

No. 25-

IN THE
Supreme Court of the United States

EVERGLADES COLLEGE, INC.,

Petitioner,

v.

LINDA MCMAHON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rebuffed by Congress and this Court in its attempts to cancel student-loan debt *en masse*, the Biden Administration transmogrified a narrow procedural lawsuit into a sweeping class-action settlement that eliminated \$7.5 billion in debt and rewrote student-loan regulations without Congressional authorization. Worse still, the government used the settlement to label 150 non-party educational institutions guilty of “substantial misconduct” without providing those schools notice or an opportunity to be heard. This settlement was an egregious example of “sue and settle”—i.e., “collusion between advocacy groups and executive officials who want to bind the hands of future policymakers.” *Horne v. Flores*, 557 U.S. 433, 449 (2009).

Several schools injured by their surprise inclusion in the settlement intervened in the district court to challenge the settlement’s legality. After the district court rejected those challenges and approved the settlement, the schools appealed. A split panel of the Ninth Circuit—over a dissent from Judge Collins—held that although the schools suffered Article III injury, they lacked so-called “prudential standing” to challenge or appeal the settlement because it did not inflict “formal legal prejudice.”

The question presented is: Whether federal courts may impose a judge-made “prudential standing” bar to block non-settling intervenors from redressing Article III injury imposed on them by a government

class-action settlement simply because the injury does not create “formal legal prejudice.”

PARTIES TO THE PROCEEDINGS

Petitioner Everglades College, Inc., was an intervenor-appellant in the court of appeals. The other intervenor-appellants were American National University, Inc. and Lincoln Educational Services Corporation.

Respondents were plaintiff-appellees and defendant-appellees in the court of appeals. The plaintiff-appellees were Theresa Sweet, Chenelle Archibald, Daniel Deegan, Samuel Hood, Tresa Apodaca, Alicia Davis, and Jessica Jacobson. The defendant-appellees were the U.S. Department of Education and its Secretary.

CORPORATE DISCLOSURE STATEMENT

Petitioner Everglades College, Inc., is a not-for-profit entity and has no parent corporation, and no publicly held company owns ten percent or more of its stock.

STATEMENT OF RELATED CASES

The related proceedings are as follows:

- *Sweet v. Everglades Coll., Inc.*, No. 23-15049, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on November 5, 2024; timely rehearing petition denied on May 21, 2025.
- *Sweet v. Lincoln Educ. Servs. Corp.*, No. 23-15050, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on November 5, 2024; timely rehearing petition denied on May 21, 2025.
- *Sweet v. Am. Nat'l Univ.*, No. 23-15051, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on November 5, 2024; timely rehearing petition denied on May 21, 2025.
- *Sweet v. Cardona*, No. 3:19-cv-3674, U.S. District Court for the Northern District of California. Judgment entered on Nov. 16, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Everglades College, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 121 F.4th 32 (9th Cir. 2024), and reproduced at App.1a-44a. The Ninth Circuit's order denying rehearing en banc is unpublished and reproduced at App.86a-87a.

The district court's order approving the settlement is reported at 641 F. Supp. 3d 814 (N.D. Cal. 2022), and reproduced at App.45a-82a. The district court's order permitting Everglades to intervene is reported at 2022 WL 4596629 (N.D. Cal. Aug. 31, 2022), and reproduced at App.83a-85a.

JURISDICTION

The Ninth Circuit issued its decision on November 5, 2024, and denied a timely rehearing petition on May 21, 2025. Justice Kagan extended the time to file a petition for a writ of certiorari by sixty days on July 21, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Federal Rules of Civil Procedure 24 and 41 are reproduced at App.89a-93a. Article III, Section 2, Clause 1 of the United States Constitution is reproduced at App.88a.

INTRODUCTION

Few practices warp our separation of powers more than “sue and settle”: collusive deals in which the executive branch and politically aligned plaintiffs effectively amend federal law through court-approved settlements. *Mi Familia Vota v. Fontes*, 129 F.4th 691, 745 (9th Cir. 2025) (Bumatay, J., dissenting). These settlements, for example, raise the “fundamental” question of “whether the Government’s actions ... comport with the principles of administrative law” because they “allow[] the Government to circumvent the usual and important requirement” that “a regulation originally promulgated using notice and comment ... may only be repealed through notice and comment.” *Arizona v. City & Cnty. of San Francisco*, 596 U.S. 763, 765-66 (2022) (Roberts, C.J., concurring). And they “sidestep” our democratic process by “bind[ing] the hands of future policymakers,” “depriv[ing them] of their designated legislative and executive powers.” *Horne v. Flores*, 557 U.S. 433, 448-49 (2009) (citing Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal Forum 295, 317).

This case is a brazen example. In 2019, a class of federal student-loan borrowers sued the Department of Education, alleging unlawful delay in processing their “borrower defense” applications—a carefully circumscribed process that cancels student debt related to schools proven by the borrower to have engaged in loan-related misconduct. Plaintiffs disclaimed seeking a specific outcome for their applications; they sought only an order requiring resumption of the adjudication process. The

Department vigorously opposed this claim for years. Meanwhile, President Biden took office after promising during the campaign to cancel student loans *en masse*. Yet Congress declined to enact that policy, and this Court rejected the administration’s attempt to cancel debt by executive fiat. *See Biden v. Nebraska*, 600 U.S. 477 (2023).

So the administration turned to this case about procedural delay and—through an unprecedented, collusive class settlement—transformed it into a vehicle for rewriting federal regulations to permit blanket cancellation of \$7.5 billion in loan debt. The government also justified that act by slapping a scarlet letter on roughly 150 schools, declaring in the settlement—without providing notice, evidence, or a hearing—that the schools had engaged in “substantial misconduct.”

Challenging democracy-distorting, collusive settlements like this one is often difficult, especially after the fact. One way to do so, however, is for parties harmed by the putative settlement to intervene to challenge its legality. *Cf. Arizona*, 596 U.S. at 765-66 (Roberts, C.J., concurring) (describing States’ attempt to intervene “in light of the Government’s actions” to collude with politically aligned plaintiffs). That is what occurred here. Petitioner and several other schools, deemed by the proposed settlement to have committed “substantial misconduct,” moved to intervene to challenge its legality. App.14a, 52a. Finding that intervention would “keep the system honest,” ER-341,¹ the district court permitted the schools to intervene under Rule 24(b) for the “express purpose of objecting to and opposing” the settlement, App.83a-85a.

¹ “ER” refers to the “Excerpts of Record” filed below.

The district court considered, but ultimately rejected, the schools' arguments.

After the schools appealed, a divided Ninth Circuit panel—over Judge Collins' dissent—dismissed the appeal. Although the court conceded that the settlement's approval inflicted Article III injury on the schools, it held they lacked so-called “prudential standing” to redress that injury by challenging the settlement's legality. App.11a-24a. By the panel's lights, “a non-settling entity generally lacks prudential standing to object to a settlement—or to challenge on appeal a district court's approval of a settlement”—unless it establishes “formal legal prejudice.” App.17a. Such prejudice, the court held, occurs when a settlement “formally strips” a party of a legal right, like a “claim or cause of action.” App.20a-21a. Without that specific form of injury, an intervening party may not challenge a settlement's approval, regardless of constitutional standing.

This judge-made “prudential standing” rule has no basis in positive law. An intervening party is just that: a party. Parties may respond to motions that hamper their interests, like a motion to approve a settlement. And when, as here, the settlement's approval causes the intervenor to suffer Article III injury, it may appeal the settlement's approval. *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986). Those straightforward rules should have obliged the Ninth Circuit to “reach the merits.” App.39a (Collins, J., dissenting). The panel's decision to duck that “virtually unflagging obligation,” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), based on its mistaken view of what “prudence” dictates,” *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014), stems

from no legal authority and raises serious constitutional problems. It also undermines Rule 24 intervention, one of the few checks on the alarmingly growing trend of unlawful “rulemaking-by-collusive-acquiescence.” *Arizona*, 596 U.S. at 765-66 (Roberts, C.J., concurring).

Unsurprisingly, this “prudential standing” doctrine splits the circuits. Contrary to the Ninth Circuit, the Fourth Circuit holds that intervenors may challenge settlements, without regard for “formal legal prejudice.” The Ninth Circuit’s holding also clashes with a different line of circuit authority applying this Court’s rule that parties are “entitled to ... have [their settlement] objections heard” in the district court and on appeal. *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986); see *Lawyer v. Dep’t of Just.*, 521 U.S. 567, 579 (1997). And adding to the confusion, even courts applying the Ninth Circuit’s rule cannot agree on its provenance, with some grounding it in Article III, others in Rule 41, and still more in raw judicial policymaking. In short, this tangled area of law needs this Court’s clarification.

STATEMENT

A. LEGAL BACKGROUND

The Department of Education administers student-loan programs under the Higher Education Act of 1965 (HEA), 20 U.S.C. § 1070 *et seq.*, including the Direct Loan Program, *id.* §§ 1087a-1087j, and the Federal Family Education Loan Program, *id.* §§ 1071 to 1087-4.

For Direct Loans, the Secretary must “specify in regulations which acts or omissions of an institution

of higher education a borrower may assert as a defense to repayment.” *Id.* § 1087e(h). The Secretary has done so several times from 1995 to 2022.² Together, those regulations establish a borrower-defense program, which allows borrowers to obtain affirmative debt cancellation (rather than a defense to collection) if they prove their school engaged in specified misconduct.³

The regulatory regime outlines a two-step framework to ensure schools are afforded due process before their federal regulator declares they have committed misconduct. First, the Department notifies the school of a borrower-defense claim. 34 C.F.R. §§ 685.206(c)(2), (d), (e)(10) & 685.222(e)(3)(i), (f)(2)(iv). For loans issued before July 1, 2020, the Department must “consider[]” “[a]ny response or submissions from the school.” *Id.* § 685.222(e)(3)(i). The Department adjudicates the applications “through a fact-finding process” and issues a written decision. *Id.* § 685.222(e)(3)-(4). For loans issued on or after July 1, 2020, the Department must “provide a copy” of the application to the school, “invite the school to respond and to submit evidence” in its defense, *id.* § 685.206(e)(10), and “consider[] the school’s

² 60 Fed. Reg. 37,768 (July 21, 1995); 81 Fed. Reg. 75,926 (Nov. 1, 2016); 84 Fed. Reg. 49,788 (Sept. 23, 2019); 87 Fed. Reg. 65,904 (Nov. 1, 2022).

³ The Fifth Circuit has held the Department’s regulatory regime for affirmative borrower-defense *claims* is likely unlawful under the HEA. *Career Colls. & Sch. of Tex. v. U.S. Dep’t of Educ.*, 98 F.4th 220, 239-42 (5th Cir. 2024). This Court granted certiorari to resolve that issue, *Dep’t of Educ. v. Career Colls. & Sch. of Tex.*, 145 S. Ct. 1039 (2025), but the case was voluntarily dismissed.

response,” *id.* § 685.206(e)(11)-(12). The Department must then issue a written decision. *Id.*⁴

Step Two occurs only if the Department finds a school engaged in misconduct, grants a borrower-defense application, and discharges debt. In that event, the Department may sue the school to recoup the discharged amount. *See id.* §§ 685.206(c)(3) & (e)(16), 685.222(e)(7).

A Step One finding, standing alone, can have serious consequences for schools. For example, the Department may wield the finding to conclude that a school is not “financially responsible,” which would bar the school from participating in federal financial-aid programs. 20 U.S.C. § 1099c(b)-(c); 34 C.F.R. § 668.171; *see* ER-83-85, 89-90 (activists claimed misconduct findings should bar schools from financial-aid participation). It may also use the finding to justify “pursu[ing] personal liability” against school directors and officers.⁵ Moreover, defamatory misconduct findings from an entity’s regulator can have an outsized effect on the entity’s reputation, *see Meese v. Keene*, 481 U.S. 465, 473-77 (1987), as there is a “unique stigma associated with having a government official label someone a law breaker,” *Kennedy v. Warren*, 66 F.4th 1199, 1206 (9th Cir. 2023). And that reputational harm—serious in its own right—can trigger grievous financial and

⁴ Though the regulations purport to set different standards for loans issued on or after July 1, 2023, the One Big Beautiful Bill Act has undone those changes. Pub. L. No. 119-21, § 85001(b), 139 Stat. 72, 355 (2025).

⁵ *Education Department Takes Steps to Hold Leaders of Risky Colleges Personally Liable*, Educ. Advisors (Mar. 6, 2023), <https://tinyurl.com/vrns77vz>.

programmatic injuries. As this case shows, misconduct findings may prompt lenders to freeze lines of credit or subject schools to closer due-diligence scrutiny, ER-77; force schools to disclose the finding in securities reporting, ER-72; prompt high schools to bar named institutions from recruiting their students, ER-69-70; and even provoke United States Senators to call for boycotts of universities.⁶

B. FACTS AND PROCEDURAL HISTORY

1. Everglades College, Inc., is a Florida nonprofit that helps students achieve social mobility through higher education. ER-189, 460. It advances that mission through two universities: Keiser University and Everglades University. *Id.* In 2022, Keiser was ranked best in the nation for upward social mobility and seventh among its peers for graduation rates. ER-189. Everglades University, too, has earned “Top Performer” status for upward social mobility and first-place rankings for its online aeronautics and environmental programs. *Id.* The schools serve roughly 20,000 students across twenty-seven campuses and online, many of whom are lower-income adults who rely on Everglades to “enhance or change their careers.” ER-460.

2. In 2019, a putative class of student-loan borrowers sued the Department for failing to process their borrower-defense applications. ER-834-37, 888. The borrowers emphasized they did “not ask th[e] Court to adjudicate their borrower defenses,” nor “to dictate how the Department should prioritize” their

⁶ Press Release, *Durbin Calls on Illinois Educators to Sound the Alarm on For-Profit-Colleges* (Apr. 15, 2025), <https://tinyurl.com/3zrabhve>.

claims. ER-836-37. Plaintiffs sought only to compel the Department to process their applications. *Id.* They moved to certify a Rule 23(b)(2) class to obtain “a single injunction requiring the Department to start and to continue adjudicating borrower defenses.” ER-828. The district court certified a (b)(2) class, “for all purposes, including settlement,” of essentially all people with qualifying federal loans who had pending borrower-defense claims. ER-820-21. The class covered about 296,000 members, U.S. Stay Opp. 8-9, No. 22A867 (U.S. Apr. 12, 2023), who received more than \$7.5 billion in loans, ER-558.

After months of litigation, the parties lodged a settlement. The Department agreed to resolve pending borrower-defense claims on a timeline and issue written decisions. ER-776-800. Before final approval, however, Plaintiffs alleged that the Department violated the settlement’s terms by issuing unreasoned “Form Denial[s]” for many borrower-defense applicants. ER-755-63. The court, in turn, expressed “disappoint[ment]” with the Department because it had hoped to “get reasoned decisions, even if reasoned denials.” ER-721.

Judge Alsup withheld settlement approval and directed a “return to litigating the merits.” ER-720-21. The court also sua sponte ordered Plaintiffs to seek extra-record discovery from the Department, including depositions of Department officials. ER-726.⁷ And it instructed Plaintiffs to “move for summary judgment as to the lawfulness of the

⁷ The district court even ordered the Secretary of Education to sit for deposition, which the Ninth Circuit quashed by writ of mandamus. *In re U.S. Dep’t of Educ.*, 25 F.4th 692 (9th Cir. 2022).

Secretary’s delay and the lawfulness of the perfunctory denial notice.” ER-717-21, 726. Plaintiffs abided yet still sought to compel the Department only “to lawfully adjudicate each and every borrower defense application” through reasoned decisionmaking. ER-698-99.

3. Meanwhile, during the 2020 presidential campaign, then-candidate Biden promised to cancel federal student-loan debt if elected President.⁸ But, as then-Speaker Pelosi explained: “[T]he President” “does not have th[e] power” to cancel student debt; it is “not even a discussion” because such a policy change requires “an Act of Congress.”⁹ After President Biden’s election, Congress declined to enact such legislation.

Undeterred, the Biden Administration acted unilaterally. Then-Secretary of Education Cardona announced he would invoke the HEROES Act to cancel up to \$20,000 in debt per borrower.¹⁰ But this Court rejected the Secretary’s bid to “rewrite th[e] statute from the ground up” “to cancel” billions in “student loan principal.” *Biden v. Nebraska*, 600 U.S. 477, 494 (2023).

Scrambling for other ways to fulfill its campaign promise, the Biden Administration turned to this lawsuit to enshrine the very policy changes both Congress and this Court rejected. In June 2022, after

⁸ Joe Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, Medium (Apr. 9, 2020), <https://tinyurl.com/29f7tprp>.

⁹ *House Speaker Weekly Briefing*, C-SPAN, at 14:24-16:24 (July 28, 2021), <https://tinyurl.com/ycx28t8a>.

¹⁰ *Student Loan Cancellation Under the HEROES Act*, CRS (Apr. 14, 2023), <https://tinyurl.com/58v64j8a>.

years of denying Plaintiffs' claim of unlawful delay, the Department turned heel and consented to a settlement that swept far beyond the requested *procedural* relief and the defined class. ER-554-603. Rather than merely grant a restart of agency adjudications, the settlement redefined the regulatory framework and granted *substantive* relief of \$7.5 billion in debt cancellation—and reimbursement of past payments—to hundreds of thousands of borrowers, broken up into three subclasses. ER-558, 571, 580-87.

Subclass One: For roughly 196,000 borrowers with debt “associated with the schools” in “Exhibit C to the Settlement,” the Department would “automatic[ally]” cancel all student loans and refund all past payments, regardless of the merits or timeliness of their borrower defenses. In other words, for this subclass, all borrower-defense requirements were effectively repealed. ER-559, 580-83; App.9a.¹¹

Exhibit C originally listed 153 institutions (though several “were erroneously included” due to unexplained “clerical errors,” and one was added later). ER-612-16, 283. The settlement offered no explanation for why any school was listed, nor were the schools notified that they would be roped into the settlement for public opprobrium by their federal regulator. The preliminary-approval motion offered a single sentence of explanation:

[B]ecause the Department has identified
common evidence of institutional

¹¹ If any “substantial question” arose over whether debt was “associated with” a school, it was “resolved in favor of the Class Member,” without any process for the school. ER-583.

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

ER-573-74. The parties neither supplied the “evidence” driving their allegations nor permitted the summarily convicted schools to rebut it.

Subclass Two: The second subclass contained about 100,000 debtors with pending borrower-defense applications not associated with an Exhibit C school. ER-559; App.9a. For them, the settlement established a new “review” process not found in any operative borrower-defense rule. ER-583-87. It entitled them to a decision on a certain timeline and granted them several “presumptions” that effectively guaranteed a finding of misconduct by their schools. ER-557-60, 584-86. Under those presumptions, a borrower’s claim could not be denied for (1) false allegations, (2) insufficient evidence, (3) lack of reliance, or (4) untimeliness. ER-584. And if the Department “fail[ed] to provide a written decision within the specified time period,” subclass-two members would also have all debt cancelled and all prior payments refunded. ER-559.

Subclass Three: The final subclass consisted of so-called “Post-Class Applicants” who “submit[ted] a borrower defense application after” the settlement’s “Execution Date ... but before the Final Approval Date.” ER-560, 587. Accordingly, subclass three included borrowers who never suffered *any* injury alleged in the lawsuit—and potentially encompassed *anyone* with a federal student loan. To maximize the subclass’ membership, Plaintiffs’ counsel and the Department collaborated to solicit new borrower-defense applications, eventually recruiting about 206,000 borrowers. ER-70-71, 273; App.9a.

For Post-Class Applicants, the Department agreed to “review” their applications under its 2016-era regulations, even though different borrower-defense regulations would normally govern many such applications. ER-587. It also had to process those applications within thirty-six months or else the borrower also received automatic cancellation of all debt and refunds of all prior payments, regardless of the claim’s merit. *Id.*

4. Everglades and three other “Exhibit C” schools moved to intervene to challenge the settlement’s legality. ER-434-58, 345-94. To “keep the system honest” and develop the issues for resolution, ER-341, the court granted permissive intervention for the “express purpose of objecting to and opposing the class action settlement,” App.85a.

The schools challenged the settlement’s legality for a host of reasons. *First*, they explained that the settlement exceeded the Department’s authority under the HEA. ER-204-06.

Second, the schools explained that the settlement violated Rule 23 for many reasons, including that it

impermissibly granted to a (b)(2) class “individualized award[s] of monetary damages,” rather than indivisible injunctive relief. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011); *see* ER-193-97.

Third, the schools asserted that the settlement was arbitrary and capricious and violated the Due Process Clause because it effectively “determined,” through secret and collusive negotiations, that every borrower-defense application associated with 151 schools was justified, without any explanation, notice, or an opportunity to be heard. ER-197-200, 201-03.

Fourth, the schools highlighted that the settlement contravened the HEA and the APA by amending the Department’s borrower-defense regulations without undergoing notice-and-comment procedures. ER-200-01.

The court rejected these challenges and approved the settlement. App.45a-82a.

5. Everglades and two other schools appealed. ER-898-913. A coalition of states filed an amicus brief supporting the schools, underscoring that the Department’s “strategic surrender” had allowed it to seize “immense new authority beyond the scope of anything Congress ever approved” and posed a severe “threat to our separation of powers.” CA9 Dkt.24 at 2-3. Neither Plaintiffs nor the Department challenged the district court’s intervention ruling.

A split Ninth Circuit panel dismissed the appeal. All panel members agreed that the schools had Article III standing to challenge the settlement because the Department’s “substantial misconduct” finding inflicted “reputational harm.” App.13a-17a; App.29a (Collins, J., dissenting). Nonetheless, the majority declined to adjudicate the merits of the schools’

challenges because the schools lacked “prudential standing.” App.17a-24a.

Although neither Plaintiffs nor the government cited the case or relied on its reasoning in their briefs, the majority invoked *Waller v. Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987). Under *Waller*, “an entity who is not a party to a settlement” may not “object[] to court approval of the settlement” unless the settlement will cause the objector to suffer “formal legal prejudice.” App.12a. To cause such prejudice, the agreement must “formally strip[]” the non-settling entity of a legal right, like a “cause of action” or a “contract right[].” App.21a. Based on this judge-made rule, the majority held that the schools could not challenge the settlement either in district court or on appeal, regardless of their Article III injury. App.20a-24a.

Judge Collins dissented, refusing to apply a judicially manufactured prudential-standing bar to a party that satisfies both Article III and Rule 24(b). The question, he explained, was simply whether the district court “abuse[d] its discretion in allowing the Schools to permissively intervene for the purpose of objecting to the settlement.” App.30a. Because it had not, the court had “properly reached the merits of the Schools’ objections.” App.38a. And because the district court’s approval inflicted Article III injury on the schools, they had “standing” to appeal the judgment. App.38a-39a. The majority’s contrary analysis, Judge Collins noted, wrongly transformed the “‘formal legal prejudice’ standard [into] an artificial constraint on a district court’s [power] to allow permissive intervention [to] object[] to a settlement.” App.35a.

With “prudential standing” posing no bar, Judge Collins would have vacated the settlement. Though he did “not exhaustively address the Schools’ objections,” he easily found that “at least two” justified vacatur. App.39a.

First, Judge Collins explained, the HEA does not authorize the Department “to grant the relief contained in the settlement.” *Id.* Second, “the settlement unlawfully grants individualized monetary relief” to swathes of borrowers, even though the class “was certified only as an injunctive-relief class under Federal Rule of Civil Procedure 23(b)(2).” App.42-43a. (citing *Wal-Mart*, 564 U.S. at 360-61).

6. Everglades sought rehearing en banc. CA9 Dkt.94. It again drew support from a coalition of states concerned that the panel had “damaged the separation of powers” by blessing a “collusi[ve]” settlement that bypassed the “limits on [the executive’s] power.” CA9 Dkt.95 at 1, 5. The Ninth Circuit denied rehearing en banc, again over Judge Collins’ dissenting vote. App.86a-87a.

REASONS FOR GRANTING THE PETITION

I. There Is a Circuit Split on the Requirement for “Prudential Standing” To Challenge Settlements

The Ninth Circuit holds that “a non-settling entity generally lacks prudential standing to object to a settlement—or to challenge on appeal a district court’s approval of a settlement, unless” the entity establishes “formal legal prejudice.” App.17a (citing *Waller*, 828 F.2d at 583). That judge-made rule, the panel explained, recognizes a narrower universe of injuries than does Article III. It credits only certain

injuries like the loss of a “cause of action” or a “contract right[].” App.21a. Other circuits have likewise applied that rule to non-settling intervenors and other parties seeking to challenge a settlement’s approval.¹²

The Fourth Circuit, by contrast, has “reject[ed] the blanket proposition” that non-settling intervenors lack “standing” to press settlement objections. *Gould v. Alleco, Inc.*, 883 F.2d 281, 285 (4th Cir. 1989). And the formal-legal-prejudice bar also splits with cases applying this Court’s teaching that parties are “entitled to ... have [their settlement] objections heard” in the district court and on appeal. *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986); see *Lawyer v. Dep’t of Just.*, 521 U.S. 567, 579 (1997).

1. In *Gould*, the Fourth Circuit held that intervenors may object to, and appeal, their co-parties’ settlements. There, stockholders filed a class action against a beverage company. 883 F.2d at 283. After they agreed to settle, a group of bondholders opposed the settlement under Rule 23 and moved to intervene under Rule 24, but their motion was denied. *Id.* On

¹² E.g., *City of Bangor v. Citizens Commc’ns Co.*, 532 F.3d 70, 92 (1st Cir. 2008) (co-defendant); *Bhatia v. Piedrahita*, 756 F.3d 211, 218-19 (2d Cir. 2014) (same); *Eichenholtz v. Brennan*, 52 F.3d 478, 482-83 (3d Cir. 1995) (same); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 172 (5th Cir. 1979) (same); *Ball ex rel. Burba v. DeWine*, 2021 WL 4047032, at *3 (6th Cir. June 30, 2021) (intervenor); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1232-34 (7th Cir. 1983) (co-defendant); *Alumax Mill Prods., Inc. v. Cong. Fin. Corp.*, 912 F.2d 996, 1002 (8th Cir. 1990) (same); *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1102-03 (10th Cir. 2001) (same); *Mayfield v. Barr*, 985 F.2d 1090, 1092-93 (D.C. Cir. 1993) (co-plaintiff).

appeal, the Fourth Circuit agreed that Rule 23 did not permit non-party, non-class members like the bondholders to object to the settlement. *Id.* at 284. But the court “reject[ed] the blanket proposition” that the bondholders “ha[d] no standing as a matter of law to intervene” to challenge the settlement “solely by virtue of their” not being class members. *Id.* at 285. Rather, “[i]nterjection of the opposing views of non-class members should proceed via intervention under Rule 24.” *Id.* at 284. Nowhere did the court suggest that, to do so, intervening parties also must establish formal legal prejudice. *See id.* at 284-87.

Gould is not alone. Though the Tenth and Third Circuits have sometimes echoed the Ninth Circuit’s judge-minted rule, other cases from those courts adopt the Fourth Circuit’s view that non-settling intervenors may “interject[]” their “opposing views” of a settlement, without regard for formal legal prejudice. *Heller v. Quovadx, Inc.*, 245 F. App’x 839, 842 (10th Cir. 2007) (Gorsuch, J.). In *In re Fine Paper Litig.*, a district court held that a non-party to a settlement “had no standing to object” to the settlement because “it was not part of any certified class that joined in the settlement” and “none of its rights would be compromised” because it was “free to file a separate action.” 632 F.2d 1081, 1085 (3d Cir. 1980). On the “question of [the non-party’s] standing to present its objections,” the Third Circuit agreed that, under Rule 23, the “general rule [is] that a nonsettling party may not object to the terms of a settlement.” *Id.* at 1086, 1087. But the court further held that the non-party could have—and “should

have”—intervened to “properly present its contention” about the legality of the settlement. *Id.* at 1088.¹³

2. This split is part of a broader disconnect in this muddled area of law. Like ships passing in the night, the formal-legal-prejudice line of authority has drifted past a different strand of caselaw: decisions applying this Court’s rule that parties are “entitled to ... air [their] objections” to a settlement and appeal orders overruling them. *Local No. 93*, 478 U.S. at 529. Courts applying that rule regularly permit non-settling intervenors to challenge their co-parties’ settlements, without regard for the judge-made doctrine of formal legal prejudice. *See, e.g., P.R. Dairy Farmers Ass’n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014); *Kirkland v. N.Y. State Dep’t of Corr. Servs.*, 711 F.2d 1117, 1128 (2d Cir. 1983); *Tenn. Ass’n of HMOs, Inc. v. Grier*, 262 F.3d 559, 567 (6th Cir. 2001); *Airline Stewards & Stewardesses Ass’n v. Am. Airlines, Inc.*, 573 F.2d 960, 963-64 (7th Cir. 1978); *United States v. Metro. St. Louis Sewer Dist. (MSD)*, 952 F.2d 1040, 1044 (8th Cir. 1992); *United States v. Carpenter*, 526 F.3d 1237, 1240-41 (9th Cir. 2008); *United States v. City of Hialeah*, 140 F.3d 968, 975-81 (11th Cir. 1998); *see also Edwards v. City of Houston*, 78 F.3d 983, 1003-04 (5th Cir. 1996) (en banc) (reversing denial of intervention motions, vacating class settlement, and remanding so intervenors could object, without discussing “prudential standing”).

¹³ Citing *Gould*, district courts have also permitted intervenor parties to challenge settlements without imposing a prudential-standing overlay. *E.g., In re Novatel Wireless Sec. Litig.*, 2014 WL 2858518, at *2 (S.D. Cal. June 23, 2014); *cf. Candelaria v. Health Care Serv. Corp.*, 2020 WL 3832919, at *2 (D.N.M. July 8, 2020).

The latter lineage stems from *Local No. 93*. There, a class of first responders sued Cleveland for employment discrimination. 478 U.S. at 504-05. The district court also allowed a firefighter’s union (Local 93) to intervene. *Id.* at 506. The first responders and Cleveland later reached a settlement that “imposed no legal duties or obligations on Local 93.” *Id.* at 511. Even so, the district court entertained Local 93’s objections, overruled them, and approved the settlement. *Id.* at 511-12. On appeal, the Sixth Circuit held that Local 93 had appellate standing to challenge the settlement—even though it was “not formally bound or restricted by the agreement”—because it caused Local 93’s members to endure “some detriment.” *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 484 (6th Cir. 1985). The appellate court thus considered Local 93’s challenges to the settlement, without requiring Local 93 to show formal legal prejudice. *Id.* at 484-89.

On certiorari review, this Court confirmed that approach. In challenging a settlement, the Court explained, intervenors are no different from “an original party.” *Local No. 93*, 478 U.S. at 529. They are thus “entitled to ... have [their] objections heard at the [fairness] hearings.” *Id.* But they cannot “block” a settlement “merely by withholding [their] consent.” *Id.* To trigger that greater power, the settlement must instead inflict some “legal” harm on the non-settler, like saddling it with “legal duties or obligations,” or “dispos[ing] of” its legal “claims.” *Id.* at 529-30. Because the settlement in *Local No. 93* did not do that, the intervenor could not “preclude” the settlement through nonconsent. *Id.* But—contra the Ninth Circuit’s rule here—the intervenor *was* allowed

to argue on appeal that the settlement violated federal law—an argument this Court resolved on the merits. *See id.* at 515-24.

This Court reiterated that non-settling parties may challenge and appeal co-party settlements in *Lawyer v. Department of Justice*, 521 U.S. 567 (1997). There, a plaintiff challenged his co-parties' redistricting settlement on two grounds. He first argued that, because he had not consented to settlement, the district court could not approve relief without first holding that the challenged districting map was unconstitutional. *Id.* at 578-80. He also asserted that the settlement's proposed districting plan produced an unlawful racial gerrymander. *Id.* at 580.

In addressing those arguments, the Court reiterated that non-settling parties are "entitled to ... have [their] objections heard at the [fairness] hearings," but may not "preclude other parties from settling" by withholding their consent unless the settlement causes the non-settlers to suffer legal injury. *Id.* at 579. Here, the Court explained, the non-settler was entitled to have "his views on the merits of the proposed plan ... heard, and ... to attack it [o]n ... appeal." *Id.* at 580. This Court thus reached the merits of his assertion that the settlement's districting plan violated federal law. *See id.* at 580-83.

The Ninth Circuit's approach to non-settler objections thus contradicts this Court's precedents. *Local No. 93* and *Lawyer* hold that non-settling parties (including intervenors) with constitutional standing may challenge and appeal their co-parties'

settlements, even when they “do[] not bind” the non-settlers in a formal legal way. *Local No. 93*, 478 U.S. at 529-30; see *Lawyer*, 521 U.S. at 579-83. The Ninth Circuit, by contrast, requires non-settlers to show formal legal prejudice to even “be heard in objection to the settlement.” App.30a (Collins, J., dissenting).

Those irreconcilable rules have, unsurprisingly, yielded arbitrary outcomes. Sometimes, circuit courts apply the Ninth Circuit’s prudential-standing rule to bar non-settler objections and appeals. *Supra* n.12. Other times, those same circuits apply *Local No. 93* to authorize non-settler challenges to co-party settlements, without mentioning formal legal prejudice or the cases requiring it. *Supra* 19. Indeed, the Ninth Circuit itself has allowed non-settling intervenors to challenge a settlement without regard for “formal legal prejudice.” See *Carpenter*, 526 F.3d at 1240-41 (citing *Local No. 93*); *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1026-32, 37 (9th Cir. 2007) (entertaining non-settling intervenor’s appeal challenging a settlement, and vacating the settlement as unlawful, without regard for formal legal prejudice). A non-settling party’s “right to object to a settlement agreement,” *South Carolina v. North Carolina*, 558 U.S. 256, 288 (2010) (Roberts, C.J., concurring in judgment in part and dissenting in part), thus turns on which line of conflicting precedent a court selects.

Nor is that the only inconsistency in this tangled web: Courts adopting the prudential-standing bar cannot even agree on the rule’s provenance. Some decisions call it a judge-made dictate designed to “advance[] the policy of encouraging the voluntary

settlement of lawsuits.” App.17a.¹⁴ Others claim the doctrine “maintain[s] consistency” with Rule 41, which has been interpreted to require non-settling defendants opposing their co-defendants’ dismissal to establish “plain legal prejudice.” *Quad/Graphics*, 724 F.2d at 1233.¹⁵ Still more say it is not a prudential-standing rule at all, but an Article III injury requirement¹⁶—a rationale the Ninth Circuit disclaimed here. App.17a. And many decisions do not even try to justify the rule: They simply cite cases applying it and declare the principle “settled.”¹⁷

The upshot is that this area of law remains deeply conflicted despite decades of development. The Court’s review is warranted to set a clear, nationwide rule.

¹⁴ *E.g.*, *Mayfield*, 985 F.2d at 1092; *In re Integra*, 262 F.3d at 1102.

¹⁵ *E.g.*, *Waller*, 828 F.2d at 583; *Alumax*, 912 F.2d at 1002.

¹⁶ *E.g.*, *Bhatia*, 756 F.3d at 217-18; *In re Integra*, 262 F.3d at 1102-03; *LeBlanc v. Tex. Brine Co.*, 989 F.3d 359, 364 (5th Cir. 2021).

¹⁷ *E.g.*, *Eichenholtz*, 52 F.3d at 482; *In re Viatron Computer Sys. Corp. Litig.*, 614 F.2d 11, 14 (1st Cir. 1980); *In re Beef Indus.*, 607 F.2d at 172. Usually, these citation rabbit holes lead back to a single district-court case from the 1950s that not only disclaimed reliance on the federal rules, but involved an objection to a co-defendant’s voluntary dismissal, not a settlement objection. *Broadway & Ninety-Sixth St. Realty Corp v. Loew’s, Inc.*, 23 F.R.D. 9, 11 (S.D.N.Y. 1958).

II. The Decision Below Impermissibly Grafts a Judge-Made Prudential-Standing Rule Atop the Requirements of Article III and Rule 24

The Ninth Circuit wrongly applied a judicially invented “prudential” bar to hold that parties cannot challenge a settlement causing them Article III injury. Under ordinary rules of civil procedure and standing, intervenors like Everglades may challenge settlements that impair their interests and appeal judgments that cause them Article III injury. The Ninth Circuit’s extratextual rule resurrects the concept of “prudential standing” this Court buried in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), and raises serious constitutional questions about whether judges may conjure up procedural bars to avoid their “virtually unflagging obligation” to decide cases, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The Ninth Circuit’s rule also spurns this Court’s teaching that non-settling parties are “entitled” to have their settlement “objections heard” in district court and on appeal. *Local No. 93*, 478 U.S. at 529. And it raises so many practical problems that it cannot possibly be correct.

1. As Judge Collins outlined in dissent, basic principles of civil procedure and Article III standing should have made this an easy issue. The district court permitted Everglades to intervene under Rule 24 for the “express purpose of ... opposing” a government settlement. App.83a-85a. At that point, Everglades became a “part[y].” *Diamond v. Charles*, 476 U.S. 54, 68 (1986). So, like the “original parties,” Everglades was entitled to “litigate fully on the

merits” at the fairness hearing. *Wright & Miller*, 7C Fed. Prac. & Proc. Civ. § 1920 (3d ed.) (collecting cases). After all, “[o]ur adversarial system depends on the principle that all sides to a dispute must be given the opportunity to fully advocate their views of the issues presented.” *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1263 (9th Cir. 2010). “[F]undamental requirement[s] of due process” thus entitled Everglades “to present [its] objections” to the settlement in district court. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); see *Streber v. Hunter*, 221 F.3d 701, 733 (5th Cir. 2000) (“It is well-settled that litigants have due process rights to fully litigate each issue.”). And because the Ninth Circuit conceded that the settlement’s approval caused Everglades injury under Article III, App.17a, Everglades also had constitutional standing to appeal the judgment, *Diamond*, 476 U.S. at 68-69; see *Vanguards*, 753 F.2d at 484 (intervenor had “standing” to appeal settlement that caused it “some detriment”).

2. By layering a judge-made prudential-standing rule atop that analysis, the Ninth Circuit defied this Court’s teaching in *Lexmark*. There, the Court clarified that limitations on a party’s right to litigate come from positive law—Article III and statutes—not “merely because ‘prudence’ dictates.” 572 U.S. at 128. Thus, the Court explained that “declin[ing] to adjudicate” based on “grounds that are ‘prudential,’ rather than constitutional” or statutory is “in some tension with [the Court’s] reaffirmation of the principle that ‘a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging.’” *Id.* at 125-26 (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)).

Incredibly, the Ninth Circuit cited *Lexmark* for the proposition that it “describ[ed] the development of a ‘prudential’ branch of standing, a doctrine not derived from Article III,” App.11a, ignoring entirely this Court’s *rejection* of that development. With this expurgated version of *Lexmark* in hand, the Ninth Circuit reasoned that the formal-legal-prejudice rule “advances the policy of encouraging the voluntary settlement of lawsuits.” App.17a. In other words, contra *Lexmark*, the Ninth Circuit grounded its rule in what “‘prudence’ dictates.” 572 U.S. at 128.

The closest courts come to grounding the formal-legal-prejudice bar in *any* positive law is Rule 41, which governs when “an action may be dismissed at the plaintiff’s request.” The rule dictates such dismissal may occur “on terms that the court considers proper,” and courts have developed the theory that a defendant may not block a voluntary dismissal unless it “demonstrate[s] plain legal prejudice.” *Quad/Graphics*, 724 F.2d at 1233. Because “Rule 41(a)(2) is usually the mechanism by which ... settling defendants are eliminated from the case,” courts have required non-settling parties opposing a settlement to meet the same requirement. *Id.* That rule, they say, is necessary because it would “be incongruous for a non-settling defendant to have any less of a burden in [opposing another’s] voluntary dismissal than he would if he were the party being dismissed.” *Id.*

That reasoning is flawed to the core. For one thing, it is still an application of judicial policymaking. Courts adopting the theory have not derived the formal-legal-prejudice principle from Rule 41’s text; they created it to “maintain[] consistency” with Rule 41, *Quad/Graphics*, 724 F.2d at 1233—or, put

differently, because “‘prudence’ dictates.” *Lexmark*, 572 U.S. at 128. Moreover, challenging the legality of a settlement’s substantive terms is distinct from opposing a party’s dismissal. It is one thing to say a non-settling defendant cannot challenge the “mechanism by which ... settling defendants are eliminated from the case,” *Quad/Graphics*, 724 F.2d at 1233, but quite another to say the entire settlement is off limits because it may eventually be effectuated by that mechanism.

The prudential-standing bar also does not derive from Article III, as some courts have posited. *E.g.*, *Bhatia*, 756 F.3d at 218; *In re Integra*, 262 F.3d at 1103; *LeBlanc*, 989 F.3d at 364. As the Ninth Circuit held, “Article III injury” need “not equal formal legal prejudice.” App.12a; *see Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247 (7th Cir. 1992) (“Mere allegations of injury in fact [flowing from] a settlement simply do not rise to the level of plain legal prejudice.”). Many non-legal harms satisfy the injury-in-fact requirement, from “reputational” damage to “monetary” loss. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021).

Unmoored from any text, the Ninth Circuit’s rule raises the same constitutional “tension[s]” this Court sought to avert in *Lexmark*. 572 U.S. at 126. It is an “undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds.” *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans (NOPSI)*, 491 U.S. 350, 359 (1989). Thus, save for a few traditional abstention doctrines, “federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.” *Id.* at 358. They must instead “decide

cases within the scope of federal jurisdiction,” *Sprint*, 571 U.S. at 72, and “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given,” *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).¹⁸ Yet, by fashioning an “artificial” prudential-standing rule out of whole cloth, App.35a (Collins, J., dissenting), the Ninth Circuit violated its duty to exercise the jurisdiction Congress gave it.

3. Along with disavowing this Court’s prudential-standing precedents, the Ninth Circuit’s holding also defies this Court’s rule that parties are “entitled to” have their “objections heard at the [fairness] hearings” and on appeal. *Local No. 93*, 478 U.S. at 529; see *Lawyer*, 521 U.S. at 579. As explained above, this Court has not required non-settlers to *also* establish formal legal prejudice. See *id.* To the contrary, this Court has held that formal legal prejudice grants non-settling parties the greater power to “*block*” a settlement by withholding consent. *Local No. 93*, 478 U.S. at 529. Such harm, however, is not necessary merely to have one’s “objections heard” at the fairness hearing and on appeal. *Id.*; see *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 391-92, 400 (1982) (allowing litigant who “was permitted to intervene and to object to the settlement” to appeal the settlement’s approval, without discussing formal

¹⁸ See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983) (Prudential standing “leaves unexplained the Court’s source of authority for simply granting or denying standing as its prudence might dictate.”); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 74 (1984) (“[N]either total nor partial judge-made abstention is acceptable as a matter of legal process and separation of powers[.]”).

legal prejudice); *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 136 (1967) (reversing denial of intervention and ordering that intervenors be given “an opportunity to be heard” on a settlement agreement, without discussing formal legal prejudice).

Nor have those precedents yellowed with time. This Court reiterated just last year that “an intervenor is entitled to ... have its [settlement] objections heard” and may even “block” a settlement that “affect[s] the intervenor’s claims.” *Texas v. New Mexico*, 602 U.S. 943, 953-54 (2024) (citing *Local No. 93*, 478 U.S. at 529). And in 2010, four Justices cited *Local No. 93* to emphasize that “intervention makes settling a case more difficult, as a private intervenor has the right to object to a settlement agreement.” *South Carolina*, 558 U.S. at 288 (Roberts, C.J., concurring in judgment in part and dissenting in part, joined by Thomas, Ginsburg, and Sotomayor, JJ.).

4. The Ninth Circuit’s prudential-standing bar is wrong for still more reasons. First, it would “effectively eliminate” permissive intervention when challenging a settlement. App.35a-36a (Collins, J., dissenting). If a settlement causes an entity formal legal prejudice, that would also “establish an interest ... impair[ed] by the [settlement], which is the standard for intervention as of right.” *Id.* (quoting Fed. R. Civ. P. 24(a)). The prudential-standing bar thus improperly collapses Rules 24(a) and 24(b) in the settlement context. See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (rejecting a judicially implied rule that would render positive law “superfluous”).

Second, courts have offered no clear framework to define what counts as “formal legal prejudice.” The

rule supposedly applies when a settlement “*formally* strips a non-settling party of a legal claim or cause of action” or “invalidates a non-settling party’s contract rights.” App.21a. But what does it mean for a right to be stripped “formally”? Does the rule cover non-contract rights, like the right to participate in notice-and-comment (a right denied here)? And does the rule extend to other legal interests, like a right to attorney’s fees? *Cf. Lawyer*, 521 U.S. at 579-83 (in which a plaintiff’s claim, and possible entitlement to fees, was mooted by his co-parties’ settlement). All that is a mystery, further undermining the rule’s validity.

Third, even if policy concerns were not “beside the point,” *Trump v. CASA, Inc.*, 606 U.S. 831, 856 (2025), the formal-legal-prejudice rule does not advance the policy it purports to serve. The rule’s proponents preach that it achieves finality by “encouraging the voluntary settlement of lawsuits.” App.17a. Yet, in the same breath, those courts concede that the rule “encourag[es] additional litigation,” *Quad/Graphics*, 724 F.2d at 1234, by “forc[ing]” non-settlers to file “a second lawsuit against the dismissed parties,” *Agretti*, 982 F.2d at 247; *see* App.23a (suggesting that Everglades “must file a second lawsuit to remedy” its “reputational harm”). The rule thus finalizes nothing; at most, it shifts the laboring oar to a new judge who must adjudicate a collateral attack on a settlement approved by another court. That maneuver is fraught with thorny comity concerns. *See, e.g., Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1004-07 (8th Cir. 1993) (affirming an injunction of parallel district-court proceedings under the first-filed rule to “avoid conflicting rulings” between the courts). And it cuts against the civil-procedure devices meant to minimize

such conflict, such as transfer under 28 U.S.C. § 1404(a) or consolidation under Rule 42.

Nor must courts concoct prudential-standing rules to further “the policy of encouraging the voluntary settlement of lawsuits.” App.17a. They need only faithfully apply Rule 24 and Article III. When a district court grants intervention—especially when done for the “express purpose of objecting to and opposing” the settlement, App.83a-85a—it necessarily determines that the intervenor has a sufficient interest to justify being heard. *See* Fed. R. Civ. P. 24(a)-(b). And Article III, in turn, precludes a party from appealing the settlement’s approval unless it causes the party concrete and redressable injury. *Diamond*, 476 U.S. at 68-69. Together, those principles prevent litigants from unjustifiably delaying settlements.

III. The Question Presented Is Exceptionally Important for Policing Collusive Government Settlements

The split over the formal-legal-prejudice bar, and the rule’s disregard for this Court’s precedents, warrants review standing alone. But as this case illustrates, the bar is especially problematic in the context of “collusive” government settlements—a constitutional problem that has long merited this Court’s attention. *Flores*, 557 U.S. at 448-49 (collecting critiques of the practice); *cf. Arizona*, 596 U.S. at 765-66 (Roberts, C.J., concurring) (similar). Indeed, settlements in “ordinary litigation” between “private parties” usually affect only those parties’ interests. *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1189 (8th Cir. 1984). But a secretly negotiated government surrender requiring a federal agency to alter a regulatory program can inflict sweeping harm

on regulated entities and persons, without affording them required process.

This “sue and settle” regime “presents disturbing separation-of-powers concerns.” *Mi Familia Vota v. Fontes*, 129 F.4th 691, 745 (9th Cir. 2025) (Bumatay, J., dissenting). It circumvents the democratic process by “bind[ing] the hands of future policymakers.” *Flores*, 557 U.S. at 449. It runs roughshod over the APA by inviting agencies to modify rules without notice-and-comment—a pernicious form of “rulemaking-by-collusive-acquiescence.” *Arizona*, 596 U.S. at 766 (Roberts, C.J., concurring). And it tramples the separation of powers by allowing agencies to provide relief “well beyond what is required”—or even allowed—“by federal law.” *Flores*, 557 U.S. at 448.¹⁹

The Ninth Circuit’s prudential-standing bar exacerbates those problems. Under Article III and the Federal Rules of Civil Procedure, parties injured by a collusive government settlement may intervene to challenge its legality.²⁰ But superimposing a

¹⁹ Citing those very reasons, the Department of Justice in 2018 issued a policy requiring “special caution” for such settlements. Memorandum from Jefferson B. Sessions III, *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities*, DOJ (Nov. 7, 2018), <https://tinyurl.com/3hn3z69h>. The Biden Administration abolished that policy upon assuming office. Memorandum from Merrick B. Garland, *Civil Settlement Agreements and Consent Decrees with State and Local Governmental Entities*, DOJ (Apr. 16, 2021), <https://tinyurl.com/mss8jvs2>.

²⁰ *E.g.*, *Carpenter*, 298 F.3d at 1124 (private parties intervened to challenge EPA’s settlement); *Citizens for a Better*

nebulous prudential-standing bar atop those ordinary principles “immunize[s]” unlawful government settlements from meaningful adversarial testing. *Flores*, 557 U.S. at 449. Even the district court here, which approved the settlement, recognized this problem, permitting intervention to “keep the system honest” and “help [the court] see the opposing arguments.” ER-341. The Ninth Circuit eviscerated that important check on a practice that already stretches the constitutional separation of powers to its breaking point.

This case well illustrates why it is especially important that injured parties be able to challenge the “evil of government by consent decree” or collusive settlement. *Gorsuch*, 718 F.2d at 1136 (Wilkey, J., dissenting). Plaintiffs sued the Department for the modest relief of ordering the Department to *process* their applications, and not for any specific substantive outcome. Yet because President Biden could not fulfill his campaign promise to cancel student debt through legislation or lawful agency action, his administration turned to this collusive settlement to achieve the same end. In doing so, the Department cancelled billions in student-loan debt and rewrote its governing regulations without statutory authority or APA compliance. Then, in a process reminiscent of the Star Chamber, the parties (that is, the accusers and the adjudicator) secretly determined 151 schools had engaged in “substantial misconduct,” without affording the schools notice, evidence, hearings, or even a description of the misconduct alleged. See *Chambers v. Florida*, 309 U.S. 227, 237 (1940) (“[A]n

Env’t v. Gorsuch, 718 F.2d 1117, 1120-21 (D.C. Cir. 1983) (same); cf. *Arizona*, 596 U.S. at 765-66 (Roberts, C.J., concurring) (States sought intervention to defend Public Charge Rule).

accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes.”).

To describe this unprecedented power grab is to detail its illegality—illegality that the Ninth Circuit conceded inflicted constitutionally cognizable harm on Petitioner. Yet, under the Ninth Circuit's “prudence,” Petitioner cannot redress that injury by challenging the settlement's legality, despite the following litany of infirmities.

First, the settlement is unlawful because, as all parties concede, the federal government cannot enter a settlement requiring an agency “to take substantive action that exceeds [their] statutory power.” App.40a (Collins, J., dissenting) (citing *Authority of the U.S. to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.L.C. 126, 136-38 (1999)); see ER-35. Yet the HEA provisions relied on by the Department do not permit it to cancel student-loan debt *en masse*. See App.39a-42a (Collins, J., dissenting). Specifically, the Department cited 20 U.S.C. § 1087e(h), but that provision requires the Department to “specify” borrower defenses “in regulations,” which is the exact opposite of cancelling borrower debt in a settlement. App.40a-41a (Collins, J., dissenting). The Department also invoked 20 U.S.C. § 1082(a)(6), which bears the heading “General [P]owers” and states: “In the performance of, and with respect to, the functions, powers, and duties, vested in him *by this part*, the Secretary may ... enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption.” But “this part” is

Part B of the HEA, *id.* §§ 1071 to 1087-4, which addresses only FFEL Loans, not the Direct Loans that constitute most of the cancelled loans. ER-204-05. And even if Section 1082(a)(6) did apply to Direct Loans, it would not provide authority for blanket cancellation because Part B specifically delimits the circumstances under which the Secretary may cancel FFEL Loans. To read Section 1082(a)(6) as authorizing full discharge in *every* circumstance would render meaningless the specific authorizations provided in these sections.

Second, the settlement violated Rule 23 in multiple ways. ER-193-97. Most glaringly, Rule 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.” *Wal-Mart*, 564 U.S. at 360-61. Yet the “settlement recognize[d] that individualized determinations will be required to decide whether” each borrower’s debt should be cancelled and how much of a “refund[]” the borrower should receive. App.42a-43a (Collins, J., dissenting).

Third, the settlement was arbitrary and capricious and violated Everglades’ due-process rights. ER-197-200, 201-03. After secret negotiations, the settlement “determined” that Everglades had engaged in “substantial misconduct” without explanation, notice, or a hearing. But the arbitrary-and-capricious standard requires “reasoned decisionmaking,” not “ipse dixit.” *Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 429 (D.C. Cir. 2020). And the Due Process Clause demands “[a]n opportunity to meet and rebut evidence utilized by an administrative agency” to harm a regulated entity. *Ralpho v. Bell*, 569 F.2d 607, 628 (D.C. Cir. 1977).

Fourth, the settlement unlawfully amended the Department’s rules without notice-and-comment. ER-200-01. A settlement cannot “permanently and substantially amend[] an agency rule that would have otherwise been subject to statutory rulemaking procedures.” *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1187 (9th Cir. 2013). Yet the settlement did just that: It created three new avenues to succeed in a borrower-defense proceeding that were divorced from the Department’s governing regulations. Those substantive changes required both notice and comment, 5 U.S.C. §§ 551(4), 553, and negotiated rulemaking, 20 U.S.C. § 1087e(h).

Any of these significant infirmities should have stopped the settlement cold, protecting Petitioner from the injury caused by the Department’s illegal actions. Yet the Ninth Circuit’s judge-made bar on non-settler challenges holds that Petitioner is powerless to do anything about it. That tactic upends the “party presentation” principle that drives “our adversarial system,” *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020)—a critical part of “institutional reform litigation.” *Flores*, 557 U.S. at 448. And it charts a path to stonewall other efforts to contest strategic surrenders on issues of national importance. Those serious repercussions warrant this Court’s review.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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October 17, 2025

APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
FILED NOVEMBER 5, 2024**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15049
D.C. No. 3:19-cv-03674-WHA

THERESA SWEET; CHENELLE ARCHIBALD;
DANIEL DEEGAN; SAMUEL HOOD; TRESA
APODACA; ALICIA DAVIS; JESSICA JACOBSON,
ON BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

EVERGLADES COLLEGE, INC.,

Intervenor-Appellant,

v.

MIGUEL A. CARDONA, SECRETARY OF THE
UNITED STATES DEPARTMENT OF EDUCATION;
U.S. DEPARTMENT OF EDUCATION,

Defendants-Appellees,

2a

Appendix A

LINCOLN EDUCATIONAL SERVICES
CORPORATION; AMERICAN NATIONAL
UNIVERSITY; CHICAGO SCHOOL OF
PROFESSIONAL PSYCHOLOGY,

Intervenors.

No. 23-15050
D.C. No. 3:19-cv-03674-WHA

THERESA SWEET; CHENELLE ARCHIBALD;
DANIEL DEEGAN; SAMUEL HOOD; TRESA
APODACA; ALICIA DAVIS; JESSICA JACOBSON,
ON BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

LINCOLN EDUCATIONAL SERVICES
CORPORATION,

Intervenor-Appellant,

v.

MIGUEL A. CARDONA, SECRETARY OF THE
UNITED STATES DEPARTMENT OF EDUCATION;
U.S. DEPARTMENT OF EDUCATION,

Defendants-Appellees,

3a

Appendix A

EVERGLADES COLLEGE, INC.; AMERICAN
NATIONAL UNIVERSITY; CHICAGO SCHOOL OF
PROFESSIONAL PSYCHOLOGY,

Intervenors.

No. 23-15051
D.C. No. 3:19-cv-03674-WHA

THERESA SWEET; CHENELLE ARCHIBALD;
DANIEL DEEGAN; SAMUEL HOOD; TRESA
APODACA; ALICIA DAVIS; JESSICA JACOBSON,
ON BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

AMERICAN NATIONAL UNIVERSITY,

Intervenor-Appellant,

v.

MIGUEL A. CARDONA, SECRETARY OF THE
UNITED STATES DEPARTMENT OF EDUCATION;
U.S. DEPARTMENT OF EDUCATION,

Defendants-Appellees,

4a

Appendix A

EVERGLADES COLLEGE, INC.;
LINCOLN EDUCATIONAL SERVICES
CORPORATION; CHICAGO SCHOOL OF
PROFESSIONAL PSYCHOLOGY,

Intervenors.

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted December 5, 2023
San Francisco, California

Filed November 5, 2024

Before: Daniel P. Collins, Danielle J. Forrest, and
Jennifer Sung, Circuit Judges.

Opinion by Judge Sung;
Dissent by Judge Collins

OPINION

SUNG, Circuit Judge:

Three intervenor for-profit university organizations (American National University, Everglades College, Inc., and Lincoln Educational Services Corp.—collectively, “the Schools”) appeal from the district court’s final approval of a class action settlement between the United States Department of Education (“the Department”) and

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Plaintiffs, who represent a class of over 500,000 federal loan borrowers. The settlement completely resolves Plaintiffs' class action complaint, originally filed in June 2019, regarding the Department's backlog of hundreds of thousands of unprocessed applications for borrower defense ("BD") relief.

For the reasons stated below, we conclude that the Schools have alleged the minimum constitutional requirements for Article III standing. But because the Schools are not parties to the settlement and have not shown that the settlement will cause them formal legal prejudice, they lack standing to challenge the district court's final approval of the settlement on appeal. We also conclude that the dispute between Plaintiffs and the Department was not moot at the time the district court approved the settlement, and we affirm the district court's denial of the Schools' motion to intervene as of right.

I. Background

The Student Loan Reform Act of 1993 authorized the Secretary of Education to develop a program for discharging federal educational loan debts based on the wrongful acts or omissions of the schools attended by borrowers. 20 U.S.C. §§ 1070, 1087e(h); Student Loan Reform Act of 1993, Pub. L. No. 103-66, § 455, 107 Stat. 341, 351. Accordingly, the Secretary established the BD program. William D. Ford Federal Direct Loan Program, 59 Fed. Reg. 61,664, 61,696 (Dec. 1, 1994) (to be codified at 34 C.F.R. pt. 685); *see also* Office of Postsecondary Education, 60 Fed. Reg. 37,768, 37,769 (July 21, 1995).

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Under the program regulations, when a borrower submits a BD application, the Department engages in factfinding and decides whether and to what extent to grant any repayment relief. 34 C.F.R. §§ 685.222(e), 685.206(e).¹ If the Department approves the application and discharges any of the borrower's debt, the Department may, but is not required to, seek recoupment of funds from the school in a separate adjudicatory proceeding. *Id.* §§ 668.125, 685.308(a)(3); *see also id.* §§ 685.206(c)(3)-(4), 685.222(e)(7).

During the first 20 years of the BD program's existence, few borrowers filed applications for relief. *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 39,330, 39,330 (June 16, 2016) (to be codified in scattered sections of 34 C.F.R.). In May 2015, however, Corinthian Colleges, Inc., a for-profit educational institution with over 70,000 students across more than 100 campuses, filed for bankruptcy, which caused a "flood" of BD applications. *Id.* In response, the Department announced that it would

1. The Department has amended the regulations governing the adjudication of BD applications several times, including in 2016 and 2019. As a result, two different versions of the adjudication process are relevant in this appeal. *Compare* 34 C.F.R. § 685.206, *with* 34 C.F.R. § 685.222. The date on which a BD applicant's original federal loan was disbursed determines which version applies. 34 C.F.R. § 685.206(c)-(e). The parties agree that either the 2016 or 2019 versions govern the class members' applications, so we consider both.

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“develop new regulations to establish a more accessible and consistent borrower defense standard and clarify and streamline the borrower defense process to protect borrowers and improve the Department’s ability to hold schools accountable for actions and omissions that result in loan discharges.” *Id.* at 39,331.

By the end of 2016, more borrowers from a range of schools had begun to use the BD process, and “the Secretary had approved 31,773 applications for discharge and found 245 ineligible, for a 99.2% grant rate.” Still, many thousands of applications remained pending. By June 2018, “borrowers had submitted, in total, 165,880 applications” with “105,998 still to be decided.” By June 2019, the backlog had grown to more than 210,000 applications, and the Department had stopped adjudicating any BD applications. *In re U.S. Dep’t of Educ.*, 25 F.4th 692, 696 (9th Cir. 2022) (“From June 2018 through December 2019, the Department issued no borrower defense decisions.”).

Plaintiffs sued the Department in June 2019, alleging that its failure to adjudicate BD applications violated the Administrative Procedure Act (“APA”). In October 2019, the district court certified a class of “[a]ll people who borrowed a Direct Loan or FFEL loan to pay for a program of higher education, who have asserted a borrower defense to repayment to the U.S. Department of Education, whose borrower defense has not been granted or denied on the merits, and who is not a class member in *Calvillo Manriquez v. DeVos*, No. 17-7106 (N.D. Cal.).”

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First settlement agreement. In December 2019, Plaintiffs and the Department cross-moved for summary judgment. But before the district court ruled on the motions, the parties executed their first settlement agreement. In this settlement, the Department agreed to decide all pending BD applications within 18 months. The district court preliminarily approved the settlement in May 2020.

Before final approval, however, the Department began issuing *pro forma* denial notices to a large number of class members, instead of adjudicating the applications on the merits. When Plaintiffs learned about the *pro forma* denials, they notified the district court that the Department was breaching the settlement agreement. The district court conducted an inquiry, and the Department admitted that it had used four templates to deny 89.8% of the 131,800 applications reviewed. At the fairness hearing, several class members expressed “serious concern” with the settlement “in light of the Secretary’s recent string of form denials.” Because of Plaintiffs’ concerns and the class members’ objections, the district court denied final approval of the first settlement and ordered discovery to resume. A few months later, Plaintiffs filed a supplemental complaint adding claims that the Department had illegally adopted a “presumption of denial” policy in violation of the APA and the Due Process Clause of the Fifth Amendment.

Second settlement agreement. In June 2022, Plaintiffs again moved for summary judgment. While that motion was pending, the parties requested preliminary approval of a second settlement agreement—the one at issue in this

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appeal. The settlement divides the class into three groups, described below, for the purposes of relief.

Borrowers in Group One (approximately 196,000 borrowers) get automatic debt forgiveness. Group One consists of borrowers who have pending BD applications associated with any of 151 schools on a list attached as Exhibit C to the settlement. The settlement agreement does not explain how Exhibit C was developed. But the parties' joint motion for preliminary approval of the settlement states: "The Department has determined that attendance at one [of the schools listed in Exhibit C] justifies presumptive relief, for purposes of this settlement, based on strong indicia regarding substantial misconduct by [the] listed schools, whether credibly alleged or in some instances proven, and the high rate of class members with applications related to the listed schools."

Group Two (approximately 100,000 borrowers) consists of borrowers with pending BD applications associated with schools that are not listed in Exhibit C. The Department agreed to resolve Group Two borrowers' claims in a streamlined adjudication process. If the Department does not meet specified deadlines, Group Two borrowers will receive automatic debt relief.

Group Three (approximately 206,000 borrowers) covers borrowers who submitted a BD application after the settlement's execution date but before the date of final approval. The Department may adjudicate Group Three borrowers' applications under the regulations applicable to loans between 2017 and 2020, but it must resolve them

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within three years. If the Department fails to meet the deadline, Group Three borrowers will receive full relief.

Intervention by Schools. Three weeks after the parties moved for preliminary approval of the second settlement, four schools listed in Exhibit C (including the three Schools bringing the present appeal) moved to intervene. Plaintiffs and the Department opposed intervention. The district court conducted a hearing where it heard from the prospective intervenors regarding their asserted interests in the litigation and heard from the parties regarding the settlement. At the close of the hearing, the district court preliminarily approved the settlement in a bench ruling. A few weeks later, the district court denied the intervenors' motions to intervene as of right but allowed them to permissively intervene for the sole purpose of objecting to the class action settlement at the final approval fairness hearing.

The Schools submitted written objections to the settlement and were given an opportunity to be heard at the final fairness hearing. The district court rejected the Schools' objections and granted final approval of the settlement.

The Schools timely appealed and moved to stay the judgment pending appeal. The district court, our court, and the Supreme Court all denied the Schools' applications for a stay.

*Appendix A***II. Standing**

The Department² argues that this appeal should be dismissed because the Schools do not have Article III standing. Additionally, the Department argues that, because the Schools are not parties to the settlement, they have no “cause of action” to challenge the settlement.

Standing analysis “involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.” *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). “The constitutional requirements are derived from Article III, Section 2, Clause 1 of the United States Constitution, and the prudential limitations are rules of judicial self-governance.” *United States v. Mindel*, 80 F.3d 394, 396 (9th Cir. 1996).

“Apart from th[e] minimum constitutional mandate, [the Supreme] Court has recognized other limits on the class of persons who may invoke the courts’ decisional and remedial powers.” *Warth*, 422 U.S. at 499 (explaining prohibitions on generalized grievances and third-party standing); see also *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014) (describing the development of a “‘prudential’ branch of standing, a doctrine not derived from Article III” (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S. Ct. 2301, 159 L. Ed. 2d

2. We have considered both Plaintiffs’ and the Department’s arguments, but because they are so similar, we refer to “the Department” for simplicity.

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98 (2004))); *United States ex rel. Alexander Volkhoff, LLC v. Janssen Pharmaceutica N.V.*, 945 F.3d 1237, 1241 (9th Cir. 2020) (“‘The rule that only parties to a lawsuit . . . may appeal an adverse judgment’ . . . is sometimes described as ‘standing to appeal,’ [but] it is distinct from the requirements of constitutional standing.” (citation omitted)).

One of these additional limits prevents an entity who is not a party to a settlement from objecting to court approval of the settlement, either before the district court or on appeal. *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 582 (9th Cir. 1987) (“[A] non-settling defendant, in general, lacks standing to object to a partial settlement.”). There is only one exception to this general rule: A non-settling entity may challenge a settlement when it “demonstrate[s] that it will sustain some formal legal prejudice as a result of the settlement.” *Id.* at 583.

Article III injury does not equal formal legal prejudice. *See United States v. Kovall*, 857 F.3d 1060, 1068 (9th Cir. 2017) (“The fact that a would-be litigant has Article III standing does not guarantee the right to take an appeal.”); *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247 (7th Cir. 1992) (“Mere allegations of injury in fact . . . as a result of a settlement simply do not rise to the level of plain legal prejudice.”). Thus, a non-settling entity may have Article III standing but nonetheless lack prudential standing to challenge a settlement.³

3. We recognize that it might be better to ask whether a non-settling entity has a “cause of action” to object to the settlement, instead of asking whether the non-settling party has “standing”

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To establish Article III standing, the Schools must show that they 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, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

The Schools allege that their inclusion on Exhibit C has caused them reputational harm. We must first determine whether the alleged reputational harm is

to object the settlement, as we did in *Waller*. The term “standing” “is a word of many, too many, meanings.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2, 318 U.S. App. D.C. 95 (D.C. Cir. 1996)). And federal courts use many different terms to refer to a litigant’s eligibility to bring a particular claim or appeal when the eligibility requirements stem from a statute or legal doctrine other than Article III. *See, e.g., Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 197, 137 S. Ct. 1296, 197 L. Ed. 2d 678 (2017) (pointing out that the terms “prudential standing,” “statutory standing,” and “cause of action” have all been used to describe the “zone of interests” requirement); *Lexmark*, 572 U.S. at 128 n.4 (explaining that the nomenclature of “statutory standing,” “prudential standing,” and a “cause of action” have all been used interchangeably to refer to non-Article III limits on standing). Still, because we, and our sister circuits, have predominantly referred to the *Waller* formal-legal-prejudice requirement as a “standing” requirement, we continue to do so here. *See, e.g., Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 91 (2d Cir. 2019); *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31, 342 U.S. App. D.C. 26 (D.C. Cir. 2000); *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 998-99 (9th Cir. 2005).

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concrete enough to constitute “injury in fact.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

“Central to assessing concreteness is whether the asserted harm has a ‘close relationship’ to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 417, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021).

The Department argues that, because Exhibit C is not false, misleading, or defamatory, it cannot cause injury that is concrete enough to support Article III standing without other proof of concrete harm. Nothing in the settlement agreement states that the schools listed in Exhibit C engaged in any wrongdoing or that the Department made a finding to that effect. However, the Department and Plaintiffs’ joint motion for settlement approval states, “The Department has determined that attendance at one [of the schools listed in Exhibit C] justifies presumptive relief, for purposes of this settlement, based on strong indicia regarding substantial misconduct by [the] listed schools, whether credibly alleged or in some instances proven, and the high rate of class members with applications related to the listed schools.” The Schools argue that, because the “speaker” of this statement is the Department, and the Department is their “primary federal regulator,” the reputational harm caused by the statement is sufficiently concrete to constitute Article III injury.

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We agree with the Schools that the Department’s statement could cause reputational injury that supports Article III standing, even if the statement is not false, misleading, or defamatory. “In looking to whether a plaintiff’s asserted harm has a ‘close relationship’ to a harm traditionally recognized as providing a basis for a lawsuit in American courts, we do not require an exact duplicate.” *TransUnion*, 594 U.S. at 433. A non-defamatory statement may cause reputational harm that is concrete enough to confer standing if it is “disparag[ing]” or “impugns the professional integrity” of its subject, *Kennedy v. Warren*, 66 F.4th 1199, 1206 (9th Cir. 2023), or if it “would subject [a person] to hatred, contempt, or ridicule,” *TransUnion*, 594 U.S. at 432 (citation omitted). Such statements cause more concrete harm when the government is the speaker, because there is a “unique stigma associated with having a government official label someone a law breaker.” *Kennedy*, 66 F.4th at 1206. Thus, even when “we are unsure” that an unretracted government statement actually implies that a person or entity engaged in unlawful conduct, if “any reader . . . might come away with this impression,” the resulting reputational injury “is a sufficiently concrete injury for standing purposes.” *Id.* Here, an individual who reads the Department’s statement about Exhibit C might come away with the impression that schools listed in Exhibit C have engaged in unlawful conduct. Consequently, the Schools’ alleged reputational harm is concrete enough to support Article III standing.

The Department also contends that the alleged reputational injury is not redressable by a favorable

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decision. Reputational injury, however, is redressable if the relief sought “would remove the unique stigma associated with having a government official label someone a law breaker and thereby cast a shadow over their activities and affiliates.” *Id.*; see also *Foretich v. United States*, 351 F.3d 1198, 1213-14, 359 U.S. App. D.C. 54 (D.C. Cir. 2003) (explaining that “[c]ase law is clear that where reputational injury derives directly from an unexpired and unretracted government action, that injury satisfies the requirements of Article III standing to challenge that action,” but “the ‘lingering effects’ on reputation of a retracted or repealed government action normally do not furnish a basis for Article III standing”). A reputational injury is redressable by retraction even if retraction would not prevent other public criticism. *Kennedy*, 66 F.4th at 1206; see also *Meese v. Keene*, 481 U.S. 465, 476-77, 107 S. Ct. 1862, 95 L. Ed. 2d 415 (1987).

In this case, the alleged reputational harm was caused by the Department’s inclusion of the Schools on Exhibit C coupled with its unretracted statement regarding Exhibit C in the joint motion for settlement approval. Because the reputational harm was not caused by the district court’s final approval of the settlement, the relief sought by the Schools—reversal or vacatur of that approval—would not necessarily require the Department to redress the Schools’ claimed injury. Still, where “a favorable judicial decision would not require the defendant to redress the plaintiff’s claimed injury,” the plaintiff can demonstrate redressability by “show[ing] that the defendant or a third party are nonetheless likely to provide redress as a result of the decision.” *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th

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Cir. 2018) (internal citations and quotation marks omitted). Further, there is redressability if the relief sought would “at least partially redress the reputational injury.” *Meese*, 481 U.S. at 476. Applying these standards here, we find redressability because reversal or vacatur would enable and likely cause the Department to retract the statement and file a new motion for settlement approval. Therefore, the Schools have met their burden to establish Article III standing based on their alleged reputational harm.⁴

B.

As noted above, a non-settling entity generally lacks prudential standing to object to a settlement—or to challenge on appeal a district court’s approval of a settlement, unless the non-settling entity demonstrates that it will “sustain some formal legal prejudice as a result of the settlement.” *Waller*, 828 F.2d at 583. “This rule advances the policy of encouraging the voluntary settlement of lawsuits.” *Id.* “[T]he interest in encouraging settlements” is particularly strong “in class actions, which are often complex, drawn out proceedings demanding a large share of finite judicial resources.” *Mayfield v. Barr*, 985 F.2d 1090, 1092, 300 U.S. App. D.C. 31 (D.C. Cir. 1993).

Courts have applied this rule to both parties and non-parties, including non-settling defendants, *Smith*, 421 F.3d at 998; *Waller*, 828 F.2d at 582; non-settling

4. Because we conclude that the Schools have Article III standing based on their alleged reputational injury, we do not reach whether they have standing based on their alleged financial and procedural injuries.

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third-party defendants, *Melito*, 923 F.3d at 91; opted-out class members, *Mayfield*, 985 F.2d at 1092; and non-class members, *Gould v. Alleco, Inc.*, 883 F.2d at 281, 285 (4th Cir. 1989).

The Department argues that the Schools, as non-settling permissive intervenors, lack standing to challenge the settlement approval on appeal. The Schools argue that the parties have forfeited this issue. Alternatively, the Schools argue that they have demonstrated that the settlement will cause them formal legal prejudice.

1.

We first address the Schools' argument that the Department and Plaintiffs forfeited the argument that the Schools lack standing to challenge the district court's final approval of the settlement. We have never decided whether or how a settling party must preserve this issue, and we do not need to do so here, because the parties adequately raised the issue below and on appeal.

Below, the Schools moved to intervene for the purpose of objecting to the parties' proposed settlement agreement. Plaintiffs opposed the intervention motions, arguing that the Schools did not have "standing to block" the settlement's approval. Plaintiffs also repeatedly argued that the Schools should not be permitted to intervene because they do not have "any claims or defenses" at issue in the settlement. The Department similarly opposed the Schools' motions to intervene on the ground that the Schools "lack any concrete interest" in the discretionary settlement, and cited *Gould*, 883 F.2d at 285, for the

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proposition that “courts usually reject outsiders’ attempts to enter the litigation during the settlement phase.”⁵

The Department has not abandoned its challenge to the Schools’ standing to object to the settlement on appeal. Specifically, the Department argues in its answering brief that the Schools, as intervenors, “fail to identify any cause of action that would permit them to challenge the district court’s approval of the settlement.” As noted above, courts use the terms “standing” and “cause of action” interchangeably to refer to a particular litigant’s eligibility to bring a particular claim or appeal. *See supra* note 3. Although the Department did not cite *Waller*, a party does not have to cite a particular case to adequately raise an issue. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000) (“[T]his principle [of preserving an issue] does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue.”); *see also United States v. Williams*, 846 F.3d 303, 311 (9th Cir. 2017) (explaining that a party does not waive or forfeit arguments relating to claims it properly presents to the district court); *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013) (“[W]e may consider new legal arguments raised by the parties relating to claims previously raised in the litigation.”). And in any event, the Schools apparently understood that the Department’s

5. In *Gould*, the Fourth Circuit held that “non-class members have no standing to object . . . to a proposed class settlement” under Rule 23(e), and it affirmed the district court’s denial of the non-class members’ motion to intervene as of right under Rule 24 because they lacked sufficient interest in the settlement. 883 F.2d at 284-85.

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cause-of-action argument invoked the *Waller* rule because they countered in their reply brief, “[U]nder a ‘recognized exception,’ non-settling defendants may object if, as here, they will suffer ‘formal legal prejudice as a result of the settlement,’” quoting *Waller* and citing *Smith*. See *Thompson*, 705 F.3d at 1100 (noting the court did not abuse its discretion in considering a new legal argument that was “fully addressed by both parties” on appeal).

Under these circumstances, the parties have not forfeited their challenge to the Schools’ standing to object to the settlement.

2.

The Schools, as non-settling intervenors, lack standing to object to the district court’s settlement approval unless they demonstrate formal legal prejudice.⁶

Formal legal prejudice “exists only in those rare circumstances when, for example, the settlement

6. For purposes of the *Waller* rule, an intervenor who is not a party to a settlement is like any other non-settling entity. See, e.g., *Waller*, 828 F.2d at 584 (holding that non-settling entity should have been granted intervention as of right but lacked standing to object to settlement); *United States v. Gila Valley Irrigation Dist.*, 345 F. App’x 281, 283 (9th Cir. 2009) (applying *Waller* and holding that a tribal intervenor lacked standing to challenge a district court’s order approving a settlement agreement); *Ball ex rel. Burba v. Dewine*, No. 20-3927, 2021 U.S. App. LEXIS 19556, 2021 WL 4047032, at *3 (6th Cir. June 30, 2021) (holding that entities that had been granted intervention nonetheless did “not have standing to challenge the settlement agreement on appeal”).

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agreement *formally* strips a non-settling party of a legal claim or cause of action, such as a cross-claim for contribution or indemnification, invalidates a non-settling party's contract rights, or the right to present relevant evidence at a trial." *Bhatia v. Piedrahita*, 756 F.3d 211, 218 (2d Cir. 2014); accord *Waller*, 828 F.2d at 582-83. It is not enough for a non-settling entity to allege that the settlement "*effectively* strips them of defenses" or claims if nothing in the settlement agreement precludes the non-settling entity "from asserting in the district court or in other litigation any claims or defenses that may be available to them." *Bhatia*, 756 F.3d at 218.

Thus, for example, we held that a non-settling party demonstrated formal legal prejudice where the settlement approval order explicitly stated, "The non-settling parties are permanently barred and enjoined from asserting or continuing to prosecute, either directly or in any other capacity, any and all Claims (as defined in the Settlement Agreement). . . ." *Smith*, 421 F.3d at 1000. But we held that a non-settling defendant did not demonstrate formal legal prejudice where a settlement bound a settling party to "cooperate" with other settling parties in prosecuting claims against the intervenor but did not require the disclosure of privileged communications. *Waller*, 828 F.2d at 584. "At most," we said, "the settlement puts [the intervenor] at something of a tactical disadvantage in the continuing litigation. Such an injury does not constitute plain legal prejudice." *Id.*⁷

7. Because the *Waller* rule and its exception are closely related to Federal Rule of Civil Procedure 41(a)(2) governing voluntary dismissals, federal courts often use the terms "formal

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The Schools do not identify any provision in the settlement agreement or settlement approval order that formally strips them of any legal claim or defense, or any contractual right. The settlement does not compromise any of the Schools' rights or impose any obligations or liabilities on them. For class members' BD applications associated with Exhibit C schools, the settlement only requires the Department to fully discharge the amount that those borrowers owe the federal government. The settlement does not entitle the Department to recoup any funds from the schools.

Normally, when the Department approves a BD application, the Department has the discretion to initiate a separate proceeding against the school for recoupment. 34 C.F.R. § 668.125. But even when the Department initiates a recoupment proceeding, the school is free to contest the issue, and the school retains due process rights. *See id.* §§ 668.125, 685.308(a)(3); *see also id.* §§ 685.206(c)(3)-(4), 685.222(e)(7). Moreover, as the district court explained, a Group One BD application that is resolved pursuant to the settlement is not “a successful or approved borrower-defense claim” as a matter of law, and consequently, the Department cannot initiate recoupment proceedings against any Exhibit C schools as a result of the settlement.⁸

legal prejudice” and “plain legal prejudice” interchangeably—as we did in *Waller* itself. *See* 828 F.2d at 583, 584.

8. The Department has repeatedly represented on the record that it cannot and will not seek recoupment from any schools for BD applications covered by the settlement, and it will not use a school's inclusion in Exhibit C as evidence against them in any future BD proceedings. The district court explicitly noted this

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Although the alleged reputational harm to the Schools is concrete enough to support Article III standing, it does “not rise to the level of plain legal prejudice.” *Agretti*, 982 F.2d at 247; *see also Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1233 (7th Cir. 1983) (even when a settlement causes “factual injury to a non-settling party,” “the court should not intercede in the plaintiff’s decision to settle with certain parties, unless a remaining party can demonstrate plain legal prejudice”). Even if the Schools must file a second lawsuit to remedy the alleged reputational harm, that does not mean the Schools have standing to object to the district court’s approval of the settlement in this case. *See Agretti*, 982 F.2d at 247 (noting courts have repeatedly held that a settlement does not cause formal legal prejudice to a non-settling party even if it “may force a second lawsuit” against settling parties); *Waller*, 828 F.2d at 584 (concluding non-settling party lacked standing to object to settlement when it could “seek injunctive relief” or other remedies to address the alleged harm). Neither the settlement, nor the district court’s order approving the settlement, bars the Schools from bringing claims to remedy the alleged reputational harm in a separate lawsuit.⁹

in its order approving the settlement, stating, “The Department has also represented in the sworn declaration of [Deputy Under Secretary] Benjamin Miller that it does not consider inclusion on Exhibit C a finding of misconduct and that inclusion does not constitute evidence that could or would be considered in an action by the Department against a school. The Court relied upon, and the Court expects the government to stand behind, the statements made in the Miller Declaration.”

9. The Schools could have moved to seal the settlement or for a protective order, but, apparently, they did not.

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Because the Schools do not have prudential standing to object to the settlement, “we cannot review the settlement approved by the district court.” *Agretti*, 982 F.2d at 248.¹⁰

III. Mootness

“To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (internal quotation marks omitted) (citation omitted). When Plaintiffs originally filed their complaint, they requested that the district court declare that the Department’s “policy of inaction” on BD applications was unlawful. Under the parties’ first settlement agreement, the Department agreed to process all pending BD applications within 18 months. *See supra* Part I. But, because the Department began issuing *pro forma* denial notices to the vast majority of class members, the district court denied final approval of the first settlement, and Plaintiffs filed a supplemental complaint which added claims and related allegations contending that the Department had unlawfully transformed its “policy of inaction” into a policy of “presumption of denial.”

10. Our conclusion that we lack jurisdiction to review the district court’s order approving the settlement does not affect our jurisdiction to review the district court’s separate order denying the Schools’ motion to intervene as of right. *See Waller*, 828 F.2d at 584 (holding non-settling defendant lacked standing to object to settlement but district court erred in denying the entity’s motion to intervene as of right). We address the Schools’ appeal of that order below, in Part IV.

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Before the Department and Plaintiffs received preliminary approval of their second settlement agreement, the Department moved for summary judgment and argued, among other things, that its actions had mooted the case. On appeal, only the Schools argue that the case was moot before the district court approved the settlement. Although we have concluded that the Schools lack standing to object to the settlement, we address mootness because we have an independent obligation to confirm jurisdiction.

Below, the Department contended that it had mooted Plaintiffs' original claims by processing thousands of BD applications. But under Rule 15(d), Plaintiffs' supplemental complaint merged with their then-operative complaint. *See* Fed. R. Civ. P. 15(d); *Keith v. Volpe*, 858 F.2d 467, 473-76 (9th Cir. 1988). Thus, even assuming that the Department mooted Plaintiffs' original claims by processing many (but not all) pending applications, that action did not moot Plaintiffs' supplemental claims.

The Department also argued below that Plaintiffs' supplemental claims were moot because it had stopped issuing *pro forma* denials. But the Department's voluntary cessation of the challenged practice did not render this case moot. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) ("It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" (citation omitted)); *Rosebrock v. Mathis*, 745 F.3d 963, 971-72 (9th Cir. 2014). The

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Department could easily resume its conduct if the case were dismissed. *See Rosebrock*, 745 F.3d at 971-72.

IV. Intervention as of Right

To qualify for intervention as of right under Rule 24(a)(2), a prospective intervenor must “show that: (1) its motion is timely; (2) it has a significantly protectable interest relating to the subject of the action; (3) it is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) its interest is inadequately represented by the parties to the action.” *Kalbers v. U.S. Dep’t of Just.*, 22 F.4th 816, 822 (9th Cir. 2021) (cleaned up). “[A] proposed intervenor ‘has a significant protectable interest in an action if (1) it asserts an interest that is protected under some law, and (2) there is a relationship between its legally protected interest and the plaintiff’s claims.’” *Id.* at 827 (citation omitted).

We review de novo the district court’s decision under Rule 24(a) to deny the Schools intervention as a matter of right. *See Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020). However, the harmless error doctrine applies to intervention rulings, which means that we will reverse only if any error affected the substantial rights of the parties. *Prete v. Bradbury*, 438 F.3d 949, 959-60 (9th Cir. 2006).

Here, the district court did not err in denying the Schools’ motion for intervention as of right. The Schools

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do not have a significantly protectable interest as required by Rule 24(a), and they fail to explain how they were prejudiced by the district court's denial of intervention as of right.

The Schools claim that they have significantly protectable financial interests. But the Schools do not—and cannot—face exposure to financial recoupment for two reasons: First, the Schools do not have an independent financial interest in a borrower's BD relief because the Department alone bears the cost of discharging that debt, which is solely money owed by the student to the federal government. *See* 20 U.S.C. § 1087e(h); 34 C.F.R. § 685.222(d)(1). As the district court summarized, the schools have “already gotten the money and [they] don't have to pay it back” under the terms of the Department's settlement with the borrowers. Second, because a settled BD application under this settlement does not constitute a successful BD adjudication, the Department cannot use the settled applications as a predicate for pursuing recoupment from the Schools under its own regulations. *See* 34 C.F.R. § 685.222(e)(7). And, as noted above, the Department has sworn not to pursue any recoupment proceedings against any Exhibit C school for any of the loans discharged through the settlement, and the district court further conditioned the settlement on that promise. Recoupment of funds implicated by the settlement from any of the Schools is thus a virtual impossibility.

The Schools also claim that the settlement interferes with their rights under Department regulations. As noted above, the Department first decides whether to

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grant a student's application for repayment relief in a BD proceeding. *Supra* Part I. If the Department grants the student relief, the Department may (but is not required to) try to recoup money from the school by initiating a second, separate proceeding. 34 C.F.R. §§ 668.125, 685.308(a)(3); *see also id.* §§ 685.206(c)(3)-(4), 685.222(e)(7). In the recoupment proceeding, the school may contest the basis on which the Department granted the student relief. *See* § 668.125.

In the settlement, the Department and Plaintiffs agreed to summarily grant BD applications for Group One borrowers (who attended schools listed in Exhibit C) without further adjudication. *Supra* Part I. The Schools argue that, by doing so, the settlement interfered with their procedural right to participate in the BD proceeding that the Department would normally conduct to adjudicate a student's application for relief. In a BD proceeding, a school has, at most, the right to receive notice that an application was filed and an opportunity to submit a response to information that was provided by the student. 34 C.F.R. §§ 685.206(e)(10)-(12)(i), 685.222(e)(3)(i). The regulations do not prohibit the Department from resolving a BD application through settlement instead of an adjudication on the merits. The Department cannot seek recoupment from schools for applications resolved by the settlement, and, in any event, the settlement has no effect on the Schools' rights in recoupment proceedings. Under these circumstances, the Schools' interest in participating in a BD proceeding (as opposed to a recoupment proceeding) is not a sufficiently "significant protectable interest" to support intervention as of right.

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United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004) (citation omitted).

But even if we agreed that the district court erred by denying the Schools intervention as of right, we would decline to reverse because any error was harmless. The district court allowed the Schools to intervene permissively and carefully considered their objections to the settlement. The Schools only discuss prejudice in their reply brief, and even then, they only conclusorily assert that intervention as of right would allow them to “file claims or assert defenses, take discovery, move to decertify the class, or participate in settlement negotiations, among other party actions.” That broad assertion, standing alone, does not show that the denial of intervention as of right prejudiced the Schools’ “substantial rights.” *Prete*, 438 F.3d at 960.

* * *

For the foregoing reasons, this appeal is **DISMISSED in part**, and the district court’s denial of intervention as of right is **AFFIRMED**.

COLLINS, Circuit Judge, dissenting:

I agree with the majority that this case is not moot and that Intervenor Everglades College, Inc.; Lincoln Educational Services Corp.; and American National University (“the Schools”) have Article III standing to challenge the settlement in this case. But I disagree with the majority’s further conclusion that the Schools lack so-called “prudential standing” to challenge the settlement.

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And although the majority thus does not directly address the merits of the Schools' objections, I would do so and would reverse the district court's approval of the settlement. I therefore respectfully dissent.

I

In holding that the Schools lack prudential standing to object to the settlement, the majority relies on *Waller v. Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987), which held that “a non-settling defendant, in general, lacks standing to object to a partial settlement,” unless “it can demonstrate that it will sustain some formal legal prejudice as a result of the settlement.” *Id.* at 582-83. Because *Waller* is not a special rule about *appellate* standing, but is instead a rule that governs the ability to make objections to a settlement both in the district court and on appeal, *see* Opin. at 21-22, the majority's *Waller*-based ruling necessarily rests on the premise that the district court should not have allowed the Schools to be heard in objection to the settlement and should not have addressed those objections on the merits. In effect, then, the majority holds that the district court erred when it granted permissive intervention to the Schools “for the sole and express purpose of objecting to and opposing the class action settlement.” In my view, the district court did not abuse its discretion in allowing the Schools to permissively intervene for the purpose of objecting to the settlement. *See Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1352 (9th Cir. 2013) (“We review a decision whether to grant permissive intervention under

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an abuse of discretion standard.” (citation omitted)).¹ And because the district court thus properly *reached* the merits of the intervenor Schools’ objections, the Schools have a right to appeal that adverse ruling, and we must resolve those merits.

A

“We have often stated that permissive intervention ‘requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant’s claim or defense and the main action.’” *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011) (citation omitted); *see also* Fed. R. Civ. P. 24(b)(1)(B). The district court correctly held that all of these requirements were satisfied here. With respect to the first requirement, we have “clarif[ied] that the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims,” including when the proposed intervenor is “an intervening defendant.” *Freedom from Religion Found., Inc.*, 644 F.3d at 844 (citation omitted). More specifically, we held that the jurisdictional component of the permissive-intervention test “prevents the enlargement of federal jurisdiction in such cases only where a proposed intervenor seeks to bring new *state-law* claims.” *Id.* (emphasis added). Because the

1. I agree with the majority that the Plaintiffs and the Government adequately preserved their objections on this score. Both have consistently argued, in the district court and on appeal, that the Schools lack a sufficient interest in the settlement to warrant their being heard in objection.

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Schools did not seek to assert “new state-law claims” on the merits, but merely sought to raise federal legal objections to the settlement, the statutory “jurisdictional concern drops away.” *Id.* The Schools’ motions were plainly timely, because they were filed within weeks of the filing of the amended settlement agreement. And whether the settlement was lawful and should be approved obviously involved “common question[s] of law or fact” with “the main action.” FED. R. CIV. P. 24(b)(1)(B).

But “[e]ven if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention.” *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). We have recognized a wide variety of non-exhaustive factors that may be relevant to a district court’s exercise of such discretion:

These relevant factors include the nature and extent of the intervenors’ interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case. The court may also consider whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors’ interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and

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equitable adjudication of the legal questions presented.

Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977) (footnotes omitted). The record confirms that the district court adequately considered the factors that were relevant here, and its weighing of those factors does not reflect any abuse of discretion. In granting permissive intervention, the court noted that the Schools had asserted that the settlement would implicate their “procedural rights” under the applicable regulations and that the settlement would also “cause reputational harm” (internal quotation marks omitted). The order also noted that the Schools had “explicitly disclaimed” any pursuit of additional discovery, which confirmed that intervention would not result in undue delay. At the hearing on the motion, the court also added that allowing permissive intervention would “keep the system honest” and thereby contribute to the full development of the issues and their just resolution. The district court thus acted well within its discretion by allowing the Schools to permissively intervene for purposes of objecting to the settlement.

The majority nonetheless holds that, in the absence of a showing of “formal legal prejudice,” the Schools should not have been allowed to intervene for purposes of objecting to the settlement. *See* Opin. at 24 (citing *Waller*, 828 F.2d at 582-83). The majority notes that, absent such a showing, we have generally not allowed non-settling *codefendants* in a suit to be heard in objection to another defendant’s settlement with the plaintiffs, *see Waller*, 828 F.2d at 582-83, and the majority concludes that the same

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rule should apply to “an intervenor who is not a party to a settlement.” Opin. at 24 n.6. The majority asserts that *Waller* itself supports extending that rule to permissive intervenors, but an examination of *Waller* confirms that that is wrong.

In *Waller*, a codefendant in consolidated securities class actions settled separately with the plaintiffs, but the settlement required an “expansion of the classes.” 828 F.2d at 580. After a non-settling codefendant (the accounting firm that had audited the challenged financial statements) objected to changing the classes, the plaintiffs sought to expedite matters by filing (with the district court’s approval) duplicative actions on behalf of the expanded classes, but omitting the non-settling codefendants. *Id.* The accounting firm then sought to be heard in the duplicative suits for the purpose of objecting to the settlement, but the district court denied that motion. *Id.* at 581. On appeal, we construed that order as having denied intervention “as of right” and as having held that the objector lacked “standing as a non-settling party to offer objections to the settlement.” *Id.* at 581-82. In holding that the district court erred in denying intervention as of right, we did *not* rely on the codefendant’s asserted interests in objecting to the settlement. Rather, we noted that the *underlying* allegations of false financial statements in the complaint confirmed that the accounting firm had an “obvious interest in defending against such allegations” on the merits. *Id.* at 582. In effect, we held that the accounting firm should have been added as a defendant *with respect to the merits* of the duplicative action. The intervention-as-of-right issue was thus independent of, and did not rest

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on, the accounting firm's objections to the settlement. Although we did not discuss permissive intervention, it seems obvious from the district court's ruling that, had it been presented with a motion seeking only permissive intervention for the limited purpose of objecting to the settlement, that court would have exercised its discretion to *deny* permissive intervention. *Waller* thus had no occasion to address the specific question that confronts us here, namely, whether a district court *has discretion to allow* permissive intervention for the limited purpose of objecting to a settlement, even in the absence of "formal legal prejudice." Apart from its inapposite reliance on *Waller*, the majority cites no published precedent that it claims addresses this specific issue, and I have found none either.

In resolving this open question, I discern no reason for imposing *Waller*'s "formal legal prejudice" standard as an artificial constraint on a district court's exercise of its authority to allow permissive intervention for the limited purpose of objecting to a settlement. Indeed, requiring a showing of formal legal prejudice in order to obtain permissive intervention would effectively require the putative intervenor to establish that it qualifies for intervention *as of right*. The sort of "formal legal prejudice" discussed in *Waller*—*e.g.*, a codefendant's loss of a "legal claim or cause of action" due to a settlement, the invalidation of its "contract rights," or the loss of the "right to assert an *in pari delicto* defense," *see Waller*, 828 F.2d at 583—would surely suffice to establish an "interest relating to the property or transaction that is the subject of the action" that is "impair[ed]" by the

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proposed disposition of the action, which is the standard for intervention as of right. *See* FED. R. CIV. P. 24(a)(2). Applying the “formal legal prejudice” standard as a rigid requirement for obtaining permissive intervention to challenge a settlement would thus effectively *eliminate* such “permissive” intervention altogether.²

2. The “formal legal prejudice” standard is also stricter than the zone-of-interests test that the Government argues on appeal that the Schools must satisfy before they may assert that the settlement violates administrative law principles or the Administrative Procedure Act (“APA”). *See Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U.S. 209, 224, 132 S. Ct. 2199, 183 L. Ed. 2d 211 (2012) (stating that the zone-of-interests test requires a plaintiff to show that its asserted injury is “‘arguably within the zone of interests to be protected or regulated by the statute’ that [it] says was violated” (citation omitted)); *see also Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987) (noting that this test “is not meant to be especially demanding”). Even assuming *arguendo* that the Schools had to satisfy the zone-of-interests test here even though they did not intervene to assert affirmative claims for relief under the APA and instead only sought to defend against the affirmative relief being granted to Plaintiffs under the settlement, I think that the Schools have satisfied that test here. The Government argues that, because the Schools are the *regulated parties* whose alleged wrongdoing is the subject of the borrower-defense provisions, the “statutory and regulatory provisions” governing borrower defense and discharge of student loans “are not designed to benefit” them, and the Schools therefore “do not fall within the zone of interests” of those provisions. But the relevant zone of interests is not defined by the “overarching purpose” of the applicable statute, “but by reference to the particular provisions of law” at issue. *Bennett v. Spear*, 520 U.S. 154, 175-76, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (unanimously rejecting the view that a party impacted by

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Moreover, I do not think that the underlying *Waller* rule is quite as rigid as the majority seems to think. *Waller* adopted the “general” rule that a non-settling defendant “lacks standing to object to a partial settlement,” as well as an “exception to th[is] general principle” where the non-settling defendant “can demonstrate that it will sustain some formal legal prejudice as a result of the settlement.” 828 F.2d at 582-83. We said that the resulting “standard strikes a balance between the desire to promote settlements and the interests of justice.” *Id.* at 583. But we did not say that there are no other conceivable circumstances in which the “interests of justice” might permit a district court to exercise discretion to consider objections from a non-settling party. Again, *Waller* involved an effort, on appeal, to *force* the district court to consider the non-settling defendant’s objections, and it may be that, under *Waller*, a district court is never *required* to consider such objections absent a showing of

implementation of the Endangered Species Act fell outside the zone of interests of that statute simply because it did not seek to “vindicate [that statute’s] overarching purpose of species preservation”). It follows that a regulated party whose underlying conduct is at issue in a regulatory legal regime will generally fall within the zone of interests of the relevant provisions of law that *limit* the Government’s power to take action based on such alleged conduct. *See, e.g., Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922, 280 U.S. App. D.C. 296 (D.C. Cir. 1989) (noting that “those whom the agency regulates have the incentive to guard against any administrative attempt to impose a greater burden than that contemplated by Congress” and that such entities therefore fall within the zone of interests of the relevant laws under which that regulation is accomplished). The Schools therefore satisfy the zone-of-interests test here, even if one assumes that they cannot establish formal legal prejudice.

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formal legal prejudice. However, it is another matter to say that a district court is *forbidden* from considering objections from a non-settling party who is already in the case or that it is forbidden from granting permissive intervention to allow objections from particular non-settling entities that otherwise meet the requirements of Rule 24(b) and Article III.

Accordingly, I would hold that the district court did not abuse its discretion in allowing the Schools to permissively intervene for the limited purpose of objecting to the settlement. And, having done so, the district court therefore properly reached the merits of the Schools' objections to the settlement in this case.

B

Having been properly granted intervention to object to the settlement, and having obtained a merits ruling from the district court concerning those objections, the Schools are entitled to appeal that adverse decision, and we must decide the merits of that appeal.

“An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court.” *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76, 107 S. Ct. 1177, 94 L. Ed. 2d 389 (1987). Where, as here, intervention was granted for a limited purpose, an intervenor may raise on appeal only those issues that affect the interests of the intervenor that formed the basis for that limited intervention. *See Shaff v. United States*, 695 F.2d 1138, 1140 n.1 (9th Cir.

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1983); *see also* 7c CHARLES ALAN WRIGHT, ARTHUR R. MILLER, AND MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1923 at pp. 643-44 (3d ed. 2007) (noting that, although “[o]ne who has been allowed to intervene in an action may appeal from subsequent orders in the action,” an appeal by the intervenor will be allowed “only if the subsequent orders affect the intervenor and only to the extent of the interest that made it possible for intervention” (footnote omitted)). And because, as the majority correctly concludes, the Schools have Article III standing and the case is not moot, the Schools are entitled to appeal the district court’s rejection of their arguments against approving the settlement. *See Organized Vill. of Kake v. USDA*, 795 F.3d 956, 963 (9th Cir. 2015) (noting that intervenors must have Article III standing to pursue an appeal). We are therefore obligated to decide whether the district court properly rejected the Schools’ objections.

II

Because the majority (erroneously) declines to reach the merits of the Schools’ appeal, I will not exhaustively address the Schools’ objections and will only briefly summarize why I would conclude that the Schools are correct in contending that the settlement should be set aside. In particular, at least two of the objections raised by the Schools require that the settlement be vacated.

First, the Government lacks the necessary statutory authority to grant the relief contained in the settlement. The Government concedes, for purposes of this appeal, that the Department of Justice’s general authority to

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settle litigation “may not be used to require an agency to take substantive action that exceeds its statutory power.” *See* Brief for Defendants-Appellees at 31 (citing *Authority of the U.S. to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.L.C. 126, 136-38 (1999)). The Government proffers two sources of the Education Department’s statutory authority to justify the settlement’s loan forgiveness, but neither suffices.

The Government cites the borrower-defense authority granted under § 455(h) of the Higher Education Act of 1965 (“HEA”), but that provision requires that any such defense to repayment must be “specif[ied] in regulations.” *See* HEA § 455(h), 20 U.S.C. § 1087e(h).³ However, the loan forgiveness contained in the settlement—particularly the portion relating to the schools on “Exhibit C” to the settlement agreement—is not being done pursuant to, or in accordance with, the applicable borrower-defense regulations. Indeed, in upholding the settlement, both the district court and the majority have placed great weight on the fact that the monetary relief afforded to a borrower attending an “Exhibit C” school “is not ‘a successful or approved borrower-defense claim.’” *See* Opin. at 26 (quoting district court order); *see also id.* at 31

3. Because title 20 of the U.S. Code has not been enacted as positive law, I will cite the underlying text of the HEA, together with a citation to the section of title 20 to which the relevant provision has been classified. The current text of the HEA is available on the website of the Government Publishing Office at <https://www.govinfo.gov/content/pkg/COMPS-765/pdf/COMPS-765.pdf>.

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(similar). But if *full* loan relief is being given to an entire subclass of Plaintiffs *outside* the strictures and limitations of the borrower-defense statute and regulations, then that statute and those regulations cannot be invoked as the authority for that action, which effectively replaces the statutory borrower-defense system with something entirely different. *Cf. Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1031 (9th Cir. 2007) (“A settlement agreement cannot be a means of bypassing congressionally mandated requirements.”). Indeed, the settlement here presumably eschewed reliance on the borrower-defense provisions precisely because invoking them would have implicated the procedural and substantive rights of the Schools in a way that would likely have allowed them to establish formal legal prejudice and a basis for intervention as of right.

The Government also notes that, under § 432 of the HEA, the Secretary may, in connection with the exercise of his authority under “this part”—*i.e.*, Part B of Title IV of the HEA (which governs the “Federal Family Education Loan Program” or “FFEL Program”)—“enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption.” *See* HEA § 432(a)(6), 20 U.S.C. § 1082(a)(6). But even assuming *arguendo* that this general grant of administrative authority includes the power to forgive loans on the scale involved here—a question on which I express no view—it is undisputed that the vast majority of the loans covered by this settlement were issued under *Part D* of Title IV (governing the “William D. Ford Federal Direct Loan Program” or “Direct Loan

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Program”), not Part B. The Government’s only response to this obvious textual problem is to note that, under § 455(a)(1) of the HEA, direct loans under Part D “shall have the same terms, conditions, and benefits, and be available in the same amounts,” as loans issued under four specified sections of Part B. HEA § 455(a)(1), 20 U.S.C. § 1087e(a)(1). But a general administrative *power* granted to an *agency* does not fall within the ordinary understanding of the “terms, conditions, and benefits” of a “*loan*[]” issued by a *third party* under the federal guarantees afforded under the FFEL Program. *Id.* (emphasis added). Accordingly, nothing in the text of § 455(a)(1) carries over, into the Direct Loan Program, administrative authorities applicable only under the FFEL Program. Given that the relief granted by the Department in the settlement exceeds its statutory authority, the settlement is unlawful and should not have been approved.

Second, the settlement unlawfully grants individualized monetary relief in a class action that was certified only as an injunctive-relief class under Federal Rule of Civil Procedure 23(b)(2). *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (stating that Rule 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages”). The settlement recognizes that individualized determinations will be required to decide whether a particular borrower’s loans are “associated with a program, school, or School Group listed in Exhibit C” as well as to determine the individualized monetary refunds to be made to each such

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borrower. The district court held that the individualized restitution awards fell within the scope of the equitable relief permitted in a Rule 23(b)(2) class action, but that is wrong. *See id.* at 365 (holding that equitable restitutionary awards of “backpay” are not authorized in “a (b)(2) class action,” because Rule 23(b)(2) “does not speak of ‘equitable’ remedies generally but of injunctions and declaratory judgments”); *see also Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530-31, 372 U.S. App. D.C. 53 (D.C. Cir. 2006) (holding that Rule 23(b)(2) did not authorize certification of a class action seeking an injunction requiring Delta to process and pay class members’ monetary claims for lost or damaged baggage). Plaintiffs argue that the settlement is comparable to the sort of injunctive relief that we allowed to be pursued on a classwide basis in *Fowler v. Guerin*, 899 F.3d 1112 (9th Cir. 2018), but that is incorrect. At issue in *Fowler* was an “*indivisible* injunction benefitting all [class] members at once” by merely mandating the defendant’s use of a “single formula” in calculating interest in retirement accounts. *Id.* at 1120 (emphasis added) (quoting *Dukes*, 564 U.S. at 362). In contrast to *Fowler*, the settlement here bears no resemblance to a simple, indivisible injunction that merely has indirect collateral monetary consequences.

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Because these key features of the settlement were invalid, the district court erred in approving the settlement. I would therefore vacate the approval of the settlement and remand for further proceedings.⁴

I respectfully dissent.

4. Because I would vacate the settlement as unlawful, I have no occasion to address whether the district court erred in denying the Schools' request for intervention as of right. The Schools' arguments in favor of intervention as of right (including their arguments that their motions for such intervention were timely) were all predicated on the specific features of the parties' proposed settlement agreement. A vacatur of that settlement agreement as unlawful suffices to vitiate the Schools' asserted grounds for intervention as of right, thereby rendering it unnecessary for me to reach that issue.

45a

**APPENDIX B — ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA, FILED NOVEMBER 16, 2022**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 19-03674 WHA

THERESA SWEET, *et al.*,

Plaintiffs,

v.

MIGUEL CARDONA, *et al.*,

Defendants.

November 16, 2022, Decided;
November 16, 2022, Filed

**ORDER GRANTING FINAL
SETTLEMENT APPROVAL**

INTRODUCTION

The United States Secretary of Education has reached a settlement with a class of student-loan borrowers whose complaint alleges that, for years, the Department of Education unlawfully delayed processing, or perfunctorily denied, hundreds of thousands of “borrower-defense” applications — requests by students to discharge their

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loans in light of alleged wrongful acts and omissions of the schools they attended. The settlement leaps over the borrowers' request to require administrative proceedings and provides for the automatic discharge of billions of dollars of student loans and streamlined claim processing. This settlement is separate and apart from President Biden's broader program to forgive \$430 billion in student debt. The key question now at final approval concerns whether the Secretary has the authority to enter into such a settlement.

STATEMENT

Title IV of the Higher Education Act directs the Secretary of Education "to assist in making available the benefits of postsecondary education to eligible students" through financial-assistance programs. The Student Loan Reform Act of 1993 directed the Secretary to promulgate legislative regulations for agency consideration of discharges of loans due to the wrongful acts or omissions of the schools attended by the borrowers. 20 U.S.C. §§ 1070, 1087e(h); Pub. L. No. 103-66 (1993).

The Secretary established the first "borrower defense" program for certain federal loans in 1994, which allowed a borrower to "assert as a defense against repayment of his or her loan any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law." 59 Fed. Reg. 61,664, 61,696 (Dec. 1, 1994); *see also* 60 Fed. Reg. 37,768 (July 21, 1995). These rules went largely unused for the next twenty years (AR 590).

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That all changed in May 2015 with the collapse of Corinthian Colleges, Inc., a for-profit college with more than 100 campuses and over 70,000 students. The Department faced a “flood of borrower defense claims submitted by Corinthian students.” Secretary John B. King, Jr. quickly moved to update the regulations for handling these applications to expedite processing. 81 Fed. Reg. 39,330, 39,330, 39,335 (June 16, 2016); 81 Fed. Reg. 75,926 (Nov. 1, 2016) (final regulation).¹

The Secretary recruited an interim “Special Master” Joseph Smith to assess the influx of claims, and eventually created a “Borrower Defense Unit” (“BDU”) to address the backlog. In total, by the end of the Obama Administration, the Secretary had approved 31,773 applications for discharge and found 245 ineligible, for a 99.2% grant rate (a rate that includes both Corinthian students and claimants who attended other schools). Borrowers, however, had submitted many thousands more which remained unexamined (AR 339-40, 347, 369, 384-85, 392-94, 502-03).

After the 2016 election and a change in administrations, new Secretary Elisabeth DeVos paused claim adjudications in order to review the overall procedure. She did, however, honor 16,164 borrower-defense applications approved but not yet finalized before the change in administrations, albeit with “extreme displeasure” (Dkt. No. 66-3, Ex. 7).

1. Our action does not directly address issues related to Corinthian, which proceeded in a separate action filed in our district, *Calvillo Manriquez v. DeVos*, No. C 17-07210 (N.D. Cal. filed Dec. 20, 2017) (Judge Sallie Kim).

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Including all prior decisions, by June 2018 the Department had granted in total 47,942 applications and denied or closed 11,940, for an 80% grant rate for borrower defense-claims. (The grant rate under Secretary DeVos alone was 58%.) By that point, borrowers had submitted, in total, 165,880 applications, leaving 105,998 still to be decided (AR 401). The flood of applications continued.

Then, all adjudication stopped. For *eighteen* months, well into this suit, the Secretary issued zero decisions. As of June 2019, borrowers had filed (from day one) 272,721 applications and 210,168 of them remained pending (AR 350, 397-404, 587-88).

Named plaintiffs accordingly brought this suit to require the Secretary to adjudicate these applications. They argued the Secretary's delay constituted unlawful stonewalling. The complaint spelled out the relief sought: "[Named plaintiffs] do not ask this Court to adjudicate their borrower defenses. Nor do they ask this Court to dictate how the Department should prioritize their pending borrower defenses. Their request is simple: they seek an order compelling the Department to start granting or denying their borrower defenses and vacating the Department's policy of withholding resolution" (Compl. ¶¶ 1, 10).

A Rule 23(b)(2) class was eventually certified as follows:

All people who borrowed a Direct Loan or FFEL loan to pay for a program of higher

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education, who have asserted a borrower defense to repayment to the U.S. Department of Education, whose borrower defense has not been granted or denied on the merits, and who is not a class member in *Calvillo Manriquez v. DeVos*, No. 17-7106 (N.D. Cal.) [the latter action concerning Corinthian Colleges specifically]

(Dkt. No. 46 at 14). Afterwards, an administrative record was lodged and cross-motions for summary judgment were filed. At that point, the number of pending applications was around 225,000 (AR 591).

Before an order issued on summary judgment, the parties ostensibly reached a settlement (an earlier one than the settlement now under consideration). A May 2020 order preliminarily approved that proposal as it appeared to impose an eighteen-month deadline for the Secretary to decide claims and a twenty-one-month deadline to effect relief for claims filed by April 7, 2020. That settlement also set reporting requirements and established hefty penalties should the Secretary fail to uphold her end of the bargain (Dkt. No. 103). The parties notified the class and solicited comments for a fairness hearing scheduled for October 2020.

However, unbeknownst to class counsel or the Court, the Secretary had already adopted a practice of sending alarmingly curt form-denial notices, in violation (as class counsel put it) of both the spirit of the proposed settlement and the Administrative Procedure Act. Upon inquiry from the Court, the Secretary acknowledged that, since

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December 2019 (when decisions on borrower-defense applications had resumed), the Department used four templates to deny 118,300 of 131,800 applications reviewed (for an 89.8% denial rate). This was so out of keeping with the supposed settlement that the Court found there had been no meeting of the minds. An October 2020 order denied the class settlement and restarted discovery. The Secretary thereafter agreed to abstain from those types of form denials until further order (Dkt. Nos. 116, 146, 150).

Plaintiffs filed a supplemental complaint that alleged the Secretary had not actually restarted adjudication of borrower-defense claims. Rather, plaintiffs argued she had violated the law and the settlement by sending boilerplate denials without review. Plaintiffs asserted the Secretary’s “presumption of denial” policy constituted further violations of the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment.

After a trip to our court of appeals regarding the extent of permissible discovery (*In re Dep’t of Education*, 25 F.4th 692 (9th Cir. 2022)), an order herein set a new summary judgment schedule with a hearing planned for July 28, 2022. During the pendency of the summary judgment briefing schedule, and after another change in administrations, the parties reached the instant settlement and filed their second motion for preliminary approval.

Separate from our litigation, President Biden announced a different plan to cancel up to \$10,000 of

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student debt for low- to middle-income borrowers. The reader should keep in mind that this order does not consider President Biden's initiative but considers only a discrete settlement for a specific group of borrowers who have filed borrower-defense applications.

In brief, the settlement under consideration here sorts class members into three groups.

For group one, approximately 200,000 borrowers or 75% of the class as defined by the settlement, the agreement provides for "full," "automatic" relief, *i.e.*, discharge of the borrower's federal loans, cash refunds of amounts paid to the Department, and credit repair. This "up-front" relief would go to class members who attended one of the 151 schools listed in Exhibit C to the settlement (151 of the 6,000 colleges operating in the United States). The relief provided for this group will result in the discharge of approximately six billion dollars of debt in the aggregate.

For group two, the remaining 25% of the class as defined by the settlement (approximately 64,000 borrowers), the agreement provides for final written decisions on their borrower-defense applications within specified periods of time, correlated to how long they have been waiting for a decision. The Department will make those decisions according to a streamlined process that provides certain presumptions in favor of the borrower. Should the Department not issue a decision within a specified time, the borrower will receive full, automatic relief like the borrowers in group one. The Secretary

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estimates the relief provided for this group will result in the discharge of a further \$1.5 billion in cumulative student debt.

For group three, those who submitted a borrower-defense application after execution of the settlement on June 22, 2022, and before final approval (approximately 179,000 borrowers), *i.e.*, “post-class applicants” as defined by the settlement, the agreement provides a streamlined process for their borrower-defense applications. If the Secretary does not render a decision within three years of final approval, then the borrower would receive full, automatic relief like the borrowers in group one. The settlement also has reporting requirements and some appeal procedures (Dkt. No. 246-1).

Four schools filed motions to intervene to oppose the settlement: American National University (ANU), The Chicago School of Professional Psychology, Everglades College, Inc., and Lincoln Educational Services Corporation. The schools take issue with their inclusion on Exhibit C, which they label a scarlet letter. Argument on their motions to intervene were heard during the hearing on preliminary approval.

Preliminary approval was granted. After no further interested parties moved to intervene, an order found that the schools could not intervene as of right but could permissively intervene to object to the settlement (Dkt. Nos. 307, 322). This order follows full briefing and oral argument.

*Appendix B***ANALYSIS****1. The Secretary Has Authority To Enter Into The Settlement.**

Let's consider the central issue. The settlement provides extensive relief for the class: complete and automatic discharge of all loans for 75% of the settlement class — about six billion dollars in loan forgiveness; streamlined adjudication with a presumption towards discharge for the rest of the settlement class; and a presumption of discharge and borrower-friendly procedures for “post-class applicants,” as defined by the settlement. This bonanza raises the question whether the Secretary has authority to provide such relief.

It is important to observe (again) that this settlement is separate and apart from the significantly more expansive loan-forgiveness plan recently announced by President Biden. That plan will (potentially) affect 40 million borrowers and cancel approximately \$430 billion in student debt. *See* The Congressional Budget Office, Re: Costs of Suspending Student Loan Payments and Cancelling Debt (Sept. 26, 2022); The White House, Assessing Debt Relief's Fiscal and Cash-Flow Effects (Aug. 26, 2022). The instant settlement is anchored in separate authority. Even if the broader loan-forgiveness plan recently announced by President Biden lacks authority (and this order does not so hold), this lesser litigation settlement lies within the authority of the government.

“[T]he Attorney General has plenary discretion under 28 U.S.C. §§ 516 and 519 to settle litigation to which the

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federal government is a party.” *United States v. Carpenter*, 526 F.3d 1237, 1241 (9th Cir. 2008). The compromise and settlement authority has long been considered an inherent facet of the Attorney General’s charge to supervise litigation for the United States. *See Confiscation Cases*, 74 U.S. 454, 7 Wall. 454, 19 L. Ed. 196 (1869); *Power of the Attorney General in Matters of Compromise*, 38 U.S. Op. Atty. Gen. 124 (1934). And, Section 5 of Executive Order No. 6166 (June 10, 1933), transferred to the Department of Justice the powers “to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense” of actions involving the United States. *See also* 28 U.S.C. § 510; *see generally Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 U.S. Op. Off. Legal Counsel 126, 135 (1999).

Of course, the Department of Justice, though it has plenary settlement authority, cannot agree to something that the Secretary of Education cannot do in the first place. For example, the Department of Justice could not settle a lawsuit against the Federal Communications Commission by giving a plaintiff the privilege of putting a new pharmaceutical drug on the market. The FCC lacks that authority (which is possessed by the Food and Drug Administration). “The Attorney General’s authority to settle litigation for its government clients stops at the walls of illegality.” *Carpenter*, 526 F.3d at 1242 (quoting *Exec. Bus. Media, Inc. v. Dep’t of Defense*, 3 F.3d 759, 762 (4th Cir. 1993)); *see also Heckler v. Chaney*, 470 U.S. 821, 834, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).

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The Secretary primarily relies upon two provisions of the Higher Education Act to effectuate the instant settlement, 20 U.S.C. Sections 1082(a)(6) and 1087e(a)(1). *See also* 20 U.S.C. §§ 3441, 3471. Section 1082(a)(6) of Title 20 of the United States Code recites, in relevant part, “In the performance of, and with respect to, the functions, powers, and duties, vested in him by this part, the Secretary may . . . enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption.” This provision has been in effect since 1965 and passage of the original iteration of the Higher Education Act. Upon a plain reading, it bestows the Secretary with broad discretion over handling — and discharging — student loans. *See Nat’l Ass’n of Mfrs. v. Dep’t of Defense*, 138 S. Ct. 617, 631, 199 L. Ed. 2d 501 (2018); *United States v. Lillard*, 935 F.3d 827, 833-34 (9th Cir. 2019). The legislative history supports this reading. *See* H.R. Rep. No. 89-621, at 49 (1965); *see also* Robert A. Katzmann, Judging Statutes 29, 51-52 (2014).

The reader will note that the provision specifies “this part.” Section 1082 is housed under Part B of the Student Assistance subchapter, which outlines the Federal Family Education Loan (FFEL) Program. The Federal Direct Loan Program is under a different part, Part D. Section 1087e(a)(1) of Part D, says in relevant part: “Unless otherwise specified in this part, loans made to borrowers under this part shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers, and first disbursed on June 30, 2010, under sections 1078, 1078-2, 1078-3, and 1078-8 of this

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title.” Since the Department first proposed borrower-defense regulations in 1994, it has construed Section 1087e to confirm that the Secretary’s general discretion to discharge loans made pursuant to the FFEL Program applied with equal force to the Direct Loan program, ensuring parity. *See* 59 Fed. Reg. 42,646, 42,649 (Aug. 18, 1994); 81 Fed. Reg. 39,330, 39,368, 39,379 (June 16, 2016).

“[C]ourts generally will defer to an agency’s construction of the statute it is charged with implementing.” *Chaney*, 470 U.S. at 832. The legislative history supports this conclusion, in part due to the fact that the Direct Loan Program was intended to eventually replace the FFEL Program. H.R. Rep. 102-447, at 156 (1992); H.R. Doc. No. 103-82 at 3, 357 (1993); H.R. Doc. No. 103-49, at 92 (1993). Another district court has also recently found that Section 1082(a)(6) covers both FFEL loans and Direct Loans. This order finds unpersuasive the dicta from a different district court that reached the opposite conclusion as it considered different issues and because Section 1082 is the only congressional authorization in the Higher Education Act for the Secretary to sue and be sued regarding student aid, *e.g.*, Direct Loans, FFEL loans, or otherwise. *Compare Weingarten v. DeVos*, 468 F. Supp. 3d 322, 328 (D.D.C. 2020) (Judge Dabney L. Friedrich), *with Pa. Higher Educ. Assistance Agency v. Perez*, 416 F. Supp. 3d 75, 96-97 (D. Conn. 2019) (Judge Michael P. Shea). This order finds the Secretary’s interpretation of Section 1087e(a)(1) the most reasonable interpretation of the provision and concludes that Section 1082(a)(6) applies to both FFEL loans and Direct Loans.

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The school-intervenors argue, however, that the Secretary’s interpretation of the Higher Education Act hides “elephants in mouseholes,” which sets this action apart as a “major questions case.” *See West Virginia v. EPA*, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022). As the Supreme Court recently explained,

Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices. Nor does Congress typically use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme. Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line. We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies.

Id. at 2609 (cleaned up).

In *West Virginia*, EPA had “issued a new rule concluding that the ‘best system of emission reduction’ for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.” “The White House stated that the Clean Power Plan would ‘drive a[n] . . . aggressive transformation in the domestic energy industry.’” In other words, the rule “restructure[ed] the Nation’s overall mix of electricity generation.” *Id.* at 2599, 2604, 2607.

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Our settlement, in contrast, will not fundamentally transform a domestic industry, nor will it have any national ripple effect. The relief will remain limited to class members in a litigated case. Yes, this settlement will discharge over six billion dollars in loans, but *West Virginia* made clear that determining whether a case contains a major question is not merely an exercise in checking the bottom line. The representative decisions cited in *West Virginia* considered “unusual” and “unheralded” applications of agency authority. *Id.* at 2608-09. There is nothing unusual about the Secretary exercising his discretion to discharge student-loan debt, and the *scale* of relief here is inherently limited to the metes and bounds of this federal class-action litigation. *Cf. Chaney*, 470 U.S. at 833 n.4.²

Justice Frankfurter, as quoted with approval in *West Virginia*, reasoned that “just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.” 142 S. Ct. at 2610. The Secretary

2. Everglades tears down a strawman when it argues that interpreting Section 1082(a)(6) to support the settlement leaves the Secretary with exclusive authority to eliminate a \$1.6 trillion industry and discharge every student loan in America (Everglades Opp. 23). The Secretary has asserted no such broad authority. His actions remain rooted in, and limited to, this litigation. Recall, *West Virginia* based its analysis on EPA’s own projections of the effects of the “Clean Power Plan” it had promulgated. 142 S. Ct. at 2603-04. Common sense dictates we consider the actual agency action — the settlement — not a hypothetical.

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has exercised the authority utilized in our settlement many times, even in the past few years, even across administrations:

School	Date Announced	Est. Number of Borrowers	Est. Amount Discharged
Dream Center Education Holdings (Art Inst. of Colo.; Ill Inst. of Art)	2019	7,400	\$175 M
<i>Weingarten v. Cardona</i> , No. C 19-02056 DLF, Dkt. No. 49 (D.D.C.)	2021	7	\$0.283 M
Minnesota School of Business / Globe University	2021-22	1,191	\$26 M
Marinello Schools of Beauty	2022	28,000	\$238 M
Corinthian Colleges, Inc. (Everest; Heald College; WyoTech)	2022	560,000	\$5.8 B
ITT Technical Institute	2022	208,000	\$3.9 B
Westwood College	2022	79,000	\$1.5 B

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These discharges addressed both Direct Loans and loans pursuant to the FFEL program. The Secretary also stressed that the Department has discharged many student loans pursuant to Section 1082(a)(6) on an individual basis (Dkt. No. 337).

Our settlement will discharge less than three percent of the outstanding federal student loan portfolio (*see* Dkt. Nos. 325-2; 331 at 16). Intervenor's assert the Department's press releases regarding the above discharges did not specifically cite Section 1082(a)(6). This is specious. Statements to the general public regarding an agency action need not provide the legal minutiae regarding the authority underlying the action. The Secretary has provided those details in a filing herein (Dkt. No. 337).

Here's the practical litigation problem the Secretary faces and seeks to settle. The borrower-defense program set up by Congress has devolved into an impossible quagmire. This has been true across all administrations, as detailed above. As of now, approximately 443,000 borrowers have pending borrower-defense applications. That is a staggering number. If, hypothetically, the Department's Borrower Defense Unit had all 33 of its claim adjudicators working 40 hours a week, 52 weeks a year (no holidays or vacation), with each claim adjudicator processing two claims per day, it would take the Department *more than twenty-five years* to get through the backlog.

Had each and every class member sued the Department individually, the Department could have settled those

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individual actions one by one, and it could have done so using precisely the same criteria set forth for Exhibit C — namely, indicia of misconduct and the volume of claims associated with a given school. Indeed, it could have done so without even revealing its internal criteria used to settle claims. If it can do that, then this order holds that it can resolve them all in a class settlement using the same criteria and that such a settlement falls within the plenary authority of the Secretary and the Attorney General. “For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.” *Smith v. Swormstedt*, 57 U.S. 288, 303, 14 L. Ed. 942 (1853). This order holds that this group approach is the only feasible way for the agency to give practical relief to class members. Conducting individualized reviews is no longer practicable.

Yes, the agency has explained its criteria and placed 151 schools on a list (151 of the 6,000 colleges operating in the United States). This was done to explain why some class members will get full relief whereas others will get less relief. This does not change the fact that the Department could have used the very same criteria to settle each application one at a time and therefore can now do the same thing on a class basis. The approach taken here is group-wise and within the plenary settlement authority of the Secretary and Attorney General.

This order rejects intervenors remaining arguments.

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First, intervenors dispute the Secretary’s authority under Section 1082(a)(6) based upon a rescinded, January 2021 memorandum composed by the Department’s Office of General Counsel, which the Department later substantively and procedurally disavowed. *See* Dep’t of Educ., Office of the General Counsel, Memorandum re: Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority (Jan. 12, 2021); 87 Fed. Reg. 52,943 (Aug. 30, 2022). The memo stated: “[W]e believe 20 U.S.C. § 1082(a)(6) is best construed as a limited authorization for the Secretary to provide cancellation, compromise, discharge, or forgiveness only on a case-by-case basis and then only under those circumstances specified by Congress.” The memo has been rescinded and this order disagrees with it for the reasons stated above.

Second, at the hearing intervenors highlighted two other provisions they deemed statutory bars to relief. The anti-injunction provision in 20 U.S.C. Section 1082(a)(2) is inapplicable because the government is requesting and consenting to this settlement. Plaintiffs have also maintained a viable theory throughout this litigation that the Secretary acted *ultra vires*, and that consequently the anti-injunction provision does not apply. And, Section 1082(b) only places a cap on the size of settlements where the Attorney General is not involved. The government confirmed at the hearing the settlement is properly authorized.

Third, intervenors say that the settlement must incorporate the Department’s standard borrower-defense

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regulations, citing the *Accardi* doctrine (*e.g.*, *Everglades Opp.* 20). This order disagrees. Those regulations constitute a procedure promulgated by the Department to perform ordinary reviews of borrower-defense applications, as enabled by 20 U.S.C. Section 1087e(h). Within the specific context of settling this class-action litigation, in contrast, the Secretary relies upon different, independent sources of statutory authorization — Sections 1082(a)(6) and 1087e(a)(1). The Secretary has plenary discretion to settle litigation within the confines of the law; this order cannot dictate the basis by which the Secretary effectuates the settlement, particularly in light of the fact that the Secretary has multiple sources of statutory authority on which to premise action on student loans. *See Carpenter*, 526 F.3d at 1241; *United States v. Hercules, Inc.*, 961 F.2d 796, 798 (8th Cir. 1992). Imposing such a mandate would limit the Secretary’s broad discretion in settlement — “the court’s role should be more restrained.” *Citizens for a Better Env’t v. Gorsuch*, 718 F.2d 1117, 1126-27, 231 U.S. App. D.C. 79 (D.C. Cir. 1983).

Fourth, intervenors similarly argue that the Secretary cannot “circumvent” notice-and-comment rulemaking under the guise of settlement, citing *Conservation Northwest v. Sherman*, 715 F.3d 1181 (9th Cir. 2013). But in that opinion our court of appeals held “that a district court abuses its discretion when it enters a consent decree that *permanently and substantially* amends an agency rule that would have otherwise been subject to statutory rulemaking procedures.” *Id.* at 1187 (emphasis added). The Secretary has not altered the borrower-defense procedures at all. Those regulations remain in place.

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In fact, the Department recently amended them. *See* 87 Fed. Reg. 65,904 (Nov. 1, 2022). Rather, for the specific group of borrowers contemplated by the class certification order and this settlement, the Secretary has crafted a process for resolving the enormous backlog of claims, and he has done so pursuant to specific congressional authorization. *See Turtle Island Restoration Network v. Dep't of Commerce*, 672 F.3d 1160, 1167 (9th Cir. 2012).

Fifth, intervenors assert “the parties cannot achieve by settlement what the [p]laintiffs could not have achieved by litigating the case to judgment” as a further reason that the borrower-defense regulations must be followed (*see* Lincoln Opp. 17). The Supreme Court has made clear, however, that “a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.” *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525, 106 S. Ct. 3063, 92 L. Ed. 2d 405 (1986). This statement applies with equal force to settlements. *See id.* at 519; *Conservation Nw.*, 715 F.3d at 1185-86.

In sum, the Secretary has not exceeded his statutory authority or failed to follow the agency’s regulations by entering into the settlement. Intervenors’ constitutional arguments concern their inclusion on Exhibit C, which this order considers next in conjunction with their broader reputational harm contentions.

*Appendix B***2. Exhibit C Does Not Invalidate The Settlement.**

The settlement grants full and automatic relief to all class members that attended the schools listed on Exhibit C. Intervenor's argue Exhibit C constitutes an impermissible scarlet letter. This order finds the list does not carry the necessary legal significance to justify denying final approval of the settlement.

The settlement agreement recites that the Secretary “will effectuate Full Settlement Relief for each and every Class Member whose Relevant Loan Debt is associated with the schools, programs, and School Groups listed in Exhibit C.” Intervenor's point to a statement made in the class and Secretary's joint motion for preliminary approval:

The Department has determined that attendance at one of these schools justifies presumptive relief, for purposes of this settlement, based on strong indicia regarding substantial misconduct by listed schools, whether credibly alleged or in some instances proven, and the high rate of class members with applications related to the listed schools

(Dkt. No. 246 at 3). The joint motion for final approval further discussed automatic loan discharge for students who attended a school on Exhibit C:

Such automatic relief is warranted in the context of the overarching settlement structure,

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as certain indicia of misconduct by the listed schools, including the high volume of Class Members with applications related to the listed schools, led the Department to conclude that these Class Members were entitled to summary settlement relief without any further time-consuming individualized review process

(Br. 11). Intervenor concentrate their fire on these statements and their inclusion on Exhibit C.

These explanations do not impose any liability whatsoever on intervenors, for the schools cannot be held liable for any remedial measures absent proceedings initiated specifically against them. To understand why this is so, it is necessary to summarize the relevant regulations. When a borrower-defense application criticizes a school, the Department gives the school notice and the opportunity to file a responsive statement, although the school is not required to do so. *Regardless of whether the school files such a statement (or not), the grant of a borrower-defense application has no binding effect on the school.* If the Department approves a borrower-defense application, then that can be the predicate for the department *initiating* a proceeding against the school for recoupment. But even in such an instance, the school still retains all due process rights, is not bound by the success of the student's application, and is free to litigate *ab initio* the merits of its performance. The Department may also pursue other remedial actions against a school unrelated to a successful borrower-defense application but, again, in those instances the school still has all of its due process

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protections. *See* 34 C.F.R. § 685.308; 34 C.F.R. Pt. 668, Subpt. G.³ Nothing in this settlement will cause any school to lose a dime.

Moreover, the settlement does not constitute a successful or approved borrower-defense claim, a position maintained by both the class and Secretary (*see* Dkt. No. 300). Therefore, no recoupment action could be initiated in any event as a result of the settlement.

In *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), the Supreme Court, in consideration of an “active shoplifters” flyer distributed by police that listed the plaintiff therein, held that “[w]hile we have in a number of our prior cases pointed out the frequently drastic effect of the ‘stigma’ which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests

3. For clarity, this order lays out the order of operations regarding a school’s participation in borrower-defense claims. For loans issued prior to July 1, 2017, a Department official notifies the school and considers any response or submission from the school. *See* 34 C.F.R. § 685.222(a)(1); *id.* § 685.206(c)(2); *id.* § 685.222(e)(3)(i). For loans issued on or after July 1, 2017 but before July 1, 2020, a Department official will follow that same procedure of notifying the school and considering any response or submission from the school. *Id.* § 685.222(a)(2), (e)(3)(i). For loans issued on or after July 1, 2020, the Department provides the school a copy of the borrower’s claim and other evidence, after which the school may respond and the borrower may reply (copies of which will also be provided to the school). *Id.* § 685.206(e)(8)-(12). A new set of regulations will go into effect July 1, 2023. *See* 87 Fed. Reg. 65,904 (Nov. 1, 2022).

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such as employment, is either ‘liberty’ or ‘property’ by itself sufficient to invoke the procedural protection of the Due Process Clause.” *See also Fikre v. FBI*, 35 F.4th 762, 776 (9th Cir. 2022).

As explained, the schools have lost no procedural rights, nor has their status been altered. No liberty or property interest has been disturbed. Any hypothetical, future remedial action would proceed according to established regulations, which would provide the schools with full due process. *Cf. Endy v. Cnty. of Los Angeles*, 975 F.3d 757, 764-65 (9th Cir. 2020). The Department has also represented in the sworn declaration of Benjamin Miller that it does not consider inclusion on Exhibit C a finding of misconduct and that inclusion does not constitute evidence that could or would be considered in an action by the Department against a school. The Court relied upon, and the Court expects the government to stand behind, the statements made in the Miller Declaration (Dkt. No. 288-1).

Furthermore, because the class and Secretary’s briefing advocating for approval of the settlement had no legally binding effect on the intervenors, no actionable reputational harm exists on that basis either. *See Joshi v. Nat’l Transp. Safety Bd.*, 791 F.3d 8, 11-12, 416 U.S. App. D.C. 185 (D.C. Cir. 2015); *see also Przywieczerski v. Blinken*, 2021 U.S. Dist. LEXIS 109352, 2021 WL 2385822, at *4 (D.N.J. June 10, 2021) (Judge Kevin McNulty) (citing cases). The issues herein differ from those in *Foretich v. United States*, 351 F.3d 1198, 1212-13, 359 U.S. App. D.C. 54 (D.C. Cir. 2003), which considered

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a fully enacted law that embodied a congressional determination of misconduct. Here, there is no binding or official determination of misconduct against the schools. To repeat, since the settlement does not utilize the borrower-defense procedure, the Secretary cannot initiate a recoupment action against any of the schools listed on Exhibit C premised upon a successful borrower-defense application.

Finally, intervenors contend their inclusion on Exhibit C means the settlement is not fair to them. They argue the “court must ‘reach a reasoned judgment that . . . the settlement, taken as a whole, is fair, reasonable and adequate *to all concerned*’” (Lincoln Opp. 9, quoting *Officers for Just. v. Civ. Serv. Comm’n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982), emphasis in brief). In light of the foregoing, and taking stock of the settlement as a whole, this order finds that intervenors’ speculative assertions of harm fail to render the settlement unfair, especially in light of the significant benefits to both the class and Department in settling this litigation.

To repeat, had borrowers brought individual actions, each could have been compromised using whatever criteria the Attorney General and Secretary felt wise in the circumstances, including the criteria behind Exhibit C. That the claims are aggregated and now settled on a class basis using the same criteria does not matter.

*Appendix B***3. The Case Is Not Moot And Plaintiffs Still Have Standing.**

The school-intervenors further argue the district court does not have jurisdiction to entertain the settlement because plaintiffs lack standing and the action is now moot. Both arguments fail.

First, to establish Article III standing, plaintiffs must show they have suffered an injury in fact that is concrete, particularized, and actual or imminent, that the injury was likely caused by the defendants, and that the injury would likely be redressed by judicial relief. Plaintiffs must demonstrate standing to the degree required by each stage of the litigation, including at the class-action settlement stage. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203, 2208, 210 L. Ed. 2d 568 (2021); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1116 (9th Cir. 2020).

This order finds all class members, including our named plaintiffs, have properly asserted a real and concrete injury arising from the Secretary's alleged unlawful handling of their borrower-defense claims. The injury is two-fold. The Secretary's improper delay and suspension of processing claims for debt relief has directly led to a specific economic injury to each class member. Unlawful delay of debt relief results in clear monetary harm. Moreover, as detailed in the supplemental complaint, the Secretary's "presumption of denial" policy and form denials have resulted in another layer of injury to class members. These issues would likely be redressed by judicial action. To this, the intervenors make the following arguments.

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Everglades and ANU argue plaintiffs cannot demonstrate standing for the remedies provided by the settlement (Everglades Opp. 8; ANU Opp. 24). The standing analysis, however, considers plaintiffs' stake in the case and whether they can demonstrate standing "for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *See TransUnion*, 141 S. Ct. at 2203, 2208. Plaintiffs have properly demonstrated such a stake in this action and for the judicial relief they seek. And again, a settlement agreement can provide broader relief than a court could have awarded after a trial. *See Firefighters*, 478 U.S. at 519, 525; *Conservation Nw.*, 715 F.3d at 1185-86. ANU's assertion that the settlement's rescinding of form denials impermissibly puts borrowers that lack standing back into the class misses the mark for an additional reason: it wholly ignores the supplemental complaint and the allegations that the Secretary never lawfully adjudicated those claims in the first place. ANU's contention that this constitutes a "second bite at the apple" ignores the problem they never got a bite in the first place.

The Chicago School and ANU further argue the class as defined is overbroad and inherently includes individuals who lack standing. Their theory is incorrect. Per the class definition, any class member that has their claims properly adjudicated will drop out of the class. All current class members, therefore, have a concrete injury stemming from the Secretary's alleged improper delay and presumption of denial policy. The intervenors' reference to other settlements and discharges apart from this litigation is similarly inapposite. This settlement

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provides no opportunity for any “unjust enrichment” as it simply discharges a borrower’s affirmative obligation to repay their student loans. The agreement provides that a borrower’s relief cannot exceed the student loan debt associated with their borrower-defense application (Settlement Agreement II.W, Dkt. No. 246-1). On our record, there is no proof of any double recovery and specifically no proof of any litigation against a school that resulted in money going to a student specifically for loans. So, it is speculation by intervenors, and speculation only, that some will get duplicative recovery.

Second, litigation that becomes moot during the proceedings “is no longer a ‘Case’ or ‘Controversy’ for purposes of Article III, and is outside the jurisdiction of the federal courts.” *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537, 200 L. Ed. 2d 792 (2018) (quotations removed). Dismissal based on mootness, however, “is justified only if it is absolutely clear that the litigant no longer has any need of the judicial protection that it sought.” *Pizzuto v. Tewalt*, 997 F.3d 893, 903 (9th Cir. 2021) (cleaned up).

That is not the case here. Intervenors argue the Secretary has already “approved tens of thousands of borrower defense applications” (Everglades Opp. 7, quoting Dkt. No. 249 at 1). But what of the hundreds of thousands of applications that remain? It is not enough for merely some absent class members to have dropped out of the class because they have had their claims adjudicated. Unquestionably, five of our seven named plaintiffs’ borrower-defense applications remain pending and their

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loans outstanding. The Chicago School says that two class representatives who attended Corinthian (but are not part of the *Calvillo Manriquez* class action) will have their loans discharged by the Secretary in a separate agency action (Chicago Opp. 13). This does not render our action moot, nor otherwise impact the validity of the class. *See also Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014).

True, the Secretary argued that this action was moot in his most recent cross-motion for summary judgment, briefing of which was interrupted by the joint filing of the motion for preliminary approval (Dkt. No. 249). Like all litigants, however, the Secretary can aggressively advocate for his position while simultaneously negotiating a settlement that will end the litigation without the risk of trial. “Settlement is to be encouraged.” *Turtle Island*, 672 F.3d at 1167. Because the Secretary has not resolved all of the pending borrower-defense applications, nor addressed the issues stemming from the presumption of denial policy used during the pendency of this action, this litigation is not moot.

Finally, Everglades, ANU, and Lincoln all argue that class members lack standing or that this action is moot in light of President Biden’s recently announced initiative for student loan relief, which *could* provide up to \$10,000 of debt relief for low and middle-income federal student-loan borrowers. *See* The White House, Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most (Aug. 24, 2022). The instant settlement, however, is anchored in separate authority and is completely independent from the Biden

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plan, which has already been declared unlawful by one district court, so relief thereunder is in some doubt. *See Brown v. Dep't of Education*, 2022 U.S. Dist. LEXIS 205875, 2022 WL 16858525, No. C 22-0908, Dkt. No. 37 (N.D. Tex. Nov. 10, 2022) (Judge Mark T. Pittman); *see also, e.g., Nebraska v. Biden*, No. 22-3179, 52 F.4th 1044, 2022 U.S. App. LEXIS 31414 (8th Cir. Nov. 14, 2022). This order need not and does not opine on the authority of the President to cancel student loans (one way or the other), but this order does hold that the instant settlement, involving a narrower class and narrower relief, falls within the government's authority.

In sum, this order finds that plaintiffs have adequately demonstrated standing at this stage of the proceedings and that this action is not moot.

4. The Settlement Is Still Viable and Fair, Reasonable, and Adequate.

A settlement purporting to bind absent class members must be fair, reasonable, and adequate. *See* FRCP 23(e). This settlement is not only fair, reasonable, and adequate but a grand slam home run for class members. They originally sued just to get a decision one way or another on their applications. Now, they are getting total forgiveness in most cases. For the remainder of the class, it is at least a home run. This is a very good deal for the class.

Intervenors initially question whether a viable Rule 23(b)(2) class still exists for which settlement relief can be approved, challenging commonality, typicality, adequacy,

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the relief provided by the settlement, and the validity of the “post-class applicant” group.

Considering commonality, “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). The class certification order, to this end, found “the Department’s alleged policy of inaction applies to the proposed class as a whole.” The order made clear that “whether a borrower defense claim has been pending for three years or three months, all claims were subject to the same alleged policy of inaction” (Dkt. No. 46 at 12, 13). As the litigation progressed, and the Secretary’s practice of issuing form denials came to light, plaintiffs sought additional relief consistent with Rule 23(b)(2) to hold the Secretary accountable for further alleged *ultra vires* actions (*e.g.*, Dkt. No. 245 at 33). All class members remain subject to the same delay and allegedly unlawful policies. A single judicial remedy directed at the Secretary’s activities could provide class-wide relief in a single stroke. Commonality remains.

Everglades argues that differences in class member’s individual circumstances defeat typicality, but it provides no support for that argument. Typicality — like all the Rule 23 requirements — “limit[s] the class claims to those fairly encompassed by the named plaintiff’s claims.” *Dukes*, 564 U.S. at 349 (quotation omitted). Plaintiffs’ claims focus on the Department’s policy of inaction, form denials, and presumption of denial. Typicality is still satisfied.

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Next, Lincoln says that the settlement “effectively” provides damages, which therefore destroys the viability of the class (Lincoln Opp. 15). *Dukes* explained that Rule 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.” 564 U.S. at 360-61. The settlement relief here fits squarely within Rule 23(b)(2) as it in effect provides injunctive relief voiding the borrower’s obligation to repay their student loans. In some cases a class member will receive refunds, but refunds are restitution and fall within the relief available in an injunction/declaratory relief action. Discharge of an obligation to repay a debt does not constitute monetary damages.

Intervenors similarly argue that the settlement is inadequate and unfair because some class members will receive automatic debt relief while others will have their borrower-defense applications reviewed. This mirrors the fairness inquiry recited by Rule 23(e)(2)(D), which requires the settlement to treat class members equitably relative to one another, not for each class member to receive identical relief. The class and Secretary have provided a logical and reasoned explanation regarding how the volume of applications and certain indicia of misconduct asserted against each school warrant tailoring settlement relief to certain subgroups. This order finds such differentiation equitable. Rule 23(b)(2) does not affect this conclusion because it remains true that a single injunction or declaratory judgment after a trial could provide relief and, as explained, a settlement can provide broader relief than a court could have awarded after a trial. See *Firefighters*, 478 U.S. at 519, 525; *Conservation Nw.*, 715 F.3d at 1185-86.

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The last issue intervenors raise regarding the general viability of the settlement concerns the “post-class applicant” group, which is composed of individuals that filed a borrower-defense application in between execution of the settlement on June 22, 2022, and final approval. The named plaintiffs and Department state that this group does not fall “within the class definition and thus [is] not formally part of the Rule 23 analysis” (Mot. Final Approval 12 n.3). Contrary to these points, the class certification order set no cut-off date for membership, so the class definition as recited in that order clearly encompasses all of these borrowers. Nevertheless, to ensure the overall fairness of the settlement, this group will receive relief under the agreement, namely their applications will be decided with streamlined procedures within three years on pain of automatic discharge of the loans. This lesser relief is justified on the ground that this group has not been waiting as long for a decision as groups one and two.

With no issues regarding the viability of the class, this order turns to the eight *Churchill* factors our court of appeals has enumerated for review in the final fairness assessment to determine whether the settlement is fair, reasonable, and adequate: (1) the strength of the plaintiff’s case; (2) the suit’s risk, expense, complexity, and the likely duration of further litigation; (3) the risk of maintaining class-action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class members of the proposed settlement. Rule 23(e)(2) also requires the district court

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to consider an overlapping set of factors. *See Kim v. Allison*, 8 F.4th 1170, 1178-79 (9th Cir. 2021) (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)); *Churchill Vill., LLC. v. Gen. Elec.*, 361 F.3d 566 (9th Cir. 2004).

Many of these factors have been addressed in the foregoing analysis. This order finds the second, fifth, sixth, and seventh *Churchill* factors all clearly and strongly favor settlement. A brief review of the docket (and this order) will reveal to the reader the complexity of the issues this action considers. Continuing on with this litigation through summary judgment and (possibly) trial would require still more expense and delay in an action directly addressing undue delay and agency inaction. *Indeed, we have already attempted a settlement once and the proposed timeline for that entire process has come and gone.* Discovery has already taken place, so the parties have had an adequate opportunity to evaluate the strengths and weaknesses of their respective positions. Counsel for both sides, which includes the government, have advocated for the advantages of this settlement.

Next, the first and third factors also favor settlement. Plaintiffs have strong arguments that the Secretary's actions were unlawful, but as the opening salvos in the latest round of summary judgment reveal, the ordinary risks of litigating on a class-wide basis persist. Moreover, as plaintiffs acknowledge, questions remain about the remedies they could seek and be granted after a trial.

The relief offered (the fourth factor) clearly favors settlement. This order pauses to again emphasize that

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automatic loan discharges and a streamlined process for adjudicating the remaining borrower-defense applications as provided for in the settlement will likely prove a transformative opportunity for many class members. These class members decided to take on considerable debt to attend schools that they now allege misled them on the value of such a significant financial decision. The relief also furthers the Secretary's interest in resolving the backlog of claims. Notice was sufficient, the discharge process ranks as adequate, attorney's fees have been left to the Court's discretion, and the method for processing relief is also fair.

The reaction of the class (the eighth and final *Churchill* factor) also supports the settlement. The class has actively participated in the settlement approval process, sending both class counsel and the Court over 1,500 letters and emails.

Most of these letters express complete support for the agreement. One class member wrote that, "Like so many thousands of college students I was misled by my graduate school and given a financial death sentence in student loan debt. I have spent my adult life following the path of my heart and helping hundreds of patients, yet I can barely help myself." Another voiced support but "ask[ed] the Court to ensure that [the] final terms of the settlement protect individual applicants from arbitrary treatment by the Department." As this order demonstrates, the settlement includes appropriate protections.

Fewer than 175 borrowers objected or requested changes to the settlement. Primarily, these borrowers

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requested: additional schools be added to Exhibit C; delay of the cut-off date for class membership (as defined by the settlement); automatic debt relief for “post-class applicants”; faster timelines for debt relief; and relief for those borrowers who refinanced their loans into private loans. None of these concerns constitute meaningful objections to the settlement as a whole. Rather, these borrowers request further relief and do not call into question the overall fairness of the settlement. One “objector” expressed concern about never receiving notice of this class action (she did not file her borrower-defense application until after the announcement of the instant settlement). She hence objected to being considered a “post-class applicant.” As discussed, this objector’s issues speak to the importance of the streamlined procedures for the “post-class applicant” designation in ensuring the overall fairness of the settlement. Finally, private borrowers are not part of our class.⁴

In sum, the *Churchill* factors favor settlement. We turn to the remaining two factors listed in Rule 23(e)(2).

First, named plaintiffs and class counsel have adequately represented the class. Everglades, the Chicago School, and one objector argued that, because class counsel was (until recently) affiliated with Harvard Law School, a conflict of interest existed. The objector noted,

4. ANU makes a brief argument that the settlement is unfair to the class because it imposes tax risks that the Secretary and named plaintiffs failed to address. But every class member has voluntarily filed a borrower-defense application to have their loan discharged. Any ensuing tax consequences accordingly do not rank as unfair.

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and intervenors echoed, that his program, the American Repertory Theater/Moscow Art Theater Institute for Advanced Theater Training at Harvard (“ART”) was not on Exhibit C. This order is not persuaded. Any speculative conflict of interest is now resolved (class counsel have separated from Harvard) and neither the objecting class member nor the intervenors provide any meaningful basis to call into question counsel’s representation or ART’s exclusion from Exhibit C. The settlement provides substantial relief to class members, which supports the conclusion named plaintiffs and class counsel have adequately represented the class.

Second, the proposal was negotiated at arm’s length. Everglades and the Chicago School object that the settlement is collusive. Taking a step back, the purpose of any such objection is to protect absent class members from settlements that disproportionately reward named plaintiffs and their counsel at the expense of the class as a whole. Intervenors do not raise this problem at all. They argue instead that the settlement provides so much to the class it could not have been negotiated at arm’s length. This just underscores all the more that the settlement is and will be in the best interest of the class. That the settlement was conducted in “secret” goes nowhere. It’s a common practice.

In short, the *Churchill* and Rule 23 factors favor final approval of the settlement.

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CONCLUSION

For the foregoing reasons, all objections are **OVERRULED**. Final approval of the settlement is **GRANTED**. This action is hereby **DISMISSED WITH PREJUDICE**, except in that the Court shall retain jurisdiction over this action as set forth in the settlement agreement. Once the defendants have effectuated all appropriate relief, plaintiffs and defendants shall file a notice with the Court. A joint status report regarding the class and Department's progress in carrying out the settlement is due **JANUARY 26, 2023**.

IT IS SO ORDERED.

Dated: November 16, 2022.

/s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

**APPENDIX C — ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA, FILED AUGUST 31, 2022**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. C 19-03674 WHA

THERESA SWEET, *et al.*,

Plaintiffs,

v.

MIGUEL CARDONA, *et al.*,

Defendants.

August 31, 2022, Decided;
August 31, 2022, Filed

ORDER RE MOTIONS TO INTERVENE

In this class action concerning the Department of Education's processing of student-loan borrower-defense applications, four schools move to intervene to oppose the proposed settlement: The Chicago School of Professional Psychology; Everglades College, Inc.; American National University; and Lincoln Educational Services Corporation. The deadline for any further interested parties to move to intervene has come and gone (Dkt.

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No. 308). As discussed on the record in the hearing on preliminary approval, while the four schools have not met their burden of demonstrating they can intervene as of right, intervenors have satisfied the requirements for permissive intervention and may oppose the settlement.

Under Rule 24(b), a district court has discretion to permit intervention when the movant presents “(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant’s claim or defense and the main action.” *Callahan v. Brookdale Senior Living Cmtys., Inc.*, 42 F.4th 1013, 1022 (9th Cir. 2022) (citation omitted).

First, because our movants are not raising new claims and this is a federal-question action, the independent jurisdictional grounds requirement does not apply. *See Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011).

Second, the schools’ motions are timely. The crucial date for assessing timeliness “is when proposed intervenors should have been aware that their interests would not be adequately protected by the existing parties.” *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (citations omitted). The schools here all filed their motions around three weeks after the parties moved for preliminary approval on June 22. The relief provided by the proposed settlement and the inclusion of the schools in Exhibit C to the settlement triggered their interest in this action. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). Intervention to oppose the settlement will not result in any undue delay that will prejudice the parties.

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Third, the schools seek to intervene to object to the proposed settlement. They complain about violations of certain procedural “rights” should the settlement be approved. They further argue the settlement will cause reputational harm. The schools are included on Exhibit C to the settlement; class members who attended a school on that list will have their federal student loans automatically discharged. Because the schools seek to address the subject matter of the settlement, the defenses they will provide in opposition to the settlement share common questions with the main action.

Pursuant to Rule 24(b), the motions to permissively intervene filed by The Chicago School of Professional Psychology, Everglades College, Inc., American National University, and Lincoln Educational Services Corporation are **GRANTED** for the sole and express purpose of objecting to and opposing the class action settlement. To be clear, intervenors have explicitly disclaimed, and this order explicitly prohibits, any further discovery in this litigation.

IT IS SO ORDERED.

Dated: August 31, 2022.

/s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

**APPENDIX D — DENIAL OF REHEARING
OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT, FILED MAY 21, 2025**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15049, 23-15050, 23-15051

THERESA SWEET; *et al.*,

Plaintiffs-Appellees,

EVERGLADES COLLEGE, INC.,

Intervenor-Appellant,

v.

LINDA MCMAHON, SECRETARY OF THE
UNITED STATES DEPARTMENT OF EDUCATION;
U.S. DEPARTMENT OF EDUCATION,

Defendants-Appellees,

LINCOLN EDUCATIONAL SERVICES
CORPORATION; *et al.*,

Intervenors.

May 21, 2025, Filed

D.C. No. 3:19-cv-03674-WHA. Northern District of
California, San Francisco.

Before: COLLINS, FORREST, and SUNG, Circuit
Judges.

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ORDER

Judge Collins has voted to grant the petition for rehearing en banc. Judge Forrest and Judge Sung have voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40.

The petition for rehearing en banc (23-15049 Dkt. Entry 94, 23-15050 Dkt. Entry 97, 23-15051 Dkt. Entry 89) is DENIED.

APPENDIX E — RELEVANT PROVISIONS

U.S.C.A. Const. Art. III § 2, cl. 1

Section 2, Clause 1. Jurisdiction of Courts
[Text & Notes of Decisions subdivisions I to VII]

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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Federal Rules of Civil Procedure Rule 24

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

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(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

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Federal Rules of Civil Procedure Rule 41

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded

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a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule--except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

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(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.