No. 22A-__

IN THE

Supreme Court of the United States

EVERGLADES COLLEGE, INC.; LINCOLN EDUCATIONAL SERVICES CORPORATION; AND AMERICAN NATIONAL UNIVERSITY,

Applicants,

v.

MIGUEL CARDONA, ET AL.; THERESA SWEET, ET AL.,

Respondents.

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit

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Application to Stay the Judgment Entered by the United States District Court for Northern District of California

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QUESTIONS PRESENTED

The Higher Education Act of 1965 (“HEA”), 20 U.S.C. § 1082(a)(6), states that “[i]n the performance of, and with respect to, the functions, powers, and duties, vested” by Part B of the HEA, the Secretary of Education (“Secretary”) may “enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption.” For decades, this provision was understood to allow the Secretary only to cancel student loans in statutorily defined circumstances. *E.g.*, *id.* § 1087(a), (b), (c), (d) (providing for discharges for borrower’s death, total disability, bankruptcy, or school closure); *id.* § 1078-10(c)(1), (c)(3) (allowing discharges for teachers). A later provision, 20 U.S.C. § 1087e(a)(1), states that federal Direct Loans made after 2010, under Part D of the HEA, are subject to “the same terms, conditions, and benefits” as federal student loans made before 2010 under Part B’s Federal Family Education Loan (“FFEL”) program.

In this case, the Secretary argued, and the district court held, that § 1082(a)(6) and § 1087e(a)(1) together allowed the Secretary to (i) cancel and refund prior payments on approximately 200,000 student loans issued under the FFEL and Direct Loan programs for borrowers who attended 151 educational institutions, and (ii) create a new administrative process to decide several hundred thousand additional requests for loan cancelation and refunds from borrowers who attended approximately 4,000 educational institutions. The Secretary did this in the purported settlement of a class action brought under the Administrative

Procedure Act ("APA") and certified for injunctive relief under Federal Rule of Civil Procedure 23(b)(2).

The questions presented are:

(1) Whether the Higher Education Act of 1965, 20 U.S.C. §§ 1082(a)(6) and 1087e(a)(1), gives the Secretary authority to cancel and refund federal student loans *en masse* and outside statutorily defined circumstances.

(2) Whether the Secretary may settle an APA claim certified as a Rule 23(b)(2) injunctive class action by providing monetary relief in the form of student loan cancellation and refunds.

PARTIES TO THE PROCEEDING

Applicants Everglades College, Inc., Lincoln Educational Services Corporation, and American National University are Intervenors-Appellants in consolidated appeals in the United States Court of Appeals for the Ninth Circuit and Intervenors in the United States District Court for the Northern District of California.

Respondents Miguel Cardona, in his official capacity as Secretary of Education, and the United States Department of Education are Defendants-Appellees in the consolidated appeals in the United States Court of Appeals for the Ninth Circuit and Defendants in the United States District Court for the Northern District of California.

Respondents Theresa Sweet, Alicia Davis, Tresa Apodaca, Chenelle Archibald, Daniel Deegan, Samuel Hood, and Jessica Jacobson, on behalf of

themselves and all others similarly situated, are Plaintiffs-Appellees in the consolidated appeals in the United States Court of Appeals for the Ninth Circuit and Plaintiffs in the United States District Court for the Northern District of California.

Respondent The Chicago School of Professional Psychology is an Intervenor in the United States District Court for the Northern District of California, but did not appeal from the final judgment or move for a stay pending appeal.

RELATED PROCEEDINGS

United States District Court for the Northern District of California:

Theresa Sweet, et al. v. Miguel Cardona, et al., No. 3:19-cv-03674-WHA

United States Court of Appeals for the Ninth Circuit:

Theresa Sweet, et al. v. Everglades College, Inc, et al., No. 23-15049

Theresa Sweet, et al. v. Lincoln Educational Services Corp, et al., No. 23-15050

Theresa Sweet, et al. v. American National University, et al., No. 23-15051

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of this Court, undersigned counsel state as follows:

Everglades College, Inc. is a nonprofit corporation; it does not have a parent corporation, and no publicly traded company owns 10% or more of its stock.

Lincoln Educational Services Corporation is a publicly traded corporation; it does not have a parent corporation, and no publicly traded company owns 10% or more of its stock.

American National University, Inc., is wholly owned by National University Services, Inc., a privately held Virginia corporation, and no publicly held corporation owns 10% or more of its stock.

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

INTRODUCTION

Pursuant to Rules 22 and 23 of the Rules of this Court and 28 U.S.C. §§ 1651(a) and 2101(f), Applicants Everglades College, Inc. ("Everglades"), Lincoln Educational Services Corporation ("Lincoln"), and American National University ("American National") (collectively "Applicants") respectfully request that this Court stay the issuance of the district court's judgment pending the filing and disposition of a timely petition for a writ of certiorari.

The President has directed the Department of Education ("Department") to implement a national program of blanket cancellation of student-loan debt. *See Brown v. U.S. Dep't of Educ.*, 2022 WL 16858525, at *2 (N.D. Tex. Nov. 10, 2022). The Department complied by announcing two sweeping debt-cancellation programs. The first program—a plan to cancel $10,000 of loans per debtor—proceeds under the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act"). A federal court has vacated that program because it exceeds the Secretary's authority. *Brown*, 2022 WL 16858525, at *11–12. This Court is addressing that issue this Term. *See Biden, et al. v. Nebraska, et al.*, No. 22-506 (U.S. Dec. 1, 2022); *Dep't of Educ., et al. v. Brown, et al.*, No. 22-535 (U.S. Dec. 12, 2022).

The second program is the subject of this application. Through a collusive, nationwide class settlement of a lawsuit that sought to compel the Department merely to restart *adjudication* of applications for loan cancellation, the Department instead has ignored its regulations, foregone adjudication altogether, and plans to

cancel and refund billions in loans for hundreds of thousands of borrowers. Specifically, under the settlement, the Department will cancel the debt and refund all past payments for individuals who attended any of 151 schools that the Department has "determined"—in secret negotiations with Plaintiffs—engaged in "substantial misconduct." App. 42a. The schools at issue were given no prior notice of that determination or opportunity to defend themselves and, in many instances, did not even receive notice of the individual borrower allegations against them. Moreover, the Department will engage in a modified "review" of the applications of hundreds of thousands of additional borrowers from thousands of schools that essentially guarantees debt cancellation and refunds of prior payments.

To explain this unprecedented, sweeping settlement is to detail its illegality. It is based on a claim of statutory authority, under the Higher Education Act ("HEA"), even more sweeping than that claimed under the HEROES Act. The HEA provision in question states that "[i]n the performance of, and with respect to, the functions, powers, and duties, vested" by Part B of the HEA, the Secretary may "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption." 20 U.S.C. § 1082(a)(6). But that general provision—applicable only to a subset of federal loans—is delimited by the specific and carefully tailored authorizations throughout the HEA; it in no way grants the limitless and unilateral power the Secretary now claims. Accordingly, before 2022, the provision was seldom invoked, and never on the vast scale of this case. Here, the Secretary invoked Section 1082(a)(6) to cancel

and refund approximately 200,000 federal student loans concerning 151 separate schools with no relationship or commonality—totaling an estimated cost in excess of $6 billion. Simultaneously, the Secretary used the same statutory provision to create new processes for deciding approximately 300,000 other administrative proceedings brought by borrowers seeking cancellation and refunds of their federal student loans. In this way, the Biden Administration claims to have cancelled "the loans of more than a million borrowers."[1]

The Secretary's claimed authority amounts to nothing less than the power to cancel, *en masse*, every student loan in the country. The Secretary has never identified any principled limit to his claimed authority, because every federal student loan represents a "right" to repayment that the Secretary allegedly can "compromise" or "waive." 20 U.S.C. § 1082(a)(6). And the Secretary contends that his exercise of this authority is not judicially reviewable. If the Secretary is correct, the pending decisions in *Nebraska* and *Brown* could be rendered potentially irrelevant. After an adverse decision from this Court, the Secretary could turn around and cancel the same debts under his claimed HEA authority. Just as in *Nebraska* and *Brown*, the Court should not permit the Secretary to proceed under such unprecedented and breathtaking claims of executive authority before this Court has had a chance to address its legality.

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[1] *See* Press Release, *Education Department Takes Steps to Hold Leaders of Risky Colleges Personally Liable*, Dep't of Educ. (Mar. 2, 2023), https://www.ed.gov/news/press-releases/education-department-takes-steps-hold-leaders-risky-colleges-personally-liable.

Applicants are three educational institutions that were named in and gratuitously maligned by the settlement, denied basic due process and stripped of their administrative rights, and exposed to new liability for the cancelled loans. Applicants intervened in the district court to protect their rights, but the district court subsequently overruled their objections and entered judgment anyway. They have sought orderly appellate review, but the Department has announced it will effectuate the settlement immediately, rather than on the year-plus timeframe established by the settlement. Accordingly, the schools seek a stay pending a writ of certiorari.

OPINIONS BELOW

The district court issued an order granting final settlement approval, 2022 WL 16966513 (App. 29a–53a), and an order granting final judgment (App. 54a) on November 16, 2022. The district court denied a stay pending appeal on February 24, 2023. App. 4a–28a. The Ninth Circuit denied a stay pending appeal on March 29, 2023. App. 1a–3a.

JURISDICTION

This Court, or any Justice thereof, has jurisdiction to issue a stay pending the filing and disposition of a petition for a writ of certiorari under 28 U.S.C. §§ 1651(a) and 2101(f), and Rules 22 and 23 of this Court.

STATEMENT OF THE CASE

I. Federal Student Loans And Borrower Defense

Under Title IV of the HEA, 20 U.S.C. § 1070 *et seq.*, the Secretary administers student-loan programs, including the Direct Loan Program, which issues loans from the federal government, and the FFEL Program, which, until 2010, allowed students to obtain private loans guaranteed by the federal government. For Direct Loans, the Secretary must "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment." *Id.* § 1087e(h). The Department has done so four times. 60 Fed. Reg. 37,768 (July 21, 1995); 81 Fed. Reg. 75,926 (Nov. 1, 2016); 84 Fed. Reg. 49,788 (Sept. 23, 2019); 87 Fed. Reg. 65,904 (Nov. 1, 2022). The regulations establish a "borrower-defense" program allowing Direct Loan borrowers to obtain debt cancellation if they prove their school engaged in certain misconduct.

The borrower-defense process proceeds in two steps. In Step One, the Department must provide notice to the school of a borrower-defense claim. 34 C.F.R. §§ 685.206(c)(2), (e)(10), 685.222(e)(3)(i). For loans issued before July 1, 2020, the Department must "conside[r] … [a]ny response or submissions from the school." *Id.* § 685.222(e)(3)(i). A Department official then adjudicates the applications "through a fact-finding process" and issues a written decision. *Id.* § 685.222(e)(3)–(4). For loans issued after July 1, 2020, the Department must "provide a copy" of the application to the school, affirmatively "invite the school to respond and to submit evidence" in its defense, *id.* § 685.206(e)(10), and "conside[r]

… the school's response," *id.* § 685.206(e)(11)–(12). The Department then must issue a written decision with reasoning. *Id.* Step Two occurs only if—after a Step-One adjudication—the Department finds a school engaged in misconduct, grants a borrower-defense application, and discharges debt. In Step Two, the Department may initiate proceedings to recover the discharged amount from the school. *See id.* §§ 685.206(c)(3), (e)(16), 685.222(e)(7).

Regardless of whether the Department engages in a Step-Two recoupment proceeding, the Step-One findings can form the predicate for significant programmatic, financial, and reputational consequences, such as fines and limitations, suspensions, or terminations of a school's right to participate in federal aid programs. *See* C.A.App. 376–77 (Declaration of Benjamin Miller) (citing 34 C.F.R. §§ 668.81–.99); *see also* 20 U.S.C. § 1099c(c); 34 C.F.R. §§ 668.15, 668.171.[2]

II. This Lawsuit

In 2019, borrowers sued the Department, alleging that a "policy of inaction" on their borrower-defense applications constituted "unlawfully withheld and unreasonably delayed agency action" under the APA, 5 U.S.C. § 706(1). C.A.App. 48, 102–05 ¶¶ 7, 377–404. Plaintiffs were explicit in describing the relief they sought (and did not seek):

> Plaintiffs … do not ask this Court to adjudicate their borrower defenses. Nor do they ask this Court to dictate how the Department should prioritize their pending borrower defenses. Their request is simple: they seek an order

[2] "C.A.App." refers to the appendix in the court of appeals. Dkts. 13-2, 13-3, *Sweet v. Cardona*, No. 23-15049 (9th Cir. Feb. 27, 2023). "App." refers to the appendix filed in this Court concurrently with this application.

> compelling the Department to start granting or denying their borrower defenses and vacating the Department's policy of withholding resolution.

C.A.App. 48–49 ¶ 10. Plaintiffs reiterated this position in moving to certify a Rule 23(b)(2) class, stating they sought "a single injunction requiring the Department to start and to continue adjudicating borrower defenses." Reply in Support of Motion to Certify Class at 6, *Sweet v. Cardona*, No. 3:19-cv-03674 (N.D. Cal. Oct. 1, 2019), Dkt. 42. Because "*the Department ha[d]*"—at the time—"*decided zero applications since June 2018*," the district court certified the following Rule 23(b)(2) class:

> All people who borrowed a Direct Loan or FFEL loan to pay for a program of higher education, who have asserted a borrower defense to repayment to the U.S. Department of Education, whose borrower defense has not been granted or denied on the merits, and who is not a class member in *Calvillo Manriquez v. DeVos*, No. 17-7106 (N.D. Cal.).

App. 62a, 68a. That definition applies "for all purposes, *including settlement*." App. 68a (emphasis added). The Class includes about "264,000 Class Members who received more than an estimated $7.5 billion" in loans. C.A.App. 205.

After a failed settlement attempt in 2020, Plaintiffs supplemented their complaint with claims that the Department had adopted an unlawful "presumption of denial" policy. C.A.App. 195–97 ¶¶ 436–455. Plaintiffs sought an order declaring class members "are entitled to a decision, on the merits," and that form denials are invalid and compelling the Department "to lawfully adjudicate each and every borrower defense application." C.A.App. 198–99.

On June 22, 2022, the parties filed a Joint Motion for Preliminary Approval of Settlement. C.A.App. 201. Attached thereto was a fully executed settlement agreement. App. 69a–108a. Nearly simultaneously, on June 23, the Department

filed a summary judgment motion. C.A.App. 304. The Department represented that it "has already provided the very relief that Plaintiffs sued to obtain," that there is no longer a basis for the court to grant class-wide relief, and argued that Plaintiffs' class claim challenging the Department's alleged inaction "must be dismissed." C.A.App. 314–15; *see also* C.A.App. 348 (approximately 106,000 borrower-defense applications approved since February 2017).

III. The Settlement

Despite the district court's certification of only an indivisible injunctive class, the settlement creates three subclasses and provides injunctive or monetary relief to each. Although Plaintiffs sought only to restart adjudication and rescind alleged "form" denials, the settlement sweeps far more broadly. It proceeds as follows:

A. Sub-class 1: "Automatic Relief Group"

Within twelve months of final judgment, for Class Members who have debt "associated with" schools listed on Exhibit C to the settlement, the Department will, among other things, automatically: (i) "discharge" the debt, and (ii) refund "all amounts … previously paid to the Department." App. 72a (Definition "S"), 74a–75a. If there is a "substantial question" as to whether debt "is associated with" a listed school, that "question will be resolved in favor of the Class Member (*i.e.*, in favor of granting relief)" without any further process. App. 75a. The parties estimate that 75% of the Class (200,000 borrowers) will receive this automatic debt cancellation and refunds without individualized adjudication of their claims. App. 33a.

Exhibit C lists 151 institutions. The settlement offers no explanation as to why any school is on the Exhibit C list, but the motion seeking preliminary approval offered a single sentence of explanation:

> [B]ecause the Department has identified common evidence of institutional misconduct by the schools, programs, and school groups identified in Exhibit C to the Agreement, it has determined that every Class Member whose Relevant Loan Debt is associated with those schools should be provided presumptive relief under the settlement due to strong indicia regarding substantial misconduct by the listed schools, whether credibly alleged or in some instances proven, and the high rate of class members with applications related to the listed schools.

C.A.App. 220–21. The motion for final approval added that Exhibit C "was created based on information available to the Department at the time the agreement was executed regarding demonstrated or credibly alleged misconduct, as well as a review of the comparative rate of Class Members with applications concerning the listed schools." C.A.App. 412. After preliminary approval, Plaintiffs and the Department removed some schools from Exhibit C that "were erroneously included" due to unexplained "clerical errors" and added a new school. C.A.App. 381.

B. Sub-class 2: "Decision Group"

For Class Members not associated with an Exhibit C school—about 68,000 borrowers, C.A.App. 206—the settlement establishes a new "review" process not found in any operative borrower-defense rule. The "review" requires a series of presumptions that essentially guarantee a finding of wrongdoing by any accused school and, thereafter, debt cancellation and refunds. As a result of these presumptions, a borrower's claim cannot be denied for (1) false allegations, (2) insufficient evidence, (3) lack of reliance, or (4) untimeliness. App. 75a–76a.

C. Sub-class 3: "Post-Class Applicants"

Finally, the settlement creates a third sub-class of "Post-Class Applicants," which includes any person who "submits a borrower defense application after the Execution Date … but before the Final Approval Date." App. 79a. In other words, the settlement created an avenue to encompass any person who held a federal student loan, and the settling parties spent months recruiting people to enter this sub-class. *See* C.A.App. 414 (detailing these efforts). The Department has represented that this "post-class" class "consists of approximately 250,000 applications from approximately 206,000 borrowers who attended approximately 4,000 schools." Response at 1, *Sweet*, No. 3:19-cv-03674 (N.D. Cal. Feb. 16, 2023), Dkt. 380. The "post-class" class therefore affects the rights of nearly *three-quarters* of the approximately 5,500 institutions of higher education that receive Title IV funds. School Data, Federal Student Aid, https://studentaid.gov/data-center/school (last visited Apr. 2, 2023). For Post-Class Applicants, the settlement requires the Department to "review" their applications pursuant to the standards established in the 2016 Rule, even though the borrower-defense regulations normally require different standards for many of these applications. App. 79a. If the Department does not complete the "review" within thirty-six months, the Department must cancel the applicant's debt and refund prior payments, regardless of the application's merits. *Id.* So, within three years, the Department can unilaterally cancel federal student-loan debt—and refund prior payments—by simply not

acting.[3]

IV. "Exhibit C" Schools Intervene And Object To Settlement

After the parties lodged the settlement, four educational institutions ("Intervenors") listed on Exhibit C moved to intervene of right or permissively. The district court granted permissive intervention on the condition that Intervenors could not seek discovery regarding the Department's Exhibit C determination or the settlement process generally. C.A.App. 390–91.

The settling parties moved for final approval of the settlement. C.A.App. 392. Intervenors filed objections, arguing that the court could not approve the settlement because, among other reasons: (1) class certification could no longer be maintained; (2) the Department did not have statutory authority to agree to the relief in the settlement; (3) the Department would violate the APA by entering into and effectuating the settlement; and (4) the settlement violates Intervenors' due process rights. The district court overruled all objections and granted final approval of the settlement. App. 53a. Three Intervenors (the Applicants here) timely appealed to the Ninth Circuit, C.A.App. 42, and that court consolidated the appeals.

Applicants jointly moved the district court to stay effectiveness of its final judgment pending appeal. C.A.App. 42. Applicants submitted supplemental declarations detailing the regulatory, reputational, financial, and programmatic

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[3] The district court estimated it would take "*more than twenty-five years*" for the Department to process 443,000 borrower defense applications. App. 39a. That same reasoning means it will take the Department twelve years to review the 250,000 applications that poured in from Post-Class Applicants.

harms they would face—and were already beginning to experience—as a result of the settlement. App. 120a–31a. That evidence included that: (1) the Federal Trade Commission had publicized "the list of schools included in the *Sweet* settlement" to solicit more borrower-defense applications, App. 122a–23a; (2) Lincoln had been denied an opportunity to speak with a class at a Nevada high school because of its inclusion on Exhibit C, App. 121a–22a; (3) Lincoln had to describe this litigation as a material risk in its financial reporting with the Securities and Exchange Commission, App. 124a; and (4) Everglades has faced additional scrutiny, and denials, from financial partners due to questions about Everglades's inclusion on Exhibit C, App. 128a.

Under the settlement, the Department has one year from the "Effective Date" (January 28, 2023) to provide relief to the Automatic Relief Subclass. App. 71a, 74a. Nevertheless, the Department announced—at a status conference on January 26, 2023—that, on January 30, 2023, it would instruct loan servicers to "start performing discharges" for "about 99-percent of borrowers in Exhibit C." January 26 Hearing Tr. 5:24–6:6, *Sweet*, No. 3:19-cv-3674 (N.D. Cal.), Dkt. 360. The district court ordered the Department not to take any action until the court ruled on Intervenors' motion to stay. C.A.App. 43.

Despite Applicants' detailed showing of harm, on February 24, the district court denied a stay. App. 27a–28a. The court reasoned that Applicants had not shown "likely" regulatory or reputational harm "that a stay would counteract."

App. 21a. On the merits, the court "st[ood] by its analysis" in approving the settlement. App. 24a.

Applicants then sought a stay from the Ninth Circuit. Plaintiffs and the Department opposed, and Plaintiffs cross-moved to dismiss for lack of Article III standing. On March 29, the Ninth Circuit summarily denied a stay because "Appellants fail to demonstrate a sufficient probability of irreparable harm." App. 3a (Tashima, J., S.R. Thomas, J., Koh, J.). The court also denied the cross-motion to dismiss without prejudice.

Applicants now seek a stay from this Court.

REASONS FOR GRANTING THE STAY

A stay pending the filing and disposition of a petition for a writ of certiorari is appropriate where there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). In addition, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* These factors strongly favor a stay here.

I. There Is A Reasonable Probability This Court Will Grant Review And A Fair Prospect That The Court Will Reverse The Judgment.

In *Nebraska* and *Brown*, this Court granted certiorari before judgment to consider whether the Secretary's program to provide blanket cancellation of federal student loans is statutorily authorized and was adopted in a procedurally proper

manner. *See Dep't of Educ., et al. v. Brown, et al.*, No. 22-535 (U.S. Dec. 12, 2022); *Biden, et al. v. Nebraska, et al.*, No. 22-506 (U.S. Dec. 1, 2022). Under that program, the Secretary claims the HEROES Act authorizes him to cancel student loan debt during a "national emergency," such as a respiratory pandemic. Here, the Secretary goes even further, claiming that a national emergency is not necessary at all because the HEA broadly authorizes him—at any time and for any reason—to cancel federal student-loan debt, and refund prior payments on that debt, *en masse* and outside the borrower-defense regulations. This case involves more than a half million student loans associated with thousands of schools across the country, but the Secretary's claimed power has no limit—extending to any federal student loan for which the government holds a right to repayment. The Secretary has even argued that this power is "presumptively unreviewable." C.A.App. 418 (citation omitted). As in *Nebraska* and *Brown*, therefore, the question here is one of vast economic and social importance and warrants this Court's review.

Additionally, the Department asserted this sweeping authority by settling an APA class action, certified under Rule 23(b)(2), to award billions in monetary relief. Approval of this settlement flouts this Court's precedents and deepens a split of authority in the lower courts about whether monetary relief in the form of "restitution," App. 49a, is ever appropriate for Rule 23(b)(2) classes. The government is racing to discharge all loans in the class before appellate review can occur. A stay is therefore needed to preserve this Court's certiorari jurisdiction.

A. The HEA Does Not Grant The Secretary Authority To Cancel Student-Loan Debt *En Masse*.

The Secretary claims that the HEA grants him power to cancel student debt *en masse* and refund all prior payments on such debt. Critically, the Secretary's claimed authority is not cabined to this APA case or to settlements of borrower-defense claims pending in the agency. Instead, the power the Secretary claims to justify his actions here would allow him to nullify *$1.6 trillion* in federal loans and to spend untold trillions more in refunding past payments on those loans.[4]

As the district court held in *Brown*, an agency's claim of power over an issue of such "vast 'economic and political significance'" falls under the "major-questions doctrine" and requires the government to show "'*clear* congressional authorization.'" 2022 WL 16858525, at *11–12 (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–14 (2022)) (emphasis added). The Secretary has not pointed to any "clear" language authorizing the asserted authority. Indeed, for more than fifty years, no Secretary of Education asserted the "breathtaking amount of authority," *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam), the Secretary has now discovered in the HEA. And the Secretary does not—and cannot—identify any "limit" to the power he now claims. *Id.*

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[4] *See* U.S. Dep't of Educ., Federal Student Loan Portfolio, Summary, https://studentaid.gov/data-center/student/portfolio (reporting that, at the end of the first quarter of 2023, 43.8 million borrowers owed $1.635 trillion in outstanding principal and interest on federal student loans). Even on its own terms, the settlement encompasses a "staggering number" of borrowers, App. 39a, and at least $7.5 billion of debt owed to American taxpayers (an amount that has probably doubled by the influx of applications from "Post-Class Applicants"), C.A.App. 205. As the Department admits, Response to Motion for Stay Pending Appeal at 1, *Sweet v. Cardona*, No. 23-15049 (9th Cir. Mar. 9, 2023), Dkt. 14, this is a "massive" class action.

The Secretary has contended that two subsections of the HEA work in concert to vest him with the sweeping power to cancel federal student loans and refund prior payments on such loans. First, the Secretary has invoked subsection 1082(a)(6), which states: "In the performance of, and with respect to, the functions, powers, and duties, vested in him *by this part*, the Secretary may … enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption." 20 U.S.C. § 1082(a)(6) (emphasis added). Second—because "this part" is Part B of the HEA, *id.* §§ 1071–1087-4, which addresses only FFEL Loans and not Direct Loans (Part D)—the Secretary has invoked 20 U.S.C. § 1087e(a)(1) in an attempt to exert authority to forgive Direct Loans.[5] Subsection 1087e(a)(1) states that Direct Loans "shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers" under Part B. But these subsections—read separately or together—do not grant the vast power the Secretary claims.

1. Subsection 1087e(a)(1) Does Not Incorporate Subsection 1082(a)(6).

In briefing below, the Secretary failed to explain how his general "functions, powers, and duties" in Section 1082 constitute "terms, conditions, and benefits" of

[5] "[T]he vast majority" of loans "at issue here" are "[D]irect [L]oans." Preliminary Approval Hearing Tr. 14:10–12, *Sweet*, No. 3:19-cv-03674-WHA (N.D. Cal. Aug. 4, 2022), Dkt. 311. Likewise, most of the Department's outstanding loan debt is in the form of Direct Loans, not FFEL Loans. *See* U.S. Dep't of Educ., Federal Student Aid Portfolio Summary, https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls (by the end of Q1 2023, 38.3 million borrowers owed $1.4 trillion for Direct Loans, while 8.8 million borrowers owed $197 billion in FFEL loans).

Part B loans. Instead, the Secretary insisted that his "functions, powers, [and] duties" are "inextricably intertwined with the indisputable terms and conditions governing repayment." Response to Motion for Stay Pending Appeal at 17, *Sweet*, No. 23-15049 (9th Cir. Mar. 9, 2023), Dkt. 14. But these phrases are not equivalent, and the HEA itself specifically defines the "terms and conditions" of FFEL loans in *other* subsections of Part B. *See*, *e.g.,* 20 U.S.C. § 1077 ("terms of federally insured student loans"); *id.* § 1078-2(a)(2) ("Terms, conditions, and benefits" of Federal Plus Loans); *id.* § 1078-3(b)(4) ("Terms and conditions" of Consolidation Loans); *id.* § 1078-8 ("terms and conditions" of Unsubsidized Stafford Loans). These provisions include, among other things: specific terms and conditions addressing to whom loans can be made, *id.* § 1077(a)(1); how they can be made, *id.* § 1077(a)(2); how long they can last, *id.*; when repayment must begin, *id.* § 1077(a)(2)(B); minimum annual repayment amounts, *id.* § 1077(c); applicable interest rates, *id.* § 1077a; the option for graduated or income-sensitive repayment, *id.* § 1077(a)(2)(H); when "installments of principal need not be paid," *id.* § 1077(a)(2)(C); and how borrowers can pay early without penalty, *id.* § 1077(a)(2)(F). These are the "[t]erms and conditions" incorporated into Part D by 20 U.S.C. § 1087e(a)(1), not the Secretary's "General powers." Indeed, if the Secretary's "General powers" in Section 1082 were loan "terms," it would lead to absurd conclusions, including that the Secretary's "power[] … [to] prescribe … regulations," *id.* § 1082(a)(1), constitutes a loan "term." In short, the HEA simply has no "language incorporating into Part D the

Secretary's 'general powers' … of Section 1082, from Part B." *Pa. Higher Educ. Assistance Agency v. Perez*, 416 F. Supp. 3d 75, 96 (D. Conn. 2019).[6]

2. Subsection 1082(a)(6) Is A General Provision That Must Be Read In The Context Of More Specific And Limited Authorizations.

Even if subsection 1082(a)(6) is interpreted (wrongly) to apply to Direct Loans, it does not provide authority for blanket debt cancellation of Direct or FFEL Loans. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia*, 142 S. Ct. at 2607. And "[i]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). This canon applies "to statutes such as the one here," where "Congress has enacted a comprehensive scheme" in which "a general authorization" and "more limited, specific authorization[s] exist side-by-side." *Id.* In such a situation, the "general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Id.* at 646 (brackets omitted). This result "avoids … the superfluity of a specific

[6] During the pendency of this litigation, the Department explicitly disclaimed the interpretation the Secretary now adopts. *See* Mem. from Principal Deputy Gen. Counsel, U.S. Dep't of Educ., to Sec'y of Educ. at 4 & n.3 (Jan. 12, 2021) ("the Secretary's general power to compromise or waive claims under the FFEL program is neither a term nor a condition nor a benefit of FFEL program loans"). Although the Department conveniently rescinded this memorandum after Intervenors cited it to the district court, the Department purportedly did so based on disagreement with the memorandum's treatment of the HEROES Act, not its conclusions with respect to subsection 1082(a)(6) of the HEA. *See* 87 Fed. Reg. 52,943 (Aug. 30, 2022). At any rate, "when the government … speaks out of both sides of its mouth, no one should be surprised if its latest utterance isn't the most convincing one." *Bittner v. United States*, 143 S. Ct. 713, 722 n.5 (2023).

provision that is swallowed by the general one," which would violate "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *Id.* at 645; *see also Corley v. United States*, 556 U.S. 303, 314 (2009). The Secretary's reading of subsection 1082(a)(6) violates these cardinal rules of statutory interpretation.

First, subsection 1082(a)(6) is a summary grant of "General powers" tied to the Secretary's "performance of … the functions, powers, and duties, vested in him by this part." In other words, the Secretary's ability to compromise claims is limited to "the performance of … powers[] and duties[] vested in him by" Part B of the HEA. And Part B specifically delimits the circumstances under which the Secretary has the power or duty to cancel FFEL Loans. To read subsection 1082(a)(6) as providing the power to grant full discharge in *every* circumstance would render meaningless the specific authorizations provided in these subsections. Specifically:

- Part B delineates only five circumstances in which the Secretary may discharge loans in full based on: (1) the borrower's death or total disability, 20 U.S.C. § 1087(a), (d); (2) the borrower's bankruptcy, *id.* § 1087(b); (3) the school's closure, *id.* § 1087(c); (4) the school's false certification of the student as student-loan eligible, *id.*; or (5) the school's failure to pay refunds to the lender, *id.*
- Part B authorizes *partial* discharge pursuant to carefully delineated terms, conditions, and amounts. *See, e.g.*, 20 U.S.C. § 1078-10(c)(1) ($5,000 for teachers broadly); *id.* § 1078-10(c)(3) ($17,500 for teachers in

math, science, or special education); *id.* § 1078-11(b)(1)–(18) ($10,000 for, among others, early childhood educators, nurses, foreign-language specialists, librarians, "highly qualified" teachers, child-welfare workers, speech-language pathologists and audiologists, school counselors, public-sector employees, nutrition professionals, other health and educational professionals); *id.* § 1078-12(d)(3) ($40,000 for legal-aid attorneys).

- Part B also authorizes the Secretary to pay some interest payments for students who meet certain conditions, such as a school's documentation of their need for a loan based on various factors. *See* 20 U.S.C. § 1078.

The Secretary's claimed authority to provide not just $10,000, $17,500, or $40,000 in debt relief for some professions, or full relief in a handful of circumstances, but *full* discharge in *all circumstances*—and refunds of past payments—renders these carefully calibrated grants of specific authority impermissibly superfluous.

Second, Congress carefully planned for the delimited discharges it has authorized. Congress pledged "[t]he full faith and credit of the United States … to the payment of all amounts which may be required" under the full-discharge provisions of Section 1087. 20 U.S.C. § 1075(b)(4). Congress appropriated funds for each of these full-discharge scenarios. *See id.* § 1071(b)(2). And Congress mandated that FFEL loans include terms allowing the Secretary to discharge them under Section 1087. *See id.* § 1077(a)(2)(E). Congress did *none* of this for the boundless discharges that the Secretary claims are permitted by subsection 1082(a)(6). The absence of such congressional planning indicates that no discharges were expected,

or authorized, beyond those specifically delineated in Part B. "When Congress includes particular language in one section of a statute but omits it from a neighbor," the Court "normally understand[s] that difference in language to convey a difference in meaning." *Bittner*, 143 S. Ct. at 720.

Third, the Secretary's interpretation also would render some Part B provisions "nonsensical." *Corley*, 556 U.S. at 314. Consider 20 U.S.C. § 1078-1. That section allows the Secretary to "waive or modify" certain requirements relating to the Department's agreements with loan-guaranty agencies, but explicitly directs that "the Secretary may not waive … any statutory requirement pertaining to the terms and conditions attached to student loans." *Id.* § 1078-1(a)(1)(A). This prohibition makes no sense if the Secretary has the power to discharge those same loans under subsection 1082(a)(6). Or take 20 U.S.C. § 1082(i), which conditions the Secretary's authority to sell defaulted loans on his first exhausting "all other collection efforts." This condition makes no sense if the Secretary may unconditionally discharge that same defaulted loan.

Fourth, Part D provides specific authority to the Secretary for discharging Direct Loans. *See, e.g.*, 20 U.S.C. § 1087e(m) (full discharge for public-service employees); *id.* § 1087j(c) ($5,000 for teachers broadly and $17,500 for math, science, and special-education teachers); *id.* § 1087e(*l*) (covering interest for active service members). As with Part B, the Secretary's reading of subsection 1082(a)(6)—through subsection 1087e(a)(1)—to authorize him to fully discharge *all* Direct Loans for *any* reason renders these more specific Part-D discharge

authorizations superfluous. And it creates other absurdities, purporting to allow, for example, the Secretary to cancel the underlying principal on Direct Loans while the Secretary can reduce interest rates on these loans only if "cost neutral" to the federal government, 20 U.S.C. § 1087e(b)(9)(A). Similarly, Congress has prevented the Secretary from buying or selling Direct Loans at a cost to the federal government, *id.* §§ 1087i, 1087i-l, but the Secretary's claimed authority would allow him to discharge those same loans for free. Other examples abound. *E.g.*, *id.* § 1087e(d)(4) (authorizing alternative repayment plans only if they do not "exceed the cost to the Federal Government" compared to normal plans); *id.* § 1087h(c) (prohibiting payment for administrative expenses without submitting to Congress "a detailed description of the specific activities for which" payments will be made).

Fifth, the Department's view of subsection 1082(a)(6) of the HEA cannot be squared with its view of the HEROES Act in *Nebraska* and *Brown*. There, the Secretary contends that the HEROES Act provides him with blanket debt-cancellation authority in cases of national emergency. Petrs. Br. at 34–57, *Biden v. Nebraska*, No. 22-506 (U.S. Jan. 4, 2023). But if subsection 1082(a)(6) already authorized the Secretary to cancel loans *en masse* at *any time*, there was no need for Congress to authorize such power only during specific national emergencies, or for the Secretary to have invoked the HEROES Act to "issu[e] waivers and modifications to the [death, bankruptcy, and school-closure] provisions of 20 U.S.C. 1087," Joint Appendix at 261, *Biden v. Nebraska*, No. 22-506 (U.S. Jan. 4, 2023).

* * *

Statutory subsections cannot be read "in a vacuum." *Abramski v. United States*, 573 U.S. 169, 179 (2014). When considered in relation to the rest of the HEA, the Department's claimed authority under subsection 1082(a)(6) to discharge any and all student debt plainly is unauthorized and must be rejected.[7]

3. Even If The HEA Grants The Secretary The Power To Cancel Student Loans And Refund Prior Payments *En Masse*, He Cannot Establish Such A Program Without Valid Rulemaking.

The Secretary supposedly established a new "framework" for "resolving" more than half a million student loans. Response to Motion for Stay Pending Appeal at 19, *Sweet*, No. 23-15049 (9th Cir. Mar. 9, 2023), Dkt. 14.[8] For sub-classes 2 and 3 (the Decision Group and Post-Class Applicants), this "framework" establishes an entirely new adjudication process, complete with borrower-friendly presumptions and resurrected standards from superseded rules. Sub-class 1, the Automatic Relief subclass, is even more mysterious. The new adjudication "framework" for this group involved the Department engaging in secret, *ex parte* meetings with

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[7] In the Ninth Circuit, the Secretary vaguely asserted general "authority to provide discharges and refunds to borrowers who have made borrower-defense claims." Response to Motion for Stay Pending Appeal at 16, *Sweet*, No. 23-15049 (9th Cir. Mar. 9, 2023), Dkt. 14. But that authority is exercisable only as "specif[ied] in regulations." 20 U.S.C. § 1087e(h). The Secretary conceded he is *not* proceeding under borrower-defense regulatory authority. *See* Response to Motion for Stay Pending Appeal at 10–11, *Sweet*, No. 23-15049 (9th Cir. Mar. 9, 2023), Dkt. 14 (the settlement's "purpose" is to "avoid" "individualized adjudications contemplated by the borrower-defense regulations").

[8] The Secretary argued below that the debt-cancellation program he has established here is merely a settlement of the claims in this case. *See, e.g.*, Response to Mot. for Stay Pending Appeal 16, *Sweet*, No. 23-15049 (9th Cir. Mar. 9, 2023). But this was an APA case presenting a claim of unlawful delay under 5 U.S.C. § 706(1), and the borrower-defense claims at issue were *separate* claims proceeding inside the agency. *See* Complaint at 2–3, *Sweet*, No. 3:19-cv-03674-WHA (N.D. Cal. June 25, 2019), Dkt. 1. And the Secretary was not authorized to grant monetary relief for an APA claim. *See* 5 U.S.C. § 702 (waiving sovereign immunity only for "relief other than money damages").

claimants' counsel, after which the Department "determined" that 151 schools (give or take, based on "clerical errors") engaged in "substantial misconduct" warranting immediate monetary relief. Even if the HEA granted the Secretary the authority to establish a program of *en masse* loan cancellation and refunds—and the major-questions doctrine confirms Congress did not—at minimum, creation of such a far-reaching, detail-laden program would require formal rulemaking.

First, under the APA, notice-and-comment rulemaking was required because the new "framework" is a legislative "rule." 5 U.S.C. § 551(4). Specifically, the "framework" has the "'force and effect of law,'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015), and "'affect[s] individual rights and obligations'" to repay debts, *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). The "framework" also amends "existing regulations" that permit loan cancellation only in limited circumstances. *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995).

Second, under the HEA, negotiated rulemaking was required because the "framework" is a regulation that "pertain[s]" to Title IV, the subchapter governing student loans. 20 U.S.C. § 1098a(b)(2). Indeed, when promulgating other regulations authorizing debt cancellation, the Department has used traditional procedures. For example, one Department rule governs the "discharge of loans due to death, total and permanent disability, attendance at a school that closes, false certification … and unpaid refunds." 34 C.F.R. § 682.402(a)(1). This rule was promulgated and amended through negotiated rulemaking and notice-and-

comment. *See, e.g.*, 81 Fed. Reg. at 75,933–34, 76,079–80; 67 Fed. Reg. 67,048, 67,050, 67,079–80 (Nov. 1, 2002); 64 Fed. Reg. 58,938, 58,940, 58,960 (Nov. 1, 1999).

Third, specifically with respect to borrower defense, the HEA states that the Secretary may "specify *in regulations*" the process for "assert[ing] … a defense to repayment of a loan." 20 U.S.C. § 1087e(h) (emphasis added). The Department promulgated such rules, 34 C.F.R. §§ 685.206, .222, and the Secretary must follow them—or amend them through proper rulemaking. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 748 (2004).

B. The District Court's Refusal To Decertify The Class Independently Warrants Review.

The Class here was certified under Rule 23(b)(2), App. 66a–67a, which "applies only when a *single* injunction or declaratory judgment would provide relief to *each* member of the class," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (emphases added). Rule 23(b) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.* at 360–61. Those blackletter principles remain "undiluted," and indeed, demand "even heightened, attention in the settlement context." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 849 (1999).

At the time of certification, Plaintiffs merely sought an injunction forcing the Department to adjudicate their borrower-defense claims—a typical Rule 23(b)(2) request. But between certification and settlement the suit morphed entirely, and

the settlement both discharges debts and provides individualized refunds to the Automatic Relief subclass. *Wal-Mart* does not permit that result.

The district court reasoned that discharge of debts and class member "refunds are restitution" that "fall[s] within the relief available in an injunction/declaratory relief action." App. 49a. But that premise is wrong. By its terms, Rule 23(b)(2) extends to "final injunctive relief or corresponding declaratory relief"—not to *any* kind of equitable relief, including restitution.

The district court's outlier holding deepens a split of authority in the lower courts. The Fourth and Seventh Circuits have squarely held that even "equitable" restitution is not permitted under Rule 23(b) where it takes the form of monetary relief. *Thorn v. Jefferson–Pilot Life Ins. Co.*, 445 F.3d 311, 331–32 (4th Cir. 2006); *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 825 (7th Cir. 2011) (rejecting the premise that "a class action suit may be maintained under Rule 23(b)(2)" if only "equitable" "monetary" relief is sought). The Third Circuit, by contrast, has not foreclosed the possibility that a Rule 23(b)(2) class may seek restitution, except when pursued as a disguise "for money damages." *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1008 (3d Cir. 1986); *see Sourovelis v. City of Philadelphia*, 320 F.R.D. 12, 28 (E.D. Pa. 2017) (certifying Rule 23(b)(2) class that sought "restitution" in the form of "return of property … including cash" under Third Circuit precedent). Here, the awarded debt cancellation and refund payments are nowhere near an injunction and serve effectively as individualized monetary damages.

II. Applicants Will Suffer Irreparable Harm In The Absence Of A Stay.

Denial of a stay would irreparably harm Applicants. If the settlement is fully effectuated, it would become impossible to unwind its many harms if the final judgment is later vacated. The Court thus should temporarily preserve the status quo to safeguard its "ability to render a meaningful decision on the merits." *Doe #1 v. Trump*, 957 F.3d 1050, 1068 (9th Cir. 2020); *accord Houchins v. KQED, Inc.*, 429 U.S. 1341, 1346 (1977) (Rehnquist, J., in chambers) ("[T]he preservation of th[e] status quo is an important factor favoring a stay.").

A. Schools listed on Exhibit C are suffering and will suffer irreparable reputational injury if the settlement remains in effect. Being publicly branded a presumptive wrongdoer by one's primary federal regulator based on undisclosed evidence (or no evidence at all)—without any opportunity to defend oneself—seriously damages a school's reputation and goodwill, resulting in "irreparable harm," *adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 756 (9th Cir. 2018); *cf. Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (discussing injury to "a person's good name, reputation, honor, or integrity" from government "[p]osting" of notice forbidding sales of alcohol to the individual); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 140–41 (1951) (discussing "injury" and "right" of "a bona fide charitable organization to carry on its work, free from defamatory statements [in the form of publication on a 'Communist' list by the Attorney General]").

This injury can manifest immediately or subtly over time, as when community or business partners quietly discontinue their relationships with

schools, prospective students look elsewhere for their educations, or employers distance themselves from a school's graduates. App. 123a. These consequences are of vital concern to schools. Applicants have worked for decades to build relationships with secondary schools, community leaders, employers, and business partners; Exhibit C directly damages those relationships in ways that often cannot be repaired. Such harm is "self-evident." *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 908 (2d Cir. 1990). And it has already begun.

For example, six months after Exhibit C was released, a teacher at Centennial High School in Nevada—a school with which Lincoln has had a longstanding relationship—denied Lincoln an opportunity to speak with a class specifically because of Exhibit C. The teacher's email stated:

> It is my understanding that Lincoln Tech is on the U.S. Department of Ed's list of predatory schools. I no longer feel comfortable taking class time to have your people talk to my students.

App. 122a ¶ 4. As a result, the Lincoln representative did not speak to the class, and both Lincoln and the students lost an invaluable opportunity to connect about career opportunities. *Id.* The email draws a "direct connection" between inclusion on Exhibit C and programmatic harm to schools, *id.* ¶ 5, showing how schools are harmed by effectuating a settlement that unjustly maligns them as wrongdoers.

Further, financial partners have altered due diligence and lending patterns because of the settlement. *See* App. 129a. Everglades' financial partners, for example, have requested diligence on the settlement or refused to extend credit because of the settlement, *id.*, and have made further requests since proceedings on the stay motion began, Berardinelli Decl. ¶ 8, *Sweet*, No. 23-15049 (9th Cir. Feb. 27,

2023), Dkt. 13-4. Lincoln, a public company, has also incurred new burdens from financial reporting and harm to shareholder relations as a result of reporting this settlement in its financial statements. App. 124a.

Plaintiffs, the government, and third-party activists also have used Exhibit C to damage schools' reputations. For example, Plaintiffs' counsel recently wielded the Department's purported "determination" of wrongdoing as a cudgel to sabotage a business opportunity by a listed school. *See* Berardinelli Decl. Ex. A at 1–2, *Sweet*, No. 23-15049 (9th Cir. Feb. 27, 2023), Dkt. 13-4 (letter sent by Plaintiffs' counsel and other activist organizations to the University of Arkansas' Board of Trustees, touting Department's "determination" of "strong indicia regarding substantial misconduct" against a listed school in an effort to block its potential acquisition by an entity affiliated with the University of Arkansas). The Federal Trade Commission publicized several schools it had sued "for their allegedly deceptive practices" (App. 123a, 126a) in its solicitation of new borrower-defense claims against *all* Exhibit C schools, thereby maligning all listed schools. And activists leveraged Lincoln's inclusion on Exhibit C to pressure and criticize the Department for recently renewing Lincoln's Program Participation Agreement—which is necessary for receipt of Title IV funding. Dkt. 350-1 at 10–11, *Sweet*, No. 3:19-cv-03674 (N.D. Cal. Jan. 13, 2023). These attacks capitalize on the absence of an administrative record showing that the borrower-defense claims are meritless—a key means for schools to defend themselves in the public arena. All of this evidence

concretely demonstrates public perception that Exhibit C is a government-approved list of bad actors. The attacks will only intensify if the judgment remains in effect.

Plaintiffs are expected to argue the Applicants deserve these consequences because they are supposedly bad actors, but the record does not support that claim. In fact, the scant administrative record made available in this case *refutes* the claims of wrongdoing. In the only record document related to Everglades, the Department said it reviewed "a sample of 50 applications" and concluded it "has not identified evidence that suggests that the Everglades is participating in … activity that would support borrower defense discharges." Dkt. 193-3 at 41, *Sweet*, No. 3:19-cv-03674 (N.D. Cal. Mar. 18, 2021). The Department also submitted an exhibit to identify any "final determinations" that certain schools had "engaged in fraudulent conduct for which borrower defense relief may be granted," and identified "None" for Lincoln. Dkt. 145-2 at 13, *Sweet*, No. 3:19-cv-03674 (N.D. Cal. Oct. 14, 2020). Plaintiffs repeatedly have cited a "group" borrower-defense application against Lincoln by a state regulator, but at least 12% of individuals in that group had no Title IV loans for attending Lincoln. C.A.App. 464. For American National, the Department has pointed only to a lawsuit that settled and was dismissed after American National appealed. *See* Stipulation, *Commonwealth v. Am. Nat'l Univ.*, No. 11-CI-4922 (Ky. Cir. Ct., Fayette Cnty. Nov. 17, 2020). In short, the reputational harms Applicants cite here are traceable to Exhibit C, not to any independent determination of wrongdoing.

These concrete harms are not "reparable through correction," as the district

court supposed. App. 21a. By this logic, reputational harm could never be irreparable, because "correction" is always an option. That is not the law. *See, e.g.*, *adidas Am.*, 890 F.3d at 756. And it ignores reality. It is wrong to assume that a charm campaign by schools necessarily could overcome their federal regulator's "determination" as endorsed by a federal court. Even if "correction" *could* mitigate some harm, in many cases the reputational consequences will materialize silently, leaving affected schools unable to identify with whom they should engage for "correction." App. 123a. But a stay of the judgment, and of the efficacy of the Department's determination—with vacatur or reversal possible in the future—could accomplish the kind of reputation-repairing correction that is now necessary.

B. Separately, if the settlement is effectuated, Applicants will immediately lose administrative rights and defenses under the Department's borrower-defense regulations. Not only will Applicants lose their rights to create an administrative record and receive a reasoned decision on each borrower-defense claim that implicates them, but Applicants will be automatically exposed to potential liability to the Department for all borrower-defense claims that were summarily granted or may be granted under the new "review" framework. Because it is highly unlikely that the settlement could be fully undone once it is effectuated, these concrete harms will be irreparable absent a stay.

Under the Department's binding regulations, a school has a right to receive notice of a borrower-defense application that implicates the school, a right to submit evidence in the factfinding process that forms the administrative record, and a right

to receive a reasoned decision from the Department adjudicator. *See* 34 C.F.R. §§ 685.206(c)(1)–(2), (e)(10)–(11), 685.222(e)(3)(i). The regulations specify the grounds on which the Department can grant a borrower-defense claim based on, for example, an alleged "statement, act, or omission by an eligible school to a borrower that is false, misleading, or deceptive … and that directly and clearly relates to enrollment or continuing enrollment at the institution or the provision of educational services for which the loan was made." *Id.* § 685.206(e)(3). To weed out unmeritorious and untimely claims, the regulations also specify grounds on which a borrower-defense claim shall *not* be granted and limitations periods. *Id.* § 685.206(e)(5)–(6). These regulations, which were promulgated pursuant to notice-and-comment rulemaking required by the APA and 20 U.S.C. § 1087e(h), expressly grant rights and defenses to schools, and they are necessary steps in the administrative process. The same regulations that prescribe the borrower-defense adjudication process also permit the Department, if it grants a borrower-defense application, to seek "recoupment" for discharged funds from the implicated school. *See, e.g.*, *id.* § 685.222(e)(7). As the Department itself has recognized, a school's ability to participate in the initial borrower-defense adjudication is an important right designed to "reduce the likelihood" that a school will later "be burdened by [an] unjustified clai[m]." 84 Fed. Reg. 49,788, 49,825 (Sept. 23, 2019).

In minimizing the loss of these essential rights, the district court relied on a carefully worded declaration submitted by the Department to rule that the Department "*cannot* recoup" loans summarily discharged under the settlement.

App. 15a; *see* C.A.App. 376 ¶ 9 (Declaration of Benjamin Miller). But despite that declaration and the district court's ruling, the Department has affirmatively represented in other litigation that it *can* recoup discharged loans from Applicants. Reply in Supp. of Defs.' Mot. to Dismiss at 10 n.4, *DeVry Univ., Inc. v. U.S. Dep't of Educ.*, No. 22-cv-5549 (N.D. Ill. Mar. 3, 2023), Dkt. 25. In that litigation, the Department stated that "[a]ny recoupment proceedings against the schools that intervened in *Sweet*" could "be based on separate decisions that the standard for borrower defense is met." *Id.* Thus, the Department threatens to purportedly "adjudicate" no-longer-pending borrower-defense claims to justify relief *already awarded* based on a supposed "determination" of misconduct. The Department's representations show that recoupment liability is real and imminent.

Dispensing with the borrower-defense adjudication not only exposes schools to liability for recoupment, but also immediately creates other adverse legal consequences for schools. Findings at the borrower-defense stage can form the predicate for significant programmatic, financial, and reputational consequences aside from recoupment, such as fines and limitations, suspensions, or terminations of a school's right to participate in federal aid programs. *See* C.A.App. 376–77 ¶¶ 10, 12 (Declaration of Benjamin Miller) (citing 34 C.F.R. §§ 668.81–.99); *see also* 20 U.S.C. § 1099c(c); 34 C.F.R. §§ 668.15, .171 (factors affecting school's "Financial Responsibility Composite Score," which can affect participation in federal aid). The Department also recently announced "guidance" that "clarifies" it will seek *personal* liability for the leaders of certain colleges—an issue that not only has major

financial implications but also harms the recruitment and retention of officers and directors. Significantly, "settlements … by the Department … involving federal student aid" will be a factor that the Department considers "when determining whether to pursue personal liability." Press Release, Dep't of Educ., *supra* p. 3 n.1.

By denying Applicants the ability to submit evidence to clear their names, the settlement further exacerbates the reputational harm to Applicants. In effect, they are being held liable—and experiencing corresponding tarnish to their reputation—without having the opportunity, guaranteed to them by regulation, to present a defense. *Cf. Yellin v. United States*, 374 U.S. 109, 121 (1963) (faulting congressional committee for failing to consider the risk to a witness's reputation before compelling him to testify publicly, as required by its own rules). Applicants therefore have a property interest in a fair and lawful borrower-defense adjudication and will be irreparably harmed if that adjudication is extinguished.

The deprivation of constitutional rights "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Depriving schools of their regulatory rights to clear their name before acceptance of a borrower-defense claim, as the settlement does, deprives schools of due process. *See Wisconsin*, 400 U.S. at 437 ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.").[9]

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[9] Contrary to Plaintiffs' assertions in their cross-motion to dismiss in the Ninth Circuit, Applicants clearly have Article III standing. The settlement is inflicting concrete injury on Applicants in the

III. The Balance Of Equities Favors A Stay.

By contrast, a stay would inflict no irreparable harm to the settling parties. No class member is paying or accruing interest on any of the loans covered by the settlement. Nor will that happen during any appeal. The settlement provides that class members' loans "will remain in forbearance or stopped collection status" until there is full settlement relief. App. 78a. In any event, there has been a national policy of forbearance on federal student loan payments and zero interest for the last three years. The Administration has made clear that this policy will "continue" even "after the formal end of the" COVID-19 emergency. C.A.App. 514. There is no irreparable harm to class members from a stay here.

In holding otherwise, the district court uncritically accepted Plaintiffs' vague assertions of intangible harm—*e.g.*, the need to "breathe easier" and "sleep easier," App. 26a–27a. But the settling parties' own actions undermine any claim of irreparable harm. Plaintiffs delayed this action 17 months while they (unsuccessfully) sought an unnecessary deposition of the former Secretary of Education. *See In re U.S. Dep't of Educ.*, 25 F.4th 692 (9th Cir. 2022). Plaintiffs cannot now complain that a stay pending certiorari would irreparably injure them.

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form of reputational harm and associated loss of financial and programmatic opportunities. This harm satisfies the injury-in-fact requirement. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). The record reflects that lenders and community partners cited the settlement as the basis for requesting additional diligence and forgoing business relations, satisfying traceability. *See supra* pp. 27–29. And vacatur on appeal would establish for those interested parties that the Department's "determination" of misconduct was unsupported and unlawful—mitigating existing reputational harms and preventing new ones. *See, e.g.*, *Meese v. Keene*, 481 U.S. 465, 476 (1987) ("enjoining application of the words 'political propaganda' to the films would at least partially redress the reputational injury of which appellee complains").

The settling parties further *agreed*—prior to Applicants' intervention—to delay the settlement's Effective Date until after the final judgment became unappealable or any class-objector appeal was resolved. App. 71a. It is entirely contradictory for them to speculate about irreparable injury from delay now.

The Department argued to the district court that it would be injured by a stay given the growing backlog of borrower-defense applications. But the government itself procured many of those backlogged claims through its own solicitation efforts. App. 122a–23a. And nothing prevents the Department from continuing to decide borrower-defense claims lawfully while this case is appealed.

In reality, the Department would *benefit* from a stay. A stay would spare the Department from expending resources—and taxpayer dollars—carrying out an elaborate and expensive process that could later be held unlawful. It would eliminate any risk that the Department might ultimately need to rescind promises and claw back payments made prematurely and illegally to class members. *See, e.g.*, *Heckler v. Turner*, 468 U.S. 1305, 1308 (1984) (Rehnquist, J., in chambers) ("[I]t is extremely unlikely that the Secretary would be able to recover funds improperly paid out.").

This case presents multiple important issues of national and political significance. The settlement directly affects hundreds of thousands of class members, the 151 schools on Exhibit C, and at least 4,000 other educational institutions that will be subjected to the new procedures for the Decision Group and Post-Class Applicants sub-classes. The judgment is also estimated to cost taxpayers

$7.5 billion just for the Class (and likely double with the addition of Post-Class Applicants) and will bind the Department for years to come. If the settlement takes full effect, the settling parties may then argue that the settlement is a *fait accompli* and no longer justiciable; that it is infeasible to reverse what has been done; and that any attempt to do so will cause confusion and more hardship. In these circumstances, the federal government, which is duty-bound to protect the public fisc and avoid injuring or confusing class members, cannot reasonably maintain that a stay would harm its interests.

Instead, a stay would serve the public interest in "preserv[ing] … [the] status quo." *Houchins*, 429 U.S. at 1346. And the Court's recent precedent confirms the propriety of a stay here. In *Nebraska v. Biden*, the Eighth Circuit preliminarily enjoined the Administration's other debt-cancellation program, 52 F.4th 1044 (8th Cir. 2022) (per curiam), and the Court left that injunction in place "pending oral argument," thereby preserving the status quo, *Biden v. Nebraska*, 143 S. Ct. 477 (2022) (Mem.). Notably in *Nebraska* (unlike here), the government contended that the debt-cancellation program was necessary "[t]o protect student-loan borrowers affected by a national emergency," Petrs. Br. at 2, *Nebraska*, No. 22-506, yet the Court still maintained the injunction during its review. Here, where there is *no* emergency and the parties *already agreed* to defer the settlement's Effective Date during an appeal, App. 71a, there is no plausible claim that awaiting the final resolution of Applicants' petitions would irreparably harm anyone.

A stay would also promote the orderly administration of justice. As noted,

the Court is currently considering the lawfulness of the Administration's other debt-cancellation program, and a decision in that case is expected by the end of this Term. *See Dep't of Educ. v. Brown*, No. 22-535 (U.S.); *Biden v. Nebraska*, No. 22-506 (U.S.). The outcome there is likely to have a significant impact here. For example, the scope of the Secretary's claimed authority to cancel debts under the major-questions doctrine is at issue in both sets of cases. Notably, the government's opening brief in *Nebraska* cited the district court's judgment *here* in arguing against application of that doctrine. *See* Petrs. Br. at 4 n.1, 55, *Nebraska*, No. 22-506. Moreover, if the Secretary has the authority to cancel student debts *en masse* under the HEA, then a decision against the government in *Nebraska* and *Brown* practically could have limited effect—the Department could turn around and cancel student debts under the guise of the HEA. Resolution of all three cases is necessarily intertwined, making a stay of the settlement all the more important.

IV. Alternatively, The Court May Wish To Treat This Application As A Petition For A Writ of Certiorari Before Judgment.

For the foregoing reasons, a stay is warranted. Nonetheless, in the alternative, given the significance of the student loan cancellation issues and the interrelationship between this case and *Brown* and *Nebraska*, the Court could follow the same tack that it did in those cases. Thus, it could treat this application as a petition for a writ of certiorari before judgment on the question of the Secretary's authority to cancel debts under the HEA and set the case for oral argument. *See Brown*, No. 22-535 (Dec. 12, 2022) (treating application for stay as petition for writ of certiorari before judgment, granting the petition, and scheduling

argument); *Nebraska*, No. 22-506 (Dec. 1, 2022) (same for application to vacate injunction). Or, at minimum, the Court could stay the judgment and treat the application as a petition for certiorari and hold the case for disposition after *Brown* and *Nebraska* are decided.

A writ of certiorari before judgment under 28 U.S.C. § 2101(e) is an extraordinary remedy, but this Court has already determined that it was warranted for consideration of the Department's other, related loan-cancellation program. As in *Brown* and *Nebraska*, the issues presented by the district court's judgment are "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Especially because of the connections between this case and *Brown* and *Nebraska*, the importance of the issue of the Secretary's authority under the HEA, and the vast economic stakes, there is little reason to wait for a Ninth Circuit decision. Applicants have not yet even filed their opening briefs in the Ninth Circuit, and it could be a year or more before that court issues any decision. Under the normal schedule, consideration of the case by this Court may not occur until October Term 2024. It is in no one's interest—not the Department, the class members, the schools, the lenders, or the public at large—to wait that long for final resolution of whether the Secretary had authority under the HEA to cancel student loans *en masse* and change regulatory standards for Applicants.

CONCLUSION

A stay is warranted to protect the status quo while the Court considers the substantial questions raised by this case in a petition for certiorari. This Court should therefore stay the district court's judgment pending the filing and disposition of that petition. In the alternative, the Court should construe the application as a petition for a writ of certiorari before judgment and grant the petition (or at minimum, construe the application as a petition and hold it until after a decision in *Nebraska* and *Biden*).

Respectfully submitted.

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