No. 22A867

In the Supreme Court of the United States

EVERGLADES COLLEGE, INC., LINCOLN EDUCATIONAL SERVICES CORP., AND AMERICAN NATIONAL UNIVERSITY,
Applicants,

v.

MIGUEL CARDONA, in his official capacity as Secretary of the U.S. Department of Education, 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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Opposition to Application to Stay the Judgment Entered by the United States District Court for Northern District of California

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INTRODUCTION

Contrary to the impression left by the stay application, this case has nothing to do with the Biden Administration's broad student-loan cancellation program. Nor does it involve a legal challenge to some other recent federal program. This is instead a *sui generis* attack by three schools that intervened to object to the settlement of a long-running class action, claiming that it offends their procedural due-process rights and visits reputational harm upon them. But the schools identify no concrete injury, much less irreparable harm, that is both traceable to the settlement and redressable via the relief they now seek.

In 2015, a series of state and federal investigations revealed widespread misconduct by Corinthian Colleges, a sprawling for-profit college chain with more than 70,000 students. Following the investigations, Corinthian collapsed, leaving thousands with debt from a school that had misled them into enrolling and, now, no longer existed. The closure of numerous other for-profit colleges followed. In the wake of this scandal, the Department of Education faced a growing backlog of applications for relief under 20 U.S.C. § 1087e(h), a provision of the Higher Education Act that permits student-loan borrowers to "assert as a defense to repayment" certain "acts or omissions of an institution of higher education."

This class-action lawsuit was filed in 2019 by borrowers who challenged the Department's failure to timely process the application backlog. An initial settlement, under which the Department agreed to process all pending applications within eighteen months, collapsed after it became apparent that the Department wasn't really processing the applications but was instead denying them outright and in bad faith. Another year and a half of hard-fought litigation and discovery culminated in a new settlement.

Under this settlement, the loans of about 200,000 class members who attended 151 specific schools, listed in Exhibit C to the settlement agreement, will be discharged, enabling the Department to adjudicate the remaining applications on a specified timeline. The motion for final approval explains that "indicia of misconduct" at these 151 schools, along with a high volume of credible borrower-defense applications from their former students, "led the Department to conclude that these Class Members were entitled to summary settlement relief without any further time-consuming individualized review process." C.A.App.407.

The district court approved the settlement after a fairness hearing, and not one of the hundreds of thousands of class members objects. Yet three of the 151 schools—whose former students comprise less than 1.5% of the class—seek to block the entire settlement. Before the settlement, these schools had all been the subject of law-enforcement investigations, highly publicized consumer-protection lawsuits, and multi-million-dollar settlements. Yet they now complain that their inclusion in Exhibit C may cause them "concrete injury" in "the form of reputational harm." Stay App. 34–35 n.9. The schools' legal claims are not entirely clear; their main contention below seemed to be that they had a right to certain procedures before the government settled litigation by discharging loans that the government itself issued. But the settlement binds *only* the Department and the class. It gives neither the Department nor the class any additional rights against the intervenors.

Because the schools have identified neither redressable injury nor irreparable harm, and because they cannot show that their inchoate legal theories have any chance of success, the requested relief should be denied.

STATEMENT

A. Borrower defense to repayment of federal student loans

Under the Higher Education Act, borrowers of federal student loans may assert a defense to repayment of those loans based on a school's misconduct. *See* 20 U.S.C. § 1087e(h). This defense, known as borrower defense, applies only to federal loans held by the government, not to private loans. *See id.*[1]

Although the defense rests on a student borrower's allegations of a school's misconduct, the Department of Education's decision to grant a borrower-defense application does not impose liability on the school. It merely discharges the borrower's obligation to the government. 34 C.F.R. § 685.212(k). If the Department wishes to recoup any losses from a school that it believes committed misconduct, it must bring a separate proceeding against that school. 34 C.F.R. § 668.87(a)-(b). That proceeding affords the school several rights, including a right to notice of the "facts and law" upon which the Department relies, an opportunity to respond, and a hearing. *Id.*

B. The 2015 surge in borrower-defense applications

Although borrower defense has been available since 1995, applications surged in 2015. That year, a series of state and federal investigations revealed widespread misconduct by Corinthian Colleges, a sprawling for-profit college chain with more than 100 campuses and over 70,000 students. *See* C.A.Supp.App.2; U.S. Dep't of Educ., *U.S. Department of Education Fines Corinthian Colleges $30 Million for Misrepresentation* (April 14, 2015),

[1] Unless otherwise specified, all internal quotation marks, citations, and alterations are omitted from quotations throughout this response. Citations to App. are to the stay applicants' appendix before this Court. Citations to "C.A.App.", "C.A.Supp.App.", and "C.A.Reply.App." are to the appendices filed in the Ninth Circuit. And citations to "Dkt." are to the district court docket.

https://perma.cc/348D-5CKX. Following these investigations, Corinthian collapsed, leaving hundreds of thousands of students with loan debt from a school that had misled students into enrolling and that now no longer existed. *See id.* The closure of numerous other for-profit colleges followed. *See*, *e.g.*, C.A.App.63–64; Dkt. 55 at 13. And the Department of Education soon faced a flood of borrower-defense applications. C.A.Supp.App.2–3.

The Department created a borrower-defense unit to adjudicate these applications, but the backlog kept growing. C.A.Supp.App.2. By January 2017, the agency had processed over 30,000 borrower-defense applications, but more than 40,000 applications remained. C.A.Supp.App.2–3.

Then, following a change of administration, in March 2017, the agency stopped processing applications altogether. C.A.Supp.App.3. The stated rationale was to give the new Secretary of Education time to review the borrower-defense process. C.A.Supp.A.3. At the request of the Secretary, the Department's Inspector General reviewed the process and recommended that the Department resume consideration of borrower-defense applications. Dkt. 56-4, at AR517. The agency did so—temporarily. C.A.Supp.App.4. But by June 2018, the Department had again stopped processing applications. *Id.* And for more than a year, the Secretary refused to issue any borrower-defense decisions at all. *Id.* Meanwhile, the backlog only grew, with over 200,000 applications pending without decision by June 2019. *Id.*

C. Borrower-defense applicants seek relief in court, and the parties spend years litigating.

Eventually, in June 2019, several borrower-defense applicants filed this lawsuit, alleging that the Department's refusal to adjudicate their borrower-defense applications

violated the Administrative Procedure Act. C.A.App.102. Several months later, the district court (over the Department of Education's opposition) certified a class. C.A.App.55. Because the case was filed under the Administrative Procedure Act, the Department produced an administrative record, *see* Dkt. 56, and the parties immediately proceeded to summary judgment, *see* Dkt. 63, 67.

While cross-motions for summary judgment were pending, the parties engaged in court-ordered mediation. Dkt. 47. That mediation initially appeared to be successful: The Department of Education agreed to process all pending borrower-defense applications within the following eighteen months. C.A.Supp.App.5. And, if it failed to meet this deadline, it agreed to discharge 30% of an applicant's loan balance for every 30 days the application remained pending after the deadline. Dkt. 97-2. The district court granted preliminary approval of this settlement in May 2020. C.A.Supp.App.5.

But, following preliminary approval, class counsel and the court discovered that although the Department of Education had technically resumed adjudicating borrower-defense applications, it had done so by issuing "perfunctory" denials of tens of thousands of claims. C.A.Supp.App.6. What had appeared to be the "long-awaited restart of borrower-defense application review" was, instead, in the words of the district court, "cause for alarm." C.A.Supp.App.7. The Department was "processing" borrower-defense applications by sending virtually identical form letters denying the applications with no reasoning. C.A.Supp.App.8. The only way a borrower could challenge the denial was to seek reconsideration, explaining why the Department got it wrong the first time. *Id.* But, as the district court explained, it's "impossible to argue with an unreasoned decision."

C.A.Supp.App.9. The Department rejected almost 95% of the class members' applications that it processed through what the district court called this "Kafkaesque" system. C.A.Supp.App.8.

In response to these revelations, the plaintiffs asked the district court not only to approve the settlement but to enforce it. C.A.Supp.App.6. In the plaintiffs' view, the settlement's requirement that the Secretary issue "final decisions" on pending applications within 18 months could not reasonably be interpreted to mean unexplained, perfunctory denials. *Id.* After all, the plaintiffs reasoned, due process, the Administrative Procedure Act, and the agency's own regulations require that the Department actually consider an application before denying it and articulate reasons for its denials. C.A.Supp.App.9–10. The plaintiffs argued that the settlement's reference to "final decisions" had to mean decisions that comply with the law. *See id.* They requested that the court enforce this interpretation of the settlement. *See id.*

The Department of Education also sought final approval of the settlement, but disputed the plaintiffs' interpretation. C.A.Supp.App.9. In the Secretary's view, all the settlement required was that borrower-defense applications be processed—lawfully or otherwise. *See id.* Even if denials are perfunctory, the Secretary asserted, they are still "final decisions." *See id.*

In the face of this dispute about the settlement's meaning, the district court denied final approval. C.A.Supp.App.10. The court concluded that, because of the parties' differing interpretations, there had been no "meeting of the minds" on the "rights and duties" the settlement imposed and therefore there was no actual agreement in the first place. *Id.*

So the case returned to litigation. But the plaintiffs were no longer confined to the administrative record. The Department's conduct, the district court held, evidenced bad faith: The Department had defended its long delay in processing borrower-defense applications based on the time and effort required to do so, only to turn around and "issu[e] perfunctory denial notices utterly devoid of meaningful explanation at a blistering pace"—including, the court observed, to borrowers who plainly met the standard for borrower defense. C.A.Supp.App.15. The administrative record upon which the lawsuit had been proceeding thus appeared to be "a fictional account of the [agency's] actual decisionmaking process." C.A.Supp.App.11. Therefore, although the district court recognized that "discovery against agencies is disfavored," it concluded that this was the rare case in which it was warranted. C.A.Supp.App.15.

The court emphasized that by purporting to agree to actually adjudicate borrower-defense applications, but then issuing a raft of form denials, the Department had "put[] borrowers in worse positions than they started." *Id.* Many borrowers, the court explained, "live under the severe financial burden of their loans." *Id.* The eight months "lost" pursuing this failed settlement only "compound[ed]" the harm caused by the Secretary's refusal to process borrower-defense applications in the first place. *Id.*

The court ordered the parties to show cause why the Secretary's perfunctory denials should not be enjoined. *Id.* In response, the Department agreed not to issue any more form denials—or collect on the loans of borrowers who received such denials—until the lawsuit concluded. Dkt. 150 at 2–3. Another year and a half of hard-fought litigation followed. In discovery, the plaintiffs confirmed that, following its eighteen-month refusal to adjudicate

borrower-defense applications at all, the Department had implemented numerous policies that ensured that the vast majority of applications would be summarily denied. Dkt. 198. For example, reviewers were empowered to deny, but not approve, applications; they were given only minutes to do so; and they were not permitted to credit borrowers' sworn statements, even where they were corroborated by other borrowers. C.A.App.137–40. The Department routinely denied applications even where the agency itself had—in non-borrower-defense proceedings—already concluded that the school committed misconduct. *See* C.A.App.150, 151, 154, 155, 156; C.A.Supp.App.14.

Based on this discovery, the plaintiffs filed a supplemental complaint, alleging that the Department's refusal to even process applications, followed by its blanket denial of nearly all applications, violated the Administrative Procedure Act and the Due Process Clause. *See* Appx. 32a. In June 2022, the plaintiffs again moved for summary judgment and sought an order to show cause why—given the Department's long delays and bad faith—each and every class member's borrower-defense application should not be granted immediately. Dkt. 245 at 33–37.

D. The parties settle, and four school owners seek to intervene.

About a month before trial was set to proceed, and with the plaintiffs' summary judgment motion pending, the parties reached a settlement. Dkt. 242. The settlement—the product of months-long arms-length negotiations—provides relief to three groups of people. App. 6a. The first group is class members who attended the schools listed in Exhibit C to the settlement agreement, whose loans the settlement agreement automatically

discharges.[2] *Id.* The motion for final approval of the settlement explained that "indicia of misconduct" at these schools, along with a high volume of borrower-defense applications from their students, "led the Department to conclude that these Class Members were entitled to summary settlement relief without any further time-consuming individualized review process." *Id.* For the remainder of the class members whose borrower-defense applications were pending when the settlement was entered (i.e. those who did not attend schools listed on Exhibit C), the agreement provides streamlined procedures for adjudicating their applications, "with certain presumptions in favor of the borrower." *Id.* And, finally, for people whose borrower-defense applications were submitted after the settlement was entered but before final approval, the settlement provides a three-year deadline for adjudicating their applications. *Id.*

Three weeks after the parties moved for preliminary approval of their settlement, four schools moved to intervene as of right.[3] *See* App. 34a. All four schools had been the subject of law enforcement investigations, highly publicized consumer-protection lawsuits resulting multi-million-dollar settlements, or both.[4] Yet the schools asserted that their

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[2] The settlement also includes people who applied for borrower defense to discharge federal student loans they borrowed for a child or dependent to attend a postsecondary institution. *See* 34 C.F.R. § 685.222(a)(4)(ii).

[3] Although formerly a for-profit college, Everglades is currently purporting to operate as a non-profit. But a House Education Committee probe suggested that its non-profit status is dubious. C.A.Reply.App.400.

[4] *See, e.g.*, Veronica Jean Seltzer, *American National Univ. found guilty of violating KY Consumer Protection Act*, WVTQ (June 18, 2019), https://perma.cc/5Z8C-4ZRU; Karishma Mehrotra, *Two for-profit-colleges settle lawsuit with attorney general for $2.3 million,* Boston Globe (July 30, 2015), https://perma.cc/H6AL-RB39 (reporting that Lincoln Technical Institute, an affiliate of Movant LESC, settled a lawsuit accusing it of "using unfair recruiting tactics and inflating job placement numbers"); Lucy Campbell, *Students Win $11.2M Settlement in Chicago School of Psychology Fraud Lawsuit*, Lawyers & Settlements.com (Sept. 22, 2016), https://perma.cc/KU48-DN5U (describing settlement in lawsuit brought by students who "wanted to study at the Chicago School of Professional Psychology," and "alleged they were provided with misleading information regarding the school's accreditation and their job prospects after completing their courses"); C.A.App.150-151 (describing settlement agreement between Everglades University and the state of Florida "over alleged violations of Florida's Unfair Trade Practices Act").

inclusion on Exhibit C of the settlement agreement—the list of schools for which class members' federal loans would be automatically discharged—would cause them reputational harm. *See* Dkt. 254 at 15–17; Dkt. 261 at 10. The schools' legal arguments were not entirely clear, but their main contention seemed to be that they had a right to notice and an opportunity to be heard before the government settled claims against the Secretary of Education by discharging student loans that the government itself had issued. Dkt. 254 at 15–18; Dkt. 261 at 15–16.

The district court held that the schools had "not met their burden of demonstrating they can intervene as of right," C.A.App.390, but allowed the schools to permissively intervene to ensure that the court was informed of all "the opposing arguments" to settlement approval. C.A.Supp.App.112; C.A.App.402.

E. After considering the schools' objections, the district court approves the settlement, and both the district court and Ninth Circuit deny the intervenors' request for a stay.

In its order granting final settlement approval, the district court carefully addressed—and rejected—each of the intervenors' objections. *See* App. 34a–53a.[5] Of particular relevance here, the court held that the settlement did not abrogate any of the schools' "procedural rights, nor has their status been altered." App. 44a. The court explained that the settlement resolves borrowers' claims *against the government*. *See* App. 42a. It does "not impose any liability whatsoever on intervenors." *Id.* In other words, "[n]o liberty or property interest" of the schools "has been disturbed." App. 44a. And if the government wanted to bring claims against the schools, it would have to do so in a separate

[5] This order followed a public hearing, attended by 1,000 people, making clear that the settlement here was no secret. C.A.Supp.App.119–120.

proceeding, in which the schools are "free to litigate *ab initio* the merits" of their conduct. App. 43a. The Department of Education has made clear that inclusion on Exhibit C "does not constitute evidence that could or would be considered in" such an action. App. 44a. The schools, therefore, retain "all of [their] due process protections." App. 43a.

To the extent the schools relied on freestanding reputational harm, the court explained, that argument is foreclosed by this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), which held that "reputation alone, apart from some more tangible" liberty or property interest, is insufficient "to invoke the procedural protection of the Due Process Clause." App. 43a.

On the merits, the district court concluded that the Secretary had authority to settle the borrowers' claims against the government. App. 34a. The settlement, the court emphasized, has nothing to do with the "loan forgiveness plan [then] recently announced by President Biden." *Id.* Rather, it is rooted in the Attorney General's authority to settle claims, and the Department of Education's statutory authority to discharge loans—authority the Department has exercised routinely across administrations. App. 36a. If each borrower had sued the Department individually, the court explained, "the Department could have settled those individual actions one by one, and it could have done so using precisely the same criteria." App. 39a. And so there was no reason, the court held, that the Department could not settle them as a group as part of this class action—especially because, otherwise, the record showed, the Department would not clear the backlog for over twenty-five years. *See id.*

The court rejected the school's "strawman" argument that construing the Secretary's authority as encompassing the power to settle claims after litigation would somehow necessarily allow the Secretary to unilaterally discharge every student loan in America. App. 38a. The authority to take the ordinary step of discharging loans in response to specific claims, the court explained, is nothing like a program of broad-based loan cancellation. *Id.* A ruling on the former simply does not implicate the latter. *See id.*

After concluding that the settlement was "fair, reasonable, and adequate," the district court granted final approval. App. 48a. None of the class members appealed the final approval order. But on day 58 of the 60-day appeal period, three of the four schools that had been allowed to permissively intervene in the case did. App. 4a. And although they had waited nearly two months, the schools argued that they would suffer "irreparable harm" if the district court did not stay its order pending their appeal. Dkt. 350 at 18–22.

The court denied the schools' request because they had shown neither irreparable injury nor a likelihood of success on appeal. As to irreparable injury, the court again rejected the schools' contention that the Secretary's decision to settle borrowers' claims against the government somehow implicated the schools' due process rights. App. 14a–16a. Again, the court explained, the settlement does not impose any liability on any school. *See id.* And if the government later seeks to take any enforcement action against a school, the settlement would—and could—have no impact. *See id.*

The court also again rejected the schools' claimed reputational injury. Despite being "on notice" that they would have to show injury, the schools' assertions of "reputational harm," the court found, were "markedly speculative, grounded in platitudes rather than

evidence." App. 17a. The schools made no effort to show why, in light of their "history of law enforcement activity and consumer fraud abuses," any reputational harm they might experience could be attributed to the settlement. App. 18a. And they offered little evidence that they suffered any reputational harm at all. *See id.* One school, for example, speculated that disclosure of the settlement in its securities filings would cause "concrete and material consequences for the company, its financial reporting, and its shareholder relations." App. 22a. But there was no impact on its stock price; in fact, its stock price increased in the months following the settlement. *Id.* The most concrete example of injury any school proffered was an assertion—offered for the first time on reply—that one intervenor lost the opportunity to speak to a high school class because a teacher there understood that the school was on the Department of Education's "list of predatory schools." App. 20a. To the extent this comment was even about the settlement, the district court concluded that it could be easily "reparable." App. 21a.

In any event, the court explained, even if the schools had shown that they were experiencing irreparable reputational harm, a stay would not ameliorate that harm. App. 16a. That's because their "purported reputational harm" stemmed from their inclusion on Exhibit C to the settlement, and a stay would not take them off the list. *See id.*

In addition to failing to demonstrate that a stay was necessary to prevent irreparable harm, the district court held that the intervenors had also failed to demonstrate a likelihood of success on appeal. App. 23a. The schools attempted to satisfy this requirement by simply recycling the arguments they made in opposition to final approval, "often verbatim." App. 24a. But the court declined to "revisit" those arguments because the schools' motion

suffered a more fundamental, "threshold" defect. App. 24a. For an intervenor to appeal a decision that neither party to the litigation has appealed, they must have Article III standing. *Id.* And "[n]oticeably absent" from the schools' briefing was "any discussion of" standing—even though the plaintiffs had flagged the issue for them. *Id.* Again, the court reiterated that the schools had never identified any "legally protected interest they have that the settlement affects." *Id.* And the court itself was "at a loss" to point to any injury to the intervenors "arising from this settlement agreement (that they were not a party to) resolving this litigation (that did not involve them)." *Id.*

Without any showing of irreparable harm or likelihood of success, the district court denied the request for a stay. App. 27a. "Resolution of a lawsuit concerning monumental delay," the court concluded, "should not be delayed any longer by three intervenor schools who were not parties to the settlement agreement and who were not involved in the long, hard-fought litigation that preceded it." *Id.* The Ninth Circuit also denied a stay pending appeal, agreeing with the district court that the schools "fail[ed] to demonstrate a sufficient probability of irreparable harm." Appx. 3a.

The schools sought an emergency stay in this Court five days later.

REASONS TO DENY THE APPLICATION

I. The intervenors are not entitled to a stay.

A stay is warranted "only if a four-part showing is made": The applicant must show first, "that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction"; second, "that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; third, "that irreparable harm is likely to result from the denial of a stay";

and finally, that the "balance [of] the equities" favors the applicant. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The schools have failed to satisfy any of these requirements.

A. The schools have not shown that any harm will result from the denial of a stay.

1. To begin, take irreparable harm. The schools' lead argument (at 27–31) is that their inclusion on Exhibit C of the settlement agreement has caused and will continue to cause them "irreparable reputational injury." But they fail to show *any* reputational injury stemming from that exhibit.

The strongest evidence they can muster (at 28) is that a high school teacher didn't feel comfortable "taking class time" for Lincoln, one of the intervenor schools, to recruit their students. It's not at all clear that this has anything to do with the settlement. The teacher purportedly attributed this discomfort to their "understanding that Lincoln Tech is on the U.S. Department of Ed's list of predatory schools." Stay App. 28. But the schools offer no evidence that whatever list the teacher might have been referring to is Exhibit C of the settlement in this lawsuit. Indeed, Lincoln has been the subject of several law enforcement inquiries, including an action by the Massachusetts Attorney General for violating state consumer protection law, an investigation by the Consumer Financial Protection Bureau, and investigations by the Department of Education (entirely unrelated to the settlement of this lawsuit). C.A.App.546. Any one of these investigations could have landed Lincoln on a list of predatory schools.

The intervenors complain (at 29–30) that the settlement has occasionally been referenced alongside public evidence of their misconduct, such as law enforcement actions

and lawsuits. But, again, that doesn't demonstrate that the settlement—and not the "numerous law enforcement inquiries" and lawsuits, *see* C.A.Supp.A.194—is causing any reputational harm they might be suffering.

And even if it did, the schools' argument is self-defeating. The schools vociferously contend (at 30) that their reputational harm is attributable to their mere inclusion in Exhibit C. But the schools will remain on Exhibit C, regardless of whether the district court's settlement approval is stayed. Any harm the schools might suffer, therefore, is not harm caused by the denial of a stay.

2. The schools fare no better arguing (at 31–34) that they have "administrative rights and defenses" that will be irreparably lost absent a stay. The settlement does not adjudicate any borrower-defense application; it settles litigation challenging the Secretary's failure to do so. And so any procedural rights that the schools might have when the Department of Education *does* adjudicate borrower-defense applications simply don't apply. But more fundamentally, as explained above, the Secretary's decision to discharge a borrower's loan, either via settlement or in response to a borrower-defense application, does not impose liability on the borrower's school. *See supra* page 3. That requires a separate proceeding, at which the school has a right to notice and a hearing—and in which the settlement here is irrelevant. *See id.* At most, the schools' claimed "administrative" injury is that they have a right to participate in proceedings—borrower-defense adjudications—that never happened and that couldn't possibly affect them. That is not harm at all, let alone irreparable harm.

B. The intervenors cannot show a reasonable probability that this Court will grant certiorari, let alone a fair prospect that the Court will reverse.

1. The schools lack standing to appeal.

There is no prospect that this Court (or any court) will reverse the district court's settlement approval because the intervening schools lack Article III standing to challenge it. An intervenor who appeals a final judgment when neither of the original parties below have appealed must independently demonstrate Article III standing. *Wittman v. Personhuballah*, 578 U.S. 539, 543-44 (2016). The schools therefore "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

In their stay briefing before the district court, the schools didn't even try to satisfy these requirements. They do little more here, devoting only a single, cursory footnote to the issue. *See* Stay App. 34–35 n.9. And there's little more they could do: The intervenors can't possibly demonstrate that they have suffered a concrete harm that is both traceable to the settlement and that would be redressed by overturning its approval.

Again, the settlement does not impose any liability on the schools. It couldn't. They aren't parties to the case. The sole "concrete injury" the schools assert here is "reputational harm" from being listed in Exhibit C to the agreement, "and associated loss of financial and programmatic opportunities." *Id.* But, as the district court concluded, there's no evidence that any reputational harm the schools suffer was caused by a list attached to a settlement agreement—as opposed to the highly publicized law-enforcement actions and consumer-protection lawsuits brought against the schools as a result of their misconduct. In other

words, there's no evidence that any harm to the schools' reputations is traceable to the settlement agreement, let alone the district court's order approving it.

In any event, reversing the order approving the settlement couldn't redress any such harm, even assuming it exists. The schools claim that their harm stems from being included on Exhibit C to the agreement. But reversing the final approval order wouldn't change what Exhibit C says. The schools assert (at 35 n.9) that "vacatur on appeal would establish . . . that the Department's 'determination' of misconduct was unsupported and unlawful." But it wouldn't: The schools' arguments for vacatur are about the Secretary's authority to settle the borrowers' claims and the propriety of class certification, not Exhibit C. So even if the schools got the exact decision that they ask for on appeal, that decision wouldn't redress the harm that the schools claim to have suffered.

"It has never been supposed that" an intervenor can prevent the actual parties to a lawsuit "from settling their own disputes." *Loc. No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 528–29 (1986). The schools offer no reason why this case should be any different.

2. The intervenors' challenge fails on the merits.

Even if the schools had standing, they still could not show any prospect of reversal on the merits. The intervenors argue that the government had no statutory authority to settle the borrowers' claims against it. By settling this lawsuit, they contend (at 3), the Secretary is claiming "the power to cancel, *en masse*, every student loan in the country." But the Secretary makes no such claim. Unlike *Nebraska* and *Brown*, this case does not involve a blanket loan cancellation program; it involves the settlement of specific claims brought by specific borrowers in a hard-fought lawsuit. It does not, therefore, rely on any

extraordinary assertion of power. It relies on the Attorney General's ordinary authority of the Attorney General to settle claims against the United States. *See* App. 35a (citing 28 U.S.C. §§ 516, 519).

The schools do not dispute—or even mention—this authority. Instead, they assert that the Higher Education Act somehow bars the Secretary of Education from compromising student loan debt as part of a settlement. *That* would be extraordinary: It would leave the Department of Education uniquely unable to settle litigation against it. But the statute says no such thing.

To the contrary, the Act explicitly authorizes the Secretary to "compromise, waive, or release any right, title, claim, lien, or demand" acquired in the Secretary's performance of his vested "functions, powers, and duties" to administer federal student loans. 20 U.S.C. § 1082(a)(6). Although the intervenors argue that this provision applies only to Federal Family Education Loans, the statute says otherwise. Loans under the Direct Loan Program "shall have the same terms, conditions, and benefits" as loans under the Federal Family Education Loans program. 20 U.S.C. § 1087e(a)(1). One of those terms and conditions is that the Secretary may discharge the loan.

In addition, Congress has provided the Secretary with broad authority to promulgate rules and regulations governing the programs administered by the Department of Education—including the Direct Loan Program. 20 U.S.C. § 1221e-3. One such regulation the Secretary has promulgated is that it "may compromise a debt" owed to it according to the Federal Claims Collections Standards. 34 C.F.R. § 30.70(e)(1). Those standards, in turn, authorize agencies to compromise debts where "[t]here is significant

doubt concerning the Government's ability to prove its case in court." 31 C.F.R. § 902.2(a)(4). That is precisely the case here.

Nothing in the Higher Education Act—or anywhere else—suggests that lawsuits against the Department of Education are somehow unique, or that the Attorney General lacks authority to settle them. Nor is there anything in the statute that suggests that to settle litigation, the Department of Education must undertake a formal rulemaking. Again, the Secretary did not implement a new program for adjudicating borrower-defense applications. He agreed to a process for resolving the specific claims of the specific plaintiffs in this specific lawsuit, in order to settle this litigation. The Administrative Procedure Act does not govern ordinary litigation decisions.

Finally, the schools briefly argue (at 25–26) that the district court should have decertified the class because claims for "individualized award[s] of monetary damages" cannot be certified under Rule 23(b)(2). But the borrowers didn't bring a claim for individualized monetary damages, nor did the settlement provide them such an award. The settlement provided procedures for pursuing loan discharges. The schools do not seriously contend that debt cancellation is an award of monetary damages. And to the extent that the discharge of some borrowers' loans will result in them receiving a refund, that refund is incidental to the essentially injunctive relief that they received. There is no reasonable probability that this Court will grant certiorari to review, let alone reverse, an unobjectionable district court class-certification order challenged only by a nonparty to the litigation.

C. The balance of equities does not favor a stay.

Only in close cases will the Court balance the equities of a requested stay. *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). The intervenor schools have not presented a close case, and the balance of the equities is not in their favor. As the district court found, while the schools "acutely overstate" their harms, they "acutely understate[]" the harm to borrowers, the Department of Education, and the public of continuing to delay loan relief. App. 25a. The borrowers "have languished in borrower-defense application limbo"—in many cases, for years—while "the sword of Damocles hangs over their head," threatening that suddenly they will have to repay loans they were often misled into taking out. App. 25a–27a. The intervenors claim (at 35) that the district court considered only "vague assertions of intangible harm" to the class. But, in fact, the court had before it 144 sworn declarations that detailed specific harms that class members will suffer if settlement relief is delayed, including mental and physical health struggles, delays to marriage and retirement, even potential job losses. *See* C.A.Supp.App. 200–359. "[T]he relief provided by this settlement . . . will allow plaintiffs to breathe easier, sleep easier, repair their credit scores, take new jobs, enroll in new educational programs, finish their degrees, get married, start families, provide for their children, finance houses and vehicles, and save for retirement." App. 27a. Forcing the class to wait even longer for relief they should have received years ago would exacerbate the "financial, physical, and emotional" harms that they had already suffered. Appx. 26a.

Further delay would also harm the Department of Education and the public. A stay "frustrates" the government and the public's "strong interest in" ameliorating the "backlog of borrower-defense applications." App. 26a. The public interest is squarely in providing

long-awaited relief to student borrowers, not in delaying that relief at the behest of three intervenors who weren't even party to the litigation. *See id.*

Ultimately, then, the balance of equities is severely lopsided: The three schools have identified no harm they will suffer if a stay is denied, while the harm to borrowers, the government, and the public is "acute." This Court should not allow a few intervenors with have no actual interest in this litigation to delay the much-needed relief the settlement affords.

II. The schools' claims of alleged reputational injury do not warrant the extraordinary remedy of certiorari before judgment.

In a final Hail Mary, the three intervenor schools propose that this Court grant certiorari before any court of appeals in the nation has even considered their novel theories of procedural due-process and reputational harm stemming from a settlement to which they are not parties. But certiorari before judgment has traditionally been "an extremely rare occurrence," *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers), reserved for urgent situations such as a hostage crisis or a national wartime emergency. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584–85 (1952). Under this Court's rules, the remedy is available "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11.

The schools' application does not remotely satisfy that "very demanding standard." *Mount Soledad Mem'l Ass'n v. Trunk*, 134 S. Ct. 2658, 2659 (2014) (Alito, J., statement respecting the denial of certiorari before judgment). Indeed, as discussed, the schools

cannot even satisfy the bare-minimum requirements of Article III standing necessary for *any* litigant to seek relief of *any* kind in federal court. Nor do they attempt to explain why the "normal appellate practice" is incapable of adjudicating their novel theories in this case.

Instead, as they do throughout their application, the schools default back to a spurious attempt to equate this unusual non-party collateral attack on a class-action settlement with the legal challenges to President Biden's emergency student loan debt cancellation program, now pending before this Court in *Brown* and *Nebraska*. The schools blithely contend that "this Court has already determined" that certiorari before judgment was warranted there, so it should do the same here. Stay App. 39. But, other than the fact that the cases all involve student loans, the situations are nothing alike. By the time *Brown* and *Nebraska* reached this Court, two lower courts, including the U.S. Court of Appeals for the Eighth Circuit, had already weighed in and issued nationwide injunctions against the operation of a federal program that was expressly premised on the existence of a national emergency. In that unusual scenario, the Solicitor General urged certiorari before judgment and this Court agreed. But, here, nobody will be harmed if these three schools' novel claims of reputational injury are subject to the normal appellate practice. No deviation from that normal practice is warranted.

CONCLUSION

For the reasons stated above, the intervenors' application should be denied.

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Respectfully submitted,

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