BRIAN M. BOYNTON
Acting Assistant Attorney General
MARCIA BERMAN
Assistant Director, Federal Programs Branch
KATHRYN L. WYER (Utah Bar No. 9846)
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Tel. (202) 616-8475
kathryn.wyer@usdoj.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ISAI BALTEZAR & JULIE CHO, Plaintiffs, v. MIGUEL CARDONA, in his official capacity as Secretary of Education, *et al*., Defendants.	Case No. 5:20-cv-455-EJD **DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR** Date: March 24, 2022 Time: 9:00 a.m. Place: Courtroom 4, 5th Floor Judge: Hon. Edward J. Davila

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INTRODUCTION

Now that American Federation of Teachers and California Federation of Teachers have voluntarily dismissed their claims, the only objection to Defendants' motion for remand without vacatur comes from two individuals ("Plaintiffs"), who concede Defendants' legitimate and good faith basis for requesting remand but argue that the Court should go beyond Defendants' request by vacating in its entirety the 2019 final rule ("2019 Rule") at issue in this case, even though doing so would reinstate a prior rule that, the Court has recognized, can no longer be implemented. The Court should reject Plaintiffs' arguments, which seek to turn Defendants' remand motion into a vehicle for providing their requested remedy even though ten of their eleven claims have been dismissed.

Defendants seek remand without vacatur because the Department of Education ("Department") has decided, in light of a new Administration's policy goals, to undertake a new rulemaking process addressing those programs that the Higher Education Act ("HEA") defines as leading to gainful employment ("GE"), which is the subject of the 2019 Rule and the 2014 GE Rule that it rescinded. The Department hopes to focus its resources on this new rulemaking rather than on unnecessary further litigation over Plaintiffs' single remaining claim, which relates only to the notice and comment procedures that the Department followed in the 2019 Rule's rescission of the 2014 GE Rule's eligibility provisions. This procedural issue ultimately can be addressed through the rulemaking that the Department has already set in motion.

To be clear, Defendants' motion seeks only remand without vacatur. The Department has explained that vacatur would be disruptive in this circumstance, not only to the Department but to all those who potentially are regulated by or would benefit from GE regulations, because it would require the Department to divert its resources toward attempting to resurrect the 2014 GE Rule, even though this Court has already recognized that that Rule as written cannot operate, and the only redress available for Plaintiffs' procedural claim is more rulemaking—which is precisely what the Department is committed to doing.

Plaintiffs' arguments in favor of vacatur—a form of relief that Defendants' Motion did not request or invite, even in the alternative—rely on flawed premises that mischaracterize the

record. Most fundamentally, Plaintiffs assume "serious" errors in the 2019 Rule, but this Court has not addressed the merits of any of Plaintiffs' claims and has instead dismissed all but one of those claims. The Department also has not conceded error but instead has explained that it intends to conduct new rulemaking due to the policy priorities of a new Administration. The Court thus has no basis to find a serious error here sufficient to warrant vacatur, nor can the Court properly evaluate the merits of Plaintiffs' remaining procedural claim in the current posture, where no administrative record has been filed. It would undermine the very purpose of remand to expend additional judicial resources conducting such an analysis. Moreover, even if the Court had a proper record to evaluate, any procedural error that the Court might identify in the Department's disclosure of sources during the 2019 Rule's promulgation could not on balance justify resurrecting the relevant portions of the inoperable 2014 GE Rule, which would be in place only temporarily. With or without remand, the rulemaking process will proceed and allow any past procedural error to be addressed. Vacatur would do little but interfere with the Department's ability to carry out other activities that affect the public, including its reregulation on the subject of GE. The Court should exercise its equitable authority to hold that vacatur is not warranted here. It should accordingly remand this action without vacatur.

ARGUMENT

I. The Department Has Justified Its Request for Remand Without Vacatur

As discussed in Defendants' Motion, the Department has legitimate and good faith grounds for seeking voluntary remand of the single remaining claim in this case because it intends, for policy reasons, to initiate new rulemaking on GE issues that will allow full participation by Plaintiffs and other interested members of the public and will ultimately render any challenge to the current rule moot. Mot. [ECF 48] at 8-10. Defendants did not request vacatur of the relevant portion of the 2019 Rule (its eligibility provisions) because no error has been found in the 2019 Rule, and attempting to resurrect the 2014 GE Rule when its provisions cannot as a practical matter be implemented would disrupt Department operations, including its ability to reregulate on GE. Mot. at 10-12. Plaintiffs do not contest the Department's legitimate and good faith reasons for requesting remand. Pl. Opp. [ECF 50] at 1. Yet they argue that, under

Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993), any such remand must include vacatur of the entire 2019 Rule. Plaintiffs cite no authority for their bald assertion that voluntary remands are "typically" accompanied by vacatur, Pl. Opp. at 4, nor is that assertion supported by the Ninth Circuit's equitable framework, which calls on courts to exercise equitable discretion in light of a case's particular circumstances. *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). The Ninth Circuit has never limited a court's discretion in a case like this one, where no legal error has been found and most claims have been dismissed. *See In re Clean Water Act Rulemaking* ("*In re Clean Water*"), 2021 WL 4924844, at *4 (N.D. Cal. Oct. 21, 2021) (recognizing Ninth Circuit statement that "remand without vacatur is appropriate only in limited circumstances" has only been made "in opinions where the agency action had been found erroneous"). Plaintiffs' argument should be rejected, and the Court should decline to vacate the 2019 Rule or any part thereof.

As explained in Defendants' Motion, remand without vacatur is proper under the *Allied-Signal* framework, which calls for an equitable balancing of "the seriousness of the agency's errors against 'the disruptive consequences of an interim change that may itself be changed.'" *See Cal. Cmtys*., 688 F.3d. at 992 (quoting *Allied-Signal*, 988 F.2d at 150-51); Mot. at 10-13. Although Plaintiffs argue that both *Allied-Signal* prongs weigh in their favor, their arguments lack merit and should be rejected.

A. The First Prong of *Allied-Signal* Weighs Against Vacatur

The first equitable consideration under *Allied-Signal* is "how serious the agency's errors are." *Cal. Cmtys.*, 688 F.3d at 992. As discussed in Defendants' Motion, this factor weighs conclusively against vacatur here because the Court has never found error in the 2019 Rule. *See* Mot. at 10. To the contrary, the Court dismissed Plaintiffs' substantive challenges to the 2019 Rule—Counts 1-10—for lack of standing. Order of Sept. 3, 2020 [ECF 33]. In regard to the claims implicating the 2019 Rule's rescission of the 2014 GE Rule's disclosure provisions, the Court held that Plaintiffs lacked a cognizable informational injury. *Id.* at 17. The Court further held that any substantive challenge to the 2019 Rule's rescission of the 2014 GE Rule's eligibility provisions was not redressable because a separate agency, the Social Security

Administration, had decided to stop providing earnings data that the 2014 GE Rule had required. *Id.* at 19-20. The only remaining claim is therefore Count 11, a procedural claim that implicates only the rescission of the 2014 Rule's eligibility provisions. *See* Compl. ¶ 445 (referencing research and analysis relating to "the D/E rates measure" and "outcomes," as well as GE programs' alternate earnings appeals, which are part of the D/E rate calculation process).[1] Because no proceedings on the merits have occurred and the Department has not confessed error with respect to the sole remaining claim, remand without vacatur here is consistent with the vast majority of decisions applying the *Allied-Signal* factors, including those cited by Plaintiffs, Pl Opp. at 3-5, and Proposed Amici, *see* Proposed Br. [ECF No. 55-1] at 4 & n.2, which have found error only in the course of regular proceedings on the merits or through an agency concession.[2]

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[1] Proposed Amici ignore entirely that only Count 11's procedural challenge to rescission of the 2014 GE Rule's eligibility provisions is at issue and make no attempt to show serious error in the 2019 Rule. They also ignore the historic non-regulation of GE programs, the fact that the GE Rule was never fully implemented, and the absence of a data source for the GE Rule, which entirely undermines their discussion of relative harms.

[2] *See, e.g., Allied-Signal, Inc*, 988 F.2d at 151 (concluding vacatur was not warranted after reviewing merits in normal course of proceedings); *Nat'l Fam. Farm Coal. v. EPA*, 960 F.3d 1120, 1144 (9th Cir. 2020) (considering vacatur as remedy after holding that EPA decision was not based on substantial evidence); *California v. Bernhardt*, 472 F. Supp. 3d 573, 630 (N.D. Cal. 2020) (considering vacatur as remedy after finding "BLM failed to comply with the APA and NEPA on myriad grounds"); *Behring Reg'l Ctr. LLC v. Wolf*, No. 20-CV-9263, 2021 WL 2554051, at *9 (N.D. Cal. June 22, 2021) (considering vacatur as remedy after holding rule invalid); *State v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1125 (N.D. Cal. 2017) (vacating postponement rule as remedy due to agency's serious error in invoking 5 U.S.C. § 705); *Klamath-Siskiyou Wildlands Ctr. v. NOAA*, 109 F. Supp. 3d 1238, 1239–40 (N.D. Cal. 2015) (vacating incidental take permits after finding serious error on summary judgment); *Ctr. for Env't Health v. Vilsack*, No. 15-CV-1690, 2016 WL 3383954, at *13 (N.D. Cal. June 20,

Plaintiffs rely on Judge Alsup's recent decision in *In re Clean Water* to argue that the Court must now take up the merits of their claims for the first time in order to determine whether the 2019 Rule should be vacated. Pl. Opp. at 4 n.2. In that case, the court considered an EPA request to remand without vacatur a 2019 rule that replaced EPA certification procedures that had been in place for half a century. *In re Clean Water*, 2021 WL 4924844, at *4. The court recognized that the caselaw is "unsettled" when it comes to vacating a rule before its validity has been adjudicated on the merits. *Id.* However, the court proceeded to examine the plaintiffs' claims—none of which had previously been dismissed—based solely on the published preamble of the rule, without an administrative record, and concluded that there were "serious deficiencies in an aspect of the certification rule that . . . [wa]s the foundation of the final rule and [] informs all other provisions of the final rule." *Id.* at *6 (internal quotation omitted).

Significantly, the court in *In re Clean Water* relied in part on EPA's acknowledgement that its rule was inconsistent with the Clean Water Act. *Id.* at *7-8 (noting EPA had identified eleven aspects of the rule that raised "substantial concerns"). In that respect, the court's decision is in line with other courts that have remanded an action with vacatur before a merits determination—including those cited in *In re Clean Water* and by Plaintiffs—based on the agency's confession of legal error, and often at the request of the agency itself, neither of which has occurred here. *See Safer Chems., Healthy Fams. v. EPA*, 791 F. App'x 653, 656–57 (9th Cir. 2019) (remanding one provision with and two without vacatur at EPA's request); *Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1243 (D. Colo. 2011) (granting agency's motion for remand with vacatur after agency withdrew challenged statutory interpretation); *Pascua Yaqui Tribe v. EPA*, No. CV-20-266, 2021 WL 3855977, at *5 (D. Ariz. Aug. 30, 2021) (holding

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2016) (considering vacatur as remedy after holding rule invalidly promulgated without notice and comment); *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 933 F. Supp. 2d 700, 714 (E.D. Pa. 2013) (considering vacatur as remedy after holding rule invalid); *League of Wilderness Defs. v. U.S. Forest Serv.*, No. 3:10-CV-1397, 2012 WL 13042847, at *2 (D. Or. Dec. 10, 2012) (considering partial vacatur as remedy after granting summary judgment in part to plaintiffs).

vacatur appropriate where agency confessed "fundamental, substantive flaws that cannot be cured without revising or replacing" the challenged rule); *All. for Wild Rockies v. Marten*, No. CV 17-21, 2018 WL 2943251, at *3 (D. Mont. June 12, 2018) (holding vacatur appropriate where agency acknowledged that major fire rendered prior analysis legally erroneous).[3]

Plaintiffs argue that Counts 1-3 and 11 warrant vacatur here. But the situation here is quite different from *In re Clean Water*. As noted above and discussed in detail below, Counts 1-3 have been dismissed, along with all Plaintiffs' substantive claims, nor do those counts identify serious error even if the Court were to consider them. And Count 11 fails to present significant issues similar to those that the court in *In re Clean Water* identified. Moreover, the Court has already held that the only redress available for Count 11—given that the 2014 GE Rule's eligibility provisions can no longer operate—would be for the Department to engage in further rulemaking that "would allow the public an opportunity to comment on the sources upon [which] the DOE relies and Defendants the opportunity [to] consider amending the GE Rule to use a different source of annual earnings data." Order of Sept. 29, 2021 [ECF 44], at 7 & n.3. It would be an inefficient use of judicial resources to proceed with an analysis of the merits of Count 11 for the sole purpose of determining whether there is legal error that might warrant vacatur when the new rulemaking that the Department plans to conduct will provide the very same opportunity without any finding of error. Rather than proceeding with an analysis that is otherwise

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[3] The court deemed it appropriate to consider the merits and ultimately vacate the EPA rule at issue because it viewed vacatur as akin to a preliminary injunction. *In re Clean Water*, 2021 WL 4924844, at *5. However, unlike a preliminary injunction, remand with vacatur is final. Such an order would grant Plaintiffs full relief without affording an opportunity for reconsideration or dissolution through full summary judgment briefing. The posture here is in contrast to those cited in *In re Clean Water* where the agency was the one seeking vacatur, conceding the merits. *Cf. Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 137 (D.D.C. 2010) (remanding without vacatur despite agency's request for vacatur); *Ctr. for Native Ecosystems*, 795 F. Supp. 2d at 1243 (remanding with vacatur at agency's request). Defendants here have not done so.

unnecessary simply to determine whether a rule that cannot be implemented should nevertheless be put back into place, the Court should conclude that the first prong of *Allied-Signal* weighs against vacatur.

1. Counts 1-3 Were Dismissed and Do Not Identify Serious Error

Plaintiffs are wrong that Counts 1-3 remain at issue following the Court's ruling on Defendants' motion to dismiss. As explained in Defendants' Motion, Defendants' motion to dismiss sought dismissal of Counts 1-3 as both Disclosure Claims and Eligibility Claims. *See* Mot. at 4 n.2 (citing Def. MTD [ECF 26] at 10-11). Plaintiffs' opposition to Defendants' motion to dismiss did not object to that characterization and identified no basis to treat Counts 1-3 differently. *See id.* Plaintiffs thus waived any such argument. *See Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1211 (N.D. Cal. 2009) ("Where plaintiffs fail to provide a defense for a claim in opposition, the claim is deemed waived.") (citation omitted); *Hopkins v. Women's Div. Gen. Bd. of Global Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) ("[W]hen a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."). Plaintiffs effectively concede as much now by failing to address the analysis in Defendants' Motion to Remand, again waiving any argument to the contrary. Instead, Plaintiffs suggest that the "plain language" of the Court's Order of September 3, 2020 failed to identify those counts as dismissed. Pl. Opp. at 3. However, the Court's reasoning clearly encompassed those claims—a fact that Plaintiffs do not deny. Plaintiffs offer no justification for their assertion that Counts 1-3 should now be considered on the merits.[4]

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[4] Even if the Court's September 3, 2020 Order requires clarification because the shorthand definitions omit any reference to Counts 1-3, such action would not open the door to new arguments in opposition to dismissal, nor would it suggest that Plaintiffs have standing to assert those counts or that those counts should now be considered on the merits. Rather, Defendants moved to dismiss those counts (which Defendants characterized as Disclosure Claims in part and as Eligibility Claims in part) on the same bases as the other Disclosure Claims and Eligibility

Moreover, Counts 1-3 do not identify serious errors but are instead meritless. Contrary to Plaintiffs' assertions in Count 1, the 2019 Rule did not rely on any finding that the HEA was unambiguous, or that the HEA precluded the Department from regulating on GE. *See* Pl. Opp. at 5-6 & n.4. Rather, the Department recognized that it had authority to interpret the relevant statutory language; it merely concluded, consistent with the Department's practice for over forty years before the first GE regulations were proposed in 2009, that under its interpretation, no regulation specifically focused on this issue was needed. *See* 2019 Rule, 84 Fed. Reg 31392, 31401 (July 1, 2019); *cf. APSCU v. Duncan* ("*APSCU I*"), 870 F. Supp. 2d 133, 140-41 (D.D.C. 2012). In Count 2, Plaintiffs appear to argue that the HEA requires the Department to issue GE regulations. *See* Compl. ¶ 364 (accusing the Department of "refus[ing] to interpret and apply a statutory mandate"). But the HEA plainly contains no such requirement, and no court has held otherwise. Rather, courts have recognized that the Department may regulate, not that it must. *See APSCU v. Duncan* ("*APSCU II*"), 110 F. Supp. 3d 176, 186 (D.D.C. 2015) (policy gap allowed for "binary, yes/no test"—which may not require GE regulations—or for "more nuanced metrics"). And there were in fact no regulations between 1968 and 2011. 84 Fed. Reg. at 31401. Finally, in Count 3, Plaintiffs argue that the 2019 Rule ignored Congress's intent to distinguish

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Claims, and the Court could thus issue a clarification that Counts 1-3 are dismissed for the same reasons explained in its Order of September 3, 2020. Plaintiffs fault Defendants for not seeking such a correction earlier. Again, however, Plaintiffs never argued, in the course of briefing Defendants' motion to dismiss, that Counts 1-3 should be treated differently and thus waived any such argument. *Conservation Force*, 677 F. Supp. 2d at 1211. Defendants thus had no reason to anticipate that Plaintiffs would later suggest that those Counts had not been dismissed. Defendants did not learn that Plaintiffs intended to pursue such a notion until after Defendants filed a proposed motion for reconsideration on another issue. The parties then identified the issue in their Joint Case Management Statement, but no further proceedings took place while the Court considered Defendants' motion for partial reconsideration. Defendants reasonably anticipated that the issue would be addressed at a later point if the Court deemed it necessary.

between different types of programs. *See* Pl. Opp. at 7-8; Compl. ¶¶ 367-373. But again, nothing required the Department to interpret the statutory language that certain programs "prepare students for gainful employment in a recognized occupation" the way it did in the 2014 GE Rule, and the Department did not distinguish between programs in this way before 2009. *See APSCU I*, 870 F. Supp. 2d at 140-41. Even if the Court had jurisdiction over Counts 1-3 (which it does not), the Court should decline to find serious error based on these counts.

2. Count 11 Also Provides No Basis For a Finding of Serious Error

Count 11 similarly provides no basis for a finding of serious error. This procedural notice and comment challenge alleges that the 2019 Rule's discussion of rescinding the 2014 GE Rule's eligibility provisions at times referred to "research" without citing specific studies and referenced the Department's "analysis" without indicating whether there were any documents containing such analysis. Pl. Opp. at 9-10; Compl. ¶¶ 216-218, 445(a)-(d). Because these portions of this claim raise questions about what research or analysis the Department actually relied upon when making these statements, and whether the 2019 Rule's use of the word "analysis" referred to anything memorialized in written form that could have been shared, it cannot properly be evaluated without the administrative record. *See* 5 U.S.C. § 706 (requiring a reviewing court to "review the whole record or those parts of it cited by a party"). Here, the Court has conducted no such review. Indeed, the parties agreed, and the Court ordered, that the administrative record would not be due until 30 days after the Court resolved the remand motion. Order of Oct. 27, 2021 [ECF No. 46]. The Court cannot conclude that Plaintiffs have identified a serious error through these allegations based on the current record.

This claim otherwise alleges that the Department failed to provide an opportunity to review alternate earnings appeal submissions by GE programs during the single year of eligibility calculations that had ever occurred, in order to allow for comments on the Department's assertion that administering alternate earnings appeals had been more burdensome than anticipated. *See* Compl. ¶¶ 284-292, 445(e). However, the Department's review of alternate earnings appeals was still ongoing at that time, and the prior judicial decision that had invalidated the Department's original scheme for alternate earnings appeals, resulting in

significant delays in the Department's review of such appeals, was publicly known. *See Am. Ass'n of Cosmetology Schs v. DeVos* ("*AACS*"), 258 F. Supp. 3d 50, 76-77 (D.D.C. 2017). As the record stands now, this claim does not identify serious error that would justify vacating the 2019 Rule.[5] The circumstances here thus stand in contrast to *Pascua Yaqui Tribe*, where the court made extensive reference to summary judgment briefing that had already occurred and concluded that "[t]he concerns identified" by both the plaintiffs and the agency were "not mere procedural errors" but were "fundamental, substantive flaws." 2021 WL 3855977, at *5.

Plaintiffs argue that the Department's anticipated rulemaking on GE is unlikely to result in its retention of the 2019 rescission and that this weighs in favor of vacatur. Pl. Opp. at 11. The court in *In re Clean Water* suggested this factor could be significant when it bolstered the erroneous nature of the challenged rule. *See In re Clean Water*, 2021 WL 4924844, at *8. Here, however, the Department's stated intention to revisit the GE issue in new rulemaking is due to the "substantial policy concerns" of the new Administration, rather than any legal error. *See* Kvaal Decl. ¶ 11. This factor does not favor vacatur here.

B. The Second Prong of *Allied-Signal* Weighs Against Vacatur

The second *Allied-Signal* prong also weighs against vacatur. As explained in Defendants' Motion, vacatur of the 2019 Rule would disrupt the Department's ability to

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[5] In connection with Plaintiffs' counsel's FOIA request for alternate earnings appeal submissions, Compl ¶¶ 287-292, the request was submitted while appeals were still being processed, but the Department ultimately released all nonexempt information responsive to that request by December 14, 2018, before this case was filed. *See* Joint Status Rpt. ¶¶ 2, 6-7, *Nat'l Student Legal Defense Network v. U.S. Dep't of Educ.*, No. 1:18-cv-1209, ECF No. 15 (D.D.C. filed Mar. 1, 2019). Plaintiffs' counsel has posted this information on its website. *See* https://www.defendstudents.org/foia/ gainful-employment. That information is thus now available for Plaintiffs or others to reference in the Department's future rulemaking. *Cf. Cal. Cmtys.*, 688 F.3d at 993 (holding "any disadvantage" caused by alleged lack of documents could be "corrected on remand" in a new comment process and did not justify vacatur).

operate, including its ability to move forward with further rulemaking on GE and other issues. *See* Mot. at 10-11; Kvaal Decl. ¶¶ 7-10. Plaintiffs characterize such disruption as purely an internal matter that does not affect public interests. Pl. Opp. at 12. However, Plaintiffs' position on this issue contradicts the entire premise of their challenge. Plaintiffs argue that the Department's regulation of GE programs has a significant public impact.[6] But the vacatur that they propose would interfere with the Department's ability to do just that. The Department would have to divert resources from its rulemaking efforts, focusing instead on trying to implement the 2014 provisions that cannot currently operate as intended and would be in place only temporarily. Significantly, Plaintiffs acknowledge, as did the Court, Order of Sept. 29, 2021, at 7 n.3, that further rulemaking would be required to change the data source for debt-to-earnings rate calculations, which the 2014 GE Rule specified must come from the SSA, *see* Pl. Opp. at 14 n.10, but they fail to address the corollary to that admission—that the timeline for rulemaking on a new data source is no different from the timeline for the rulemaking that the Department already has initiated. Kvaal Decl. ¶ 9. Plaintiffs' speculation that any new rule promulgated by the Department might be held invalid sometime in the future, Pl. Opp. at 19, is no justification for reinstating an old rule that one court has recognized was "never fully implemented," *Maryland v. U. S. Dep't of Educ.*, 474 F. Supp. 3d 13, 37 (D.D.C. 2020), *vacated and remanded as moot*, No. 20-5268, 2020 WL 7868112 (D.C. Cir. Dec. 22, 2020), and

[6] Ironically, Plaintiffs argue that they and other students "need[] the protections of the GE Rule today," Pl. Opp. at 18 n.15, but this Court has recognized that vacating the 2019 Rule would not redress such injuries for the very reasons just described. Order of Sept. 3, 2020, at 20. Instead, as the Court has explained, the only redress available is the procedural redress of participating in further rulemaking. Order of Sept. 29, 2021, at 7 n.3. The most expeditious way to achieve Plaintiffs' goal would be to allow the Department to proceed with its intended rulemaking without the disruption that would be caused by vacatur.

doesn't work anymore.[7] On the other hand, the likelihood that reinstatement of the 2014 GE Rule will lead to more lawsuits that the Department will need to defend is demonstrated by the *Maryland* case that Plaintiffs cite, which, despite the court's ultimate ruling that the states lacked standing, took several years to litigate, with numerous rounds of supplemental briefing and two hearings, and was on appeal before the 2019 Rule rendered it moot. *See Maryland*, 474 F. Supp. 3d at 25-28 (describing procedural history).[8]

The situation here is again far removed from that in *In re Clean Water*. There, the court emphasized that vacatur of the 2019 rule would reinstate a prior regime that had been in place for 50 years, and EPA identified no operational barrier to implementing the prior rule. *In re Clean Water*, 2021 WL 4924844, at *8-9. Indeed, the new rule had only been in effect for thirteen months and had not resulted in "institutional reliance." *Id.* at *8. On the other hand, leaving the

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[7] The Department has also estimated that even the task of modifying its systems so that they could once again perform preliminary steps under the 2014 GE Rule's eligibility provisions could take a year or longer. Kvaal Decl. ¶ 8. Plaintiffs' proposal that the Court stay its vacatur to allow such modifications to occur, Pl. Opp. at 17 n.14, essentially concedes the futility of vacatur here. And to the extent Plaintiffs are suggesting that the Court impose some time limit on such modifications, doing so runs an even higher risk that the modifications would interfere with other ongoing Department activities that are more likely to benefit the public than preparing to implement parts of an inoperable rule for only a temporary period before a new rule takes effect.

[8] Plaintiffs also repeat an assertion that Defendants already refuted in briefing on Defendants' motion to dismiss, suggesting that reinstating the 2014 GE Rule will save the Department money. Pl. Opp. at 18. As Defendants explained when Plaintiffs first made this claim, the Federal Register discussion that Plaintiffs cite reflects a prediction that the 2014 GE Rule would lead to fewer students receiving Pell Grants because they would end up not attending any school at all. Def. MTD Reply [ECF 28] at 9. Of course, the Department's goal is not to prevent individuals from seeking education or receiving Pell Grants. Moreover, such numbers assume that the 2014 GE Rule is operable—which would not be the case if it were reinstated now.

new rule in place would have continued the disruption that it had caused by "dramatically br[eaking] with fifty years of precedent." *Id.* at *9. Here, in contrast, the 2014 GE Rule that Plaintiffs ask the Court to reinstate was in effect only a short time; it never yielded more than a single year of eligibility data and never resulted in a GE program being deemed ineligible. The 2019 rescission resulted in a return of the longstanding status quo since the HEA's enactment in 1968 to 2009, when there were no GE regulations in existence. Rather than continuing a recent dramatic disruption, as the court in *In re Clean Water* sought to avoid, leaving the 2019 Rule in place merely leaves a blank slate for the Department's further regulation. Similar to another court's analysis, here the consequences of vacatur would be more disruptive than the consequences of failing to vacate. *See N. Coast Rivers All. v. U.S. Dep't of the Interior*, No. 116-CV-307, 2016 WL 8673038, at *12 (E.D. Cal. Dec. 16, 2016) (granting motion to remand without vacatur, weighing the error found by the court of appeals against the court's finding that the consequences of vacatur would be worse than the consequences of failing to vacate). On balance, considering the lack of any demonstrated error in the 2019 Rule and the disruptive consequences of its vacatur, the Court should exercise its equitable discretion to remand this action without vacatur.

C. The Court Should Not Consider Vacatur of the Entire 2019 Rule

As explained above, the single remaining claim at issue in this case is a procedural claim that implicates only the 2019 Rule's rescission of the 2014 GE Rule's eligibility provisions. As Defendants explained in prior briefing, and as this Court has already recognized, the 2014 GE Rule consisted of "two distinct regulatory frameworks," Order of Sept. 3, 2020, at 13—the disclosure requirements in the former 34 C.F.R. § 668.412 and the eligibility requirements set forth in the former 34 C.F.R. §§ 668.403-.410 and .414. *See* Def. MTD at 10-11. The 2019 Rule rescinded both of these categories, but Plaintiffs' claims were divided into Disclosure Claims, challenging the rescission of § 668.412, and Eligibility Claims, challenging the rescission of §§ 668.403-.410 and .414. Plaintiffs argue that despite the distinct nature of these two sets of requirements, a finding by the Court that the Department committed error in connection with Count 11 would justify vacatur of the entire 2019 Rule. Pl. Opp. at 8-9 n.6. Indeed, Plaintiffs

rely on this possibility when claiming that, even though the 2014 GE Rule's eligibility provisions cannot operate, the Department could still implement "program-level disclosures" as well as reporting and certification requirements. *Id.* at 14-15.

In fact, however, reinstatement of those aspects of the 2014 GE Rule is not at issue, and Plaintiffs fail to support their contrary notion with any legal authority or reasoning. To the contrary, courts commonly set aside only the parts of an agency rule deemed defective and have specifically done so in connection with GE regulations. *E.g.*, *APSCU I*, 870 F. Supp. 2d at 155-57 (vacating previous GE rule's reporting and eligibility requirements while upholding its disclosure requirements); *cf. AACS*, 258 F. Supp. 3d at 76-77 (prohibiting enforcement of part of 2014 GE Rule's alternate earnings process deemed defective but otherwise leaving regulatory scheme intact). Certainly, if a court were to conclude as a matter of equity, after most claims in the case were dismissed and before any adjudication on the merits has occurred, that vacatur was warranted due to possible legal error in some aspect of a rule, it has the discretion to tailor that vacatur to address only the potential error that it identified. Here, nothing in Count 11 mentions any aspect of the 2019 Rule other than its rescission of the debt-to-earnings rate calculations and alternate earnings appeal process that were part of the 2014 GE Rule's eligibility provisions. Thus, even aside from the other reasons weighing against vacatur, described above, vacatur should not be considered for any aspect of the 2019 Rule other than its rescission of the 2014 GE Rule's eligibility provisions.

II. Plaintiffs' Alternative Proposal To Expedite Merits Briefing Should Be Rejected

Plaintiffs propose that, if the Court does not order a remand, it should order expedited summary judgment briefing. Such a request is inappropriately raised in Plaintiffs' opposition brief and thus should be denied. *See* Local Rules 6-3(a), 7-1. As noted above, the parties have previously agreed, and the Court has ordered, that, if necessary, the Answer and relevant administrative record would be due 30 days after the Court's Order on Defendants' Motion to Remand. *See* ECF No. 46. However, to the extent Plaintiffs continue to dispute that Count 11 is the only remaining claim in the case, a further request for clarification may be required. In any event, neither of the two individuals who remain as Plaintiffs has identified any irreparable

harm that they would incur in the absence of expedited briefing.

Moreover, if the Court were to deny Defendants' request for remand without vacatur but proceed to consider alternative forms of relief within its discretion, more appropriate relief could consist of holding this action in abeyance while the Department proceeds with the rulemaking process, as the court did in *Am. Petroleum Inst.* ("*API*") *v. EPA*, 683 F.3d 382, 390 (D.C. Cir. 2012), a case cited by Plaintiffs.[9] Such an alternative would, like remand, allow the Court to avoid expending judicial resources unnecessarily while the Department pursues an administrative rulemaking process that will allow for public participation and is likely to address the very procedural concerns that Plaintiffs raise in Count 11.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to remand this action to the Department, without vacatur, dismiss this action without prejudice.

DATED: November 23, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

[9] Although the court in *API* held that case in abeyance pursuant to the prudential ripeness doctrine—a doctrine this Circuit has identified as "disfavored," *Fowler v. Guerin*, 899 F.3d 1112, 1116 n.1 (9th Cir. 2018)—courts commonly exercise their inherent authority over their own dockets for the purpose of continuing or staying proceedings when rulemaking is anticipated or underway. *See, e.g.*, Order of Oct. 7, 2021, ECF No. 35, *California v. U.S. Dep't of Educ.*, No. 21-cv-384 (N.D. Cal. Oct. 7, 2021) (granting joint request to continue proceedings in light of Department's potential rulemaking and administratively closing case); Minute Entry of Aug. 17, 2021, ECF No. 467, *California v. U.S. Dep't of Health & Human Servs.*, No. 17-cv-5783 (N.D. Cal. Aug. 17, 2021) (staying case in light of agency's notice of intent to initiate rulemaking); Order Granting Request for Stay, ECF No. 53, *Cal. Life Sciences Ass'n v. CMS*, No. 3:20-cv-8603 (N.D. Cal. Jan. 19, 2021) (staying case in light of agency's consideration of whether to rescind rule).

MARCIA BERMAN
Assistant Director, Federal Programs Branch

/s/ Kathryn L. Wyer
KATHRYN L. WYER (Utah Bar No. 9846)
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Tel. (202) 616-8475
kathryn.wyer@usdoj.gov
Attorneys for Defendants