamental protections offered by the constitutional separation of powers.

RELIEF REQUESTED

WHEREFORE, Plaintiff asks that this Court issue judgment in its favor and against the

Department, and to grant the following relief:

A. Declare that the Department's recoupment scheme is unconstitutional because it violates Article I;

B. Declare that the Department's ALJs are unconstitutionally insulated from at-will removal by the President in violation of Article II;

C. Declare that the Recoupment Action is (i) contrary to and exceeds the Department's statutory and administrative authority under the HEA, the APA, and rules promulgated thereunder; (ii) arbitrary, capricious, an abuse of discretion, and not in accordance with law; (iii) contrary to the requirements of the Due Process Clause of the Fifth Amendment to the United States Constitution; and (iv) otherwise unlawful;

D. Issue a preliminary and permanent injunction enjoining the Department from enforcing the unconstitutional recoupment scheme, including a prohibition on the Department from continuing to prosecute the Recoupment Action and/or any further proceedings in the Recoupment Action;

E. Issue a permanent injunction enjoining (i) the Recoupment Action from proceeding without strict compliance with all applicable rules and laws; (ii) the Department from taking any further action under the Recoupment Notice; and (iii) the Department from taking other related punitive, prejudicial, or adverse actions against DeVry, including requiring a letter of credit from or imposing heightened cash monitoring over DeVry;

F. Grant reasonable attorney's fees and expenses; and

G. Award such further relief as this Court deems just and proper.

H. In the alternative, if the Recoupment Action is permitted to proceed, Plaintiff asks that this Court declare (i) the appropriate legal basis (if any) for the Recoupment Action and (ii) what procedures would govern the rights of the parties in adjudicating the merits of the underlying BDR Applications and the Recoupment Action to ensure DeVry is provided due process of law.

Dated: June 16, 2023

Respectfully submitted,

/s/ Matthew Kutcher

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EXHIBIT A

UNITED STATES DEPARTMENT OF EDUCATION

THE UNDER SECRETARY

March 31, 2022

The Honorable Robert C. Scott
Chair
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Scott:

Thank you for your August 16, 2021, letter to Secretary Miguel Cardona regarding the personal liability of owners, executives, and board members of for-profit colleges. Your letter has been forwarded to me, and I am pleased to respond.

The Department agrees that school owners, not students and taxpayers, should be held liable for the wrongdoing or closure of their institutions and has taken steps to increase taxpayer protections for colleges that incur liabilities with the federal government. For instance, we have required entity owners to co-sign the Program Participation Agreements (PPAs), including in some change of ownership transactions, and updated those steps on March 23.[1] The Department also recently denied an institution's application to be recertified to participate in the federal financial aid programs after an entity owner refused to sign the institution's PPA. The Department is committed to expanding its use of enforcement and financial protection tools to protect both students and taxpayers.

The Department agrees with your concern that the now-shuttered institutions of higher education that you mention closed down and left considerable liabilities owed to the federal government.[2] Unfortunately, the Department did not require the owners of those institutions to assume responsibility for losses by co-signing the PPAs of the institutions. As a result, there is no clear path to collect liabilities from entities or individuals associated with the shuttered institutions. In addition, requiring individuals–whether owners or executives–to sign a PPA in their individual capacity is limited in some cases by § 498(e)(4) of the Higher Education Act. However, under the Department's regulations, an institution is not financially responsible if any person who exercises substantial control over that institution, also exercised control over an institution with unpaid liabilities. *See* 34 C.F.R. § 668.174. Under these rules, individuals who controlled shuttered institutions with unpaid liabilities cannot simply move to a new institution.

[1] U.S. Department of Education, "U.S. Department of Education Announces Steps to Hold Institutions Accountable for Taxpayer Losses," Press Release, March 23, 2022, https://www.ed.gov/news/press-releases/us-department-education-announces-steps-hold-institutions-accountable-taxpayer-losses-0.

[2] In response to your request, we have attached a list of all institutions with outstanding financial liabilities incurred within the last five years, with balances as of August 2021.

The Department will, moving forward, seek to identify high-risk institutions (particularly those that do not meet the statutory exceptions for the assumption of personal liability in § 498(e)(4) of the HEA) and may, as appropriate, require individual owners or other persons with substantial control, as well as entity owners, to co-sign the institution's PPA and thereby assume responsibility for any losses. We believe that such efforts will put the Department on firm legal footing to pursue collection of unpaid liabilities from other parties when the institution does not have sufficient revenues or assets to satisfy their liabilities.

We are continuing to consider appropriate steps to ensure both students and taxpayers are protected from the misconduct of institutions. For instance, the Department recently announced the approval of more than $70 million in borrower defense claims for former students from DeVry University, the first approved claims associated with a currently operating institution. If those claims are ultimately adjudicated as final liabilities against DeVry, the Department will seek repayment of those liabilities under the authority granted by 34 C.F.R. § 685.308.

Thank you for your ongoing interest in ensuring the owners of for-profit colleges are held accountable when they incur liabilities owed to the federal government. We look forward to continuing to work with you on accountability and enforcement efforts like these. If you have further questions, your staff may contact the Office of Legislation and Congressional Affairs at (202) 401-0020.

Sincerely,

James Kvaal

Enclosure

EXHIBIT B

AUG 15 2022

Mr. Thomas L. Monahan III, President and CEO
Mr. John Lorenz, Chief Financial Officer
Cogswell Education, LLC
DeVry University
1200 East Diehl Road
Naperville, IL 60563

Sent Via UPS and electronic mail
Tracking #: 1Z37X7Y30104505128
Tom.Monahan@DeVry.edu
John.Lorenz@DeVry.edu

Re: Initiation of Collection Action Based on Discharge of Federal Student Loans from Borrowers with Approved Borrower Defense Claims for DeVry University (OPE ID: 01072700, TIN: 362781982, UEI: MN6JA6YLM213, RCN: BD-01072700-2022-N1)[1]

Dear Mr. Thomas L. Monahan III:

This letter is to inform you that the U.S. Department of Education ("Department") intends to initiate a recovery proceeding against DeVry University ("DeVry") to recoup the Department's losses based on discharges of federal student loans from current and former students who have successfully asserted borrower defenses to repayment under 34 C.F.R. § 685.206(c) (the "1995 Borrower Defense Regulation") and/or 34 C.F.R. § 685.222 (the "2016 Borrower Defense Regulation") and to demonstrate the validity of those approved claims.[2] 34 C.F.R. § 668.87(a)(1)(i). This collection action is taken in accordance with the procedures that the Secretary of Education ("Secretary") has established for recovering funds from institutions participating in any of the programs authorized under Title IV of the Higher Education Act ("HEA") of 1965, as amended, 20 U.S.C. §§ 1070 *et seq.*, as outlined in 34 C.F.R. § 668.87. As detailed below, this recovery action seeks to recoup $23,638,104 in approved discharged amounts which represents 649 borrowers.

As required under 34 C.F.R. § 685.222(e)(7)(iii), the Department provided sufficient notice to DeVry prior to initiating this recovery action. On June 23, 2020, the Department first notified DeVry by letter that several thousand borrower defense applications seeking relief based on

[1] The TIN is DeVry's Taxpayer Identification Number, the UEI is DeVry's Unique Entity Identifier, and the RCN is the Department's Reference Control Number.
[2] *See* 34 C.F.R. § 685.206(c)(3) (authorizing the Department to "initiate an appropriate proceeding to collect from the school whose act or omission resulted in the borrower defense and the amount of relief arising from the borrower defense"); *and* 34 C.F.R. § 685.222(e)(7) (authorizing the Department to "initiate a proceeding to collect from the school the amount of relief resulting from a borrower defense").

allegations of misconduct by DeVry had been received. *(Enclosure A).* On June 30, 2020, the Department also began providing notification letters to DeVry regarding individual borrowers. A sample of the letters sent to DeVry regarding individual borrower applications is included as *Enclosure B.* The Department received DeVry's responses to some, but not all, of these individual notification letters beginning on September 15, 2020. The Department then sent a follow-up letter on April 19, 2021, notifying DeVry of over two thousand additional borrower defense applications received since the June 23, 2020 communication.[3] *(Enclosure C).*

After reviewing DeVry's responses to the individual notification letters, the Department completed its investigation and analysis in its Common Statement of Facts Regarding DeVry's 90% Representation ("Common Statement of Facts") on January 19, 2022. *(Enclosures D–E).* As further described below, the Department determined that DeVry failed to comply with the HEA and the underlying borrower defense regulations and that DeVry made substantial misrepresentations about its job placement rates. On February 16, 2022, the Department published a press release which summarized the findings against DeVry.[4]

This action seeks to recoup $23,638,104 in approved discharges representing the loan amounts and borrowers outlined in *Enclosure F.* Based on the grounds described below, the Department has stated facts and law sufficient to show that the Department is entitled to recovery for the amount of losses to the Secretary caused by the granting of discharge relief to the identified borrowers.[5]

This notice informs DeVry that the Department intends to recover the amount of losses identified by requiring DeVry to repay $23,638,104 as instructed below.[6] Additionally, the Department intends to proceed with this recoupment action in a single action as permitted by 34 C.F.R. § 668.87(a)(1)(iv)(A).

I. The Department Seeks Recovery Based on DeVry's Misrepresentations Regarding Employment Prospects Between 2008 and 2015

The Department is taking this collection action based on its findings outlined in the Common Statement of Facts, which concluded that DeVry committed an act or omission that gave rise to

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[3] In addition, DeVry received sufficient notice prior to this recovery action in 2014 when both the New York Office of the Attorney General and the Federal Trade Commission initiated investigations into DeVry's placement rates by issuing a subpoena and Civil Investigative Demand ("CID"), respectively. Again, in 2016, DeVry was put on notice when the Massachusetts Office of the Attorney General issued a CID to DeVry seeking information relating to the advertisement of placement rates. *See* U.S. DEP'T OF EDUC., BORROWER DEFENSE COMMON STATEMENT OF FACTS REGARDING DEVRY UNIVERSITY – 90% REPRESENTATION (Jan. 19, 2022), at § I(C) [hereinafter "Common Statement of Facts"].

[4] Press Release, U.S. Dep't of Educ., *Education Department Approves $415 Million in Borrower Defense Claims Including for Former DeVry University Students* (Feb. 16, 2022), https://www.ed.gov/news/press-releases/education-department-approves-415-million-borrower-defense-claims-including-former-devry-university-students.

[5] *See* 34 C.F.R. § 668.87(a)(1)(ii).

[6] *See* 34 C.F.R. § 668.87(a)(1)(i)(B).

the borrowers' successful defense to repayment and led to the discharge of loans.[7] As discussed below, the Department's findings in the Common Statement of Facts are consistent with and supported by information revealed and conclusions reached in several legal actions as well as the Department's own internal investigation. These actions included lawsuits initiated by the Federal Trade Commission and the Attorneys General from New York and Massachusetts.

a. The Department's Findings of Fact Show that DeVry Misled Prospective Students to Believe that They Had a Very High Likelihood of Landing New In-Field Jobs with a DeVry Education

In its Common Statement of Facts, the Department determined that DeVry regularly misled prospective students between January 2008 and December 2015 by representing that 90% of its graduates who actively sought employment found employment within six months of graduating ("90% Representation"). In reality, the actual percentage of graduates who sought and obtained employment was only 58% on average.[8] The Department concluded that DeVry's 90% Representation was misleading because it conveyed that the 90% statistic was the percentage of *all* job-seeking DeVry graduates who obtained *new* in-field jobs as a result of attending DeVry within six months of graduating (i.e., it was presented as being the school's job placement rate). DeVry's method of calculating the 90% statistic deviated from the plain language of the representation in two significant ways: (1) DeVry counted "old jobs" held by its mid-career students towards its placement rate, even though the students obtained the jobs on their own, without leveraging their DeVry education; and (2) DeVry improperly deemed graduates as inactive in their job searches and thus excluded them from its calculations.[9]

Impact of Correcting DeVry's Calculations to Be Consistent with the 90% Representation						
	2008	**2009**	**2010**	**2011**	**2012**	**Average**
DeVry's typical advertised job placement rate	90%	90%	90%	90%	90%	90%
Job placement rate if "old jobs" are removed	80.6%	73.9%	75.3%	73.1%	80.2%	76.6%
Job placement rate if excluded graduates are added	82.4%	77.0%	77.6%	71.8%	73.4%	76.4%
Job placement rate if "old jobs" are removed *and* excluded graduates are added	**66.4%**	**55.6%**	**59.7%**	**53.4%**	**54.3%**	**57.9%**

The information about how the 90% Representation was calculated was not disclosed to current or prospective students. The methods that DeVry used to calculate the 90% Representation were

[7] *See* Common Statement of Facts at § II.
[8] *See id.* § II(A)–(B).
[9] *Id.* § II(B).

of its own creation and were not prescribed by its accreditors or by any regulatory body. DeVry was aware that its 90% Representation was misleading, and a number of DeVry employees raised concerns about it.[10] Despite the concerns about its misleading nature, DeVry continued to advertise it extensively.[11] As further described below, such misleading statements constitute a substantial misrepresentation regarding the employability of DeVry graduates in violation of 34 C.F.R. § 668.74.

b. DeVry's Misrepresentations Regarding the Likelihood of Employment Violated the 1995 Borrower Defense Regulation

For loans first distributed prior to July 1, 2017, a borrower may assert as a defense to repayment "any act or omission of the school . . . that would give rise to a cause of action against the school under applicable State law."[12] The Department determined that the Common Statement of Facts satisfies the elements of the Unfair or Deceptive Acts or Practices Statutes of all fifty states and the District of Columbia, except that the borrower's reliance must be determined on an individual basis and except where noted.[13] In particular, the Department has found that: the 90% Representation qualifies as an unlawful or deceptive act; DeVry made the 90% Representation while knowing it to be misleading; borrowers could have reasonably and justifiably relied on the 90% Representation; the 90% Representation was material to the decision to enroll at DeVry; and borrowers who relied on the 90% Representation suffered harm as a result.[14]

c. DeVry's Misrepresentations Regarding the Likelihood of Employment Violated the 2016 Borrower Defense Regulation

For borrower defense to repayment for loans first disbursed on or after July 1, 2017, and before July 1, 2020, a borrower has a borrower defense if (1) the institution made a substantial misrepresentation in accordance with 34 C.F.R. Part 668, Subpart F; (2) that the borrower reasonably relied on; (3) to the borrower's detriment when the borrower decided to attend, or to continue attending, the school or decided to take out a Direct Loan.[15]

The Department determined that the 90% Representation constituted a "substantial misrepresentation"[16] because it grossly exaggerated DeVry's actual job placement rate and related to the enumerated subject matter regarding "the employability of its graduates."[17] The Department also concluded that borrowers could reasonably have relied on the 90% Representation because information about the "employability of its graduates" is identified as information upon which borrowers should have been able to rely, and borrowers would have

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[10] *Id.* § II(C).
[11] *Id.*
[12] 34 C.F.R. § 685.206(c)(1).
[13] *See generally* Common Statement of Facts at § II.
[14] *See id.*
[15] 34 C.F.R. §§ 685.206(d); 685.222(d).
[16] A school's misrepresentation rises to the level of a qualifying "substantial misrepresentation" if it is one "on which the person to whom it was made . . . has reasonably relied, to that person's detriment." 34 C.F.R. § 668.71(c).
[17] *See* Common Statement of Facts at § II(B); *see* 34 C.F.R. §§ 668.71(b), 668.72–74.

considered their employment prospects after graduation to be important when deciding whether to enroll.[18]

Finally, the Department concluded that borrowers suffered a detriment because they chose to attend DeVry in reliance on misrepresentations published in the school's marketing materials,[19] and borrowers did not receive what they paid for — i.e., a degree that afforded them a ninety percent likelihood to quickly land jobs in their fields of study.[20]

The Department determined that DeVry's 90% Representation qualifies as a substantial misrepresentation under the regulation; borrowers could reasonably have relied on the 90% Representation; and borrowers who did rely on the Representation suffered detriment as a result, provided their 90% Representation Claims relate to the period between January 2008 and December 2015.

d. The Department Is Granting 100% Relief to Impacted Borrowers

On August 24, 2021, the Department announced that "approved claims will be assessed using a rebuttable presumption of full relief as a starting point."[21] The Department then factors the borrower's cost to attend the school, the value of the education, and any other relevant factors into the relief determination.[22]

The Department reviewed an expert witness report provided by DeVry which addresses the purported value of a DeVry education. The expert witness report was reviewed by Deputy Under

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[18] *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75926-01, at *75950 (Nov. 1, 2016) ("By noting specifically in section 487(c)(3) of the HEA, 20 U.S.C. 1094(c)(3), that the Department may bring an enforcement action against a school for a substantial misrepresentation of . . . the employability of its graduates, Congress indicated its intent that [this] information . . . should be viewed as material information of certain importance to students."); *see also* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 39330-01, at *39344 (June 16, 2016) (noting that the Department "consider[s] whether the misrepresentation related to information to which the borrower would reasonably attach importance in making the decision to enroll or continue enrollment at the school.").

[19] *See* 34 C.F.R. § 685.222(i)(4)(ii) and app. A, at example 6 (detriment exists, *e.g.*, where a school includes "inflated data" "in its own marketing materials" and "[t]he borrower relied on the misrepresentation about the admissions data to his detriment, because the misrepresentation factored into the borrower's decision to choose the school over others").

[20] *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75926-01, at *75951 (Nov. 1, 2016) (explaining that "any identifiable element or quality of a program that is promised but not delivered due to a misrepresentation can constitute such a detriment," even if the amount of the detriment is minimal).

[21] Press Release, Fed. Student Aid, *Rescission of Borrower Defense Partial Relief Methodology* (Aug. 24, 2021), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2021-08-24/rescission-borrower-defense-partial-relief-methodology-ea-id-general-21-51?source=email.

[22] 34 C.F.R. § 685.222(i)(2)(i).

Secretary and Chief Economist Jordan Matsudaira, who found serious shortcomings in the analyses presented by DeVry and determined that DeVry students suffered financial harm.

Based on these findings, and consistent with the presumption of full relief, the Department is discharging 100% of applicable loans incurred by impacted DeVry borrowers.[23]

ASSESSED BORROWER DEFENSE AMOUNT TO BE COLLECTED

As of February 16, 2022, the Department identified approximately 1,800 borrowers who will be eligible for approximately $71.7 million in discharges because they relied upon DeVry's employment prospects misrepresentation when deciding to enroll.[24] As previously noted, with this notice, the Department is seeking recoupment of $23,638,104 for the loans and borrowers set forth in *Enclosure F*, as permitted by 34 C.F.R. § 668.87(a)(1)(i)(B).

In addition to the discharged loans which are the subject of this action, processing of the discharges identified in the February 16th press release is ongoing, and the Department also anticipates the number of approved discharge amounts to continue to grow as the Department continues to adjudicate additional applications from former DeVry students. The Department reserves the right to seek future recovery actions, as warranted, for collection from DeVry for those additional approved amounts.

The collection of $23,638,104 will be imposed on September 6, 2022, unless DeVry submits a request for a hearing or written material indicating why the collection action should not be undertaken by that date as outlined in the Request for Review section below.

PAYMENT INSTRUCTIONS

The total amount owed as a result of these findings is $23,638,104 and must be paid to the Department's Office of Finance and Operations ("OFO") Accounts Receivable and Bank Management Division via an electronic transfer of funds through the Treasury Financial Communications System, which is known as FEDWIRE. The Department is unable to accept any other method of payment of these liabilities. DeVry must make this transfer within 10 days of imposition of the collection of the recoupment amount. The FEDWIRE payment must be made via the Federal Reserve Bank in New York. If DeVry's bank does not maintain an account at the Federal Reserve Bank, it must use the services of a correspondent bank when making the payments through FEDWIRE. Instructions for completing the electronic fund transfer message format are included on the attached FEDWIRE form. The RCN number at the top of this notice

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[23] Impacted DeVry borrowers includes borrowers who attended (or whose child attended) DeVry brick-and-mortar campuses or online and whose application is approved based on a 90% Representation claim pursuant to the 1995 Borrower Defense Regulation and/or the 2016 Borrower Defense Regulation. *See generally* Common Statement of Facts at § II.

[24] Press Release, U.S. Dep't of Educ., *Education Department Approves $415 Million in Borrower Defense Claims Including for Former DeVry University Students* (Feb. 16, 2022), https://www.ed.gov/news/press-releases/education-department-approves-415-million-borrower-defense-claims-including-former-devry-university-students.

must be included in item 4 on the FEDWIRE form to ensure proper application of DeVry's payment.

The Department has created a receivable for this recoupment amount and payment must be received by the Department within 10 days of the date imposing collection. If payment is not received within that timeframe, interest will accrue in monthly increments from the date of the imposition on the amounts owed to the Department, at the current value of funds rate in effect as established by the Treasury Department, until the date of receipt of the payment. In addition, if this debt is not paid within 90 days, absent entering a repayment plan to pay this balance over time, penalties of 6% per year will accrue from the date of this notice until the receipt of payment. If a request for review is not filed within the time frame provided in this notice, or payment or arrangement to repay the balance over time is not made by the end of the 10-day period following imposition of collection, the Department will refer the debt to Centralized Receivables Service (CRS) for servicing and collection. Continued failure to pay the debt after notification from CRS may result in costs exceeding 32% on the amount due.

If the institution has any questions regarding payment of this debt or wishes to request a payment plan within the 10 days following imposition of collection, those inquiries should be sent by email to OCFOAccountsReceivable@ed.gov. Once the debt is referred to CRS, you will receive notification and any further inquiries should be directed to that entity at 855-549-2683. Interest charges and other conditions may apply to any payment plan.

If within 10 days of the imposition of collection, DeVry has neither made payment in accordance with these instructions nor entered into an arrangement to repay the debt under terms satisfactory to the Department, the Department intends to collect the amount due and payable by administrative offset against payments due DeVry from the Federal Government. DeVry **may object to the collection by offset only by challenging the existence or amount of the debt.** To challenge the debt, DeVry must **timely request a review as described in the section below**. The Department will use those procedures to consider any objection to offset. **No separate review opportunity will be provided**. If a timely request for review is filed, the Department will defer offset until completion of the review, unless the Department determines that offset is necessary as provided at 34 C.F.R. § 30.28. This debt may also be referred to the Department of the Treasury for further action as authorized by the Debt Collection Improvement Act of 1996.

REQUEST FOR REVIEW

If DeVry wishes to request a hearing or to submit written material, that request or submission must be sent to me at:

Administrative Actions and Appeals Service Group
U.S. Department of Education
Federal Student Aid
830 First Street, NE – UCP-3, Room 84F2
Washington, DC 20002-8019

If DeVry submits a timely response and requests a hearing, the case will be referred to the Office of Hearings and Appeals ("OHA"), which is a separate entity within the Department. That office will arrange for assignment of DeVry's case to a hearing official who will conduct an independent hearing. DeVry is entitled to be represented by counsel during the proceedings. The procedures under which that hearing will be conducted are outlined in 34 C.F.R. § 668.89. If DeVry submits a written response but does not request a hearing, I will consider that material and notify DeVry of the amount of collection, if any, that will be imposed.

If any response documents include personally identifiable information ("PII"), the PII must be redacted, except for the student's name and last four digits of his/her social security number (please see the enclosed document, "Protection of Personally Identifiable Information," for instructions on how to mail records containing PII).

ANY REQUEST FOR A HEARING OR WRITTEN MATERIAL THAT DEVRY SUBMITS MUST BE RECEIVED BY SEPTEMBER 6, 2022; OTHERWISE, THE $23,638,104 COLLECTION WILL BE EFFECTIVE ON THAT DATE.

If you have any questions or desire any additional explanation of DeVry's rights with respect to this action, please contact Kerry O'Brien at 303-844-3319 or kerry.obrien@ed.gov.

Sincerely,

Susan D. Crim

Susan D. Crim, Director
Administrative Actions and Appeals Service Group
Federal Student Aid
U.S. Department of Education

Enclosures A–E via UPS
Enclosure F via electronic mail only

cc: Barbara Gellman-Danley, President, the Higher Learning Commission, via bgdanley@hlcommission.org
Kevin LaMountain, Executive Director, Arizona State Board for Private Postsecondary Education, via kevin.lamountain@azppse.gov
Deborah Cochrane, Executive Director, CA Bureau for Private Postsecondary & Vocational Education - Department of Consumer Affairs, via deborah.cochrane@dca.ca.gov
Angie Paccione, Executive Director, Colorado Commission on Higher Education, via angie.paccione@dhe.state.co.us
Samuel Ferguson, Executive Director, Florida Commission for Independent Education, via samuel.ferguson@fldoe.org

Kirk Shook, Executive Director, Georgia Non-Public Postsecondary Education Commission, via kshook@gnpec.ga.gov
Ginger Ostro, Executive Director, Illinois Board of Higher Education, via ostro@ibhe.org
Chris Lowery, Executive Director, Indiana Commission for Higher Education, via clowery@che.in.gov
Zora Mulligan, Executive Director, Missouri Coordinating Board for Higher Education, via zora.mulligan@dhewd.mo.gov
Peter Hans, President, University of North Carolina-General Administration, via president@northcarolina.edu
Brian Bridges, Executive Director, New Jersey Commission on Higher Education, via brian.bridges@oshe.nj.gov
Kelly Wuest, Administrator, Nevada Commission on Postsecondary Education, via kdwuest@cpe.state.nv.us
William Murphy, Executive Director, New York State Department of Education, via william.murphy@nysed.gov
Randy Gardner, Chancellor, Ohio Board of Regents, via chancellor@highered.ohio.gov
Tanya Garcia, Deputy Secretary & Commissioner for Postsecondary & Higher Education, Pennsylvania Department of Education, via tagarcia@pa.gov
Emily House, Executive Director, Tennessee Higher Education Commission, via emily.house@tn.gov
Harrison Keller, Executive Director, Texas Higher Education Coordinating Board, via harrison.keller@highered.texas.gov
Edward Serna, Executive Director, Texas Workforce Commission, via edward.serna@twc.state.tx.us
Peter Blake, Executive Director, Virginia State Council of Higher Education, via peterblake@schev.edu
Department of Defense, via osd.pentagon.ousd-p-r.mbx.vol-edu-compliance@mail.mil
Department of Veteran Affairs, via INCOMING.VBAVACO@va.gov
Consumer Financial Protection Bureau, via CFPB_ENF_Students@cfpb.gov

EXHIBIT C

Cooley

Joseph J. Vaughan
T: +1 202 776 2031
jvaughan@cooley.com

Via Email and FedEx

August 19, 2022

Susan D. Crim, Director
Administrative Actions and Appeals Service Group
U.S. Department of Education
Federal Student Aid/Partner Enforcement and Consumer Protection Directorate
830 First Street NE — UCP-3, Room 84F2
Washington, DC 20002-8019

Re: Initiation of Collection Action based on Discharge of Federal Student Loans from Borrowers with Approved Borrower Defense Claims for DeVry University (OPE ID: 01072700, TIN: 362781982, UEI: MN6JA67LM213, RCN: BD-01072700-2022-N1)

Dear Ms. Crim:

We represent DeVry University ("DeVry") and are in receipt of the Department's August 15, 2022 letter (the "Recoupment Notice"), which states that on September 6, 2022, the Department will seek to recoup $23,638,104 in discharged federal student loan debt unless DeVry timely responds as provided under 34 C.F.R. § 668.87. DeVry intends to so respond but writes today seeking necessary information and sufficient time to respond effectively.

As explained below, the Department has not provided adequate information to allow DeVry to meaningfully respond to the claims identified in the Recoupment Notice, including those of the 649 "current and former [DeVry] students who have [purportedly] successfully asserted borrower defenses to repayment." Accordingly, DeVry respectfully requests that the Department provide these necessary facts (as detailed herein) and grant additional time to permit DeVry to file a properly informed response.

The Department Has Not Provided Sufficient Information for DeVry to Respond to the Recoupment Notice.

Consistent with the mandates of due process, the regulations require that the Department provide DeVry with information sufficient to allow it to respond substantively to the Department's recoupment demand. Specifically, as set forth further below, the Department must—but has failed to:

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1. Notify DeVry of all borrower defense applications as part of the Department's fact-finding process to determine whether the borrower has stated a proper basis for borrower defense, pursuant to 34 C.F.R. § 685.222(e)(3)(i); and

2. Include with its Recoupment Notice a statement of facts and law sufficient to support the Department's determination that it is entitled to grant the borrower defense relief that it claims to have granted and recoup the amounts from DeVry, pursuant to 34 C.F.R. § 668.87(a)(1)(ii).[1]

A. DeVry Cannot Respond to the Recoupment Notice Without the Borrowers' Applications.

Although the Department has provided some notification letters to DeVry regarding individual borrowers since June 30, 2020, it has not provided DeVry with the borrower defense applications of all 649 borrowers at issue in this action. DeVry therefore does not know critical information about each borrower, the alleged defenses, or the applicable standard by which the applications were adjudicated, and Enclosure F is insufficient to enable DeVry to associate the applications it has received with the borrowers at issue here. The Department's notification letters and response instructions require the use of unique claim numbers to identify each applicant, not student names or social security numbers. In fact, most borrower defense applications do not include the borrower's social security number, and it is impossible to identify applications by student name, because many borrowers have the same name or used different names on their applications and loans and Enclosure F does not include the relevant claim numbers.

DeVry cannot properly or fairly respond to the Department's Recoupment Notice or defend a recoupment action without the borrowers' applications. Each borrower's application contains critical information essential for DeVry to determine whether the borrower defense is valid, whether the Department is entitled to discharge the loan in whole or in part, and whether the Department is entitled to recover the claimed losses from DeVry, including, but not limited to, (i) which DeVry program each borrower attended, (ii) which state law applies to each borrower's claim (a required element for

[1] The Recoupment Notice does not expressly indicate that the Department relied on the group process procedures set forth in 34 C.F.R. § 685(f)–(h), although it appears that the Department has selected from those procedures to consolidate the individual claims and apply the presumption set forth in 34 C.F.R. § 685.222(f)(3) to adjudicate the borrower defense applications at issue in the Recoupment Notice. The Department lacks the authority to adjudicate these claims on anything other than an individual basis, and the Department has not properly followed the procedures set forth in 34 C.F.R. § 685.222(f)–(h). Even if the Department had such authority (and it does not) and had properly followed those procedures (which it did not), DeVry would have been entitled to significantly more information, including notice of the "basis of the group's borrower defense, the initiation of the fact-finding process . . ., and of any procedure by which the school may request records and respond" pursuant to 34 C.F.R. § 685.222(f)(2)(iv).

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nearly all of the adjudications), or (iii) whether each borrower's discharge is subject to any offsets due to amounts received from other sources, as set forth in 34 C.F.R. § 685.222(i)(8).

Accordingly, DeVry respectfully requests that the Department provide the complete borrower defense application of each of the 649 borrowers listed in Enclosure F, pursuant to the Department's obligations under 34 C.F.R. § 685.222(e)(3)(i).

B. DeVry Cannot Respond without the Full Statement of Facts

DeVry is also entitled to a statement of the facts and law upon which the Department relies to support its position that it is entitled to grant the borrower defense relief and to recoup the demanded sum from DeVry. Although Enclosures D and E to the Recoupment Notice include over 70 pages of allegations of fact that the Department claims entitles it to grant relief to the subject borrowers, the Department has not provided DeVry with the 136 exhibits and seven appendices referenced in the statement of facts. Without this information upon which the Department relied to adjudicate the borrower defense applications for which it seeks recoupment, DeVry cannot properly and fairly respond to the Recoupment Notice or defend itself against the Department's allegations. Accordingly, DeVry respectfully requests that the Department provide this information, pursuant to the Department's obligations under 34 C.F.R. § 668.87(a)(1)(ii).

In addition, while Enclosures D and E include allegations of fact that purport to apply to DeVry and some of its former students generally, they do not include any details specific to each of the borrowers who have sought to assert a defense to repayment, much less the specific facts and laws upon which the Department relied in each individual case. Further, Enclosure F includes codes for the loan type and status for which the Department has not provided a key. Individualized determinations are essential under the statute and regulations to properly determine in each instance whether to discharge a loan and whether there is a right to seek recoupment from DeVry. Accordingly, DeVry respectfully requests that the Department provide this information, pursuant to the Department's obligations under 34 C.F.R. § 668.87(a)(1)(ii).

DeVry Requests an Extension of Time to Respond.

For the reasons described above, the Department has not provided adequate notice of its recoupment claims and DeVry cannot meaningfully, properly and fairly respond to the Department's Recoupment Notice. The time to respond should not and cannot begin until proper notice – with all required information – has been provided.

Moreover, even if the Department had provided all the applications, the exhibits to the allegations of fact, and a description of the individualized determinations for each of the

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649 borrower defense applications, allowing DeVry only 20 days to respond—the *minimum* period allowed for a response pursuant to 34 C.F.R. § 668.87(a)(1)(iii), and with the due date the day after Labor Day—would be unreasonable. DeVry is entitled to sufficient time to adequately assess the claims and determine the defenses it has to the Department's recoupment claims.

Accordingly, DeVry respectfully requests that the Department grant an extension of time for DeVry to respond to the Recoupment Notice until 60 days from the date DeVry receives the information requested above.

* * * * *

The Department's Recoupment Notice contemplates the adjudication of several hundred student borrower applications involving more than $23 million. Notwithstanding the scope and scale of these proceedings, it is essential that DeVry receive the information upon which the Department relies to support the grounds for the discharges and claims for recoupment. DeVry will be fully prepared to address these claims once we have the necessary information, and we would be happy to discuss an approach that would allow the parties sufficient time and a fair process to adjudicate their positions and protect their rights.

Sincerely

Joseph J. Vaughan

Cc: Kerry O'Brien, Management and Program Analyst, Administrative Actions and Appeals Service Group, U.S. Department of Education, via kerry.obrien@ed.gov
David E. Mills, Cooley LLP, via dmills@cooley.com
Thomas L. Monahan III, President and CEO, Cogswell Education LLC, DeVry University, via tom.monahan@devry.edu
John Lorenz, Chief Financial Officer, Cogswell Education LLC, Devry University, via john.lorenz@devry.edu

EXHIBIT D

AUG 29 2022

Joseph J. Vaughan
Cooley, LLP
Reston Town Center
11951 Freedom Drive, 14th Floor
Reston, Virginia 20190-5656

Sent via email: jvaughan@cooley.com

Re: Initiation of Collection Action based on Discharge of Federal Student Loans from Borrowers with Approved Borrower Defense Claims for DeVry University (OPE-ID: 01072700, TIN: 362781982, UEI: MN6JA67LM213, RCN: BD-01072700-2022-N1)

Dear Mr. Vaughan:

The U.S. Department of Education ("Department") is in receipt of your August 19, 2022 letter on behalf of DeVry University ("DeVry"). Your letter requested that the Department provide additional information and documents in order for DeVry to respond to the Department's letter dated August 15, 2022 (hereafter, referred to as the Department's "Recoupment Notice"). In particular, you requested that the Department provide copies of the borrower defense applications for all 649 borrowers identified in Enclosure F to the Recoupment Notice as well as the necessary borrower identifiers. These include: 1) the educational program attended by each borrower; 2) the state law applicable to each borrower's claim; and 3) whether each borrower's discharge is subject to any offsets of amounts received from other sources.

You also requested that the Department provide the Full Statement of Facts to include the 136 exhibits and seven appendices referenced in Enclosures D and E of the Recoupment Notice. DeVry claims it cannot adequately respond to the notice without the details specific to each borrower who sought defense to repayment, and specific facts and laws upon which the Department relied in each individual case. In addition, you requested a key explaining the code for each of the loan types identified in Enclosure F[1]. Finally, you requested an extension to provide a response within 60 days of DeVry's receipt of the requested information to allow the institution an opportunity to review and respond to the complete notification and supporting documents.

The Department previously provided DeVry with borrower applications for 648 of the 649 borrowers identified in Enclosure F[2]. Accordingly, there is no need to do so again. The

[1] DeVry also asks for a key for the loan status codes, although Enclosure F provides a description for each of those status codes.
[2] Enclosure F to the Recoupment Notice detailed the $23,638,104 in approved discharges for specific loan amounts and borrowers.

Department is enclosing the one borrower application that was not previously provided. (Enclosure G). To assist DeVry in determining which applications are associated with the borrowers previously identified in Enclosure F, the Department has revised that enclosure to include columns identifying the case number associated with each borrower/Social Security Number, the applicable borrower defense regulation and the applicable state law. (Enclosure F-Revised). This will provide DeVry with the necessary crosswalk information to identify the borrower defense applications it has already received. The information concerning the students' program of study and any known offset information will be available on the borrower defense applications, if provided. Additionally, a description of each loan status was previously included in Enclosure F (see column F). Please note that a separate document provides a key to identify the loan types at issue. (Enclosure H).

The Department believes that it has met its obligation for beginning a borrower defense and recovery proceeding against DeVry under 34 C.F.R. § 668.87 generally, and that the statements of law and facts included to date meet the specific obligations under 34 C.F.R. § 668.87(a)(1)(ii) and provide DeVry with the necessary information to respond and/or request a hearing in accordance with 34 C.F.R. § 668.89.

The Department is confident, that with the provision of these documents, DeVry has the information and documents necessary to respond to the Recoupment Notice. As a result of the provision of these additional documents, the Department grants DeVry a 30-day extension from the date of receipt of these items to respond to the Recoupment letter, or until September 28, 2022.

Sincerely,

Susan D. Crim

Susan D. Crim
Director
Administrative Actions and Appeals Service Group

Enclosures Revised F-H via e-mail

cc: Mr. Thomas L. Monahan III, President and CEO
Mr. John Lorenz, Chief Financial Officer
Todd Davis, U.S. Department of Education, Office of General Counsel

EXHIBIT E

Cooley

Joseph J. Vaughan
T: +1 202 776 2031
jvaughan@cooley.com

Via Email and FedEx

September 12, 2022

Susan D. Crim, Director
Administrative Actions and Appeals Service Group
U.S. Department of Education
Federal Student Aid/Partner Enforcement and Consumer Protection Directorate
830 First Street NE — UCP-3, Room 84F2
Washington, DC 20002-8019

Re: Initiation of Collection Action based on Discharge of Federal Student Loans from Borrowers with Approved Borrower Defense Claims for DeVry University (OPE ID: 01072700, TIN: 362781982, UEI: MN6JA67LM213, RCN: BD-01072700-2022-N1)

Dear Ms. Crim:

We are in receipt of the Department's August 29, 2022 letter responding to DeVry's August 19, 2022 request for necessary information and documentation related to the Department's Recoupment Notice. Unfortunately, the Department still has not provided foundation information and documents necessary to allow DeVry to meaningfully respond to the claims identified in the Recoupment Notice.

In its August 19 letter, we requested that the Department provide (1) the borrower defense applications submitted to the Department for each of the 649 borrowers for whom the Department is seeking recoupment and (2) the 136 exhibits and 7 appendices to the Statement of Facts in Enclosures D and E to the Recoupment Notice. In your August 19 response, you claim that the Department previously provided DeVry with the borrower defense applications for 648 of the 649 borrowers identified in Enclosure F to the Recoupment Notice. With your response, you enclosed (i) the one application you claim the Department had not yet provided to DeVry and (ii) a revised Enclosure F with case numbers associated with each borrower, as well as the borrower defense regulation and a general reference to the applicable state under "Applicable Law" (notably without identifying any actual state law) that the Department claims is applicable to each borrower. As explained below, the information the Department has provided is still materially deficient and inadequate for DeVry to provide a meaningful response to the Recoupment Notice. A summary of some of the numerous deficiencies follows.

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DeVry Has Not Received Over 40% of the Referenced Borrower Defense Applications and No State Laws to Support Discharges Have Been Identified

DeVry has received only 386 of the 649 granted applications for which the Department seeks recoupment. DeVry has confirmed this using the case numbers provided in the Department's revised Enclosure F, and DeVry has no record of receiving applications for 261 of the applicants identified by case number in Enclosure F, as listed in Appendix A to this letter.[1]

As explained in our August 19 letter, DeVry cannot properly or fairly respond to the Department's Recoupment Notice or defend a recoupment action without receiving, at a minimum, these borrowers' applications. Beyond the spreadsheet provided with the original notice, DeVry has no other information, including the actual claims they are asserting. The applications contain information essential for DeVry to meaningfully respond to the Recoupment Notice, consistent with the mandates of due process.

In addition, the Department's conclusory statements regarding which regulations and state laws apply to each borrower, as added to Enclosure F, are insufficient for DeVry to understand the basis for each discharge and properly respond to the Recoupment Notice. By way of example, each application must be reviewed to determine accurately the regulations and state law, among other things, on which the discharge request was based and granted. The Department's most recent response simply lists a state – and not any state law - for each borrower. Without the actual state law, the only basis a student could assert to defend against a payment request for loans under the BDR rule that controls most of the adjudications in this request, it is unclear why the Department discharged the loan or how the decision aligns with state limitations and requirements.

Accordingly, DeVry respectfully requests that the Department provide the borrower defense applications for each of the 261 claim numbers listed in Appendix A and the 2 claim numbers referenced in footnote 1, pursuant to the Department's obligations under 34 C.F.R. § 685.222(e)(3)(i). In addition, please include the applicable state law for adjudications that rely on that standard for all borrowers that are part of this action.

The Department Still Has Not Provided the Full Statement of Facts

As the August 29 letter acknowledges, the Department is required under 34 C.F.R. § 668.87(a)(1)(ii) to provide a statement of the facts and law upon which the Department relied to support its position that it is entitled to grant the borrower defense relief and seek

[1] In addition, DeVry received applications for case numbers 01417314 and 02099805, but the passwords the Department provided for those applications were incorrect, and therefore DeVry has not been able to open them.

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recoupment from DeVry. With no explanation, the Department asserts that the Statement of Facts provided to DeVry meets the Department's obligations, despite missing 136 exhibits and 7 appendices, including the marketing and enrollment materials the Department claims were misleading (Appendices A–E); "Statements of Borrower Applications that They Relied on DeVry's Misrepresentations" (Appendix F); and a "Collection of Written Statements" (Appendix G).

Plainly, the statement of facts and law upon which the Department purports to have relied in the Recoupment Notice to grant the borrower defense relief and seek recoupment from DeVry is incomplete and legally insufficient to enable DeVry to properly and fairly respond or defend itself. At a minimum, and by way of example, DeVry is entitled to know (i) the materials the Department contends were misleading for each borrower, (ii) the basis for the Department's conclusion that each borrower relied on the allegedly misleading material, (iii) any statements by borrowers relevant to the claims against DeVry, and (iv) any facts or documents that might provide a defense to the claims, such as offsetting payments each borrower has received, among other things. Simply stating referenced items are on file with the Department is insufficient.

The Department has provided no justification for withholding any of this information from DeVry. Accordingly, DeVry repeats its request for complete information and documentation, as the Department is required to provide under its own rules and regulations.

* * * * *

As noted in its August 19, 2022 letter, before DeVry may be required to respond, it is necessary that DeVry receive the information and documents upon which the Department relied to support the grounds for the discharges and claims for recoupment. Only after this information has been provided and DeVry has had adequate time to review it would DeVry be sufficiently informed to address the claims.

Please note that—separate from the failure to provide basic information necessary for DeVry to meaningfully respond to the individual discharges and recoupment claims, as required under applicable regulations, the governing statute, and principles of due process—the process the Department has followed and the procedures proposed to adjudicate the recoupment claims are unlawful. Among other deficiencies, the Department lacks authority to proceed with the claims described in the Recoupment Notice as a group action; fails to apply the proper regulatory scheme to the claims; exceeds recovery limitation periods; fails to detail the process followed and individual facts relied on to determine the damages actually suffered by each borrower that entitles them to the relief the Department granted; and fails to account for the substantial amount

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of funds that have already been paid to borrowers, which the Department must consider in this process.

Accordingly, DeVry requests the Department promptly provide the information and documents described herein and in our August 19 letter and extend the time for DeVry to respond to the Recoupment Notice until 60 days from the date DeVry receives all the information and documents requested. DeVry is also willing to discuss an approach to these proceedings that would allow the parties adequate time to protect their rights and ensure a fair process.

Sincerely

Joseph J. Vaughan

Encl.

cc: Kerry O'Brien, Management and Program Analyst, Administrative Actions and Appeals Service Group, U.S. Department of Education, via kerry.obrien@ed.gov
David E. Mills, Cooley LLP, via dmills@cooley.com
Thomas L. Monahan III, President and CEO, DeVry University, via tom.monahan@devry.edu
John Lorenz, Chief Financial Officer, DeVry University, via john.lorenz@devry.edu

APPENDIX A
Applications Not Received by DeVry

Case Number	Borrower Name
01276998	[redacted]
01301710	
01302042	
01302118	
01304800	
01306512	
01307388	
01313558	
01343943	
01344513	
01344579	
01349035	
01354680	
01356468	
01356566	
01356869	
01356973	
01357071	
01357521	
01357683	
01357824	
01358458	
01358478	
01358560	
01358596	
01358664	
01358667	
01359309	
01359543	
01359548	
01359552	
01359903	
01359905	
01359944	
01360453	
01361059	

Case Number	Borrower Name
01361399	[redacted]
01362181	
01362340	
1362395	
01362898	
01363488	
01364246	
01364866	
01365078	
01366215	
01366331	
01366905	
01366906	
01367144	
01367469	
01367856	
01367962	
01369007	
01369037	
01369039	
01369283	
01369832	
01369911	
01369921	
01369937	
01369951	
01370074	
01370352	
01370571	
01370588	
01370699	
01371623	
01371630	
01371648	
01371782	
01371784	
01371929	
01372600	

Case Number	Borrower Name
01373017	[redacted]
01373110	
01373189	
01374083	
01374110	
01374631	
01374756	
01375775	
01375939	
01376002	
01376576	
01376721	
01377498	
01377582	
01377872	
01377894	
01377905	
01378463	
01378644	
01378700	
01378789	
01379637	
01379734	
01380115	
01380696	
01381061	
01381104	
01381195	
01381830	
01381840	
01381966	
01382400	
01382437	
01382768	
01382888	
01382894	
01382978	
01383578	

Case Number	Borrower Name
01383740	[redacted]
01383816	
01383818	
01383880	
01383925	
01383927	
01384002	
01384006	
01384440	
01384926	
01384942	
01385831	
01385847	
01385988	
01385990	
01386002	
01386885	
01386951	
01387083	
01387095	
01387141	
01387485	
01387667	
01388052	
01388059	
01388136	
01388186	
01388201	
01388979	
01388981	
01389008	
01389405	
01390045	
01390331	
01390591	
01391514	
01391617	
01391820	

Case Number	Borrower Name
01391952	[redacted]
01391953	
01392113	
01392203	
01392285	
01392519	
01392616	
01392658	
01392871	
01393127	
01393418	
01393426	
01393450	
01393503	
01393509	
01393561	
01393641	
01393956	
01394009	
01395326	
01395331	
01396020	
01398110	
01398129	
01398256	
01398302	
01398414	
01398587	
01398797	
01398971	
01399007	
01399280	
01399601	
01400031	
01400218	
01400243	
01400481	
01400683	

Case Number	Borrower Name
01400710	[redacted]
01401096	
01401221	
01401256	
01402068	
01402095	
01402103	
01402178	
01402467	
01402541	
01402598	
01402887	
01403032	
01403094	
01403630	
01403632	
01404056	
01404207	
01404282	
01404338	
01404378	
01404940	
01405198	
01405712	
01405748	
01405783	
01405979	
01406355	
01406478	
01406645	
01406894	
01407095	
01407161	
01407196	
01407263	
01408279	
01409364	
01409475	

Case Number	Borrower Name
01409581	[redacted]
01410406	
01410421	
01410469	
01410482	
01411097	
01411965	
01412568	
01412778	
01413466	
01415283	
01416413	
01417314	
01418128	
01419134	
01419313	
01419900	
01421043	
01421156	
01423578	
01423990	
01424010	
01426034	
01426181	
01441917	
01452060	
01468522	
01477037	
01478219	
01493362	
01531206	
01533495	
02040315	
02041317	
02097324	
02099805	
02109393	

EXHIBIT F

September 19, 2022

Joseph J. Vaughan
Cooley, LLP
Reston Town Center
11951 Freedom Drive, 14th Floor
Reston, Virginia 20190-5656

Sent via email: jvaughan@cooley.com

Re: Initiation of Collection Action based on Discharge of Federal Student Loans from Borrowers with Approved Borrower Defense Claims for DeVry University (OPE-ID: 01072700, TIN: 362781982, UEI: MN6JA67LM213, RCN: BD-01072700-2022-N1)

Dear Mr. Vaughan:

The U.S. Department of Education ("Department") is in receipt of your September 12, 2022 letter on behalf of DeVry University ("DeVry"). Your letter requested that the Department provide additional information and documents in order for DeVry to respond to the Department's letter dated August 15, 2022 (hereafter, referred to as the Department's "Recoupment Notice"), which it claims it still does not have following the Department's August 29, 2022 correspondence. In particular, you requested that the Department provide copies of the borrower defense applications for 261 claims that DeVry asserts it never received, as well as access to two applications for which DeVry claims it is unable to access using the password provided by the Department. Additionally, your September 12th letter requests that the Department provide the applicable state law for adjudications that rely on that standard for all borrowers who are part of the Recoupment Notice.

You also reiterated your request from August 19th that the Department provide the Full Statement of Facts to include the 136 exhibits and seven appendices referenced in Enclosures D and E of the Recoupment Notice. DeVry claims it cannot adequately respond to the notice without the details specific to each borrower who sought defense to repayment, and specific facts and laws upon which the Department relied in each individual case. Finally, you requested an extension to provide a response within 60 days of DeVry's receipt of the requested information to allow the institution an opportunity to review and respond to the complete notification and supporting documents.

The Department has provided the 261 claims DeVry identified as having no record of receiving. A spreadsheet (Enclosure I) included with this letter lists the "missing" claims and shows that the information was emailed to DeVry officials. The spreadsheet includes the claim number and email subject line, as well as the date the claim was emailed to F. Willis Caruso, Jr. (bcaruso@devry.edu) at DeVry, with copies to John Lorenz and Barbara Bickett. Case number

1478219 is highlighted on Enclosure I and was mistakenly emailed to the borrower instead of DeVry officials. However, this claim information was provided to DeVry as Enclosure G to the Department's August 29th correspondence. Additionally, the Department is providing two claims which DeVry was unable to access. These represent claims numbers 01417314 and 02099805, listed in footnote 1 of DeVry's September 12th letter (Enclosures J and K).

As stated in its August 19th correspondence, the Department's position is that it has met its obligation for beginning a borrower defense and recovery proceeding against DeVry under 34 C.F.R. § 668.87 generally, and that the statements of law and facts included to date meet the specific obligations under 34 C.F.R. § 668.87(a)(1)(ii) and provide DeVry with the necessary information to respond and/or request a hearing in accordance with 34 C.F.R. § 668.89. The Department notes that Enclosures D and E from its Recoupment Notice contain Statements of Facts. Although the Department has already provided DeVry with a sufficient statement of law and facts, in the interest of cooperation, the Department is enclosing with this communication a list of the 35 states - and the relevant statutes from those states - from which borrowers listed in this matter successfully asserted borrower defenses to repayment under 34 C.F.R. § 685.206(c) (the "1995 Borrower Defense Regulation"). *See* Enclosure L.

With the provision of these additional documents and clarifying information, DeVry has the information and documents necessary to respond to the Recoupment Notice, including requesting a hearing or submitting written material. The Department will allow DeVry until October 11, 2022 to respond to the recoupment letter as instructed in the Recoupment Notice but no further extensions will be granted. Additional questions or concerns regarding this letter should be directed to Todd Davis of the Department's Office of the General Counsel at Todd.Davis@ed.gov.

Sincerely,

Susan Crim Digitally signed by Susan Crim
Date: 2022.09.19 15:25:23 -04'00'

Susan D. Crim
Director
Administrative Actions and Appeals Service Group

Enclosures I-L via e-mail

cc: Mr. Thomas L. Monahan III, President and CEO
Mr. John Lorenz, Chief Financial Officer
Todd Davis, U.S. Department of Education, Office of General Counsel

EXHIBIT 2

~~IN THE~~ UNITED STATES DISTRICT COURT
~~FOR THE~~ NORTHERN DISTRICT OF ILLINOIS

DEVRY UNIVERSITY, INC.

~~DEVRY UNIVERSITY, INC.~~

Plaintiff,

v.

UNITED STATES DEPARTMENT OF EDUCATION and
~~UNITED STATES DEPARTMENT OF EDUCATION and~~

DR. MIGUEL CARDONA, *in his official capacity as Secretary of the United States Department of Education*,

Defendants.

~~Civil Action~~Case No. 1:22-cv-05549

Honorable LaShonda A. Hunt

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

~~COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF~~
INTRODUCTION

1. By this First Amended Complaint, DeVry University, Inc. ("DeVry") seeks to enjoin as a violation of Article I of the U.S. Constitution the elaborate recoupment adjudication scheme the United States Department of Education ("Department") has created by regulatory fiat—exceeding its delegated authority from Congress—and imposed on DeVry to force the school to pay for massive discharges of student debt the Department unilaterally granted. DeVry also challenges as unconstitutional the structure of the adjudicatory process imposed on the school, which relies on administrative judges who are improperly insulated from and not accountable to the President in violation of Article II of the U.S. Constitution. Finally, DeVry challenges related and equally improper final agency actions that undergird the recoupment

action initiated against DeVry.

2. Based on a single directive from Congress simply to determine the defenses students may assert to the repayment of federal loans—a "Borrower Defense to Repayment" ("BDR") rule that lay essentially dormant for two decades—the Department has fashioned an extensive and convoluted scheme (a) to approve *en masse* borrower loan discharges, (b) to presume entitlement to full relief in amounts the Department determines on the basis of allegations for which the Department's officials alone make findings, and (c) to force institutions to pay these amounts through a Department-established and -controlled recoupment adjudication process. Officials from the Department prosecute the recoupment claims, and administrative law judges ("ALJs") from the Department adjudicate them. The ALJs, inferior officers of the United States, exercise executive authority but are insulated from and not accountable to the President of the United States.

3. In addition, the rules and regulations the Department recently enacted to modify the recoupment scheme improperly allow "group" adjudications, revive long-expired claims through a modification of the limitations period enacted in violation of notice-and-comment requirements, and establish a presumption of full relief against institutions in violation of internal agency notice requirements, among other legal infirmities.

4. ~~By this Complaint, DeVry University, Inc. ("DeVry") seeks to enjoin the unlawful and coercive action of the Department of Education ("Department") to recoup from DeVry tens of millions of dollars in~~DeVry is caught in the crosshairs of the Department's unconstitutional recoupment scheme. In August 2022, the Department declared that DeVry was liable to the Department for some $23 million—an amount reflecting federal student loans ~~that~~ the Department unilaterally discharged on behalf of 649

borrowers without statutory authority and in violation of regulatory requirements (the "Recoupment Action"). ~~DeVry thus requests injunctive relief and a declaration of law to establish~~ Rather than pay the improper assessment (or risk default and a collection action), and in the absence (at the time) of a right to challenge the recoupment scheme in federal court before enduring the unconstitutional proceeding, DeVry was forced to request and endure a hearing before a Department ALJ to challenge the Department's findings and conduct.

5. ~~that~~At the same time, DeVry filed the Complaint in this case challenging certain final agency actions that are part of the Recoupment Action because the Department (i) ~~lacks the authority to prosecute~~violated its authority in extending retroactively the limitations period on discharge and recoupment claims and otherwise in its prosecution of the Recoupment Action; (ii) ~~has~~ exceeded its statutory mandate and violated ~~dispositive~~controlling procedures in adjudicating the underlying borrower defense claims *en masse*; and (iii) ~~has~~ violated DeVry's due process rights by failing to provide ~~DeVry with~~ adequate notice or a meaningful opportunity to contest the discharged sums~~. Alternatively, should~~ on which the recoupment claims are based. Recognizing the Recoupment Action ~~be allowed to~~might proceed even while its challenges were pending, DeVry alternatively seeks declaratory relief to ~~establish what~~clarify the recoupment scheme's procedures ~~would govern the rights of the parties~~ to ensure DeVry has a fair opportunity to present a meaningful defense and to clarify the appropriate legal basis (if any) for the Department's demand.

~~INTRODUCTION~~BACKGROUND

6. ~~1.~~ Founded in 1931 by inventor Dr. Herman DeVry, Chicago-based DeVry University has become a leader in online education. Accredited by the Higher Learning

Commission, DeVry offers academic programs in technology, business, and healthcare across a range of degree levels. DeVry has educated hundreds of thousands of students over its almost century-long history. Most have earned degrees, enjoyed successful careers and, to the extent they obtained loans to attend DeVry, repaid those loans.

7. ~~2.~~ In recent years, a number of former DeVry students have sought discharge of their federal loans by filing Borrower Defense to Repayment applications ("BDR Applications") with the Department. By filing a BDR Application, a qualifying borrower may seek discharge of his or her federal loans under certain conditions, which the Department may grant only after it has followed very particular rules. As to the 649 BDR Applications underlying this action, the Department has disregarded those rules by summarily discharging the underlying loans without individualized assessment and by pursuing recoupment of the discharged sums without following applicable procedures or providing adequate notice of the underlying claims sufficient to allow DeVry to defend itself.

8. ~~3. For context, in~~In 1993, Congress authorized the federal government to lend directly to eligible students ("Direct Loans"). Ordinarily, Direct Loans must be repaid. However, Congress directed the Department to publish regulations specifying "which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment." 20 U.S.C. § 1087e(h). The Department thus published the initial ~~Borrower Defense to Repayment ("~~BDR~~")~~ regulations, effective in 1995, establishing an "interim" process by which borrowers could assert a defense to repayment of their Direct Loans based on certain acts of the school they attended.

9. ~~4.~~ However, in 2016—after more than two decades of agency inaction on the interim BDR process—the Department, without congressional approval, vastly expanded the

BDR regulations by claiming authority to discharge loans *en masse*, and then to seek recoupment without meaningful school participation in the process. Pursuant to that supposed authority—and without affording basic due process—the Department now seeks to recoup millions of dollars in discharged loans from DeVry.

10. ~~5.~~ Specifically, on February 16, 2022, the Department announced it had granted over 1,800 BDR Applications filed by former DeVry students based on allegedly deceptive advertising that DeVry ceased running by September 2015.[1] Like the rest of the world, DeVry learned of this action from the media, and despite DeVry's subsequent request for information, the Department provided none.

11. ~~6.~~ Then, on August 15, 2022, the Department notified DeVry of its intent to recoup more than $23 million in discharged debt on behalf of 649 borrowers, based on DeVry's allegedly deceptive advertising that had ended years earlier ("Recoupment Notice"). The Department also provided—for the first time—some (but not all) of the students' identities referenced in the press release and the amounts of their discharged loans.

12. ~~7.~~ The Recoupment Notice came on the heels of a proposed $6 billion class settlement involving almost 200,000 BDR Applications from students attending more than 150 colleges[2] (including many who are part of this action), and immediately before President Biden's declaration of loan forgiveness for millions of borrowers.

[1] *See* Press Release, U.S. Dep't of Educ., *Education Department Approves $415 Million in Borrower Defense Claims Including for Former DeVry University Students* (Feb. 16, 2022), https://www.ed.gov/news/press-releases/education-department-approves-415-million-borrower-defense-claims-including-former-devry-university-students.

[2] *See* Order Granting Preliminary Approval of Class Action Settlement, *Sweet v. Cardona*, No. 3:19-cv-03674 (N.D. Cal. Aug. 4, 2022), ECF No. 307.

13. ~~8.~~ The legal shortcomings presented by the Recoupment Notice are numerous. For example, nothing in the Recoupment Notice indicates (i) whether the Department determined that each of the underlying BDR Applications should be granted based on individualized facts; (ii) on what basis the Department is authorized to initiate a recoupment action beyond the regulatorily prescribed limitations period (which, if applied, would bar recovery of more than 90% of the $23 million the Department demands from DeVry); (iii) why the Department believes that DeVry is liable for claims of students who will receive (or have received) settlement funds or loan forgiveness outside of the BDR process; or (iv) whether the Department has ensured, as it must under 20 U.S.C. § 1087e(h), that no student has received "an amount in excess of the amount such borrower has repaid on such loan[s]."

14. ~~9.~~ The Department has also grossly exceeded its statutory authority by enacting the various versions of the BDR regulations that it now seeks to enforce against DeVry, and by discharging the underlying loans without proper adjudication, often beyond the applicable limitations period. Congress created a *limited* right to repayment relief for students in *specific* circumstances, subject to the Department ~~establishing regulations~~defining defenses consistent with that mandate. But the Department issued regulations vastly exceeding that authority, and now attempts to apply those regulations to impose financial liability on DeVry without due process of law.

15. The Department's regulations—specifically, beginning with the 2017 BDR Rules—vastly exceed the limited authority Congress delegated to the Department to specify by regulation the specific acts or omissions that a student may assert as a defense to repayment of federal student loans in an action. *See* 20 U.S.C. § 1087e(h). That specific and narrow delegation of authority provides no basis for the recoupment scheme that the Department has

fashioned. The Department's recoupment scheme is thus an unconstitutional exercise of legislative authority by the Department.

16. In the Department's scheme, the Department alone determines which borrower defense claims it can assert against an institution by approving discharges in amounts that the Department selects, as the Department's Recoupment Notice exemplifies. While the Department's regulations purport to authorize a Department ALJ to preside over recoupment proceedings brought against an institution, the Department's regulations authorize the Secretary to decide borrower defense claims asserted on the Secretary's behalf.

17. The Department's regulations, which allow the Department's ALJs to preside over recoupment proceedings, including the Recoupment Action, also violate Article II because the Department's ALJs exercise executive authority but are not politically accountable to the President of the United States. Indeed, an ALJ subject to at least two layers of good cause removal presides over the Recoupment Action.

18. ~~10.~~ The Department's final decision to discharge thousands of loans without meaningful participation from DeVry violates regulatory, statutory, and constitutional principles. Both the BDR regulations and the process by which the Department ~~has prosecuted~~is prosecuting the Recoupment Action conflict with other applicable rules, the Administrative Procedure Act ("APA"), Articles I and II of the United States Constitution, and the Due Process Clause of the Fifth Amendment to the United States Constitution, in at least the following ways:

a. The Department has discharged thousands of loans without providing DeVry a meaningful opportunity to participate in the discharge process or challenge the underlying obligations, as required by law.

b. The Department has failed to provide sufficient notice to DeVry of the BDR

Applications, including the basic information DeVry needs to understand and defend against both the individual student claims and the Recoupment Action. Here, that means providing, at a minimum, information about each student's attendance, the basis for each student's alleged defense to repayment, and any receipt of offsetting payments—among other things plainly relevant to the merits of the claims, DeVry's defenses, and amounts purportedly owed.

c. The Department has adjudicated the underlying BDR Applications in a single group process, but there is no lawful basis for such an act. Congress has not authorized the Department to adjudicate BDR Applications and seek reimbursement in this manner, and the Department cannot circumvent controlling regulations or suspend due process because the volume of claims is large. Rather, the Department must *individually* assess the viability of each student's claimed defense to repayment—and thereby eliminate ineligible claims and identify applicable offsets to relief—*before* seeking reimbursement. Instead, the Department turned the process on its head by requiring DeVry to sort it out, without providing the information DeVry needs to do so.

d. The Department relies on regulations promulgated without proper notice and comment, and on policy memoranda issued in contravention of then-controlling processes for issuing guidance documents.

e. The haphazard process by which the Department has prosecuted the Recoupment Action lacks clear standards for establishing liability, eliminates nearly every protection to meaningful legal process to which DeVry is entitled, and eviscerates congressional and constitutional limitations on the Department's power to seek

recoupment.

19. ~~11.~~ DeVry thus ~~stands to suffer~~is currently suffering considerable constitutional and pecuniary harm by being forced to endure the ongoing Recoupment Action, which is exacerbated by the Department's seemingly unfettered discretion to impose devastating financial and operational demands on DeVry, including the possibility of a letter of credit that would irreversibly impact DeVry during the administrative process and create needless uncertainty for thousands of current students.

20. ~~12.~~ Accordingly, DeVry seeks injunctive and declaratory relief to stay the unconstitutional recoupment process, enforce pertinent constitutional and statutory limits on the Department's authority, clarify the parties' rights and the governing rules, and, if a recoupment action were to move forward, ensure a fair process so DeVry can present a meaningful defense.

PARTIES

21. ~~13.~~ Plaintiff DeVry is a university incorporated under Illinois law with a principal place of business in Naperville, Illinois.

22. ~~14.~~ Defendant United States Department of Education is an executive agency of the United States Government. The Department's principal address is 400 Maryland Avenue SW, Washington, D.C. 20202.

23. ~~15.~~ Defendant Dr. Miguel Cardona is the Secretary of the Department. Dr. Cardona is sued in his official capacity and maintains an office at 400 Maryland Avenue SW, Washington, D.C. 20202.

24. ~~16.~~ All defendants are collectively referred to hereinafter as the "Department."

JURISDICTION AND VENUE

25. ~~17.~~ This Court has subject matter jurisdiction under Article III, § 2 of the United States Constitution and 28 U.S.C. § 1331, because this action arises under ~~the~~Articles I and II of the United States Constitution, the Due Process Clause of the Fifth Amendment to the United States Constitution, the APA, 5 U.S.C. § 500 et seq., and Title IV of the Higher Education Act of 1965 ("HEA"), 20 U.S.C. § 1001 et seq. The HEA provides federal courts with subject matter jurisdiction over actions against the Secretary of Education. 20 U.S.C. § 1082(a)(2).

26. ~~18.~~ Judicial review of the Department's final agency actions is authorized under the APA~~, as~~. DeVry has "suffer[ed a] legal wrong because of agency action." 5 U.S.C. § 702. ~~Both the~~The Department's ~~discharge~~2017 BDR Rules, discharges of the underlying loans, and the recoupment demand constitute final agency action permitting judicial review. *Id.* § 704; *see also Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

27. Judicial review of Defendants' allegedly unconstitutional conduct is authorized under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.

28. ~~19.~~ Because this is an action against an officer and agency of the United States, venue is proper under 28 U.S.C. § 1391(e)(1).

29. ~~20.~~ This Court may award the requested declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, the APA, 5 U.S.C. § 706, the Mandamus Act, 28 U.S.C. § 1361, the HEA, 20 U.S.C. § 1082, and the Court's inherent equitable powers.

FACTUAL ALLEGATIONS

I. ~~A.~~ DeVry Settles Claims Relating to the "90-Percent Ads" Without a Finding or Admission of Wrongdoing

30. ~~21.~~ Beginning in 2014, certain governmental authorities investigated DeVry for advertised statements regarding the employment prospects of its graduates, namely, that

90-percent of students in certain of DeVry's programs obtained jobs in their field within six months of graduation ("90-percent ads").

31. ~~22.~~ In January 2014, the Federal Trade Commission ("FTC") sent DeVry a civil demand for information regarding the 90-percent ads and other topics. Although DeVry had significant documentation and analysis supporting the 90-percent ads, it stopped running the ads in September 2015.

32. ~~23.~~ On January 27, 2016, after a two-year investigation, the FTC filed a federal action against DeVry alleging the 90-percent ads violated section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by constituting deceptive practices affecting commerce.[3] DeVry vigorously disputed the FTC's allegations.

33. ~~24.~~ On December 19, 2016, DeVry settled the FTC dispute and stipulated to a judgment under which DeVry agreed—without admitting wrongdoing—to pay approximately $50 million to the FTC for distribution to eligible then-current and former DeVry students, and to forgive approximately $50 million in loan balances for eligible then-current and former DeVry students. Of the 649 borrowers underlying this action, 602 were eligible to receive relief under the FTC settlement.

34. ~~25.~~ Around this time, DeVry also settled claims relating to the 90-percent ads with the Department and the Attorneys General of New York and Massachusetts. Under these settlements, DeVry paid—without admitting wrongdoing—$2.25 million for distribution to students in New York and $455,000 for distribution to students in Massachusetts. Under the settlement agreement with the Department, DeVry posted a letter of credit exceeding $68 million

[3] *See* Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. DeVry Educ. Grp.*, No. 2:16-cv-00579 (C.D. Cal. Jan. 27, 2016), ECF No. 1.

(which the Department has since allowed to expire). Over the next four years, DeVry settled other class and individual actions based on the 90-percent ads, also without any admission or finding of wrongdoing.[4]

35. ~~26.~~ To date, DeVry has paid over $122 million to former students to resolve claims relating to the 90-percent ads.

II. ~~B.~~ THE DEPARTMENT GRANTS BDR RELIEF *EN MASSE* AND INITIATES THE RECOUPMENT ACTION

36. ~~27.~~ On June 23, 2020, the Department informed DeVry that ~~it~~the Department had received and would investigate several thousand BDR Applications from then-current and former DeVry students. The Department undertook to inform DeVry of the applications on a rolling basis and allowed DeVry to respond to each, which DeVry promptly began to do.

37. ~~28.~~ To date, DeVry has received over ~~30,000~~47,000 BDR Applications from the Department. Many of the applications were filed as many as eight years before the Department sent them to DeVry. Equally problematic, many of the Department's notices to DeVry attached BDR Applications that are illegible, blank, or incomplete; contain names that do not match those provided by the Department; are duplicative of other applications; or are otherwise inaccessible (including because they are missing passwords or provided incorrect passwords). Other of the Department's notices failed to attach a BDR Application, or attached BDR Applications from students who did not attend DeVry.

38. ~~29.~~ On February 16, 2022, without communicating with or notifying DeVry, the Department issued a press release (i) summarizing the "findings" of its "investigation" into the

[4] *See, e.g.*, *McCormick, et al. v. Adtalem Global Education Inc., et al.*, No. 2018-CH-04872 (Cir. Ct. Cook Cty.).

thousands of BDR Applications that it claims had been filed based on DeVry's 90-percent ads (conduct that DeVry settled with the FTC in 2016 without any admission or finding of wrongdoing); (ii) announcing roughly $71.7 million in discharges for approximately 1,800 students; and (iii) stating its intent to recoup the discharged sums from DeVry in the "first approved" recoupment action "associated with a currently operating institution."[5] The Secretary publicly endorsed these findings, stating that the Department's "findings show too many instances in which students were misled into loans at institutions or programs that could not deliver what they'd promised."[6]

39. ~~30.~~ Shortly thereafter, DeVry asked the Department for information about the announced discharge, including the identities of the borrowers. Apart from continuing to forward BDR Applications, the Department did not reply to DeVry's requests or contact DeVry about its decision. Indeed, after receiving several initial notices of individual BDR Applications, DeVry received no further communications from the Department, other than one isolated (and unexplained) e-mail directed to one borrower (who is not affiliated with the Recoupment Action) that the Department had granted that borrower's BDR Application.

40. ~~31.~~ On March 31, 2022, James Kvaal, Undersecretary of the Department, sent a letter to Congressman Robert C. Scott stating that the Department had "recently announced the approval of more than $70 million in borrower defense claims for former students from DeVry" and that "[i]f those claims are ultimately adjudicated as final liabilities against DeVry, the

[5] *See* Press Release, U.S. Dep't of Educ., *Education Department Approves $415 Million in Borrower Defense Claims Including for Former DeVry University Students* (Feb. 16, 2022), https://www.ed.gov/news/press-releases/education-department-approves-415-million-borrower-defense-claims-including-former-devry-university-students.

[6] *See id.*

Department will seek repayment of those liabilities under the authority granted by 34 C.F.R. § 685.308." *See* March 31, 2022 Letter from James Kvaal to Robert C. Scott ("Exhibit A").

41. ~~32.~~ Then, on August 15, 2022, the Department sent DeVry the Recoupment Notice, purportedly under the authority of Title IV of the HEA, 20 U.S.C. § 1070 et seq. (as amended). *See* Aug, 15, 2022 Letter from Susan D. Crim to Thomas L. Monahan III ("Exhibit B"). The Department demands $23,638,104 in discharged amounts for 649 students who purportedly attended DeVry between 2008 and 2015, and who the Department claims have successfully asserted defenses to repayment based on alleged "substantial misrepresentations" and state law causes of action involving the 90-percent ads. The Recoupment Notice is signed by Susan D. Crim, Director of the Department's Administrative Actions and Appeals Service Group, who is authorized to seek recoupment on the Department's behalf.

42. ~~33.~~ The Recoupment Notice states that the Department would impose the multimillion-dollar collection on September 6, 2022, unless DeVry responded as provided therein, and that the stated amount constitutes only a portion of the $71.7 million already discharged. *See* Ex. B at 6. The Notice also cautions that the "Department . . . anticipates the number of approved discharge amounts to continue to grow as the Department continues to adjudicate additional applications from former DeVry students." *Id.* Accordingly, the Department reserves "the right to seek future recovery actions, as warranted, for collection from DeVry for those additional approved amounts." *Id.* The Department further threatens to impose financial penalties if DeVry fails to respond or timely pay the demanded sum. *Id.* at 7.

43. ~~34.~~ On August 19, 2022, DeVry replied to the Recoupment Notice, raising critical deficiencies that encumbered DeVry's ability to respond. *See* Aug. 19, 2022 Letter from Joseph J. Vaughan to Susan D. Crim ("Exhibit C"). Accordingly, DeVry asked the Department

for specific information and an extension of the allotted 20-day response period (the minimum provided under 34 C.F.R. § 668.87(a)(1)(iii)).

44. ~~35.~~ On August 29, 2022, the Department answered by extending the response deadline to September 28, 2022, and by enclosing certain materials concerning the BDR Applications that had not previously been provided. *See* Aug. 29, 2022 Letter from Susan D. Crim to Joseph J. Vaughan ("Exhibit D"). Yet the Department declined DeVry's request for the exhibits and appendices supporting the Department's Statement of Facts, claiming that providing DeVry with the Statement of Facts alone (without its referenced exhibits and appendices) was sufficient under the BDR regulations. *Id*.

45. ~~36.~~ On September 12, 2022, DeVry responded to the Department, reiterating its request for the missing BDR Applications and the exhibits and appendices to the Statement of Facts, and noting other serious legal deficiencies in the discharge and recoupment processes. *See* Sept. 12, 2022 Letter from Joseph J. Vaughan to Susan D. Crim ("Exhibit E"). The Department responded on September 19, 2022, restating its position "that it has met its obligation[s]" under applicable regulations, but providing information to assist DeVry in accessing all but two of the missing BDR Applications and a list of 36 state statutes on which the BDR Applications are purportedly based. *See* Sept. 19, 2022 Letter from Susan D. Crim to Joseph J. Vaughan ("Exhibit F"). The Department also extended DeVry's response deadline to October 11, 2022. *Id*.

46. ~~37.~~ On October 11, 2022, concurrently with filing this Complaint, and as ~~thoroughly as present~~ circumstances ~~allow~~at the time allowed, DeVry formally responded to the Recoupment Notice to stay the payment demand, preserve DeVry's ability to challenge the Recoupment Action, and avoid immediate financial and potentially other penalties.

~~C. The Recoupment Action Is Unlawful~~

~~38. The Department seeks to recoup amounts for 7,622 discharged loans on behalf of 649 borrowers. As outlined below, the Recoupment Action is unlawful and must be enjoined.~~

47. On October 25, 2023, an administrative law judge ("ALJ") in the Department's Office of Hearings and Appeals issued an order and notice of pre-hearing conference in *In the Matter of DeVry University*, Docket No. 22-54-BD.

48. As of the filing of this First Amended Complaint, the Department's Recoupment Action remains ongoing.

III. THE DEPARTMENT'S BORROWER DEFENSE RULES

A. ~~i.~~ The Higher Education Act & Direct Loan Program

49. ~~39.~~ In 1965, Congress adopted the HEA to "mak[e] available the benefits of postsecondary education to eligible students." 20 U.S.C. § 1070(a).

50. ~~40.~~ In 1993, Congress amended Title IV of the HEA to establish the William D. Ford Federal Direct Loan Program ("Direct Loan Program"), under which students may borrow directly from the federal government to finance their postsecondary education. *See* Student Loan Reform Act of 1993 ("Student Loan Reform Act"), Pub. L. No. 103-66, 107 Stat. 341 (codified at 20 U.S.C. §§ 1087a–h); 20 U.S.C. § 1087a(a).

51. ~~41.~~ To partake in the Direct Loan Program, a school must, among other things, "accept[] responsibility and financial liability stemming from its failure to perform its functions" under the program. 20 U.S.C. § 1087d(a)(3). Schools must also adhere to "such other provisions as the Secretary determines are necessary to . . . promote the purposes of [the program]." *Id*. § 1087d(a)(6). For example, the Secretary may require an irrevocable letter of credit, or

impose a heightened cash monitoring obligation requiring a school to credit a student's account with institutional funds before receiving those funds from the Title IV program. *See* 34 C.F.R. §§ 668.175(c), 668.162(d). Either of these actions may impose an extreme financial burden that alone would force a school to cease operations.[67]

52. In connection with certain federal loans available to student borrowers, Congress has specified that: "[n]otwithstanding any other provision of State or Federal law, 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, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan." 20 U.S.C. § 1087e(h).

B. ~~ii.~~ The Borrower Defense to Repayment ~~Rule~~Rules

53. ~~42.~~ Since the enactment of the Direct Loan Program, the procedures by which student borrowers may seek (and the Department may grant) repayment relief have been delineated by regulations referred to as the "BDR Rule." The BDR Rule allows a student borrower to seek discharge of his or her federal loan balance by asserting certain arguments depending on when the loan was disbursed. Such claims must generally assert that a participating school committed an act or omission relating "to the making of the loan for enrollment at the school" that would "give rise to a cause of action against the school under applicable State law."

[67] *See* Danielle Douglas-Gabriel, *ITT Technical Institutes Shut Down After 50 Years in Operation*, The Washington Post (Sept. 6, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/09/06/itt-technical-institutes-shut-down-after-50-years-in-operations/ ("Financial analysts said the deathblow to ITT came in the form of a letter of credit.").

34 C.F.R. § 685.206(c)(1).

54. ~~43.~~ There are three relevant versions of the BDR Rule at issue here: the "1995 BDR Rule"; the "2017 BDR Rule"; and the "2020 BDR Rule." While the Department has issued another BDR Rule that is set to become effective in July 2023 ("the 2023 BDR Rule"), the Department has not invoked that Rule in the Recoupment Action.

55. Pursuant to these BDR Rules, the Department seeks to recoup from DeVry amounts for 7,622 discharged loans on behalf of 649 borrowers. As outlined below, the Recoupment Action is unconstitutional and unlawful, and must be enjoined.

IV. THE RECOUPMENT ACTION IS UNCONSTITUTIONAL

56. The Department's ALJs—who preside over recoupment proceedings in the Department—are not removable by the President at will, thereby allowing unelected officials to wield significant executive power without political accountability in violation of Article II of the United States Constitution. Moreover, the Department's complex recoupment scheme—fashioned without congressional authorization—violates Article I of the United States Constitution.

A. The Department's ALJs Lack Political Accountability in Violation of Article II

57. Article II of the United States Constitution "vest[s]" all "executive Power" in the President of the United States. U.S. Const., art. II, § 1, cl. 1. The President alone is charged with "tak[ing] Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. This command necessarily encompasses rules and regulations enacted pursuant to Congress's delegation of authority to the Department to specify by regulation defenses to repayment of federal student loans. 20 U.S.C. § 1087e(h).

58. The concentration of Executive power solely in the President "ensure[s] . . .

accountability" of the Executive Branch to the people. *Printz v. United States*, 521 U.S. 898, 922 (1997). Indeed, "the restraints of public opinion" is one of the "greatest securities" for the "faithful exercise" of Executive power. The Federalist No. 70 at 424, 428–29 (Alexander Hamilton).

59. "[T]he President alone and unaided could not execute the laws." *Myers v. United States*, 272 U.S. 52, 117 (1926). Thus, the Constitution authorizes the President to delegate some executive authority to a "principal Officer in each of the executive Departments" as well as "inferior officers" of the United States in these executive departments. U.S. Const. art. II., § 2, cl. 2.

60. In connection with the President's delegation of executive authority, the President must have the "authority to remove those who assist him in carrying out his duties." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010). "[T]he President's removal power is the rule, not the exception." *Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2206 (2020). This removal power applies both to principal officers of the United States as well as to inferior officers of the United States who wield executive power.

61. The Department's ALJs are inferior officers of the United States, housed within the Department of Education, an executive department. Yet, these ALJs are shielded from at-will removal by the President, thereby insulating them from the democratic accountability Article II requires for those who exercise executive power. This scheme is unconstitutional.

1. The Department's ALJs Are Inferior Officers of the United States

62. The Department's ALJs satisfy each of the considerations the Supreme Court identified in *Lucia v. Securities & Exchange Commission*, 138 S. Ct. 2044 (2018), to conclude that an agency's ALJs are inferior officers of the United States.

63. First, the Department's ALJs "hold a continuing office established by law." *Id.* at 2053. Congress requires the Secretary to establish in the Department of Education an Office of Administrative Law Judges. 20 U.S.C. § 1234(a). The ALJs "shall be appointed by the Secretary in accordance with [5 U.S.C. § 3105]." 20 U.S.C. § 1234(b).

64. Second, the Department's ALJs "have all the authority to ensure fair and orderly adversarial hearings," including taking testimony, conducting trials, ruling on the admissibility of evidence, and possessing the power to enforce compliance with discovery orders, *Lucia*, 138 S. Ct. at 2053:

a. Congress has authorized the Department's ALJs to "order a party to . . . (A) produce relevant documents; (B) answer written interrogatories that inquire into relevant matters; and (C) have depositions taken." 20 U.S.C. § 1234(g)(1).

b. Congress has provided that "[i]n order to carry out the provisions of subsections (f)(1) and (g)(1), the judge is authorized to issue subpoenas and apply to the appropriate court of the United States for enforcement of a subpoena. The court may enforce the subpoena as if it pertained to a proceeding before that court." *Id.* § 1234(g)(2).

c. In the context of the Department's recoupment scheme, ALJs presiding over the recoupment proceedings significantly shape the administrative record, through their powers to "accept only evidence that is relevant and material to the proceeding and is not unduly repetitious," 34 CFR § 668.89(b)(5), "restrict the number of witnesses or exclude witnesses to avoid undue delay or presentation of cumulative evidence," *id.* § 668.89(b)(6), and manage expert witnesses, *id.* § 668.89(b)(7).

d. Although ALJs presiding over recoupment proceeding are "not authorized to issue subpoenas," *id.* § 668.90(b)(1), the Department's regulations empower the ALJs to enforce compliance with discovery deadlines by authorizing the ALJs to "terminat[e] the hearing and issu[e] a decision against a party that does not meet those time limits" set by the ALJs, *id.* § 668.90(c)(3).

65. Third, the Department's ALJs "issue decisions" that contain factual findings, legal conclusions, and appropriate remedies, with the "capacity" to be the "last-word" where the agency declines to review the decision, *Lucia*, 138 S. Ct. at 2053–54. For example:

a. By statute, in a recovery of funds proceeding, the Department's ALJs issue preliminary decisions with "findings of fact" that "if supported by substantial evidence, shall be conclusive." 20 U.S.C. § 1234a(d)(1). A decision by the Department's ALJs "shall become final agency action 60 days after the recipient [of funds] receives written notice of the decision" when the Secretary takes no action. *Id*. § 1234a(g).

b. In the context of the Department's recoupment proceedings, the Department's regulations allow the Secretary to render a "final decision" when a party appeals the ALJ's initial decision. *See* 34 C.F.R. § 668.91(c)(2)(vii). The ALJ's decision is final where the parties do not appeal to the Secretary.

2. The Department's ALJs Are Subject to Dual Layers of Removal Protection

66. The Department's ALJs are subject to dual layers of removal protection that unconstitutionally insulate them from removal by the President.

67. The Supreme Court has underscored that it is "incompatible with the Constitution's separation of powers" when there are two layers of for-cause removal protection

between the President and an "inferior Officer." *Free Enter. Fund*, 561 U.S. at 498.

68. Here, at the first layer, the Department's ALJs may be removed only for good cause, as determined by the Merit System Protection Board ("MSPB"). 5 U.S.C. § 7521(a).

69. At the second layer, members of the MSPB can be removed only by the President for good cause. 5 U.S.C. § 1202(d). MSPB members are principal officers of the United States. *See McIntosh v. Dep't of Def.*, 53 F.4th 630, 639 (Fed. Cir. 2022) ("The MSPB itself is made up of three members who are appointed by the President with the advice and consent of the Senate, making them principal officers. 5 U.S.C. § 1201.").

70. Although the Secretary is removable by the President at will, the Secretary cannot remove a Department ALJ unless the MSPB finds good cause. 5 U.S.C. § 7521(a).

71. The dual layers of removal protection between the Department's ALJs and the President violate Article II of the United States Constitution. *See Jarkesy v. SEC*, 34 F.4th 446, 464–65 (5th Cir. 2022) (striking down identical removal restrictions as unconstitutional as applied to SEC ALJs); *see also Free Enter. Fund*, 561 U.S. at 484.

72. DeVry is subject to the Department's unconstitutionally insulated ALJs by virtue of the Recoupment Action, over which a Department ALJ presides.

B. The Department's Recoupment Scheme is Not Authorized by Any Congressional Delegation of Authority

73. Article I of the United States Constitution "vest[s]" all "legislative Powers" in Congress. U.S. Const., art. I, § 1.

74. Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *Wayman v. Southard*, 23 U.S. 1, 10 Wheat. 1, 42-43 (1825)). But Congress "may 'obtain[ ] the assistance of its coordinate Branches'—and in particular, may confer substantial discretion on

executive agencies to implement and enforce the laws." *Id.* (quoting *Mistretta v. United States*, 488 U. S. 361, 372 (1989).

75. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also W. Va. v. EPA*, 142 S. Ct. 2587, 2609 (2022) ("Agencies have only those powers *given* to them by Congress[.]" (emphasis added)).

76. In 1993, Congress delegated specific and limited authority to the Department to determine the defenses borrowers may assert to avoid repayment of federal student loans. Specifically, Congress provided that: "[n]otwithstanding any other provision of State or Federal law, 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, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan." 20 U.S.C. § 1087e(h).

77. Section 1087e(h)—a single subsection tucked within an extensive statutory provision—plainly provides only limited authority for the Secretary to promulgate regulations that specify which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a federal student loan. Congress never authorized the Department to create an administrative adjudication system for recoupment claims, nor did Congress even mention recoupment against institutions of higher education.

78. The Department promulgated a BDR rule in 1995. 34 C.F.R. § 685.206(c) (1995 version). This Rule allowed borrowers to "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" in certain specified formal proceedings—none of which concerned Department adjudication of borrower defense claims. *Id.* § 685.206(c)(1) (1995 version). The Department's 1995 BDR Rule also purported to authorize the Secretary to "initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies." *Id.* § 685.206(c)(3) (1995 version). The Rule did not specify what "an appropriate proceeding" would be.

79. In 2016, without authorization from Congress, the Department began to fashion its extensive and complex administrative recoupment scheme, departing dramatically from § 2087e(h)'s text and the Department's 1995 BDR Rule. The Department promulgated the 2017 BDR Rule. *See* 81 Fed. Reg. 75,926 (Nov. 1, 2016) (codified at 34 C.F.R. § 685 *et seq.*); *see also* 34 C.F.R. § 685.22 ("2017 version"). The Department also promulgated a regulation creating "borrower defense and recovery proceedings." 34 C.F.R. § 668.87 (the "2017 BDR Recoupment Rule").

80. The Department's scheme under these 2017 Rules operates, in relevant part, as follows:

a. The 2017 BDR Rule purported to allow the Secretary to designate a Department official to resolve borrower defenses by individual student borrowers. 34 C.F.R. § 685.222(e)(3) (2016 version). The Rule authorized the Secretary "to initiate a proceeding to collect from the school the amount of relief resulting from a borrower defense under this section." *Id.* § 685.222(e)(7).

b. The 2017 BDR Rule also authorized the Secretary to designate a Department official to assert borrower defenses against an open school on behalf of a group of

borrowers before a Department "hearing official." *Id.* § 685.222(h). If successful, the Secretary "collects from the school any liability to the Secretary for any amounts discharged or reimbursed to borrowers," *id.* § 685.206(h)(5)(i), and "may initiate a proceeding to collect at any time." *Id.* § 685.222(h)(5)(ii).

c. The 2017 BDR Rule provided that "the granting of any relief under this section" "transfer[s]" to the Secretary "the borrower's right of recovery against third parties," including "against the school." *Id.* § 685.222(k).

d. The Department's 2017 BDR Recoupment Rule refers to these proceedings as "borrower defense and recovery proceedings," governed by 34 C.F.R. Part 668, Subpart G. 34 C.F.R. § 668.81(a)(5)(ii); *see generally* 82 Fed. Reg. 6,253 (Jan. 19, 2017).

e. Subpart G provides that "[a] designated department official begins a borrower defense and recovery proceeding against an institution by sending the institution a notice by certified mail[.]" 34 C.F.R. § 668.87(a)(1). The notice "[i]ncludes a statement of facts and law sufficient to show that the Department is entitled to grant any borrower defense relief asserted within the statement, and recover for the amount of losses to the Secretary caused by the granting of such relief," *id.* § 668.87(a)(1)(ii), as well as "the date on which the Secretary intends to take action to recover the amount of losses arising from the granting of such relief, which date will be at least 20 days from mailing of the notice of intent." *Id.* § 668.87(a)(1)(iii).

f. The institution may submit a written response, which can include a request for a hearing. *Id.* If the institution submits such a response, "the Secretary will not

take action" on the date specified in the notice. *Id.* If the institution submits no response, then the regulation contemplates, and the Department's Recoupment Notice confirms, that the institution will be deemed liable for the amount specified in the notice.

g. A "hearing official" presides over hearings related to recoupment proceedings. *See generally id.* § 668.90; *see also id.* § 668.89(a) ("A hearing is an orderly presentation of arguments and evidence conducted by a hearing official."). As DeVry's experience confirms, the hearing official is a Department ALJ.

h. The hearing official is authorized to convene pre-hearing conferences to facilitate the efficient resolution of the matter. *See id.* § 668.88(a)–(c). During the hearing, parties may submit non-dispositive motions as well as motions for summary disposition. *Id.* § 668.88(d)–(e); *see also id.* § 668.89(a). The hearing official may also authorize "an oral evidentiary hearing conducted in person, by telephone, by video conference, or any combination thereof; or a review limited to written evidence." *Id.* § 668.89(a). Although formal discovery is not permitted, the hearing official may receive relevant documentary evidence and allow the testimony of witnesses, including expert witnesses. *Id.* § 668.89(b)(4)–(7).

i. After considering the evidence presented during the hearing, the hearing official issues an "initial decision." *Id.* § 668.91(a)(1)(i). That "initial decision states whether the imposition of the . . . recovery sought by the designated department official is warranted, in whole or in part." *Id.* § 668.91(a)(2)(i).

j. Either the institution or designated Department official may appeal the hearing official's initial decision to the Secretary within 30 days of receiving that

decision. *Id.* § 668.91(c)(2). During the pendency of the appeal, the initial decision of the hearing official does not take effect. *See id.* § 668.91(c)(2)(vi). In an appeal, "[t]he Secretary renders a final decision." *Id.* § 668.91(c)(2)(vii).

81. In 2020, again without authorization from Congress, the Department promulgated another BDR Rule. *See* 34 CFR § 685.206; *see also* 84 Fed. Reg. 49,788 (Sept. 23, 2019) ("2020 version"). In relevant part, under the 2020 BDR Rule:

a. "[T]he Secretary issues a written decision" on a BDR application, 34 CFR § 685.206(e)(11)(i), and notifies the borrower and the school if the Secretary grants" relief. *Id.* § 685.206(e)(12)(i).

b. The Secretary's BDR determination is "final" and "not subject to appeal within the Department." *Id*. § 685.206(e)(13).

c. The 2020 BDR Rule also transfers to the Secretary "the borrower's right of recovery against third parties," including "against the school." *Id.* § 685.206(e)(15)(i).

d. The 2020 BDR Rule authorizes the Secretary to initiate a proceeding against a school "to pay to the Secretary the amount" discharged in accordance with 34 C.F.R., subpart G. *Id*. § 685.206(e)(16). Thus, the 2020 BDR Rule relies on the same "borrower defense and recovery proceedings" created by the 2017 BDR Recoupment Rule.

82. The Department's sprawling recoupment scheme contravenes the limited role Congress delegated to the Department over borrower defenses to repayment, which solely contemplates establishing permissible defenses for student borrowers, not the adjudication by the Department of recoupment claims.

83. Section 1087e(h) does not authorize the Department to establish an adjudicatory system, which is an extraordinary power for an executive agency. *See W. Va.*, 142 S. Ct. 2587 at 2610 (extraordinary powers should not be readily gleaned from "ancillary" statutory provisions). The statute does not mention adjudication *by the Department* at all—let alone adjudication of recoupment claims against an institution—but rather only authorizes the Department to specify borrower defenses.

84. Although the Department labels its adjudication of recoupment claims as "recovery proceedings," Congress did not provide such authority to the Department in 20 U.S.C. § 1087e(h), in contrast to other situations where Congress expressly delegated to the Department authority to recover funds from a recipient for certain conduct by initiating an adjudicatory process through the Department's ALJs. *See, e.g.*, 20 U.S.C. § 1234a.

85. The Department's promulgation of the recoupment scheme without congressional delegation of authority constitutes an unauthorized exercise of legislative power by an executive department in violation of Article I.

V. THE RECOUPMENT ACTION IS UNLAWFUL UNDER THE BDR RULES

86. As outlined below, the Recoupment Action is not authorized under the 1995 BDR Rule, the 2017 BDR Rule, or the 2020 BDR Rule.

A. ~~iii.~~ The Recoupment Action Is Not Authorized Under the 1995 BDR Rule

87. ~~44.~~ The 1995 BDR Rule governs BDR Applications relating to loans disbursed before July 1, 2017. *See* 34 C.F.R. § 685.206(c)(1). Of the 7,622 loans underlying the Recoupment Action, 7,512 (98.6%) are controlled by the 1995 BDR Rule. Each of the 649 underlying borrowers held at least one of these 7,512 loans.

88. ~~45.~~ Under the 1995 BDR Rule, a "borrower may assert as a defense against

repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law." 34 C.F.R. § 685.206(c)(1) (1995 version). References to an "act or omission" under "applicable State law" are "intended to reflect the *limited* scope" of available relief, such that relief may be awarded "*only* if the school's act or omission has a clear, direct relationship to the loan." *See* 60 Fed. Reg. 37,768, 37,769 (July 21, 1995) (emphases added). At the time of adoption, the Department also stated that it "expect[ed] . . . the adjudication of individual claims [would] provide further explanation of the Secretary's interpretation of the regulatory requirements." *Id.*

89. ~~46.~~ Under the 1995 BDR Rule, upon a successful showing, the Secretary may "relieve[] [a borrower] of the obligation to repay all or part of the [challenged] loan," 34 C.F.R. § 685.206(c)(2) (1995 version), notwithstanding that the HEA by its own terms limits relief to "the amount such borrower has repaid on such loan[s]," 20 U.S.C. § 1087e(h).

90. ~~47.~~ Despite providing virtually no procedural guidance for adjudicating BDR Applications, the 1995 BDR Rule empowers the Secretary to "initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment . . . to pay . . . the amount of the loan to which the defense applies." 34 C.F.R. § 685.206(c)(3) (1995 version).

91. ~~48.~~ The regulations limit this recoupment power, however, by barring the Secretary from initiating a recoupment proceeding "after the period for the retention of records described in § 685.309(c) unless the school receive[s] actual notice of the claim during that period." 34 C.F.R. § 685.206(c)(3) (1995 version). Since its promulgation, § 685.309(c) has referenced § 668.24, which imposes a three-year record retention requirement following the end of the "award year" in which the student last attended the institution. *See* 61 Fed. Reg. 60,490,

60,492 (Nov. 27, 1996). Thus, absent actual notice of a borrower's claim for relief during the three-year retention period, the 1995 BDR Rule allows the Department to seek recoupment only within the three-year period after the borrower stopped attending DeVry.

92. ~~49.~~ In pursuing recoupment, the Department disregards or violates several dispositive sections of the 1995 BDR Rule. For example:

a. The Department ignores the limitations period set forth in § 685.206(c)(3), which bars the Department from pursuing recoupment for a loan amount more than three years after the last day of the last award year in which the borrower attended DeVry, absent actual notice of the claimed defense to repayment within that three-year period. Because DeVry did not receive any of the BDR Applications relating to 7,061 of the 7,512 loans governed by the 1995 BDR Rule within this three-year period (and in fact did not receive any notices related to any of the underlying borrowers until 2020, at the earliest), the Secretary is time-barred from recouping any amounts for those 7,061 discharged loans (approximately $21,735,305).

b. The Recoupment Notice does not provide adequate information to assess the grounds on which the underlying borrowers purported to assert a defense to repayment. For example, many of the BDR Applications do not assert reliance upon the 90-percent ads (the supposed basis for the Recoupment Action). Thus, the Department has failed to provide a factual basis—let alone evidence—to show that any of those BDR Applications governed by the 1995 BDR Rule have asserted an "act or omission" that would "give rise to a cause of action against [DeVry] under applicable State law." 34 C.F.R. § 685.206(c)(1) (1995 version).

c. The Department has ostensibly adjudicated the underlying BDR Applications in a single "group" process, which the 1995 BDR Rule does not authorize. Indeed, the regulatory history of the 1995 BDR Rule shows that BDR Applications were to be adjudicated *individually*, not in batches. *See* 60 Fed. Reg. at 37,769 (noting that the Department "expect[ed] that the adjudication of *individual claims* [would] provide further explanation of the Secretary's interpretation of the regulatory requirements" (emphasis added)).

d. The Department has not provided any information by which to verify that the amounts it seeks were accurately calculated under the state law governing each BDR Application. Rather, to avoid its obligation to analyze the relief to which each individual borrower is actually entitled, the Department applies a presumption of total relief derived from an August 2021 policy memorandum issued in contravention of then-effective Department processes for issuing guidance documents. This is particularly vexing given the Department's previously articulated position that quantification of BDR relief is governed by state law. *See, e.g.*, Ex. 8 to Decl. of Joshua D. Rovenger in Supp. of Pls.' Mot. for Prelim. Inj. at 73–82, 86–99, *Calvillo Manriquez v. DeVos*, No. 3:17-cv-07210 (N.D. Cal. Mar. 17, 2018), ECF No. 35-8 (detailing the Department's position that BDR relief must be calculated by reference to state law).

93. ~~50.~~ For these and other reasons, the Recoupment Action is unlawful with respect to loans governed by the 1995 BDR Rule.

B. ~~**iv.**~~ **The Recoupment Action Is Not Authorized Under the 2017 BDR Rule**

94. ~~51.~~ The 2017 BDR Rule governs BDR Applications relating to loans disbursed

on or after July 1, 2017 but before July 1, 2020. *See* 34 C.F.R. §§ 685.206(d), 685.222. Of the 7,622 loans underlying the Recoupment Action, 98 (about 1.3%) are controlled by the 2017 BDR Rule. These 98 loans were held by 32 of the 649 underlying borrowers.

95. ~~52.~~ In 2016, the Department published sweeping changes to the BDR Rule, despite no intervening changes to the relevant statutory provisions governing the Direct Loan Program. *See* 81 Fed. Reg. 75,926 (Nov. 1, 2016) (codified at 34 C.F.R. § 685 et seq. ("2017 version")). The 2017 BDR Rule took effect on October 18, 2018.

96. ~~53.~~ As relevant here, under the 2017 BDR Rule, a borrower may assert a defense to repayment of a loan disbursed on or after July 1, 2017 based on a "substantial misrepresentation . . . that the borrower reasonably relied on to the borrower's detriment when the borrower decided to attend, or to continue attending, the school or decided to take out a Direct Loan." 34 C.F.R. § 685.222(d) (2017 version). In so doing, individual borrowers may seek "to recover amounts previously collected by the Secretary on the Direct Loan," *id.* § 685.206(c)(ii) (2017 version), but only within the six-year period after the borrower could have reasonably discovered the purported misrepresentation upon which the borrower's claim is based, *id.* § 685.222(d)(1) (2017 version). The borrower must also offer "evidence that supports the borrower['s] defense [to repayment]." *Id.* § 685.222(e)(1)(i)(B) (2017 version).

97. ~~54.~~ If a borrower states an appropriate claim for relief, the Department must notify the borrower's school and initiate an investigation during which the Department must consider any response submitted by the school. *See* 34 C.F.R. § 685.222(e)(3) (2017 version).

98. ~~55.~~ The 2017 BDR Rule also purports to provide the Secretary with authority to forgo individualized assessment of BDR Applications and instead adjudicate BDR Applications in groups. *See* 34 C.F.R. § 685.222(e)(6) (2017 version) ("The Secretary may consolidate

applications . . . that have common facts and claims, and resolve the borrowers' borrower defense claims as provided in paragraphs (f), (g), and (h) of this section." (together, the "Group Adjudication Provisions")); *see generally id.* § 685.222(f) (2017 version).

99. ~~56.~~ To initiate group adjudication under the 2017 BDR Rule, the Secretary must identify a subset of borrowers sharing "common facts and claims." 34 C.F.R. § 685.222(e)(6) (2017 version). After considering the common facts and claims and other factors (e.g., the fiscal impact of affording relief and the public interest in promoting compliance), the Secretary must then assess whether the borrower group has a valid defense. *Id.* § 685.222(f)(1) (2017 version). To that end, the Secretary must notify "the school of the basis of the group's borrower defense, the initiation of the fact-finding process," and "any procedure by which the school may request records and respond." *Id.* § 685.222(f)(2)(iv) (2017 version). As with individualized adjudication of BDR Applications, the Department must "consider[] any evidence and argument presented by the school." *Id.* § 685.222(h)(1) (2017 version).

100. ~~57.~~ If the Secretary grants relief (either on an individual or group basis), the Department may "discharge[] the borrower's [or borrowers'] obligation to repay all or part of the [applicable] loan . . . and, if applicable, reimburse[] the borrower [or borrowers] for amounts paid toward the loan voluntarily or through enforced collection." 34 C.F.R. §§ 685.222(i)(1), (6) (2017 version). However, such relief must be "reduced by the amount of any refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, compromise, or any other financial benefit received by . . . the borrower that was related to the borrower defense." *Id.* § 685.222(i)(8) (2017 version).

101. ~~58.~~ Where the 2017 BDR Rule is successfully asserted, and upon the Department's grant of relief, "the borrower is deemed to have assigned to, and relinquished in

favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the contract for educational services for which the loan was received, against the school." 34 C.F.R. § 685.222(k) (2017 version).

102. ~~59.~~ Following a grant of relief, the 2017 BDR Rule authorizes the Secretary to initiate recoupment proceedings against the borrower's school. *See* 34 C.F.R. §§ 685.222(h)(5), 685.222(e)(7), 685.206(c)(3) (2017 version). Before seeking recoupment, however, the Department must provide the targeted school with "a statement of facts and law sufficient to show that the Department is entitled to grant any borrower defense relief asserted." *Id.* § 668.87(a)(1)(ii) (2017 version).

103. ~~60.~~ Recoupment actions under the 2017 BDR Rule are also limited in time. Unless the targeted school has "notice" of a borrower's claimed defense to repayment, a recoupment proceeding must be initiated within (1) six years for BDR Applications based on breach of contract or substantial misrepresentation by the school; or (2) any time for BDR Applications based on a judgment against the school. 34 C.F.R. §§ 685.222(e)(7)(i)–(iii) (2017 version). Notably, in adopting the 2017 BDR Rule—but without following the mandatory notice-and-comment procedures that accompanied the changes to the 1995 BDR Rule—the Department significantly and substantively expanded the definition of "notice" to purportedly allow the Secretary to initiate recoupment proceedings *at any time* and resurrect long-expired claims. *See id.* § 685.206(c)(4) (2017 version).

104. ~~61.~~ Specifically, under the 2017 BDR Rule, the Secretary modified the definition of "notice" to mean (1) "[a]ctual notice from the borrower, from a representative of the borrower, or from the Department," (2) a "class action complaint asserting relief for a class that

may include the borrower," or (3) "[w]ritten notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower." 34 C.F.R. §§ 685.206(c)(4)(i)–(iii) (2017 version).

105. ~~62.~~ In pursuing recoupment against DeVry, the Department disregards or violates several dispositive sections of the 2017 BDR Rule. For example:

a. The Recoupment Notice fails to provide adequate information to assess the basis on which the underlying borrowers purportedly asserted a defense to repayment. Many of the BDR Applications, for example, do not indicate whether the pertinent borrowers relied upon (or even knew of) the 90-percent ads (the purported basis for the Recoupment Action). Thus, the Department has failed to provide sufficient facts—let alone evidence—to show that any of the 32 relevant borrowers have stated a basis for finding a "substantial misrepresentation . . . that the borrower reasonably relied on to the borrower's detriment when the borrower decided to attend, or to continue attending, the school or decided to take out a Direct Loan." 34 C.F.R. § 685.222(d) (2017 version).

b. The Recoupment Notice fails to provide sufficient information to assess the relief available to each borrower under the 36 state statutes the Department claims govern the BDR Applications. Indeed, the Recoupment Notice does not indicate whether the Department considered *any* of the required factors relevant to determining the proper discharge amounts for loans disbursed on or after July 1, 2017, including (i) the value of the education the borrower received, (ii) the value of the education that a reasonable borrower in the borrower's circumstances

would have received, or (iii) the value of the education the borrower should have expected given the information provided by DeVry. *See* 34 C.F.R. § 685.222(i)(2)(i) (2017 version).

c. The Recoupment Notice fails to provide any information to verify that the Department accurately offset from the demanded sums the "amount of . . . any other financial benefit received by, on or behalf of the borrower that was related to the borrower defense," 34 C.F.R. § 685.222(i)(8), including, for example, the numerous settlements related to the 90-percent ads, outlined *supra* at paragraphs 21–26.

106. ~~63.~~ For these and other reasons, the Recoupment Action is unlawful with respect to loans governed by the 2017 BDR Rule.

C. ~~v.~~ The Recoupment Action Is Not Authorized Under the 2020 BDR Rule

107. ~~64.~~ The 2020 BDR Rule governs BDR Applications relating to loans disbursed on or after July 1, 2020. *See* 34 C.F.R. § 685.206(e). Of the 7,622 loans underlying the Recoupment Action, 12 loans (less than 1%) are controlled by the 2020 BDR Rule. These 12 loans (which were disbursed nearly five years after DeVry ceased using the 90-percent ads) were held by six of the 649 underlying borrowers.

108. ~~65.~~ On September 23, 2019, the Department published a modified BDR Rule for loans disbursed on or after July 1, 2020. *See* 84 Fed. Reg. 49,788 (Sept. 23, 2019) (codified at 34 CFR § 685.206(e) ("2020 version")). Under these regulations, a borrower may assert a repayment defense based on a misrepresentation of "material fact upon which the borrower reasonably relied in deciding to obtain a Direct Loan" if it "directly and clearly relates to [the borrower's] [e]nrollment or continuing enrollment," and if the "borrower was financially harmed

by the misrepresentation." 34 C.F.R. §§ 685.206(e)(2)(i)–(ii) (2020 version). Such a defense must be asserted "within three years from the date the student is no longer enrolled at the institution." *Id*. § 685.206(e)(6)(i) (2020 version).

109. ~~66.~~ An actionable "misrepresentation" is one that is (i) "false, misleading, or deceptive" and (ii) "made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth." 34 C.F.R. § 685.206(e)(3) (2020 version).

110. ~~67.~~ Importantly, a borrower must have suffered "financial harm" from the misrepresentation, exclusive of damages resulting from (i) "nonmonetary loss" such as "inconvenience" or "opportunity costs," (ii) "intervening . . . labor market conditions," or (iii) the "borrower's voluntary decision to pursue less than full-time work." 34 C.F.R. § 685.206(e)(4) (2020 version).

111. ~~68.~~ After receiving a BDR Application, the Department must "notify the school" and provide the school (i) "a copy of the borrower's request," (ii) "any supporting documents," (iii) "a copy of any evidence otherwise in the possession of the Secretary," and (iv) "a waiver . . . permitting the institution to provide the Department with items from the student's education record relevant to the defense to repayment claim." 34 C.F.R. § 685.206(e)(10)(i) (2020 version).

112. ~~69.~~ The school must be allowed to "respond and to submit evidence," after which the borrower may submit a reply. *See* 34 C.F.R. §§ 685.206(e)(10)(i)–(ii) (2020 version). Following this process, the Secretary must "specify[] the relief determination" in writing. *Id*. §§ 685.206(e)(11)(i)(A)–(C) (2020 version).

113. ~~70.~~ The 2020 BDR Rule also removed the 2017 BDR Rule's Group Adjudication Provisions for loans disbursed on or after July 1, 2020. *See* 34 C.F.R. § 685.206(e).

114. ~~71.~~ In seeking recoupment from an institution under the 2020 BDR Rule, the Department must provide "a statement of facts and law sufficient to show that the Department is entitled to grant any borrower defense relief" for which it seeks to recover. 34 C.F.R. § 668.87(a)(1)(ii) (2020 version).

115. ~~72.~~ In pursuing recoupment from DeVry, the Department disregards or violates several dispositive sections of the 2020 BDR Rule. For example:

a. The 2020 BDR Rule does not authorize the Department to adjudicate BDR Applications by group, as the Department has ostensibly done here. In modifying the BDR Rule, the Department *removed* the 2017 BDR Rule's Group Adjudication Provisions such that they do not apply to BDR Applications relating to loans disbursed on or after July 1, 2020. Just as the Recoupment Action is unlawful as to loans controlled by the 1995 BDR Rule, the Recoupment Action is unlawful as to loans controlled by the 2020 BDR Rule because the Department improperly discharged the loans in a group adjudication and may not pursue recoupment for such unlawfully discharged sums. *See* 34 C.F.R. § 668.87(a)(1)(ii) (2020 version) (requiring the Department show a legal basis for granting BDR relief before pursuing recoupment).

b. The Department has failed to provide any information to suggest that, for the six borrowers for whom the 2020 BDR Rule applies, the Department considered whether the borrowers have proven "by a preponderance of the evidence," 34 C.F.R. § 685.206(e)(2) (2020 version), that (i) DeVry made a "false, misleading,

or deceptive" statement with *scienter*, *id.* § 685.206(e)(3) (2020 version); (ii) reasonable reliance on that statement, *id.* § 685.206(e)(2)(i) (2020 version); and (iii) resulting financial harm, *id.* §§ 685.206(e)(2)(ii), 685.206(e)(4) (2020 version).

c. The Department has not provided any information by which to verify that the amounts it seeks were accurately assessed. *See supra* at paragraph 62.

116. ~~73.~~ For these and other reasons, the Recoupment Action is unlawful with respect to loans governed by the 2020 BDR Rule.

D. ~~vi.~~ The Department Proposes Additional Changes to the BDR Rule

117. ~~74.~~ In July 2022, the Department announced it would revise the BDR rules for the third time in six years to (i) to resurrect the broad bases of relief afforded under the 2017 BDR Rule; (ii) to reinstate the 2017 BDR Rule's Group Adjudication Provisions; and (iii) to change many of the evidentiary presumptions for obtaining relief. *See* 87 Fed. Reg. 41,878 (July 13, 2022). The revised BDR regulations are expected to take effect in 2023. *Id.* at 41,880.

~~**vii. DeVry Will Suffer Substantial Injury If the Recoupment Action Is Not Enjoined**~~

VI. DEVRY SUFFERS ONGOING HARM FROM THE RECOUPMENT ACTION AND FACES AN IMMINENT THREAT OF SUBSTANTIAL INJURY FROM THE RECOUPMENT ACTION

118. DeVry currently suffers and will continue to suffer ongoing harm as a result of the Recoupment Action given the structural constitutional flaws in the Department's recoupment scheme. *See Bond v. United States*, 564 U.S. 211, 223 (2011) ("[I]ndividuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies.").

119. DeVry is harmed by being subjected to the Recoupment Action because the ALJ who presides over the Recoupment Action is unconstitutionally insulated from removal by the

President, thereby depriving DeVry of the political checks and safeguards under the President's Article II power to remove inferior officers of the United States.

120. DeVry is also harmed by being subjected to the Recoupment Action because the Department exceeded its authority in establishing the regulatory scheme pursuant to which the Action is being prosecuted in violation of Article I of the U.S. Constitution.

121. The harm to DeVry from being subjected to the Department's unconstitutional recoupment scheme is a "here-and-now injury" that cannot be remedied by later judicial review. *Axon*, 143 S. Ct. at 903; *Seila Law*, 140 S. Ct. at 2196.

122. ~~75. If~~In addition, if not enjoined, the Recoupment Action poses considerable harm to DeVry by, among other things, forcing DeVry to endure an administrative proceeding that denies DeVry due process of law. *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *Davis v.* ~~*District of Columbia*~~*D.C.*, 158 F.3d 1342, 1346 (D.C. Cir. 1998).

123. ~~76. And although the more than~~Moreover, DeVry faces an imminent threat of substantial injury from the Recoupment Action because the Department seeks to recoup $23 million ~~now at issue is~~from DeVry, which threatens substantial~~,~~ financial injury, and also because the Department has stated its intent to recoup significantly more from DeVry, including—but not limited to—approximately $71.7 million in already-discharged loans. ~~Thus,~~ Taken together, the Recoupment Action (and similar actions the Department has stated will follow) will burden DeVry's ability to continue operating, thereby imposing existential pecuniary and reputational damage.

FIRST CLAIM FOR RELIEF
Violation of APA—Action in Excess of Statutory Jurisdiction, Authority, or Limitations

124. ~~77.~~ The above paragraphs are incorporated by reference herein.

125. ~~78.~~ The APA, 5 U.S.C. § 706(2)(C), provides that a reviewing court shall "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations." There are at least two grounds to do so here.

126. ~~79.~~ *First*, the Department claims to have initiated the Recoupment Action "in accordance with the procedures" promulgated under Title IV of the HEA. Yet the Group Adjudication Provisions by which the Department purports to act are not authorized under the HEA.

127. ~~80.~~ Under Title IV of the HEA, the Department is directed to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan." 20 U.S.C. § 1087e(h). The Department is also directed to collect payment on loans funded pursuant to the HEA. *See, e.g.*, *id*. §§ 1087e(d)–(e).

128. ~~81.~~ The Department issued regulations exceeding this prescribed power that purportedly authorize the group discharge of Direct Loans. *See* 34 C.F.R. §§ 685.222(f)–(h). And although Congress may choose to authorize the Department to discharge Direct Loans *en masse*, it has not done so. Rather, Congress has explicitly authorized discharge of repayment amounts or terms only in very limited circumstances. *See, e.g.*, 20 U.S.C. §§ 1087e(f), 1087e(h), 1094(c)(3), 1098aa.

129. ~~82.~~ For this reason, the Department itself has conceded that "[n]either Title IV [of the HEA] nor the [APA] specifically authorizes" the Group Adjudication Provisions, including "the 'class action' provision of the [2017 BDR Rule], 34 C.F.R. §§ 685.222(f)–(h), providing for blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances based on substantial misrepresentations." Mem. from U.S. Dep't of Educ. Principal Deputy Gen. Counsel Reed Rubinstein to Sec'y of Educ. Betsy DeVos, at 4 n.2

(Jan. 12, 2021), https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf.

130. ~~83.~~ Accordingly, through its collective "group" determination of the BDR Applications and initiation of a Recoupment Action, the Department's actions exceed its statutory authority.

131. ~~84.~~ *Second*, the Department's redefining of the term "notice" in the 2017 BDR Rule is unlawful because, in adopting a substantively modified and expanded definition, the Department failed to follow required notice and comment procedures. *See* 5 U.S.C. § 553(b) (requiring the terms or substance of a proposed rule to be published in the Federal Register so that the public may submit written comments).

132. ~~85.~~ For these reasons, the Group Adjudication Provisions in the 2017 BDR Rule, the adjudication of the BDR Applications, and the Department's prosecution of the Recoupment Action violate the APA.

SECOND CLAIM FOR RELIEF
Violation of APA—Failure to Observe Procedure Required by Law

133. ~~86.~~ The above paragraphs are incorporated by reference herein.

134. ~~87.~~ The APA, 5 U.S.C. § 706(2)(D), provides that a reviewing court shall "hold unlawful and set aside agency action" that is "without observance of procedure required by law."

135. ~~88.~~ Agency action is unlawful if it is "inconsistent with" governing regulations. *Ind. Ass'n of Homes for the Aging Inc. v. Ind. Off. of Medicaid Pol'y & Plan.*, 60 F.3d 262, 266 (7th Cir. 1995). The Department's conduct underlying the Recoupment Action is unlawful because the Department has failed to adjudicate the BDR Applications underlying the Recoupment Action in accordance with the procedures specified in the Department's own

regulations.

136. ~~89.~~ As to the 7,512 underlying loans disbursed before July 1, 2017, the Department has failed to apply the governing standards set forth in the 1995 BDR Rule. Namely, the Department has failed to establish that any of the BDR Applications for which it seeks to recoup funds stated a basis for a discharge, including: (a) that an "act or omission" of DeVry gave rise to a state law claim, as required under 34 C.F.R. § 685.206(c) (1995 version); (b) that the Recoupment Action falls within the applicable limitations period, *see id.* § 685.206(c)(3) (1995 version); (c) that group discharge and recoupment processes apply to these loans; or (d) that the relief for which the Department seeks recoupment was rightly assessed under the state laws applicable to each individual borrower.

137. ~~90.~~ As to the 93 loans at issue in the Recoupment Notice that were disbursed on or after July 1, 2017 but before July 1, 2020, the Department has failed to apply the standards set forth in the 2017 BDR Rule. *See supra* at paragraphs 51–63.

138. ~~91.~~ As to the 12 loans at issue in the Recoupment Notice that were disbursed on or after July 1, 2020, the Department has failed to apply the standards set forth in the 2020 BDR Rule, including by failing to establish, among other things, that the applicable borrowers have shown "by a preponderance of the evidence," *see* 34 C.F.R. § 685.206(e)(2), (i) that DeVry made a "false, misleading, or deceptive" statement with *scienter*, *id.* § 685.206(e)(3) (2020 version); (ii) reasonable reliance on that statement, *id.* § 685.206(e)(2)(i)–(ii) (2020 version); and (iii) resulting financial harm, *id.* § 685.206(e)(4) (2020 version).

139. ~~92.~~ As to *all* of the loans at issue in the Recoupment Action, the Department has failed to establish that the full relief granted to the individual borrowers is not improper or excessive, including where borrowers have already received relief through settlement with

DeVry, FTC settlement proceeds, or other circumstances, *see* 34 C.F.R. § 685.222(i)(8), or that the Department is legally entitled to discharge the underlying loans, a prerequisite to recoupment, *see id.*, § 668.87(a)(1)(ii). These failures are of particular concern considering the Department's ostensible failure to consider:

a. whether any claims or rights, including those that would be transferred to the Department to bring a Recoupment Action, have been waived in or precluded by prior settlement agreements with or judgments involving DeVry;

b. whether any prior settlements can be properly considered evidence of wrongdoing, including when those agreements expressly disclaim any admission or finding of fault or wrongdoing; and

c. any individualized facts regarding the 649 borrowers underlying the Recoupment Notice, including whether each of the 649 borrowers attended DeVry and enrolled in a relevant program and could have reasonably relied on the misrepresentations alleged by the Department (which ceased in 2015), took out the borrowed funds for the purpose of attending DeVry, graduated from DeVry, or received any proceeds as part of settlements or other adjudications regarding the 90-percent ads.

140. ~~93.~~ Moreover, in its June 23, 2020 letter, the Department notified DeVry that it would undertake *individualized* assessment of each of the BDR Applications under 34 C.F.R. § 685.222(e). The Department has failed to follow the procedures governing the adjudication of individual BDR Applications, including by failing to:

a. consider "evidence or argument presented by the borrower" as required under 34 C.F.R. § 685.222(e)(3)(i);

b. provide any written decision of the Department's determination as required under 34 C.F.R. § 685.222(e)(4)(i);

c. notify DeVry of the fact-finding process or any procedure by which the school could request records and respond as required under 34 C.F.R. § 685.222(f)(2); and

d. provide DeVry with other basic information about the underlying borrowers as required under 34 C.F.R. § 685.222(e)(1).

141. ~~94.~~ Finally, in granting the underlying discharge, the Department wrongly applied a rebuttable presumption of full relief derived from policy memoranda that were issued in violation of then-controlling processes for issuing guidance documents.[~~7~~8] The rebuttable presumption of complete relief is inappropriate, including because the Department failed to observe the required "period of public notice and comment of at least 30 calendar days" prior to its issuance. *See* 34 C.F.R. § 9.14(h)(1) (2020 version).

142. ~~95.~~ For these reasons, the adjudication of the BDR Applications and the prosecution of the Recoupment Action violate the APA.

THIRD CLAIM FOR RELIEF
Violation of APA—Arbitrary & Capricious Agency Action

143. ~~96.~~ The above paragraphs are incorporated by reference herein.

[~~7~~8] *See* Rescission of Borrower Defense Partial Relief Methodology, Office of the Under Secretary of the U.S. Dep't of Educ. (Aug. 24, 2021), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2021-08-24/rescission-borrower-defense-partial-relief-methodology-ea-id-general-21-51; Department of Education Announces Action to Streamline Borrower Defense Relief Process, U.S. Dep't of Educ. (March 18, 2021), https://www.ed.gov/news/press-releases/department-education-announces-action-streamline-borrower-defense-relief-process; *see also* Rulemaking & Guidance Procedures, 85 Fed. Reg. 62,597 (Oct. 5, 2020); Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 9, 2019).

144. ~~97.~~ The APA, 5 U.S.C. § 706(2)(A), states that a reviewing court shall "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or . . . not in accordance with law."

145. ~~98.~~ Under this provision, agency action is unlawful where the agency fails to articulate a rational connection between the facts found and a decision rendered, fails to consider an important aspect of the issue underlying the agency action, or fails to explain its decision that runs counter to the evidence. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

146. ~~99.~~ The Department's initiation of the Recoupment Action is "arbitrary, capricious, an abuse of discretion, or . . . not in accordance with law," including for the reasons stated in paragraphs 77–95.

147. ~~100.~~ For these reasons, the adjudication of the BDR Applications and prosecution of the Recoupment Action violate the APA.

FOURTH CLAIM FOR RELIEF
Violation of APA—Agency Action Contrary to the Fifth Amendment to the United States Constitution~~—Procedural Due Process~~

148. ~~101.~~ The above paragraphs are incorporated by reference herein.

149. ~~102.~~ The APA, 5 U.S.C. § 706(2)(B), provides that a reviewing court shall "hold unlawful and set aside agency action" that is "contrary to constitutional right, power, privilege, or immunity."

150. ~~103.~~ The Fifth Amendment to the United States Constitution demands DeVry be afforded due process before it is deprived of a protected interest. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). DeVry is thus entitled to notice and an opportunity to be heard at a

"meaningful time and in a meaningful manner." *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

151. ~~104.~~ DeVry's right to due process has been violated by the Department's prosecution of the Recoupment Action because it adversely affects a protected interest of DeVry and poses a risk of erroneous deprivation of that interest.

152. ~~105.~~ The Department's prosecution of the Recoupment Action violates the Due Process Clause of the Fifth Amendment because it relies on an impermissibly vague state-law standard that purports to allow the Department to grant relief and seek recoupment without any identification, analysis, or adjudication of a school's violation of pertinent state law. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.").

153. ~~106.~~ The 2017 BDR Rule violates the Due Process Clause because it does not provide a durational limit on the Department's ability to initiate a recoupment proceeding, including without limitation seeking recoupment based on BDR Applications the Department originally received as early as 2012 but delayed processing for years.

154. ~~107.~~ The Department failed to provide DeVry with sufficient notice of the underlying BDR Applications for DeVry to meaningfully respond either to the claims or to the Recoupment Action, including by failing to provide DeVry with: (a) a calculation of the relief sought, including with respect to appropriate offsets and whether interest is included; (b) a full statement of facts, including all relied upon exhibits and appendices; or (c) all other documents and information, including internal reports and policy directives, considered by the Department in making its findings and determinations, including in granting the BDR Applications and

prosecuting the Recoupment Action against DeVry.

155. ~~108.~~ The Department has not provided sufficient time for DeVry to respond to the Recoupment Action on behalf of 649 individual claimants with 7,622 loans in a reasonable time and manner under the circumstances here. *See Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950) (noting that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

156. ~~109.~~ The Rules relating to the Department's assertion of consolidated, group recoupment actions are also facially defective under the Due Process Clause of the Fifth Amendment to the United States Constitution.

157. ~~110.~~ For these reasons, the prosecution of the Recoupment Action violates the Fifth Amendment to the United States Constitution, which guarantees the right to due process of law.

FIFTH CLAIM FOR RELIEF
Violation of Article II, U.S. Constitution – Unconstitutional Structure of the Department's ALJs

158. The above paragraphs are incorporated by reference herein, as applicable.

159. The Department's ALJs are inferior officers of the United States who, by statute, may be removed only for good cause, as determined by the MSPB. 5 U.S.C. § 7521(a). Members of the MSPB can only be removed by the President for good cause. 5 U.S.C. § 1202(d). Although the Secretary is removable by the President at will, the Secretary cannot remove a Department ALJ unless the MSPB finds good cause to do so. 5 U.S.C. § 7521(a).

160. As currently structured, the multiple layers of tenure protection for the Department's ALJs violate Article II of the United States Constitution.

161. For these reasons, the Department's BDR Rules and the Recoupment Action violate Article II of the United States Constitution.

162. DeVry is irreparably harmed by the ongoing violation of Article II because DeVry is subject to the Recoupment Action over which a Department ALJ who is unconstitutionally insulated from removal presides. Monetary damages cannot remedy the harm to DeVry from the deprivation of fundamental protections offered by the constitutional separation of powers.

SIXTH CLAIM FOR RELIEF
Violation of Article I, U.S. Constitution – Unconstitutional Exercise of Legislative Power by an Executive Department

163. The above paragraphs are incorporated by reference herein, as applicable.

164. Congress did not delegate authority to the Department to create a recoupment or administrative adjudication scheme to recoup discharged loans, yet the Department has fashioned by regulations with the force of law a recoupment scheme in which the Department

unilaterally approves borrower defense discharges in amounts the Department determines based on alleged misrepresentations or omissions by an institution for which the Department's officials alone make findings. The Department requires an institution to agree to pay the amount of loans for which the Department approves a discharge or to subject itself to an administrative recoupment action.

165. Congress did not delegate authority to the Department to create the recoupment scheme, so the Department's promulgation of regulations creating this scheme was an unconstitutional exercise of legislative power by an executive department.

166. For these reasons, the Department's BDR Rules and the Recoupment Action violate Article I of the United States Constitution.

167. DeVry is irreparably harmed by the Department's Article I violations because the Department is subjecting DeVry to the Recoupment Action, a proceeding that is beyond the delegated authority of the Department to establish and prosecute. Monetary damages cannot remedy the harm to DeVry from the deprivation of fundamental protections offered by the constitutional separation of powers.

RELIEF REQUESTED

WHEREFORE, Plaintiff asks that this Court issue judgment in its favor and against the Department, and to grant the following relief:

A. Declare that the Department's recoupment scheme is unconstitutional because it violates Article I;

B. Declare that the Department's ALJs are unconstitutionally insulated from at-will removal by the President in violation of Article II;

C. ~~A.~~ Declare that the Recoupment Action is (i) contrary to and exceeds

the Department's statutory and administrative authority under the HEA, the APA, and rules promulgated thereunder; (ii) arbitrary, capricious, an abuse of discretion, and not in accordance with law; (iii) contrary to the requirements of the Due Process Clause of the Fifth Amendment to the United States Constitution; and (iv) otherwise unlawful;

D. Issue a preliminary and permanent injunction enjoining the Department from enforcing the unconstitutional recoupment scheme, including a prohibition on the Department from continuing to prosecute the Recoupment Action and/or any further proceedings in the Recoupment Action;

E. ~~B.~~ Issue a permanent injunction enjoining (i) the Recoupment Action from proceeding without strict compliance with all applicable rules and laws; (ii) the Department from taking any further action under the Recoupment Notice; and (iii) the Department from taking other related punitive, prejudicial, or adverse actions against DeVry, including requiring a letter of credit from or imposing heightened cash monitoring over DeVry;

F. ~~C.~~ Grant reasonable attorney's fees and expenses; and

G. ~~D.~~ Award such further relief as this Court deems just and proper.

H. ~~E.~~ In the alternative, if the Recoupment Action is permitted to proceed, Plaintiff asks that this Court declare (i) the appropriate legal basis (if any) for the Recoupment Action and (ii) what procedures would govern the rights of the parties in adjudicating the merits of the underlying BDR Applications and the Recoupment Action to ensure DeVry is provided due process of law.

Dated: June 16, 2023

Respectfully submitted,

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