No. 22-_______

IN THE SUPREME COURT OF THE UNITED STATES

FRANK GARRISON, ET AL.,

Applicants

v.

U.S. DEPARTMENT OF EDUCATION, ET AL.,

Respondents

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION PENDING APPEAL

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STATEMENT PURSUANT TO RULE 29.6

All applicants, and the class they represent, are individuals. Applicants are represented by Pacific Legal Foundation (PLF), which is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF has no parent corporation and no publicly held companies own more than 10% of PLF's stock.

TABLE OF CONTENTS

STATEMENT PURSUANT TO RULE 29.6 i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

FACTS AND PROCEDURAL HISTORY 4

A. Federal Student Loans, Repayment, and Forgiveness 4

B. Imminent and Automatic Loan Cancellation 5

C. Harm to the Applicant Class 9

D. Procedural History 10

JURISDICTION 11

THIS COURT SHOULD ENJOIN THE POLICY PENDING APPEAL 11

I. APPLICANTS HAVE DEMONSTRATED A STRONG LIKELIHOOF OF SUCCESS ON THE MERITS 14

A. Applicants Clearly Have Standing to Challenge a Federal Policy that Will Necessarily Result in the Imposition of a Tax Liability Under Existing State Law 14

B. ED's Efforts to Moot this Case Must Fail 18

1. ED's Voluntary Exclusion of the Applicants and Creation of the Opt-Out Mechanism Does Not Moot the Original Claims 18

2. The Class Will Suffer Imminent, Irreparable Harm, even if the Named Representatives No Longer Face Loan Cancellation 22

C. The Underlying Challenge to the Policy Is Likely to Succeed 25

1.Respondents' Debt Cancellation Is Not Supported by Statute 26

a.ED is cancelling debt for statutorily ineligible individuals 27

b.Debt cancellation is not "necessary" 29

c. The debt cancellation program presents a major question not answered by statute 29

d. The statute should be read to avoid constitutional questions 31

2.The Statute Violates the Non-Delegation Doctrine 32

II. APPLICANTS AND THE CLASS THEY REPRESENT WILL SUFFER IRREPARABLE HARM 34

III. THE INJUNCTION IS EQUITABLE AND IN THE PUBLIC INTEREST 35

CONCLUSION.. 36

TABLE OF AUTHORITIES

Page(s)

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Abbott Lab'ys v. Mead Johnson & Co.,
971 F.2d 6 (7th Cir. 1992) 37

AFL-CIO v. Am. Petroleum Inst.,
448 U.S. 607 (1980) 32

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141 S. Ct. 2485 (2021) 30, 36

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137 S. Ct. 1296 (2017) 17

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911 F.3d 558 (9th Cir. 2018) 36

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141 S. Ct. 2104 (2021) 15

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529 U.S. 277 (2000) 21

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139 S. Ct. 2551 (2019) 13, 15–16

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462 U.S. 919 (1983) 32

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142 S. Ct. 2587 (2022) 13, 19–22, 29–32

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422 U.S. 490 (1975) 25–26

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134 S. Ct. 2806 (2014) 12

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Statutes

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Ark. Code § 26-51-404(b)(1) 5, 16, 35

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Use of the Heroes Act of 2003 to Cancel the Principal Loan Amounts of Student Loans, 46 Op. O.L.C. __, 2022 WL 3975075 6

TO THE HONORABLE AMY CONEY BARRETT, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Applicants Frank Garrison and Noel Johnson are representatives of a class of borrowers who are set to receive automatic cancellation of a portion of their federal student loans on or about November 15, 2022. The cancellation will trigger increased state-tax liability for members of the class, and Applicants therefore respectfully request that this Court enter an emergency order pursuant to the All Writs Act, 28 U.S.C. § 1651, to prevent this imminent cancellation and resulting tax liability. On October 21, the U.S. District Court for the Southern District of Indiana dismissed the case for lack of standing, rejected as moot Applicants' request for a temporary restraining order and preliminary injunction, and entered final judgment. Applicants appealed and moved in the U.S. Court of Appeals for the Seventh Circuit for an injunction pending appeal. On October 28, the Seventh Circuit denied the motion. Applicants now seek an injunction from this Court, while the appeal in the Seventh Circuit proceeds to the merits.

INTRODUCTION

Student debt cancellation is among the most contentious and hotly-debated proposals in the nation today. And although Congress has erected certain pathways for loan forgiveness, such as the Public Service Loan Forgiveness (PSLF) program, some call for the government to cancel loan principals more broadly. Nevertheless, Congress has declined to do so.

Dissatisfied with Congress's response, the President announced in August that Respondents Secretary of Education Miguel Cardona and the Department of

Education (collectively, ED) will unilaterally cancel up to $20,000 in loan principal for each of 40 million borrowers at a cost of over $500 billion. Of those 40 million borrowers, 8 million are set to have their debts cancelled automatically.

Despite the staggering scope of this regulatory action, it was taken with breathtaking informality and opacity. The Department did not undertake the notice-and-comment process required for rulemaking, much less solicit any public input. It did not even issue a formal order or directive setting out its cancellation program. Instead, it issued a press release on August 24th along with two legal memoranda providing its justifications, and, later, a hastily created FAQ section on its website.

Mr. Garrison and Mr. Johnson are the representatives of a class of borrowers facing automatic debt cancellation who will also face excess tax liability under state law. When this suit was filed the Department planned to enact "automatic" cancellation during "early October," just weeks after first enacting the policy through a press release. As of September 27, 2022, ED said, "Although most borrowers will have to apply for debt relief, we have income data on hand for around 8 million borrowers. These borrowers will get the relief automatically." *One-Time Student Loan Debt Relief*, https://studentaid.gov/debt-relief-announcement/one-time-cancellation (Sept. 27, 2022) (*Sept. 27 FAQs*). There was no opt-out process.

In its rush, the administration created new problems for members of the class—borrowers in at least six states that tax loan cancellation as income and who are pursuing debt forgiveness under statutory forgiveness programs like PSLF. These borrowers, including Applicants Garrison and Johnson, will actually be worse off

because of the cancellation. Because their debts are expected to be forgiven under a statutory program anyway, ED's debt cancellation will not benefit them. Yet, debt cancelled under ED's program will trigger state-tax liability, unlike debt cancelled under the statutory programs. As a result, Mr. Garrison, Mr. Johnson, and potentially millions of others similarly situated in the six relevant states will receive no additional benefit from the cancellation—just a one-time additional *penalty*.

Even after the filing of this suit, the Department's slapdash policy has changed from hour to hour and remained utterly elusive. In response to this and other suits, ED simply updated its website FAQs to try to negate individual claims by creating an opt-out program whose contours remain informal. Indeed, ED also excluded the class representatives from the program in a transparent effort to moot their claims. Meanwhile, however, ED has pressed forward with its stated intent to cancel hundreds of billions of dollars in student loan debt before any court meaningfully reviews the action. Up to 8 million borrowers still face "automatic" cancellation as early as November 15, 2022, many of them in states taxing the cancellation as income.

To prevent this irreparable harm, Applicants respectfully move for an injunction preventing Respondents from implementing the cancellation. The claimed basis for the cancellation is the Higher Education Relief Opportunities for Students (HEROES) Act of 2003, 20 U.S.C. § 1098bb(a)(1), a statute enacted in 2003 during the Iraq war to provide relief to veterans and their families. But never before has the Act been used to unilaterally cancel debts *en masse*, much less at a cost of half a trillion dollars. And no wonder: ED's debt cancellation far exceeds the statute's

reasonable constraints. The Act does not authorize debt cancellation; in fact, its terms clearly forbid ED's current actions. Further, the use of the Act in this manner inflicts a grievous wound on our constitutional order.

This is precisely the sort of case for which interim relief was designed. The Executive Branch's claimed authority for cancelling half a trillion dollars in student loans is weak, at best, while allowing the program to move forward will, as a practical matter, be irreversible once it happens. Further, no borrower will be disadvantaged by a pause in the program because loan repayments and interest accruals have been paused since March 2020. Even if the loan cancellation program was lawful, there is no rush to get it done less than two months after it was announced. This Court must intervene to ensure appropriate judicial review.

FACTS AND PROCEDURAL HISTORY

A. Federal Student Loans, Repayment, and Forgiveness

The Higher Education Act allows eligible students at participating schools to borrow money directly from the Department. 20 U.S.C. §§ 1077, 1091.

Separately, the Act establishes two programs to help borrowers repay their loans. First, under income-driven repayment (IDR) programs, borrowers contribute a portion of their income toward their loans. 20 U.S.C. §§ 1087e(d), 1098e. At the end of a set period, the remaining balance is forgiven. 34 C.F.R. § 685.209. Second, under the PSLF program, borrowers who make 120 payments while working in qualifying public-interest positions are eligible to have their balances forgiven. *Id.* § 1087e(m).

Since the beginning of the COVID-19 pandemic, Defendants have suspended "repayment of and interest accrual on all Federal loans." 87 Fed. Reg. 41,878, 41,884 (July 13, 2022). As a result, "[n]o one with federally-held loans has had to pay a single dollar in loan payments," nor have their balances accumulated interest. *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, White House (Aug. 24, 2022) (*FACT SHEET 1*).[1] Those participating in PSLF and IDR are not disadvantaged by this suspension of repayments. Despite making no payments, each passing month counts toward the payments required for forgiveness. *See id.*

B. Imminent and Automatic Loan Cancellation

On August 24, 2022, Respondents announced a plan to cancel $10,000 of federal student loan debt for every borrower who, in either 2020 or 2021, earned less than $125,000 (or $250,000 for those married filing jointly or heads of households). *See* Dist. Ct. Dkt. No. 4-4. The amount canceled would increase to $20,000 for eligible borrowers who had received Pell Grants. *Id.*

While loan cancellation is not taxed federally as income, at least six states *will* tax cancellation as income. *See* Ark. Code § 26-51-404(b)(1); Ind. Code § 6-3-1-3.5(a)(30); Minn. Stat. § 290.01(19)(f); Miss. Code § 27-7-15(4)(mm); N.C. Stat. § 105-153.5(c2)(22); Wis. Stat. § 70.01.

Originally, the cancellation was to have been implemented in "early October." Dist. Ct. Dkt. No. 4-7 at 2. After lawsuits arose, ED delayed the program to October

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1 https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.

17, then to October 23. Dist. Ct. Dkt. No. 27. But ED will not undertake notice and comment or any other ordinary procedure before implementing the program. *See Use of the Heroes Act of 2003 to Cancel the Principal Loan Amounts of Student Loans*, 46 Op. O.L.C. __, 2022 WL 3975075, at *3 (Aug. 23, 2022) (OLC Op.).

ED estimates that approximately 40 million borrowers will be eligible for cancellation. *See FACT SHEET: The Biden-Harris Administration's Plan for Student Debt Relief*, White House (Sept. 20, 2022) ("[A]nalysis from the Department of Education") (*FACT SHEET 2*).[2] An independent study estimated that, altogether, this one-time cancellation will cost approximately $519 billion. Chen, Smetters & Paulson, *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, University of Pennsylvania, Wharton School (Aug. 26, 2022).[3]

As originally enacted, 32 million of the 40 million borrowers were required to apply for the cancellation, but loan cancellation was fully "automatic" for the other 8 million borrowers. As of September 27, 2022, ED emphasized on its website that, "Although most borrowers will have to apply for debt relief, we have income data on hand for around 8 million borrowers. These borrowers will get the relief automatically." *Sept. 27 FAQs*. This "automatic[]" cancellation applies to borrowers who have provided income or other information to ED or their servicer because they have enrolled in programs like IDR or have certified payments made under PSLF. *Id.* According to ED, again as of September 27, 2022, for those receiving automatic

[2] https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/20/fact-sheet-the-biden-harris-administrations-plan-for-student-debt-relief-could-benefit-tens-of-millions-of-borrowers-in-all-fifty-states/.

[3] https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness.

cancellation, "Your loan servicer will notify you when the relief has been applied to your account, with details on how the relief was applied." *Id.*

Many of the borrowers facing automatic cancellation also face potential state income-tax liabilities, though. ED expects that approximately 856,400 borrowers are eligible for cancellation in the state of Indiana, which taxes the cancellation as income. *See FACT SHEET 2*. Likewise, ED expects more than 3.5 million borrowers in the other five states that tax cancellation as income will qualify. *See id.* Potentially massive numbers of those borrowers will receive cancellation automatically.

In response to this suit, ED hastily created a mechanism for borrowers to opt out from the automatic cancellation. Just hours after this suit was filed, White House press secretary Karine Jean-Pierre commented on it at a daily briefing, saying, "Opponents of the Biden-Harris administration's student loan plans are trying to stop it because it will provide much needed relief for working families. Anyone who doesn't want to get that debt relief can opt out." Shabad, Rachel, *Lawsuit seeks to block Biden's student debt forgiveness program*, NBC News, (Sept. 27, 2022) https://www.nbcnews.com/politics/politics-news/lawsuit-seeks-block-bidens-student-debt-forgiveness-program-rcna49638 At the time, however, ED's own website said nothing about opting out, and still proudly proclaimed that "around 8 million borrowers" "will get the relief automatically." *Sept. 27 FAQs*.

The next day, ED quietly amended its website to conform its policy to the Press Secretary's. As ED said in a notice to the district court, it had amended its website, which apparently contains the full and final regulatory action concerning

cancellation, to now include the language, "If you would like to opt out of debt relief for any reason, including because you are concerned about a state tax liability, you will be given an opportunity to opt out." *See* Dist. Ct. Dkt. No. 13.

Applicants filed their Amended Complaint, motions for temporary injunctive relief, and motion for class certification on October 10, 2022, and, at the time, the opt-out mechanism remained completely unspecified. *See* Dist. Ct. Dkt. Nos. 23–26. Applicants' filings pointed out there was no actual mechanism to opt out and no notice was planned to inform borrowers of the ability to optout. In response, ED *yet again* changed its website to avoid review. In its briefing in the district court, ED revealed that "since October 12, it has provided instructions a borrower can use to contact her loan servicer to opt out of such relief." Dist. Ct. Dkt. No. 31 at 6. ED's FAQs put the onus entirely on the borrower; "If you would like to opt out of debt relief for any reason—including because you are concerned about a potential state tax liability—contact your loan servicer by phone or email and tell them that you don't want to receive one-time student loan debt relief." *One-Time Student Loan Debt Relief*, https://studentaid.gov/debt-relief-announcement/one-time-cancellation (Oct. 12, 2022) (*Oct. 12 FAQs*).

On October 18, 2022, ED also represented that, in response to this litigation, "Starting today, the Department also began sending borrowers who it has determined are eligible for debt relief without applying an email notifying them of their eligibility and the option to opt out." Dist. Ct. Dkt. No. 31 at 6. Details of who will receive that email, where the list of email addresses comes from (and whether

they can be relied upon to be up-to-date), or if the Department will take any other measures to notify the class, remain elusive. *See id.* ED also represented that borrowers in the automatic cancellation class only have "until November 14 to opt out." *Id.* After that date, ED still intends to automatically cancel a portion of their debts. *Id.*

C. Harm to the Applicant Class

It is undisputed that Applicant Garrison faced automatic and mandatory loan cancellation of $20,000 of his debt at the time this suit was initially filed. *See* Dist. Ct. Dkt. No. 4, at 6–8. Likewise, Applicant Johnson faced automatic cancellation of $10,000 of his debt when he joined the suit at the time the Amended Complaint was filed. *See* Dist. Ct. Dkt. No. 25-8 (Johnson Decl. ¶¶ 2–8).

Both class representatives are pursuing PSLF and reside in Indiana, so that ED's cancellation (but not PSLF) will increase their state-tax liability, by more than $1,000 or $500 respectively. *See* Ind. Code § 6-3-1-3.5(a)(30).

As part of its efforts to avoid judicial review, ED removed Mr. Garrison from automatic cancellation after he filed suit. Dist. Ct. Dkt. No. 13. Likewise, ED exempted Mr. Johnson from cancellation after he joined the suit. *See* Dist. Ct. Dkt. No. 31. However, it did so after Mr. Johnson sought to act as the representative of a putative class that still faces automatic cancellation, will incur state tax liability, and has had inadequate notice of any opt-out provision. *See* Dist. Ct. Dkt. No. 24.

Even after ED changed its policy in response to this litigation, opting out requires affected borrowers to recognize that they face state tax liability for

cancellation and then contacting their servicers, and not ED, to request relief from ED's policy. *Oct. 12 FAQs*. Automatic cancellation for those who do not opt out will likely occur immediately following November 14, 2022. *See* Dist. Ct. Dkt. No. 31 at 6.

D. Procedural History

Applicant Garrison filed a Complaint on September 27, 2022, on his own behalf. Dist. Ct. Dkt. No. 1 (Attachment A). Mr. Garrison also filed for a temporary restraining order to stop Respondents from implementing "automatic" cancellation. Dist. Ct. Dkt. No. 4. The next day, ED attempted to moot the case by exempting Mr. Garrison from the program. Dist. Ct. Dkt. No. 13. In response the district court denied preliminary relief and granted Mr. Garrison leave to amend his complaint. Dist. Ct. Dkt. No. 16.

Mr. Garrison, joined by Mr. Johnson, filed an Amended Complaint on behalf of a class of similarly-situated borrowers on October 10, 2022. Dist. Ct. Dkt. No. 23 (Attachment B). The same day, they moved for preliminary relief and class certification. *See* Dist. Ct. Dkt. Nos. 24, 25, 26. ED responded by agreeing that "the Department will not discharge any student loan debt pursuant to the policy challenged in this case prior to October 23, 2022," and briefing its response in opposition to preliminary relief. *See* Dist. Ct. Dkt. Nos. 27, 31.

On October 21, 2022, the district court dismissed Applicants' Amended Complaint, after it concluded that the class lacked standing because the tax consequences of cancellation were not "traceable" to the federal program. Dist. Ct. Dkt. No. 36 at 6 (Attachment C). The district court also entered final judgment

against Applicants. Dist. Ct. Dkt. No. 37. Applicants filed a notice of appeal that same day. Dist. Ct. Dkt. No. 38 (Attachment D).

Applicants moved for an injunction pending appeal with the Seventh Circuit on October 24, 2022. On October 28, 2022, a panel of that court denied the motion in an order, once again finding a lack of standing, but this time because ED had successfully excluded the class representatives after they filed suit. *Garrison, et al., v. Dept. of Education, et al.*, No. 22-2886, Dkt. No. 9 (Oct. 28, 2022) (Attachment E).

JURISDICTION

The district court dismissed Applicant's Amended Complaint on October 21, 2022. Attachment C. Applicants filed a notice of appeal the same day. Attachment D. Applicants' merits appeal is pending in the Seventh Circuit Court of Appeals. Applicants moved for an injunction pending appeal pursuant to Rule 8 of the Federal Rules of Appellate Procedure, which the Seventh Circuit denied in an order on October 28, 2022. Attachment E. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254, 1651, 2101.

THIS COURT SHOULD ENJOIN THE POLICY PENDING APPEAL

The Circuit Justices of this Court have authority to issue injunctions under the All Writs Act, 28 U.S.C. § 1651(a), when applicants' claims "are likely to prevail," the denial of injunctive relief "would lead to irreparable injury," and "granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65–66 (2020). These are the same well-known factors used for preliminary injunctions. *See id.* (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

Under this standard, the first prong does not require ultimate success on the merits. An application for an injunction may be granted without serving "as an expression of the Court's views on the merits," to prevent enforcement of a potentially unconstitutional statute. *See Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014) (mem.). The Court has thus granted emergency injunctions pending appeal when there is a "fair prospect" of reversal and a likelihood of "irreparable harm . . . from the denial of equitable relief." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *see also, e.g.*, *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (granting injunction enjoining enforcement of challenged provisions of the Affordable Care Act "pending final disposition of appellate review"); *Roman Catholic Diocese*, 141 S. Ct. at 66 (granting injunction enjoining enforcement of executive order limiting attendance at religious services).

Applicants satisfy the standard for an emergency injunction. First, this appeal presents a clear case for relief. Respondents are poised to enact a transformational policy with profound political and economic reach on the flimsiest of statutory pretexts. The HEROES Act simply cannot bear the weight of the looming cancellation policy. The Executive has thus improperly seized from Congress the prerogative to "make major policy decisions." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). And as in *Little Sisters*, 571 U.S. at 1171, the relevant statutory provision is likely unconstitutional.

Rather than addressing the legality of the policy itself, the lower courts simply rewarded ED's cynical attempts to evade review. The district court incorrectly

concluded that the class of affected borrowers lacked standing because their concrete injuries were caused by third parties. Attachment C. This Court has held to the contrary. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019) (standing based injury caused by the independent decision of a third party because it was "likely" that a third party would "react in predictable ways to" the challenged action). Rather than defending that notion, the Seventh Circuit found no *present* harms, Attachment E, but confused standing with mootness and ignored the remaining members of the plaintiff class entirely. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 76 (2013) (the cessation of a named plaintiff's injury does not bar class-wide injunctive relief). While the appeal continues on the merits in the Seventh Circuit, it cannot now be decided before ED's policy comes to fruition. This Court's intervention is needed to protect the lower court's ability to meaningfully decide the merits question that ED so desperately wishes to avoid.

Second, Applicants' request is both extraordinarily time-sensitive and solely within this Court's power to redress. ED's policy was set to be enacted already, and the plaintiff class had faced unwanted "automatic" loan cancellation during "early October." *Sept. 27 FAQs.* This and other litigation slowed the policy only slightly, but ED has represented that it will continue with its automatic cancellation policy no later than November 15, 2022. Dist. Ct. Dkt. No. 31 at 6. And on October 27, 2022, President Biden declared, "I think in the next two weeks you're going to see those

checks going out."[4] Once ED acts, the program cannot be unwound. As a one-time action that causes irreparable harm to potentially millions of class members, the only way to stop it pending a final merits review is this Court's intervention.

Third, the balance of equities weighs heavily in favor of maintaining the status quo. There is simply no legitimate reason for ED to rush through its obviously unlawful policy without so much as a formal order setting it out. After all, ED has already paused all repayment and interest on federal student debts. The risks of allowing cancellation are profound, both to the plaintiff class and our constitutional order.

I. APPLICANTS HAVE DEMONSTRATED A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

Applicants have an unusually strong likelihood of prevailing on the merits. The lower courts' decisions on standing were undoubtedly wrong. Furthermore, not only does this Court presume the merits of Applicants' underlying challenge to ED's policy, but that underlying challenge also has a strong likelihood of success.

A. Applicants Clearly Have Standing to Challenge a Federal Policy that Will Necessarily Result in the Imposition of a Tax Liability Under Existing State Law

"A plaintiff has standing only if he can allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) (cleaned up).

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[4] Sam Fossum and Katie Lobosco, *Biden Predicts Student Loan Borrowers Will Start Receiving Relief Within Weeks, Despite Court Challenge*, CNN (Oct. 27, 2022) https://www.cnn.com/2022/10/27/politics/biden-student-loan-forgiveness/index.html.

When "a causal relation between injury and challenged action depends upon the decision of an independent third party," a plaintiff "must show at the least that third parties will likely react in predictable ways." *Id.* at 2117 (cleaned up). Predictability is not a huge hurdle. This Court found standing, for instance, when it was "likely" that a third party would "react in predictable ways to [a] citizenship question [on the census], even if they do so unlawfully[.]" *Commerce*, 139 S. Ct. at 2566.

The injury to members of the class is more than predictable; it is certain. Though ED has excluded Mr. Garrison and Mr. Johnson from automatic cancellation, their circumstances are exemplary of class members'. Any loan forgiveness that Mr. Garrison or Mr. Johnson receive pursuant to the pre-existing PSLF program, as it was enacted prior to January 1, 2020, will not be taxed in Indiana as income. *See* Ind. Code § 6-3-1-3.5(a)(30). But if Mr. Garrison received $20,000 in automatic cancellation under the challenged loan forgiveness program, he would face a state income tax liability (including county income tax) of more than $1,000 for 2022. *See id*. Mr. Johnson would face more than $500 in tax liability for his $10,000 cancellation. *See id.* That is hardly conjecture. Indeed, it is far more than "predictable" that Indiana will apply its laws as written. *See Commerce*, 139 S. Ct. at 2566. And the remaining states that will tax cancellation as income will likewise apply their own laws as written. *See e.g.,* Ark. Code § 26-51-404(b)(1); Minn. Stat. § 290.01(19)(f); Miss. Code § 27-7-15(4)(mm); N.C. Stat. § 105-153.5(c2)(22); Wis. Stat. § 70.01. An injunction, however, would redress that injury, by stopping the automatic

cancellation and avoiding these harms. Applicants and the class members therefore have standing to sue to stop ED's policy. *See Commerce*, 139 S. Ct. at 2566.

Despite this straightforward analysis, the district court dismissed this case after it erroneously concluded that the tax consequences of cancellation were not "traceable" to the federal program. Attachment C at 6. In the district court's view, the tax liability that will arise the moment ED's policy is enacted is simply a matter for state courts to resolve. *Id.*

The district court was wrong in its assertion that "[a]n injury is not traceable to the decision of a defendant where the injury flows from a different, independent decision made by a third party." *Id.* at 6. On the contrary, "Article III requires no more than *de facto* causality." *Commerce*, 139 S. Ct. at 2566. Cases therefore abound where parties had standing to challenge agency action that resulted in an indirect harm, even when it came from an independent third party. *See id.* For instance, this Court has long held that a party has standing to challenge agency action when it will simply *allow* conduct that results in an injury. *See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (whale watchers suffered injury-in-fact from agency's refusal to punish unlawful Japanese whaling activities).

This Court has likewise found standing where a defendant's actions were reasonably likely to result in a third party injuring the plaintiff, even where the defendant does not coerce or even *encourage* that injury. In *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979), the Court held that realtors' racial steering practices injured the village through third parties. A higher minority population could

"precipitate an exodus of white residents," injuring the municipality's "racial balance and stability," even though the white residents had no interactions with the realtors themselves. *Id.* at 110–11; *see also Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1304–05 (2017) (discriminatory loans injured city, because, inter alia, the expected foreclosures can result in individuals committing more crimes in the area, thus requiring more police services). Nor does it matter that the state statutes pre-exist ED's program, because the program increases the cost of complying with the statutes. *Cf. Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1537–38 (9th Cir. 1993) (traceability satisfied where EPA rule "increased financial burden" of complying with pre-existing agreement.). These cases reinforce the conclusion in *Commerce* that the relevant inquiry is *de facto* causation, not whether the defendant determined, coerced, or cajoled a third party into injuring the plaintiff.

A person thus has standing to challenge a government action *resulting* in tax liability. Consider *Clinton v. City of New York*, 524 U.S. 417 (1998). There both the city and individual hospitals challenged the President's reinstatement of a decision by Health and Human Services that resulted in tax liability. *Id.* at 421, 431. This Court found standing to challenge the President's actions because the city and hospitals had a "multibillion dollar contingent liability that had been eliminated" without the President's action. *Id.* at 430. Even to the extent that the contingent liability may or may not ever need to be paid by the challengers, they suffered an "immediate injury" merely by the effect of the "contingent liability." *Id.* at 431.

Applicants suffer the same type of contingent tax liability, which will only arise once cancellation occurs. Thus, Applicants have standing to challenge the cancellation policy that gives rise to that liability. *See Clinton*, 524 U.S. at 430–31. The district court's decision on standing was wholly inconsistent with controlling precedent.

B. ED's Efforts to Moot this Case Must Fail

Without even requesting input from ED, a panel of the Seventh Circuit denied relief by erroneously confusing standing with mootness and then getting the mootness question wrong. According to the panel, "The federal program is not compulsory. Debtors who do not want their loans reduced or cancelled are free to opt out. The Department of Education has treated both plaintiffs as exercising this option. None of their debt will be cancelled, and they will not be subject to a tax on a reduction of indebtedness. It follows that the program does not injure them and that they lack standing to sue." Attachment E. But that decision again ignores controlling law that shows Applicants' individual claims should be reviewed under a mootness exception and the class allegations remain live even though ED removed the class representatives from cancellation in response to the suit.

1. ED's Voluntary Exclusion of the Applicants and Creation of the Opt-Out Mechanism Does Not Moot the Original Claims

First, under the voluntary cessation doctrine, this Court may review this case notwithstanding any of ED's changes since Applicant Garrison first filed. In essence,

this Court should return to the circumstances first presented and ignore ED's shifting efforts to alter the program to evade review.

Standing is measured at the time a complaint is filed, but mootness is often described as "the doctrine of standing set in a time frame"; that is, "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189, (2000). This is not a "comprehensive" explanation, though, and well-known exceptions allow review even when the challenged conduct ends. *Id.* at 190–91. And it is sometimes easy to "confuse[] mootness with standing." *See id.* at 189. "The distinction matters because the Government, not petitioners, bears the burden to establish that a once-live case has become moot." *West Virginia*, 142 S. Ct. at 2607.

When this case was filed, Applicant Garrison faced an imminent injury from the loan cancellation policy proposed by ED. There was no opt-out at all. The Seventh Circuit's observation that "[d]ebtors who do not want their loans reduced or cancelled are free to opt out," Attachment E, focused only on ED's *response* to the litigation. And when the Amended Complaint was filed, Applicant Johnson likewise faced automatic cancellation, as did the class he immediately moved to certify. *See* Dist. Ct. Dkt. Nos. 23, 24. It was therefore also false that, at the time of the *filing*, "ED has treated both plaintiffs as exercising this option" to opt-out. *See* Attachment E. Thus, "the Court of Appeals confused mootness with standing." *Friends of the Earth*, 528 U.S. at 189.

When the question of mootness arises because of a defendant's voluntary action, the defendant "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190. If the Government invokes mootness based on its voluntary conduct, a court "do[es] not dismiss a case as moot" if "the Government nowhere suggests that if this litigation is resolved in its favor it will not reimpose" the challenged policy, but instead "vigorously defends the legality of such an approach." *West Virginia*, 142 S. Ct. at 2607. (cleaned up); *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (emphasizing that "even if the government withdraws or modifies a [policy] in the course of litigation, that does not necessarily moot the case").

Voluntary cessation looks closely at the realities of a defendant's conduct—where the circumstances surrounding the cessation suggest that the defendant is "attempting to manipulate the [c]ourt's jurisdiction to insulate a favorable decision from review," a case is not moot. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000). Further, this Court recently rejected any special solicitude to the Government, applying the normal heavy presumption of impropriety *against the Government's* attempt to moot a case through voluntary cessation. *See West Virginia*, 142 S. Ct. at 2607.

From the start, ED has done everything in its power to change the program *just enough* to avoid review. When Mr. Garrison filed his original complaint on September 27, 2022, ED still advertised "automatic" cancellation for up to 8 million borrowers, including him. At the time, there was no way to opt out. But just hours

after this suit was filed, the White House announced an opt-out policy that did not yet exist. *See* Shabad, NBC News, *supra*. The next day, ED amended its website to say, "If you would like to opt out of debt relief for any reason, including because you are concerned about a state tax liability, you will be given an opportunity to opt out." *See* Dist. Ct. Dkt. No. 13. How a recipient of loan cancellation would capitalize on that "opportunity" would remain unclear for weeks, until ED yet again amended its website in response to this litigation to inform the public that they must contact their loan servicers instead of ED to request a chance to opt-out. *See Oct. 12, FAQs*. Meanwhile, ED addressed Mr. Garrison's claims directly. ED filed a notice alerting the district court that it had tried to moot Mr. Garrison's claim by considering the suit his effort "to opt out of the program." Dist. Ct. Dkt. No. 13. Thus, in *direct* response to the suit, ED created the opt-out mechanism and simultaneously excluded Mr. Garrison from the automatic cancellation policy.

ED's manipulations continued when Mr. Johnson joined the suit on behalf of the class. The Department yet again treated his lawsuit as his decision to opt-out. *See* Dist. Ct. Dkt. No. 31. But ED ignored the class as a whole and has insisted that it will still go forward with automatic cancellation. *See id.* ED clearly removed the representatives' harms simply to avoid review of the class claims.

ED's manipulation should prompt careful review. ED has not disavowed its policy, or the legality of it, for the 8 million borrowers it still insists will get "automatic" cancellation any day. And while the voluntary cessation doctrine allows review even if *no* class member still faces *any* harm, the opt-out policy—which places

the onus entirely on members of the class to know they face adverse tax consequences and then to opt out of loan cancellation—is hardly sufficient to alleviate their potential harms. Indeed, just the fact that some automatic cancellation still exists proves it is not "absolutely clear" that the policy "could not reasonably be expected to recur." *See West Virginia*, 142 S. Ct. at 2607. ED's voluntary change in conduct toward Applicants does not prevent review.

ED's actions in other cases confirm its motives. The day after ED tried to moot this suit, it tried the same tactic against a suit filed by six states. Within hours of that suit's filing, ED *yet again* changed the program. Even the New York Times noticed what ED was doing—since the "automatic cancellation" at issue in this case "would leave the plan open to legal challenges," and the challenged aspect of forgiveness in the States' lawsuit raised profound legal question, "[t]he effort [from ED] was no coincidence — eliminating eligibility for those students could make it harder for a Republican attorney general to successfully attack the entire program in court." Katie Rogers, *Biden's Student Debt Plan Touches Off Lawsuits, Scams and Confusion*, NY Times (Sept. 30, 2022).[5] ED should not be allowed to succeed in its clear effort to avoid judicial review.

2. The Class Will Suffer Imminent, Irreparable Harm, even if the Named Representatives No Longer Face Loan Cancellation

"[I]nherently transitory" claims for class-wide injunctive relief will not become moot once the named plaintiff no longer suffers the challenged harms. *See Genesis*

[5] https://www.nytimes.com/2022/09/30/us/politics/biden-student-loans.html

Healthcare, 569 U.S. at 76. As this Court said, under the "relation-back doctrine," the cessation of the named plaintiff's injury does not bar class-wide injunctive relief "where it is certain that other persons similarly situated will continue to be subject to the challenged conduct and the claims raised are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Id.* (cleaned up). Thus, "in cases where the transitory nature of the conduct giving rise to the suit would effectively insulate defendants' conduct from review, certification could potentially 'relate back' to the filing of the complaint." *Id.*

Indeed, this Court has long recognized the need to review class actions of this type *particularly* where the defendant tries to remedy only the class representatives' harms. *See, e.g.*, *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991) (challenge to lack of probable cause hearing for the class was not moot even when class representatives were given hearings). As this Court said, "[T]he termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Id.* (citations omitted). Moreover, "[t]hat the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction." *Id.*

ED's attempt to moot the class-wide injury suffered by borrowers in the relevant states by suddenly stopping the harm to the class representatives fails under this exception. Instead, the analysis should focus on the state of affairs when the plaintiffs sought class certification and challenged the adequacy of the hastily created

opt-out mechanism. Even though ED has *since* excluded the class representatives, they can still challenge the policy on behalf of the class.

The loan cancellation program remains imminent for anyone in the class of automatic cancellation, and once it occurs, it is irreversible. As discussed, ED reacted to Mr. Garrison's suit by agreeing not to automatically cancel *only his loans*, and simply promising to build in a mechanism that allows others to opt-out. But others in Mr. Garrison's situation will only exercise that option if they both know that they face the same tax liability and that an opt-out exists. Mr. Johnson filed on behalf of a class to challenge the adequacy of that "option," but rather than address his challenge, ED simply tried to pick him off as a class representative by excluding him from cancellation as well. Because ED did not extend that remedy to the class—even though Applicants had moved to certify the class immediately—ED's action does not moot the claims on behalf of the class. *See Cnty. of Riverside*, 500 U.S. at 51–52.

The class, meanwhile, continues to face a wholly inadequate opt-out mechanism that will not prevent the harms it faces, *because ED is not acting toward the class as it has acted toward the class representatives.*[6] Whereas ED exempted the class representatives from the program, it has merely created an opt-out for the class that they have to choose to activate themselves. These are not equivalent options. The only way to make them equivalent would be to allow class members to *opt in* to

[6] It is also important to distinguish the harms from the inadequate opt-out mechanism for purposes of *standing* from the harms as they relate to the need for an injunction. Because the class might suffer *any* harm, it has standing to challenge the automatic cancellation policy. Of course, as discussed below, because the opt-out mechanism is inadequate to prevent widespread harm to the class, an injunction is necessary.

loan cancellation. Otherwise, the only option for class members that would allow them to be treated the same as ED has treated the class representatives would be for each member of the class to sue individually, so ED could then exempt them from the program. This, of course, would defeat the whole point of a class action and of the voluntary cessation exception to mootness. ED should not be permitted to evade review by changing course mid-litigation, as it so obviously is attempting to do. Review is therefore proper notwithstanding ED's attempted manipulation of this Court's Article III jurisdiction.

C. The Underlying Challenge to the Policy Is Likely to Succeed

"[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal[.]" *Warth v. Seldin*, 422 U.S. 490, 500 (1975). When reviewing a decision on standing, this Court assumes that the challenged conduct is unlawful. *Id.* at 502. Thus, an injunction is appropriate regardless of whether Applicants' underlying challenge to the cancellation policy will succeed.

But if the Court were to look further, the cancellation policy is clearly unlawful. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Particularly when the Executive claims "sweeping and consequential authority," a "colorable textual basis" in statute is insufficient; rather, the Executive must point to "clear congressional authorization." *West Virginia*, 142 S. Ct. at 2608–09. The HEROES Act not only lacks such clear authorization, but its terms clearly do not support ED's broad actions. Moreover, the HEROES Act's waiver provision empowers the

Executive to modify law and therefore violates the non-delegation doctrine. It thus cannot support ED's cancellation program.

1. Respondents' Debt Cancellation Is Not Supported by Statute

ED is purportedly implementing the cancellation program pursuant to the HEROES Act's waiver provision. *See Federal Student Aid Programs*, 87 Fed. Reg. 61,512 (Oct. 12, 2022). But the program cannot be supported by the statute's text.

Under the HEROES Act, "[t]he Secretary of Education . . . may waive or modify any statutory or regulatory provision applicable to . . . student financial assistance programs . . . as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide . . . waivers or modifications." 20 U.S.C. § 1098bb(a)(1)–(2)(A). The waivers or modifications must "be necessary to ensure that . . . recipients of student financial assistance . . . who are affected individuals are not placed in a worse place financially in relation to that financial assistance because of their status as affected individuals[.]" *Id.* And an "affected individual" includes "an individual who . . . resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" and an individual who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." *Id.* § 1098ee(2).

ED's blanket cancellation policy does not follow this text, however, as it applies broadly to individuals who are not "affected" by the declared emergency, and is not "necessary" to alleviate direct harms from the declared emergency. Indeed, the

cancellation policy is a massively overbroad measure devoid of any respect for the statutory limits.

a. ED is cancelling debt for statutorily ineligible individuals

Under the relevant provisions, the Secretary may provide waivers only to individuals who would otherwise be (1) "in a worse position financially" (2) "in relation to their financial assistance" (3) "because of their status as affected individuals." *Id.* § 1098bb(a)(2)(A). ED's debt cancellation far exceeds these limits.

First, cancellation will be available to those who are in a *better* financial position, such as those whose wealth or income have increased since 2020 when the COVID-19 pandemic started. Because the cancellation program's sole substantive criterion is an income of less than $125,000 in either 2020 or 2021 (or $250,000 for households), those whose income has increased from 2019 to 2020 to 2021 will be eligible for cancellation. This flies in the face of the statutory requirement that the waiver be only for "affected individuals" who are "in a worse position financially" because of the pandemic. *See id.*

Second, no borrower will be worse off "in relation to their financial assistance." *See id.* That's because repayments and interest accrual have been paused "since March 2020." 87 Fed. Reg. 41,878, 41,884 (July 13, 2022). Additionally, participants in PSLF and IDR continue to earn credit toward the payments necessary to obtain forgiveness under those programs, despite making no payments. *See* Dist. Ct. Dkt. No. 4, Ex. 2, at 1–2, Ex. 3, at 1. Once again, the policy broadly acts as though the opposite were true.

Third, even assuming there are those who would be worse off with respect to their federal student loans in the absence of debt cancelation, no part of ED's plan limits cancelation to those who would be worse off "because of their status as affected individuals." 20 U.S.C. § 1098bb(a)(2)(A). The entire nation may have been declared to be a disaster area, 87 Fed. Reg. at 61,513, but no one suggests any borrower is worse off because he lives or works in the United States (all of which has been declared a disaster area). *Cf. id.* § 1098ee(2)(C). And the cancelation program's eligibility criteria far exceed those who have "suffered direct economic hardship as a direct result of" the COVID-19 pandemic. *Id.* § 1098ee(2)(D). To the extent individuals have been "determined by the Secretary," *id.*, to be suffering from such hardship despite not *actually* so suffering, they cannot be worse off "because of" that designation, *id.* § 1098bb(a)(2)(A).

To be sure, "[t]he Secretary is not required to exercise the waiver or modification authority . . . on a case-by-case basis." *Id.* § 1098bb(b)(3). And that allows him to grant relief to categories of individuals all of whom are eligible for relief, such as the residents of a city destroyed by a war. But the Secretary's power to exercise waiver authority on a categorical basis does not give the Secretary the power to enormously expand who may receive a waiver under § 1098bb(a)(2)(A). *See West Virginia*, 142 S. Ct. at 2609 (Congress does not "use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme." (simplified)); *infra* Part I.B.1.c (discussing the major questions doctrine). Even when making categorical choices, the Secretary still must respect the statutory criteria.

b. Debt cancellation is not "necessary"

Under § 1098bb(a)(2)(A), waivers are permitted only if "necessary" to ensure affected individuals are not placed in a worse position with respect to their federal loans because of their status as affected individuals. As discussed, by suspending repayment and interest accrual, ED has placed borrowers in the *same* position now as before the pandemic with respect to their federal loans. Debt cancellation is clearly unnecessary to achieve the statutory goal under § 1098bb(a)(2)(A). This "necessary" requirement is meant to place real limits on the Secretary's discretion, as demonstrated by contrast with the broader "as the Secretary *deems* necessary" language just one paragrapher earlier, *see id.* § 1098bb(a)(1) (emphasis added). *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of statutory language).

ED's disregard for necessity is most obvious in their plan to *refund* loan payments to borrowers who have *finished* paying off their loans and reimpose debt in the refunded amount—just so they can cancel that debt and give those once-borrowers a windfall. *See* Dist. Ct. Dkt. No. 35 at 4. Nothing could suggest this is necessary to protect these individuals from being worse off with respect to their student loans. They do not even currently have such loans.

c. The debt cancellation program presents a major question not answered by statute

The Court does not assume that Congress has assigned to the Executive Branch questions of "vast economic and political significance" without a "clear

statement" to that effect. *West Virginia*, 142 S. Ct. at 2605. This is particularly so "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). In such circumstances, a court should adopt a narrow reading of a statute. *See Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

Outright debt cancellation—on a categorical basis for 40 million borrowers and costing more than $500 billion—is undisputedly a "power of vast economic and political significance." *West Virginia*, 142 S. Ct. at 2605. And it is also clear that ED's plan relies on as-yet-undiscovered powers in the HEROES Act. This Court should therefore view the policy with heavy skepticism. *See id.*

Relief under the Act has never been so broad and included so many individuals who do not meet statutory criteria. Until COVID-19, ED "generally invoked the HEROES Act relatively narrowly to grant relief to limited subsets of borrowers, such as deployed military service members or victims of certain natural disasters." Kevin M. Lewis & Edward C. Liu, *The Biden Administration Extends the Pause on Federal Student Loan Payments*, Congressional Research Service, LSB10568 Version 3, at 2–3 (Jan. 27, 2021).[7] Nor has the statute ever been used to broadly cancel loan principals before. *See* Department of Education, Office of the General Counsel, *Memorandum to Betsy DeVos, Secretary of Education* 6 (Jan. 12, 2021).[8] Recasting the HEROES Act from a statute permitting limited modifications to one that can sweep away debt for 40 million people and effectively spend more than $500 billion "effects a fundamental

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[7] https://crsreports.congress.gov/product/pdf/LSB/LSB10568.
[8] https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf.

revision of the statute, changing it from one sort of scheme . . . into an entirely different kind." *West Virginia*, 142 S. Ct. at 2596.

Congress itself has struggled over the question of whether to cancel student-loan principals. *See* Student Loan Debt Relief Act of 2019, S. 2235, 116th Cong. (2019); Income-Driven Student Loan Forgiveness Act, H.R. 2034, 117th Cong. (2021). Given the inevitably controversial nature of such a program, it is "doubt[ful] that Congress intended to delegate decisions of such economic and political significance" to the Executive in the HEROES Act; and it is equally doubtful that that power lay dormant in that statute all along in the "oblique" words of § 1098bb. *See West Virginia*, 142 S. Ct. at 2596, 2609.

d. The statute should be read to avoid constitutional questions

Even if the HEROES Act could bear the weight of ED's extraordinary, unilateral actions, the Court should construe the statute to avoid "serious constitutional problems, . . . unless such construction is plainly contrary to the intent of Congress." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (simplified). The Act contains important limits to ED's discretion, including the requirements under § 1098bb(a)(2)(A). But those limitations would be rendered meaningless if the statute were to be construed as allowing ED to freely grant waivers or modifications to individuals who are not financially worse off with respect to their student loans because of their status as affected individuals. Such a construction would violate the non-delegation doctrine and must be rejected. *See AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46 (1980) (plurality opinion).

2. The Statute Violates the Non-Delegation Doctrine

The Secretary's authority to waive or modify statutory provisions under the HEROES Act itself violates the non-delegation doctrine, whether or not the statute contains an intelligible principle. Whether an act has a "legislative character" is "confirmed by the character of the Congressional action it supplants." *INS v. Chadha*, 462 U.S. 919, 953 (1983). By authorizing the Secretary to waive and modify a statute, then replace it with "the terms and conditions to be applied in lieu of such statutory . . . provisions," 20 U.S.C. § 1098bb(b)(2), the Act permits the Secretary to supplant the Congressional action of legislative amendment.

The waiver authority is substantially the same as the line-item veto disapproved in *Clinton v. City of New York*, 524 U.S. 417 (1998). Since waiver "prevents the [waived] item from having legal force or effect," the "legal and practical effect" of waiver is to "amend[] . . . Acts of Congress," even if it does not formally "effect a repeal." *Id.* 437–39. It does not matter that waiver does not formally "effect a repeal"; what matters is the relevant statutory provisions became "entirely inoperative as to" the borrowers under ED's program. *See id.* at 441.

While *Clinton* acknowledged that *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), upheld a foreign policy statute requiring the President to suspend statutes under certain circumstances, *Field* does not control here. Suspension under *Field* is allowed only if "Congress itself ma[k]e[s] the decision to suspend or repeal the particular provisions . . . upon the occurrence of particular events," whereupon the Executive "ha[s] a duty to suspend." *Clinton*, 524 U.S. at 443, 445. This prevents the Executive from "effect[ing] the repeal of laws[] for his own policy reasons." *Id.* at 445.

Moreover, the *Field* suspensions were "in the foreign affairs arena, [where] the President has a degree of discretion and freedom . . . which would not be admissible were domestic affairs alone involved." *Id.*

Here, not only is higher-education financing purely a domestic matter, but unlike the *Field* suspensions, the Secretary does not have a duty to issue waivers or modifications; he "*may* waive or modify" statutory provisions. 20 U.S.C. § 1098bb(a)(1) (emphasis added). Though the Secretary may do so only in service of statutory goals, *see id.* § 1098bb(a)(2), his discretion in choosing *whether* and *when* to do so allows "his own policy reasons"—and not Congress—to determine the existence and timing of a waiver. *See Clinton*, 524 U.S. at 445. Furthermore, the Secretary has the discretion to waive provisions "as [he] deems necessary," 20 U.S.C. § 1098bb(a)(1), so he controls which statutory provisions he waives and what "terms and conditions" he replaces them with, *id.* § 1098bb(b)(2). That is, he controls the contents of the statutory amendment.

The effects of this discretion are evident here. The Secretary's discretion over *how* to enact a waiver was to produce debt cancelation, fulfilling a long-term priority of the President and his political party. *Cf.* Student Loan Debt Relief Act of 2019, S. 2235, 116th Cong. (2019). The Secretary's choice of *whether* to enact debt cancelation was thoroughly infected with non-statutory considerations, including the rising cost of education "[s]ince 1980" and the aim of "[a]dvanc[ing] racial equity." *See FACT SHEET 1*. And the Secretary's choice of *when* to enact debt cancellation was aimed not at the heart of the pandemic, but at a midterm congressional election that will

take place long past the peak of the pandemic. It cannot be said that "Congress itself made the decision" to enact debt cancellation in early October of an election year through the HEROES Act's waiver provision. *Clinton*, 423 U.S. at 445.

The statute permits the Secretary to suspend the law, to "modify" it with his own "terms and conditions," 20 U.S.C. § 1098bb(a)(1), (b)(2), and to do so when and how "[he] deems necessary," *id.* § 1098bb(a)(1). The statute thus bestows the Executive with lawmaking power in violation of Article I of the Constitution.

II. APPLICANTS AND THE CLASS THEY REPRESENT WILL SUFFER IRREPARABLE HARM

Applicants must show they are "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter*, 555 U.S. at 22. "Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010).

Potentially millions of members of the proposed class face irreparable harm from the automatic tax liability that loan cancellation will impose on them. If ED is not enjoined, there is no way to recover that loss. Individuals in Indiana, for instance, would become liable for more than $500 in state income tax as soon as ED automatically cancels $10,000 of their outstanding loans. *See* Ind. Code. § 6-3-2-1(b)(3). ED estimates that 856,400 borrowers in Indiana will be eligible for loan cancellation, with 555,500 eligible for Pell Grant cancellation of up to $20,000. *See FACT SHEET 2*.

But the class is even larger, and potentially millions face the same irreparable harm. At least five other states will tax cancellation as income. *See* Ark. Code § 26-51-404(b)(1); Minn. Stat. § 290.01(19)(f); Miss. Code § 27-7-15(4)(mm); N.C. Stat. § 105-153.5(c2)(22); Wis. Stat. § 70.01. And ED expects more than 3.5 million borrowers in those states will have their loans canceled. *See FACT SHEET 2*. But there is no way for Applicants, or anyone else, to recover for the new tax bill, even though ED's actions are unlawful, because Section 702 of the Administrative Procedure Act forbids monetary damages against the federal government. *See California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) ("harm is irreparable here because the states will not be able to recover monetary damages" because of 5 U.S.C. § 702). Those harms are irreparable.

III. THE INJUNCTION IS EQUITABLE AND IN THE PUBLIC INTEREST

A party seeking relief must demonstrate "that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). A government "does not have an interest in enforcing a law that is likely" invalid. *Edmondson*, 594 F.3d at 771. Instead, "'the public interest will perforce be served by enjoining the enforcement of the invalid provisions of [] law.'" *Id.* (citation omitted). Thus, this Court has held that when a rule exceeds an agency's authority, it should not "weigh [] tradeoffs" between its intended effect and harms. *NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022). "In our system of government, that is the responsibility of those chosen by the people through democratic processes." *Id.*

Simply—"[t]he public interest is served by compliance with the APA." *California*, 911 F.3d at 581; *see also Ala. Ass'n of Realtors*, 141 S. Ct. at 2490 ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends," such as the public's "strong interest in combating the spread of the COVID-19 Delta variant.").

ED has not only exceeded its authority under the HEROES Act but has also violated constitutional limits. They thus have no *legitimate* interest in avoiding an injunction. Huge numbers of borrowers face the immediate possibility of unwanted, and unlawful, tax liability through automatic cancellation, while *every* American will foot the half-trillion-dollar bill for ED's improper actions. *See Abbott Lab'ys v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992) (this factor considers "the consequences of granting or denying the injunction to non-parties."). The public interest lies with adherence to the "democratic processes" and not ED's actions. *See NFIB*, 142 S. Ct. at 666.

Even if none of this were so, the public interest would not be harmed by an injunction. Loan repayments and interest accrual are still paused, so no borrower will be disadvantaged by an injunction that allows the Seventh Circuit to consider Applicants' claims on the merits in an orderly fashion.

CONCLUSION

This Court should enjoin ED's cancellation policy pending appeal.

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Respectfully submitted,

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