IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

FRANK GARRISON, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF EDUCATION, *et al.*, Defendants.	CIVIL ACTION NO.: 1:22-cv-1895

MOTION FOR PRELIMINARY INJUNCTION

Relief requested on or before October 13, 2022

Plaintiffs respectfully move for a preliminary injunction under Federal Rule of Civil Procedure 65 to enjoin Defendants from implementing their planned cancellation of federal student loans, which appears set to take place on or about October 17, 2022. Plaintiffs' Memorandum in Support of this motion is filed contemporaneously.

Should the Court be unable to rule on this motion on or before October 13, 2022, Plaintiffs respectfully request that the Court grant the contemporaneously filed Motion for Temporary Restraining Order to afford the Court time to consider and rule on the instant motion.

DATED: October 10, 2022

Respectfully submitted,

/s/ Caleb Kruckenberg

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CERTIFICATE OF SERVICE

The undersigned hereby certify that on October 10, 2022, I electronically filed the foregoing document with the Clerk of the Court via the CM/ECF system, which will cause a copy to be served upon counsel of record.

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Relief requested on or before October 13, 2022

Student debt cancellation is among the most contentious, most hotly debated proposals in the nation today. And although Congress has erected established pathways for loan forgiveness, such as the Public Service Loan Forgiveness (PSLF) program, some call for the government to cancel loan principals more broadly. Nevertheless, Congress has declined to do so. Dissatisfied with Congress's response, the President announced in August that the Department of Education will unilaterally cancel up to $20,000 in loan principal for each of 40 million borrowers at a cost of over $500 billion. Of those 40 million borrowers, 8 million were set to have their debts cancelled automatically. Once this suit was filed, however, the Department suddenly claimed borrowers might be able to opt out, but has yet to explain what that might look like. This extraordinary act of Executive lawmaking is to be taken with equally extraordinary opacity and informality, with cancellations beginning in early October without so much as notice and comment. The Executive thus seized from Congress the prerogative to "make major policy decisions." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (simplified).

In their rush to enact debt cancellation, Defendants Secretary of Education Miguel Cardona and the Department of Education will inflict new harms on Plaintiff Johnson and members of the proposed plaintiff class. In at least six states, including Indiana where the named Plaintiffs reside, the automatically canceled loan principal will give rise to tax liability. Yet for Plaintiffs and others participating in pre-existing, congressionally authorized debt forgiveness programs, Defendants' debt cancellation will not actually reduce the amount borrowers pay back. The result is that Plaintiffs and numerous others in the proposed class will receive a tax penalty with no corresponding benefit—and that tax liability will arise as soon as Defendants implement the cancellation. This will likely be as soon as October 17, and will happen without notice and comment or other prior warning or procedure. *See Nebraska v. Biden*, No. 22-cv-1040, Docket No. 14 (E.D. Mo. Sept. 30, 2022) (parties stipulating that "Defendants will not discharge any student loan debt . . . before October 17, 2022"); *Use of the Heroes Act of 2003 to Cancel the Principal Loan Amounts of Student Loans*, 46 Op. O.L.C. __, 2022 WL 3975075, at *3 (Aug. 23, 2022) (OLC opinion) (indicating the Administration's position that no notice and comment is required to implement loan cancellation); Ex. 5 (indicating the Administration's position that loan cancellation is an "ongoing Departmental action[]" and thus not a "rule[]" that it must submit to Congress under the Congressional Review Act).

To prevent this irreparable harm, Plaintiffs respectfully move for a preliminary injunction preventing Defendants from implementing the cancellation. The claimed basis for the cancellation is the HEROES Act, a statute enacted in 2003 during the Iraq war to provide relief to veterans and their families. But never before has the Act been used to unilaterally cancel debts en masse at a cost of half a trillion dollars. And no wonder: Defendants' debt cancellation far exceeds the statute's reasonable constraints. The Act does not authorize Defendants' debt cancellation; in fact,

its terms clearly forbid the scope of the cancellation. Further, the use of the Act in this manner inflicts a grievous wound on our constitutional order.

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

Should the Court deny Plaintiffs' motion, Plaintiffs respectfully requests that the Court do so by October 13 so that Plaintiffs may seek appellate relief before the loan program is implemented. *Cf. Wheeler v. Talbot*, 770 F.3d 550, 552 (7th Cir. 2014) (holding that district courts may deny preliminary injunctions without notice to adverse parties, including before adverse parties are served, and that an order doing so "may be appealed immediately").

I. FACTUAL BACKGROUND

A. Federal student loans, repayment, and forgiveness

The Higher Education Act establishes the Direct Loan Program (DLP) and Federal Family Education Loan Program (FFEL). 20 U.S.C. §§ 1071 *et seq.*, 1087a *et seq.* The Direct Loan Program allows eligible students at participating schools to borrow money directly from the Department of Education. 20 U.S.C. §§ 1077, 1091. Under the FFEL, the federal government guarantees student loans held by private lenders. 34 C.F.R. § 682.100.

Separate from these programs, the Higher Education Act establishes two programs to help borrowers repay their federal loans. First, under income-driven repayment (IDR) programs, borrowers contribute a portion of their income each year toward their loans. 20 U.S.C. §§ 1087e(d), 1098e. Income-driven repayment lasts for a set repayment period, and at the end of

that period, the remaining balance is forgiven. 34 C.F.R. § 685.209. For example, Plaintiffs take part in the REPAYE program, which forgives any remaining balance after they make 240 payments. *Id.* § 685.209(c)(6). Participation in IDR requires borrowers to regularly certify that their income qualifies for the program. *See, e.g.*, *id.* § 685.209(c)(4).

Second, under the PSLF program, borrowers who make 120 payments while working in qualifying public service or public interest positions are eligible to have their balances forgiven. *Id.* § 1087e(m). To obtain forgiveness, a borrower need not "register" for PSLF in advance; he may simply notify the Department when he becomes eligible to have his loan balance forgiven. However, a borrower may register employment in a qualifying position in a given year, if he chooses. Garrison Decl. ¶ 9. Doing so allows the Department to confirm with a borrower that his employment that year counts toward the 10-year requirement. *See id.* ¶ 11.

B. Relief provided to borrowers since 2020

Since the beginning of the COVID-19 pandemic, Defendants have suspended "repayment of and interest accrual on all Federal loans." 87 Fed. Reg. 41,878, 41,884 (July 13, 2022). As a result, "[n]o one with federally-held loans has had to pay a single dollar in loan payments," *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, White House (Aug. 24, 2022),[1] nor have their balances accumulated interest. Ex. 3, at 1. Those participating in PSLF and IDR are not disadvantaged by this suspension of repayments. Despite making no payments, each passing month counts toward their 120 or 240 payments required for forgiveness. Ex. 2, at 1–2; Ex. 3, at 1.

C. Imminent and automatic loan cancellation

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

On August 24, 2022, Defendants announced a plan to cancel $10,000 of federally held student debt for every borrower who, in either 2020 or 2021, earned less than $125,000 (or $250,000 for those married filing jointly or heads of households). Ex. 1, at 2. The amount canceled would increase to $20,000 for eligible borrowers who had received Pell Grants. *Id.* Originally, the cancellation program was to have been implemented in "early October." Ex. 4, at 2; Ex. 1, at 2. After lawsuits arose, Defendants delayed the program to October 17. *Nebraska v. Biden*, No. 22-cv-1040, Docket No. 14 (E.D. Mo. Sept. 30, 2022) (parties stipulating that "Defendants will not discharge any student loan debt . . . before October 17, 2022"). Defendants will not undertake notice and comment or any other ordinary procedure before implementing the program. *See* OLC Opinion, 2022 WL 3975075, at *3 (indicating the Administration's position that no notice and comment is required to implement loan cancellation); Ex. 5 (indicating the Administration's position that loan cancellation is an "ongoing Departmental action[]" and thus not a "rule[]" that it must submit to Congress under the Congressional Review Act).

Defendants estimate that approximately 40 million borrowers will be eligible for cancellation under the income criteria, including approximately 856,400 in the state of Indiana. *FACT SHEET: The Biden-Harris Administration's Plan for Student Debt Relief Could Benefit Tens of Millions of Borrowers in All Fifty States*, White House (Sept. 20, 2022) (hereinafter "*FACT SHEET 2*") ("[A]nalysis from the Department of Education").[2] An independent study estimated this one-time cancellation will cost up to $519 billion. Chen, Smetters & Paulson, *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, University of Pennsylvania, Wharton School (Aug. 26, 2022).[3]

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

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

For borrowers who are eligible and who have submitted income data under income-driven repayment programs, loan forgiveness will be automatic unless they opt out. Defendants have made no representation how, or even if they will, notify borrowers of their chance to opt out.

D. Harm to Plaintiffs

It is undisputed that Plaintiff Garrison faced automatic and mandatory loan cancellation at the time this suit was initially filed. *See* ECF No. 4, at 6–8. Since then, Defendants have removed Mr. Garrison from those set to receive automatic loan cancellation. ECF No. 13. Plaintiffs discuss justiciability issues below.

Plaintiff Noel Johnson is in a similar position as Mr. Garrison was at the initiation of this suit. Like Mr. Garrison, Mr. Johnson has taken out federally held student loans, had an income qualifying for Defendants' loan cancellation program, and participates in an income-driven repayment program through which Defendants are aware of Mr. Johnson's qualifying income. Ex. 6, Johnson Decl. ¶¶ 2-8. Mr. Johnson is therefore set to have $10,000 automatically canceled from his federal loans unless he opts out. *Id.* ¶¶ 18-19. And like Mr. Garrison, Mr. Johnson is pursuing PSLF and resides in Indiana, so that Defendants' cancellation (but not PSLF) will increase his state-tax liability. *Id.* ¶¶ 8-18; Ind. Code § 6-3-1-3.5(a)(30).

Although Mr. Johnson is aware of Defendants' intent to provide an opt-out process, Defendants have not made any such process available or even described its details. Mr. Johnson is also a representative of a proposed class that has no notice of the opt-out provision. Without notice, class members may unwittingly suffer increased state-tax liability.

II. THIS CASE IS JUSTICIABLE

A. Plaintiffs Have Standing to Challenge Loan Cancellation

Article III's case or controversy requirement is an essential component of this Court's jurisdiction. *See California v. Texas*, 141 S. Ct. 2104, 2113 (2021). "A plaintiff has standing only

if he can allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* (cleaned up). That injury can either be "actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted).

The Court's cases "have consistently spoken of the need to assert an injury that is the result of a statute's actual or threatened *enforcement*, whether today or in the future." *California*, 141 S. Ct. at 2113. When "a causal relation between injury and challenged action depends upon the decision of an independent third party," a plaintiff "must show at the least that third parties will likely react in predictable ways." *Id.* at 2117 (cleaned up). But predictability is not a huge hurdle. The Court found standing, for instance, when it was "likely" that a third party would "react in predictable ways to [a] citizenship question [on the census], even if they do so unlawfully[.]" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019). "Article III requires no more than *de facto* causality." *Id.* (cleaned up).

The Seventh Circuit has likewise recognized that "the present impact of a future though uncertain harm may establish injury in fact for standing purposes." *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 498–99 (7th Cir. 2005). Thus, a tribe could challenge a compact that made the state's rejection of the tribe's casino application more likely, even though the injury depended first on federal approval of the application. *See id.* at 498; *accord Clinton v. City of New York*, 524 U.S. 417, 430-31 (1998) (state had standing because it suffered "contingent liability" to repay debt, even though debt could be waived by federal agency).

The named plaintiffs, and the members of the putative class, would all suffer a concrete injury from ED's imminent automatic cancellation through the direct state tax consequences that would arise under state law. Indeed, Mr. Garrison, and Mr. Johnson like all Indiana residents, would suffer a unique tax liability from federal cancellation. By statute, any loan forgiveness that

Mr. Garrison or Mr. Johnson receive pursuant to the pre-existing PSLF program, as it was enacted prior to January 1, 2020, will not be taxed in the State of Indiana as income. *See* Ind. Code § 6-3-1-3.5(a)(30). But if Mr. Garrison received $20,000 in automatic cancellation of his federal student loan debt, he would face a state income tax liability of more than $1,000 for 2022. *See* Ind. Code § 6-3-1-3.5(a)(30). Mr. Johnson would face more than $500 in tax liability for his $10,000 cancellation. *See id.* That is hardly conjecture—it is "predictable" that Indiana will apply its laws as written. *See Dep't of Com.*, 139 S. Ct. at 2566. And the remaining states that will tax cancellation as income will likewise predictably apply their own laws. *See e.g.,* Ark. Code § 26-51-404(b)(1); Minn. Stat. § 290.01(19)(f); Miss. Code § 27-7-15(4)(mm); N.C. Stat. § 105-153.5(c2)(22); Wis. Stat. § 70.01. An injunction, however, would redress that harm, by stopping the automatic cancellation policy and avoiding these harms. Because ED's unwanted cancellation is the "*de facto* caus[e]" of the state tax liability, Plaintiffs and the class members have standing to sue to stop it. *See Dep't of Com.*, 139 S. Ct. at 2566.

Furthermore, the cancellation remains imminent for Mr. Johnson and the millions of borrowers who reside in the relevant states. While it has tried to moot Mr. Garrison's individual harm (discussed below), ED still promises to carry out its policy for millions of others, including Mr. Johnson. ED has confirmed that it views loan cancellation as an "ongoing Departmental action[]," not a rule that will be submitted to Congress. Ex. 5. ED will also implement the policy without undertaking notice and comment. *See* OLC Opinion 2022 WL 3975075, at *3.

And ED's FAQs, which appear to be the only public description of the actual policy, promise to implement the policy "in October 2022." *One-Time Student Loan Debt Relief*, https://studentaid.gov/debt-relief-announcement/one-time-cancellation (Oct. 5, 2022). ED also intends to apply cancellation to millions of borrowers who do not apply. *Id.* "Although most

borrowers will have to apply for debt relief, we have income data on hand for around 8 million borrowers. These borrowers will get the relief without applying, unless they choose to opt out (see below, "What if I don't want to receive debt relief?")." *Id.* ED has also already implemented part of its cancellation policy, by improperly allowing consolidation of FFELP loans, which it stopped only in response to other litigation. *See Nebraska, et al., v. Biden, et al.*, No. 4:22-cv-1040 (E.D. Mo.), ECF No. 1 at ¶¶ 62-63, 119-20. ED has only committed to delaying its cancellation policy until October 17, 2022, at which point the Department will proceed with its stated policy. *See Nebraska, et al., v. Biden, et al.*, No. 4:22-cv-1040 (E.D. Mo.), ECF No. 14 at 1.

Finally, ED continues to publicly state that automatic cancellation will happen at any moment. "On a call with reporters Wednesday [Oct. 5, 2022], a senior administration official said the date provided to the court has no bearing on when the application will go live but declined to give a firm release date. 'We're charging full speed ahead in getting relief to borrowers who need it most,' the official said, speaking on the condition of anonymity under ground rules set by the administration. 'We've already started communicating with borrowers on what to expect in the coming weeks. And we'll have more updates in the coming days.'" Danielle Douglas-Gabriel, *White House shares more on student loan forgiveness application, efforts to curb scams*, Washington Post (Oct. 5, 2022).[4] ED confirmed that "Roughly 8 million borrowers whose income is already on file at the department will have their loans automatically forgiven without having to apply." *Id.* Plaintiffs therefore have standing to seek to enjoin that imminent injury.

The decision in *Segovia v. United States*, 880 F.3d 384, 388 (7th Cir. 2018), does not compel a different result. In that case, the plaintiffs challenged a federal statute that *required* states to send absentee ballots to former residents in certain U.S. territories but *allowed* the states to

[4] https://www.washingtonpost.com/education/2022/10/05/student-loan-forgiveness-application-scams/.

decline to send those ballots to former residents in other territories. These former residents could not challenge the federal law because the state law inflicted the harm, and a state could comply with federal statute whether it sent the ballots or not. *Id*. "Federal law *requires* Illinois to provide absentee ballots for its former residents living in the Northern Mariana Islands, but it does not *prohibit* Illinois from providing such ballots to former residents in Guam, Puerto Rico, and the Virgin Islands. State law could provide the plaintiffs the ballots they seek; it simply doesn't." *Id*.

Here ED's loan cancellation will necessarily result in state tax liability. *See* Ark. Code § 26-51-404(b)(1); Ind. Code § 6-3-1-3.5(a)(30); Minn. Stat. § 290.01(19)(f); Miss. Code § 27-7-15(4)(mm); N.C. Stat. § 105-153.5(c2)(22); Wis. Stat. § 70.01. That's the harm, which results directly from ED's unlawful policy, and it is not optional. Without ED's policy, this harm does not arise. Thus, unlike in *Segovia*, where the alleged harm arose solely because of a state law decision *permitted* by federal statute, the harm in this case results from an automatic (and lawful) federal program and the inevitable operation of state tax law. *See Segovia*, 880 F.3d at 388.

B. ED's Opt-Out Policy Does Not Remedy the Harm Facing Plaintiff Johnson or the Putative Class

When a defendant tries to avoid an injunction against a challenged practice by allowing a class to "opt out" of the alleged harm, a class-wide injunction may still be appropriate. *See Fischer v. Instant Checkmate LLC*, No. 19 C 4892, 2022 WL 971479, at *14 (N.D. Ill. Mar. 31, 2022). That is so where "there is no indication that a significant number of class members know about the opt-out function" or "it is not clear that opting out is an appropriate substitute for an injunction" then an injunction is still warranted. *Id*. at *14.

Defendants have been remarkably cagey about what their policy *is* at any given moment, and, as discussed, have reacted to legal challenges by making drastic revisions on the fly. But ED's current promise to this Court that "any borrower who qualifies for automatic debt relief—*i.e.*, relief

without filing an application—will be given an opportunity to opt out," does not obviate the need for an injunction. *See* ECF No. 13, at 1. Defendants still insist that they have "income data on hand for around 8 million borrowers. These borrowers will get the relief without applying, unless they choose to opt out." *One-Time Student Loan Debt Relief*, https://studentaid.gov/debt-relief-announcement/one-time-cancellation (Oct. 5, 2022). That includes Mr. Johnson, who has yet to receive any information about the potential for opting out. And there is no indication that Defendants will ensure that all members of the proposed class fully understand their options prior to the automatic cancellation—or even that the members are aware of the loan cancellation program. Thus, an injunction is still warranted. *See Fischer*, 2022 WL 971479, at *14.

Likewise, the opt-out policy, whatever it looks like when it is implemented, does not defeat the immediate injuries facing the class. Even with an opt-out, the lack of notice of the opt-out's availability means proposed class members face an Article III injury from the state tax. The Supreme Court and Seventh Circuit have recognized that the lack of information can prevent an individual from protecting his interests, resulting in Article III injury. In *Robertson v. Allied Solutions, LLC*, the Seventh Circuit held that a prospective employer's failure to provide a rejected applicant with a copy of her background check created an injury in fact, because she was "denied information that could have helped her craft a response." 902 F.3d 690, 697 (7th Cir. 2018). The court recognized that the Supreme Court in *FEC v. Akins* held that the plaintiffs' "inability to obtain information" about political candidates constituted an injury in fact, because "the information would help them . . . to evaluate candidates for public office." 524 U.S. 11, 21 (1998). Likewise, in *Bryant v. Compass Group USA, Inc.*, the Seventh Circuit held that the defendant's failure to disclose information regarding how biometric data collected from the plaintiff would be used denied the plaintiff "the opportunity to consider" whether to allow the collection. 958 F.3d

617, 626 (7th Cir. 2020). These cases demonstrate the common-sense conclusion that, without notice of the loan cancellation program and of the availability of an opt-out process, proposed class members will still suffer an Article III injury, because they may not know to opt out, resulting in an unexpectedly higher state-tax bill in April. Thus, the mere existence of an opt-out procedure does not defeat standing, nor does it negate the need for an injunction.

C. This Case Is Not Moot For Any Plaintiff

Standing is measured at the time a complaint is filed, but mootness is often described as "the doctrine of standing set in a time frame"; that is, "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189, (2000). This is not a "comprehensive" explanation, though, and well-known exceptions allow review even when the challenged conduct ends. *Id.* at 190-91.

Indeed, in the context of class actions, defendants regularly attempt to moot a representative plaintiff's claim by curing the problem at the initiation of the litigation. *See, e.g., Fischer*, 2022 WL 971479, at *5 ("As for the Injunctive Relief Class, [the defendant] argues that [the class representative's] claims are moot because it has 'suppressed' their information such that 'it will not be displayed in a search result or SEO Directory profile.'"). When a plaintiff seeks an injunction, it is a common tactic for a defendant to opt the representative plaintiff out of the class of injured persons and allow the remaining class the option to opt-out as well. *See id.* at *14. These efforts don't work, however, for several different reasons.

1. Mr. Johnson Presents a Live Claim on Behalf of the Class

Class actions are maintained on behalf of the entire class, not just the named plaintiff. *Wiesmueller v. Kosobucki*, 513 F.3d 784, 785 (7th Cir. 2008). Thus, even when "the named

plaintiff's claim becomes moot, the mooting of his claim does not doom the suit" once the class is certified. *Id.* at 785-86. Moreover, mootness must only be measured at the time class certification is *sought*—"as long as the proposed class representative has not lost on the merits before a class certification motion is filed, it is not barred from seeking class treatment." *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541, 546 (7th Cir. 2017).

Mr. Johnson currently faces imminent loan cancellation and thus has an active harm he seeks to prevent. And Plaintiffs have sought certification of the class on behalf of similar claims. Thus, even if ED reacts by trying to moot Mr. Johnson's claim as well, and removes him from automatic cancellation, he can still maintain his status as class representative. *See id.*

2. Even Mr. Garrison's Claims Present a Reviewable Controversy

A defendant's effort to moot the claim of a representative plaintiff also fails when it takes remedial action even *before* class certification is sought, because of common exceptions to mootness. *See Fischer*, 2022 WL 971479, at *5. Indeed, whether viewed as a matter of mootness, or as a simple unaccepted offer, one cannot defend a class action by picking off a representative plaintiff's claims one by one. *See Fulton Dental*, 860 F.3d at 545-46 (holding a deposit into an account with the court in the plaintiff's name before the plaintiff moved to certify the class was insufficient to moot the individual and potential class claims). ED's attempt to moot the claims here by giving a partial remedy to Mr. Garrison does not moot this case.

i. Voluntary Cessation

First, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190. The defendant bears the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected

to start up again." *Id*. at 189. If the Government invokes mootness based on its voluntary conduct, a court "do[es] not dismiss a case as moot" if "the Government nowhere suggests that if this litigation is resolved in its favor it will not reimpose" the challenged policy, but instead "vigorously defends the legality of such an approach." *W. Virginia*, 142 S. Ct. at 2607. (cleaned up).

Voluntary cessation looks closely at the realities of a defendant's conduct—where the circumstances surrounding the cessation suggest that the defendant is "attempting to manipulate the [c]ourt's jurisdiction to insulate a favorable decision from review," a case is not moot. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000). "More generally, the 'timing and content' of a voluntary decision to cease a challenged activity are critical in determining the motive for the cessation and therefore 'whether there is [any] reasonable expectation . . . that the alleged violation will recur.'" *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1266 (11th Cir. 2010) (quoting *Burns v. PA Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008)). While courts have often presumed good faith on a government defendant's part when it ceases challenged behavior, "the timing and content of the decision are also relevant in assessing whether the defendant's termination of the challenged conduct is sufficiently unambiguous to warrant application of the [] presumption in favor of governmental entities." *Id*. (cleaned up). "Short of repealing a statute, if a governmental entity decides in a clandestine or irregular manner to cease a challenged behavior, it can hardly be said that its 'termination' of the behavior is unambiguous." *Id*. at 1266-67. Further, the Supreme Court recently rejected any special solicitude to the Government, applying the normal heavy presumption of impropriety *against the Government's* attempt to moot a case through voluntary cessation. *See W. Virginia*, 142 S. Ct. at 2607.

ED's voluntary efforts to moot only Mr. Garrison's claim is an obvious attempt to avoid this Court's jurisdiction. Mr. Garrison filed his original complaint on September 27, 2022, when

ED still advertised "automatic" cancellation for up to 8 million borrowers, including Mr. Garrison. But just hours after this suit was filed, White House press secretary Karine Jean-Lierre commented on it at a daily briefing, saying, "Opponents of the Biden-Harris administration's student loan plans are trying to stop it because it will provide much needed relief for working families. Anyone who doesn't want to get that debt relief can opt out." NBC News, *Lawsuit seeks to block Biden's student debt forgiveness program*, (Sept. 17, 2022).[5] At the time, however, ED's own website said nothing about opting out, and still proclaimed that "we have income data on hand for around 8 million borrowers. These borrowers will get the relief automatically." *One-Time Student Loan Debt Relief*, https://studentaid.gov/debt-relief-announcement/one-time-cancellation (Sept. 27, 2022). The next day, ED quietly amended its website to conform its policy to the Press Secretary's statement. As ED said in a notice to this Court, it had amended its website--which apparently contains the full and final regulatory action concerning cancellation--to say, "If you would like to opt out of debt relief for any reason, including because you are concerned about a state tax liability, you will be given an opportunity to opt out." *See* ECF No. 13. ED's notice made clear the reason for this change was to moot the challenge: "Upon receiving this lawsuit and reviewing Plaintiff's filings, the Department has already taken steps to effectuate Plaintiff's clearly stated desire to opt out of the program and not receive $20,000 in automatic cancellation of his federal student loan debt, and so notified Plaintiff's counsel today." *Id.*

This kind of "clandestine or irregular" effort "to cease a challenged behavior" is exactly the kind of conduct that should prompt careful review. *See Harrell*, 608 F.3d at 1266-67. ED hasn't disavowed its policy, or the legality of it, for the 8 million other borrowers it still insists will get

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[5] https://www.nbcnews.com/politics/politics-news/lawsuit-seeks-block-bidens-student-debt-forgiveness-program-rcna49638

"automatic" cancellation any day. *One-Time Student Loan Debt Relief*, https://studentaid.gov/debt-relief-announcement/one-time-cancellation (Oct. 5, 2022). The fact that some automatic cancellation still exists proves it is not "absolutely clear" that the policy "could not reasonably be expected to recur." *See W. Virginia*, 142 S. Ct. at 2607.

ED's actions in other cases confirm its motives. The day after ED tried to moot this suit, it tried the same tactic against a suit filed by six states. Within hours of that suit's filing, ED *yet again* changed the program. Even the New York Times noticed what ED was doing—since both the "automatic cancellation" at issue in this case "would leave the plan open to legal challenges," and the challenged aspect of forgiveness in the States' lawsuit raised profound legal question, "[t]he effort [from ED] was no coincidence — eliminating eligibility for those students could make it harder for a Republican attorney general to successfully attack the entire program in court." Katie Rogers, *Biden's Student Debt Plan Touches Off Lawsuits, Scams and Confusion*, NY Times (Sept. 30, 2022).[6] ED should not be allowed to succeed in its clear effort to avoid judicial review.

ii. Inherently Transitory Claims

Apart from voluntary cessation, "inherently transitory" claims for class-wide injunctive relief will not become moot once the named plaintiff no longer suffers the challenged harms. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 76 (2013). As the Court said, under the "relation-back doctrine," the cessation of the named plaintiff's injury does not bar class-wide injunctive relief "where it is certain that other persons similarly situated will continue to be subject to the challenged conduct and the claims raised are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Id.* (cleaned up). Thus, "in cases where the transitory

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

nature of the conduct giving rise to the suit would effectively insulate defendants' conduct from review, certification could potentially 'relate back' to the filing of the complaint." *Id.*

ED's attempt to moot the class-wide injury suffered by borrowers in the relevant states by suddenly stopping the harm to Mr. Garrison fails under this exception as well. The challenged policy will have a single occurrence, which remains imminent for anyone in the class of automatic cancellation. Once it occurs, it cannot be enjoined further. ED reacted to Mr. Garrison's suit by promising not to act *only* with respect to him, and simply promising to build in a mechanism for the others facing the injury to proactively try to stop the harm. The inherently transitory harms that members of the putative class face, particularly those who do not realize the need to opt-out of automatic cancellation, will likely recur on a broad scale. Thus, review is proper, and Mr. Garrison remains a proper class representative, notwithstanding ED's manipulation. *See id.*[7]

III. STANDARD FOR A PRELIMINARY INJUNCTION

A plaintiff is entitled to preliminary relief if he shows: (1) a likelihood of success on the merits; (2) a likelihood that he will suffer irreparable harm in the absence of preliminary relief, that is, that remedies at law are inadequate; (3) that the balance of equities tips in his favor; and (4) that the injunction is in the public interest. *Winter v. N.R.D.C., Inc.*, 555 U.S. 7, 21 (2008).

When the government is the defendant, the last two elements merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Furthermore, courts consider the likelihood of success on the merits and the degree of irreparable harm on a sliding scale, so that a greater likelihood of success requires less

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[7] Plaintiffs filed a motion for class certification simultaneously with their amended complaint. Thus, Mr. Garrison seeks to "relate back" to the injury he faced when he filed the original complaint. *See Genesis Healthcare Corp.*, 569 U.S. at 76. When a complaint is amended to add a putative class, it may still relate back to the original complaint whenever the original complaint fairly apprised the defendants of the potential class action claim. *See Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1018 (7th Cir. 1988). As the original complaint described ED's conduct and its impact on all borrowers facing automatic cancellation in states taxing cancellation as income, relation back is appropriate. *See id.*

irreparable harm and vice versa. *Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735, 740 (7th Cir. 2013).

IV. ARGUMENT

A. Plaintiffs are likely to succeed on the merits.

Plaintiffs are likely to succeed on the merits. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Particularly when the Executive claims "sweeping and consequential authority," a "colorable textual basis" in statute is insufficient; rather, the Executive must point to "clear congressional authorization." *West Virginia*, 142 S. Ct. at 2608–09 (simplified). And the Administrative Procedure Act directs courts to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right," or "in excess of statutory jurisdiction [or] authority." 5 U.S.C. § 706(2). Because Defendants lack any statutory authority to cancel loans en masse, and because the HEROES Act unconstitutionally delegates lawmaking authority to the Secretary of Education, Plaintiffs are entitled to relief on the merits.[8]

1. Defendants' debt cancellation is not supported by statute

According to Defendants, *General Counsel Opinion*, 87 Fed. Reg. 52,943, the cancellation program is authorized by the HEROES Act, Pub. L. No. 108-76, 117 Stat. 904 (2003). Under the

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[8] As a preliminary matter, Defendants' debt cancellation is a final agency action reviewable under the sovereign immunity waiver of 5 U.S.C. § 704 because it is the "'consummation' of the agency's decisionmaking process," and it determines "rights [and] obligations" and will result in "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (simplified). The cancellation marks the consummation of Defendants' decisionmaking process because it has formally announced the cancellation, including the specific criteria required for a borrower to qualify for cancellation, and justified its legal authority under public released memos from the Department of Education's General Counsel and the Office of Legal Counsel. *Notice of Debt Cancellation Legal Memorandum*, 87 Fed. Reg. 52,943 (Aug. 30, 2022) (General Counsel Opinion); OLC opinion, 2022 WL 3975075. And the cancellation creates rights and obligations with legal consequences because it will purportedly erase more than $500 billion in federal student debt for more than 40 million borrowers, doing so automatically for up to 8 million borrowers.

HEROES Act, "[t]he Secretary of Education . . . may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide . . . waivers or modifications" that are "necessary to ensure that . . . recipients of student financial assistance under title IV of the Act who are affected individuals are not placed in a worse place financially in relation to that financial assistance because of their status as affected individuals[.]" 20 U.S.C. § 1098bb(a)(1)–(2)(A).

An "affected individual" is defined to include "an individual who . . . resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" and an individual who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." *Id.* § 1098ee(2).

a. The Secretary lacks authority to categorically cancel debt based on income alone

Under the relevant statutory provision, the Secretary may provide waivers only to individuals who are (1) "in a worse position financially" (2) "in relation to their financial assistance" (3) "because of their status as affected individuals." *Id.* § 1098bb(a)(2)(A). That is, waivers are allowed only to those who are worse off relative to their student loans as a result of direct economic hardship caused by a national emergency or because they live in a disaster area. Defendants' debt cancellation far exceeds these limited parameters.

First, debt cancellation will be available to those who are in a better financial position, such as those whose wealth or income have increased since 2020 when the COVID-19 pandemic started. Defendants' eligibility requirements only restrict cancellation to individuals who made less than $125,000 in either 2020 or 2021 (or $250,000 for households), so those whose income has increase

from 2019 to 2020 to 2021 will still be eligible for cancellation.

Second, simply being in a worse position financially compared to 2020 is insufficient. Borrowers must be worse off "in relation to their financial assistance." 20 U.S.C. § 1098bb(a)(2)(A). And no borrower is worse off with respect to their financial assistance. That's because, "since March 2020," Defendants have suspended "repayment of and interest accrual on all Federal loans held by the Department." 87 Fed. Reg. 41,878, 41,884 (July 13, 2022). So since the beginning of the COVID-19 pandemic, "[n]o one with federally-held loans has had to pay a single dollar in loan payments," *FACT SHEET*, *supra*, nor have their balances accumulated interest, *see* Ex. 2, at 1. Defendants have been so thorough as to ensure that participants in PSLF and income-driven repayment programs continue to earn credit toward the 120 and 240 payments, respectively, necessary to obtain forgiveness under those programs, despite making no payments. Ex. 2, at 1–2; Ex. 3, at 1. So due to actions Defendants have already taken, no borrower is worse off with respect to their federal student loans.

Third, even assuming there are those who are worse off with respect to their federal student loans, no part of Defendants' plan limits cancelation to those who are worse off "because of their status as affected individuals." 20 U.S.C. § 1098bb(a)(2)(A). Recall that an "affected individual" include an individual who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" and an individual who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." *Id.* § 1098ee(2).

The entire nation has been declared a COVID-19 disaster area by FEMA.[9] But no one

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[9] *COVID-19 Disaster Declarations*, FEMA (Aug. 20, 2021), https://www.fema.gov/disaster/coronavirus/disaster-declarations.

suggests that any borrower's student-loan obligations are worse off "because of their status" as a resident of the United States. *Id.* § 1098bb(a)(2)(A). And, if the Court were to ignore Defendants' pause of loan repayments and interest accrual, it's conceivable that the second class of affected individuals—borrowers who "suffered direct economic hardship as a direct result of" COVID-19—would be worse off with respect to their student loans. *Id.* § 1098ee(2). But Defendants' extremely broad income criteria clearly provides cancellation beyond that limited statutory class.

To be sure, "[t]he Secretary is not required to exercise the waiver or modification authority . . . on a case-by-case basis." *Id.* § 1098bb(b)(3). But the Secretary's power to exercise waiver authority for individuals on a categorical basis does not expand the *types* of individuals who may receive waivers. Thus, the Secretary may be able to waive certain requirements for residents of a city that was destroyed in a war, because such destruction would create obvious direct economic hardship for each resident. And under § 1098bb(b)(3), the Secretary would not be required to identify each affected individual by name before extending relief. But nothing in § 1098bb(b)(3) gives the Secretary the power to enormously expand the specific criteria required to be an "affected individual" under § 1098ee(2).

b. Debt cancellation is not "necessary"

Under § 1098bb(a)(2)(A), waivers are permitted only if "necessary" to ensure affected individuals are not placed in a worse position with respect to their federal loans because of their status as affected individuals. As discussed above, by suspending loan repayments and interest accrual, Defendants have put borrowers in the *same* position now as before the pandemic with respect to their federal loans. As such, debt cancellation is clearly unnecessary to achieve the statutory goal under § 1098bb(a)(2)(A).

Defendants may not rely on the broader language in § 1098bb(a)(1), which empowers the Secretary to "waive or modify any statutory or regulatory provision . . . as the Secretary deems

necessary." This language permits the Secretary to choose *which* statutory or regulatory provisions to waive, but it does not allow the Secretary to determine *for whom* waiver is permitted. The latter is controlled by paragraph 2, which allows waivers that are "necessary" to achieve five specific goals. *Id.* § 1098bb(a)(2). The omission of the "deeming" language in paragraph 2 demonstrates that Congress meant for the paragraph to place real limits on the Secretary's discretion. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (simplified)).

The Sixth Circuit considered an analogous question in *Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022). There, the President attempted to force the employees of every federal contractor to obtain a COVID-19 vaccine. The court held that this unilateral coercive action was unsupported by statute. The government there relied on the Procurement Act, under which "[t]he President may prescribe policies and directives that the President considers necessary to carry out this subtitle." 40 U.S.C. § 121(a). And "[t]he purpose of th[e] subtitle is to provide the Federal Government with an economical and efficient system for" enumerated activities, such as obtaining property and services. *Id.* § 101. The government argued that the breadth of the "considers necessary" language supported a vaccine mandate, but the court disagreed. It reasoned that, while § 121 allowed the President leeway in deciding how to carry out § 101, the President's substantive power derived from § 101; and § 101 "never actually confers" a vaccine-mandate power. *Kentucky*, 23 F.4th at 607. So § 121 gave the President "a modest valence of necessary and proper powers" in exercising "powers enumerated in § 101"—but the exercise of that "necessary and proper power" must still "clearly stem[] from a power enumerated." *Id.*

Here, the "deems necessary" language in paragraph 1 of 20 U.S.C. § 1098bb(a) does no

more than give the Secretary discretion in deciding how to implement a waiver, that is, which statutory and regulatory provisions to waive. But like the President's discretion under the Procurement Act, the Secretary's discretion still must be exercised toward enumerated ends, i.e., his actions must be "necessary" to achieve one of the five goals in paragraph 2.

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

Courts will not assume that Congress has assigned to the Executive Branch questions of "vast economic and political significance" without a "clear statement" to that effect. *West Virginia*, 142 S. Ct. at 2605 (simplified). Even when a statute contains a "colorable textual basis" for Executive action, courts "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* at 2609 (simplified). "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [the Court] typically greet[s] its announcement with a measure of skepticism." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (simplified). A court should thus adopt a narrow reading of a statute when an agency tries "to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (simplified).

Outright debt cancellation—on a categorical basis for 40 million borrowers and costing more than $500 billion—is a "power of vast economic and political significance." *Id.* As one measure of economic significance, Executive Order 12866 designates "economically significant" rules as those that have an annual impact of at least $100 million. The order subjects such rules to analyses designed to ensure agencies have considered the costs and benefits of the rule and its alternatives. The debt cancellation is more than 5,000 times that threshold amount.

And it is also clear that Defendants' plan relies on as-yet-undiscovered powers in the HEROES Act. First, the class of borrowers given relief under the Act has never been so broad and

included so many individuals who do not actually meet statutory criteria. Until COVID-19, ED has "generally invoked the HEROES Act relatively narrowly to grant relief to limited subsets of borrowers, such as deployed military service members or victims of certain natural disasters." Kevin M. Lewis & Edward C. Liu, *The Biden Administration Extends the Pause on Federal Student Loan Payments: Legal Considerations for Congress*, Congressional Research Service, LSB10568 Version 3, at 2–3 (Jan. 27, 2021).[10]

Nor has the statute ever been used to broadly cancel loan principals before. As ED's Office of General Counsel concluded in 2021, "the Department has never relied on the HEROES Act . . . for the blanket or mass cancellation . . . of student loan principal balances" or for the "material change of repayment amounts or terms." Department of Education, Office of the General Counsel, *Memorandum to Betsy DeVos, Secretary of Education* 6 (Jan. 12, 2021).[11] Recasting the HEROES Act from a statute permitting limited modifications to adjust certain requirements to one that can sweep away debt for 40 million people and effectively spend more than $500 billion is a change so significant as to "effect[] a fundamental revision of the statute, changing it from one sort of scheme . . . into an entirely different kind." *West Virginia*, 142 S. Ct. at 2596 (2022).

Congress itself has struggled over the question of whether to cancel student-loan principals, with bills being introduced, considered, and defeated in both the Senate and the House of Representatives, and during both this and the prior administrations. Student Loan Debt Relief Act of 2019, S. 2235, 116th Cong. (2019); Income-Driven Student Loan Forgiveness Act, H.R. 2034, 117th Cong. (2021). Given the inevitably controversial nature of such a program, it is "doubt[ful] that Congress intended to delegate decisions of such economic and political significance" as

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[10] https://crsreports.congress.gov/product/pdf/LSB/LSB10568.

[11] https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf

whether to cancel 40 million borrowers' loan principals—whether $10,000, $20,000, or in their entirety—to the Executive in the HEROES Act; and it is equally doubtful that that power lay dormant in that statute all along in the "oblique" words of § 1098bb(a)(2). *West Virginia*, 142 S. Ct. at 2596, 2609 (simplified).

d. The statute should be read to avoid constitutional questions

Even if the HEROES Act could bear the weight of Defendants' extraordinary, unilateral actions and authorize Defendants to spend more than $500 billion, Plaintiffs are still likely to prevail on the merits. That's because "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs.*, 531 U.S. 159, 173 (2001) (simplified). Courts are "obligated to construe the statute to avoid constitutional problems if it is fairly possible to do so." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008); *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (Careful application of the major questions doctrine "ensure[s] that the government does not inadvertently cross constitutional lines." (simplified)).

The HEROES Act contains important limits to Defendants' discretion, including the requirement under the relevant provision that the waiver or modification be necessary to ensure affected individuals are not placed in a worse place financially relative to their financial assistance as a result of their status as affected individuals. But those limitations would be rendered meaningless if the statute were to be construed as allowing Defendants to freely grant waivers or modifications to individuals who are not financially worse off, who are in the same position with respect to their student loans as before the pandemic, and whose status as affected individuals has no relation to their financial state. This Court must reject that construction under the canon of constitutional avoidance because it would violate the non-delegation doctrine to construe the

statute as authorizing the Department of Education to decide for itself whether and under what conditions to allow waivers or modifications. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46 (1980) (plurality opinion) ("[I]t is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view . . . . A construction of the statute that avoids this kind of open-ended grant should certainly be favored."); *see also Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 672 (6th Cir. 2021) (construing a statute narrowly to avoid raising a potential non-delegation problem); *United States v. Mitchell*, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994) (affirming that statutes should be interpreted to avoid non-delegation problems).

Already § 1098bb vests the Secretary with a degree of discretion in deciding which statutes to "waive or modify" and how to modify them in pursuit of statutory goals. But if these goals are construed so elastically as to permit debt cancellation for 40 million debtors solely based on their income, the statute will impermissibly vest the Secretary with wholly unguided discretion. *See Panama Ref. Co. v. Ryan*, 293 U.S. 388, 415 (1935) (finding a non-delegation violation where nothing in the statutory text established a guiding policy or governing standard, and finding it problematic that the President was not required to make any findings before exercising conferred discretion to prohibit transport of a regulated commodity); *see also Whitman v. Am. Trucking Assn.*, 531 U.S. 457, 472 (2001) (affirming that Congress may not leave it to the Executive Branch to decide what standard shall govern Executive Branch discretion).

To avoid these serious questions of the HEROES Act's constitutionality, the Court must conclude the statute does not authorize Defendants' cancellation program.

2. The HEROES Act unconstitutionally delegates lawmaking authority to the Secretary

Not only is there no statutory authority for Defendants' debt cancellation, but the waiver-

or-modification provision is itself unconstitutional because it unconstitutionally delegates legislative power to the Secretary. Unlike the non-delegation concern discussed previously, this non-delegation violation is inherent in the nature of a waiver or modification and cannot be avoided with a narrowing construction.

The HEROES Act empowers an Executive official to "waive or modify any statutory . . . provision" as that official "deems necessary." 20 U.S.C. § 1098bb(a)(1). Such waiver or modification of a statute has a "legislative character," as "confirmed by the character of the Congressional action it supplants"—legislative amendment. *INS v. Chadha*, 462 U.S. 919 (1983). Whether or not an intelligible principle guides the waiver or modification, *cf.* 20 U.S.C. § 1098bb(a)(2), such waiver or modification of legislation—and the provision of "the terms and conditions to be applied in lieu of such statutory . . . provisions," *id.* § 1098bb(b)(2)—is unavoidably and quintessentially the legislative act.

In *Clinton v. City of New York*, the Court rejected the President's authority under the Line Item Veto Act to "cancel" certain types of "provisions that have been signed into law." 524 U.S. at 436. Because the effect of cancellation was to "prevent[] the item from having legal force or effect," the "legal and practical effect" of cancellation was to "amend[] . . . Acts of Congress," because it takes places "*after* the bill becomes law." *Id.* at 437–39 (simplified). It did not matter that the cancellations did not formally "effect a repeal" and cancelled items continued to have some effect on budgets; the relevant outcome was that "the President made [the canceled items] entirely inoperative as to appellees." *Id.* at 441. The Court made clear that such changes to statute must "accord with a single, finely wrong and exhaustively considered procedure"—that provided in Article I. *Id.* at 439 (simplified). There is no daylight between the cancellation disapproved in *Clinton* and the authority to "waive or modify any statutory . . . provision" in the HEROES Act.

20 U.S.C. § 1098bb(a)(1).

To be sure, *Clinton* acknowledged that *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), held to be constitutional a foreign-policy statute requiring Presidential suspensions of certain statutory provisions under specified circumstances. But even assuming *Field* should still be followed, in that case, "Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events," and "when the President determine that the contingency had arisen, he had a duty to suspend." *Clinton*, 524 U.S. at 443, 445. There was thus no room for "the President himself to effect the repeal of laws[] for his own policy reasons." *Id.* at 445. Furthermore, any discretion was supported by the fact that the *Field* suspensions were "in the foreign affairs arena, [where] the President has a degree of discretion and freedom . . . which would not be admissible were domestic affairs alone involved." *Id.* (simplified).

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

The effects of this discretion are evident here. The Secretary's choice of *how* to enact a waiver and modification was to produce debt cancellation—a long-term political priority of the current President and his political party. The Secretary's choice of *whether* to enact debt

cancellation was indisputably, thoroughly infected with non-statutory considerations, including the rising cost of education "[s]ince 1980" and the aim of "[a]dvanc[ing] racial equity." *FACT SHEET*, *supra* ("This plan offers targeted debt relief as part of a comprehensive effort to address the burden of growing college costs and make the student loan system more manageable for working families."). And Defendants' loan cancellation achieves a priority of the President's political party that predates COVID-19. *See* Elizabeth Warren, *I'm calling for something truly transformational: Universal free public college and cancellation of student loan debt*, Medium (Apr. 22, 2019) (proposing "the cancellation of up to $50,000 in student loan debt for 42 million Americans")[12]; Bernie Sanders, *America Is Drowning in Student Debt. Here's my Plan to End It*, Fortune (July 9, 2019) (proposing that the federal government "cancel all $1.6 trillion of student debt")[13]; Student Loan Debt Relief Act of 2019, S. 2235, 116th Cong. (2019) (Bill was not enacted.). Finally, the Secretary's choice of *when* to enact debt cancellation was aimed not at the heart of the pandemic, when borrower need would have been highest, but at a midterm congressional election that will take place long past the peak of the pandemic.

Whatever the merits of student-debt cancellation, it is clear that the President and his Secretary's "own policy reasons" for enacting debt cancellation directed every aspect of the Secretary's choice to invoke waiver and modification under § 1098bb. *Clinton*, 423 U.S. at 445. Even if that were not so, the capacious discretion allowed by the HEROES Act would certainly allow the Secretary's own policy considerations to control the timing and manner of a waiver or modification. Either way, the Act contradicts the requirement that "Congress itself ma[k]e the decision" of whether, when, and how to suspend the laws. *Id.*

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[12] https://medium.com/@teamwarren/im-calling-for-something-truly-transformational-universal-free-public-college-and-cancellation-of-a246cd0f910f.

[13] https://fortune.com/2019/07/09/bernie-sanders-cancel-student-debt/.

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

B. Injunctive relief is necessary to prevent irreparable harm, as there is no adequate remedy at law

Plaintiffs must show they are "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter*, 555 U.S. at 22 (citation omitted). Irreparable harm is "harm that cannot be repaired and for which money compensation is inadequate." *Orr v. Shicker*, 953 F.3d 490, 502 (7th Cir. 2020) (citation omitted). "Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010); *see also California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) ("harm is irreparable here because the states will not be able to recover monetary damages" because of 5 U.S.C. § 702), *remanded on other grounds by* 141 S. Ct. 192 (2020); *Ind. Fine Wine & Spirits, LLC v. Cook*, 459 F. Supp. 3d 1157, 1170 (S.D. Ind. 2020) (harm was irreparable because the plaintiff "cannot recover the costs that it has incurred . . . [b]ecause this lawsuit is against state officials in their official capacities, and because of sovereign immunity of the Defendants against compensatory damages, [the plaintiff] has no adequate remedy at law]); *GoodCat, LLC v. Cook*, 202 F. Supp. 3d 896, 918 (S.D. Ind. 2016) (irreparable harm because "[p]rinciples of sovereign immunity would preclude [the plaintiff] any recovery against Defendants" for financial harms suffered); *Cmty. Pharmacies of Ind., Inc. v. Ind. Fam. & Soc. Servs. Admin.*, 801 F. Supp. 2d 802, 806 (S.D. Ind. 2011).

Plaintiff Johnson, and potentially millions of members of the proposed class face irreparable harm from the automatic tax liability that Defendants' loan cancellation will impose

on them in early October. If Defendants are not enjoined, there is no way to recover that loss. Mr. Johnson, in particular, will become liable for more than $500 in state income tax as soon as Defendants automatically cancel $10,000 of his outstanding loans. *See* Ind. Code. § 6-3-2-1(b)(3); Johnson Decl. He's not alone. The Department of Education estimates that 856,400 borrowers in Indiana will be eligible for loan cancellation, with 555,500 eligible for Pell Grant cancellation of up to $20,000. *See FACT SHEET 2*, *supra*.

But the class is even larger, and potentially millions of class members face the same irreparable harm. Each one of those people will face income tax liability for 2022 the moment that Defendants cancel their loans, even those, like Mr. Johnson, who will get automatic cancellation without asking for it. At least five other states will tax cancellation as income. *See* Ark. Code § 26-51-404(b)(1); Minn. Stat. § 290.01(19)(f); Miss. Code § 27-7-15(4)(mm); N.C. Stat. § 105-153.5(c2)(22); Wis. Stat. § 70.01. And Defendants expect more than 3.5 million borrowers in those states will have their loans canceled. *See FACT SHEET 2*, *supra*. But there's no way for Mr. Johnson, or anyone else, to recover for the new tax bill, even though Defendants' actions are unlawful. And, as discussed, an undeveloped opt-out policy, which does not yet even exist, is no substitute for an injunction as this Court has no assurances that the entire class will ever have notice of a theoretical future policy. *See Fischer*, 2022 WL 971479, at *14.

Section 702 of the APA forbids monetary damages against the federal government. Thus, the financial harm suffered by Mr. Johnson and the other members of the class, which will also affect potentially millions of others, is irreparable and merits this Court's intervention. *See California*, 911 F.3d at 581; *Ind. Fine Wine & Spirits, LLC*, 459 F. Supp. 3d at 1170*; GoodCat, LLC*, 202 F. Supp. 3d at 918.

C. The balance of the equities favors granting the motion

A party seeking a temporary restraining order or preliminary injunction must demonstrate

"that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. A government "does not have an interest in enforcing a law that is likely" invalid. *Edmondson*, 594 F.3d at 771. Instead, "'the public interest will perforce be served by enjoining the enforcement of the invalid provisions of [] law.'" *Id.* (citation omitted). Indeed, the Supreme Court has held that when a rule exceeds an agency's authority, the court should not "weigh [] tradeoffs" between its intended effect and harms. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 666 (2022). "In our system of government, that is the responsibility of those chosen by the people through democratic processes." *Id*. Simply—"[t]he public interest is served by compliance with the APA." *California*, 911 F.3d at 581; *Alabama Association of Realtors*, 141 S. Ct. at 2490 ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends," such as the public's "strong interest in combating the spread of the COVID-19 Delta variant.").

Defendants, in playing fast and loose with the law, have not only exceeded their authority under the HEROES Act but have also violated constitutional limits under Article I. They thus have no *legitimate* interest in avoiding an injunction. The cancellation will result in more than $500 billion in federal expenditures, affect more than 40 million individuals, and wholly bypass the congressional representatives those individuals elected to decide this contentious issue. As many as 8 million individuals will get automatic loan cancellation in early October, and as discussed, millions of people qualify for loan cancellation in the states that treat cancellation as taxable income. *See FACT SHEET 2*, *supra*. Huge numbers face the immediate possibility of unwanted, and unlawful, tax liability through automatic cancellation, while *every* American will foot the half-trillion bill for Defendants' improper actions. *See Abbott Lab'ys. v. Mead & Johnson & Co.*, 971

F.2d 6, 11 (7th Cir. 1992) (This factor considers "the consequences of granting or denying the injunction to non-parties.") "[T]he public interest will perforce be served by enjoining the enforcement of the invalid provisions of [] law," and the court should enter the injunction. *See Edmondson*, 594 F.3d at 771.

Even if none of this were so, the public interest would not be harmed by a preliminary injunction. As discussed above, loan repayments and interest accrual are still paused—and may yet be extended further—so no borrower will be disadvantaged by an injunction that allows the Court to consider Plaintiffs' claims in an orderly fashion.

D. The scope of injunction

The purpose of a preliminary injunction "is to minimize the hardship to the parties pending the ultimate resolution of the suit*."* *Crue v. Aiken*, 137 F. Supp. 2d 1076, 1082 (C.D. Ill. 2001) (citing *Faheem–El v. Klincar*, 841 F.2d 712, 717 (7th Cir.1988)). When imposing an injunction or other equitable relief, "both historical and current practice lends support to a determination that the courts possess the authority to impose injunctions that extend beyond the parties before the court." *City of Chicago v. Barr*, 961 F.3d 882, 916 (7th Cir. 2020). Further, the scope of any equitable relief will depend, in part, on the harm faced by the public at large. *See id.*

When crafting such a remedy, this Court should also consider the ultimate remedy available. The APA provides unequivocally that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be," arbitrary and capricious, not in accordance with law, in excess of statutory authority, or unconstitutional. 5 U.S.C. § 706(2) (emphasis added). Thus, "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). Such has long been standard practice under the APA. *See, e.g.*, *Camp v. Pitts*, 411 U.S. 138, 143 (1973) ("If [the agency's action] is not sustainable on the administrative

record made, then the [agency's] decision must be vacated."); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) ("If an appellant . . . prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency's [action]."). "Justice Blackmun made a similar observation in *Lujan* [497 U.S. at 913], writing in dissent but apparently expressing the view of all nine Justices on this question: '. . . if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain 'programmatic' relief that affects the rights of parties not before the court.'" *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *see also Pennsylvania v. President United States*, 930 F.3d 543, 575 (3d Cir. 2019), *rev'd on other grounds sub nom. by Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) ("courts invalidate—without qualification—unlawful administrative rules as a matter of course").

Defendants promise to take an unheralded action within the month, possibly as soon as next week, which not only will result in more than $500 billion in federal expenditures but will also impose irreparable economic harms on potentially millions of class members. Those actions are almost certainly unlawful. Faced with this scenario, this Court should simply maintain the status quo and enjoin Defendants' entire program. Indeed, as Defendants' entire regulatory action is a one-time payment, the only way to preserve the possibility of the APA's presumptive remedy of *vacatur* is to preserve the status quo while this Court determines the merits.

V. CONCLUSION

There is no denying that Defendants' debt cancellation addresses questions of "vast economic and political significance." *West Virginia*, 142 S. Ct. at 2605 (simplified). In our constitutional order, however, such questions are entrusted to Congress unless it explicitly directs

otherwise. And, far from clearly authorizing Defendants' actions, the HEROES Act forbids Defendants from canceling debt based on income alone. In pressing ahead, Defendants not only displace Congress in resolving this major question, they also usurp Congress's power to amend and repeal statute, in violation of Article I of the Constitution.

The Court should enjoin the debt cancellation program to hold the status quo and give itself time to resolve the case on the merits. But if the Court should deny this motion, Plaintiffs respectfully request that the Court do so by October 13, so that Plaintiffs may seek appellate relief before cancellation is implemented as soon as October 17.

DATED: October 10, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this day, October 10, 2022, I served copies of the foregoing on counsel of record for all Defendants using the Court's CM/ECF system.

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